

COMMENT

IN RE COSTAS: THE MISAPPLICATION OF SECTION 548(a) TO DISCLAIMER LAW

INTRODUCTION

The relation-back doctrine is a legal fiction currently residing in our American jurisprudence as a way for attorneys to rewrite the past.¹ For purposes of this Comment, the relation-back doctrine of most concern is found in the probate law of many state jurisdictions.² This doctrine declares that if a beneficiary disclaims a

¹ One example of "turning back the clock" in legal jurisprudence involves amending a pleading notwithstanding the expiration of the statute of limitations. *See, e.g.*, FED. R. CIV. P. 15(c)(2) (2006) ("An amendment to a pleading dates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"); N.Y.C.P.L.R. 203(b) (McKinney 2003) (establishing procedure by which claim commenced by service is interposed against defendant or co-defendant united in interest); *Mondello v. N.Y. Blood Ctr.*, 604 N.E.2d 81, 85 (N.Y. 1992) (observing under section 203(b) of New York Civil Practice Law and Rules ("C.P.L.R.") that claim asserted in complaint is valid against non-party when (1) claims arose out of the same conduct or occurrence; (2) non-party is united in interest with original defendant so that non-party can be charged with notice and not be prejudiced from defending on merits of stale claim; and (3) non-party knew or should have known that but for mistake by the plaintiff in originally failing to identify proper parties, action would have been brought against third party).

Another example is when a beneficiary expunges a vested right to an inheritance retroactively by exercising the right to disclaim. *See, e.g.*, CAL. PROB. CODE § 282(a) (Deering 2004) ("A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest"); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(a)(2)(A), 2-1.11(d) (McKinney Supp. 2006) (declaring renounced inheritance created by section 2-1.11(a)(2)(A) relates back to date of decedent's death and passes from estate as if beneficiary predeceased decedent); *Drye v. United States*, 528 U.S. 49, 53 (1999) ("The disclaimer creates the legal fiction that the disclaimant predeceased the decedent; consequently, the disclaimant's share of the estate passes to the person next in line to receive that share."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 592 (1989) (noting relation-back doctrine developed in England as legal fiction to allow devisees to reject burdensome inheritances).

² *See, e.g.*, ALA. CODE § 43-8-294(b)(2) (LexisNexis 1991) ("A disclaimer relates back for all purposes to the effective date of the instrument or contract or the date of the determinative event, as the case may be."); ALASKA STAT. § 13.12.801(g) (2004) (providing circumstances under which "disclaimed property or interest devolves as if the disclaimant had predeceased the decedent"); CAL. PROB. § 282(a) (Deering 2004) (establishing "disclaimer relates back . . . to the date of the death of the creator of the disclaimed interest or the determinative event"); COLO. REV. STAT. § 15-11-801(4)(a) (2005) (conditioning instances under which "disclaimed interest devolves as if the disclaimant had predeceased the decedent" and others where it "passes per capita at each generation or passes as directed by the governing instrument to the descendants of the disclaimant who survive the decedent"); CONN. GEN. STAT. ANN. § 45a-579(e) (West 1993) (setting standards under which disclaimed interest devolves as if disclaimant had predeceased either decedent or donee of power of appointment); D.C. CODE ANN. § 21-2094(a) (LexisNexis 2001) (describing situations by which "a disclaimer shall relate back to the date of the death of the decedent, the date of the death of the donee of the power of appointment, or the determinative event"); GA. CODE ANN. § 53-1-20(g)(1) (Supp.

vested interest in an inheritance, the disclaimer will relate back to the date of the decedent's death, and the interest is deemed never to have vested in the beneficiary.³ The end effect is that the inheritance passes from the estate as if the disclaimant had predeceased the decedent.⁴

Recently, in *Gaughan v. Edward Ditloff Revocable Trust (In re Costas)*⁵ (hereinafter "*Costas*"), the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP" or "*Costas* court") held that a disclaimed interest in an inheritance does not constitute a "transfer . . . of an interest of the debtor in property" pursuant to the Bankruptcy Code's ("Code") fraudulent transfer provision in section 548(a).⁶ Although the BAP essentially reaffirmed its previous ruling in *Wood v. Bright (In re*

2006) (allowing renunciation to relate back to following applicable dates: date of decedent's death; date of death of power of appointment holder; date gift was attempted; or date power was created); IDAHO CODE ANN. § 15-2-801(c) (2001) (relating back date of renunciation to date of decedent's death or donee's death); 755 ILL. COMP. STAT. ANN. 5/2-7(d) (West 1991) (setting dates to, and conditions under, which disclaimer of interest in property relates back); KAN. STAT. ANN. § 59-2293(a) (2005) (applying relation-back doctrine to disclaimed interests or powers); NEV. REV. STAT. ANN. § 120.060 (LexisNexis 2004) (marking standards by which disclaimant is considered to have predeceased person creating interest and relating disclaimer back to date interest created); N.Y. EST. POWERS & TRUSTS § 2-1.11(a)(2)(A), 2-1.11(d) (McKinney Supp. 2006) (declaring renounced inheritance created by section 2-1.11(a)(2)(A) relates back to date of decedent's death and passes from estate as if beneficiary predeceased decedent); TEX. PROB. CODE ANN. § 37(A) (Vernon 2003) ("A disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent . . ."); Kevin A. White, Note, *A Clash of Expectations: Debtors' Disclaimers of Property in Advance of Bankruptcy*, 60 WASH. & LEE L. REV. 1049, 1053 (2003) ("Many states have statutes that codify the common law relation-back doctrine.").

³ See, e.g., TEX. PROB. CODE ANN. § 37(A) (Vernon 2003) (establishing conditions for date of disclaimer's relating back to death if decedent); see also *Atchison v. Jones (In re Atchison)*, 925 F.2d 209, 211 (7th Cir. 1991) (explaining Illinois's relation-back doctrine erases any interest a beneficiary has in gift); *In re Baird's Estate*, 933 P.2d 1031, 1034 (Wash. 1997), *reh'g denied*, 1997 Wash. LEXIS 170 (Wash. 1997) ("So long as a disclaimer is property executed and timely delivered, the legal fiction of 'relation back' treats the interest as having never passed to the intended beneficiary or heir at law."); *Dyer v. Eckols*, 808 S.W.2d 531, 534 (Tex. App. 1991) (reiterating Texas's relation-back doctrine erases interest of beneficiary retroactively).

⁴ See, e.g., CAL. PROB. CODE § 282(a) (Deering 2004) ("[T]he interest disclaimed shall descend, go, be distributed, or continue to be held . . . as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest feasibly vested."); 277 ILL. COMP. STAT. 5/2-7(d) (West 1991) ("[T]he property, part or interest disclaimed shall descend or be distributed . . . in the case of a transfer by reason of the death of any person, as if the disclaimant had predeceased the decedent . . ."); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney Supp. 2006) ("Unless . . . otherwise provided, the filing of a renunciation . . . has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent . . ."); TEX. PROB. CODE ANN. § 37(a) (Vernon 2003) ("Unless the decedent's will provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming . . . had predeceased the decedent . . .").

⁵ 346 B.R. 198 (B.A.P. 9th Cir. 2006).

⁶ See *id.* at 204 (holding "Debtor's Disclaimer was not a fraudulent transfer of property" and Supreme Court's rationale in *Drye v. United States* did not require contrary finding); see also *Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994) ("We . . . hold that under Texas law a disclaimer is not a fraudulent transfer under [section] 548."); *Atchison*, 925 F.2d at 212 ("[W]e hold that the disclaimer does not constitute a transfer of an interest in property which the trustee may avoid under [s]ection 548(a) of the Bankruptcy Code."); *Hoecker v. United Bank of Boulder*, 476 F.2d 838, 841 (10th Cir. 1973) ("[W]e conclude that under the Colorado statute the disclaimer did not operate as a transfer by the bankrupt of the property disclaimed to his children . . .").

Bright),⁷ the court had to distinguish a subsequent decision by the Supreme Court in *Drye v. United States*,⁸ which declared that a beneficiary's disclaimed interest constitutes "property" or "rights to property" pursuant to section 6321 of the Internal Revenue Code ("I.R.C.").⁹

This Comment maintains that a debtor's interest in both an inheritance and a right to disclaim represents property that should be subject to fraudulent transfer treatment under section 548(a). The *Costas* decision magnifies the often incongruous relationship between state law and bankruptcy and serves as an example of when state law undercuts the authority of the Code.

Part I of this comment recounts the history and nature of fraudulent transfer law. Part II of this Comment examines the *Costas* court's decision and how it ultimately relied on Arizona's statutory relation-back doctrine in reaching its conclusion. Part III of this Comment argues that within the context of section 548(a), the relation-back doctrine is nothing more than a means of managing a debtor's preexisting property interests, which usurps the authority of the Code. Part III further declares (1) the interaction between certain provisions of the Code in conjunction with the doctrine of *expressio unis est exclusio alterius* demonstrates the BAP wrongly distinguished *Drye*; (2) the recovery of a disclaimed inheritance within reach of section 548(a) does not violate the doctrine of preemption; and (3) the combination of the doctrine of preemption and the nature of section 101(54) empowers the Code to overcome the relation-back doctrine and categorize a disclaimer as a fraudulent transfer.

Thereafter, Part IV of this Comment explores various public policy reasons as to why pre-petition disclaimers should be invalidated under section 548(a). Part V concludes that a bankruptcy court should use its section 548(a) authority under the Code to apply fraudulent transfer treatment to disclaimers.

I. THE ANATOMY OF SECTION 548(a)

Section 548(a) of the Bankruptcy Code sets forth in part:

⁷ 241 B.R. 664 (B.A.P. 9th Cir. 1999). See *In re Costas*, 346 B.R. at 201 ("Absent a change in law, we are bound by our precedent in *Bright*."); *In re Bright*, 241 B.R. at 666–672 (reasoning under Washington disclaimer law, by persuasive precedent from other circuits, through non-disclaimer cases in other circuits, via disclaimer subject to disclaimer law, and by way of treatment of disclaimers in other states, that disclaimed interest in inheritance does not constitute fraudulent conveyance for bankruptcy purposes).

⁸ 528 U.S. 49 (1999). See *In re Costas*, 346 B.R. at 200–04 (recognizing Supreme Court's holding in *Drye* and distinguishing Court's reasoning and facts under which it ruled); see also Grassmuck v. Nistler (*In re Nistler*), 259 B.R. 723, 725–728 (Bankr. D. Or. 2001) (discussing conflict between *Drye* and *Bright* and limiting holding of *Drye* to cases involving interpretation of Internal Revenue Code or similar federal law).

⁹ Compare *Drye*, 528 U.S. at 58–61 (holding federal law must determine whether disclaimed interest in trust proceeds constitutes "property" or "rights to property" pursuant to section 6321 of the I.R.C.) with *In re Bright*, 241 B.R. at 667–72 (holding debtor's pre-petition disclaimer does not constitute fraudulent transfer under the Code because Washington's relation-back doctrine retroactively erased any interest in inheritance). The Supreme Court handed down the *Drye* decision thirty-three days after the BAP handed down *Bright*. Compare *Drye*, 528 U.S. at 59 (ruling on December 7, 1999), with *In re Bright*, 241 B.R. at 664 (ruling on November 4, 1999).

(a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity . . . ; or

(B)(i) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(ii) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation¹⁰

Section 548(a) is otherwise known as a fraudulent transfer provision, although fraud need not be involved.¹¹ It allows a trustee in bankruptcy to recover property (1) a debtor has transferred for the purpose of defrauding creditors, or (2) a debtor has transferred for less than a reasonably equivalent value and while insolvent (or having become insolvent as a result of the transaction).¹² Fraudulent transfers are

¹⁰ 11 U.S.C. § 548(a) (2006). See S. REP. NO. 95-989, at 89 (1978), as reprinted in 1978 U.S.C.C.A.N. 4717, 5875 ("[This section] permits the trustee to avoid transfers by the debtor in fraud of his creditors. Its history dates from the [S]tatute of 13 Eliz. c. 5 (1570).").

¹¹ See, e.g., *BFP v. Trust Resolution Corp.*, 511 U.S. 531, 535 (1994) ("Section 548 of the Bankruptcy Code [] sets forth the powers of a trustee in bankruptcy . . . to avoid fraudulent transfers.") (footnote omitted); *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 849 (6th Cir. 2002) (citing *United States v. Hunter (In re Walter)*, 45 F.3d 1023, 1027 (6th Cir. 1995)) (explaining trustee's power to avoid fraudulent transfers under section 548 of Code is question of law); *Kaler v. Craig (In re Craig)*, 144 F.3d 587, 590 (8th Cir. 1998) (citing *Jenkins v. Chase Home Mortg. Corp. (In re Maple Mortg., Inc.)*, 81 F.3d 592, 596 (5th Cir. 1996)) ("The burden of proof is on the [t]rustee to establish each element of a fraudulent transfer under section 548."); *Pension Transfer Corp. v. Beneficiaries Under the Third Amendment to Fruehauf Trailer Corp. Ret. Plan No. 003*, 319 B.R. 76, 84 (D. Del. 2005) ("Section 548 of the Bankruptcy Code addresses the law of fraudulent transfers. Such a transfer may be caused by either actual fraud or constructive fraud.").

¹² See *BFP*, 511 B.R. at 535 ("[Section 548] permits to be set aside not only transfers infected by actual fraud but certain other transfers as well—so-called constructively fraudulent transfers."); David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 165–67 (2003) (explaining fraudulent transfer law addresses two scenarios: first is when debtor transfers property with actual intent to defraud creditors; second is constructive and applies when debtor transfers property while insolvent and for less than reasonably equivalent value); see also *In re Best Products, Co. Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) ("Fraudulent transfer laws are intended to promote payment to creditors; that is, the statutes are remedial, rather than punitive."); *In re Metro Water & Coffee Serv.*, 157 B.R. 742, 747 (Bankr. W.D.N.Y. 1993) ("A fraudulent conveyance, or, more correctly in fraud of creditors, may generally be defined as a transaction by means of which the owner of real or personal property has sought to place the land or goods beyond the reach of his creditors" (citation omitted)); Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 EMORY BANKR. DEV. J. 55, 59 (1991) ("The fraudulent transfer is an infringement of the creditor's right to realize upon the available assets of its debtor. The law imposes a substantive prohibition—the debtor may not dispose of its property with the intent, actual or implied by law, of placing the property beyond the reach of its creditors.").

broadly interpreted, covering most conceivable ways a debtor may depart with property in circumvention of creditors.¹³

The basis of American fraudulent-transfer law dates back to 1570 with the enactment of the Statute of 13 Elizabeth in England.¹⁴ The Statute addressed the actual, subjective intent of the debtor and stemmed from a series of English laws geared toward curtailing debtors from collusively conveying their property and taking sanctuary on holy ground.¹⁵ Unfortunately for creditors, it became increasingly difficult to prove actual intent "as debtors found subtler ways of transferring their property and avoiding the payment of their debts."¹⁶ This problem

¹³ See PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* ¶5.01[1][c], at 5–6 (1989).

The law of fraudulent dispositions polices not only outright transfers of property but all debtor actions that may put the debtor's assets beyond the reach of his creditors. That is not to say that every disposition is avoidable. But it's worthwhile to keep in mind that virtually every disposition is subject to avoidance if the proper factual predicates are established.

Id.; cf. *Sensenich v. Molleur (In re Chase)*, 328 B.R. 675, 683–84 (Bankr. D. Vt. 2005) (detailing non-exclusive list of factors court may consider "to the question of whether a transfer is properly categorized as a fraudulent transfer").

¹⁴ 13 Eliz., c. 5 (1570) (Eng.). See *BFP*, 511 U.S. at 541 ("The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth . . ."); Paul J. Hartman, *A Survey of the Fraudulent Conveyance in Bankruptcy*, 17 VAND. L. REV. 381, 382 (1964) (citing 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 58 (1940)) ("The Statute of 13 Elizabeth, regarded as the source of the American law on conveyances in fraud of creditors, became part of our inheritance.") (footnote omitted).

¹⁵ 1 DEWITT C. MOORE, *A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' REMEDIES AT LAW AND IN EQUITY* § 7, at 10–11 (1908):

The famous statute of 13 Elizabeth (1570), perpetuated by the statute of 29 Elizabeth (1587), was preceded by earlier legislation by the [P]arliament of England against fraudulent transfers, enacted to more clearly formulate the common law with a view to suppress voluntary conveyances and secret trusts made by debtors who escaped arrest for debt, or avoided service of process by fleeing to sanctuaries or holy ground.

Id.; Peter A. Alces & Luther M. Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527, 529 (1985) ("The Statute of Elizabeth required that a creditor prove actual, subjective intent to hinder, delay, or defraud to avoid a conveyance."); Robert M. Zinman, James A. Houle & Alan J. Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977, 987–88 (1984) [hereinafter Zinman & Houle, *Fraudulent Transfers*] (stating fraudulent transfer law developed in part to prevent debtors from abusing ancient "sanctuary law" by collusively conveying property and thereafter seeking sanctuary beyond reach of creditors).

¹⁶ Zinman & Houle, *Fraudulent Transfers*, *supra* note 15, at 989. See *Sharp Int'l Corp. v. State Street Bank and Trust Co. (In re Sharp Int'l Corp.)*, 403 F.3d 43, 56 (2d Cir. 2005) ("Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." (quoting *Wall St. Ass'n v. Brodsky*, 257 A.D.2d 526, 529 (N.Y. App. Div. 1999))); Juliet M. Moringiello, *Distinguishing Hogs From Pigs: A Proposal for a Preference Approach to Pre-Bankruptcy Planning*, 6 AM. BANKR. INST. L. REV. 103, 111 (1998) ("Courts use these badges of fraud, or extrinsic evidence of fraud, because fraudulent intent is difficult to prove directly.").

led to the famous decision by Lord Coke in *Twyne's Case*.¹⁷ There, Lord Coke established six "signs and marks" of fraud—later rephrased "badges of fraud" in America—used to imply a debtor's intent.¹⁸

As American jurisdictions adopted 13 Elizabeth either by statute or judicial decision, creditors increasingly turned to the badges of fraud and circumstantial evidence in order to show a debtor's actual intent.¹⁹ By the turn of the twentieth century, however, "American courts seemed confused and inconsistent in their application of the doctrine of implied fraud"²⁰ Thus in 1918, the National Conference of Commissioners for Uniform State Laws ("Commissioners") promulgated the Uniform Fraudulent Conveyance Act ("UFCA").²¹ The UFCA pulled together and objectified the various common law doctrines that had developed under 13 Elizabeth, including the trend toward identifying the effects of a fraudulent transfer as opposed to establishing a debtor's actual intent.²² In particular, the UFCA codified a constructive fraudulent-transfer provision.²³ This provision declared, *inter alia*, that a conveyance made by an insolvent person and without fair consideration constituted a fraudulent transfer.²⁴

As for the presence of fraudulent transfer law in American bankruptcy, every major bankruptcy law of the United States has contained a fraudulent transfer

¹⁷ 3 Coke 806, 76 Eng. Rep. 809, 810 (Star Ch. 1601) (addressing circumstances surrounding debtor's secret assignment of all goods and chattels to creditor despite maintaining possession). See MOORE, *supra* note 15, § 14, at 18 ("The leading case under the statute of 13 Elizabeth is [*Twyne's Case*], a decision promulgated in 1601 Its interpretation of [13 Elizabeth] and clear exposition of the rules governing fraudulent conveyances have gained for it equal prominence with the statute itself").

¹⁸ See JAMES ANGELL MACLACHLAN, BANKRUPTCY § 222, at 254 (1956) ("The court here [] found six 'signs and marks' of fraud, which came later to be more commonly described as 'badges of fraud.'"). The six marks of fraud established by Lord Coke are: (1) the transfer involves practically all of the debtor's property and was made "without excepting apparel or of anything of necessity"; (2) the donor "continued in possession and used the goods as his own; and by reason thereof [] traded and trafficked with others, and defrauded and deceived them; (3) the transfer was made secretly; (4) the transfer was made pending the writ"; (5) there existed a trust between the debtor and creditor whereby the creditor retained title while the debtor continued to enjoy the benefits of possession, and (6) the deed contains a clause stating the transfer was valid and bona fide "*et clausulae inconset* *simper inducunt suspicionem*." *Twyne*, 76 Eng. Rep. at 812–14.

¹⁹ See Paul J. Hartman, *supra* note 14, at 382 ("After the American Revolution, the Statute of Elizabeth was re-enacted in some states, and in others the courts considered it as part of the common law in force."); see also Zinman & Houle, *Fraudulent Transfers*, *supra* note 15, at 988–89 ("A complaining creditor who could not show such actual intent could still meet the burden of proof by showing that there were sufficient badges of fraud to create a presumption of actual intent to defraud.").

²⁰ Zinman & Houle, *Fraudulent Transfers*, *supra* note 15, at 989.

²¹ See UNIF. FRAUDULENT CONVEYANCE ACT §§ 4, 7 (repealed 1984), 7A U.L.A. 318, 378 (2006).

²² See Alces & Dorr, *supra* note 15, at 532–33 (stating drafters of UFCA attempted to rectify evolving ambiguities surrounding American fraudulent-conveyance law by adding predictability and uniformity); Michael L. Johnson, Comment, *Recent Applications of the Arkansas Fraudulent Transfer Act*, 51 ARK. L. REV. 489, 492 (1998) ("In 1918, due to the multiplicity and variety of American laws on the voidability of fraudulent conveyances, the National Conference of Commissioners on Uniform Laws promulgated the [UFCA].").

²³ See UNIF. FRAUDULENT CONVEYANCE ACT § 4 (repealed 1984), 7A U.L.A. 318 (2006).

²⁴ See *id.* Aside from section 4, the UFCA also addressed constructively fraudulent transfers made by a person involved in a business transaction or an insolvent partnership. See *id.* §§ 5, 8.

provision premised on English law, starting with the first bankruptcy act in 1800.²⁵ Yet noting the favorable changes brought about by the UFCA, Congress generally adopted the UFCA's version into bankruptcy law by the Chandler Act of 1938.²⁶ Forty years later, Congress again revised bankruptcy's fraudulent transfer provision by creating section 548(a) in the Bankruptcy Reform Act of 1978.²⁷ Section 548(a) differed from the UFCA in certain respects, including replacing the term "fair consideration" with "reasonable equivalent value" for clarification purposes, and amending constructively fraudulent transfers to cover prospective insolvency.²⁸

Following Congress's creation of section 548, the Commissioners promulgated the Uniform Fraudulent Transfer Act ("UFTA") in 1984.²⁹ The Commissioners devised the UFTA both to modernize the UFCA and to conform state fraudulent-transfer law with section 548.³⁰ Today, forty-four states have adopted some form of the UFTA.³¹

²⁵ See Bankruptcy Act of 1978, Pub. L. No. 95-598, § 548, 92 Stat. 2549, 2600–01 (codified as amended at 11 U.S.C.); Bankruptcy Act of 1898, ch. 541, § 67(e), 30 Stat. 544, 564–65 (1898), *amended by* Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1978); Bankruptcy Act of 1867, ch. 176, § 35, 14 Stat. 517, 534 (repealed 1878); Bankruptcy Act of 1841, ch. 9, § 2, 5 Stat. 440, 442 (repealed 1843); Bankruptcy Act of 1800, ch. 19, § 17, 2 Stat. 19, 26 (repealed 1803); 4 COLLIER ON BANKRUPTCY ¶ 67.01, at 15–21 (Frank R. Kennedy & Lawrence P. King eds., 14th ed. 1978) (assessing amendments to bankruptcy's fraudulent transfer law beginning with Bankruptcy Act of 1800); Charles Jordan Tabb, *History of Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995) (explaining first federal bankruptcy act was (1) enacted in 1800, (2) based on 1732 English bankruptcy act, and 3) contained a fraudulent transfer provision); Zinman & Houle, *Fraudulent Transfers*, *supra* note 15, at 989 (declaring every bankruptcy law since first bankruptcy act in 1800 contained fraudulent transfer provision based on English fraudulent-transfer law).

²⁶ Ch. 575, § 67(d)(2), 52 Stat. 840, 877 (amending Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978)). See Zinman & Houle, *Fraudulent Transfers*, *supra* note 15, at 991 (explaining Congress adopted UFCA in following established tradition of adopting most recent statement of fraudulent transfer law); see also Scott Pryor, *Tension Between the Trustee & the Tithe*, AM. BANKR. INST. J., May 1996, at 1 ("With the amendments of the Chandler Act, Congress even incorporated the UFCA into the [Bankruptcy] Act....").

²⁷ Pub. L. No. 95-598, § 548, 92 Stat. 2549, 2600–01 (codified as amended at 11 U.S.C.). See ALCES, *supra* note 13, ¶5.01[2][c], at 5 -13, -14 (declaring Congress revolutionized debtor-creditor relations in Bankruptcy Reform Act of 1978 and sought to clarify UFCA).

²⁸ Compare 11 U.S.C. § 548(a)(B)(ii) (2006) (covering transactions made for less than a reasonably equivalent value and by a person that (1) was insolvent, (2) was engaged in business or a transaction that would have rendered that person or business undercapitalized, or (3) incurred or would incur debts beyond the debtor's ability to pay such debts beyond maturity), with UNIF. FRAUDULENT CONVEYANCE ACT §§ 2, 4, 7 (repealed 1984), 7A U.L.A. 318, 378 (2006). See, e.g., *Meyer v. Gen. Am. Corp.*, 569 P.2d 1094, 1096 (Utah 1997) (interpreting "fair consideration" as requiring both equivalent value and good faith). Congress amended section 548(a) in 2005 by extending the reach-back period from one year to two years. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 23, 214.

²⁹ UNIF. FRAUDULENT TRANSFER ACT § 4, 7A U.L.A. 301–02 (2006). See generally Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195, 195–211 (1986) (providing extensive commentary on provisions of UFTA).

³⁰ See Kennedy, *supra* note 29, at 198–99 (stating Commission was influenced by changes in Bankruptcy Code's fraudulent transfer law); see also Michael L. Cook & Richard Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87, 87 (1988) (stating UFTA has borrowed heavily from the Bankruptcy Code, but uniformity between the two has not yet been achieved).

³¹ See 8A U.L.A. 2, 2–3 (2006).

As for the nature of a fraudulent transfer, Professor David Gray Carlson narrows it down to two basic types of transactions by the debtor—exchanges and donations.³² An "exchange" is when the debtor receives value in a transaction with a third party, and a "donation" is when the debtor fails to receive value in a transaction with a third party.³³ A constructively fraudulent transfer, explains Professor Carlson, connotes a "theoretical failure" and involves a donation by an insolvent person in which the third party fails to pay a *reasonably equivalent value* to the transferor.³⁴ Constructive fraudulent-transfer law thus serves to protect creditors by ensuring the loss of a valuable asset is essentially replaced or otherwise returned.³⁵

In the context of disclaimers, constructive fraudulent-transfer law applies when an insolvent disclaimant fails to receive a reasonably equivalent value for the disclaimed interest from the eventual beneficiary. As noted above, section 548(a)(1)(B) of the Code codifies constructive fraudulent-transfer law based on the

³² See Carlson, *supra* note 12, at 166 ("Substantively speaking, fraudulent transfer can be divided into two types. First, there are cases in which the third party transferee pays value. These I will call 'exchanges.' Second, there are transfers in which the third party does not pay value. These shall be informally referred to as 'donations.'").

³³ See *id.*

³⁴ See *id.* at 166–67 (explaining term "constructive" represents theoretical failure and that constructive fraudulent transfers involve inquiry into debtor's solvency and whether reasonably equivalent value was given in the transaction). Courts for the most part determine whether a debtor received a reasonably equivalent value based on all the facts and circumstances of the case. See, e.g., *In re Bundles*, 856 F.2d 815, 824–25 (7th Cir. 1988) (assessing all circumstances surrounding foreclosure sale in determining reasonably equivalent value); *In re Morris Commc'n N.C., Inc.*, 75 B.R. 619, 628 (Bankr. W.D.N.C. 1987) ("Whether reasonably equivalent value was paid in a particular case depends upon facts and circumstances of that case."); *In re Join-in Int'l (U.S.A.)*, 56 B.R. 555, 559–60 (Bankr. S.D.N.Y. 1986) (explaining no precise formula can be used to ascertain reasonably equivalent value and that it must be based on all facts and circumstances of case); *In re Curtina Int'l, Inc.*, 23 B.R. 969, 974 (Bankr. S.D.N.Y. 1982) (espousing facts and circumstances of case should be used to determine reasonably equivalent value); cf. Marie T. Reilly, *A Search for Reason in "Reasonably Equivalent Value" After BFP v. Resolution Trust Corp.*, 13 AM. BANKR. INST. L. REV. 261, 286–95 (2005) (advocating reasonably equivalent value should be equated with absence of material irregularity or collusion). But see *Durrett v. Wash. Nat'l Ins. Co.*, 621 F.2d 201, 203–04 (5th Cir. 1980) (holding regularly conducted foreclosure sale constitutes fraudulent transfer and defining reasonably equivalent value as less than 70% of fair market value). Factors used in measuring a reasonably equivalent value include the market value of the items transferred, the comparative value of the items transferred, and the debtor's direct and indirect benefit from the transaction. See, e.g., *Kittay v. Peter D. Leibowitz Co. (In re Duke & Benedict, Inc.)*, 265 B.R. 524, 530–31 (Bankr. S.D.N.Y. 2001) ("The determination of whether reasonably equivalent value was received by the debtor requires the court to compare what was given with what was received." (quoting *Coan v. Fleet Credit Serv. (In re Guerra)*, 225 B.R. 32, 36 (Bankr. D. Conn. 1998))); *Morris*, 75 B.R. at 628 ("Factors to be considered include the good faith of the transferee, the relative difference in the amount paid compared to the fair market value, and the percentage the amount paid is of the fair market value." (quoting *Cooper v. Smith (In re Smith)*, 24 B.R. 19, 23 (Bankr. W.D.N.C. 1982))).

³⁵ See Carlson, *supra* note 12, at 165–66 ("To spite their creditors, [debtors] can convey their assets instantly to favored third parties, whereas creditors (if they are unsecured) must engage in expensive, time-consuming procedures in or to collect. Fraudulent transfer law evens the playing field."); see also Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165, 1177 (1994) (stating purpose of fraudulent transfer law includes restoring "to the extent possible the status quo that existed prior to the transaction").

version set forth by the UFCA, thereby subjecting a disclaimant in bankruptcy to section 548(a) irrespective of intent.³⁶

II. THE *COSTAS* DECISION

Rachelle Costas ("Debtor") was a beneficiary of the Edward Dittlof Revocable Trust ("Trust"), to which she would receive a one-third interest upon the death of her father.³⁷ The Trust included real estate in Milwaukee, Wisconsin, and contained a provision allowing any beneficiary to disclaim his or her interest in the Trust.³⁸

The Debtor's father died on February 25, 2002, but the Debtor disclaimed her share in the Trust on November 7, 2002—a share purported to be worth at least \$34,800.³⁹ On December 3, 2002, the Debtor and her spouse filed voluntary chapter 7 bankruptcy, and the Trustee thereafter filed a complaint under section 548(a) to bring the disclaimed inheritance into the estate.⁴⁰

Both the Debtor and the Trustee filed motions for summary judgment regarding the Debtor's pre-petition disclaimer.⁴¹ The Bankruptcy Court for the District of Arizona granted summary judgment for the Debtor, distinguishing the Supreme Court's ruling in *Drye v. United States*⁴² and holding that a disclaimer does not constitute a fraudulent transfer.⁴³ The Trustee thereafter appealed to the Bankruptcy Appellate Panel for the Ninth Circuit.⁴⁴

³⁶ See 11 U.S.C. § 548(a)(1)(B) (2006); Hartman, *supra* note 14, at 384 (acknowledging Chandler Act addressed certain fraudulent transfers without regard to actual intent).

³⁷ See *In re Costas*, 346 B.R. 198, 199 (B.A.P. 9th Cir. 2006). The court stated that the terms of the trust included:

"[The Property] to benefit in equal shares to: my daughter [Debtor], my son Eric Dittlof, and my daughter Renee Dittlof, equally who survive me . . . I leave all the rest and remainder of the trust property to these same 3 beneficiaries: [Debtor], Eric Dittlof, and Renee Dittlof to be divided equally."

Id. at 199 (quoting Edward Dittlof Revocable Trust).

³⁸ *Id.* ("The Trust provided that any beneficiary could disclaim his or her interest in the Trust. The Trust further provided that in the event a beneficiary died before complete distribution of the Trust's assets, the beneficiary's children would receive the beneficiary's estate.").

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 528 U.S. 49, 52 (1999) (declaring petitioner's interest in inheritance may not be disclaimed against tax lien on petitioner's assets).

⁴³ *Id.* at 200 (citing *In re Costas*, No. 02-19423-RTB, Adv. No. 04-01228-RTB (Bankr. D. Ariz. Dec. 3, 2002). The BAP noted that the bankruptcy court entered a "minute/entry" order without "a separate document embodying a final judgment that is distinct from and in addition to an order granting a motion for summary judgment." See *id.* at 199–200 & n.3 (citing FED. R. BANKR. P. 9021).

⁴⁴ *Id.*

A. *Costas on Disclaimer Law in Bankruptcy: Preserving the Inheritance*

The BAP in *Costas* opened its discussion by acknowledging that federal courts across the country have applied the relation-back doctrine in determining "the debtor/beneficiary never held a property interest which could be 'fraudulently transferred.'"⁴⁵ Many states today have a statutory relation-back doctrine.⁴⁶ In terms of the doctrine's relationship to state fraudulent-transfer law, some states have encoded a separate provision expressly validating disclaimers against creditor claims,⁴⁷ while others have left the issue to the judiciary.⁴⁸ The majority of state courts having ruled on the subject have held that a disclaimer cannot constitute a fraudulent transfer.⁴⁹

⁴⁵ *Id.* at 201 (citing *Wood v. Bright (In re Bright)*, 241 B.R. 664, 672 (B.A.P. 9th Cir. 1999)) (holding debtor's disclaimer is valid under section 548(a) because state law of Washington validates disclaimers against its fraudulent conveyance law); see *Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994) (promulgating under Texas law that disclaimer is not fraudulent transfer of property); *Jones v. Atchison (In re Atchison)*, 925 F.2d 209, 212 (7th Cir. 1991) (declaring since Illinois law validates disclaimers against fraudulent transfer law, debtor's disclaimer does not constitute fraudulent transfer pursuant to section 548(a)).

⁴⁶ See *supra* note 2. But see UNIF. DISCLAIMER OF PROPERTY INTERESTS ACT §§ 5, 6 (1999), 8A U.L.A. 166–75 (2003). The Uniform Disclaimer of Property Interests Act ("U.D.P.I.A."), which was incorporated into section 2-801 of the Uniform Probate Code ("U.P.C.") in 2002, expressly abandons the relation-back doctrine in favor of a new provision stipulating a disclaimer is not a "transfer." See *id.* § 5; see also UNIF. PROBATE CODE § 2-801 (1999), 8 U.L.A. 51–54 (Supp. 2006). This Comment's analysis essentially stays the same, however, because under the U.D.P.I.A., a renunciation of an intestate share takes effect on the date of the decedent's death, and a renunciation of a bequest or a devise takes effect on the date the will becomes irrevocable. See UNIF. DISCLAIMER OF PROPERTY INTERESTS ACT § 6(b)(1) (1999), 8A U.L.A. 166–75 (2003). Thus, a disclaimer under the U.D.P.I.A. basically maintains its retroactivity.

The U.D.P.I.A. or some form thereof has been adopted in twelve states, including Arizona, Arkansas, Florida, Hawaii, Indiana, Iowa, Maryland, New Mexico, North Dakota, Oregon, Virginia, and West Virginia. See 8A U.L.A. 26 (Supp. 2006). The U.D.P.I.A., however, leaves the effect of a disclaimer against a creditor's claim to pre-existing state law. See Prefatory Note, 8A U.L.A. 160 (2003) ("In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property . . . while leaving the effect of the refusal itself to other law.").

⁴⁷ See, e.g., CAL. PROB. CODE § 283 (Deering 2004) ("A disclaimer is not a fraudulent transfer by the beneficiary" (rejecting California Supreme Court's ruling in *In re Kalt's Estate*, 108 P.2d 401, 402–04 (Cal. 1940), which held that renunciation of legacy constituted fraudulent transfer)); MO. REV. STAT. § 469.010 (West Supp. 2006) ("For all purposes the disclaimed interest is deemed to have passed directly from the transferor to the ultimate taker or takers and is not subject to the claim of any creditor of the disclaimant."); TEX. PROB. CODE ANN. § 37(A) (Vernon 2003) ("[A] disclaimer . . . is not subject to the claims of any creditor of the disclaimant.").

⁴⁸ See, e.g., *Tompkins State Bank v. Niles*, 537 N.E.2d 274, 283 (Ill. 1989) ("We must reject as gratuitous the [b]ank's contention that the legislature has manifested its intent to allow creditors to set aside a disclaimer as a fraudulent conveyance where giving the disclaimer effect will defeat the claims of creditors."); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 33–34 (1993) ("With few exceptions, courts applying state law have held that a disclaimer is not a fraudulent transfer even if it frustrates the disclaimant's creditors.").

⁴⁹ See *Wood v. Bright (In re Bright)*, 241 B.R. 664, 671 (B.A.P. 9th Cir. 1999) (declaring majority of state courts "which have addressed the issue of whether a disclaimer can constitute a fraudulent conveyance under state law have held that it cannot"). Those states that bar a disclaimer against a creditor's claim do so either by statute or judicial decision. See, e.g., FLA. STAT. ANN. § 739.402 (West Supp. 2006) (barring disclaimer when disclaimant is insolvent); LA. CIV. CODE ANN. art. § 967 (Supp. 2006) (declaring creditor of successor may accept succession rights to renounced interest subject to judicial authorization); MASS. GEN. LAWS ch.

1. The Development and Application of the Relation-Back Doctrine

Whether property passes by bequest, devise, or intestacy, one of the most fundamental concepts of probate law is that a beneficiary's interest in the estate arises at the moment of the decedent's death.⁵⁰ Disclaimers allow a beneficiary to expunge that interest retroactively and for any reason.⁵¹ For example, accepting the property may impose an unwanted tax burden,⁵² or the beneficiary may want to pass a life estate on to the remainder.⁵³ Regardless, states allot a beneficiary a certain amount of time to exercise the disclaimer, or else the beneficiary is deemed to have accepted the inheritance.⁵⁴

191A, § 8(2) (1994) (stating right to disclaim is barred by beneficiary's insolvency at time of attempted disclaimer); MINN. STAT. ANN. § 525.532 (sub. 6) (West 2006) ("The right to disclaim otherwise conferred by this section shall be barred if the beneficiary is insolvent at the time of the event giving rise to the right to disclaim."); *Pennington v. Bigham*, 512 So.2d 1344, 1347 (Ala. 1987) (classifying disclaimer as fraudulent transfer because disclaimant was insolvent and showed no reason for disclaiming property other than to place it beyond reach of creditors); *Stein v. Brown*, 480 N.E.2d 1121, 1124 (Ohio 1985) (holding conveyance made with intent to hinder, delay, or defraud creditor is invalid); *In re Reed's Estate*, 566 P.2d 587, 590–92 (Wyo. 1977) (holding disclaimer by insolvent person in face of threat of litigation is badge of fraud and invalid).

⁵⁰ See, e.g., *Burcham v. Burcham*, 1 P.3d 756, 757 (Colo. Ct. App. 2000) ("A will takes effect only upon the testator's death and generally speaks from that date."); *In re O'Keefe's Estate*, 354 N.W.2d 531, 534 (Minn. Ct. App. 1984) ("For no one is an heir of the living."); see also, e.g., TEX. PROB. CODE ANN. § 37 (Vernon 2003) ("When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will . . . shall vest immediately in the devisees or legatees . . . and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law . . ."); cf. *infra* note 77 (analyzing "acceptance-rejection" theory in probate law).

⁵¹ See, e.g., *Commerce Trust Co. v. Fast*, 396 S.W.2d 683, 686 (Mo. 1965) (quoting 57 AM. JUR. *Wills*, § 1566) (noting motives for renunciation are immaterial); *Strom v. Wood*, 164 P. 1100, 1101 (Kan. 1917) (citing *Bradford v. Calhoun*, 109 S.W. 502, 504 (Tenn. 1907)) ("[T]he motive in making the renunciation was nothing the creditors could complain of so long as there was no collusion with the remainderman or residuary devisees . . .").

⁵² Cf., e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(2) (McKinney 1999) (promulgating estate taxes shall be disregarded in computing spouse's elective share). A child beneficiary may want to renounce his or her share in the decedent's estate so as to utilize the tax exemption allotted to a spouse's right of election. See *id.*; see also *Estate of Monroe v. Comm'r*, 124 F.3d 699, 702–03 (5th Cir. 1997) (describing situation wherein all twenty-nine beneficiaries renounced at decedent's husbands request to avoid tax implications); *In re Estate of Fienga*, 347 N.Y.S.2d 150, 152 (N.Y. Sur. Ct. 1973) (discussing tax-motivated renunciations).

⁵³ *Keen v. Brooks*, 47 A.2d 67, 70–72 (Md. 1946) (acknowledging renunciation of title by decedent's child accelerated title to decedent's grandchildren as fee absolute); *In re Schlesinger's Estate*, 640 N.Y.S.2d 743, 745 (N.Y. Sur. Ct. 1996) (stating renunciation of trust by first beneficiary and remainder was effective to vest grandchildren's interest therein in light of consent by trustees and all interested parties); *In re Paine's Estate*, 425 N.Y.S.2d 1018, 1020 (N.Y. Sur. Ct. 1980) (describing effect of renunciation by remainderman was to pass interest to his issue and thus carry out presumed intention of testator).

⁵⁴ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(b)(2) (McKinney Supp. 2006) (promulgating renunciation must be filed within nine months after effective disposition of decedent's estate); TEX. PROB. CODE ANN. § 37(A)(a) (Vernon 2003) (stating renunciation invalid if not filed within nine months of decedent's death); *Parker*, *supra* note 48, at 33–34 n.17 (observing most states provide specific time limits to renounce).

The law on disclaimers is by no means a novel concept.⁵⁵ Originating under Roman law and expanded upon in feudal England around the sixteenth century, disclaimers and the relation-back doctrine derive from a series of presumptions declaring "title [to real property] could not be suspended . . . in mid-air,"⁵⁶ and a beneficiary accepted a testamentary gift beneficial on its face.⁵⁷ The relation-back doctrine developed as a way for the beneficiary to undo these presumptions along with any consequences following from the legal fiction that a title literally needs a home.⁵⁸ Hence, the law on disclaimers involves one fiction unraveling another.

Another aspect of common law disclaimers is that courts traditionally recognized them only in testamentary proceedings.⁵⁹ This was based on the theory that a devise served as an offer on one hand, while a disclaimer served as a means to expunge both the offer and the presumption of acceptance on the other hand.⁶⁰ As for property passing through intestacy, English law barred disclaimers based on the

⁵⁵ See Hirsch, *supra* note 1, at 591 ("The American law of rejection [] of inheritances traces to England, specifically to the English system of feudalism that has so pervasively (and persistently) colored the common law of property."); see also Joan B. Ellsworth, *On Disclaimers: Let's Renounce I.R.C. Section 2518*, 38 VILL. L. REV. 693, 694 (1993) ("The doctrine of disclaimer is of ancient origin." (citing John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. CHI. L. REV. 316, 316 n.2 (1979) (explaining concept of disclaimers existed under Roman law))).

⁵⁶ See Hirsch, *supra* note 1, at 591–92 (explaining under English law that title to real property vested at moment of decedent's death because decedent could not retain it); cf. *Fleenor v. Williamson* (*In re Fleenor's Estate*), 17 P.3d 520, 524 (Or. Ct. App. 2000) (reiterating under Oregon law that title to decedent's real property vests in decedent's heirs and devisees upon decedent's death); *In re Vincent's Estate*, 98 S.W.3d 146, 149 (Tenn. 2003) (explaining under Tennessee statutory law, real property of intestate decedent or testator vests immediately upon decedent's death).

⁵⁷ See, e.g., *Perkins v. Isley*, 32 S.E.2d 588, 591 (N.C. 1945):

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator.

Id.; *Sanders v. Jones*, 147 S.W.2d 424, 427 (Mo. 1941) ("[W]hen the gift is beneficial to the donee acceptance by him is presumed, though the presumption is rebuttable."); *Albany Hosp. v. Albany Guardian Soc'y*, 108 N.E. 812, 813 (N.Y. 1915) ("While there is a presumption of acceptance in the case of a grant or devise beneficial on its face, the presumption is not conclusive, and it is settled beyond any opportunity for controversy that a devisee may refuse to accept, and renounce a provision in his favor and prevent it from being effective.").

⁵⁸ See Ellsworth, *supra* note 55, at 698 ("The act of refusal, whenever performed, relates back to the instant when the transfer was initiated. Thus, under the common law the disclaimant does not participate in the transfer.").

⁵⁹ See Hirsch, *supra* note 1, at 591–93 (observing English courts refused to acknowledge intestate renunciation); White, *supra* note 2, at 1053 ("Under common law, the relation-back doctrine does not apply when property passes by intestacy.").

⁶⁰ See *Albany Hosp.*, 108 N.E. at 813–14 ("[T]he weight of authority . . . in this country is to the effect that such a devise is really an offer to the proposed beneficiary, and while the presumption is that he will accept it . . . there is no presumption of immediate acceptance."); cf. *Jones v. Atchison* (*In re Atchison*), 925 F.2d 209, 211 (7th Cir. 1991) (commenting "although there is a presumption that a beneficiary accepts a testamentary gift, a valid disclaimer overcomes this presumption and retroactively erases any interest in the beneficiary disclaiming.").

sentiment that property passing by operation of law displaced individual choice.⁶¹ American courts continued to adhere to the English rule, operating under the assumption that a beneficiary could not accept or reject property passing automatically.⁶² Today, however, all but two states have statutorily abolished the distinction between testacy and intestacy for purposes of allowing disclaimers.⁶³

Turning to the BAP's decision in *Costas*, the court applied Arizona's disclaimer law in holding that the Debtor's disclaimer does not constitute a fraudulent transfer.⁶⁴ Much like the rest of the country, Arizona law at the time contained a relation-back provision causing disclaimed property to pass from the estate as if the disclaimant had predeceased the decedent.⁶⁵ In applying Arizona's relation-back provision, the court relied primarily on the Supreme Court's decisions in *Barnhill v. Johnson*⁶⁶ and *Butner v. United States*,⁶⁷ which both declared that a debtor's property rights in bankruptcy must be determined by state law.⁶⁸ The *Costas* court

⁶¹ See Hirsch, *supra* note 1, at 591 ("This rule derived from the feudal theory that tenancy over land was not a matter of individual choice.").

⁶² See, e.g., *Coomes v. Finegan*, 7 N.W.2d 729, 732–33 (Iowa 1943) (adopting view that heirs-at-law receive title without agency or assent and subject to claims of creditors); *In re Estate of Estes*, 718 P.2d 298, 301 (Kan. 1986) ("At common law, a legatee or devisee could always renounce his testamentary disposition, while a [statutory] distributee could not."); *Bradley v. State*, 123 A.2d 148, 151 (N.H. 1956) ("The heirs-at-law of an intestate estate may not disclaim or renounce their rights because the title which they receive is in no sense a gift but is one which passes to them by force of the rules of law" (citing *Bostonian v. Milens*, 193 S.W.2d 797, 801 (Mo. Ct. App. 1946) (explaining under common law that beneficiary who receives share involuntarily may not thereafter voluntarily renounce that share))).

⁶³ See Hirsch, *supra* note 1, at 596 ("One significant development has been the passage, in forty-eight states, of disclaimer legislation ending disparate treatment of testate and intestate beneficiaries."); see also Ellsworth, *supra* note 55, at 698 ("Today, the rationale underlying this rule is no longer justifiable, and most states have passed statutes giving heirs the right to disclaim."). Professor Adam J. Hirsch also explains that the relation-back doctrine is "generally needed only for devises of realty" because "[m]ost American jurisdictions vest title to personality in the personal representative pending acceptance by the legatee." Hirsch, *supra* note 1, at 595 n.42. Still, states allow a beneficiary to disclaim anything. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(b)(1) (McKinney Supp. 2006) (authorizing renunciation of interest in inheritance but not expressly limiting renunciation to real property); OKLA. STAT. ANN. tit. 60, §§ 751, 752 (West 1994) (authorizing disclaiming of interest and defining interest as any property, real or personal, legal or equitable).

⁶⁴ See *In re Costas*, 346 B.R. 198, 200–01 (B.A.P. 9th Cir. 2006) (describing Arizona Revised Statutes section 14-2801 (G) (repealed 2005)).

⁶⁵ See *id.* at 201 n.6. Section 14-2801(G) of the Arizona Revised Statutes was repealed and replaced in 2005, but the BAP explained:

[I]t is still governing law in this case because the disclaimer occurred in 2002 and the chapter 7 petition was filed in 2002. The new Arizona law contains similar provisions: section 14-10006(A)(1) provides that the disclaimer "takes effect . . . as of the time of the intestate's death" and section 14-10006(A)(3) provides that unless otherwise provided in the will or operative instrument, "the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution."

Id.

⁶⁶ 503 U.S. 393 (1992).

⁶⁷ 440 U.S. 48 (1979).

⁶⁸ See *In re Costas*, 346 B.R. at 202–03; see also *Barnhill*, 503 U.S. at 398 ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." (citing *McKenzie v.*

also pointed out that section 548 lacks a provision defining property, and "[a]bsent a Congressional mandate . . . bankruptcy courts should not preempt areas of traditional state law in defining property interests."⁶⁹ Consequently, the BAP concluded that because the Debtor theoretically never had an interest in her father's Trust at the state level, there could be no fraudulent transfer.⁷⁰

B. Overcoming *Drye v. United States*

Despite the functionality of disclaimers under Arizona law, the *Costas* court had to address the Supreme Court's ruling in *Drye v. United States*⁷¹ in order to hold that the Debtor's disclaimer was not a fraudulent transfer. In 1999, the Supreme Court in *Drye* ruled that a disclaimed inheritance constitutes "property" or "rights to property" pursuant to section 6321 of the I.R.C, sparking debate as to whether the Supreme Court's holding invalidated pre-petition disclaimers within reach of section 548(a).⁷² The Bankruptcy Court for the Northern District of Iowa in *In re Kloubec*⁷³ opined that it did, thereby placing the BAP's ruling in *Wood v. Bright*⁷⁴ into question.⁷⁵

1. The *Drye* Decision

In *Drye*, the petitioner's mother died intestate leaving an estate worth approximately \$233,000.⁷⁶ According to Arkansas law, the right to inherit the estate vested entirely in the petitioner at the moment of his mother's death.⁷⁷ Unfortunately, not only was the petitioner insolvent at the time, but the Internal Revenue Service ("IRS" or "Government") held a valid tax lien against him in the

Irving Trust Co., 323 U.S. 365, 369–70 (1979) ("In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of state law."); *Butner*, 440 U.S. at 55 ("Property interests are created and defined by state law.").

⁶⁹ *In re Costas*, 346 B.R. at 202.

⁷⁰ *See id.* at 204.

⁷¹ 528 U.S. 49 (1999).

⁷² *See id.* at 52 ("We hold that the disclaimer did not defeat the federal tax liens."); *see also* White, *supra* note 2, at 1051, 1057–64 (arguing *Drye* is not determinative with regard to pre-petition disclaimers).

⁷³ 247 B.R. 246 (Bankr. N.D. Iowa 2000).

⁷⁴ 241 B.R. 664 (B.A.P. 9th Cir. 1999).

⁷⁵ Compare *In re Kloubec*, 247 B.R. at 253–57 (applying *Drye* in holding disclaimers are fraudulent transfers under section 548 of the Code), with *In re Bright*, 241 B.R. at 665 (affirming bankruptcy court's ruling that debtor did not have interest in bequest under Washington law which would result in a transfer of property interest).

⁷⁶ *Drye*, 528 U.S. at 52.

⁷⁷ *Id.* ("Petitioner Ronald F. Drye, Jr., her son, was sole heir to the estate under Arkansas law." (citing ARK. CODE ANN. § 28-9-214 (1987))). The Court observed that certain states adhere to the acceptance-rejection theory, "under which a property interest vests only when the beneficiary accepts the inheritance or devise." *Id.* at 55 n.1. The Court then stated that the Fifth and Ninth Circuits have held that a disclaiming taxpayer prevails in those jurisdictions. *See id.* As explained below, the Court implicitly rejected this theory by looking at the right vesting immediately upon the mother's death. *See id.*

amount of \$325,000 pursuant to section 6321 of the I.R.C.⁷⁸ To protect the interest in his mother's estate, the petitioner filed a written disclaimer, which according to Arkansas law related back to the date of his mother's death.⁷⁹ The mother's estate consequently passed to the petitioner's daughter, whereby the daughter set up a trust and named both her and her parents as the beneficiaries.⁸⁰

In an opinion delivered by Justice Ginsburg, the Court unanimously held that the petitioner's disclaimer could not be used to avoid a tax lien.⁸¹ The Supreme Court sweepingly declared "[t]he Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination of whether those rights or interests constitute 'property' or 'rights to property' [under section 6321]."⁸² The Court also pronounced "[w]hen Congress so broadly uses the term 'property,' we recognize, as we did in the context of the gift tax, that the Legislature aims to reach 'every species of right or interest protected by law and having exchangeable value.'"⁸³

The Supreme Court based its holding on the rulings set forth in *United States v. Bess*⁸⁴ and *United States v. National Bank of Commerce*.⁸⁵ In *Bess*, the Court concluded "state laws are not laws for the United States unless they have been made such by the United States Congress itself."⁸⁶ It then elaborated on that doctrine in *National Bank* by holding "the [I.R.C.] 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.' . . . [T]hose consequences are 'a matter left to federal law.'"⁸⁷ Pulling those declarations together, the Court in *Drye* held that the petitioner's right to disclaim along with his

⁷⁸ *Id.* at 53. See 26 U.S.C. § 6321 (2000) ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.").

⁷⁹ *Id.* ("Under Arkansas law . . . [t]he disclaimer creates the legal fiction that the disclaimant predeceased the decedent; consequently, the disclaimant's share of the estate passes to the person next in line to receive that share.").

⁸⁰ *Id.* at 53–54. The Court did not address whether the petitioner's interest in his daughter's trust influenced its decision. See generally *id.*

⁸¹ See *id.* at 52 (declaring petitioner's interest in mother's estate constituted property to which federal tax lien attaches).

⁸² *Id.* The Court did not expressly limit its holding to cases dealing with the I.R.C. See *In re Kloubec*, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) ("There is nothing in the [*Drye*] opinion to suggest that its clearly articulated ruling is limited to a tax lien application. To the contrary, the opinion broadly suggests that, in all contexts, the result would be the same.").

⁸³ *Drye*, 528 U.S. at 56 (citation omitted) (quoting *Jewett v. Comm'r*, 455 U.S. 305, 309 (1982) (holding beneficiary's disclaimer of a contingent interest in a testamentary trust did not defeat federal tax lien)).

⁸⁴ 357 U.S. 51 (1958).

⁸⁵ 472 U.S. 713 (1985). See *Drye*, 528 U.S. at 52, 56–58 (citing *Bess* and *National Bank* in holding disclaimer law may not determine whether petitioner had property interest under the I.R.C.).

⁸⁶ See *Bess*, 357 U.S. at 57 (quoting *Fink v. O'Neil*, 106 U.S. 272, 276 (1982)) ("It is said, however, that the laws of the State creating these exemptions are not laws for the United States; and this is certainly true, unless they have been made such by Congress itself.").

⁸⁷ See *Nat'l Bank*, 472 U.S. at 722 (citation omitted) (quoting *United States v. Rodgers*, 461 U.S. 677, 683 (1983) ("It has long been an axiom of our tax scheme that, although the definition of property interests is left to state law, the consequences that attach to those interests is a matter left to federal law.")).

interest in the trust constitutes "property" or "rights to property" in the federal context.⁸⁸

In the final part of the opinion, the Court commented on the right to disclaim in general.⁸⁹ The Court opined that Arkansas law gave the petitioner "a right of considerable value—the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant)."⁹⁰ The Court then rejected the petitioner's argument that the disclaimer served as a rejection of an *inter vivos* gift, stating unlike a disclaimer, an *inter vivos* gift restores "the status quo ante" because the donator is still alive.⁹¹ The Court also added that the disclaimer empowered the petitioner with "dominion control" over the estate, which ultimately allowed him to determine the eventual recipient of the property.⁹² As a result, the Court concluded "this power to channel the estate's assets warrants the conclusion that Drye held 'property' or a 'rights to property' subject to the Government's liens."⁹³

2. The BAP's Argument: Drye Is Not Controlling

The *Costas* court distinguished *Drye* from the Debtor's pre-petition disclaimer by adopting the positions taken in two post-*Drye* bankruptcy court decisions—*Michael A. Grassmuck, Inc. v. Nistler (In re Nistler)*⁹⁴ and *Garret v. Bank of Oklahoma (In re Faulk)*.⁹⁵ The *Costas* court first declared that *Drye* relied on tax law, noting unlike the Bankruptcy Code, the I.R.C. generally does not honor and

⁸⁸ See *Drye*, 528 U.S. at 57 ("[W]e are satisfied that the Code and interpretive case law place under federal, not state, control the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy for unpaid federal taxes."). In reaching its holding, the Court also looked at the I.R.C.'s exemption provision under section 6334(a). See *id.* at 56. The Court pointed out that since section 6334(a) does not list disclaimers, Congress did not intend to exempt disclaimed property from levy. See *id.* The Court then cited to a number of cases in which the IRS levied a taxpayer's right to certain proceeds despite the fact that state law shielded or protected the property from creditor liens. See *id.* at 58–59 & nn.4–6 (citing *Nat'l Bank of Commerce*, 472 U.S. at 724–25 (ruling taxpayer's right to withdraw entire funds from joint bank account constitutes "property" or "rights to property" under section 6321 of the I.R.C. notwithstanding state law that would not allow creditors to deplete funds in account)); see also *United States v. Mitchell*, 403 U.S. 190, 204–05 (1971) (stating wife's renunciation in community property is not exempt from federal income tax liability); *Bess*, 357 U.S. at 56–57 (deciding taxpayer's right to cash surrender value under insurance policy constitutes "property" or "rights to property" despite state law that shields cash surrender value from creditors' liens)).

⁸⁹ See *Drye*, 528 U.S. at 60–61.

⁹⁰ *Id.*

⁹¹ See *id.* at 60–61 ("A donee who declines an *inter vivos* gift generally restores the status quo ante, leaving the donor to do with the gift what she will. The disclaiming heir or devisee, in contrast, does not restore the statute quo, for the decedent cannot be revived.").

⁹² See *id.* at 61 ("Thus the heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does." (citing *Hirsh*, *supra* note 1, at 607–08)).

⁹³ *Drye*, 528 U.S. at 61.

⁹⁴ 259 B.R. 723 (Bankr. D. Or. 2001).

⁹⁵ 281 B.R. 15 (Bankr. W.D. Okla. 2002). See *In re Costas*, 346 B.R. 198, 202–03 (2006) (adopting rulings in *Nistler* and *Faulk* as opposed to ruling in *Kloubec*).

preserve state law.⁹⁶ The *Costas* court next declared that congressional mandates afford the Government broad power under the I.R.C. to impose tax liens, implying a trustee under the Bankruptcy Code lacks such aggressive mandates.⁹⁷ Lastly, the *Costas* court analogized the attachment of tax lien to the filing of a petition, observing bankruptcy courts do not uphold post-petition disclaimers because the inheritance becomes property of the estate upon the filing of a petition.⁹⁸

III. THE MISAPPLICATION OF SECTION 548(a)

A. *Disclaimed Inheritance: Property for the Bankruptcy Estate*

As noted above, the BAP in *Costas* sidestepped *Drye v. United States*⁹⁹ by first relying on *Barnhill v. Johnson*¹⁰⁰ and *Butner v. United States*¹⁰¹ (collectively, hereinafter the "*Butner* cases"). The *Butner* cases established that state law determines a debtor's property rights under the Bankruptcy Code.¹⁰² As a result, since Arizona's relation-back doctrine retroactively erased the Debtor's interest in the Trust, the BAP reasoned that the Debtor never had an interest in property to fraudulently transfer.

The BAP's argument lacks merit, however, in that the *Butner* cases are distinguishable from *Costas* and *Drye* when dealing with disclaimer law. In the *Butner* cases, the issue turned on whether state law provided creditors with enough rights to claim the subject property. In *Drye* and *Costas*, state law gave the debtors an affirmative interest in both their inheritances and their rights to disclaim.¹⁰³ As

⁹⁶ See *In re Costas*, 346 B.R. at 203 ("The *Nistler* court is correct in observing that the *Drye* decision rests on tax statutes and law which ignore state law exemptions, while the Bankruptcy Code in general observes and respects state law exemptions."); *In re Nistler*, 259 B.R. at 726–27 ("There are many instances where the IRS has superior rights over other creditors, for example, state exemption statutes are not enforceable against the IRS." (citation omitted)). The Bankruptcy Code's preservation of state-law exemptions actually works against the BAP's argument in that the Code expressly declares that bankruptcy will honor state law, while section 548(a) is silent on the subject. See 11 U.S.C. § 522(b)(2), (3) (2006) (setting forth debtor may exclude from bankruptcy estate applicable federal exemptions limited by state law). The fact that Congress honors state law in one provision and not the other detracts from the assertion that the Code as a whole preserves state law. See *infra* Part III.B.

⁹⁷ See *In re Costas*, 346 B.R. at 203 ("In essence, the *Drye* decision is based largely on Congressional mandates that the federal government be able to exercise its extensive abilities it impose liens in order to collect delinquent taxes.").

⁹⁸ See *id.* (citing *In re Faulk*, 281 B.R. at 20) (comparing disclaimer under tax levy to post-petition disclaimer and observing post-petition disclaimer has not been upheld in bankruptcy); see also 11 U.S.C. § 541(a)(5) (2006) (promulgating bankruptcy estate includes any bequest, devise, or inheritance that debtor acquires or becomes entitled to acquire within 180 days after filing of petition).

⁹⁹ 528 U.S. 49 (1999).

¹⁰⁰ 503 U.S. 393 (1992).

¹⁰¹ 440 U.S. 48 (1979). See *supra* text accompanying notes 67–70 (explaining basis of *Costas* court's reliance on the *Butner* cases).

¹⁰² See *supra* note 68.

¹⁰³ Compare *Barnhill*, 503 U.S. at 398–402 (determining whether recipient of check had right to funds on date of receipt or on date check was honored by drawee bank), and *Butner*, 440 U.S. at 49–52 (determining whether second mortgagee maintained valid security interest in rents generated by bankruptcy estate), with

explained below, this factor makes the relation-back doctrine nothing more than a means of *governing* pre-existing property rights at the federal level, which inevitably usurps the Bankruptcy Code's authority to attach consequences to state-delineated property rights. Furthermore, even if a bankruptcy court must honor the relation-back doctrine, the court still has the authority to include the actual right to disclaim as "an interest of the debtor in property," particularly because the Supreme Court recognized it as a right of considerable value in *Drye*.¹⁰⁴

1. The Concept of Property and Distinguishing the *Butner* Cases

While the Supreme Court has made it clear that state law determines a debtor's property interests, perhaps the more decisive inquiry when dealing with the relation-back doctrine is pinpointing what it truly means to have property, or an interest in it for that matter.¹⁰⁵ The word "property" is a term of art.¹⁰⁶ It embodies a metaphysical concept of desire and attitude toward a certain object or right,¹⁰⁷

Drye, 528 U.S. at 60 (acknowledging Arkansas law gave taxpayer right to inheritance under state law), and *In re Costas*, 346 B.R. at 199–200 (indicating debtor had interest in father's trust along with right to disclaim upon father's death).

¹⁰⁴ See *supra* text accompanying notes 89–93 (discussing Supreme Court's endorsement of disclaimer's value).

¹⁰⁵ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 19 (1913).

In this connection the suggestion may be ventured that the usual discussions of trusts and other jural interests seem inadequate (and at times misleading) for the very reason that they are not founded on a sufficiently comprehensive and discriminating analysis of jural relations . . . [T]he tendency—and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has . . . furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems.

Id.

¹⁰⁶ See *id.* at 21.

The word "property" furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicated the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object.

Id. Cf. Aaron Chess Lichtman, *Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body-Matter*, 34 N.Y.L. SCH. L. REV. 531, 540 (1989) ("Property is a term of art, indicating that a person has a right to control something and seek redress under the law if another person interferes with the exercise of that control."); Brian J. Nolan, *The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 48 ST. LOUIS U. L.J. 703, 711 (2004) (providing property is a term of art which is challenging to describe and understand).

¹⁰⁷ Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 360 (1954) (discussing in imaginary dialogue that property identifies desire or attitude toward a certain thing); see *Eaton v. B.C. & M. R. R. Co.*, 51 N.H. 504, 511 (N.H. 1872) ("In a strict legal sense, land is not 'property,' but the subject of

manifested by government "acting through its courts and administrative officers to give systemized recognition of and protection of these attitudes and desires."¹⁰⁸ In the context of disclaimer law, a debtor possesses property when state law (1) procures an interest in both the inheritance and the right to disclaim, and (2) protects them against the rest of civilization.¹⁰⁹

The venerated Hohfeldian "bundle of rights" theory offers us a way to delineate whether state law creates and protects both an interest in an inheritance and a right to disclaim.¹¹⁰ Devised by Wesley Newcomb Hohfeld, the bundle of rights consists of four legal relations that work in the aggregate to determine whether a person has property in a thing.¹¹¹ These relations are: right–duty,¹¹² privilege–absence of right,¹¹³ power–liability,¹¹⁴ and immunity–disability.¹¹⁵ Each relation pairs a basic

property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.'"); *Wynehamer v. People*, 13 N.Y. 378, 433 (N.Y. 1856) ("Property is the right of any person to possess, use, enjoy, and dispose of a thing.").

¹⁰⁸ Cohen, *supra* note 107, at 360.

¹⁰⁹ WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 3 (3d ed. 2000) ("Property is a 'legally protected expectation . . . of being able to draw such or such an advantage from the thing' in question, 'according to the nature of the case.'" (quoting J. BENTHAM, *THEORY OF LEGISLATION* 68 (Oceana Pub. Inc. 1975))); *cf.* Hohfeld, *supra* note 105, at 25 ("Operative, constitutive, causal, or 'dispositive' facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously.").

¹¹⁰ See generally Hohfeld, *supra* note 105, at 30–59; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 710–66 (1917). Although Hohfeld did not coin the phrase "bundle of rights," he is credited with developing the modern bundle of rights theory. See Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1191–92 & n.150 (1999) ("Though [the modern bundle of relations] version is usually attributed to Wesley Hohfeld, he never mentions a 'bundle of rights' The Hohfeldian view moved quickly from legal theory into the 1936 Restatement of Property and from there into mainstream scholarship and judicial decision-making," (citing GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT*, 1776–1970, at 319 (1997))). The Supreme Court expressly adopted the "bundle of rights" theory in *United States v. General Motors*, 323 U.S. 373, 377–78 (1944). See *id.* at 1193 ("In *United States v. General Motors*, the Court explicitly adopted the unbounded Hohfeldian perspective for the first time") (footnote omitted); *cf.* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 *UCLA L. REV.* 711, 713–14 (1996) ("While perhaps more clearly dominant in the United States, where even *the Restatement of Property* begins with an Hohfeldian outline of rights and duties, and where the 'bundle of rights' is regularly cited by courts in important property cases.").

¹¹¹ See STOEBUCK & WHITMAN, *supra* note 109, at 4; Heller, *supra* note 110, at 1191 ("[Hohfeld developed] the now standard idea that property comprises a complex aggregate of social and legal relationships made up of rights, privileges, powers, and immunities.").

¹¹² RESTATEMENT (FIRST) OF PROP. § 1, at 4 (1936). The term "right" is defined as "a legally enforceable claim of one person against another, that the other shall do a given act or . . . not do a given act." *Id.* The correlative of a right is a "duty" and means that a person by law must act or not act on another person's right. See *id.* at 4.

¹¹³ *Id.* § 2, at 5. A person has "privilege" when she enjoys the freedom to act or not to act against another. See *id.* The "absence of right" is the correlative of privilege, and implies that a person has no right to prevent a person of privilege from acting or not acting. See *id.* at 5.

¹¹⁴ *Id.* § 3, at 6. A person has "power" when she enjoys the ability to produce a change in legal relations through an act or omission. See *id.* The correlative of power is "liability," whereby a person must be held accountable to produce or not to produce a change when another exercises a power. See *id.* at 6.

interest against its correlative, forming a reciprocal universe in which the incorporeal procures the corporeal.¹¹⁶ Together, they function in varying degrees, and any combination can give you property in an object or a right.¹¹⁷

When using the bundle of rights theory, the Supreme Court has acknowledged that although state law determines what property rights are included in a person's bundle, federal law determines whether those rights constitute property under federal law.¹¹⁸ Furthermore, the Court has adopted the transformation of Hohfeld's four basic relations into a series of state-created markers used to determine whether a person has property at the federal level.¹¹⁹ The three essential markers are (1) the right to use the property, (2) the right to exclude third parties from using the property, and (3) the right to receive income generated by the property.¹²⁰ Other markers include the right to sell or convey the property, and the right to dispose of

¹¹⁵ *Id.* § 4, at 8. One has "immunity" when she enjoys the freedom to exist irrespective of a change in a legal relation brought about by another. *See id.* "Disability" serves as the correlative of immunity, and is viewed as the inability to alter another person's position through an act or omission. *See id.* at 8.

¹¹⁶ *See* Hohfeld, *supra* note 105, at 30 ("[T]he most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of 'opposites' and 'correlatives,' and then proceeding to exemplify their individual scope and application in concrete cases."). In using the phrase "incorporeal procures the corporeal," it is said that Hohfeld's theory in the aggregate takes an abstract notion and materializes it into a concrete rule of law.

¹¹⁷ *See* STOEBCUK & WHITMAN, *supra* note 109, at 5 ("We describe a person as the owner of a thing even when you have numerous interests in that thing, even though those interests may not add up to the totality comprising complete property.").

¹¹⁸ *See* *United States v. Craft*, 535 U.S. 274, 278–79 (2002). The Court in *Craft* declared:

State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of the federal lien statute is a question of federal law

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundle of rights constitute property that may be attached by the federal tax lien . . . [In *Drye*,] [w]e unanimously held that this state law fiction did not control the federal question and looked instead to the realities of the heir's interest. We concluded that, despite the State's characterization, the heir possessed a "right to property" in the estate—the right to accept the inheritance or pass it along to another

Id.; cf. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 543–546 (2005) (noting A.M. Honore's advancement of Hohfeld's bundle of rights into a list of "incidents" that include right to possess, right to use, right to manage, right to income generated by the thing, and right of transmissibility and absence of term).

¹¹⁹ *See Craft*, 535 U.S. at 283–84 (establishing certain markers to determine whether person has property, including use, exclusion, income, alienation, and disposition).

¹²⁰ *See id.* at 283 (describing three essential indicators of property are use, exclusion, and income); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [include] the right to exclude others."); *Rodrigue v. Rodrigue*, 218 F.3d 432, 436–37 (5th Cir. 2000) (explaining bundle of rights that constitute full ownership include right to use or possess and right to enjoy fruits of property, including profits or earnings); cf. *Dowling v. United States*, 473 U.S. 207, 216–17 (1985) (explaining although copyright law confers bundle of rights to copyright holder, holder's dominion is limited and does not amount to full possessory interest).

or encumber it.¹²¹ In all, the broader the language in the statute, the more value each marker has, since it would take less markers to constitute property.¹²²

The distinguishing factor in the *Butner* cases is that the creditors claiming property possessed an inadequate combination of state-created rights to constitute property under the Bankruptcy Code. For example, in *Barnhill v. Johnson* the debtor delivered a check to the creditor on the eighteenth of November.¹²³ The bank honored the check on the twentieth of November, exactly ninety days before the debtor filed for bankruptcy.¹²⁴ The trustee brought an action under section 547(b) of the Code to avoid the transfer as a preference.¹²⁵ The creditor argued that the transfer of funds in the bank account—in this case the property—took place upon receipt of the check, thereby placing the transfer outside the preference period.¹²⁶

The central issue in *Barnhill* was whether state law gave the creditor enough rights to the funds upon receipt of the check to constitute a transfer of "an interest in property" pursuant to section 101(54) of Code, thereby pushing the transfer outside of the look-back period.¹²⁷ Using the Uniform Commercial Code ("UCC"), the Supreme Court held that the creditor lacked such interests; a holding that most certainly can be analyzed under the Court's interpretation of the bundle of rights.¹²⁸ According to the UCC, although the creditor received the check on the eighteenth, he could not enforce a claim for the funds until the bank honored the check.¹²⁹ Thus,

¹²¹ See *Craft*, 535 U.S. at 283–84 (including both right to encumber and right to dispose property as part of bundle of rights); *Johnson v. Tomlinson (In re Tomlinson)*, 347 B.R. 639, 643 (Bankr. E.D. Tenn. 2006) (quoting *Rivkin v. Postal*, 2001 Tenn. App. LEXIS 682, at *38–39) (stating bundle of rights in aircraft includes right of disposition and right of testamentary disposition); *In re Ames Dep't Stores*, 287 B.R. 112, 119 (Bankr. S.D.N.Y. 2002) (determining debtor's rights to economic value in lease created necessary bundle and constituted property to sell pursuant to section 363(b) of the Bankruptcy Code).

¹²² See *Craft*, 535 U.S. at 283 (noting broad language of section 6321 of the I.R.C. results in broad interpretation of state-delineated rights as property at the federal level); *In re Ames*, 287 B.R. at 120–22 (reviewing broad interpretation of bankrupt estate under section 541(a) and holding economic value created by rights of debtor in lease constituted property).

¹²³ See 503 U.S. 393, 395 (1992).

¹²⁴ *Id.*

¹²⁵ *Id.* (stating section 547(b) of the Code "generally permits the trustee to recover, with certain exceptions, transfers of property made by the debtor within [ninety] days before the date the bankruptcy petition was filed").

¹²⁶ See *id.* at 399 ("Petitioner argues that the Court of Appeals erred in ignoring the interest that passed from the debtor to the petitioner when the check was delivered on a date outside the [ninety] day preference period.").

¹²⁷ See *id.* at 394–95 ("We granted certiorari to decide whether, in determining if a transfer occurred within the 90-day preference period, a transfer made by check should be deemed to occur on the date the check is presented to the recipient or on the date the drawee bank honors it.").

¹²⁸ See *id.* at 400 (turning to UCC in establishing no transfer of any part of debtor's claim against bank occurred until bank honored check). The Court in *Barnhill* seemingly limited the scope of its decision to whether the check's delivery constituted a transfer pursuant to section 547(b) of the Code. See *id.* at 395 (noting arguments made by parties were based on section 547(b)). The Court did not address the value in assigning a check after receipt. See *id.*

¹²⁹ See *id.* at 398 (stating check is nothing more than order from account owner to drawee bank to pay sum stated (citing U.C.C. § 3-409(1) (amended 2002), 2A U. L. A. 189 (1991)) ("A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.")).

the mere receipt of the check did not give the creditor the right to use the funds or collect any interest generated by the funds. Furthermore, the Court in *Barnhill* stressed that a litany of things could have happened between receipt and presentment.¹³⁰ Not only could another creditor have garnished the account, but the debtor could have cancelled the check or removed the funds from the account.¹³¹ Consequently, the creditor lacked one of the most essential characteristics of property—the right to exclude third parties. Taking into account all of the above factors, the receipt of the check failed to vest in the creditor any of the essential rights in the bundle. Therefore, there was no transfer of property outside the preference period.

A similar analysis can also be found in *Butner v. United States*. There, the creditor asserted a claim over the right to rent proceeds generated by the bankruptcy estate.¹³² The creditor, a second mortgagee, had a deficiency claim against the estate and wanted to apply the rent proceeds to satisfy it.¹³³ The issue before the bankruptcy court was whether the court could use its equitable powers to hold that the mortgagee's pre-petition appointment of a receiver—which under North Carolina law is essentially a precondition to the enforcement of a mortgagee's right to rent proceeds—carried over into the debtor's bankruptcy.¹³⁴ The Court of Appeals for the Fourth Circuit ruled that the debtor's bankruptcy cancelled the receivership, thereby defeating the court's equitable authority and leaving the mortgagee's right to the rent unperfected.¹³⁵ The Supreme Court thereafter affirmed, holding the Code cannot be interpreted to create or deny a security interest in derogation of state law.¹³⁶

¹³⁰ See *id.* at 399 ("Myriad events can intervene between delivery and presentment of the check that would result in the check being dishonored.").

¹³¹ See *id.* ("The drawer could choose to close the account. A third party could obtain a lien against the account by garnishment or other proceedings. The bank might mistakenly refuse to honor the check.").

¹³² See *Butner v. United States*, 440 U.S. 48, 49 (1979) ("A dispute between a bankruptcy trustee and a second mortgagee over the right to the rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property gave rise to the question we granted certiorari to decide.").

¹³³ *Id.* at 50–51 (noting petitioner sought to have funds applied to balance of second mortgage indebtedness).

¹³⁴ See *id.* at 51. The Supreme Court classified North Carolina as a "title" state, but not in the purest form. *Id.* at 52 n.3. Pursuant to North Carolina law, upon the mortgagor's default, the mortgagee's interest in rent proceeds becomes enforceable upon a change of possession in the land. See *id.*; *Gregg v. Williamson*, 98 S.E.2d 481, 484 (N.C. 1957) ("A mortgagee after default is entitled to possession of the mortgaged premises, and, to secure possession, may maintain action against the mortgagor." (citing *Bank v. Jones*, 190 S.E. 479, 479 (N.C. 1937))). The mortgagee may effectuate a change of possession through the appointment of a receiver. See *Butner*, 440 U.S. at 51.

¹³⁵ See *Golden Enter., Inc. v. United States*, 566 F.2d 1207, 1210–11 (4th Cir. 1977) (declaring "adjudication of bankruptcy and appointment of trustee terminated prior receivership" and necessitated sequestration of rents or another appointment of receiver).

¹³⁶ See *Butner* 440 U.S. at 54. The Court stated:

The constitutional authority of Congress to establish "uniform Law on the subject of the subject of Bankruptcies throughout the United States" would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by

Once again, the issue in *Butner* was whether state law gave the creditor enough rights from the bundle to claim the rent. Similar to *Barnhill*, the creditor lacked such rights because North Carolina law denied him the ability to enforce his interest. The appointment of a receiver represented a necessary condition precedent to use the rent for the deficiency, to exclude both the trustee and other secured creditors from depleting it, and to enjoy any income or interest generated by the proceeds or its source. Without a perfected interest in the rent, the creditor possessed nothing more than a general claim against the estate for the amount of his deficiency.¹³⁷

When looking at the Debtor's right to her father's Trust in *Costas*, the issue is not whether state law grants her enough rights from the bundle; this is precisely because Arizona law had already established her rights at the moment of her father's death.¹³⁸ During the pre-petition reach-back period covered by section 548(a), the Debtor had the ability to (1) draw upon and use her interest in the Trust, (2) enjoy the fruits of her interest, and (3) exclude others from drawing on her interest.¹³⁹

property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule.

Id. (footnote omitted).

¹³⁷ See, e.g., 11 U.S.C. 544(a) (2006). Section 544(a) states in part:

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

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

Id.

¹³⁸ See, e.g., *In re Johnson's Estate*, 811 P.2d 360, 362 (Ariz. Ct. App. 1991) (discussing section 14-3101 of Arizona Revised Statutes and stating that property is transferred to devisees upon decedent's death); cf. *In re Kloubec*, 247 B.R. 246, 254 (Bankr. N.D. Iowa 2000) (observing beneficiary acquires property interest immediately upon death of testator in most states that have adopted Uniform Probate Code); *In re Perry*, 40 B.R. 811, 813 (Bankr. M.D. Tenn. 1984) (explaining upon death of debtor's grandfather, "[t]he right to receive the devise existed without further action by the debtor—no affirmative acceptance was required").

¹³⁹ See *In re Stevens*, 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989) ("[T]he right to control, deduct or receive a testamentary distribution constitutes an interest in property."); cf. *Lowe v. Brajkovic (In re Brajkovic)*, 151 B.R. 402, 407 (Bankr. W.D. Tex. 1993), *questioned in Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994) (noting beneficiary had right to sell or convey interest in devise although interest may have had no economic value until probated). The Supreme Court in *Drye* addressed the issue of whether an interest in a spendthrift trust could be considered property in the federal context. See *Drye v. United States*, 528 U.S. 49, 60 n.7 (1999). The Court explained that transferability is not essential to the existence of property under the I.R.C. See *id.* It then pointed out that an interest in a spendthrift trust has been held to constitute "property" or "rights to property." See *id.* (citing *Bank One Ohio Trust Co., N.A. v. United States*, 80 F.3d 173, 176 (1996)) ("[S]tate-law restraints on the alienation of property rights created under state law do not affect the status of such rights as 'property' or 'rights to property' within the meaning of those terms as used in [section] 6321."). Under the Bankruptcy Code, a debtor's interest in a spendthrift trust is protected by section 541(c)(2). See 11 U.S.C. § 541(c)(2) (2006); *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) ("The

Thus, within the confines of the Code, the Debtor enjoyed all the essential rights from the bundle. And since the relation-back doctrine is a state law incapable of determining what constitutes an "interest of the debtor in property" for federal purposes, it becomes nothing more than a mode of channeling a vested interest back through the decedent's estate.¹⁴⁰

Another way to approach this is by acknowledging that the relation-back doctrine cannot stand on its own. There needs to be an interest created and determined before there can be anything to disclaim.¹⁴¹ Therefore, by utilizing the power to disclaim, a debtor essentially acknowledges the existence of an interest.¹⁴² The bankruptcy court must then be able to attach consequences to that interest while managing the debtor's estate under the Code, particularly without having to honor probate law's legal fiction.

Still, even if a court chooses to honor the relation-back doctrine, the inchoate right to disclaim also presents a major obstacle.¹⁴³ Though the relation-back doctrine erases a beneficiary's interest retroactively, it does not erase the existence of the disclaimer.¹⁴⁴ And as the Supreme Court noted, the right to disclaim is an inchoate right of considerable value.¹⁴⁵ This right represents an interest in property because it is personal, exclusive, and beneficial. Thus, if the right existed during section 548(a)'s reach-back period, the bankruptcy court must define it as "an interest of the debtor in property," bringing the disclaimed inheritance into the bankruptcy estate as a fraudulent transfer.

natural reading of [section 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or a trust that contains a transfer restriction enforceable under any relevant [non-bankruptcy] law."); Colish v. United States (*In re Colish*), 289 B.R. 523, 539–40 (Bankr. E.D.N.Y. 2002) (observing valid spendthrift provision in trust created under Michigan law excluded debtor's vested remainder interest with the exception of federal tax law). Under Arizona law, however, a beneficiary's interest in a spendthrift trust is subject to a money judgment once the income becomes immediately due and payable. See ARIZ. REV. STAT. ANN. § 14-7701 (2005). This raises an issue because the Bankruptcy Code empowers a bankruptcy court with the ability to define the term "transfer." See *infra* Part III.C; cf. *Lowe v. Brajkovic* (*In re Brajkovic*), 151 B.R. 402, 404 (Bankr. W.D. Tex. 1993) (noting the relation-back doctrine can not operate to alter the definition of "transfer" found in Bankruptcy Code). In this case, perhaps a debtor within section 548(a)'s reach-back period is better off not renouncing the interest in a spendthrift trust.

¹⁴⁰ See *In re Perry*, 40 B.R. at 815 (arguing Tennessee's relation-back doctrine does not erase debtor's vested rights before renunciation).

¹⁴¹ See *In re Brajkovic*, 151 B.R. at 406 ("[T]here seems to be some interest in property residing in the debtor at the moment the disclaimer is executed just by virtue of the fact that it takes a written disclaimer to get rid of it.").

¹⁴² See *id.*

¹⁴³ See *In re Acrylite Plastics, Inc.*, 144 F.Supp. 492, 493 (S.D.N.Y. 1956) ("The word 'property' when used without qualification can be construed to include obligations, rights and other intangibles, as well as physical things.").

¹⁴⁴ See *Brajkovic*, 151 B.R. at 409–10 ("[T]he [state] statute does not purpose to erase the occurrence of the disclaimer."); Robert M. Zinman, *Under the Spreading Bankruptcy: Subordinations and the Code*, 2 AM. BANKR. INST. L. REV. 229, 309–10 n.84 (1994) (citing Judge Leif Clark's decision in *Brajkovic* as indicating disclaimer constitutes fraudulent transfer because relation-back doctrine does not dispose of right to disclaim).

¹⁴⁵ See *supra* text accompanying notes 89–93 (recounting Supreme Court's declaration that right to disclaim has considerable value).

B. The Interaction Between the Provisions of the Code

By distinguishing the I.R.C from the Bankruptcy Code, the BAP essentially implied that a trustee under the Code lacks the aggressive congressional mandates afforded to the Government under the I.R.C.¹⁴⁶ The BAP's argument, however, appears to overlook the interaction of section 548(a) in relation to the rest of the Code.

The Supreme Court in *United States v. Whiting Pools, Inc.*¹⁴⁷ has acknowledged that section 548 operates as a way to pull property into a bankruptcy estate created by section 541(a).¹⁴⁸ Section 541(a) states in part "[t]he commencement of a case . . . creates an estate," and "such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case."¹⁴⁹ Congress has expressly declared that the term "property" is broad and meant to include "all kinds of property."¹⁵⁰ Thus, the phrase "interest of the debtor in property" in section 548(a) translates back to the broad definition of "property" in section 541(a), providing the Code with the broad mandate needed to reach a vested right to an inheritance and a right to disclaim.¹⁵¹

Furthermore, when taking into account the broad interpretation of property in section 548(a), the phrase becomes analogous to the terms "property" and "rights to property" in section 6321 of the I.R.C. That is to say Congress intended section 548(a) to reach every conceivable interest fraudulently transferred within the

¹⁴⁶ See *supra* text accompanying note 97.

¹⁴⁷ 462 U.S. 198 (1983).

¹⁴⁸ See *id.* at 204–205 & n.8 ("[Section] 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.") (citation omitted); see also THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 68 (BeardBooks 2001) (1950) ("Section 541 allows the trustee to step into the shoes of the debtor in gathering property of the estate, and the avoiding powers (suggestively located in nearby sections) augment that activity by giving the trustee certain other powers to bring the assets into the estate.").

¹⁴⁹ See 11 U.S.C. § 541(a)(1) (2006).

¹⁵⁰ See S. REP. NO. 95-989, at 82 (1978), as reprinted in 1978 U.S.C.C.A.N. 4717, 5868 ("The scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action, and all other forms of property currently specified in section 70[a] of the Bankruptcy Act . . .") (citation omitted).

¹⁵¹ In fact, the BAP even alluded to the notion that section 548 is an extension of section 541's expansive reach in *Parker v. Saunders (In re Bakersfield Westar, Inc.)*, 226 B.R. 227, 232–37 (B.A.P. 9th Cir. 1998). There, the BAP stated:

The United States Supreme Court has defined an "interested of the debtor in property" as "that property that would have been part of the estates had it not been transferred before the commencement of bankruptcy proceedings." [The Supreme Court] pointed to [section] 541 in determining the parameters of the definition. Section 541 includes "all legal or equitable interests of the debtor in property as of the commencement of the case" as property of the bankruptcy estate.

Id. (citations omitted).

provision's reach-back period.¹⁵² Therefore, if a right to an inheritance and a right to disclaim can be considered "property" or "rights to property," they should also be considered an "interest of the debtor in property" under the Code.¹⁵³

Still, the *Costas* court noted that the Bankruptcy Code preserves state law in many instances, particularly state-law exemptions.¹⁵⁴ Accordingly, the court advocated that state law should dictate the function of disclaimers under section 548(a).¹⁵⁵ This argument falls on its head, however, when applying the doctrine of *expressio unis est exclusio alterius* ("*expressio unis*") to the Bankruptcy Code. The doctrine of *expressio unis* stands for the proposition that "where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded."¹⁵⁶ The fact that the Code allows for the application of state law in a number of sections other than section 548(a), courts should read section 548(a) as standing independent of the relation-back doctrine and state fraudulent-transfer law.

For example, certain sections following section 541(a) empower the trustee to gather property into the bankruptcy estate.¹⁵⁷ These sections operate independently of one another and offer the trustee a variety of ways to retain such property using its "avoidance powers."¹⁵⁸ One provision in particular—section 544(b)—affords the trustee the right of an existing unsecured creditor to exercise any claims available to

¹⁵² See *French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2006) ("Congress made manifest its intent that [section] 548 apply to all property that, absent a [pre-petition] transfer, would have been property of the estate, wherever that property is located."); cf. *Drye v. United States*, 528 U.S. 55, 56 (1999) (explaining when Congress uses term "property" broadly, Congress aims to reach "every species of right or interest protected by law and having an exchangeable value" (quoting *Jewett v. Comm'r*, 455 U.S. 305, 309 (1982))).

¹⁵³ Compare 26 U.S.C. § 6321 (2000), with 11 U.S.C. § 548(a) (2006).

¹⁵⁴ See *supra* text accompanying note 96 (adopting ruling in *Nistler* wherein court stated IRS has superior rights over creditors, particularly with regard to state-law exemptions).

¹⁵⁵ See *Costas*, 346 B.R. at 204 (holding debtor's disclaimer does not constitute fraudulent transfer pursuant to Arizona law).

¹⁵⁶ *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001). See, e.g., *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) ("[W]here the legislature has included certain exceptions . . . , the doctrine of *expressio unis est exclusio alterius* counsels against judicial recognition of additional exceptions."); *Copeland v. Comm'r*, 290 F.3d 326, 334 (5th Cir. 2002) ("The plain language of the statute thus explicitly cabins its applicability to activities engaged in by *individuals* or *S corporations*—and, by virtue of the traditional maxim of statutory construction, [*expressio unis*] (the expression of one thing is the exclusion of others), precludes the section's applicability to partnerships.").

¹⁵⁷ See *supra* text accompanying note 148; see also Steven L. Harris & Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. 85, 90–91 (2001) (phrasing sections 544, 545, 547, and 548 as "avoiding powers."). But cf. JACKSON, *supra* note 148, at 68–69 (dividing avoiding powers into those that arrange rights between creditors and those that monitor relations between debtor and creditors).

¹⁵⁸ See MACLACHLAN, *supra* note 18, § 246, at 279 (1956) ("During bankruptcy, the trustee's right to avoid fraudulent conveyances is merely one aspect of his position as a statutory successor entitled to the bankrupt's estate and armed with additional creditors' rights."); see also, e.g., *Suhar v. Burns (In re Burns)*, 322 F.3d 421, 428 (6th Cir. 2003) (recognizing avoidance under section 544(a) preserves property for the benefit of bankruptcy estate).

that creditor for the benefit of all creditors.¹⁵⁹ It has been recognized that the trustee has the ability to pursue a fraudulent transfer under section 544(b) or section 548(a).¹⁶⁰ The primary difference between the two is that under section 544(b), the trustee is confined to state law, while section 548(a) contains no reference to state law.¹⁶¹ Another critical difference is that the Code expressly subjects section 544(b) to the UCC's relation-back doctrine concerning perfection of purchase-money security interests ("PMSI"); it does not, however, subject section 548(a) to any relation-back doctrine whatsoever.¹⁶²

¹⁵⁹ See 11 U.S.C. § 544(b) (2006) ("[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . ."); JACKSON, *supra* note 148, at 80 (stating trustee may pursue claims of creditors and "acts as an agent for creditors in asserting the various rights different creditors have, many of which may overlap"); cf. Moore v. Bay, 284 U.S. 4, 5 (1931) (holding trustee acting under 544(b) may recover all property in fraudulent transaction that would otherwise be unrecoverable by an unsecured creditor).

¹⁶⁰ See, e.g., *In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557, 572 (Bankr. N.D. Cal. 1994) ("Under the Federal Bankruptcy Code, the trustee can bring a fraudulent conveyance action either under federal bankruptcy (11 U.S.C. § 548) or non-bankruptcy 'applicable law' (11 U.S.C. § 544(b))."); see also Liebersohn v. First Baptist Church (*In re C.F. Foods, Inc.*), 2001 U.S. Dist. LEXIS 21057, at *3 (E.D. Pa. Dec. 19, 2001) (determining constitutionality of trustee's fraudulent transfer complaints under both sections 544(b) and 548(a)); *In re Mesa*, 48 B.R. 208, 209 (Bankr. S.D. Fla. 1985) (addressing trustee's complaint brought pursuant to sections 544(b) and 548).

¹⁶¹ Compare 11 U.S.C. § 544(b) (2006), with 11 U.S.C. § 548(a) (2006). See Andrea Coles-Bjerre, *Trusting the Process and Mistrusting the Results: A Structural Perspective on Article 9's Low-Price Foreclosure Rule*, 9 AM. BANKR. INST. L. REV. 351, 360–61 (2001) ("A trustee in bankruptcy is empowered to avoid fraudulent transfers under either the Code's own substantive provisions, set forth in section 548, or under the UFTA or UFCA, as the case might be, through the so-called strong-arm provision of section 544(b) . . ."). As for the variation between state fraudulent-transfer law and section 544(b), states adopting the UFTA limit claims to those of existing creditors at the time of the transfer. See Coles-Bjerre, *supra*, at 363.

The chief difference between the two sets of provisions is that the UFTA distinguishes between creditors whose claims arose before the transfer was made [], and permits only present creditors to bring actions based on the debtor's being insolvent at the time of, or as a result of, the transfer.

Id. Another difference between the UFTA and section 544(b), which is subject to debate, is that the trustee is confined to the statute of limitations provided by section 546(b) as opposed to one provided by state law. See, e.g., *In re McGoldrick*, 117 B.R. 554, 560–61 (Bankr. C.D. Cal. 1990) (declaring trustee pursuing action under section 544 is subject to two-year time limitation promulgated in section 546(a)(1)(A) of Code as opposed to state statute of limitations); cf. Decker v. Voisenat (*In re Serrato*), 214 B.R. 219, 226 (Bankr. N.D. Cal. 1997) (stressing claims brought under section 544 will be governed under two-year statute of limitation set forth in section 546(a)).

¹⁶² See 11 U.S.C. § 546(b)(1) (2006) (declaring section 544 is subject to "any generally applicable law that [] permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . ."); see also U.C.C. § 9-317(e), 3 U.L.A. 211–12 (Sup. 2006). This provision states:

[I]f a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

Id.

It follows that by subjecting a trustee to the relation-back doctrine and state fraudulent-transfer law under section 548(a), a bankruptcy court defies the doctrine of *expressio unis* and encroaches upon a trustee's ability to use all available options under the Code. In other words, by allowing state law to dictate whether disclaimed property constitutes a fraudulent transfer under sections 544(b) and 548(a), the purpose of providing bankruptcy law with its very own fraudulent transfer provision is defeated.¹⁶³ Furthermore, by subjecting section 548(a) to probate law's relation-back doctrine, a court would read into the Code another relation-back doctrine that Congress has failed to recognize.

Some commentators, however, believe the true character of the Code is to implement "state policy in a rule-oriented fashion, not deliberately [change] it."¹⁶⁴ They believe the Code is "bare-bones," and a provision such as section 548(a) must work in conjunction with the relation-back doctrine when defining a fraudulent transfer.¹⁶⁵

One issue with this argument is that the presence of an independent fraudulent-transfer provision in the Code effectively preempts state policy on fraudulent transfers.¹⁶⁶ Moreover, fraudulent transfer law has existed in bankruptcy since this nation's very first bankruptcy act in 1800.¹⁶⁷ It is only logical to assume Congress intended bankruptcy courts to work with their very own fraudulent transfer provision aside from those of the fifty states. If Congress intended otherwise, it certainly had a number of opportunities to remove fraudulent transfer law from the Code.¹⁶⁸

¹⁶³ Cf. Jackson, *supra* note 148, at 147 ("The Bankruptcy Code applied fraudulent conveyance law not only through section 544(b), which incorporates state fraudulent conveyance law, but also through section 548, which establishes a related but ultimately distinct bankruptcy law of fraudulent conveyances.").

¹⁶⁴ *Id.* (arguing law on fraudulent conveyances arises from non-bankruptcy jurisprudence and does not belong in bankruptcy process). See White, *supra* note 2, at 1064–68 (surmising Congress's intention for Bankruptcy Code was to create "bare-bones" statute).

¹⁶⁵ See, e.g., White, *supra* note 2, at 1066–67 ("Congress created a bare-bones Bankruptcy Code that does not address every issue. In approaching a federal statute, courts must presume that Congress intended its legislation to act in concert with legal relationships that state law has already established."); see also *Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994) (proclaiming bankruptcy courts must give state law full effect in determining whether disclaimer causes transfer of interest in property); *Jones v. Atchison (In re Atchison)*, 925 F.2d 209, 212 (7th Cir. 1991) (holding applicable state law effectively determines whether disclaimer defeats section 548); cf. Jackson, *supra* note 148, at 147 ("But since fraudulent conveyance law springs from an entirely different source, its existence in a bankruptcy statute is more problematic.").

¹⁶⁶ See *infra* Part III.C.

¹⁶⁷ See *supra* text accompanying note 25 (recounting presence of fraudulent transfer law in American bankruptcy).

¹⁶⁸ See generally Tabb, *supra* note 25, at 14–43 (documenting history of bankruptcy law in United States and recounting dozens of congressional amendments or changes since inception of first bankruptcy law in 1800).

C. The Doctrine of Preemption: No Room for the Relation-Back Doctrine or State Fraudulent-Transfer Law in Section 548(a)

The doctrine of preemption declares that a federal act will not supersede traditional state law unless it is the clear and manifest purpose of Congress.¹⁶⁹ On many occasions Congress does not explicitly state its purpose in the statute, leaving courts to interpret legislative intent using two different principles.¹⁷⁰ The first principle takes on a totality of circumstances approach, whereby a court will examine the structure and purpose of the statute to determine whether it "so thoroughly occupies the legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"¹⁷¹ The second principle involves determining whether state law actually conflicts with federal law or disrupts the federal scheme.¹⁷² The conflict or perversion must be so inconsistent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁷³

Underlying the implied principles of preemption is a presumption against overriding the states in areas traditionally governed by state law.¹⁷⁴ Some believe this presumption is strongest in matters of probate law because states have always had the authority to govern probate matters.¹⁷⁵ This leads to the sentiment that the

¹⁶⁹ See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (promulgating Supremacy Clause in Article VI of the Constitution gives rise to concept that federal act must not interfere with traditional state-police powers absent congressional intent); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (advising courts must start with assumption that federal law must not override historic police powers of the states absent clear congressional intent).

¹⁷⁰ *Malone v. Whitemotor Corp.*, 435 U.S. 497, 504 (1978) ("Often Congress does not clearly state in its legislation whether it intends to preempt state law . . ."); Catherine L. Frisk, *The Last About the Language of Erisa Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 43 (1996) (observing Congress does not always articulate intention to preempt state law).

¹⁷¹ *Cipollone*, 505 U.S. at 516 (quoting *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)); *Malone*, 435 U.S. at 504 (describing Congress's intent to occupy legislative field must be implied by totality of circumstances).

¹⁷² See *Malone*, 435 U.S. at 504 (explaining courts will normally sustain state law unless it conflicts with federal law or disrupts federal scheme); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525–26 (1977) (noting when federal acts do not exclude state law in same field, state law will still be preempted if inconsistent); *Nat'l State Bank, Eliz., N.J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (stating federal law may impose such obligations that state enforcement on same subject is assumed to be precluded).

¹⁷³ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see *Egelhoff v. Egelhoff*, 532 U.S. 141, 156–57 (2001) (Breyer, J., dissenting) (urging disruption of federal scheme is more critical than state-federal conflict).

¹⁷⁴ See *Jones*, 430 U.S. at 525 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting *Rice*, 331 U.S. at 230)); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1383–1424 (1998) (observing preemption doctrine evolved from broad construction of congressional purpose to narrow interpretation of statutory language, but ultimately settling in uncertainty).

¹⁷⁵ See White, *supra* note 2, at 1067–75 (arguing federal common law of property would develop in area traditionally reserved for states if section 548(a) ultimately prohibits disclaimers); cf. *Egelhoff*, 532 U.S. at 151 ("There is indeed a presumption against pre-emption in areas of traditional state regulation such as

strength of the presumption coupled with the Code's administrative nature makes invalidating disclaimers a disruption to the delicate balance between federal-state autonomy.¹⁷⁶

The Supreme Court, however, has recognized that federal law may govern a beneficiary's rights to property under probate so long as it does not interfere with a state court's authority to *administer* a decedent's estate.¹⁷⁷ Categorizing a disclaimer as a fraudulent transfer certainly affects the interest of a beneficiary in a decedent's estate, but by no means impedes on a state court's ability to determine the validity of a will or to administer the distribution of the decedent's property.¹⁷⁸ Moreover, any broad interpretation of a probate exception in bankruptcy has since been refuted by the Supreme Court's recent decision in *Marshall v. Marshall*.¹⁷⁹

family law."); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (stating when state family law has come into conflict with federal statute, Supreme Court has limited review under Supremacy Clause to determine whether Congress intended for preemption).

¹⁷⁶ See White, *supra* note 2, at 1070–75 (implying broad interpretation of section 548(a) would lead to new federal common law approach to property rights that wrongly trumps relation-back doctrine); cf. *Jones*, 430 U.S. at 525 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)) (explaining courts should not unnecessarily or unintentionally disturb federal-state balance using doctrine of preemption); *Erie v. Thompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State There is no federal common law.")). But cf. Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 917 (commenting on proposition that "[w]hen the United States is the relevant sovereign, federal law, including federal common law, applies because only the United States has a legitimate governmental interest in a particular issue").

¹⁷⁷ See *Marshall v. Marshall*, 126 S. Ct. 1735, 1747–48 (2006) (citing *Markham v. Cabell*, 326 U.S. 490, 494 (1946)) (explaining federal courts must not use their jurisdiction to disturb or affect probate proceedings, but may adjudicate on matters "outside those confines and otherwise within federal jurisdiction").

¹⁷⁸ See *id.* (promulgating probate exception reserves probate of will and administration of estate to state courts but does not prevent federal courts from "adjudicating matters outside those confines and otherwise within federal jurisdiction"); cf. *Markham*, 326 U.S. at 494. In *Markham*, the Court stated:

[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right to adjudicate by the federal court.

Id. (citations omitted); *Waterman*, 215 U.S. at 43–44 (declaring federal courts may exercise jurisdiction "in favor of creditors, legatees and heirs to establish claims Federal courts [may] give the relief stated, notwithstanding the statutes of the State undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates" (citations omitted)).

¹⁷⁹ 126 S. Ct. at 1751 (Stevens, J., concurring). Justice Stevens declared:

To be sure, there are cases that support limitations on federal courts' jurisdiction over the probate and annulment of wills and the administration of decedents' estates. But careful examination reveals that at least most of the limitations so recognized stem not from some *sui generis* exception, but rather from generally applicable jurisdictional rules.

Id. (citations omitted). Congress has afforded the federal district courts with "original and exclusive jurisdiction of all cases under title 11," as well as all civil proceedings "arising in or related to title 11." 28

1. The Nature of Section 101(54) Empowers the Code to Define a Disclaimer as a Transfer Under Section 548(a)

Section 101(54) of the Bankruptcy Code defines the term "transfer" as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with [] property [] or [] an interest in property."¹⁸⁰ Not only does the language of section 101(54) imply a broad and all-encompassing definition of "transfer," but Congress has indicated that it should be "as broad as possible."¹⁸¹ Additionally, the Supreme Court in *Barnhill* reaffirmed the bankruptcy court's exclusive authority to define the term "transfer" by openly declaring "'what constitutes a transfer and when it is complete' is a matter of federal law . . ." and "[t]his is unsurprising since . . . the statute itself provides a definition of 'transfer.'"¹⁸²

The all-encompassing nature of section 101(54) is critical to the *Costas* decision for two reasons. First, it leaves no room for either the relation-back doctrine or state fraudulent-transfer law to determine whether a disclaimer constitutes a transfer of an interest in property in bankruptcy law.¹⁸³ Thus, when taking into consideration the notion that a debtor possesses a property interest the moment before exercising a disclaimer, state law cannot prevent the act of disclaiming from triggering the

U.S.C. § 1334 (2006). This mandate allows bankruptcy courts—serving as a unit of the district court—to rule over matters dealing strictly with the language of the Code, as well as non-bankruptcy proceedings duly affecting the estate of the debtor. See 28 U.S.C. § 151 (2000) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 92 n.7 (1994) ("All districts have adopted a general order of reference of bankruptcy cases to the bankruptcy judges. The bankruptcy judges serve as judicial officers of a unit of the district court known as the bankruptcy court."). With regard to a bankruptcy court's equitable jurisdiction, the Supreme Court has limited it to that of the English Court of Chancery at the time of enactment of the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1331 (2000)). See *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318, 322 (1999) (noting equitable power of federal courts are flexible but limited to that of Court of Chancery circa 1789); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (describing federal courts' equity jurisdiction as being similar to jurisdiction of England's High Court of Chancery at time of adoption of Judiciary Act of 1789); J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 AM. BANK. INST. L. REV. 427, 445–50 (2000) (observing Supreme Court's ruling in *Grupo Mexicano* limits bankruptcy court's ability to fashion equitable remedies to that of English Court of Chancery in 1789, and suggesting bankruptcy court's equitable powers must be limited to provisions of Code).

¹⁸⁰ 11 U.S.C. § 101(54) (2006).

¹⁸¹ See H.R. REP. NO. 95-595, at 314 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5813 ("A transfer is of an interest in property. *The definition of transfer is as broad as possible.*") (emphasis added); Zinman, *supra* note 144, at 309 (demonstrating definition of "transfer" in section 101(54) is certainly broad).

¹⁸² *Barnhill v. Johnson*, 503 U.S. 393, 397–398 (1992) (quoting *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 396–70 (1945)).

¹⁸³ See *supra* text accompanying notes 170–75 (providing analysis on doctrine of preemption); see also *In re Russell*, 927 F.2d 413, 417–19 (8th Cir. 1991) (holding debtor's election to carry forward net operating losses pursuant to section 172(b)(3)(C) of the I.R.C. constitutes transfer under Bankruptcy Code).

phrase "transfer . . . of an interest of the debtor in property" under section 548(a).¹⁸⁴ In other words, due to the broad construction of the word "transfer" in the Code, the act of disclaiming effectuates a disposition of property under bankruptcy law before the relation-back doctrine or state fraudulent-transfer law enters the picture.

The second reason why the nature of section 101(54) is critical to the *Costas* decision is that it unravels the BAP's tax lien analogy. As stated above, the BAP compared the filing of a petition to the attachment of a tax lien, noting post-petition disclaimers are invalid because a debtor's interest in an inheritance becomes property of the estate upon the filing of a petition.¹⁸⁵ This argument lacks merit, however, beginning with the Supreme Court's decision in *Beiger v. IRS*.¹⁸⁶ There, the Court declared that a debtor's pre-petition interest should be determined by whether the interest would have been property of the bankruptcy estate had the debtor filed a petition immediately before transferring that interest.¹⁸⁷ When applying this doctrine to the BAP's argument, the filing of a petition becomes irrelevant so long as the debtor's interest in an inheritance remains eligible for the bankruptcy estate during section 548(a)'s reach-back period.¹⁸⁸

The *Beiger* doctrine also disrupts the BAP's argument—and perhaps its entire decision—in that the word "transfer" now becomes the operative term when interpreting section 548(a). In light of *Beiger*, a bankruptcy court should look to the date of the transfer as defined by the *Bankruptcy Code* to determine a debtor's pre-petition property interest; not the date of the petition, or more importantly, the date that state law deems a disclaimer to be effective. In essence, the presence and nature of section 101(54) preempt the relation-back doctrine and state fraudulent-transfer law from governing a debtor's interest in a disclaimed inheritance under section 548(a).

¹⁸⁴ See, e.g., *In re Kloubec*, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) (holding debtor's disclaimer functioned as transfer because it channeled inheritance worth \$85,000 from bankruptcy estate to debtor's children); *In re Stevens*, 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989) ("A renunciation of a devise constitutes a transfer under the [B]ankruptcy [C]ode. Further, the transfer occurred on the date of the renunciation . . . even though the renunciation may have been 'effective' for purposes of state law at the date of death.") (citation omitted); cf. *In re Tonyan Constr. Co.*, 28 B.R. 714, 728–29 (Bankr. N.D. Ill. 1983) (interpreting "transfer" in section 101(54) as "every method of disposing of or parting with an interest in property").

¹⁸⁵ See *supra* text accompanying note 98.

¹⁸⁶ 496 U.S. 53 (1990).

¹⁸⁷ See *id.* at 58–59. The Court stated:

Because the purpose of the avoidance provision [under section 547 of the Code] is to preserve the property includable in the bankruptcy estates—the property available for distribution to creditors—"property of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.

Id.

¹⁸⁸ Cf. 11 U.S.C. § 541(5)(A) (2006) (declaring an interest in bequest, devise, or inheritance at moment of filing or acquired within 180 days thereafter becomes property of bankruptcy estate).

IV. POLICY CONSIDERATIONS FOR SUBJECTING DISCLAIMERS TO FRAUDULENT TRANSFER TREATMENT

A. *Allowing Disclaimers to Defeat Section 548(a) Would Frustrate the Purposes of the Code*

Two underlying principles of bankruptcy law include maximizing creditor return and initiating a "fresh start" for "honest but unfortunate" debtors.¹⁸⁹ The concept of maximizing creditor return stems from the inefficiency of state law to deal with multiple creditors claiming an interest in the debtor's estate.¹⁹⁰ The debtor-creditor relationship under state law is individualistic, resulting in one creditor's ability to drain a debtor's assets to the detriment of other creditors.¹⁹¹ Bankruptcy law establishes a collective proceeding rooted in equity that attempts to allocate a debtor's resources to all interested entities in a fair and orderly manner.¹⁹²

¹⁸⁹ See *Local Loan v. Hunt*, 292 U.S. 234, 244–45 (1934). The Supreme Court stated:

This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for the future effort, unhampered by the pressure and discouragement of preexisting debt.

Id.; *In re Babb*, 346 B.R. 774, 778 n.3 (Bankr. E.D. Tenn. 2006) ("Discharge, which relieves 'honest but unfortunate' debtors of their debts and allows them a 'fresh start' through this discharge, is obviously a primary goal in [c]hapter 7."); *In re Stinson*, 269 B.R. 172, 176 (Bankr. S.D. Ohio 2001):

A chapter 7 debtor has an affirmative duty to cooperate with the case trustee in the administration of the bankruptcy estate. This includes a duty to surrender to the trustee all property of the estate. This duty to cooperate is based upon one of the very simple goals of any chapter 7 case—to maximize the return to creditors through the orderly liquidation of the assets.

Id. (citation omitted).

¹⁹⁰ Richard V. Butler & Scott M. Gilpatric, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 AM. BANK. INST. L. REV. 269, 270 (1994) (citing Elizabeth Warren, *Bankruptcy Policymaking In An Imperfect World*, 92 MICH. L. REV. 336, 345 (1986)) (observing state-law isolation of creditors results in likelihood that single collection effort will affect collection by other creditors); see Douglas E. Deutsch, *Exemption Reform: Examining the Proposals*, 3 AM. BANKR. INST. L. REV. 207, 210 (1995) (describing development of early bankruptcy as a way of "[a]ltering the previous system of debt collection in which secured creditors vied to be the first to seize an insolvent debtor's assets, thereby procuring the greatest chance of recovery" and creating "a more practical approach to collection").

¹⁹¹ See Butler & Scott, *supra* note 190, at 270 ("The usual argument for having a federal bankruptcy system is that the possibility of the debtor's failure may make the state law collection process unworkable . . .").

¹⁹² See *Beiger v. United States*, 496 U.S. 53, 58 (1990) ("Equity of distribution among creditors is a central policy of the Bankruptcy Code."); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 48 (2000) ("Equality of distribution among creditors is a central policy of the Bankruptcy [C]ode.").

The concept of "fresh start" involves more of a sociological approach to bankruptcy proceedings.¹⁹³ It embodies the idea that by returning the honest but unfortunate debtor to solvency through the discharge of past debts, the debtor regains confidence and motivation to produce in society.¹⁹⁴ It also alleviates the pressure placed upon society to provide for the debtor's welfare while that person is incapable of making ends meet.¹⁹⁵

Permitting recovery of disclaimed inheritances pre-petition will preserve the "fresh start" concept and the function of newly amended section 707, which allows a bankruptcy judge to implement a "totality of circumstances" approach in determining whether a debtor's financial circumstances represent abuse.¹⁹⁶ For example, in *Drye v. United States*¹⁹⁷ the disclaimed inheritance passed to the petitioner's daughter.¹⁹⁸ The daughter then set up a trust with the inheritance and named her parents and herself as beneficiaries.¹⁹⁹ By classifying pre-petition disclaimers as fraudulent transfers, courts can prevent debtors from legally disclaiming the property and later retaining it in circumvention of the bankruptcy process. Otherwise, the door is left open for debtors to receive a head start without any economic effort.²⁰⁰ Furthermore, by reassigning disclaimed inheritances, courts

¹⁹³ Robert H. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 99-100 (1990) ("Bankruptcy . . . liberally discharges individuals to afford them a fresh start based on both humanitarian and economic justifications.")

¹⁹⁴ See *Local Loan*, 292 U.S. at 244-45 (stating discharge relieves debtor of burdensome debt and offers new opportunity to put forth meaningful economic effort); MACLACHLAN, *supra* note 18, § 100, at 88 (espousing idea that man hampered by creditors will remain unproductive and have less incentive to rejoin society).

¹⁹⁵ See Hillman, *supra* note 193, at 100 ("Even if the debtor is somehow at fault, the fresh-start policy prevails because society is better off reintegrating the debtor into its productive ranks than leaving her saddled with unconquerable debt."); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 208 (1994) (noting additional theory to discharge involves removing "debtor's incentive to rely on inefficient state aid and renews her incentive to contribute to the gross national product").

¹⁹⁶ See 11 U.S.C. § 707(b)(3) (2006) (promulgating court shall consider whether "the totality of circumstances . . . of the debtor's financial situation demonstrates abuse" of chapter 7); see also Mariane B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668, 686-87 (2005) (explaining debtors who pass means test are still subject to dismissal based on totality of circumstances approach set forth in section 707(b)(3), which was created to afford judges authority to decide abuse on case by case basis); cf. Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1307 (2006) (discussing totality of circumstances test and proposition that debtors who pass means test may still be subject to abuse).

¹⁹⁷ 528 U.S. 49 (1999).

¹⁹⁸ See *supra* text accompanying notes 79, 80.

¹⁹⁹ *Id.*

²⁰⁰ See *In re Jarrell*, 189 B.R. 374, 377 (Bankr. M.D.N.C. 1995) ("Chapter 7 is intended to give 'the truly needy a fresh start, not to give those who can afford to meet the obligations a head start.'" (quoting *In re Grant*, 51 B.R. 385, 394 (Bankr. N.D. Ohio 1985))); see also 11 U.S.C. § 541(a)(6) (2006) (promulgating bankruptcy estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after commencement of the cases"); Hirsch, *supra* note 195, at 210 (describing James A. MacLachlan's theory set forth in legislative history to Chandler Act of 1938 advocating that expectancies should be included in bankruptcy estate because they are independent of debtor's economic efforts).

can preserve the Code's anti-abuse policy set forth in section 707(b)(3), precisely because debtors will now have a definitive interest subject to abuse as opposed to no interest at all.²⁰¹

Classifying pre-petition disclaimers as fraudulent transfers also furthers the goal of maximizing creditor return. One compelling argument in support of the *Costas* decision deals with the notion that creditors no longer extend credit based on an expectancy interest.²⁰² Technological advancements and a competitive market often make creditor-debtor relations impersonal.²⁰³ Thus, if creditors were allowed to reach disclaimed property, "they would actually receive more than that for which they had bargained."²⁰⁴ This argument also suggests that creditors are in a better position to calculate risks and to minimize losses by hedging their claims and insuring against bad debt.²⁰⁵ As such, a debtor who disclaims an inheritance hardly damages a creditor's overall interest in the market—an interest deriving from a comprehensive system of protection.²⁰⁶

Although it may be true creditors no longer bargain based on an expectancy, it does not take away from the fact that creditors bargain for their money back. And while many debtors now receive credit at the click of a mouse, the impersonal nature of such a transaction works in favor of debtors as well. Debtors generally

²⁰¹ See Culhane & White, *supra* note 196, at 687 ("The totality test, on the other hand, should encompass debtor actions before or during the case which, though honestly disclosed, not illegal or necessarily dishonest, are nonetheless manifestly unreasonable under the debtor's circumstances."); cf. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 236 (2005) ("By listing 'bad faith' and 'totality of financial circumstances' disjunctively, the statutory language [of section 707(b)] indicates that bad conduct by the debtor in connection with the bankruptcy is a ground for [section] 707(b) relief independent of financial circumstances indicating that the debtor could repay debt.").

²⁰² See White, *supra* note 2, at 1078–79 (arguing since creditors do not consider debtor's expectation through bequest or devise when extending credit, creditors would receive windfall if able to reach expectation); see also Hirsch, *supra* note 1, at 611–14 (explaining insolvent debtor's refusal to accept inheritance doesn't decrease creditors' opportunity to recover because creditors ordinarily do not rely on expectancies when extending credit).

²⁰³ See Hirsch, *supra* note 195, at 188–89 ("[T]he business of lending has grown impersonal and routine. Today, consumer credit dossiers do not routinely include information about the debtor's inheritance prospects. Commercial lenders instead focus on present assets and income" (footnote omitted)); Rafael Efrat, *The Moral Appeal of Personal Bankruptcy*, 20 WHITTIER L. REV. 141, 159–60 (1998) ("The [creditor and debtor] infrequently communicate, and when they do, they mainly use impersonal channels such as a telephone [T]he lack of personal bonding preclude most of these types of relationships from developing into a knowledge-based credit trust relationship.").

²⁰⁴ White, *supra* note 2, at 1078.

²⁰⁵ See *id.* at 1077–78 (citing Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. Rev. 327, 362–63 (1982)) (explaining creditors should bear risk of loss with regard to debtor default since they take calculated risks); cf. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90 (1977) (contending discharge of obligations under contract should be allowed when promisee is "the superior risk bearer").

²⁰⁶ See Hirsch, *supra* note 1, at 611 ("[A]n insolvent debtor's refusal to accept a gratuitous transfer does not reduce his creditors' opportunities for recovery. It simply fails to increase them."); cf. *Jones v. Atchison* (In re Atchison), 925 F.2d 209, 211 (7th Cir. 1991) (surmising debtor's ability to disclaim inheritance "does not unfairly prejudice creditors. Although the doctrine operates to permit a debtor to dodge creditors who might otherwise have access to inherited property, a testamentary gift could not be disclaimed if the debtor had used this property as a basis for acquiring credit").

know more about their financial situation and have greater control over their financial affairs than creditors do.²⁰⁷ Therefore, while creditors may extend credit to a general group of debtors without relying on an expectancy, debtors may inject themselves into the credit market based on an expectancy, or at the very least with the hope that their family's financial status could bail them out in the event of a default.²⁰⁸ It has been acknowledged that if a debtor grants a security interest in or assigns an expectancy interest, the debtor essentially accepts the contingent interest and loses the right to disclaim.²⁰⁹ Once the expectancy materializes into a right upon a decedent's death, however, the debtor's ability to utilize that right in the credit market becomes even stronger because the decedent cannot change the will.²¹⁰ Thus, the vested right functions like an asset from the debtor's standpoint, creating an opportunity for creditors to strip the debtor of its value.²¹¹ Accordingly, bringing the interest back into the estate furthers the goal of distributing the debtor's assets fairly and maximizing creditor return.

²⁰⁷ Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 982–83 (1981) ("In general, borrowers know more about themselves and have greater control of their affairs than lenders do."); Hillman, *supra* note 195, at 126 ("Debtors are in control of their financial activities and therefore are arguably in a better position to predict and avoid financial collapse or to insure it."); see Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1069, 1071 ("[T]he risk of bankruptcy for an individual could be largely a function of personal characteristics that creditors are not particularly adept at evaluating.").

²⁰⁸ See Eric A. Posner, *Contract Law In The Welfare State: A Defense Of The Unconscionability Doctrine, Usury Laws, And Related Limitations On The Freedom To Contract*, 24 J. LEGAL STUD. 283, 314 (1995) (discussing historic nature of wealthy ancestors helping heirs in default); cf. MACLACHLAN, *supra* note 18, § 178, at 179 (arguing wealthy ancestors should not stand idly by as heir succumbs to insurmountable debts).

²⁰⁹ See, e.g., Cassel v. Kolb (*In re Kolb*), 326 F.3d 1030, 1039–41 (9th Cir. 2003) (declaring where debtor fails to list beneficiary interest as contingent on loan application, debtor effectively accepts expectancy interest); Pher Partners v. Womble (*In re Womble*), 289 B.R. 836, 847 (Bankr. N.D. Tex. 2003) (stating debtor loses right to disclaim if debtor assigns or pledges expectancy interest under Texas law). *But see In re Seal*, 261 F. 112 (E.D.N.Y. 1919) (holding bankrupt's expectancy interest should not be listed in bankrupt's estate because testator could change her will at any time).

²¹⁰ Cf. *In re Seal*, 261 F. at 112 (excluding expectancy interest because right had not vested).

²¹¹ Of course there is always the issue that categorizing a disclaimer as a fraudulent transfer impedes on the testator's intent. See White, *supra* note 2, at 1083–04. The Code, however, includes an interest in a bequest, a devise, or an inheritance as part of the debtor's estate under section 541(a)(5). See 11 U.S.C. § 541(a)(5) (2006); Kreiss v. Mann (*In re Kreiss*), 58 B.R. 999, 1002 (Bankr. E.D.N.Y. 1986) (setting out rule in section 541(a)(5)). This should imply that Congress does not consider the testator's intent as a critical concern in the bankruptcy process. Cf. Scott T. Jarboe, *Interpreting A Testator's Intent from The Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1365–1366 n.3 ("[T]he legislature alters the common law's deference to a testator's intent in his wealth distribution for policy reasons."). Furthermore, the debtor has the opportunity to protect inherited items using Code or state exemptions. See 11 U.S.C. § 522 (2006); *In re Mitchell*, 103 B.R. 819, 821 (Bankr. W.D. Tex. 1989) (determining value of diamond ring for purposes of \$30,000 cap on exempt personal property pursuant to section 42.001(a) of Texas Property Code).

B. The Right to Disclaim Should Be Treated as a General Power of Appointment

The right to disclaim has often been compared to a beneficiary's general power of appointment.²¹² A beneficiary's general power of appointment includes the authority to designate either the beneficiary or another as the recipient of a property interest passing by bequest or devise.²¹³ Under common law, creditors can reach a general power of appointment that has been exercised.²¹⁴ Certain states, however, allow creditors to reach an unexercised general power of appointment²¹⁵ or when the debtor's property is insufficient to satisfy the claims of creditors.²¹⁶

The theory behind analogizing a disclaimer to a general power of appointment is that in both situations, debtors have an interest in property they can either accept for themselves or transfer to someone else.²¹⁷ Therefore, debtors essentially control the ultimate disposition of their interest in both situations—a power that can be used to effectuate a transfer in spite of creditors.²¹⁸ Professor Adam J. Hirsch disagrees with this comparison, arguing unlike a general power of appointment, a disclaimant

²¹² See, e.g., *Kalt v. Youngworth (In re Kalt)*, 108 P.2d 401, 403 (Cal. 1940) ("If he chooses to renounce, he determines by that action that the title will pass on to some other heir or legatee. This power is essentially analogous to a general power of appointment under a will."); Parker, *supra* note 48, at 40–43 (advocating right to disclaim is analogous to general power of appointment because like general power of appointment, beneficiary's disclaimer transfers property to select pool of people). But see Hirsch, *supra* note 1, at 608–09 (declaring disclaimers should not be compared to general power of appointment because disclaimers are quasi-conveyances and more limited).

²¹³ See, e.g., *Ohio Nat'l Bank of Columbus v. Shewan (In re Howald)*, 29 N.E.2d 575, 580 (Ohio Ct. App. 1940) (adopting view that power of appointment is power of disposition that can be given to donee through testamentary device); William J. Lindsay, Jr., *The Nebraska Uniform Trust Code from The Trenches: A Practitioner's Guide to Understanding Nebraska's New Uniform Trust Code*, 37 CREIGHTON L. REV. 93, 104 (2003) ("A power of appointment is the authority to designate the recipients of beneficial interests in all or part of the trust property. A power of appointment is either general or non-general and is either presently or not presently exercisable.").

²¹⁴ See Hirsch, *supra* note 1, at 609 ("At common law, creditors may levy against the corpus of an exercised power but not against property subject to an unexercised power."); see also *United States v. Fields*, 255 U.S. 257, 262 (1921) (acknowledging in general that exercised power of appointment is subject to claims of creditors); *State Street Trust Co. v. Kissel*, 19 N.E.2d 25, 27–28 (Mass. 1939) (explaining voluntarily executed power of appointment functions as asset of executor and subject to creditors).

²¹⁵ See N.Y. EST. POWERS & TRUSTS LAW § 10-7.2 (McKinney 2002); cf. Marie Rolling-Tarbox, *Powers of Appointment Under the Bankruptcy Code: A Focus On General Testimony Powers*, 72 IOWA L. REV. 1041, 1046–1047 n.40 (1987) ("In an attempt to ameliorate the inequities of the common law approach to creditors' access to powers, a number of states have adopted statutes providing for when creditors may reach property subject to powers of appointment.").

²¹⁶ See, e.g., CAL. PROB. CODE § 600 (Deering 2004); MICH. COMP. LAWS SERV. § 556.123(2) (LexisNexis 2001); WIS. STAT. ANN. § 702.17 (West 2001); see also RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 13.2 (1986).

²¹⁷ See *Kalt*, 108 P.2d at 403 (stating debtor with right to disclaim or general power of appointment can ultimately end up with property); Hirsch, *supra* note 1, at 606 (noting disclaimer can be analogized to general power of appointment based on property interest theory).

²¹⁸ See *Kalt*, 108 P.2d at 403 ("If [debtor] chooses to renounce, he determines by that action that the title will pass on to some other heir or legatee. This power is essentially analogous to a general power of appointment under a will."); Parker, *supra* note 48, at 40–41 (adopting Justice Traynor's view in *Kalt* that a disclaimer should be treated like a general power of appointment under fraudulent transfer law).

cannot freely determine the transferee of the property.²¹⁹ The Supreme Court, however, chose to view Professor Hirsch's analysis in a different light.²²⁰ As noted above, the Court in *Drye* observed that a disclaimer provides the disclaimant with the right to determine the ultimate disposition of the property—either to herself or to a close family member.²²¹ This power, the Court reasoned, serves as a means of channeling the property to a third party, particularly because the testator's death makes it impossible to restore the status quo.²²²

One critical point in comparing the right to disclaim to the general power of appointment is that the debtor in both situations has a profound sense of leverage. By having the right to accept the property, the debtor is not forced to transfer it, thereby setting up the opportunity for the debtor to negotiate with the transferee for a way to reach the property after bankruptcy.²²³ Moreover, as advocated by Stephen Parker, if a disclaimed inheritance passes to the disclaimant's children, the disclaimed property essentially functions like an asset.²²⁴ Therefore, if creditors can reach a property interest transferred through a general power of appointment, they should also be allowed to defeat the relation-back doctrine and reach a disclaimed property interest.

CONCLUSION

The BAP in *Costas* held that the Debtor's disclaimer does not constitute a fraudulent transfer pursuant to section 548(a) of the Code, reasoning Arizona's relation-back doctrine erased any transferable interest the Debtor had in her father's Trust. The BAP also distinguished the Supreme Court's decision in *Drye v. United States*, stating the Bankruptcy Code lacks strong congressional mandates and is often deferential to state law.

The *Costas* decision exemplifies a situation in which state law impedes on the authority of the Code. First, the BAP failed to consider the fact that within the confines of section 548(a)'s reach-back period, the Debtor possessed the essential

²¹⁹ See Hirsch, *supra* note 1, at 608 ("[T]he equation of a disclaimer with the exercise of a general power for appointment is also inapt. The holder of the power, like the assignor of a devise, is channeling the corpus to his preferred recipients.").

²²⁰ See *Drye v. United States*, 528 U.S. 49, 61 (1999) (citing to Adam Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 602–03 (1989) in declaring disclaimants exercise dominion over property by transferring to close family members, thereby constituting valuable right to transfer).

²²¹ See *supra* text accompanying notes 89–93.

²²² See *id.*

²²³ See Note, *Renunciation of a Devise in Fraud of Creditors as a Fraudulent Transfer*, 27 VA. L. REV. 936, 941 (1941) (advocating classification of disclaimers as fraudulent transfers because of impracticality of proving collusion but likelihood of collusion between disclaimant and relatives); Note, *Renunciation of Testamentary Gift to Defeat Claims of Devisee's Creditors*, 43 YALE L.J. 1030, 1030–32 (1934) (viewing relation-back doctrine as conceptual which could lead to inequitable results). The assumption of collusion is a logical one given the idea that a person renouncing an unencumbered devise would otherwise accept it had it not been for the claims of creditors.

²²⁴ See Parker, *supra* note 48, at 43–44 & n.104 (advocating since many states impose statutory obligation to support children, insolvent disclaimant benefits from property passing to children).

rights from Hohfeld's bundle to give her a qualified interest in both the right to the inheritance and the right to disclaim. As such, the Bankruptcy Code should be given full authority to administer those interests and include them as "an interest of the debtor in property" subject to fraudulent transfer treatment.

The BAP's decision also failed to consider fully the relationship between various provisions of the Code. For example, as indicated by Congress, section 541(a) establishes an all-encompassing bankruptcy estate. Section 548(a) operates as a way to pull a debtor's property interest into that estate. As a result, the phrase "an interest of the debtor in property" in section 548(a) should translate back to the broad meaning of "property" in section 541(a), providing the Bankruptcy Code with the mandate needed to include an interest in an inheritance and a right to disclaim as property subject to fraudulent transfer treatment.

Moreover, when applying the doctrine of *expressio unis* to the Code, it becomes exceedingly clear that section 548(a) is an independent law of bankruptcy and should not be subject to probate law's relation-back doctrine or state fraudulent-transfer law. For example, the Code affords the trustee a variety of independent powers to pull a debtor's property into the estate. In particular, section 544(b) allows the trustee under certain circumstances to pursue a fraudulent transfer action under state law. Section 548(a), on the other hand, makes no reference to state law. Additionally, section 546(b)(2) of the Code prohibits a trustee acting under section 544(b) to recover a secured interest shielded by the UCC's relation-back doctrine regarding perfection of PMSI's. The Code, however, does not expressly subject section 548(a) to any relation-back doctrines. Thus, in light of the doctrine of *expressio unis*, exposing a trustee to the relation-back doctrine and state fraudulent-transfer law under 548(a) defeats Congress's intentions of (1) providing bankruptcy with a federal fraudulent-transfer provision, and (2) limiting the presence of state relation-back doctrines in bankruptcy.

Next, this Comment concludes that the doctrine of preemption effectively prevents the relation-back doctrine and state fraudulent-transfer law from operating under section 548(a). Section 101(54) of the Code establishes a broad definition of "transfer," leaving no room for the relation-back doctrine or state fraudulent-transfer law to dictate whether the act of disclaiming constitutes a "transfer . . . of an interest of the debtor in property." Furthermore, the Supreme Court's decision in *Beiger v. IRS* advocates the proposition that a debtor's property interest within one of the Code's reach-back provisions should be determined at the moment before that interest is transferred. Consequently, since the Code has the authority to include the act of disclaiming within the broad definition of "transfer," the effective date for determining a debtor's interest in an inheritance and a right to disclaim is the moment before the act of disclaiming; not the date of the petition or the date that state law deems the disclaimer to be effective.

Finally, though it seems rather unfair a debtor may forfeit an inheritance with considerable value sentimental or otherwise, prohibiting disclaimers under section 548(a) diverts the opportunity for collusion and supports bankruptcy's fundamental

purpose of economically motivating debtors. It also empowers a judge to consider a debtor's interest in an inheritance when assessing a debtor's financial circumstances under section 707's totality of circumstances provision. Moreover, prohibiting disclaimers furthers bankruptcy's policy of maximizing creditor return. Bringing disclaimed property into the estate supports fair distribution to creditors because the vested right to an inheritance functions like an asset capable of being abused or stripped.

In conclusion, bankruptcy courts should subject a disclaimed inheritance to fraudulent transfer treatment under section 548(a).

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