



**Steve Leimberg's Asset Protection Planning Email Newsletter  
Archive Message #447**

**Date:** 17-Jul-25

**From:** Steve Leimberg's Asset Protection Planning Newsletter

**Subject:** Marc Soss on United States v. Miller - Can A  
Bankruptcy Trustee Avoid IRS Tax Payments?

“In United States v. Miller, 604 U. S. \_\_\_\_ (2025), a Bankruptcy Court Trustee attempted to avoid payments made to the IRS, with misappropriated corporate funds, by the shareholders of an insolvent Utah company. Miller involved a clash between Bankruptcy Code § 544(b), a Trustees avoidance powers, and §106(a), the Bankruptcy Code’s sovereign immunity waiver. The U.S. Supreme Court looked at the sovereign immunity waiver as a whole and found that § 106(a) does not alter the substantive requirements for avoiding a debtor’s transfer under § 544(b). This means that the actual creditor requirement must be met, and the trustee can only avoid a transfer by relying on state law if another creditor could have avoided the transfer. In Miller, that threshold requirement was not met.”

*In his commentary on United States v. Miller, Marc Soss reviews how bankruptcy law treats tax payments made to the IRS.*

Marc Soss’ practice focuses on estate planning, probate and trust administration, and corporate law in Southwest Florida. Marc is a frequent contributor to LISI and has published articles in the Florida Bar, Rhode Island Bar, North Carolina Bar, Association of the United States Navy and Military.Com. Marc is a retired United States Navy Supply Corps Officer.

Here is his commentary:

**EXECUTIVE SUMMARY:**

In United States v. Miller, a Bankruptcy Court Trustee attempted to avoid payments made to the IRS, with misappropriated corporate funds, by the shareholders of an insolvent Utah company. Miller involved a clash between Bankruptcy Code § 544(b), a Trustees avoidance powers, and §106(a), the Bankruptcy Code’s sovereign immunity waiver. The U.S. Supreme Court looked at the sovereign immunity waiver as a whole and found that § 106(a) does not alter the substantive requirements for avoiding a debtor’s transfer under § 544(b). This means that the actual creditor requirement must be met, and the trustee can only avoid a transfer by relying on state law if another creditor could have avoided the transfer. In Miller, that threshold requirement was not met.

**FACTS:**

Miller involved an insolvent Utah company in 2013. In 2014, two shareholders misappropriated company funds to pay off personal debts, including a \$145,000 tax payment to the IRS. In 2017, the Utah company filed for bankruptcy, and the trustee sought to avoid the 2014 IRS tax payment made by the shareholder under § 544(b) by relying on Utah’s fraudulent transfer statute.

The Bankruptcy Trustee filed an “avoidance” lawsuit pursuant to §544(b) against the United States in an attempt to claw back misappropriated funds for the benefit of the bankruptcy estate. To prevail under §544(b), “a trustee must identify an “actual creditor” who could have voided the transaction under applicable law outside of bankruptcy proceedings.” In response, the Government argued that the Trustee could not identify an “actual creditor” that could have voided the fraudulent transfer and sovereign immunity would bar any such state cause of action. The Bankruptcy Court disagreed, and held that §106(a) of the Bankruptcy Code waived the Government’s sovereign immunity under §544 and under the state cause of action. Subsequently, both the District Court and the Tenth Circuit affirmed the Bankruptcy Court’s decision. The Tenth Circuit’s ruling reinforced a conflict among the Courts of Appeals regarding whether §106(a) abrogates sovereign immunity with respect to a state-law claim that supplies the “applicable law” for a trustee’s §544(b) claim. As a result, the U.S. Supreme Court granted certiorari to resolve that conflict.

#### § 544(b)

Bankruptcy Code § 544(b) empowers a bankruptcy trustee to set aside, or invalidate certain transfers of a debtor’s assets in order to recover those assets for the benefit of the bankruptcy estate. Under § 544(b), a trustee may avoid certain transfers that would be “voidable under applicable law” (“voidable outside of bankruptcy proceedings”). A Trustee will rely on a state statute to supply the “applicable law” to avoid a debtor’s transfer of assets. However, § 544(b) requires there to be an actual creditor that could avoid the transfer under the state fraudulent transfer law.

#### § 106(a)

Section 106(a) is a sovereign immunity waiver and jurisdictional provision that empowers courts to hear §544(b) claims against the Government to the extent such claims are otherwise available under state law. “However, § 106(a)(5) provides that the sovereign immunity waiver does not create a cause of action that does not otherwise exist under bankruptcy or non-bankruptcy law.”

#### Waivers of Sovereign Immunity.

“Sovereign immunity is jurisdictional in nature” and deprives courts of the power to hear suits against the United States absent Congress’s express consent. *FDIC v. Meyer*, 510 U. S. 471 (1994). Waivers of sovereign immunity function as “prerequisite[s] for jurisdiction” and does not create any new substantive rights or alter any pre-existing ones. *United States v. Mitchell*, 463 U. S. 206 (1983).

#### U.S. Supreme Court:

Before the Court, the parties agreed that § 106(a) waived the IRS’s sovereign immunity with respect to the cause of action created under § 544(b), but disagreed as to whether § 106(a) also waived sovereign immunity with respect to the state law cause of action. The Supreme Court looked at the sovereign immunity waiver as a whole finding it did not create a cause of action under non-bankruptcy law. The Court then reviewed § 106(a), in the context of § 544(b), and “determined that § 106(a) does not alter the substantive requirements for avoiding a debtor’s

transfer under § 544(b).” As a result, the actual creditor requirement must be met, and the trustee could only avoid a transfer under state law if another creditor could have avoided the transfer.

The Trustee next argued that (i) § 106(a) enables trustees to prevail against the Government under §544(a), which has no actual-creditor requirement. This argument was predicated upon the ability to invalidate a federal tax lien under particular circumstances. 26 U. S. C. §6323; (ii) “§106(a)(1) refers to §544 as a whole (rather than by subsection), the waiver must be construed to give substantive effect to all of §544’s subsections;” and (iii) “Congress sometimes waives sovereign immunity while simultaneously establishing a new substantive right.” These arguments were rejected.

The Court also rejected the Trustee’s final argument that §106(a)’s waiver of immunity was an expansion of the trustee’s avoidance powers under §544(b). The Court held that §106(a)(5) expressly provides that “[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing” under some other source of law. That language directly refutes respondent’s argument that §106(a)’s sovereign-immunity waiver extends to “[b]oth the cause of action [§544(b) establishes] and its elements.”

#### **COMMENT:**

In reversing the Bankruptcy Court, District Court and the Tenth Circuit, the Supreme Court found “that §106(a)’s sovereign-immunity waiver applies only to the §544(b) claim itself and not to any state-law claims nested within that federal claim. Section 106(a) is properly understood as a jurisdictional provision that empowers courts to hear §544(b) claims against the Government to the extent such claims are otherwise available under state law; it does not alter the substantive meaning of §544(b)’s “applicable law” clause.”

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Marc Sass*

CITE AS: LISI Asset Protection Planning Newsletter #447 (July 17, 2025) at <http://www.leimbergservices.com>. Copyright 2025 Leimberg Information Services, Inc. (LISI). Reproduction in Any Form or Forwarding to Any Person Prohibited - Without Express Permission. Our agreement with you does not allow you to use or upload content from LISI into any hardware, software, bot, or external application, including any use(s) for artificial intelligence technologies such as large language models, generative AI, machine learning or AI system. This newsletter is designed to provide accurate and authoritative information regarding the subject matter covered. It is provided with the understanding that LISI is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

#### **CITATIONS:**

In re All Resort Group, Inc., 617 B. R. 375, 379 (Bkrcty. Ct. Utah 2020); FDIC v. Meyer, 510 U. S. 471 (1994); United States v. Mitchell, 463 U. S. 206 (1983).