PUBLICATION

Unsecured Creditors May Expect Better Recoveries in Bankruptcy

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On August 31, 2016, United States Bankruptcy Judge Robert A. Mark ruled that a bankruptcy trustee can pursue avoidance of property transfers that occurred nearly ten years before the debtor's bankruptcy filing. The proceedings are related to *In re: Kipnis*, Chapter 7 Case No. 14-11370, pending in the United States Bankruptcy Court for the Southern District of Florida.

There is nothing unusual about the substance of the trustee's claims. Pre-petition transfers by a bankruptcy debtor are a common source of recovery for unsecured creditors, where the transfers at issue are avoidable under the Bankruptcy Code or state law. What is remarkable though - and potentially a game-changer in avoidance litigation - is that the judge rejected the defense that the claims are barred by Florida's four-year statute of limitations period and allowed the trustee to pursue avoidance of transfers dating back to 2005.

In *Kipnis*, the IRS filed a *partially secured* proof of claim for unpaid taxes of $1,911,787.23, following an audit of the debtor's income tax returns and deficiency assessments issued to the debtor in 2005. Because the IRS is an unsecured creditor in the case, the trustee argued that the Internal Revenue Code's 10-year statute of limitations period applied by virtue of Section 544(b) of the Bankruptcy Code. Section 544(b) provides that:

the 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* that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Judge Mark agreed with the trustee, reasoning that since the IRS is a creditor in the case with an allowable unsecured claim and could have timely pursued the subject property transfers as of the bankruptcy petition date, the trustee can "step into the shoes" of the IRS and take advantage of the IRS's longer 10-year limitations period. Although recognizing his ruling may cause "a major change in existing practice" by trustees who previously operated as if a significantly shorter limitations period applied (depending on the particular state law), Judge Mark nevertheless determined that the plain language of the Bankruptcy Code dictated the outcome.

One of the defendants has asked Judge Mark to reconsider his ruling, and the motion for reconsideration is still pending. If Judge Mark does not change his mind and his ruling is not disturbed on appeal, we expect more aggressive avoidance actions by bankruptcy trustees across the country, particularly where the IRS is a creditor with an unsecured claim.