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Ch. 7 Trustees Can Access Longer 'Reach-Back Weapon' in Pursuit of Fraudulent Conveyances

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By stepping into the shoes of the Internal Revenue Service as the "triggering creditor" under § 544(b) of the Bankruptcy Code, bankruptcy trustees can access a powerful tool to reach back 10 or more years in pursuit of fraudulent conveyances which are otherwise outside the applicable state law statutes of limitation.

Judge Robert A. Mark of the Bankruptcy Court of the Southern District of Florida recently addressed this issue in *In re Kipnis*, 555 B.R. 877 (Bankr. S.D. Fla. 2016), finding that the plain language of § 544(b) permitted the trustee to step into the shoes of the IRS and utilize the IRS' ten year collections period to avoid Florida's four-year statute of limitations for fraudulent conveyance actions. This decision is consistent with the majority of the few published decisions on this point. In finding for trustees on this issue, courts have relied primarily on principles of statutory construction. But, as noted by Judge Mark in *Kipnis*, trustees have largely not utilized this powerful tool, perhaps because they were unaware of it. Moreover, the trustee's use of § 544(b) in this way could constitute a major change in existing policy practice, as the IRS is a creditor in a significant number of bankruptcies.

The power to avoid state law statutes of limitation has been traditionally reserved for government creditors acting in their governmental capacity and in pursuit of claims on behalf of the United States. The majority view, in allowing the private bankruptcy trustee to avoid state statutes of limitation for fraudulent conveyance actions pursued for the benefit of creditors generally, effectively hands the bankruptcy trustee an immense sovereign power that he or she would not otherwise have if the IRS was not a creditor.

These decisions raise serious policy concerns regarding what limitations periods, if any, apply to the trustee stepping into the shoes of the IRS, as well as issues of sovereignty. Look out for the January issue of the ABI Journal, which will feature our examination of the major case law on this issue, as well as the policy and practical concerns for bankruptcy and non-bankruptcy practitioners.