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*Begier v. IRS*

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Begier v. IRS: Tracing Trust Fund Taxes in Bankruptcy

I. INTRODUCTION

Transfers of a debtor’s property to a creditor made ninety days prior to filing a bankruptcy petition are, in most instances, voidable by the bankruptcy trustee.1 However, if the debtor transfers assets which are not her own, the trustee cannot vacate the transfer. More specifically, property a debtor holds in trust for another entity is not property of the debtor and is therefore excepted from the trustee’s avoidance powers.2

The Internal Revenue Code provides that employers and other persons who withhold or collect income taxes, FICA payments, excise taxes, and other similar monies, hold such funds in trust for the Internal Revenue Service (IRS).3 Therefore, transfers of these trust fund taxes to the IRS during the ninety-day period preceding bankruptcy normally should not be voidable by the trustee because they are not transfers of the debtor’s property. However, if the debtor commingles trust fund assets with her personal funds and the assets cease to be identifiable, or if the debtor disposes of trust fund assets in whole or part, the common law of trusts may view a pre-petition transfer to the IRS as voidable because it consists not of trust fund assets, but of the debtor’s property.4

2. See, e.g., 11 U.S.C. § 541(d) (1990); Research Planning, Inc. v. Segal (In re First Capital Mortgage Loan Corp.), 917 F.2d 424, 426 (10th Cir. 1990) (by definition, property held by the debtor in trust is not part of the bankruptcy estate); Sanyo Elec., Inc. v. Howard’s Appliance Corp. (In re Howard’s Appliance Corp.), 874 F.2d 88, 93 (2d Cir. 1989) (quoting United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.10 (1983) (“Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition.”)); Turley v. Mahan & Rowsey, Inc. (In re Mahan & Rowsey, Inc.), 817 F.2d 682, 684 (10th Cir. 1987) (money held under a trust arising from non-bankruptcy law is not property of the estate by definition); 4 COLLIER ON BANKRUPTCY ¶ 541.13 (15th ed. 1990).
3. 26 U.S.C. § 7501(a) (1990) (“Whenever any person is required to collect or withhold any internal revenue tax from any other person . . . the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States.”).
4. E.g., Connecticut Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 618 (1st Cir. 1988) (claimant must identify the trust fund or property and, where the trust fund has been commingled with general property of the debtor, sufficiently trace the property or funds); American Serv. Co. v. Henderson, 120 F.2d 525, 530-31 (4th Cir. 1941) (claimant to a trust fund which has been mingled with the general property of the debtor must sufficiently trace the trust property); In re Auto-Train Corp., 53 Bankr. 990, 997 (Bankr. D.C. 1985) (requiring trust fund
However, as will be demonstrated in this casenote, the common law of trusts may not always control transactions in bankruptcy. In particular, this note looks at how the common law of trusts has been modified by the recent decision in *Begier v. IRS*. It examines the history of trust fund tracing in bankruptcy prior to *Begier*, analyzes the reasons for adopting *Begier*'s approach, and summarizes the potential impacts of implementing the apparent result in *Begier*.

## II. BACKGROUND

As the result of the 1971 Supreme Court case of *United States v. Randall*, courts began to require the IRS to strictly trace all trust fund assets if it wished to recover such monies outside of normal bankruptcy distribution channels. *Randall* involved a debtor who retained possession of withheld taxes after filing a petition in bankruptcy. The IRS sought to recover these taxes, arguing that the funds were property of the IRS and not property of the debtor. Because the monies were commingled with the debtor's other assets, and the IRS could not trace the origin of the funds to the withheld taxes, the Court refused to allow the IRS to recover the funds. After *Randall*, lower courts began to impose strict tracing requirements on the IRS if it sought to collect withheld taxes from the debtor without standing in line behind bankruptcy administrative expenses and other creditors with higher priority.

Perhaps to mitigate the effect of commingling and to ameliorate the IRS's burden in bankruptcy, Congress gave the IRS power to require debtors to establish separate bank accounts for the deposit of trust fund money. Additionally, when the new Bankruptcy Code was enacted in 1978, statements made on the floor of the House and Senate indicated that the IRS should not be subject to the strict trust tracing requirements set forth in *Randall*. Instead, courts could use "reasona-
ble assumptions” regarding the disposition of trust fund taxes to permit the IRS to recover ahead of administrative expenses.9

Since 1978, courts have been increasingly uncertain as to the extent to which Randall’s strict tracing requirements were modified by the new Bankruptcy Code. Some cases have held that the IRS must still trace, to some extent, the source of pre-petition payments to the IRS during the ninety-day preference period.10 Other courts have held that the mere fact that payment is made means that the “reasonable assumptions” test is met, and no further tracing is necessary to permit the IRS to retain pre-petition payments made during the preference period.11

In Razorback Ready-Mix Concrete Co. v. United States,12 an Arkansas bankruptcy court held that the “reasonable assumptions” test means that any money paid to the IRS during the ninety-day pre-petition period would be classified as trust fund taxes, despite the fact that it was commingled with the debtor’s assets and the IRS did not trace the trust fund monies. Payment alone was sufficient to identify the assets.

However, in Drabkin v. District of Columbia,13 the Court of Appeals for the District of Columbia determined that “reasonable assumptions” means that mere payment is not enough to identify assets to the trust. Rather, the IRS must still trace the disposition of trust fund taxes.

Neither of these cases, though, had fact patterns that exactly corre-

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9. See sources cited supra note 8; see also H.R. REP. NO. 595, 95th Cong., 1st Sess. 373, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6329 (stating that “[a] payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code § 7501(a), and thus will not be a preference . . . ”).

10. E.g., Drabkin v. District of Columbia, 824 F.2d 1102, 1103 (D.C. Cir. 1987) (the fact of payment, without more, does not create a trust for purposes of the Code); Graham v. United States (In re Malmart Mortgage Co.), 109 Bankr. 1, 4 (Bankr. D. Mass. 1989) (funds paid pre-petition must be traced to withheld taxes); Ginsberg v. Washington (In re Olympic Foundry Co.), 63 Bankr. 324, 327-28 (Bankr. W.D. Wash. 1986), rev’d on other grounds, 71 Bankr. 216 (Bankr. 9th Cir. 1987) (pre-petition payment of state taxes, analogous to federal withholding taxes, were recovered as a preference because no trust account was established and trust funds were not segregated).


13. 824 F.2d 1102 (D.C. Cir. 1987).
sponded to Randall. In Randall, the IRS was trying to collect trust fund taxes that were never paid. In Drabkin, the trust fund taxes were paid involuntarily and the bankruptcy trustee was trying to recover funds from the IRS. In Razorback, the taxpayer had voluntarily paid trust fund taxes which the bankruptcy trustee was trying to recover. Consequently, there was substantial confusion over whether the voluntary nature of pre-petition payments was important to the decisions. Also, there was uncertainty whether payment or lack thereof should be a determining factor in deciding what the burden on the IRS or the trustee should be. Since Begier involved a voluntary pre-petition payment, its holding may be limited to other similar situations. However, as will be discussed later, the language of the Begier decision is so broad that it may be applied in future IRS trust fund tax cases, regardless of either the voluntary nature of payment or the lack of payment altogether.

III. Begier v. IRS

A. Facts

American International Airways (AIA) was having trouble meeting its FICA, excise, and income tax withholding payments to the IRS. Consequently, the IRS required AIA to establish a section 7512 account to deposit future tax payments. AIA established the account but neglected to deposit all payments as required. However, AIA did begin to make timely tax payments. The payments were made both from AIA’s general corporate bank accounts and from the trust account. Some time later, AIA filed bankruptcy. The bankruptcy trustee, Harry P. Begier, Jr., tried to set aside payments made to the IRS during the ninety-day pre-petition period.

B. Court Decisions

The bankruptcy court held that the trustee could avoid payments made from the general corporate accounts, but that payments from the trust account were held in trust for the IRS and were not “property of the debtor” within the meaning of the Bankruptcy Code. The Court of Appeals for the Third Circuit and, ultimately, the Supreme

14. 26 U.S.C. § 7512 (1990); see supra note 7 and accompanying text.
Court reversed the bankruptcy court, holding that all amounts paid to the IRS were held in trust by AIA and were not “property of the debtor.”

IV. How Begier Modifies the IRS’s Tracing Burden

A. The Circumstance in Which the Tracing Burden Is Clearly Established—The Case of Voluntary Transfer

The Supreme Court’s decision in Begier requires that there be some nexus between the money that the IRS claims for trust fund taxes and the actual taxes that the debtor withholds. The Court definitively finds a sufficient connection to exist when money is voluntarily transferred pre-petition to the IRS. Therefore, if the IRS can establish that the debtor voluntarily transferred money at any time prior to bankruptcy, the IRS will be entitled to keep such funds.

B. Circumstances in Which the Tracing Burden Is Unclear—Involuntary Transfer or Non-Payment

Unfortunately, if limited to its facts alone, Begier does not give clear guidance as to what other connections, besides voluntary payment by the debtor, are sufficient to allow the IRS to exclude assets from the bankruptcy estate. If the debtor never makes a pre-petition transfer of trust fund monies, as was the case in Randall, what is the tracing burden on the IRS? Must the IRS revert to strict tracing, as in Randall, or is it now permitted to recover the money, even if no transfer is ever made and without further tracing? Also, Begier, on its facts, does not directly address the issue of whether involuntary payments are to be treated the same as voluntary payments. Therefore, an important question in the Begier decision is its implication for future cases with somewhat dissimilar facts.

1. Strict tracing rule of Randall overturned

The Supreme Court stated in Begier that “[t]he strict [tracing] rule of Randall . . . did not survive the adoption of the new bankruptcy code.” By this statement the Court appears to rule out the possibility that courts in future cases, where no money is transferred, will apply

19. Id. at 2260; Begier v. IRS, 878 F.2d 762, 771 (3d Cir. 1989).
20. Begier v. IRS, 110 S. Ct. at 2267 (“[T]he House Report identifies one such [reasonable] assumption to be that any voluntary pre-petition payment of trust-fund taxes out of the debtor’s assets is not a transfer of the debtor’s property.”).
21. Id. at 2266.
the strict tracing requirements of Randall. However, the Court also seems to support the idea that some burden must be placed on the IRS to “‘demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case.’” The Court asserts that “Congress expected that the IRS would have to show some connection between the section 7501 trust and the assets sought to be applied to a debtor’s trust-fund tax obligations.” While the implication of these statements is not clear, it is clear that the strict tracing requirements of Randall were overturned by the enactment of the new Bankruptcy Code.

2. The rule to replace Randall

If Randall’s tracing requirements have been overturned by Begier, what then is the appropriate tracing burden the IRS must meet in cases where no pre-petition payments are made or are made involuntarily? The concurring opinion in Begier offers at least some guidance in answering this question. Justice Scalia suggests that, at a minimum, the taxpayer must have enough assets in her possession at the time of filing to be able to pay the amount due the IRS. If she does not, it would be impossible to show any connection between the section 7501 trust and the assets which either are non-existent at the time of filing or never existed at all. Therefore, one possible limitation to the IRS’s right to collect trust fund taxes outside normal bankruptcy distribution channels might be the fact that the debtor does not have sufficient assets even to pay her trust fund taxes.

However, such a limitation does not seem to be much of a burden on the IRS. If the IRS is allowed to recover trust fund taxes in all circumstances, except where the debtor does not have sufficient assets to pay the taxes, in essence, the IRS will always be entitled to collect trust fund taxes ahead of bankruptcy administrative expenses and other higher priority creditors.

The language used by the majority, though, seems to support this notion of bankruptcy side-stepping for the IRS. Such a conclusion can be derived from a careful reading of the Court’s interpretation of the function and scope of a section 7501 trust. The Court agreed with the

23. Id.
24. Id. at 2269 (Scalia, J., concurring). “When I pay a worker $90 there is no clearly identifiable locus of $10 in withheld taxes that I do not pay him. Indeed, if my total assets at the time of the payment are $90 there is no conceivable locus.” Id.
25. Id.
legislative history that the IRS could recover if it "could demonstrate the amounts of withheld taxes were still in the debtor's possession at the time the petition was filed." This statement seems to indicate that only the abstract "amount" of tax, not the actual physical funds collected, need be in the debtor's possession at the time the bankruptcy petition is filed. Therefore, if the IRS can show that the assets in the debtor's possession equal or exceed the amount of taxes due, the IRS may have met its tracing burden.

This conclusion is further reinforced by the Court's reference to a section 7501 trust as a different creature than a common law trust. The Court states:

A § 7501 trust is radically different from the common-law paradigm, however. That provision states that "the amount of [trust-fund] tax . . . collected or withheld shall be held to be a special fund in trust for the United States." Unlike a common-law trust, in the which the settlor sets aside particular property as the trust res, § 7501 creates a trust in an abstract "amount"—a dollar figure not tied to any particular assets—rather than in the actual dollars withheld.

In essence, the Court is mandating a new type of trust, limited to trusts created under section 7501. This new type of trust violates the well-established principle that a trust cannot exist unless identifiable and separate assets can be shown to create a trust res. Nevertheless, the Court justifies this result by asserting that "[t]he general common-law rule that a trust is not created absent a designation of particular property obviously does not invalidate section 7501's creation of a trust in the 'amount' of withheld taxes. The common law of trusts is not binding on Congress." By so stating, the Court apparently finds that

26. Id. at 2266 (quoting 124 CONG. REC. H32,417 (remarks of Rep. Edwards)).
27. Id. at 2265 (emphasis added).
28. See supra note 4 and accompanying text.
29. Begier v. IRS, 110 S. Ct. 2258, 2265 n.4 (1990) (emphasis added). The Court's conclusion may open doors for federal and state legislatures that wish to recast liens on debtor's property as trusts. If, for instance, states pass environmental laws which establish a trust in the debtor's property equal to the "amount" of damage caused by hazardous waste pollution on the debtor's property, such a statute may give the state a position in bankruptcy ahead of other creditors and administrative expenses. Of course, this assumes that the common law of trusts is also not binding on state legislatures. Prior to Begier, most courts did not allow states to invent trust tracing rules that did not provide for identification of the actual corpus of the trust. See, e.g., Torres v. Eastlick (In re North Am. Coin & Currency, Ltd.), 767 F.2d 1573, 1575 (9th Cir. 1985) (refusing to apply state constructive trust rules in bankruptcy proceedings); Elliott v. Bumb, 356 F.2d 749, 754 (9th Cir.), cert. denied, 385 U.S. 829 (1966) (state law which purported to dispense with need to trace trust assets held inapplicable in bankruptcy). For a look at the states' problems in collecting environmental cleanup costs from polluters and some of the current statutory mechanisms to enable collection, see Note, Recovering Costs for Cleaning Up Hazardous Waste Sites: An Examination of State Superlien Statutes, 63 IND. L.J. 571 (1988).
Congress intended to change the common law of trusts for the benefit of the IRS and that Congress has such power.

Yet, the Court’s ruling seems to go further than necessary. The Court easily could have ruled in favor of the IRS without rewriting trust law. Because the debtor in this case was the settlor of the trust and made the tax payments, the Court could have concluded that the debtor identified the trust by virtue of her payment to the IRS. This would have drawn a narrow rule and preserved current trust law. In addition, the Court did not have to rely on overturning Randall to arrive at its decision. Instead, the Court could have distinguished Begier on the basis of the voluntary payment—a fact not present in Randall. However, the Court’s reliance on other, broader means to reach its decision implies intent to make Begier broadly applicable to all IRS trust fund tax cases, including circumstances where no payment is made or where the payment is made involuntarily.

V. POSSIBLE REASONS FOR ADOPTING BEGIER’S APPROACH

A. Relief for Responsible Persons

One of the primary purposes for the existence of the Bankruptcy Code is to give relief and a “fresh start” to honest debtors who encounter difficulty paying debts. However, in certain circumstances, this purpose may be somewhat frustrated by federal laws which allow various types of debt to be excluded from discharge in bankruptcy. Trust fund taxes, in some cases, are an example of a non-dischargeable debt which, if not paid in bankruptcy, will continue to burden the debtor or debtor’s officers with a continuing obligation to pay the taxes, even after successful completion of a plan of reorganization or liquidation. The Internal Revenue Code provides:

Any person required to collect . . . any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded . . . .

Under this provision, any trust fund money which is not collected

30. See, e.g., G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 111 (rev. 2d ed. 1988) (a trust does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res).


from the estate may be collected from the person(s) responsible for paying over the withheld taxes. If the full tax is not recovered from the estate, the IRS may still pursue collection of the tax after discharge. Therefore, the debtor or the debtor's agents responsible for trust fund payments will, if the IRS is not paid in full in bankruptcy, continue to be burdened with personal liability for trust fund taxes, even after all other debts have been discharged.

However, if the result in Begier is extended to all trust fund tax cases, the threat of non-dischargeable trust fund tax liability will decrease. The minimal tracing requirements imposed by Begier will ensure, in many cases, that all IRS trust fund tax claims will be paid in bankruptcy, leaving no residual obligation after completion of bankruptcy. Thus, persons responsible for making tax payments will not be further burdened with liability for such debts.

B. Federal Budget Deficits

One other potential reason for expanding Begier to cover all trust fund tax obligations in bankruptcy centers on the political events and fiscal developments currently afoot in the United States. Congress has found it increasingly difficult to balance federal spending with tax revenues. Budget deficits have become a way of life in Washington. Congress finds it easier to increase spending to benefit constituents but is uneasy about increasing taxes to match higher spending—probably out of fear of voter backlash. Therefore, it is politically preferable to collect additional monies under the current tax structure than to change the taxing mechanisms, a process that would be subject to much greater public scrutiny. By allowing the IRS to avoid standing in line behind administrative expenses and creditors with higher priority status, the government will be able to collect additional taxes without the corresponding increased visibility of a tax hike. Consequently, Begier's approach is politically expedient.

VI. Unanswered Potential Problems with Begier's Formulation

If the Begier alternative to strict tracing results in bankruptcy side-stepping for the IRS, there are several potential problems and questions which will need to be addressed in the future. This note ex-


34. See, e.g., Mitchell, Save the Gramm-Rudman Sequester, HERITAGE FOUND. REP. (Apr. 3, 1990) (suggesting that federal spending and budget deficits continue to grow uncontrollably).
amines a few of these concerns, although there are undoubtedly many others, in order to point out some difficulties that may lie ahead if the abstract trust concept is implemented as Begier seems to recommend.

A. What Is the Scope of “Amount”?—The Priority Problem

Traditionally, secured creditors in bankruptcy have been repaid out of the collateral which secured their right to payment. However, if, as Begier suggests, the IRS is entitled to recover its trust fund tax claim out of the “amounts” in the debtor’s possession, without the need to trace the source of those amounts to the associated trust fund taxes, it may be possible that secured creditors will have their collateral taken to pay debtor’s trust fund taxes.

For example, assume that debtor, D, has trust fund tax liabilities of $1,000,000 and non-exempt property, Blackacre, valued at $1,000,000. D has no other exempt assets. However, C, a secured creditor of D, has a valid security interest in Blackacre to secure an obligation of $500,000. D files bankruptcy. Thereafter, the IRS seeks to seize Blackacre, arguing that the amount of withheld taxes was in D’s possession at the commencement of the case in the form of Blackacre. Therefore, the IRS, if successful, will arguably be entitled to dispose of Blackacre outside bankruptcy, leaving the estate with no assets from which to pay the otherwise secured creditor.

Of course, in the situation above, C might argue that because Blackacre is subject to its lien, D does not have the amount of taxes still in his possession. Instead, D has only $500,000 in his possession, the total value of Blackacre less the amount of C’s lien. In other words, C may allege that “amount” refers only to unencumbered assets. Alternatively, C may argue that “amount” refers only to money in D’s possession, not to land or personalty which D owns. In any event, the determination of the exact meaning or scope of the word “amount” may have profound implications for debtor-creditor transactions in the future if Begier is applied to cases involving the non-payment of trust fund taxes.

A similar problem with the majority opinion in Begier, suggested by Justice Scalia in his concurring opinion, is illustrated by the following example. Suppose debtor, D, has assets valued at $1,000,000. However, the IRS has a claim for trust fund taxes equaling $1,500,000. Does the argument that a trust automatically arises, in a sum equal to the amount of withheld taxes, apply in this case? The bankruptcy trustee presumably will argue that because the IRS cannot

35. Begier v. IRS, 110 S. Ct. 2258, 2269 (1990); see supra note 24 and accompanying text.
demonstrate that D has the full amount of trust fund taxes in her possession, the IRS cannot recover anything. The trustee will claim that a trust could not possibly have arisen in the amount of the withheld taxes because such sum does not even exist. The IRS will probably argue, in response, that to the extent that D has some of the amount of the tax in her possession, the IRS is entitled to that amount ahead of administrative and higher priority claims.

In short, Begier leaves unanswered the potential scope of the word “amount.” If future cases pay heed to the logic underlying the decision, there will necessarily be much future litigation to decide whether “amount” means property as well as money and whether the term encompasses all property and money or merely items not covered by valid security interests. These future cases may also decide whether a trust can even arise in the amount of the tax if the debtor never had sufficient assets to pay such tax.

B. Does Begier Promote Equitable Distribution Principles?

If a debtor has trust fund liability which equals the value of her assets, then arguably, under Begier the IRS may be able to take possession of all the debtor’s assets, even after a petition in bankruptcy has been filed. Under such circumstances, the estate would be left with nothing to distribute. Administrative expenses would not be paid. Attorneys would not be able to collect their fees. Other priority creditors would not recover anything. Secured creditors would be left without collateral. Instead, the IRS would take everything. Such a result is contrary to the equitable distribution principles underlying the entire bankruptcy process. Rather, it seems to promote a policy of inequitable distribution. Instead of dividing the debtor’s assets among creditors, Begier may allow the IRS to dispose of most of the debtor’s estate, leaving few assets for other creditors. This exact criticism led the Court in Randall to conclude that “the statutory policy of subordinating taxes to costs and expenses of administration would not be served by creating or enforcing trusts which eat up an estate leaving little or nothing for creditors and court officers . . . .”

The Randall criticism of allowing the IRS to extract trust fund taxes without tracing their source seems even more appropriate in light of the system of priorities explicitly established in the Bankruptcy Code. Section 507 specifically provides that taxes are to be paid only after administrative expenses and five additional types of priority

36. See id. at 2261.
claims.38 By elevating certain taxes above these other claims, the judiciary circumvents the language of the Bankruptcy Code, in direct contradiction of the legislature's intended treatment of such taxes.

C. Will Section 7512 Lose Its Importance?

Section 7512 allows the IRS to require debtors to establish separate bank accounts for the deposit of trust fund taxes.39 As previously noted, the ostensible purpose of this provision may be to prevent commingling of trust fund taxes with debtor's personal assets, thus making it easier for the IRS to trace the disposition of such taxes.40 But if Begier gives the IRS the ability to take any and all assets in the debtor's possession upon bankruptcy, the provision may become a useless tool. The IRS will not be concerned if there is not strict segregation of debtor's property and trust fund taxes. After all, if Begier's analysis holds true, as long as the IRS can show that the debtor has the "amount" of taxes in her possession, it may win with no other showing. As a result, the utility of section 7512 as a tracing aid may be completely lost.

D. Does Begier Venture into New Uncharted Trust Rules?

If trusts of abstract "amounts" can be created, is Begier a first step toward a new perception of trust law? If it is, what form will the trust rules take? Will different trust rules apply depending on whether a governmental entity or a private concern is the beneficiary of the trust? Will it become possible to create floating trusts—trusts which have no identifiable res but merely "float" over unidentified assets—in non-bankruptcy situations? These and other questions are the most difficult and perhaps the most important issues raised by Begier. The Supreme Court's simple statement that "the common law of trusts is not binding on Congress"41 may be nothing more than a blot of ink in a reporter, or it may be the beginning of the end for trust law as now practiced.

VII. CONCLUSION

Begier firmly cements new trust tracing rules to the IRS's benefit. However, the limits of these rules and their eventual impact is subject to less concrete suppositions. Nevertheless, the answer to at least one question is clear from Begier: If a debtor makes a voluntary payment of

40. See supra text accompanying note 7.
trust fund taxes to the IRS prior to bankruptcy, such a transfer is never subject to avoidance. However, if no transfer is made, or if a transfer is made involuntarily, courts cannot use Begier to determine the IRS’s entitlement to be paid outside normal bankruptcy distribution channels.

With the above concepts in mind, some statements made in Begier point to a possible new view of the IRS’s right to payment in bankruptcy. Begier may eliminate the need for the IRS to trace withheld taxes. Instead, in future cases the IRS may be required to show only that the debtor had sufficient funds to pay the tax at the time of filing bankruptcy. If this is the end result, Begier may spell relief for persons responsible for paying trust fund taxes, thus not only assisting the Treasury in filling the federal government’s coffers but also aiding Congress in balancing the federal budget. However, it may also present unanswered priority questions in bankruptcy by causing bankruptcy to shift toward payment of government claims and away from equitable distribution principles. In addition, Begier may be an experiment which ultimately changes basic trust rules. With unanswered questions waiting in the wings, Begier may play a leading role in developing new concepts and practices in modern bankruptcy law, or it simply may remain off-stage—a faceless member of a forgotten cast of innovative but impractical cases.

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