IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re IDEAL SECURITY HARDWARE CORP., Debtor.	No. 91-30877 Chapter 7
N. DAVID ROBERTS, JR., TRUSTEE, Plaintiff, *v.* A.B. PLASTICS, INC., f/k/a AMERICAN BICTECH, Defendant.	Adv. Pro. No. 94-2088
N. DAVID ROBERTS, JR., TRUSTEE, Plaintiff, *v.* STEWART AND ASSOCIATES, INC., Defendant.	Adv. Pro. No. 94-2048

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

These two adversary proceedings, seeking the avoidance and recovery of alleged preferential transfers, were consolidated by the court for the purpose of deciding the same issue raised by each defendant in its respective motion to dismiss[1]: whether the two-year statute of limitations provided by 11 U.S.C. § 546(a)(1) has run against the chapter 7 trustee, N. David Roberts, Jr. (the "Trustee"). The pertinent events and dates which the court must consider in making such a determination are not in dispute. The debtor, Ideal Security Hardware Corporation, voluntarily filed a petition under chapter 11 on February 19, 1991. Upon the United States Trustee's motion, the bankruptcy case was converted to one under chapter 7 by order entered May 21, 1992. Plaintiff was appointed interim chapter 7 trustee on that same day. Upon the subsequent meeting of creditors on June 24, 1992, plaintiff was installed as the permanent chapter 7 trustee. Thereafter, these two adversary proceedings were filed on May 19, 1994.

The defendants assert that the adversary proceedings are barred by 11 U.S.C. § 546(a)(1) because they were not commenced within two years of the date the chapter 11 petition was filed. The Trustee responds that both lawsuits were commenced within two years of his appointment as chapter 7 trustee, and that the plain

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[1]Although the defendant in Adv. Pro. No. 94-2048, Stewart and Associates, Inc., did not actually file a motion to dismiss with the clerk, a brief in support of a motion to dismiss was filed on June 15, 1995, to which the plaintiff responded without objection to the procedural defect. Accordingly, the court will treat the brief of the defendant as a motion under Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b).

language of § 546(a)(1) provides two years from that appointment in which to institute adversary proceedings such as these. Because the court agrees with the Trustee, the motions to dismiss will be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

I.

There is no dispute that the version of § 546(a)(1) applicable to this bankruptcy case is that which existed prior to the enactment of the Bankruptcy Reform Act of 1994 (the "1994 Act") on October 22, 1994. Indeed, the amended version of § 546(a)[2] clears up the dispute presented here. But since the amendment to § 546(a) by the 1994 Act does not apply to cases commenced prior to October 22, 1994, the court must construe the earlier version. That version of § 546(a) provided that: "[a]n action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed."

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[2]Sec. 216 of the 1994 Act clarified and changed § 546(a) to now state as follows:

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

Pub. L. No. 103-394, § 216, 108 Stat. 4106, 4126-27 (1994).

Recently, the court construed the same provision upon considering the related question of whether the statute runs on a chapter 11 debtor in possession (and the official unsecured creditors' committee asserting a § 544(b) fraudulent conveyance action on behalf of the debtor in possession). *See The Official Committee of Unsecured Creditors' of Millers Cove Energy Co., Inc. v. Audus (In re Millers Cove Energy Co., Inc.)*, 179 B.R. 77 (Bankr. E.D. Tenn. 1995). Despite the fact that no trustee had been appointed in that case, the court concluded that the limitations period nevertheless had run because § 546(a), when construed with § 1107(a) of the Code which not only provides the debtor in possession with the rights and powers of a trustee but also subjects it to any limitations on a trustee, could not be read so narrowly as to preclude its application to a nonappointed entity such as the debtor in possession. *Id.* at 79-84. Section 1107(a) is not applicable to this converted case, however. As a result, the court must construe § 546(a) according to its plain language in order to determine if the first appointed trustee in this case has two years in which to institute preference avoidance and recovery lawsuits regardless of the fact that more than two years has elapsed from the commencement of the bankruptcy case.[3]

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[3]No chapter 11 trustee was appointed in the case *sub judice*. Accordingly, it is not necessary for the court to reach the related question of whether subsequent to the appointment of a chapter 11 trustee, a chapter 7 trustee would have an additional two years after conversion in which to commence adversary proceedings to avoid and recover preferential transfers. Needless to say, the courts are likewise divided over whether the statute begins to run anew in such instances. *Compare, e.g., McCuskey v. Central Trailer*
(continued...)

II.

Although no circuit court of appeals has rendered a reported decision on this precise issue, it is by no means a novel one. The numerous lower courts which have addressed it have understandably reached opposite conclusions. *See, e.g., Pineo v. Reeves Bank (In re Arthur F. Hazen & Co., Inc.)*, 184 B.R. 233 (Bankr. W.D. Pa. 1995)(discussing fact that even courts within the same district are hopelessly divided). One side takes the view that there is only one limitations period which commences upon the chapter 11 filing and the resulting establishment of a debtor in possession, and the limitations period is not renewed or extended upon a subsequent conversion to chapter 7 and the appointment of a statutory trustee. *See Wilmington Savings Fund Society v. Mazze (In re Austin Truck Rental, Inc.)*, 183 B.R. 398, 401 (E.D. Pa. 1995); *Schwartz v. Kursman (In re Harry Levin, Inc.)*, 175 B.R. 560, 575 (Bankr. E.D. Pa. 1994); *Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.)*, 170 B.R. 689, 692 (C.D. Cal. 1994); *Dumas v. Research Testing Lab, Inc. (In re EPI Products USA, Inc.)*, 162 B.R. 1, 2 (Bankr. C.D. Cal. 1993).

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[3](...continued)
Services, Ltd. (In re Rose Way, Inc.), 37 F.3d 1329 (8th Cir. 1994), *reh'g denied*, (1994); *Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413 (9th Cir. 1993); *Lindquist v. First Michigan Bank (In re Dryland Marina, Inc.)*, 180 B.R. 487 (Bankr. W.D. Mich. 1995)(all holding that statute continues to run and chapter 7 trustee is not entitled to a new two-year limitations period), with *Jobin v. Boryla (In re M&L Business Machine Co., Inc.)*, 171 B.R. 383 (D. Colo. 1994); *Hovis v. United Screen Printers, Inc. (In re Elkay Industries, Inc.)*, 167 B.R. 404 (D.S.C. 1994)(both holding that after conversion, statute will begin to run anew for chapter 7 trustee upon appointment).

Representing the majority view, the opposing side concludes there may be two distinct limitations periods: one beginning upon the commencement of the chapter 11 case and the second upon the appointment of the first statutory trustee. *See Slone-Stiver v. Sol Tick & Co. (In re Tower Metal Alloy)*, ___ B.R. ___, 1995 WL 385017 (Bankr. S.D. Ohio 1995); *In re Arthur F. Hazen & Co.*, 184 B.R. at 235; *Styler v. Conoco, Inc. (In re Peterson Distributing, Inc.)*, 176 B.R. 584, 590 (Bankr. D. Utah 1995); *Young v. Paramount Communications, Inc. (In re Wingspread Corp.)*, 178 B.R. 938, 944 (Bankr. S.D.N.Y. 1995); *Biggs v. Biljo, Inc. (In re Goetz)*, 175 B.R. 743, 745 (Bankr. C.D. Cal. 1994); *England v. Whitney (In re California Canners & Growers)*, 175 B.R. 346 (9th Cir. BAP 1994); *Steege v. Helmsley-Spear, Inc. (In re Superior Toy & Manufacturing Co., Inc.)*, 175 B.R. 693, 698 (Bankr. N.D. Ill. 1994); *City of Des Moines v. Solow (In re Midway Airlines, Inc.)*, 173 B.R. 148, 149 (N.D. Ill. 1994); *Nigro v. Pittsburg Post-Gazette (In re Appliance Store, Inc.)*, 171 B.R. 525, 527 (Bankr. W.D. Pa. 1994); *Grabscheid v. Knox Metals Corp. (In re Luria Steel and Trading Corp.)*, 168 B.R. 913, 917 (Bankr. N.D. Ill. 1994); *Liebersohn v. Rental Tools/Equipment (In re Nelson Co.)*, 167 B.R. 1018 (Bankr. E.D. Pa. 1994); *Daff v. Regal Recovery, Inc. (In re Continental Capital & Credit, Inc.)*, 158 B.R. 828, 829 (Bankr. C.D. Cal. 1993).

In addressing this issue, the minority generally focus upon the fundamental purpose behind a statute of limitations, *i.e.*, to prevent the bringing of overly stale claims and to give certainty to repose from suit. *See, e.g., In re Austin Truck Rental, Inc.*,

183 B.R. at 401. These courts conclude that when one accepts, for the purposes of § 546(a)(1), that a chapter 11 debtor in possession is the functional equivalent of a chapter 11 trustee, there is no justification for allowing a chapter 7 trustee a renewed statute of limitations upon conversion. *See, e.g., In re Harry Levin, Inc.*, 175 B.R. at 576.

On the other hand, the majority, for the most part, begin their analysis by interpreting § 546(a)(1) in accordance with its ordinary meaning which unequivocally states that a chapter 7 trustee has "two years after the appointment" in which to commence an adversary proceeding to avoid and recover preferences. *See, e.g., In re Appliance Store, Inc.*, 171 B.R. at 527. Since the literal interpretation of the statute is unambiguous and does not otherwise produce an absurd result which thwarts its purpose, these courts deem it unnecessary to carry the analysis any further. *See, e.g., In re Peterson Distributing, Inc.*, 176 B.R. at 589.

III.

This court believes the majority view to be the correct one. Although a debtor in possession may be similar to a trustee in many aspects, this fact alone is insufficient to override the plain language of § 546(a)(1). One bankruptcy court considering this issue has noted the U.S. Supreme Court's directives in this regard:

> When interpreting a statute, the natural point of embarkment is the language of the statute itself. *Pennsylvania Dep. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S. Ct. 2126, 2130-31, 109 L. Ed.2d 588 (1990). ... Where a statute is clear on its face, the plain meaning of the language should apply. *Estate of*

> *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, ___, 112 S. Ct. 2589, 2594, 120 L. Ed.2d 379 (1992); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242, 109 S. Ct. 1026, 1031-32, 103 L. Ed.2d 290 (1989). A court departs from the literal meaning of a statute only where the literal application of a statute will produce a result demonstratively at odds with the intentions of the drafters. *Ron Pair*, 489 U.S. at 242, 109 S. Ct. at 1030-31. If a court finds no ambiguity in the express language of the statute, then it is bound to apply the statute as written without resort to other tools of interpretation. *Tidwell v. Bank South (In re Denver/Robins Venture Partners, Ltd.)*, 166 B.R. 769, 771-72 (M.D. Ga. 1994), *citing, Reves v. Ernst & Young*, ___ U.S. ___, ___, 113 S. Ct. 1163, 1169, 122 L. Ed.2d 525 (1993).

In re Luria Steel and Trading Corp., 168 B.R. at 915. A review of the legislative history to § 546(a)[4] provides no insight that would justify applying anything other than the plain meaning of § 546(a).

Additionally, the result that two separate statutes of limitations may arise in cases such as this, one for the debtor in possession and the second for the first statutorily appointed trustee, comports with the amendment to § 546(a) by the 1994 Act. Amended § 546(a)(1) provides a two-year statute of limitations which commences upon the entry of an order for relief and a second one-year statute of limitations which begins upon the appointment or election of a trustee in the event one is appointed or elected before the original two-year statute of limitations expires. Although the amendment does not apply to this case, the amendment and the policies which it intends to promote may be taken into

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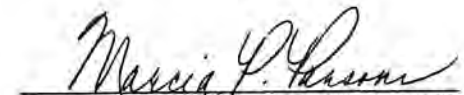
[4]The scant legislative history to § 546(a) states that the "[s]ubsection ... adds a statute of limitations to the use by the trustee of the avoiding powers. The limitation is two years after his appointment, or the time the case is closed or dismissed, whichever occurs later." S. REP. No. 989, 95th Cong., 2d Sess. 87 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5873.

consideration by the court in determining the correct interpretation of the statute in question. *See In re Millers Cove Energy Co., Inc.*, 179 B.R. at 83-84. Obviously, this particular dilemma in part prompted the amendment to § 546(a) by the 1994 Act.

It is this court's opinion that the amendment to § 546(a) both clarified that a debtor in possession was subject to a two-year statute of limitations for bringing avoidance and recovery actions, and changed the statutory scheme to reduce the window of time in which any subsequently appointed or elected trustee could likewise prosecute such actions in the event the appointment or election of the first trustee occurs within two years of entry of the order for relief. The decision to follow the literal language of the unamended version of § 546(a) is supported by its plain language and buttressed by the amendment. Accordingly, the court will contemporaneously enter an order denying the motions to dismiss.

ENTER: September 8, 1995

BY THE COURT



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