

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

THE JULIEN COMPANY, INC.,

Debtor.

BK #90-20283-WHB
Chapter 11

JACK F. MARLOW, Trustee for
The Julien Company, Inc.,

Plaintiff,

v.

Adversary Proceeding
No. 90-0324

THE UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS

This cause is before the Court on the motion of the defendant, the United States of America (Internal Revenue Service), to dismiss this case with prejudice for lack of jurisdiction pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, as made applicable by F.R.B.P. 7012(b). This proceeding is core pursuant to 28 U.S.C. §157(b)(2)(E) and (H). The issue presented is whether the United States has waived its sovereign immunity, thereby consenting to this Court's jurisdiction over it. See 11 U.S.C. §106. The following contains findings of fact and conclusions of law pursuant to F.R.B.P. 7052.

SUMMARY OF FACTS

On October 31, 1990, the Trustee for The Julien Company, Jack F. Marlow, filed this adversary proceeding against the defendant, the United States, to recover funds allegedly paid to the Internal Revenue Service ("IRS") from the debtor's funds in satisfaction of the individual income tax obligations of the debtor's

shareholders.¹ Specifically, the complaint alleges that on April 17, 1989 and September 15, 1989, Julien J. Hohenberg, acting ultra vires, used the debtor's funds to pay personal federal tax liabilities of its shareholders totalling \$2,595,000.00 and \$414,435.00 respectively.² The Trustee claims that the said transfers of the debtor's funds are avoidable. The complaint's alternative grounds for relief are: turnover under 11 U.S.C. §§105 and 542; recovery of fraudulent transfers under 11 U.S.C. §§544(b), 548, and 550 and under Tenn. Code Annot. §66-3-305, et. seq.; recovery due to erroneous collection under 28 U.S.C. §1346(a)(1); and setoff pursuant to 11 U.S.C. §106(b). The Trustee also prays for declaratory judgments stating that the funds transferred are property of the estate which is being wrongfully held by the United States, should be offset by the claims of the IRS and the United States,³ and should be rightfully returned to the bankruptcy estate. Finally, the Trustee alleges subject matter jurisdiction pursuant to 11 U.S.C. §§505, 542, 544, 548, and 550 and 28 U.S.C. §§157, 1334(b), 1346(a), and 1491(a)(1).

¹ On June 20, 1990, the Trustee requested a refund of the said funds from the IRS pursuant to 11 U.S.C. §505(a)(2)(B). The IRS responded on September 5, 1990, stating that the request had been disallowed and that suit would need to be filed with the United States District Court having jurisdiction.

² The shareholders of the debtor are: Sarah J. Hohenberg, Thomas M. and Juliet H. Thompson, Letitia C. Hohenberg, Adam E. Hohenberg, Mary M. G. Hohenberg, Jason A. Baum Hohenberg, Rachel J. Hohenberg (minor), and Julien J. Hohenberg.

³ The IRS and the United States Department of Agriculture filed proofs of claims against the bankruptcy estate in the amounts of \$273,033.19 and \$179,213.50 respectively.

On March 14, 1991, and June 26, 1991, the United States filed original and amended third party complaints against Julien J. Hohenberg and the above-mentioned shareholders claiming indemnity for any amounts recovered by the Trustee. See supra note 2. All third party defendants were dismissed from the suit for lack of jurisdiction on December 27, 1991, except for Julien J. Hohenberg.⁴

The United States has now filed this motion to dismiss with prejudice based on a lack of jurisdiction; it asserts that its sovereign immunity has not been waived.

DISCUSSION

It is a well-settled principle that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." U.S. v. Testan, 424 U.S. 392, 399 (1976); U.S. v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767 (1941). Therefore, "waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'" United States v. Nordic Village, Inc., _____ U.S. _____, 112 S. Ct. 1011, 1014 (1992) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453, 457 (1990) (emphasis added)). Moreover, waivers generally should not be "liberally construed;" they "must be 'construed strictly in favor of the sovereign . . . and not enlarge[d] . . . beyond what the language requires[.]'" Nordic Village, Inc., 112 S. Ct. at 1014-15 (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S. Ct. 3274, 3278 (1983)).

Section 106 of the Bankruptcy Code waives the United States' sovereign immunity in certain circumstances. It provides that:

- (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

⁴ The jurisdiction of Julien J. Hohenberg was stipulated to by the parties, as he is before this Court in his own bankruptcy proceeding.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity -

(1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106.

A. 11 U.S.C. §106(a)

Nordic Village held that the government plainly waives sovereign immunity against monetary relief with respect to compulsory counterclaims to governmental claims. Id. at 1015. Therefore, under §106(a), if the government files a proof of claim, sovereign immunity is waived for any claim against the government which "is property of the estate and arose out of the same transaction or occurrence out of which such governmental unit's claim arose." Id. See 2 COLLIER ON BANKRUPTCY ¶106.02, at 106-4 to -6 (15th ed. 1992).

In this case, the United States (IRS) filed a proof of claim in the amount of \$273,033.19 on June 22, 1990. The claim was for corporate employment taxes and penalties for 1987 and 1989 which the debtor corporation did not pay. See United States' Motion to Dismiss, Exh. A. On the other hand, the Trustee's claim against the United States is based on the alleged ultra vires actions of Julien Hohenberg in paying the personal federal income tax liabilities of the debtor's shareholders out of the debtor's funds. See Complaint of Trustee. The Trustee's claim, based on payment of individual taxes, clearly did not arise out of the same occurrence as the United States' claim for nonpayment of corporate taxes. In fact, the Trustee has agreed that §106(a) is not applicable in this case. See Trustee's Objection to Motion to Dismiss at 3. Therefore, the United States has not waived its sovereign immunity against monetary recovery pursuant to §106(a), and this Court does not possess jurisdiction over the United States for suit under that section.

B. 11 U.S.C. §106(b)

The United States Supreme Court also held in Nordic Village that the government waives its sovereign immunity against monetary relief with respect to "permissive counterclaims to governmental claims capped by a setoff limitation under §106(b)." 112 S. Ct. at 1015. In other words, an allowed claim of a governmental unit may be offset by any claim against that governmental unit that is property of the estate. 11 U.S.C. §106(b). In this case, the Trustee alleges in his complaint that the filed claims of the IRS and the United States Department of Agriculture, to the extent they are allowed, should be offset against the value of the property alleged to have been wrongfully collected by the IRS (or paid by Julien Hohenberg with the debtor's funds) in a total amount of \$3,009,435.00. See Complaint of Trustee at 9.

However, neither the IRS nor the United States Department of Agriculture have present claims before this Court to offset against any claim of the Trustee. As previously explained, the United States (IRS) filed a proof of claim on June 22, 1990, in the amount of \$273,033.19 for unpaid corporate employment taxes and penalties. See United States' Motion to Dismiss, Exh. A. Pursuant to an Agreed Order entered on July 27, 1990, the IRS offset its claim against debtor's funds in the amount of \$1,338,173.05 which it was holding on deposit for income and excise taxes. See id., Exh. B.⁵ The debtor therefore received \$1,262,306.41 from the IRS which represented a tax refund plus accrued interest. See id., Exh. C. Thus, the United States (IRS) no longer has a claim against the bankruptcy estate which the Trustee can use to offset against his alleged claim.

⁵ Although the United States filed a proof of claim in the amount of \$273,033.19, which was disputed by the Trustee, the United States apparently accepted a reduction of the amount owed to \$233,606.05 which was then subsequently setoff against the debtor's funds held by the IRS. See United States' Motion To Dismiss, Exh. A, B; United States' Memorandum In Support Of Its Motion To Dismiss at 6.

In addition, the United States Department of Agriculture's claim has already been offset. The Department filed a proof of claim in the amount of \$179,213.50 on June 19, 1990.⁶ See id., Exh. D. However, on July 20, 1990, this Court lifted the automatic stay, thereby permitting the Commodity Credit Corporation ("CCC") to setoff a debt owed to the debtor by CCC against a debt owed by the debtor to the Department. See id., Exh. E. CCC then paid the balance of \$54,415.82 to the debtor which satisfied any claims CCC or the Department had against the bankruptcy estate. See id., Exh. F. Therefore, the United States Department of Agriculture no longer possesses a claim against the bankruptcy estate which the Trustee can use to offset against his alleged claim.

Furthermore, setoff is limited to the extent of the government's claim, and affirmative recovery is not allowed under §106(b). See 2 COLLIER ON BANKRUPTCY ¶106.03, at 106-6 to -8 (15th ed. 1992). Since neither the United States (IRS) nor the United States Department of Agriculture possesses a present claim against the debtor's bankruptcy estate, the Trustee cannot setoff any claim he may prove against the government. Therefore, the United States has not waived its sovereign immunity against monetary recovery pursuant to §106(b), and this Court does not possess jurisdiction over the United States for purposes of setoff.

C. 11 U.S.C. 106(c)

1. Monetary Recovery

Section 106(c) of the Bankruptcy Code waives sovereign immunity too, but "it fails to establish unambiguously that the waiver extends to monetary claims." United States v. Nordic Village, Inc., _____ U.S. _____, 112 S. Ct. 1011, 1015 (1992). See Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76, 84-85 (1989). The United States Supreme Court recently held that §106(c) is susceptible to "at least two interpretations that do not authorize monetary relief." Id. The first interpretation permits the Court to issue "declaratory and injunctive," though not monetary, relief against the

⁶ The proof of claim was actually filed in the name of the Agricultural Marketing Service, a division of the United States Department of Agriculture.

government through reading the two paragraphs of §106(c) as complementary. Id. The second interpretation reads the first paragraph as using the "triggering words" enumerated there to apply fully to governmental units, but limiting that application by the requirements of subsections (a) and (b). Id. at 1016.

The Trustee cannot recover monetarily against the United States under either of these readings in this case. The Trustee requests turnover of the funds or recovery of the funds which were allegedly fraudulently transferred or erroneously collected. See Complaint at 9-10. This monetary recovery is forbidden in the first interpretation, and the second interpretation is limited by subsections (a) and (b) which have been determined as not applicable here. See 11 U.S.C. §106. Therefore, the United States has not waived its sovereign immunity against monetary recovery under §106(c), and this Court does not possess jurisdiction over the United States for the purposes of monetary recovery.

2. Declaratory Judgment

One interpretation of 11 U.S.C. §106(c) does permit the Court to issue "declaratory and injunctive" relief against the government. Nordic Village, Inc., 112 S. Ct. at 1015. In addition to monetary recovery, in his complaint, the Trustee prays for declaratory judgments stating that the United States, through the IRS, is the initial or beneficial transferee of fraudulent transfers from property of the bankruptcy estate in the total amount of \$3,009,345.00, that this amount should be offset against the allowed claims of the United States and the IRS, and that the balance of said funds is wrongfully held by the United States and should be rightfully returned to the bankruptcy estate.⁷ See Complaint at 5-8. The United States argues that the issuance of the declaratory judgments requested is tantamount to monetary relief against the United States

⁷ This Court notes that the Trustee has attempted, in a memorandum response, to "abandon" his complaint's request for a declaration that funds should be returned to the estate by the United States. See Trustee's Response To United States' Reply To Trustee's Objection Regarding Alternative Grounds For Relief at 6. He now merely desires the declaration to state that the subject transfers were fraudulent and that the United States is the initial transferee. Id. However, a responsive pleading to the Trustee's complaint has been served in this case, thereby permitting amendment only through leave of this Court or the United States' written consent. F.R.B.P. 7015; F.R.C.P. 15(a). Neither has been given; and so, proper amendment has not been accomplished. Nevertheless, the ruling of this court would be no different if the declaration prayer was limited, as requested, because the limitation would not change the declaratory judgment's effect on the United States.

which is forbidden by Nordic Village under § 106(c). See United States' Reply To The Trustee's Objection To Its Motion To Dismiss at 2. In support, the United States draws a parallel and cites cases which state that the jurisdiction of the United States Claims Court, which renders judgment on claims for monetary damages against the United States, cannot be avoided where the plaintiff's "ultimate aim" in seeking declaratory relief is to obtain money.⁸ See United States v. City of Kansas City, Kan., 761 F.2d 605, 608 (10th Cir. 1985); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 823-24 (10th Cir. 1981).

In response, the Trustee has cited a series of cases which hold that "district court jurisdiction over a suit for nonmonetary relief is not foreclosed by the fact that it may later be the basis for an award of damages against the United States." Hahn v. United States, 757 F. 2d 581, 589 (3d Cir. 1985). See Sarasota, Fla. v. EPA, 799 F.2d 674, 681 (11th Cir. 1986); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981).

⁸ The United States Claims Court's jurisdiction is based on the "Tucker Act," 28 U.S.C. 1491. This Court notes that only claims for money damages, as opposed to monetary relief such as the return of monies, are allowed under the "Tucker Act." See infra at 15-16. Nordic Village made no such distinction, and so this Court takes the broad stance, as required by Nordic Village, that the nonwaiver of sovereign immunity under § 106(c) against monetary recovery encompasses both claims for money damages and other types of monetary recovery. See 112 S.Ct. at 1015. For further discussion concerning the "Tucker Act," see infra at 14.

In Sarasota, the Court held that a declaratory judgment on the lawfulness of the criteria used by the EPA to reject the plaintiff's application for federal funds was not a money claim which must be brought in the United States Claims Court under the "Tucker Act," 28 U.S.C. §1491(a)(1).⁹ Sarasota, Fla., 799 F.2d at 677-78, 681. However, the Court did note that this declaratory judgment could only determine which criteria were appropriate and then direct the EPA to reconsider the application. Id. at 681. In other words, "[r]esolution of the . . . controversy . . . [would] not entitle [the plaintiff] to federal grant funds if the remaining steps in the grant process, such as preparation of an environmental assessment, [were] completed to EPA's satisfaction." Id. Similarly, the plaintiff in Laguna merely sought a declaration that it possessed contract rights against the United States, rather than money damages for breach. Laguna Hermosa Corp., 643 F.2d at 1379. Finally, the Court in Hahn noted that "Claims Court jurisdiction may not be evaded by merely disguising a monetary claim as a claim for an injunction requiring the payment of money." Hahn, 757 F.2d at 589. The Hahn Court decided that the equitable relief sought there would have a significant effect, instead of being "moot, futile, or negligible in comparison with the money damages sought." Id.

The present case is distinguishable from the cases cited by the Trustee. This case is in bankruptcy court and must be concerned with §106. See 112 S. Ct. at 1012, 1017. It appears that the request for declaratory judgments that fraudulent transfers were made and that those funds should be either offset or returned to the estate is an attempt to evade the United States' sovereign immunity by disguising a claim for monetary relief. See Complaint at 9. The "ultimate aim" of the declaratory request is to receive the transferred monies. This judgment would determine entitlement to and the amount of monetary relief by specifically deciding which transfers were fraudulent under 11 U.S.C. §548 or applicable state law. The equitable relief sought would be moot in comparison with the monetary relief. Nothing would be left for this Court to decide, except to order payment to the Trustee. This situation differs greatly from the cases cited by

⁹ Under the "Little Tucker Act," 28 U.S.C. §1346(a)(2), the United States Claims Court has exclusive jurisdiction for "Tucker Act" claims exceeding \$10,000.00. See also 28 U.S.C. §1491(a)(1). The "claim" in Sarasota totalled \$22,000,000.00. Sarasota, Fla., 799 F.2d at 679.

the Trustee, in that further substantive action was required to obtain money in those cases. See supra. Here, the declaratory judgment would be the equivalent of a judgment for monetary recovery.¹⁰

¹⁰ In Nordic Village, the United States Supreme Court gave examples of permissible declaratory judgments under §106(c): the determination of dischargeability of an estate's liability to the United States; and the determination of an amount owed to the government, such as unpaid federal taxes, under §505(a)(1). Nordic Village, 112 S. Ct. at 1016.

This money judgment would also serve no purpose in this case and would cause both parties to expend needless funds in litigation. This Court may not order payment by the United States based on a declaratory judgment because of the government's lack of waiver of its sovereign immunity under §106(c). Furthermore, the Trustee has stated that he is limiting the purpose of the judgment to future offsets pursuant to §106(b) under which sovereign immunity has allegedly been waived. See Trustee's Response to United States' Reply to Trustee's Objection Regarding Alternative Grounds For Relief at 6-7. However, as previously explained, the claims of the United States Department of Agriculture and the IRS, filed on June 19, 1990, and June 22, 1990, respectively, have already been setoff. Therefore, since a waiver of sovereign immunity under §106(b) is conditioned either on the filing of a proof of claim by the government or the actual existence of a governmental "claim," and, to this Court's knowledge, no further governmental claims have been filed or are in existence, the United States has not yet waived sovereign immunity under §106(b). See 2 COLLIER ON BANKRUPTCY ¶106.02, at 106-5 & n. 3, ¶106.03, at 106-7 to -8 (15th ed. 1992) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977)).¹¹ Thus, this Court has no authority to issue a declaratory judgment, which is tantamount to monetary relief prohibited under §106(c), to be reserved for the purpose of future setoffs when the United States has not waived its sovereign immunity under either §106(b) or (c). If the United States does have and/or file another claim against the bankruptcy estate in the future, then the Trustee will have an opportunity, at that point, to file a permissive counterclaim based on the allegedly fraudulent transfers for purposes of setoff. See 11 U.S.C. §106(b).

¹¹ The more frequent judicial view is that both subsections (a) and (b) of §106 condition the waiver of sovereign immunity on the filing of a proof of claim. See generally In re Town & Country Home Nursing Serv., Inc., 112 B.R. 329, 332-34 (BAP 9th Cir. 1990) (holding waiver under §106(a) is conditioned upon the existence of a governmental "claim"); In re Neavear, 674 F.2d 1201, 1204 (7th Cir. 1982) (holding waiver under §106(b) is conditioned on the government's filing of a proof of claim).

Finally, the Trustee also argues that declaratory judgments, as previously described, would enable him to recover from the benefitted shareholders under 11 U.S.C. §550(a)(1). See Trustee's Response to United States' Reply to Trustee's Objection Regarding Alternative Grounds For Relief at 7. However, this Court has already ruled that it does not have subject matter jurisdiction over these shareholders under the third party complaint. See Memorandum Opinion And Order Regarding Motion To Dismiss Filed By Third Party Defendants (December 27, 1991). Any declaratory judgment entered in this case would not be binding on the shareholders because they are not parties to this suit. Furthermore, the Trustee originally had an opportunity to directly sue these same shareholders, instead of the United States, in order to avoid the transfers and recover the funds under 11 U.S.C. §§544(b), 548, and 550(a)(1). The statute of limitations for such an avoidance suit against the shareholders has now run. See 11 U.S.C. §546(a). The Trustee is thus barred from suing the shareholders under §550(a)(1) because any declaratory judgment concerning fraudulent transfers would not bind the shareholders and thereby extend the statute of limitations for recovery under §550(e)(1).

In conclusion, the Court does not have the jurisdiction to issue the declaratory judgments requested by the Trustee. In Nordic Village, the United States Supreme Court held that 11 U.S.C. §106(c) does not waive the government's sovereign immunity against monetary claims. 112 S. Ct. at 1012, 1017. It also stated that "the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" Id. at 1015. (quoting McMahon v. United States, 342 U.S. 25, 27, 72 S. Ct. 17, 19 (1951)). A declaratory judgment that fraudulent transfers were made and that those funds should be either offset or returned to the bankruptcy estate is tantamount to a prohibited money judgment. In addition, the equitable relief would serve no purpose in that no waiver has been given under §106(b) for setoff and the judgment could not be used against the non-party shareholders. Therefore, no jurisdiction exists under §106(c) in order to declare the said transfers fraudulent and the funds returnable to the estate as requested.

Furthermore, no jurisdiction exists under 11 U.S.C. §505(a)(1), as the Trustee alleges, to declare whether the retention by the IRS of alleged fraudulent conveyances is the equivalent of an illegal tax on the

bankruptcy estate.¹² Nordic Village held that one interpretation of §106(c) would permit a bankruptcy court to "determine the amount or legality of any tax" pursuant to §505(a). Nordic Village, Inc., 112 S. Ct. at 1016. However, this Court has already determined that it lacks subject matter jurisdiction to make a determination under §505(a)(1) with respect to the prior third party defendants, the debtor's shareholders, against whom the IRS had assessed the taxes in controversy. See Memorandum Opinion And Order Regarding Motion To Dismiss Filed By Third Party Defendants (December 27, 1991). No actual tax has been assessed against the debtor corporation. In addition, the Trustee has not provided any support for the Court's ability to make a determination on the legality of a "constructive" tax against the debtor through retention of funds by the IRS. See Bullock v. Latham, 306 F.2d 45 (2d Cir. 1962); Application of J. W. Schonfeld, Ltd., 460 F. Supp. 332 (E.D. Va. 1978). Therefore, no declaratory judgment may be made under §106(c) and §505(a)(1) in this case.

Moreover, this Court does not need to address the United States' arguments under the "Declaratory Judgment Act," 28 U.S.C. §2201(a), that the requested declaratory judgments are prevented by that Act even if jurisdiction for the judgments does exist. For §2201(a) to be invoked, "federal jurisdiction must be found under some statute." Bullock v. Latham, 306 F.2d 45, 47 (2d Cir. 1962). As this Court has just held, jurisdiction does not exist over the United States due to nonwaiver of sovereign immunity under §106(c) for the above-described declaratory judgments; therefore, 28 U.S.C. §2201(a) is not applicable in this case.¹³ This adversary proceeding must therefore be dismissed with prejudice unless jurisdiction exists pursuant to either of the two remaining statutes cited by the Trustee: 28 U.S.C. §§1346(a)(1) and 1491(a)(1).

D. 28 U.S.C. §1491

¹² 11 U.S.C. §505(a)(1) states as follows:

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

¹³ A declaration under 11 U.S.C. §505 is specifically permitted under 28 U.S.C. §2201(a), but this Court has previously determined that §505 is not applicable to the facts in this case. See supra.

As an alternative ground, the Trustee alleges that jurisdiction for suit against the United States exists under the "Tucker Act" found in 28 U.S.C. §1491. Specifically, 28 U.S.C. §1491(a)(1) states that:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, [USCS, Constitution], or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Tucker Act "does not create any substantive right enforceable against the United States for money damages." United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 2967 (1983) (quoting United States v. Testan, 424 U.S. 392, 398, 96 S. Ct. 948 (1976)). That "substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" Id. (quoting 28 U.S.C. §1491). The Trustee alleges that his substantive right to bring suit under the Tucker Act in this case is found in §§ 505, 542, 544, 548 and 550 of the Bankruptcy Code, an Act of Congress. See Trustee's Objection to Motion to Dismiss at 4.

The United States Claims Court has exclusive jurisdiction of any "Tucker Act" claims exceeding \$10,000.00; the claim in this case totals \$3,009,435.00. See 28 U.S.C. §1346(a)(2). However, the exclusive jurisdiction of the Claims Court is modified by 28 U.S.C. §1334(b) which states that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court . . . other than the district courts, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under, . . . arising in or related to cases under title 11." Id.

Therefore, this Court has the subject matter jurisdiction necessary to hear a Tucker Act claim if the Code sections cited provide the substantive right to sue the United States. The test is whether the source of the substantive law "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Mitchell, 103 S. Ct. at 2968.

The Trustee cites §550(a)(1) as the substantive law on which the Tucker Act jurisdiction is based.¹⁴

This section authorizes the Trustee to recover property transferred, to the extent the transfer has been avoided, from the initial or beneficial transferee. 11 U.S.C. §550(a)(1). The United States argues that §550 cannot support a Tucker Act claim because the statute seeks the return of property, not damages in violation of a federal statute. See United States' Supplemental Reply to the Trustee's Objection to its Motion to Dismiss at 5-6. The United States Supreme Court has long recognized a distinction between an action for damages, or compensation for injury, and an action for specific relief, which may include the recovery of specific property or monies. Bowen v. Mass., 487 U.S. 879, 108 S. Ct. 2722, 2732 (1988). Statutes supporting Tucker Act claims have generally been "laws [that] attempt to compensate a particular class of persons for past injuries or labors." Id. at 2738 n. 42. "The compensation requirement of the Tucker Act refers to cases where 'classical money damages' are sought by the plaintiff" Nat'l Ass'n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988). Where Claims Court jurisdiction attaches, if the plaintiff is not strictly seeking money damages, he is "at least trying to enforce an alleged government debt or payment," not return of property that happens to be money. Floyd v. U.S., 860 F.2d 999, 1005 (10th Cir. 1988). See also Ulmet v. U.S., 888 F.2d 1028, 1030-31 (4th Cir. 1989). In this case, §550, that the Trustee relies on, does not appear to seek money damages as compensation for injury, but seeks monetary relief in the form of a return of property or money.¹⁵ Therefore, this statute is not appropriate for suit under the Tucker Act, and this Court does not possess subject matter jurisdiction under 28 U.S.C. §1491(a)(1).

Nevertheless, even if the recovery authorized under 11 U.S.C. §550(a)(1) could fairly be deemed as "compensation" for damages sustained for purposes of the Tucker Act "test," the Trustee must prove that §550 can be interpreted as mandating compensation by the United States. Mitchell, 103 S. Ct. at 2968. The Trustee argues that the substantive law relied on merely needs to provide a cause of action for compensation, not specifically for relief against the United States. See Trustee's Response at 10. The Trustee cites several cases in support of this proposition that the source need not contain a particular reference to relief against the United States. See infra. However, while a specific reference to the United States may not have been found, each statute was interpreted as applying to the federal government. See U.S. v. Mitchell, 463 U.S. 206, 103 S.

Ct. 2961, 2972-73 (1983) (interpreted general trust relationship between the United States and the Indian people as mandating compensation by the government for breach of duties); Murray v. U.S., 817 F.2d 1580, 1582-83 (Fed. Cir. 1987) (jurisdiction was recognized under the Fifth Amendment "taking claim" as conferring a right to recover money damages from the government); Ricardo v. Medina, 623 F. Supp. 1002, 1005 (D.P.R. 1985) (found source of law must mandate compensation by the government, but did not reach that interpretation because statute did not authorize money damages); Duncan v. U.S., 667 F.2d 36, 41, 48 (Cl. Ct. 1981) (trust relationship between the United States and the Indian people found to mandate compensation by the government for "normal" damages, as opposed to the "extraordinary" damages in that case).

Finally, the Trustee cites United States v. Mitchell which states that "the Tucker Act supplies a waiver of immunity . . . , the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 103 S. Ct. at 2969. Therefore, a second or separate waiver need not explicitly be included in the source of substantive law.¹⁶ However, this case is distinguishable from Mitchell in that the statute relied on does incorporate a specific provision concerning waiver of sovereign immunity and therefore cannot "fairly be interpreted as mandating compensation by the federal government." The Trustee cites §550 as allowing recovery of money damages from the United States. Not only does this section not allow the recovery of damages, as previously held, it does not authorize recovery against the United States. See supra. The Bankruptcy Code contains §106 which applies generally to all sections of the Code, including §550. Section 106 provides a limited waiver of sovereign immunity. As discussed earlier, the United States has not waived its sovereign immunity under §106; and therefore, the United States' sovereign immunity against recovery under §550 is not waived for suit under the Tucker Act.

Any other interpretation would make §106's waiver provisions moot and would allow suit in Claims Court against the United States under any bankruptcy section, without limit. Looking to the Supreme Court's strict stance on sovereign immunity in the recent case of Nordic Village, this Court does not believe that the

Supreme Court would interpret the Tucker Act in a way to allow the undermining of §106 and the Nordic Village decision. See United States v. Nordic Village, Inc., _____ U.S. _____, 112 S. Ct. 1011, 1014-15 (1992).

Therefore, this Court holds that 11 U.S.C. §§505, 542, 548 and 550 cannot fairly be interpreted as mandating compensation by the United States for damages sustained. There is no sufficient substantive law cited to support a cause of action under the Tucker Act; and therefore, this Court does not possess subject matter jurisdiction under 28 U.S.C. §1491(a)(1).

E. 28 U.S.C. §1346.

Finally, as another alternative ground, the Trustee alleges that jurisdiction for suit exists under 28 U.S.C. §1346(a)(1) which provides that District Courts shall have original jurisdiction, concurrent with the United States Claims Court, over civil actions against the United States for recovery of taxes erroneously or illegally assessed or collected. Id. Some question exists over whether §1346(a)(1) should be construed as a waiver of sovereign immunity where, as here, the party bringing the refund action is not the taxpayer. See United States' Reply to the Trustee's Objection to its Motion to Dismiss at 8-9; Trustee's Response to United States' Reply to Trustee's Objection Regarding Alternative Grounds for Relief at 20. This Court is not the normal forum for tax refund actions, therefore, because some issues exist under this action, this Court believes suit under §1346 would more properly be brought in the United States Claims Court. Therefore, in the interests of justice, this Court abstains from hearing this §1346 action pursuant to 11 U.S.C. §305(a) and 28 U.S.C. §1334(c)(1).

CONCLUSION

In summary, this Court concludes that it lacks jurisdiction to hear the Trustee's complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, as made applicable by F.R.B.P. 7012(b). The United States has not waived its sovereign immunity or consented to this Court's jurisdiction over it pursuant to 11 U.S.C. §106 or 28 U.S.C. §1491(a)(1). This Court has abstained from hearing any proceedings under 28

U.S.C. §1346(a)(1). Therefore, the Court must grant the motion of the defendant, the United States, to dismiss with prejudice the complaint filed by the Trustee for lack of jurisdiction.

IT IS THEREFORE ORDERED that the motion to dismiss the complaint of the Trustee is granted based on a lack of jurisdiction.

SO ORDERED this 29th day of October, 1992.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

Carol C. Priest
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044

William Siler
Assistant U.S. Attorney
200 Jefferson Avenue
Fourth Floor
Memphis, Tennessee 38103

David J. Cocke
C. William Denton
Borod & Kramer
Attorneys for Jack F. Marlow, Trustee
50 Monroe Avenue
Seventh Floor
Memphis, Tennessee 38103
Robert J. D'Agostino
Law Offices of William J. Norton, Jr.
Attorney for Julien J. Hohenberg
2200 Century Parkway, N.E.
Suite 250
Atlanta, Georgia 30345-3203

Julie C. Chinn
Assistant U.S. Trustee
200 Jefferson Avenue
Suite 400
Memphis, Tennessee 38103

(Published)