

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE:

TENN-FLA PARTNERS,
a Tennessee General Partnership,

Case No. 92-27624-WHB
Chapter 11

Debtor.

ORDER ON INTERIM TRUSTEE'S MOTION TO SUSPEND §546(a)

The interim chapter 7 trustee, George W. Emerson, Jr., has moved the Court to suspend the statute of limitations for filing avoidance actions, as that limitation is found in 11 U.S.C. §546(a). No objections to the motion were filed by parties in interest; however, the Court as a matter of law can not grant the relief sought.

The issue presented by this motion is whether the §546(a) limitation period begins to run with the appointment of an interim trustee or with the election and appointment of the case trustee under 11 U.S.C. §702. The Bankruptcy Code clearly provides the answer.

Section 546(a) provides that

- (a) An action or proceeding under 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.

Thus, the two years for filing avoidance actions commences with the "appointment of a trustee under section 702," for purposes of this case. 11 U.S.C. §546(a)(1). Section 702 contains the provisions

for the election of the chapter 7 case trustee or the appointment of the interim trustee to the case trustee's status if a trustee is not elected at the §341 meeting of creditors. 11 U.S.C. §702. In contrast, §701 provides for the appointment by the United States Trustee of an interim trustee after the order for relief is entered in each chapter 7 case, and "[t]he service of an interim trustee . . . terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title." 11 U.S.C. §701(b). Section 546(a) does not contain a reference to §701, the interim trustee provision.

From the statutory language, this Court concludes that the §546(a) limitations period does not begin to run from the appointment of an interim trustee. Rather, it begins to run from the appointment of the case trustee. This Court therefore disagrees with the analysis of this issue by the District Court in Clark Oil and Trading Company v. Haberbush (In re Sahuaro Petroleum & Asphalt Company), 170 B.R. 689, 693 (C.D. Cal. 1994). That court concluded that §546(a)(1) referred to "appointment" of trustees and that for chapter 7 the only reference to "appointment" was in §701. Moreover, that court observed that interim trustees "have the same rights, powers, and duties" as chapter 7 trustees. 170 B.R. at 693. That court did discuss the specific reference in §546(a)(1) to §702 rather than to §701 but found it insignificant. By contrast, this Court finds the specific statutory reference to §702 significant. It is true that routinely the creditors do not elect a case trustee at the §341 meeting and that the interim trustee is appointed the case trustee by default. 11 U.S.C. §702(d). Moreover, the specific statutory reference to §702 supports the reality that in the typical case there is little time between the commencement of the case and the §341 meeting. And, this Court disagrees with the Clark Oil court's finding that "[i]t is not the least bit uncommon for an interim trustee to assert avoidance actions." Id.

Rather, it is this Court's experience that in the typical chapter 7 case little time expires between the appointment of an interim trustee by the United States Trustee and the §702 selection of the case trustee at the §341 meeting of creditors. As a result, there is little opportunity or motivation for the interim trustee to investigate or pursue avoidance actions.

There is support for this Court's conclusion that the §546(a)(1) limitation only begins to run from the appointment of the case, rather than the interim, trustee in chapter 7 cases. See, e.g., Martino v. Assco Associates, Inc. (In re SSS Enterprises, Inc.), 145 B.R. 915, 919 (Bankr. N.D. Ill. 1992). The Martino court followed the same analysis as this Court did in applying a plain meaning to §546(a)'s reference to §702. Id. at n. 4.

This Court does not need to address the controversy of whether the §546(a) limitation period begins to run anew upon a conversion of a case from chapter 11 to chapter 7. See NORTON BANKRUPTCY LAW AND PRACTICE 2d, §56:1 (1994). Although this case was converted from chapter 11 to chapter 7 after the Court revoked the prior order of confirmation, the issue of whether the §546(a) limitation applies to a debtor in possession is not presently before the Court. In those conversion cases, however, there is authority for the conclusion that the limitation period runs from the appointment of a permanent rather than an interim trustee. See, e.g., Daff v. Regal Recovery Inc. (In re Continental Capital & Credit, Inc.), 158 B.R. 828, 829 (Bankr. C.D. Cal. 1993). Compare Ford v. Union Bank (In re San Joaquin Roast Beef), 7 F.3d 1413 (9th Cir. 1993) (holding that two year limitation did not begin to run anew as to chapter 7 trustee when there had been a prior chapter 11 trustee or debtor in possession).

Factually this case is unique. The Court revoked the order of confirmation in the prior chapter 11 case, revoked the debtor's discharge, and converted the case to one under chapter 7. First

Union National Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners), 170 B.R. 946 (Bankr. W.D. Tenn. 1994). Those orders have been appealed to the United States District Court for the Western District of Tennessee, and this Court stayed the administration of the chapter 7 case pending the outcome of the appeal. Specifically, the chapter 7 trustee was stayed from exercising his statutory duties under 11 U.S.C. §704 without prejudice to a motion to remove that stay for cause shown. See Order On Motions to Stay Proceedings, September 13, 1994. This particular stay was ordered to prevent the appeal from becoming moot. Moreover, prepetition, noninsider creditors have been paid or are the subject of the pending appeal. See In re Tenn-Fla Partners, 170 B.R. 946. Thus, there is no urgency for the chapter 7 trustee to act in this case.

The United States Trustee appointed George W. Emerson, Jr., as interim trustee on August 8, 1994, but as a result of the Court's stay of administration, the §341 meeting has not been conducted and there has been no election or appointment of a permanent chapter 7 trustee. As a result, this Court concludes that in this particular case the §546(a) two year limitation for avoidance actions has not begun to run as to the chapter 7 interim trustee. The Court would note that if the issue of whether the limitations period begins to run from the filing of the chapter 11 case and the creation of a debtor in possession is later presented to the Court by avoidance defendants, the resolution of that issue in favor of such defendants would moot the interim trustee's motion, because the chapter 11 case was filed on July 17, 1992. If the limitations period began then, it would have expired prior to the appointment of an interim trustee on August 8, 1994.

Consequently, the relief sought by the interim trustee to suspend the limitations period is unnecessary and will be denied. Denial on this basis prevents the Court from addressing the

troubling issue of whether the bankruptcy court has authority to suspend the limitations period, especially without notice to the putative avoidance defendants.

IT IS THEREFORE ORDERED that the interim trustee's motion to suspend the §546(a) limitations period is denied.

SO ORDERED this 25th day of October, 1994.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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