

IN THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE

IN RE:

American Pad & Paper Company

Debtor(s)

Steven G. Singer, Trustee
Plaintiff

Bankruptcy Nos. 00-66 through 00-68 and
00-70 through 00-72 (PIW)

Chapter 7

v.

IBM Envelope Company,
Defendant

Adversary No. 02-5173 (JKF)
filed 8/8/02

Steven G. Singer, Trustee
Plaintiff

v.

Strategic Paper Group, LLC
Defendant

Adversary No. 02-5602 (JKF)
filed 9/17/02

Steven G. Singer, Trustee
Plaintiff

v.

Georgia-Pacific Corporation
Defendant

Adversary No. 02-5715 (JKF)
filed 9/20/02

Steven G. Singer, Trustee
Plaintiff

v.

International Paper Company

Adversary No. 02-5828 (JKF)
filed 10/03/02

Defendant

**Steven G. Singer, Trustee
Plaintiff**

v.

*Adversary No. 02-6248 (JKF)
filed 10/31/02*

**Champion International Corp.
and successor in interest
International Paper Company
Defendants**

**Steven G. Singer, Trustee
Plaintiff**

v.

*Adversary No. 02-6253 (JKF)
filed 10/31/02*

**International Paper Company
d/b/a Beckett Papers
Defendant**

**Steven G. Singer, Trustee
Plaintiff**

v.

*Adversary No. 02-6643 (JKF)
filed 11/14/02*

**International Paper Company
d/b/a Xpedx
Defendant**

**Steven G. Singer, Trustee
Plaintiff**

v.

*Adversary No. 02-6773 (JKF)
filed 11/19/02*

Strathmore Paper Company, Inc.

Steven G. Singer, Trustee

Plaintiff

v.
International Paper Company
d/b/a Queen City Paper Co.,
Defendant

Adversary No. 02-6955 (JKF)
filed 12/4/02

Steven G. Singer, Trustee
Plaintiff

v.
Dwyer Associates, Inc.
Defendant

Adversary No. 02-6249 (JKF)
filed 10/31/02

Steven G. Singer, Trustee
Plaintiff

v.
Fox River Paper Company, LLC
Defendant

Adversary No. 02-6250 (JKF)
filed 10/31/02

Steven G. Singer, Trustee
Plaintiff

v.
FiberMark, Inc.
Defendant

Adversary No. 02-6259 (JKF)
filed 10/31/02

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-6650 (JKF)
filed 11/14/02

J & J Corrugated Box Corp.
Defendant

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-6682 (JKF)
filed 11/15/02

Fort James Corporation
d/b/a Fort James Communication
Papers
Defendant

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-6683 (JKF)
filed 11/15/02

Frontier Communications of America, Inc.,
Frontier Communications of Fairmount,
Inc., Frontier Communications of Georgia,
Inc., d/b/a Frontier Communications Service
Defendants

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-6780 (JKF)
filed 11/19/02

Unisource Worldwide, Inc.
Defendant

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-6994 (JKF)
filed 12/5/02

Crown Roll Leaf, Inc.
Defendant

Steven G. Singer, Trustee
Plaintiff

v.

Adversary No. 02-5718 (JKF)
filed 9/20/02

Beautone Specialties, Co., Ltd.
Defendant

MEMORANDUM OPINION¹

In each of the above-captioned adversary proceedings the outcome of pending motions to dismiss or for summary judgment depends on whether the appointment of the interim trustee under 11 U.S.C. §701 commences the running of the limitations period stated in §546(a)(1)(B).² Section 701 provides, in pertinent part:

(a)(1) Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person ... to serve as interim trustee in the case...

(b) The service of an interim trustee ... terminates when

¹The court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law.

²The trustee also filed an adversary against Franklin Boxboard Co., Adv. 02-5727, Nationwide Papers Incorporated, Adv. 02-6655, and W & D Machinery Co., Inc., Adv. 02-6246. In those adversaries the complaints were based not only on §547 as are all of the above-captioned adversaries but also on §549. Section 549 has its own statute of limitations and other elements necessary to sustain a cause of action. The situation of those three adversaries will be addressed in a separate Memorandum Opinion.

The court notes that in the motion of International Paper for Summary Judgment in Adversary Nos. 02-5828, 02-6248, 02-6253, 02-6773, 02-6643, and 02-6958, the adversary against Nationwide Papers Incorporated, Adv. No. 02-6655, is listed with the other International Paper adversaries with respect to the preference action only. The complaint filed in the Nationwide Papers adversary, however, also asserts a cause of action under 11 U.S.C. §549. The motion filed at Adversary No. 02-5828 does not address the §549 issue. As noted above, a separate Memorandum Opinion will be filed with respect to Adversary No. 02-6655 against Nationwide Papers. See note 2, *supra*.

a trustee elected or designated under §702³ ... qualifies ...

(c) An interim trustee serving under this section is a trustee in a case under this title.

Section 546 provides, in pertinent part:

(a) An action or proceeding under section 544, 545, 547, 548, or 553 ... 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 ... if such election occurs before the expiration of the period specified in subparagraph (A) ...

On January 14, 2000, an order for relief was entered following the filing of an involuntary chapter 11 petition on January 10, 2000. On November 21, 2001, the creditors' committee filed a motion to convert to chapter 7. The motion was granted by order dated December 21, 2001. By the terms of the order the conversion would be effective on January 3, 2002. A trustee, Jeffrey Birtch, was appointed as chapter 7 trustee on January 3, 2002, within two years of the entry of the order for relief. At the meeting of creditors pursuant to §341,⁴ creditors requested the election of a permanent trustee pursuant to §702.⁵ Steven Singer was elected on or about February 13, 2002, the date set for the chapter 7 §341

³Section 702 is captioned "Election of trustee" and provides that if a trustee is not elected the interim trustee shall serve as the trustee.

⁴The creditors' meeting was scheduled for February 13, 2002, *see* Dkt. No. 1477, but the docket does not reflect that it was held that day. A later docket entry dated February 8, 2002, states that the entry was in error. Docket entries made in May, 2002, state that the §341 meeting was concluded on May 22, 2002. *See* Dkt. Nos. 1558, 1574, 1575, 1576, and 1577.

⁵On February 26, 2002, the U.S. Trustee filed a Report of Election of Trustee. *See* Dkt. No. 1502. On November 1, 2002, the U.S. Trustee filed a Notice to Elected Interim Trustee/Trustee of Selection in an Asset Case. Dkt. No. 1646. The notice is dated June 19, 2002.

meeting.⁶ This date was more than two years after the date of the entry of the order for relief. The earliest complaint was filed in JBM Envelope Company, Adv. No. 02-5173 on August 8, 2002, followed by the others in September, October, November and December of 2002. All of the defendants assert that the actions against them are barred by the two-year time limit set forth in §546(a). The defendants filed motions to dismiss and/or motions for summary judgment. Defendants' motions will be granted as all of the complaints were filed beyond the maximum time period under §546.⁷

⁶The docket does not reflect when Mr. Singer qualified as trustee. The Notice to Elected Interim Trustee/Trustee of Selection in an Asset Case dated June 19, 2002, was docketed November 1, 2002. Section 322(a) provides that a trustee qualifies if the trustee files a bond before five days after being chosen or elected. Mr. Singer was elected on or about February 13, 2002. However, Mr. Singer's bond is dated March 11, 2002, and was filed with the Clerk on March 22, 2002, well beyond the four days provided in §322(a). Dkt. No. 1517. A Bond Rider increasing the amount of the bond was filed on February 26, 2003, Dkt. No. 1819, another Bond Rider further increasing the bond was dated and filed on April 29, 2003, Dkt. No. 1831.

⁷The motions filed in each adversary are as follows.

JBM Envelope Company, Adv. No. 02-5173, motion for summary judgment (the prayer for relief also requests dismissal of the complaint).

Strategic Paper Group, LLC, Adv. No. 02-5602, motion to dismiss and/or for summary judgment.

Georgia-Pacific Corporation, Adv. No. 02-5715, motion to dismiss.

Beautone Specialties, Co., Ltd., Adv. No. 02-5718, motion to dismiss.

International Paper Company, Adv. No. 02-5828, motion for summary judgment (the prayer for relief requests a "judgment ... dismissing Plaintiff's Complaint").

Champion International Corp. and International Paper Company, Adv. No. 02-6248, motion for summary judgment.

International Paper Company d/b/a Bockett Papers, Adv. No. 02-6253, motion for summary judgment.

International Paper Company d/b/a Xpedx, Adv. No. 02-6643, motion for summary judgment.

International Paper Company d/b/a Strathmore Paper Company, Inc., Adv. No. 02-6773, motion for summary judgment.

International Paper Company, d/b/a Queen City Paper Co., Adv. No. 02-6955, motion for
(continued...)

In 1994 §546(a) was revised. Prior to 1994 §546(a) provided that the deadline to file certain actions was "(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". Under the pre-1994 version the minority view held that appointment of an interim trustee triggered the running of the statute of limitations. The appointment of an interim trustee under §701 did not trigger the running of the statute of limitations. The election of a trustee under §702 had that effect.

The pre-1994 majority view held that appointment of an interim trustee did not commence the running of the statute of limitations because a permanent trustee was not appointed under §702. The statute of limitations did not begin to run until the trustee qualified under §702. Inasmuch as an interim trustee is appointed under §701, the statute did not begin to run.

In *In re Ambulatory Medical & Surgical Health Care, Inc.*, 187 B.R. 888 (Bankr.W.D.Pa. 1995), the pre-1994 version of §546 applied and the court said:

⁷(...continued)

summary judgment.

Dwyer associates, Inc., Adv. No. 02-6249, motion to dismiss.

Fox River Paper Company, LLC, Adv. No. 02-6250, motion to dismiss.

FiberMark, Inc., Adv. No. 02-6259, motion to dismiss.

J & J Corrugated Box Corp., Adv. No. 02-6650, motion to dismiss.

Fort James Corporation, a/b/a Fort James Communication Papers, Adv. No. 02-6682, motion to dismiss.

Frontier Communications of America, Inc., *et al.*, Adv. No. 02-6683, motion to dismiss.

Unisource Worldwide, Inc., Adv. No. 02-6780, motion to dismiss.

Crown Roll Leaf, Inc., Adv. No. 02-6994, motion to dismiss.

We agree with the majority view that the two-year time period for bringing an action pursuant to §§544, 547, or 548 of the Code does not begin to run with the appointment of a chapter 7 trustee who is appointed on an interim basis pursuant to 11 U.S.C. §701 and who then is replaced by a permanent trustee appointed pursuant to 11 U.S.C. §702 ... while the interim trustee who is appointed pursuant to §701 remains in office when there is a dispute which results in the election of another trustee pursuant to 11 U.S.C. §702. It begins to run in such situations only when the bankruptcy court issues an order resolving the dispute by either confirming or rejecting the election of the successor trustee.

187 B.R. at 894. Although the court appeared to qualify its conclusion by reference to the dispute that resulted in the election of a trustee, other language in the opinion indicates that the plain language of pre-1994 §546(a) meant that the statute of limitations did not begin to run until the interim trustee appointed under §701 was replaced by an elected trustee under §702. The court also noted that §546(a) had been amended in 1994 and if that amended version applied to the case before it all causes of action stated in the complaint would be barred as untimely. Earlier, however, in *In re Chequers, Ltd.*, 50 B.R. 177, 178 (Bankr. W.D. Pa. 1986), the court held that the two-year statute of limitations began to run from the date of the §341 meeting and that the appointment of a successor trustee did not extend the time period.

A first look at the statute as it exists post-1994 would suggest that an interim trustee, appointed under §701, does not satisfy subsection (B) of §546(a)(1) because that subsection specifically addresses a trustee appointed under §702 and provides that "[t]he services of an interim trustee ... terminates when a trustee elected or designated under section 702 ... qualifies" Section 702(d) provides that if a trustee is not elected "then the interim trustee

shall serve as trustee in the case."

In 1999, although bound by the pre-1994 version of §546, a district court in New York faced a similar issue. In *In re Frank Santora Equipment Corp.*, 231 B.R. 486 (E.D.N.Y. 1999), the court had to determine if, after conversion from chapter 11 to chapter 7, an adversary proceeding filed more than two years after the appointment of an interim trustee but less than two years after the appointment of the permanent trustee was barred by §546(a). The court held that appointment of the permanent trustee governed because §546(a)(1)(B) referred only to §702, not §701. *In re Conco Building Supplies, Inc.*, 102 B.R. 190 (9th Cir. BAP 1989), held that §546(a) time period did not begin to run until a permanent trustee was elected or qualified.

None of these cases controls the issue before us inasmuch as §546(a) was significantly amended in 1994. Subsection (a)(1)(B) refers to "1 year after the appointment or election of the first trustee under section 702 ... if such ... election occurs before the expiration of the period specified in subparagraph (A)", *i.e.*, "2 years after the entry of the order for relief". In this case the §702 elected trustee was not elected until more than two years after the date of the entry of the order for relief. Although the "first trustee" was appointed within the two year period, that period expired before Mr. Singer was elected. The order for relief was entered on January 14, 2000, conversion was effective on January 3, 2002, at which time the first trustee was appointed. The §341 meeting and the date of election of the permanent trustee was February 13, 2002. The election was not within the two year time frame of §546(a)(1)(A). By the terms of subsection (B) the additional one year to file the actions could not commence. Therefore, the actions filed in August, 2002, and thereafter are barred by the statute of

limitations of §546(a).

Appropriate orders will be entered at each adversary number.

DATE: *Oct. 28, 2003*

Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

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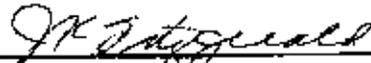
Chapter 7

Adversary No. 02-5173 (JKF)

JUDGMENT ORDER

AND NOW, this 28 day of Oct, 2003, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that Defendant's motion for summary judgment is **GRANTED** and judgment is entered in favor of Defendant and against Plaintiff.

It is **FURTHER ORDERED** that the Clerk shall close this adversary.



Judith K. Fitzgerald
United States Bankruptcy Judge

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