

In re Allen Care Centers, Inc., Civil No. 94-1507-P7

2/23/95

J. Redden aff'd ELP

The debtor filed for chapter 11 on December 10, 1990. Less than two years after the filing, the Court appointed a chapter 11 trustee. Prior to the appointment, the debtor acted as debtor in possession. On May 25, 1993, the court issued an order to convert the case from a Chapter 11 to a Chapter 7. On April 21, 1994, the trustee filed a complaint to avoid transfers from the debtor to Clinical Options, Inc., under § 547(b). Clinical Options contended that the trustee commenced the proceeding outside the two-year statute of limitation period described in § 546(a).

The issue was whether the statute of limitations described § 546(a) began to run from the date of the filing of the chapter 11 petition or began to run from the date the trustee was appointed. The resolution of the issue turned on the interpretation of In re Softwaire Centre, 994 F.2d 682 (9th Cir. 1993) and In re San Joaquin Roast Beef, 7 F.3d 1413 (9th Cir. 1993).

The district court held that the statute of limitations began to run from the date the trustee was appointed based on four factors. First, the plain language of § 546(a) supports this conclusion. Second, Softwaire Centre is limited to cases where no trustee has been appointed. Third, San Joaquin is factually indistinguishable from this case. Fourth, the debtor in possession

is not the functional equivalent to trustee when a trustee has been appointed.

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6 REDDEN, Judge:

7 Clinical Options, Inc. (Clinical) appeals the decision of  
8 the bankruptcy court denying Clinical's motion to dismiss. For  
9 the reasons that follow, the bankruptcy court's decision is  
10 affirmed.

#### 11 BACKGROUND

12 Allen Care Centers filed a Chapter 11 bankruptcy petition  
13 on December 10, 1990. A trustee was not appointed until  
14 October 2, 1992. The Trustee, Ronald G. Witcosky, filed this  
15 action against Clinical on April 20, 1994, within two years of  
16 the Trustee's appointment, but after two years from the date  
17 the bankruptcy petition was filed.

#### 18 BANKRUPTCY COURT'S DECISION

19 Without written opinion, Bankruptcy Judge Elizabeth  
20 Perris denied Clinical's motion to dismiss and held that the  
21 Trustee's claim was timely because the two-year statute of  
22 limitations contained in 11 U.S.C. § 546(a) began to run when  
23 the Trustee was appointed. This court granted Clinical's  
24 motion to file an interlocutory appeal from the bankruptcy  
25 court's decision.

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STANDARD FOR REVIEW

The bankruptcy court's decision is based purely upon conclusions of law and, therefore, is reviewed de novo. In re San Joaquin Roast Beef, 7 F.3d 1413, 1414 (9th Cir. 1993).

DISCUSSION

The crux of this appeal is the interpretation of two Ninth Circuit cases: In re Softwaire Centre, 994 F.2d 682 (9th Cir. 1993), and In re San Joaquin Roast Beef, 7 F.3d 1413 (9th Cir. 1993).

In Softwaire Centre, where a trustee was never appointed, the Ninth Circuit held that the two-year statute of limitations of 11 U.S.C. § 546(a) ran against a debtor in possession. Softwaire Centre, 994 F.2d at 683. That section states that actions "may not be commenced after the earlier of 1) two years after the appointment of a trustee . . . or 2) the time the case is closed or dismissed." 11 U.S.C. § 546(a). The court relied on the Tenth Circuit's decision in Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990), and concluded that because a debtor in possession was the "functional equivalent of a trustee," the statute of limitations began to run against the debtor in possession on the date of the bankruptcy filing. Softwaire Centre, 994 F.2d at 683.

One month later, the Ninth Circuit held that the limitations period in 11 U.S.C. § 546(a) began to run upon the appointment of the first bankruptcy trustee, and that the appointment of a subsequent trustee did not begin a new

1 limitations period. San Joaquin Roast Beef, 7 F.3d at 1415-16.

2 Clinical argues that because the debtor in possession is  
3 the functional equivalent of a trustee under Softwaire Centre,  
4 the limitations period began to run with the bankruptcy filing,  
5 not the subsequent appointment of the Trustee. The Trustee, on  
6 the other hand, relies on San Joaquin Roast Beef to argue that,  
7 in a case where a trustee is appointed, no limitations period  
8 begins to run until the appointment of the trustee. It  
9 contends that Softwaire Centre is only applicable where a  
10 trustee is never appointed.

11 While the Ninth Circuit has not squarely ruled on these  
12 arguments, bankruptcy and district courts in the Ninth Circuit  
13 and elsewhere have. The majority of courts have held that  
14 under the plain language of § 546(a) the limitations period  
15 does not begin to run until the trustee is appointed. See,  
16 e.g., In re Iron Oak Supply, 162 B.R. 301 (Bankr. E.D. Cal.  
17 1993); In re California Cannery & Growers, 175 B.R. 346 (Bankr.  
18 9th Cir. 1994); In re Luria Steel, 168 B.R. 913 (Bankr. N.D.  
19 Ill. 1994). Under these rulings, a trustee has two years from  
20 the date he is appointed to bring actions.

21 A minority of courts have held that, under San Joaquin  
22 Roast Beef and Softwaire Centre, the limitations period is not  
23 affected by the subsequent appointment of a trustee. See In re  
24 EPI Products, 162 B.R. 1 (Bankr. C.D. Calif. 1993); In re  
25 Sahuaro Petroleum, 170 B.R. 689 (C.D. Calif. 1994). Under this  
26 rule, the interests of the trustee and the debtor are perceived

1 to be identical and, therefore, all claims must be filed within  
2 two years of the bankruptcy filing.

3 Contrary to the Clinical's argument, Softwaire Centre and  
4 San Joaquin Roast Beef cannot simply be read together to reach  
5 the conclusion that the debtor in possession is a de facto  
6 trustee when a trustee is subsequently appointed.

7 First, the plain language of § 546(a) supports the  
8 conclusion that the limitations period begins to run when the  
9 trustee is appointed. See 11 U.S.C. § 546(a) ("two years after  
10 the appointment of a trustee").

11 Second, Softwaire Centre, while speaking broadly of a  
12 debtor in possession's "functional equivalency" to a trustee,  
13 is limited to cases where no trustee is ever appointed. See In  
14 re Luria Steel, 168 B.R. at 914-15. The court in Softwaire  
15 Centre, in considering the language of § 546(a), stated "[h]ere  
16 the case has not been closed or dismissed, nor has a trustee  
17 been appointed." Softwaire Centre, 994 F.2d at 683 (emphasis  
18 added). The case from which Softwaire Centre quotes and  
19 heavily relies upon, Zilkha, also stated,

20 [w]e take no position on whether a  
21 subsequent appointment of a trustee in a  
22 chapter 11 case would change the  
23 analysis. While we perceive that to be a  
24 distinguishable circumstance requiring a  
different analysis, we leave the issue  
for a case in which that situation  
arises.

25 Zilkha, 920 F.2d at 1524 n.11. Therefore, Softwaire Centre is  
26 not controlling in this case and its reasoning must be limited

1 to its facts.

2 In addition, the court in Softwaire Centre was confronted  
3 with a situation where a contrary holding would have meant that  
4 a debtor in possession was bound by no limitations period. In  
5 cases such as this where a trustee is appointed, the  
6 limitations period will run no longer than two years from the  
7 appointment.

8 Third, San Joaquin Roast Beef is factually  
9 indistinguishable from this case. In both instances, a trustee  
10 was appointed following the approximately 10-month tenure of a  
11 debtor in possession. The Ninth Circuit nonetheless held that  
12 the limitations period did not begin to run under the plain  
13 meaning of § 546(a) until the trustee was appointed. San  
14 Joaquin Roast Beef, 7 F.3d at 1415-16.

15 If Clinical's argument were correct, the court in San  
16 Joaquin Roast Beef would have held that the limitations period  
17 began running when the case was filed and that the claim was  
18 barred. To the contrary, the court in San Joaquin Roast Beef  
19 held that a trustee is allowed two years from his appointment  
20 to file actions. Unlike Softwaire Centre, the San Joaquin  
21 Roast Beef debtor in possession was not considered to be a de  
22 facto trustee. In light of the indistinguishable facts here,  
23 the same result follows.

24 Fourth, while a debtor in possession is the "functional  
25 equivalent" of a trustee in the context where no trustee is  
26 ever appointed under Softwaire Centre, the same is not true

1 when a trustee is appointed. A debtor in possession may lack  
2 the incentive to prosecute claims. In re California Cannery &  
3 Growers, 175 B.R. at 348. Commencement of the limitations  
4 period upon appointment of the trustee allows him to  
5 investigate claims and evaluate the earlier actions of the  
6 debtor in possession. In re Luria Steel, 168 B.R. at 917.

7 Clinical also relies upon a recent legislative change to  
8 § 546(a). While the change is not retroactive, Clinical argues  
9 that the legislative history helps interpret the meaning of the  
10 section.

11 Under the new provision, the limitations period expires  
12 two years from the filing of the bankruptcy petition or one  
13 year following the appointment of the trustee (if appointed  
14 within the two-year period), whichever is later. This action  
15 would have been barred under the new law.

16 Statements by Congressmen and Senators in the record shed  
17 little light on the proper interpretation of the original § 546  
18 and Representative Brooks stated that "[a]doption of this  
19 change is not intended to create any negative inference or  
20 implication regarding the status of current law or  
21 interpretations of section 546(a)(1)."

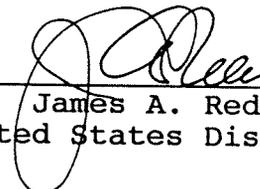
22 While the legislative history does not provide strong  
23 support for either side, the change in law does suggest that  
24 Congress, while shortening the limitations period in some  
25 instances, sought to preserve some period of time for the  
26 trustee to bring actions. Under Clinical's approach and the

1 minority rule, no period of time to bring actions was ever  
2 guaranteed a trustee.

3 **CONCLUSION**

4 The bankruptcy court's order is affirmed.

5 Dated this 22 day of February, 1995.

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10 James A. Redden  
11 United States District Judge  
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