11 U.S.C. § 702(a)
FRBP 2006(c)
FRBP 2006(d)
Trustee election

In re Attaway, Inc. Bankruptcy Case No.692-62575-H7
Hostmann v. UST et. al. (IN re Attaway, Inc)., BAP Nos OR-92-2341-MeJV, OR-92-2342-MeJV (Consolidated)

1/24/94 BAP aff'd PSH unpublished

On appeal brought by the former interim chapter 7 trustee, the BAP affirmed the bankruptcy court's confirming of the election of a different permanent chapter 7 trustee. The bankruptcy court did not abuse its discretion. The mere suspicion that creditors received preferential transfers is insufficient to disqualify them, as having materially adverse interests within the meaning of § 720(a)(2), from voting to elect the permanent trustee. Further, proxy solicitation and election requests, which may have been improper originally, may be cured by creditors' waivers of their materially adverse interests.

Judge Meyers concurred on the separate ground that the appeal should be dismissed because a former interim chapter 7 trustee lacks standing to appeal the election of a permanent chapter 7 trustee.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re ATTAWAY, INC., Debtor.	BAP No. OR-92-2341-MeJV OR-92-2342-MeJV (Consolidated) Bankruptcy No. 692-62575-H7
EDWARD C. HOSTMANN, interim Chapter 7 trustee, Appellant, v. UNITED STATES TRUSTEE; FORMER UNSECURED CREDITORS' COMMITTEE; JOEL ZABALDO; PDQ TRANSPORT, INC.; OTR EXPRESS, INC.; OLYMPIC TRANSIT; ATC COMMERCIAL COLLECTIONS; RONALD R. STICKA; ATTAWAY, INC., Appellees.	**MEMORANDUM**

Argued and Submitted
July 22, 1993 in Portland, Oregon

Filed: JAN 24 1994

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Polly S. Higdon, Bankruptcy Judge, Presiding

Before: MEYERS, JONES and VOLINN, Bankruptcy Judges

I

The former interim trustee appeals from the bankruptcy court orders entered on October 30 and November 6, 1992, which ultimately confirmed the election of Ronald Sticka as permanent Chapter 7 trustee.

We **AFFIRM.**

II

FACTS

The debtor was a common carrier and broker of freight. As a broker, the debtor would arrange for other common carriers to pick up and deliver loads of freight for the debtor's customers ("Shippers"). The debtor would bill and collect for the freight charges from the Shippers. Upon payment by the Shippers, the debtor would pay the carrier the freight bill less the debtor's commission.

The debtor filed a petition for relief under Chapter 11 on June 11, 1992. At that time, the debtor had outstanding accounts receivable for shipments brokered for other carriers. On July 27, 1992, the bankruptcy court entered an order converting the case to one under Chapter 7 and appointed Edward Hostmann ("Appellant") interim Chapter 7 trustee. On June 29, 1992, an unsecured creditors' committee was established, which consisted of creditors PDQ Transport, Inc., OTR Express, Inc. and Olympic Transit (collectively the "Seaton Group"), Wayne Kitchens and ATC Commercial Collections ("ATC").

During the pendency of both the Chapter 11 and Chapter 7 cases,

the carriers made direct claims against the Shippers to collect the accounts receivable. The Appellant took the position that these accounts were property of the debtor's estate and refused to allow the carriers to assert direct claims against the Shippers. Some of the carriers notified the Appellant that they intended to seek a declaratory judgment that the monies owed by the Shippers could be collected directly by the carriers.

A first meeting of creditors was held on September 25, 1992, pursuant to Bankruptcy Code ("Code") Section 341(a). ATC filed a proof of claim on September 25, 1992, for $1,192,692.81 as proxyholder of unsecured claims from 65 different unsecured creditors. At the meeting of creditors, Dan Laxson, vice president of ATC, requested a trustee election pursuant to Code Section 702(b). ATC cast its votes for Ronald Sticka. Twenty-four carriers, who previously had threatened to sue the Appellant, voted by proxy through ATC to elect Sticka. These 24 carriers represented $976,135.40 of the $1,192,692.81 in proxies allegedly held by ATC. The Appellant challenged the eligibility of those 24 creditors on the basis that they held materially adverse interests at the time of the election.

Pursuant to Fed.R.Bankr.P. 2003(d), the United States Trustee ("U.S. Trustee") filed a report to the court of the disputed election on September 29, 1992. The U.S. Trustee excluded the 24 carriers from the calculation of eligible voters requesting an election and declared that no election had taken place because the required number and amount of eligible voting creditors did not

request the election. The unsecured creditors' committee requested a hearing to resolve the disputed trustee election.

The Appellant filed a memorandum regarding the disputed election in which he asserted that proxies were solicited in violation of Fed.R.Bankr.P. 2006(d) and that some of the voting creditors held material adverse interests disqualifying them from requesting an election and voting. Some of the voting creditors filed a statement of position purporting to waive their material adversity prior to the hearing on the disputed election.

The Appellant filed an adversary proceeding on October 22, 1992 to enjoin 75 carriers and collection agents, including ATC, from making further direct claims to collect the accounts receivable of the debtor. The adversary proceeding included a claim to require all of the carriers to disgorge any monies collected from the Shippers postpetition.

The court held a hearing on October 23, 1992. On October 27, 1992, the court issued a letter opinion, finding that some of the voting creditors held material adverse interests at the time of the election, but allowing them to file a statement of position waiving their material adverse interests, in which event the court would appoint Sticka as permanent trustee. An order in conformance with the court's letter opinion was entered on October 30, 1992.

After the Seaton Group and ATC filed amended statements of position, an order confirming the election of Sticka was entered on November 6, 1992. The U.S. Trustee appointed Sticka permanent trustee on November 10, 1992.

The Appellant appealed from both orders of the bankruptcy court and requested a stay of the orders pending appeal. The court refused to grant the stay. The Appellant then filed a motion with the BAP to consolidate the two appeals and for leave to appeal the interlocutory orders, which was granted on January 29, 1993.

III

STANDARD OF REVIEW

Where the bankruptcy court has exercised some supervisory powers over the election of a trustee, its actions should be examined to determine whether it has abused its discretion. In re Oxborrow, 913 F.2d 751, 754 (9th Cir. 1990).

IV

DISCUSSION

A. Allegations that the Votes Were Solicited Improperly

The Appellant argues that the solicitation of votes violated Fed.R.Bankr.P. 2006(d). Rule 2006(d) prohibits solicitation of proxies "(1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by on or behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only."

The Appellant contends that subsections (d)(1) and (3) of Rule 2006 were violated because the creditors giving their proxies to ATC had materially adverse interests to the other unsecured creditors.

These issues will be addressed in the section of the Memorandum discussing Code Section 702.

The Appellant also maintains that the actions of attorney Henry Seaton violated Rule 2006(d)(4), which precludes solicitation by or on behalf of an attorney at law. There is evidence only that Seaton recommended that the other members of the creditors' committee elect Sticka as trustee. This does not equate to attorney solicitation of proxies.

Next, the Appellant argues that Rule 2006(d)(5), prohibiting solicitation "by or on behalf of a transferee of a claim for collection only," was violated. The Appellant maintains that ATC was such a transferee. In its letter opinion, the court wrote that Mr. Laxson:

> stated that ATC has received no transfers from client/creditors of any proofs of claim filed by these parties in this estate. This court finds that ATC has not received transfers of the creditors' claims through ATC's ordinary business relationship with its clients. These clients have granted to ATC only the right to collect on their claims and the right to withhold a certain percentage from the amounts collected as a commission for its services.

The court concluded that the prohibitions of subsection (d)(5) had not been breached. There is evidence in the record to support the court's finding. Laxson testified that ATC never gave any monetary consideration to creditors in exchange for its interest in their claims other than its agreements to provide services for collection.

The 1983 Advisory Committee Note to Rule 2006 states that solicitation by the holder of a claim for collection only carries a substantial risk that administration will fall into the hands of those whose interest is in obtaining fees from the estate rather

than securing dividends for creditors. In the case at bar, the court noted that ATC had entered into its contractual relationship with many, if not all, its client/creditors pre-petition. The court concluded: "Clearly ATC did not enter these relationships for the purpose of obtaining fees from the estate." The court found from Laxson's testimony that ATC undertook the solicitation from its clients in order to allow them to participate in the creditors' meeting without having to be physically present, since the client/creditors were located throughout the United States. The court did not err in finding that ATC was not a "transferee of a claim for collection only."

The Appellant also charges that there was no evidence to support the court's holding that the creditors granting their proxies to ATC were pre-existing customers of ATC and that ATC was a bona fide trade or credit association. Rule 2006(c)(1)(D) provides: "A proxy may be solicited only by. . . a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition."

At the hearing, Kitchens testified that since ATC specializes in the collection of trade receivables for the trucking industry, it could be defined as a trade association. Laxson testified that it had a number of clients who were creditors of the debtor before the case was filed. The burden of proof with respect to the ineligibility of a creditor requesting an election is on the

objecting party. In re New York Produce American & Korean Auction, 106 B.R. 42, 47 (S.N.Y. 1989). The Appellant has not proven ineligibility pursuant to Fed.R.Bankr.P. 2006(c)(1)(D).

B. Code Section 702

The Appellant contends that the majority of the creditors granting ATC their proxies were not qualified to vote under Code Section 702(a). Section 702(a)(2) provides: "A creditor may vote for a candidate for trustee only if such creditor . . . does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution. . . ."

In its letter opinion, the court determined that the evidence of preferential transfers to some of the voting creditors was insufficient to show that these creditors had a materially adverse interest in that regard. The Appellant contends that this determination was made in error.

It is generally assumed that the interest of a creditor who has received a preference will be materially adverse to other creditors. In re New York Produce American & Korean Auction, supra, 106 B.R. at 47; In re Metro Shippers, Inc., 63 B.R. 593, 598 (E.Pa. 1986). However, the mere suspicion of a preference is insufficient to disqualify a creditor from voting at the election of a trustee. In re New York Produce American & Korean Auction, supra; In re Brent Industries, Inc., 96 B.R. 193, 196 (N.Iowa 1989); In re Poage, 92

B.R. 659, 666 (N.Tex. 1988); In re Metro Shippers, Inc., supra.

The bankruptcy court found:

> The interim trustee did not identify those voting creditors by name that it believed received preferences . . . . A significant amount of factual information, including the size of the estate and the number of creditors of the estate, needs to be gathered and analyzed before a final determination is made that a preferential transfer was probably made. The interim trustee has yet to file any complaints under 11 U.S.C. § 547. He did not present any facts or figures to the court to justify his position that any of the voting creditors received a preference.

The Appellant claims that the court's factual findings are clearly erroneous. The Appellant had submitted a document entitled "Trustee's Memorandum Regarding Disputed Election." Attached to this memorandum was an exhibit which listed the creditors by name and address, and listed the amount of preferences allegedly received by 35 of the creditors.

The court erred in stating that the interim trustee had not named those voting creditors that it believed received preferences. However, this error is harmless, since the Appellant did not provide any evidence to establish the basis for the alleged preferences. Because the mere suspicion of a preference will not disqualify a creditor from voting for a permanent trustee, the bankruptcy court correctly decided that the Appellant's accusations of preferences were insufficient.

The bankruptcy court found that the interests of the voting creditors were materially adverse within the meaning of Code Section 702(a)(2), since "[a]ny direct collection activities they successfully pursued postpetition would result in fewer funds available for distribution by the estate to the general unsecured

creditor body." The court recognized that if the votes of the 24 creditors who had threatened to sue the Appellant for declaratory relief were eliminated from consideration, the remaining creditors would not hold at least 20 percent in amount of the claims taken into consideration under Section 702(b), as required for a successful election.

The court then stated that at the hearing regarding the trustee election, two attorneys representing many of the creditors said that the creditors they represented had decided not to attempt directly to collect trucking charges from the Shippers which arose from arrangements made through the debtor's services, would acquiesce in their collection by the trustee and would accept their pro rata share of any distribution from the estate as their exclusive remedy with regard to those uncollected charges, and that any charges collected by the creditors postpetition would be turned over to the trustee for distribution. The court agreed to validate the election if the creditors filed an amended statement of position putting into writing the statements which their attorneys had made at the hearing.

The court followed the reasoning in In re Klein, 119 B.R. 971 (N.D. Ill. 1990). The Klein court stated that at the time of the election, only those creditors with the prospective ability to enhance their recovery at the estate's expense held a materially adverse interest to the estate. 119 B.R. at 975. In Klein, the court concluded that strong policy reasons favor permitting a creditor to eradicate its material adverse interest prior to a

hearing if the creditor desires to regain its right to vote. A Chapter 7 bankruptcy is a creditor controlled proceeding. Accordingly, any creditor without an adverse interest should be entitled to vote. 119 B.R. at 983. Further, by having a creditor sacrifice its adverse interest to the estate, the estate saves litigation expenses and maximizes its potential for recovery. Id.

The Appellant complains that a creditor may not eradicate its adverse interest after the trustee election and after the hearing on the disputed election. The Appellant contends that Klein was wrongly decided. Further, he maintains that even if an adverse interest making a creditor ineligible to vote as described in Code Section 702(a) may be cured after the Section 341(a) meeting, it is then too late to cure the requirements for soliciting votes and call for an election set forth in Fed.R.Bankr.P. 2006(d)(3) and Code Section 702(b). Rule 2006(d)(3) bars solicitation by or on behalf of any entity not qualified to vote under Code Section 702(a).

For the policy reasons stated in the Klein case and because bankruptcy courts, within the exercise of their equitable powers, have the authority to reopen a Section 341 meeting to permit a creditor to vote, Matter of Lindell Drop Forge Co., 111 B.R. 137, 143-44 (W.Mich. 1990), the Panel finds that proxy solicitation and election requests, which may have been improper originally, may be cured by creditors' waivers of their materially adverse interests.

Moreover, various courts have held that harmless deviation from the requirements of Fed.R.Bankr.P. 2006 are insufficient to invalidate the election of a trustee, especially since the 1983

Advisory Committee Note to that Rule gives courts discretion in resolving proxy solicitation matters. In re Brent Industries, Inc., supra, 96 B.R. at 195-96; In re Metro Shippers, Inc., supra, 63 B.R. at 599. In addition, because of the strong policy of creditor control behind Chapter 7, any doubts should be resolved in favor of the claimant. In re Poage, supra, 92 B.R. at 665.

In conclusion, the Panel holds that the court did not abuse its discretion in allowing creditors to eradicate their materially adverse interests.

V

CONCLUSION

We give the bankruptcy court a wide range of discretion in handling election disputes and **AFFIRM** its decision to confirm the election of Sticka as permanent Chapter 7 trustee.

VOLINN, Bankruptcy Judge, concurring:

I **concur** with the result of the foregoing ruling.

MEYERS, Bankruptcy Judge, concurring;

I join in this decision, but write separately because I believe that as a policy matter the Appellant should not have standing to challenge the bankruptcy court's orders. While I join in affirming the trial court's orders, I would prefer to dismiss the appeal.

Although none of the parties objected to the Appellant's standing, we have the obligation to raise the issue sua sponte. Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1581 (9th Cir. 1993). Only those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to appeal that order. In re Pecan Groves of Arizona, 951 F.2d 242, 245 (9th Cir. 1991); In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983). A litigant qualifies as such an aggrieved person if the bankruptcy order appealed from diminishes the litigant's property, increases his burdens or impairs his rights. In re Fondiller, supra.

There is no binding authority on the issue of whether an interim trustee has standing to appeal an election of a permanent trustee. The majority of courts hold that an interim trustee has standing to object to the election of a Chapter 7 Trustee at the trial court level. See, e.g., Matter of Lindell Drop Forge Co., 111 B.R. 137, 141 (W.Mich. 1990); In re Klein, 110 B.R. 862, 869 (N.Ill. 1990); In re New York Produce American & Korean Auction, 106 B.R. 42, 47 (S.N.Y. 1989); Matter of NNLC Corp., 96 B.R. 7, 9 (Conn. 1989); In re Poage, 92 B.R. 659, 663 (N.Tex. 1988); In re Metro Shippers, Inc., 63 B.R. 593, 598 (E.Pa. 1986). But see Matter of G.I.C. Government Securities, Inc., 56 B.R. 105, 108 (M.Fla. 1985)

(holding without discussion that an interim trustee does not have standing to challenge a Chapter 7 trustee election).

The courts have set forth several policy reasons for giving interim trustees standing to object to a trustee election. It has been said that interim trustees are best able to ascertain initially whether a creditor having a material interest adverse to the estate, or an insider, seeks to vote. In re New York Produce American & Korean Auction, supra, 106 B.R. at 46. Also, it is said that the interim trustee, as an in place fiduciary, may object to a creditor's claim for voting purposes since the trustee represents the bankruptcy estate and the purpose behind Code Section 702 voting restrictions is to protect the estate. In re New York Produce American & Korean Auction, supra; Matter of NNLC Corp., supra. A court, learning of a possible materially adverse interest from any source, may sua sponte determine the outcome of a trusteeship election. However, without the aid of a fiduciary such as the interim trustee to alert a court to the possibility that a creditor has a material interest adverse to the estate, it would be difficult for a court to monitor such elections on its own. In re New York Produce American & Korean Auction, supra, 106 B.R. at 47.

These considerations are more applicable to initial objections at the trial court level than to appeals. Here, the Appellant has alerted the bankruptcy court to his concerns regarding the election. The court considered the Appellant's objections and wrote a detailed letter opinion in response to those objections. The rationale that trustees are best able to alert trial courts in the first instance

to possible errors in the election proceeding does not apply to appeals.

In In re Metro Shippers, Inc., supra, the court recognized that an interim trustee who has not been appointed permanent trustee ostensibly has lost the opportunity to administer the bankruptcy case and with it the possibility to earn commissions. Code Section 702(d) provides that in the event there is not a valid election of a permanent trustee at the first meeting of creditors, the interim trustee automatically will be appointed to serve as the permanent trustee. The court held that due process requires that the former trustee have standing to challenge any defects in the process by which his rights were lost. Id.

I disagree. The doctrine of standing includes several judicially self-imposed limits on the exercise of federal jurisdiction. I.C.C. v. Transcon Lines, 990 F.2d 1503, 1516 (9th Cir. 1993). One of these prudential standing limits requires that the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee. 990 F.2d at 1516. The election procedures are not designed to protect a candidate. Sandhurst Securities, supra, 96 B.R. at 456. They are designed to protect creditors and the welfare of the estate. York Intern. Building, Inc. v. Chaney, 527 F.2d 1061, 1067 (9th Cir. 1975); Sandhurst Securities, supra. A candidate is not to be clothed with those rights belonging to others in order to advance his or her own chances of election. Sandhurst Securities, supra, 96 B.R. at 456-

57.

Such is the situation here. Although the unsecured creditors' committee and the U.S. Trustee originally questioned the validity of the election, they never opposed the bankruptcy court's findings. No creditor or other party in interest has appealed the orders or joined in the Appellant's appeal. The Appellant was never elected trustee. Rather, he was appointed on an interim basis shortly after the bankruptcy case was filed. The only interest the Appellant had at stake when he filed this appeal was the possibility of fees which might accrue in the future.

An interim trustee likely has standing to object to the election of a permanent trustee at the trial court level. But once the issue is brought to the bankruptcy court's attention and the court resolves the election dispute, as a policy matter the trustee should not be accorded standing to appeal the court's ruling. Here, the creditors of the estate and other parties in interest apparently have decided that an appeal would not be worthwhile. And indeed, the bankruptcy court's order has been affirmed at the cost of additional litigation expenses to the estate.

During their pendency, election disputes cloud the administration of bankruptcy cases. To entertain election disputes brought by candidates solely or principally motivated by the possibility of future commissions affords little, if any, benefit, poses considerable risk of delay and inefficient estate administration and foreshadows the dubious prospect of numerous election disputes brought by persons seeking additional

compensation. Sandhurst Securities, supra, 96 B.R. at 457. Because an interim trustee lacks standing to appeal a bankruptcy court order confirming the election of a permanent trustee, this appeal should be dismissed.

OFFICE OF THE CLERK
United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on 1/24/94 .

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.