No Equitable Tolling of 11 U.S.C. § 548's Two-Year "Look-Back"

February 28, 2012 by Mathew Goldstein and Tianna E. Jackson

Section 548(a) of the Bankruptcy Code allows a debtor to avoid certain transfers of property as 'fraudulent transfers' provided that such transfers took place "within 2 years before the date" of a bankruptcy filing. 11 U.S.C. § 548(a). This two-year period is generally referred to as the 'look-back' period.

On January 24, 2012, Judge Brendan L. Shannon of the U.S. Bankruptcy Court for the District of Delaware ruled that section 548's two-year look-back period is not subject to the doctrine of equitable tolling. Meaning, even if a recipient of a transfer of a debtor's property took some action to prevent a debtor from becoming aware that a fraudulent transfer claim under section 548 existed against such recipient, so long as the transfer of property took place outside of the two-year look-back period, the debtor could not pursue a claim under section 548. See Industrial Enterprises of America, Inc. v. Burtis et al (In re Pitt Penn Holding Co., Inc., et al.), Adv. No. 11-51868, 2011 Bankr. LEXIS 5260 (Bank. D. Del 2012).

In In re Pitt Penn, the debtor Industrial Enterprises of America, Inc. commenced an adversary proceeding against certain defendants to recover property transferred from the debtor in the years before its bankruptcy. Among other causes of action, the debtor asserted claims based on Bankruptcy Code section 548. Initially, the bankruptcy court dismissed the section 548 claims because the debtor filed its petition on May 1, 2009, and the allegedly fraudulent transfers took place on February 6, 2007. Based on the two-year look-back period, the transfers happened outside of the window set forth in Bankruptcy Code section 548.

The debtor argued that the bankruptcy court should extend the two-year look-back period because the defendants "concealed" the section 548 claim from the debtor and the defendants should not be permitted to benefit from such deception. Id. at *5. The debtor argued that the doctrine of equitable tolling should apply to section 548's look-back period, because that doctrine has been applied by bankruptcy courts to "allow a claim to be filed outside of the applicable statute of limitations where some action on the defendant's part makes it such that the plaintiff is unaware that the cause of action exists." Id.

However, the bankruptcy court determined that the doctrine of equitable tolling does not apply to the two-year look-back period set forth in Bankruptcy Code section 548 because the look-back period is a *substantive* element of a section 548 cause of action – not a procedural regulation – and therefore cannot be equitably tolled. Id. Whereas statutes of limitation are rules of procedure governing timing requirements and therefore subject to a court's discretionary powers to thwart unfairness, the two-year look-back is a substantive statutory element designed "to cabin the broad power given to [a debtor] to pursue fraudulent transfers." Id at *9. Because Congress limited the universe of transfers avoidable under section 548 to those that took place within two years prior to filing a petition, courts do not have the ability to extend section 548's grant of power.

In arriving at its conclusion, the bankruptcy court declined to follow the decision of the bankruptcy court for the District of Connecticut in Official Committee of Unsecured Creditors v. Pardee (In re Stanwich Fin. Servs. Corp.), 291 B.R. 25 (Bankr. D. Conn. 2003). In Stanwich, the defendants in a fraudulent transfer action concealed certain facts which made it impossible for the plaintiff to become aware that allegedly fraudulent transfers had taken place. The Stanwich court sided with the plaintiff, finding that the look-back period could be equitably tolled. The Stanwich court relied on Young v. United States, 535 U.S. 43 (2002), in which the Supreme Court stated that "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling. . . ." Stanwich, 291 B.R. at 28. But, because the bankruptcy court in In re Pitt Penn found that section 548's look-back period was not a statute of limitations but rather a substantive element of a section 548 claim, the bankruptcy court in In re Pitt Penn declined to follow the Stanwich decision. In contrast, the bankruptcy court relied on the holding of In re Maui Industrial Loan & Finance Co., 454 B.R. 133 (Bankr. D. Haw. 2011) which expressly rejected the Stanwich decision and held that Bankruptcy Code section 548 "does not support an inference that Congress intended to permit discretionary extension of the [two-year] time period." In re Maui Industrial Loan & Finance Co, 454 B.R. 133 at 136.

In light of the holding of In re Pitt Penn, debtors should be mindful that a bankruptcy court in the District of Delaware may be unwilling to extend the look-back period of section 548 and permit the pursuit of fraudulent transfer claims based on transfers that took place outside of the two-year window. If a transfer occurred more than two years prior to the filing of the debtor's petition, the transfer will not avoidable pursuant to section 548.