

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOSEPH O'DONNELL,)
 PLAINTIFF)
))
v.))
))
MCI COMMUNICATIONS GROUP,)
 DEFENDANT)

Misc. No. 97-15-P-H

JOSEPH O'DONNELL,)
 PLAINTIFF)
))
v.))
))
WORLD FUEL SERVICES,)
 DEFENDANT)

Misc. No. 97-16-P-H

ORDER ON PENDING MOTIONS

The defendants' motion for leave to appeal the Bankruptcy Court's Order of January 13, 1997 is **GRANTED** in both cases under 28 U.S.C. § 158(a)(3). In light of the difference of opinion among the Circuits, I find that there is a controlling question of law as to which there is substantial ground for difference of opinion. Moreover, I find that there are exceptional circumstances here to justify the interlocutory appeal. Specifically, the issue is whether the statute of limitations has run on these adversary claims. If it has, the claims cannot go forward. The debate is whether the two-year statute of limitations period begins to run only from the date of the appointment of the trustee (when a case is first opened as a Chapter 11 and then is later converted to a Chapter 7 with a trustee only being appointed at the later time) or whether it begins to run upon the filing of a Chapter 11 bankruptcy

petition.¹ Although the statute has now been amended,² there are Chapter 11 cases in the District filed before the amendment that could still be converted to Chapter 7 and have trustees newly appointed, thereby raising the issue on a recurrent basis. The issue has been presented to me and briefed and I have been afforded the relevant caselaw. There is no reason to have this litigation go forward in the Bankruptcy Court under this cloud of uncertainty, or to delay resolution of an issue that might affect other cases. I conclude, therefore, that in this unique case an immediate interlocutory appeal is appropriate.

The defendants agreed at oral argument that all the caselaw and arguments have been presented to me so that nothing is to be gained by having further briefing on the *merits* of the statute of limitations dispute. The plaintiff trustee, although urging me not to permit the interlocutory appeal, also did not suggest that any further briefing was necessary on the merits. Accordingly, I proceed to dispose of the merits.

¹ This case is governed by the pre-1994 version of 11 U.S.C. § 546(a)(1). At the time this action was commenced, section 546(a)(1) stated:

An action or proceeding under section 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, or 1302 of this title . . . ; or
(2) the time the case is closed or dismissed.

² Section 546(a)(1) was amended by the Bankruptcy Reform Act of 1994, P.L. 103-394, § 216. The new provision provides:

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

11 U.S.C. § 546(a)(1) (Supp. 1996).

I have reviewed the multitude of cases cited to me by the parties. The First Circuit has not decided the issue.³ I find the opinions of Judges Easterbrook for the Seventh Circuit and Wilkins for the Fourth Circuit to be persuasive. See Gleichman Sumner Co. v. King, Weiser, Edelman & Bazar, 69 F.3d 799, 801-02 (7th Cir. 1995) (finding that the two-year statute of limitations begins to run only upon the appointment of a trustee); In re Maxway Corp., 27 F.3d 980, 984-85 (4th Cir.) (same), cert. denied, 115 S. Ct. 580 (1994). They have fully laid out the competing considerations on this matter of statutory construction and I have nothing to add. For the reasons they have articulated, I decline to follow the contrary precedents from other Circuits.

For these reasons, the motion to file the interlocutory appeal is **GRANTED** and the decision of the Bankruptcy Court is **AFFIRMED**. This action **MOOTS** the defendants' motion to stay the proceedings pending appeal.

SO ORDERED.

DATED THIS 25TH DAY OF MARCH, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

³The parties agree that the passing statement in Indian Motorcycle Assoc. III Ltd. Partnership v. Massachusetts Hous. Fin. Agency, 66 F.3d 1246, 1256 (1st Cir. 1995), about the limitations period for an avoidance action is dictum that should not be viewed as binding.