Intake Binder

Note: Judge Minto presided over this case as Visiting Judge for Judge Alan Shiff of the Dist. of CT.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:

SECURITYLINK CORPORATION, BK. NO. 91-52578

Debtor.

In re:

SECURITYLINK LIMITED PARTNERSHIP, BK. NO. 91-52579

Debtor.

In re:

SECURITYLINK METRO LIMITED PARTNERSHIP, BK. NO. 91-52580

Debtor.

RICHARD M. COAN, TRUSTEE,

Plaintiff,

A.P. NO. 94-5268

vs.

KELLEY, DRYE & WARREN, DECISION & ORDER

Defendants.

BACKGROUND

On September 19, 1991, Securitylink Corporation and several related entities (collectively "Securitylink") filed petitions initiating Chapter 11 cases. By Order dated July 20, 1992 (the "Conversion Order"), the Securitylink Chapter 11 cases were

converted to Chapter 7 cases.[1]

A July 24, 1992 Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (the "Section 341 Meeting Notice") was mailed to all of the creditors of Securitylink. The Section 341 Meeting Notice: (1) indicated that the Chapter 11 cases of Securitylink had been converted to Chapter 7 on July 24, 1992; (2) indicated that Byron Paul Yost was the Trustee ("Trustee Yost"); and (3) set September 3, 1992 at 9:00 a.m. at the Office of the U.S. Trustee as the date, time and location of a meeting of creditors.

By a July 30, 1992 Appointment (the "Yost Appointment") the Office of the United States Trustee formally appointed Trustee Yost as an interim trustee. The Yost Appointment provided that:

> "Byron P. Yost of New Haven, Connecticut, is hereby appointed interim trustee for the estate(s) of the above-named debtor(s). Unless a trustee is elected at the meeting of creditors to be called pursuant to Section 341 of Title 11, United States Code, in the above-referenced case, the interim trustee shall serve as trustee.
>
> This case is covered by the blanket bond for Chapter 7 case Trustees issued by the Seaboard Surety Company, a copy of which is on file with the Court."[2]

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[1] On the bottom of the Conversion Order was a handwritten notation, apparently dated July 24, 1992, which in part sets forth "Tr. Yost, UST".

[2] Trustee Yost was qualified to serve under Section 322 by reason of the blanket bond, and he did not reject the appointment within the time and as required by Rule 2008.

On September 3, 1992, shortly before the scheduled Section 341 meeting, alleging that it was making its request pursuant to Section 702(b), the Connecticut National Bank ("CNB") filed a Request for Election of Chapter 7 Trustee (the "Election Request") which requested that an election of a person to serve as trustee for Securitylink be held.[3] The Election Request contained detailed computations which indicated that CNB held at least 90% of the non-insider unsecured claims in each of the Securitylink converted Chapter 7 cases.[4] The docket of the United States Bankruptcy Court, District of Connecticut, Bridgeport Division, for the Securitylink Chapter 7 cases (the "Docket") contains the following annotation for October 6, 1992: "Hearing Off RE: [397-1] Motion for Election of Chapter 7 Trustee by Connecticut National Bank. HEARING NOT NEEDED CASE CONVERTED TO CHAPTER 7. (sds) [EOD 10/15/92] [91-52578]".

The Docket also contains the following additional annotations: (1) for September 3, 1992: "First Meeting of Creditors continued to 1:00 9/23/92 At Office of the U.S. Trustee (ahs) [EOD 09.08.92]";

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[3] There is nothing in the Bankruptcy Code or Rules or in the Local Rules of the Bankruptcy Court for the District of Connecticut that requires that a request for a Section 702(b) vote be made in writing or that it be filed with or approved by the Bankruptcy Court.

[4] Since CNB held over 90% of the non-insider unsecured claims in each of the Securitylink Chapter 7 cases, it could have on its own vote elected a trustee pursuant to Section 702(b) at the Section 341 meeting called for September 3, 1992.

and (2) for September 23, 1992: "First Meeting of Creditors continued to future date per Trustee Yost (ahs) [EOD 10/01/92]". However, the Docket contains no annotation which indicates that a further Section 341 Meeting was ever held.

By Notice to Successor Chapter 7 Trustee of Appointment and Fixing Amount of Bond (the "Notice to Successor Trustee"), dated September 24, 1992 and issued by the Office of the United States Trustee, Richard M. Coan, Esq. ("Successor Trustee Coan") was appointed as successor trustee in the Securitylink Chapter 7 cases. The Notice to Successor Trustee read in part that:

> "You have been appointed, pursuant to 11 U.S.C. 701(a) as Interim Trustee of the case of the above-named debtors. *See* U.S.C. 702(c). If no trustee is elected, you shall serve as trustee in this case by operation of law. 11 U.S.C. 702(d)."

By a "Resignation Letter"[5] dated September 25, 1992, a date subsequent to: (a) the initial Section 341 Meeting of creditors called and noticed for September 3, 1992 and the September 23, 1992 adjourned Section 341 Meeting date; and (b) September 24, 1992, when the Office of the United States Trustee appointed Successor Trustee Coan, Trustee Yost advised the Office of the United States Trustee that:

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[5] The Resignation Letter was an exhibit to the pleadings in the pending Adversary Proceeding, but was never separately filed with the Bankruptcy Court, and, therefore, not a part of the official case file prior to the commencement of the Adversary Proceeding.

> "I hereby resign my appointment as Chapter 7 Trustee in the above-referenced cases. My resignation is in lieu of the proposed election of Richard M. Coan as successor trustee, and is intended to save the expense to the estate of a separate trustee bond."

On September 22, 1994, Successor Trustee Coan commenced an "Adversary Proceeding" against Kelley, Drye & Warren ("Kelley, Drye"). The Complaint in the Adversary Proceeding alleged that three checks received by Kelley, Drye on August 15, 1991 were avoidable preferential transfers.

Kelley, Drye in its Answer in the Adversary Proceeding and in its pending "Motion for Summary Judgment", which requests that the Adversary Proceeding be dismissed, has alleged that the commencement of the Adversary Proceeding by Successor Trustee Coan was not timely, since it was not commenced within two years from the appointment of a trustee as required by Section 546(a)(1).

For the reasons set forth in this Decision & Order, I find that the Adversary Proceeding was not commenced within two years from the appointment of a trustee in the Securitylink Chapter 7 case, and, therefore, must be dismissed.

DISCUSSION

I. RELEVANT STATUTES

The relevant statutory provisions and Rules in effect on the date of the commencement of the Adversary Proceeding, Sections 341,

546, 701, 702 and 703 and Rule 2012, provide as follows:

Section 341. Meetings of creditors and equity security holders.

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

(b) The United States trustee may convene a meeting of any equity security holders.

(c) The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.

(d) Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—

(1) the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;

(2) the debtor's ability to file a petition under a different chapter of this title;

(3) the effect of receiving a discharge of debts under this title; and

(4) the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.

Section 546. Limitations on avoiding powers.

(a) 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, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed.

Section 701. Interim Trustee.

(a)(1) Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees established under section 585(a)(1) of title 28 or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(2) If none of the members of such panel is willing to serve as interim trustee in the case, then the United States trustee may serve as interim trustee in the case.

(b) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title.

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

Section 702. Election of trustee.

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) 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; and

(3) is not an insider.

(b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if—

(1) creditors holding at least 20 percent in amount of the claims of a kind specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for a trustee.

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

Section 703. Successor trustee.

(a) If a trustee dies or resigns during a case, fails to qualify under section 322 of this title, or is removed under section 324 of this title, creditors may elect, in the manner specified in section 702 of this title, a person to fill the vacancy in the office of the trustee.

(b) Pending election of a trustee under subsection (a)

of this section, if necessary to preserve or prevent loss to the estate, the United States trustee may appoint an interim trustee in the manner specified in section 701(a) of this title.

(c) If creditors do not elect a successor trustee under subsection (a) of this section or if a trustee is needed in a case reopened under section 350 of this title, then the United States trustee—

(1) shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 to serve as trustee in the case; or

(2) may, if none of the disinterested members of such panel is willing to serve as trustee, serve as trustee in the case.

Rule 2012. Substitution of Trustee or Successor Trustee; Accounting.

(a) Trustee. If a trustee is appointed in a chapter 11 case or the debtor is removed as debtor in possession in a chapter 12 case, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.

(b) Successor Trustee. When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code:

(1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and

(2) the successor trustee shall prepare, file, and transmit to the United States trustee an accounting of the prior administration of the estate.

II. COMPETING POLICIES

Successor Trustee Coan has commenced this Adversary Proceeding to avoid the alleged preferential transfers received by Kelley, Drye. The avoidance powers of a Chapter 7 bankruptcy trustee, including those under Sections 547 and 550, implement several of the fundamental policies of the Bankruptcy Code; to prevent diminution of the debtor's estate and promote equality of distribution among creditors. Statutes of limitation, on the other hand, such as the one contained in Section 546, implement fundamental policies of the American Legal System; to insure finality to the threat of litigation and eliminate stale claims. *See In re M&L Business Mach. Co., Inc.*, 75 F.3d 586, 590.

In reviewing and analyzing the unusual fact pattern presented by this case in order to determine when a trustee was appointed for purposes of Section 546(a)(1) and, therefore, when the two-year period to commence avoidance actions under Sections 547 and 550 began, it is useful to view the official records of the Bankruptcy Court in the Securitylink Chapter 7 cases from the perspective of a potential defendant of such an avoidance action.

III. AN ELECTED TRUSTEE

Neither Trustee Yost nor Successor Trustee Coan ever served as an elected trustee under Section 702. No vote by creditors for a

trustee ever took place at a Section 341 meeting of creditors, as specifically required by Section 702(b), or otherwise. Although CNB filed its Election Request on September 3, 1992, shortly before the Section 341 Meeting called for 9:00 a.m., no vote was conducted at either the September 3, 1992 Section 341 Meeting or the September 23, 1992 adjourned Section 341 Meeting, and no further Section 341 Meeting was ever called, scheduled or held.[6] Furthermore, Successor Trustee Coan was not ever elected as a successor trustee pursuant to Section 703(a). Neither the Docket nor the Securitylink Chapter 7 case files indicate that such an election ever took place, as required, in the manner specified in Section 702, or otherwise.

IV. WHEN DOES AN INTERIM TRUSTEE APPOINTED PURSUANT TO SECTION 701 BECOME A PERMANENT TRUSTEE PURSUANT TO SECTION 702(d) FOR PURPOSES OF THE SECTION 546(a)(1) TIME PERIOD WHEN NO TRUSTEE HAS BEEN ELECTED

Although there is a split of authority, the vast majority of cases hold that an interim trustee appointed under Section 701(a)(1) does not become a permanent "appointed" trustee under Section 702(d) and for purposes of Section 546(a)(1), which

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[6] Remarkably, Successor Trustee Coan's June 27, 1995 response to Kelley, Drye's request for admissions in the Adversary Proceeding denies that on September 3, 1992, the first meeting of creditors was held pursuant to Section 341 of the Bankruptcy Code. If that is true, it would indicate that no Section 341 meeting of creditors was ever held in the Securitylink Chapter 7 cases. Clearly, however, the Docket does not indicate to one reviewing it that the meeting was not held.

specifically refers to an appointment under Section 702, until the Section 341 meeting of creditors has been held and conducted as required by Rule 2003(b)(1)[7] and no trustee has been elected at that meeting pursuant to Section 702(b). *See In re Conco Bldg. Supplies, Inc.*, 102 B.R. 190 (9th Cir. BAP 1989).

Under that analysis, if Trustee Yost conducted a Section 341 Meeting of creditors on September 3, 1992, since no trustee was elected at that Meeting, or ever, in accordance with Section 702(b), pursuant to Section 702(d) Trustee Yost became the permanent and appointed trustee on September 3, 1992.

From reviewing the Docket and the case files for the Securitylink Chapter 7 cases, one must conclude that Trustee Yost was a Section 702(d) permanent trustee as of September 3, 1992, and Successor Trustee Coan was his Section 703(b) successor, since: (1) the Yost Appointment stated that Trustee Yost would serve as

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[7] Rule 2003(b)(1) provides:

(b) Order of Meeting.

(1) Meeting of Creditors. The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath, and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths.

trustee if no trustee were elected at the meeting of creditors to be "called" pursuant to Section 341; (2) the Section 341 Meeting Notice indicated that a meeting of creditors pursuant to Section 341 was called and noticed for September 3, 1992; (3) from the Docket it appears that the Section 341 Meeting was conducted on September 3, 1992 by Trustee Yost, who adjourned the Meeting to September 23, 1992 without any specific reason being indicated, a common occurrence in corporate Chapter 11 cases converted to Chapter 7, not for the purpose of electing a trustee, but to further the administration of the estate; (4) nothing in the Docket or case files indicates that a trustee was ever elected in accordance with Section 702(b); (5) the case files include the filed Election Request by CNB, but also include the Docket annotation of October 6, 1992, which indicates that a hearing on the Request was not needed since the case was converted to Chapter 7, a further confirmation that no trustee was ever elected in the cases; (6) the language of the Notice to Successor Chapter 7 Trustee, which indicated that Successor Trustee Coan was a successor trustee, was not inconsistent with the provisions of Section 703(b) and a further conclusion that Trustee Yost by then had already become the permanent trustee pursuant to Section 702(d), because no trustee was elected at the September 3, 1992

meeting "called" and apparently held pursuant to Section 341; and (7) Successor Trustee Coan was not an elected Section 703(b) trustee and could not independently qualify under Section 702(d) or the provisions of his own written appointment, because he never called, scheduled or held a Section 341 meeting after his appointment.

V. WHEN DOES AN INTERIM TRUSTEE APPOINTED PURSUANT TO SECTION 701 BECOME A PERMANENT TRUSTEE PURSUANT TO SECTION 702(d) FOR PURPOSES OF THE SECTION 546(a)(1) TIME PERIOD WHEN NO TRUSTEE HAS BEEN ELECTED AND NO SECTION 341 MEETING HAS EVER BEEN HELD

If, as suggested by Successor Trustee Coan, no Section 341 Meeting was ever conducted or held in the Securitylink Chapter 7 cases, either: (1) the two-year period provided for by Section 546(a) has never commenced, because there was never an elected trustee under Section 702(b) and no interim trustee had ever become a permanent trustee under Section 702(d), because there was never a Section 341 meeting, an unreasonable, inequitable and unjust conclusion to reach as to a defendant such as Kelley, Drye; or (2) the Court must determine the date of the appointment of a trustee for purposes of Section 546(a)(1) and Section 702 in this unusual factual situation which, in view of the specific provisions of Section 341(a), would never have been contemplated by Congress when it enacted the relevant Sections.

If no Section 341 meeting of creditors was ever held and

conducted in the Securitylink Chapter 7 cases, as required by Section 341 and Rule 2003(b)(1)[8], the specific language of the Yost Appointment, which states that, "Unless a trustee is elected at the meeting of creditors to be called (emphasis added) pursuant to Section 341 of Title 11, United States Code, in the above referenced case, the Interim Trustee shall serve as Trustee", must control. This date when the Section 341 meeting was called for, scheduled and noticed, was September 3, 1992.[9]

On the facts and circumstances of this unusual case, I do not believe that there is anything else in the Bankruptcy Court's records or the Bankruptcy Code and Rules which would be inconsistent with this determination.

It would give full effect to the policies of finality underlying statutes of limitations, balance the competing policies in favor or the estate and the creditors, and be fair and equitable to the defendant, Kelley, Drye.

All that Kelley, Drye is alleged to have done was to have received avoidable preferential transfers. Recipients of avoidable

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[8] The Court has been unable to find a published decision which has addressed this issue when no Section 341 meeting was ever conducted in a converted Chapter 7 case.

[9] One reviewing the Docket annotation for September 3, 1992 would have no way of knowing that a Section 341 meeting held and conducted as required by Section 341 and Rule 2003(b)(1) did not take place.

preferential transfers have done nothing wrong, unlawful or inequitable. They simply have received all or part of a valid antecedent debt owed to them from a debtor within a time frame which Congress has arbitrarily established as one during which recoveries can be made by the estate in order to prevent diminution of the estate and promote equality of distribution among creditors. Furthermore, whatever may or may not have happened in this case regarding the appointments of Trustee Yost and Successor Trustee Coan, Kelley, Drye did nothing which would subject it to an allegation that equitable tolling was applicable.

Furthermore, notwithstanding that the Notice to Successor Chapter 7 Trustee appointed Successor Trustee Coan as an interim trustee, that is not inconsistent with the conclusion that Trustee Yost had become a permanent trustee, and now Successor Trustee Coan was merely his successor. Section 703(b) specifically provides for the appointment of an interim trustee when a trustee (presumably a permanent trustee) dies, resigns or is removed. The Docket shows only the following October 19, 1992 annotation regarding Trustee Yost no longer serving as Trustee: "Terminated Trustee Byron Paul Yost (krf) [EOD 10/19/92]".

In addition, if the Notice to Successor Chapter 7 Trustee were to be read as other than having been issued pursuant to Section

703(b), making Successor Trustee Coan merely a successor trustee to Trustee Yost, how else could Successor Trustee Coan have qualified to serve as a permanent trustee? He was not an elected trustee pursuant to either Section 702(b) or Section 703(a), as discussed in this Decision & Order. Furthermore, not only did he not conduct or hold a Section 341 meeting of creditors, as contemplated by Section 341 and Rule 2003(b), he has never even called or scheduled one. Therefore, he could not independently have qualified to act under either the specific requirements of Section 702(d) or the specific provisions of the Notice which appointed him.[10]

VI. THE SECTION 546(a)(1) COMMENCEMENT DATE FOR A SUCCESSOR TRUSTEE

By September 2, 1994, Successor Trustee Coan knew that: (1) no trustee had ever been elected under Sections 702(b) or 703(a) in the Securitylink Chapter 7 cases; (2) he had not scheduled, held or conducted a Section 341 meeting of creditors in the cases; and (3) he had been appointed as a Successor Chapter 7 Trustee. As a Successor Trustee he had reviewed the case files, the Docket,

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[10] In his submission, Successor Trustee Coan did not even discuss these facts that: (1) no trustee had been elected in these cases; (2) perhaps no Section 341 meeting was ever held; (3) his status as a successor trustee; or (4) his inability to qualify independently, if not as a successor trustee to Trustee Yost, under Section 702 or the terms of his written appointment. Successor Trustee Coan merely stated "a disinterested trustee should have the full two years granted by Congress to investigate the financial affairs of the Debtor and take appropriate action."

including the specific language of the Yost Appointment, and the relevant case law,[11] and must have questioned whether, on September 24, 1992 when he was appointed as a Successor Trustee, Trustee Yost had become a permanent trustee on September 3, 1992 for purposes of Section 546(a)(1).

CONCLUSION

In this case: (1) no Chapter 7 trustee was ever elected pursuant to Section 702(b) or 703(a); and (2) either no Section 341 meeting of creditors was ever held, or one was held on September 3, 1992. Therefore, the two-year period provided for by Section 546(a)(1) commenced on September 3, 1992, the date the Section 341 Meeting was either held for purposes of Section 702(d) or was called for and noticed to creditors and held at least to the extent of adjourning it. It is also the date on which the interim trustee, Trustee Yost, pursuant to the specific language of his written appointment, and, therefore, the provisions of Section 702(d), became a permanent appointed trustee. On the facts of this case, no other date would be more appropriate. The motion of

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[11] Including the decisions which hold that a plain reading of Section 546(a) is that the two-year statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same two-year statute of limitations. *See In re San Joaquin Roast Beef*, 7 F.3d 1413, 1416 (9th Cir. 1993).

Kelley, Drye to dismiss this Adversary Proceeding as having been commenced subsequent to the time provided by Section 546(a)(1), is in all respects granted.

IT IS SO ORDERED.

/S/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: March 18, 1998