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Two-Year Look-Back Period Cannot Be Equitably Tolled

Industrial Enters. of Am., Inc. v. Burtis, et. al (In re Pitt Penn Hldg. Co., Inc.), 2012 WL 204095 (Bankr. D. Del. Jan. 24, 2012)

In *Industrial Enters. of Am., Inc. v. Burtis*, the Delaware Bankruptcy Court denied a motion to reconsider its holding that equitable tolling cannot enlarge the two-year look-back period under 11 U.S.C. § 548(a).

Section 548(a) provides that the trustee may seek to avoid a transfer of property by the debtor that was made on or within two years before the debtor's petition date. The defendants moved to dismiss as the plaintiff sought to avoid the transfer of property that occurred earlier than two years before the debtor's petition date. The plaintiff conceded that the transfers at issue occurred outside of the two-year timeframe but argued that its claim should not be dismissed because the look-back period was subject to equitable tolling.

The court agreed with the defendants. The plaintiff sought to avoid transfers of property that occurred more than two years prior to the debtor's petition date. Therefore "§ 548 simply does not apply" and the plaintiff's claim was dismissed.

The plaintiff moved to reconsider arguing in part that the court's decision conflicted with the court's holding in other proceedings that equitable tolling could be applied to a claim under section 548. The court acknowledged the existence of inconsistent holdings and solicited briefing from parties in such other proceedings prior to deciding the motion to reconsider. After considering the parties' views, the court denied the plaintiff's motion to reconsider and held that the two-year look-back period is a substantive element of a section 548 claim that cannot be equitably tolled.

The court agreed with the plaintiff that statutes of limitation may be subject to equitable tolling, in the absence of inconsistent statutory text, to avoid technical forfeiture where cause for application of equitable tolling is found. The plaintiff's argument faltered, however, because it assumed that the two year look-back period under section 548(a) is a limitations period. According to the court, a limitations period regulates "secondary conduct," i.e., the filing of a suit, not "primary conduct," i.e., the actions that give rise to the suit. Here, the two-year period under section 548(a) looks backward to the actions that gave rise to the suit, not forward to the time in which the trustee may file its complaint. The court noted that section 546 expressly provides a limitations period in which the trustee must file any claim under section 548. Finally, the court distinguished the case law relied on by the plaintiff by noting that those courts did not expressly consider whether the two-year period is a statute of limitations or substantive element of a section 548 claim. For all of these reasons, the court denied the plaintiff's motion to



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reconsider and held that the two-year look-back period under section 548(a) is a substantive element of a section 548 claim that is not subject to equitable tolling.

Keywords: bankruptcy, litigation, 11 U.S.C. 548(a); Fraudulent transfer; Equitable tolling

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