IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	: Chapter 7
	:
EAGLE ENTERPRISES, INC.	:
Debtor	: Bankruptcy No. 98-11297 SR
MITCHELL W. MILLER, as Trustee	:
Plaintiff	:
v.	:
USA WASTE SERVICES, INC. (now known as Waste Management Inc.) and	:
BLANK ROME COMISKY McCAULEY, LLP	:
	: Adversary No. 99-501
Defendants	:

OPINION

BY: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

INTRODUCTION.

Mitchell W. Miller, Esquire, (the "Trustee") is the Chapter 7 Trustee of the Bankruptcy estates of Eagle Enterprises, Inc. and Liberty Recovery Systems, Inc. As Plaintiff herein, the Trustee moves for leave to amend his complaint to add three causes of action against Defendant, USA Waste Services, Inc.("USA Waste"). Two of the Trustee's proposed new counts would seek the recision of certain contracts between the parties on the basis of their fraudulent inducement, together with restitution damages. The third new claim which the Trustee seeks leave to bring requests compensatory and punitive damages for alleged tortious interference by USA Waste with certain of the Debtors' third party contractual relationships. USA Waste opposes the Trustee's request in its entirety, arguing in the first instance that all of the proposed new claims which the Trustee would bring are barred at this juncture by the applicable statute of limitations. In the alternative, USA

Waste argues that the contract recision claims must be dismissed as futile, because the Plaintiff Trustee has failed to return consideration alleged to have flowed to the Debtors under the subject contracts. Oral argument was held October 12, 2000 and the issues have been extensively briefed by the parties. For the reasons discussed herein, the Court agrees that the recision claims the Trustee seeks to bring are barred by the applicable statute of limitations, the Trustee's invocation of the "discovery rule" safe harbor notwithstanding. The USA Waste objection to the recision counts will therefore be sustained. The Trustee's tortious interference claim likewise fails to withstand scrutiny. The Trustee's motion to add this count accordingly must also be denied. This disposition will obviate the need to consider USA Waste's alternative theory, or to dwell on certain other collateral issues which the parties have joined.

Discussion.

A. Leave to amend a complaint is freely given, but there are limitations

The Trustee's Motion is premised on Federal Rule of Civil Procedure 15. Rule 15 of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases by Rule 7015 of the Federal Rules of Bankruptcy Procedure, governs amended pleadings. In pertinent part, Rule 15 provides:

> . . .
> **(a) Amendments**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . .
> . . .
>
> . . .
> **(c) Relation Back of Amendments**. An amendment of a pleading

> relates back to the date of the original pleading when
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . .
> . . .

See, Fed. R. Civ. P. 15(a) and (c). *See also, Ynclan v. Department of Air Force*, 943 F.2d 1388, 1391-92 (5th Cir. 1991); *In re Tatge*, 212 B.R. 604, 610 (8th Cir. BAP 1997); *In re Zupancic*, 38 B.R. 754, 761 (9th Cir. BAP 1984); *In re Lazenby*, 253 B.R. 536, 538 (Bankr. E.D. Ark. 2000); *In re Delmonte*, 237 B.R. 132, 136 (Bankr. E.D. Tex. 1999); *In re Adler, Coleman Clearing Corporation*, 218 B.R. 13, 19 (Bankr. S.D.N.Y. 1998); *In re Numedco*, 1991 WL 204908, at *4 (Bankr. E.D.Pa. Oct 7, 1991); *In re All American of Ashburn, Inc.*, 92 B.R. 551, 552 (Bankr. N.D. Ga. 1988).

Elaborating on this, the Court in *Damrill*, *infra*, 232 B.R. at 771-72, noted that,

> "Rule 15 reflects two of the most important policies of the federal rules. First the rule's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. This is demonstrated by the emphasis Rule 15 places on the permissive approach that the district courts are to take to amendment requests, no matter what their character may be; ... Second, Rule 15 reflects the fact that the federal rules assign the pleadings the limited role of providing the parties with notice of the nature of the pleader's claim or defense and the transaction, event, or occurrence that has been called into question. 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d, § 1471, p. 505-507 (1990)."

In re Damrill, 232 B.R. 767 (Bankr. W.D. Mo.1999). *See also, In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986) *quoting, Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982); *In re Johnson*, 98 B.R. 359, 367 (Bankr. N.D. Ill. 1988). Moreover, it has been said that Rule 15 is premised on the theory "[t]hat pleadings are not an end in themselves, but are only a means to the proper presentation of a case; that at all times they are to assist, not deter, the disposition of the

litigation on the merits." *In re Metropolitan Company*, 85 B.R. 783, 785 (Bankr. S.D. Ohio 1988) *quoting* MOORE, VESTAL, KURLAND, 3 MOORE'S FEDERAL PRACTICE AND PROCEDURE § 15.02[1], 15-11 (2nd ed. 1989). *See also, Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1284 (5th Cir. 1981); *In re Frederick Petroleum Corp.*, 144 B.R. 758, 763 (Bankr. S.D. Ohio 1992); *In re Schwartzman,* 63 B.R. 348, 352-56 (Bankr. S.D. Ohio 1986). A trial court has considerable discretion when determining whether to grant leave to amend a complaint. *Zenith Radio Corp. v. Hazeltine*, 401 U.S. 321, 330, 91 S.Ct. 795, 803, 28 L.Ed.2d 77 (1971); *Jameson v. The Arrow Company*, 75 F.3d 1528, 1534-35 (11th Cir. 1996); *Estes v. Kentucky Utilities Co.,* 636 F.2d 1131, 1133 (6th Cir. 1980) and the grant or denial of a motion for leave to amend a complaint is said to be within the discretion of the bankruptcy court. *Adler, supra*, 218 B.R. at 19. *See also, In re Dairy Systems Corporation,* 97 F.3d 1171, 1175 (9th Cir. 1996); *In re Bozeman*, 226 B.R. 627, 630 (8th Cir. BAP 1998); *In re Universal Foundry Co.,* 163 B.R. 528, 541 (E.D. Wis. 1993) *aff'd* 30 F.3d 137 (7th Cir. 1994).

Rule 15(a) clearly provides that "leave shall be freely granted when justice so requires." *See*, Fed. R.Civ.P. 15(a). *See also, United States v. Duffus*, 174 F.3d 333, 337 (3rd Cir. 1999); *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1482 (9th Cir. 1997); *In re Harrison*, 71 B.R. 457, 458 (Bankr. D. Minn. 1987); *In re Dunn,* 49 B.R. 547, 550 (Bankr. W.D.N.Y. 1985). Freedom to amend, however, is not without limit. *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987), *cert. denied,* 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 483 (1988); *In re Suburban Motor Freight, Inc.*, 114 B.R. 943, 950 (Bankr. S.D. Ohio 1990); *In re Tacoma Boatbuilding Co.*, 81 B.R. 248, 260 (Bankr. S.D.N.Y. 1987). In *Foman, infra*, 371 U.S. at 182, 83 S.Ct. at 230, the United States Supreme Court observed,

". . . [i]f the underlying facts or circumstances relied upon by a plaintiff may be a

> proper subject of relief, he [or she] ought to be afforded an opportunity to test his [or her] claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given.'"

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). *See also, United States v. Thomas*, 221 F.3d 430, 435 (3rd Cir. 2000); *Tokio Marine & Fire Ins. Co. v. Employers Ins. of Wausau*, 786 F.2d 101, 103 (2nd Cir. 1986); *In re Falchi*, 1998 WL 274679, at * 12 (Bankr. S.D.N.Y. May 27, 1998); *In re Negro*, 176 B.R. 671, 673 (Bankr. D.R.I. 1995); *Frederick Petroleum*, *supra*, 144 B.R. at 763.

Since *Foman*, the developing case law has evidenced a "liberality in allowing amendments to a complaint." *Frederick Petroleum, supra*, 144 B.R. at 764. *See also, Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986); *In re Magno*, 216 B.R. 34, 38 (9th Cir. BAP 1997). Courts have stated that "delay alone is insufficient reason to deny a motion to amend." *Estes, supra,* 636 F.2d at 1134. *See also, United States v. Continental Ill. Nat'l Bank*, 889 F.2d 1248, 1254 (2nd Cir. 1989); *Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3rd Cir. 1978); *Boyle v. Texasgulf Aviation, Inc.,* 696 F.Supp. 951, 956 (S.D.N.Y. 1988), *aff'd,* 875 F.2d 307(2nd Cir. 1989); *In re Greenwald,* 107 B.R. 28, 30 (Bankr. S.D.N.Y. 1989). Rather, "the critical factors are notice and substantial prejudice." *Estes, supra*, 636 F.2d at 1134 *citing Hageman v. Signal L.P. Gas, Inc.* 486 F.2d 479, 484 (6th Cir. 1973). *See also, Minor v. Northville Public Schools, 605 F.Supp.*1185, 1201 (E.D. Mich. 1985)

The Sixth Circuit has established a four-part test for the examination of requests for leave to amend. *See, Estes, supra*., 636 F.2d at 1135. *See also, Magno, supra*, 216 B.R. at 37 *quoting*

Forsyth, supra, 114 F.3d at 1482. As articulated by the Court in *Suburban Motor, supra*, 114 B.R. at 951,

> "[t]he tests involve a determination of whether:
>
> (1) there is undue delay in seeking an amendment;
> (2) there is evidence of bad faith or dilatory tactics in requesting an amendment;
> (3) there is, or will be, undue prejudice to the nonmoving parties; and,
> (4) the amendment is futile.

See also, Feldman v. American Memorial Life Insurance Co., 196 F.3d 783, 893 (7th Cir. 1999); *In re Rogstad*, 126 F.3d 1224, 1228, (9th Cir. 1997); *Executive Leasing Corp. v. Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir. 1995); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1196-97 (3rd Cir. 1994); *Bechtel v. Robinson*, 886 F.2d 644, 652-53 (3rd Cir. 1989); *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989); *Heyl & Patterson Int'l,Inc. v F.D. Rich Housing of V.I., Inc.,* 663 F.2d 419, 425 (3rd Cir. 1981) *cert denied*, 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982); *In re Little*, 220 B.R. 13, 19 (Bankr. D.N.J. 1998). As will be discussed herein, USA Waste focuses principally on the last of the above criteria. That is to say, USA argues that the applicable statute of limitations has elapsed, and any request to amend a complaint to add time barred claims must be denied as futile. The latter proposition is correct and if an applicable Statute of Limitations has expired, a Motion to Amend a complaint to add a claim subject to the statute is properly denied on the grounds of futility. *Jablonski v. PanAm World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988)

B. Evaluation of the claims which the trustee seeks to add reveals them to be time barred and the "Discovery Rule" exception is not available to the Trustee here

Much of the historical background to this litigation is uncontested. Eagle Enterprises Inc.

("Eagle") and Liberty Recovery Systems, Inc. ("Liberty") filed petitions for relief under Chapter 11 of the Bankruptcy Code on January 30, 1998. Prior to the commencement of these cases, Eagle and Liberty were engaged in the business of transporting municipal solid waste via containers, loaded onto barges and then moved over water for disposition in landfills. USA Waste is engaged in the municipal solid waste disposal business in various capacities, one of which is the ownership and operation of solid waste landfills. The parties, that is to say, Eagle and Liberty on the one hand, and USA Waste on the other, entered into certain contracts in 1995 and 1996. Specifically, on January 12, 1995, Eagle and USA Waste entered into a certain Confidentiality Agreement. This agreement was a prelude to a future operating agreement which the parties contemplated, and was apparently designed, as its name implies, to protect proprietary operational information relative to the Eagle/Liberty waste transport by barge concept. In February 1996, Liberty entered into a multi-year Waste Disposal Agreement with Chambers Development of Virginia, Inc., a wholly owned subsidiary of USA Waste. Under the Waste Disposal Agreement the parties agreed, *inter alia,* that Liberty would deliver to the Charles City County landfill (a Chambers owned landfill in Virginia) a certain minimum tonnage of municipal solid waste per year. Chambers, in turn, guaranteed Liberty a reserved amount of space in the landfill each contract year, along with fixed disposal rates.

For reasons which are in dispute, but not all entirely relevant here, the Confidentiality Agreement and the Waste Disposal Agreement were both cancelled and replaced in the Spring of 1997 with a set of three agreements entitled 1) the Master Agreement, 2) Loan Agreement between Eagle Enterprise Inc., Borrower, and USA Waste Services, Inc., Lender, and 3) Agreement to Transport Waste Between USA Waste Services Inc. and Eagle Enterprises Inc. (Collectively the "1997 Agreements"). Generally speaking, the 1997 Agreements extensively broadened both the

nature and the scope of the various contractual relationships existing between the parties. Of particular significance to this contested matter is a provision in the 1997 Transportation Agreement, (at Section 4.1.B), which required USA Waste to provide Eagle with a certain minimum tonnage of solid waste per day for transport by Eagle/Liberty to the Charles City County landfill via a USA Waste barge facility in Richmond, Virginia, known as Port Tobacco/Shirley Plantation. The Trustee asserts, and it appears agreed, that in September of 1995, the County of Charles City had imposed a restriction upon USA Waste which limited its right to process more than 125 truckloads of waste per day (the equivalent of 2,500 tons) through its barge facility. The Trustee asserts that in view of this restriction, USA Waste could not lawfully process the volume of waste it had contractually agreed to provide to the Debtors for transport.

The crux of the Trustee's first count of fraudulent inducement is his allegation that USA Waste knew of the foregoing 125 truckload restriction when it entered into the 1997 Agreements, but purposefully concealed such fact from the Debtors, whose reliance on the promised volume then operated to their economic detriment. USA Waste does not appear to resist the notion that its Virginia barge facility was, in fact, subject to a restriction limiting to 125 the permissible number of trucks which could pass through it each day.. USA Waste's defense, instead, is premised on its contention that the truckload limitation was well known to the Debtors by at least 1997. USA points out, correctly, that an action for the recision of a contract on the basis of fraudulent inducement is subject to a two year statute of limitations under 42 Pa. C.S.A. § 5524. USA Waste thus argues that the Trustee's proposed cause of action for fraudulent inducement, insofar as the same is predicated upon the alleged concealment of the 125 truckload limitation at its Virginia barge facility, is time barred.

The Trustee does not contest the existence of a two year statute of limitations with respect to all three of his proposed new causes of action, nor does he appear to argue that, other things being equal, the statute of limitations here would have expired as to all three counts. Instead, and as noted above, the Trustee contends that the running of the statute of limitations was equitably tolled because the fraudulent conduct alleged was concealed, and the evidence of same only first came to light during the course of discovery in this lawsuit, indeed, recently so. The Trustee's legal premise is undoubtedly correct.

As a general rule, once a prescribed statutory period has expired, the complaining party is barred from bringing suit. The discovery rule, however, provides an exception to this principle in that its application tolls the passing of the statute. *Hayward v. Medical Center of Beaver County*, 530 Pa. 320, 608 A.2d 1040, 1043 (1992). Thus, when the underlying cause of action sounds in fraud, the statute of limitations is tolled until the plaintiff learns, or reasonably should have learned through the exercise of due diligence, of the existence of the claim. *Pennsylvania Ship Supply, Inc. v. Fleming International, Ltd.*, 2000 U.S. Dist. LEXIS 7955 (E.D.Pa. June 9, 2000)("when the underlying cause of action sounds in fraud, . . . the statute of limitations is tolled until the plaintiff learns or reasonably should have learned through the exercise of due diligence of existence of the claim"); *Accord, Beauty Time, Inc. v. VU Skin Systems, Inc.,* 118 F.3d 140, 148 (3d Cir. 1997) ("discovery rule" applies in Pennsylvania); *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D.Pa), *aff'd.*, 612 F.2d 572 (3d Cir. 1979)(statute of limitations tolled until such time as the fraud has been revealed). USA Waste does not challenge the Trustee's legal premise, but it vehemently disagrees that the facts support its application to any extent here. The Trustee, of course, sees the latter question differently.

With respect to the discovery rule, USA Waste underscores that for statute of limitation

purposes in a fraud case the plaintiff need only be put on "inquiry notice" by "storm warnings" of possible fraud. *Beauty Time, Inc. v. Vu Skin Sys., Inc.,* 118 F.3d 140, 148 (3d Cir. 1997) (citing *Ciccarelli v. Gichner Sys. Group, Inc.,* 862 F. Supp. 1293, 1301 (M.D.Pa. 1994), *See also, Gurfein v. Sovereign Group*, 826 F.Supp. 890, 918 (E.D.Pa. 1993) (dismissing fraud claim asserted after the running of the Statute of Limitations and rejecting plaintiff's discovery rule argument because plaintiffs were aware of enough facts underlying the claim to put them on notice of the potential fraud claim.) This legal premise is likewise correct, and in construing this standard, the Pennsylvania Supreme Court has noted that inquiry notice in the context of a statute of limitations defense is simply sufficient information to awaken inquiry and direct diligence in the channel in which it would be successful. *Bohus v. Belloff*, 950 F.2d 919, 925 (3rd Cir. 1991), *quoting Deemer v. Weaver*, 324 Pa. 85, 90, 187 A. 215 (1936) In this case, the Trustee and USA Waste have each offered a sharply different assessment of the record evidence which is germane to the application of the discovery rule. The reconciliation of this disagreement thus becomes pivotal.

With respect to the 125 truckload limitation at its Virginia barge facility, USA Waste relies on several facts as establishing sufficient inquiry notice to time bar the Trustee's claim. The first fact USA Waste points to is a certain letter of December 8, 1997, sent by the District manager of the landfill, Lee Wilson, to Robert Ferro, a founder and key employee of the Debtors. The letter is attached as "Exhibit A" to USA Waste's *Sur* Reply brief. Its brief text is, as follows:

> 8 December 1997
>
> Eagle Enterprises, Inc.
> 777 State Road
> Philadelphia, PA 19136
> Attn: Mr. Bob Ferro
>
> Dear Mr. Ferro:
>
> Please let this serve as clarification of our current

restrictions as they pertain to the hours which we are able to operate.

Shirley Plantation

- hours of operation are confined to between 7:00 a.m. and 6:00 p.m. Monday through Saturday

Charles City County Landfill

- the landfill operating hours are able to extend from 5:30 a.m. to 9:30 p.m. Monday through Friday, and 6:00 a.m. to 6:00 p.m. on Saturday

As you are aware, we are currently going through a re-zoning process which we hope will remove restrictions on the hours of operation at Shirley Plantation, as well as the restrictions on the number of vehicles per day which we are able to process. Once the re-zoning process is completed, we will be able to address the hours of operation at the landfill with the county.

Please let me know if you have any questions, or require any further clarification of this issue.

Yours truly,

CHARLES CITY COUNTY LANDFILL

Lee Wilson
District Manager

USA Waste argues that the above letter, the receipt of which is unchallenged, establishes that the existence of a truckload restriction at USA Waste's Virginia barge facility was made known to the Debtors as early as December 1997.

USA Waste next points to an affidavit offered herein from one Lawrence R. Jones ("Exhibit C" to USA Waste's *Sur* Reply brief). Jones managed the Debtors' operations at the Virginia barge facility between November 1997 and February 1998. In his affidavit, Jones states that he personally knew of the 125 truckload limitation no later than November 1997, and that he had numerous conversations with Robert Ferro on that subject during his employ. Jones, moreover, states that, among other things, he monitored the number of trucks which passed through the barge facility daily

for the very purpose of insuring that the legal limit was not exceeded. This evidence, argues USA Waste, likewise establishes that the truckload restriction was known to the Debtors so as to start the running of the statute of limitations and defeat the Trustee's reliance on tolling principles.

The Trustee's response to the above is three-fold. First, the Trustee contends that the Wilson letter of December 8, 1997 is unclear, because it only confirms that there was a truckload restriction at the barge facility, and does not speak to any specific permissible number of trucks. In this vein, the Trustee accuses USA Waste of grossly distorting the facts by giving the letter an overly broad interpretation. Second, the Trustee notes that, in his own affidavit, (Appendix "E" in Trustee's reply to USA Waste's Answer to Trustee's Motion) Ferro denies any personal knowledge of a truckload limitation. Finally, the Trustee argues that any information known to Jones about the truckload limitation cannot be imputed to the Debtors (in whose shoes the Trustee of course stands) under state law agency principals. Having considered the parties' competing positions, the Court finds USA Waste to have the better part of this dispute.

Addressing the Trustee's arguments in reverse order, the Court agrees that the law of agency dictates whether knowledge on the part of Jones may be imputed to the Debtors. The Court likewise concurs that, on this point, the inquiry centers on the employee's position within the corporate structure, and the question becomes whether the scope of the employment relationship, and the relationship between the employer and employee, is sufficient to warrant imputation given all the relevant circumstances. *Field v. Omaha Standard Inc.*, 582 F.Supp. 323, 327 (E.D.Pa. 1983); *Workmen's Compensation Appeal Board v. Evening Bulletin,* 498 Pa. 219, 445 A.2d 1190, 1192 (Pa. 1982) The Trustee answers the relevant agency inquiry in the negative, however the Court cannot agree.

Jones was a managerial employee of the Debtors who was employed on site at the Virginia barge facility. Mr. Ferro confirmed that Jones was a member of the Debtors' management team in his own deposition on March 13, 2000 (N.T. at 654) Jones' duties, according to Ferro, were those of "yard supervisor" and his responsibility was apparently to try and make sure that "everything was flowing properly" at the Virginia barge facility. (Ferro deposition March 10, 2000; n.t. at 406). The Trustee emphasizes, nevertheless, that Jones was not a corporate officer, and stresses the short duration of his employment. The Trustee also mounts a challenge to the question of exactly how much Jones actually knew of the truckload limitation and who he discussed it with, this by virtue of Jones' own deposition testimony and, in particular, his failure therein to site conversations between himself and Ferro on this topic. The Court has considered the Trustee's rebuttal arguments, but considers them all unavailing.

The principles of agency law applicable here are neither rigid, nor overly formalistic. Rather, they counsel looking to the substance of the employer/employee relationship. Under a functional analysis, Jones clearly was a sufficiently high level employee of the Debtors for purposes of imputation. *See, e.g., Vare Bros. v. Workmen's Comp. Appeal Bd.,* 496 A.2d 1316, 1318 (Pa. Commw. 1985)(imputing knowledge of job foreman to employer for the purposes of a limitations period); Although the job foreman in *Vare* was a long time employee, the length of employment is not determinative under agency law; it is only one factor to be considered. Jones' duration of employment was concededly short, but the relevance of that for present purposes seems marginal, particularly since Jones' employment ended involuntarily when the Debtors' business closed. What is more probative here is the scope of Jones' duties in Virginia, which was broad, and the nature of his relationship with his superiors, which appears to have been close. On the latter point, it is

apparent that great trust had been invested in Jones, who seems essentially to have been the key man for the Debtors at the Virginia barge facility. The Court concludes from this that Jones' knowledge of the truckload limitation may legally be imputed to the Debtors. Morever, the Court finds the evidence clear and convincing that Jones knew of the precise number of trucks which could pass through the facility, and is not dissuaded by the Trustee's understandable, but thin attempt to discredit Jones on this point.

In reaching its conclusion that Court takes note of Ferro's denial of any advices from Jones as to the 125 truckload limitation. This point itself, however, is tangential, since it is Jones' knowledge, not Ferro's, which is relevant for purposes of imputation to the corporate Debtors. If there were no issue as to Ferro's knowledge, there would be no need even to inquire as to Jones' knowledge. Thus, while it may not be possible to completely reconcile Jones' affidavit with Ferro's, the fact is not determinative. There is substantial evidence from which to infer, as the Court does, that Jones knew of the 125 truck load limitation, irrespective of any conversations he may have had with Ferro. Jones' knowledge can and must be imputed to the Debtors under applicable law, whether or not Jones and Ferro even spoke about the issue. It strikes the Court as unlikely, however, that Ferro in fact lacked personal knowledge of the truckload limitation. Here the Court rejects, in particular, the Trustee's attempt to cast doubt on the contents of the Wilson letter of December 8, 1997. That letter, addressed to Ferro, makes explicit reference to a truckload limitation at the barge facility. Even if one accepts the notion that the absence of a specific reference to 125 trucks is significant, one must remember that in this context the standard is "inquiry notice" of "storm warnings" of fraud. Clearly, the December 8, 1997 letter provides such notice to Ferro under any fair reading thereof, regardless of the weight one attributes to the role of Jones.

In sum, the Court concludes that the statute of limitations for the Trustee's cause of action for fraudulent inducement, insofar as the same is predicated on the 125 truckload restriction at USA Waste's barge facility, began possibly as early as November 1997, but in no event later than the receipt of the December 8, 1997 Wilson letter. The statute of limitations accordingly expired no later than December of 1997, and the Trustee's claim is now time barred.

The Trustee's second proposed cause of action for fraudulent inducement of contract is related to his first. The processing of container held solid waste at the USA Waste Virginia barge facility requires the use of a "tipping" machine. At the times relevant hereto, USA Waste had in place a single tipping machine at the Charles City County Landfill. The Trustee alleges that when the parties entered into the 1997 Agreements, USA Waste knew that to handle the container volume of waste it had contractually agreed to provide Liberty, it would require more than a single "tipper." The Trustee contends that USA Waste knew of the limitation on its ability to process waste that existed by virtue of having insufficient equipment, but misrepresented its abilities in order to induce the Debtors to abandon the lucrative Waste Disposal Agreement in favor of the 1997 Agreements. Once again, USA Waste does not appear to seriously challenge the propriety of its own conduct. Instead, it argues that the "limitation of the tipper" was also a fact well known to the Debtors as early as 1997. The evidence again bears this out. In this case even more clearly than with respect to the truckload limitation at the barge facility.

Mr. Jones, in his affidavit, again confirms that he personally observed the inadequacy of the single tipper to handle more than 125 truckloads of waste a day (approximately 2500 tons) in late 1997. According to the Jones' affidavit, the problem never came to much, because the Debtors themselves never had the necessary trucks to move even 125 truckloads of waste from the barge

facility to the Charles City County landfill in a single day. More significantly, Jones again asserts that he discussed the situation with Ferro, who, he says, was well aware of it. In his own deposition, Ferro discusses his view that the single tipper at the barge facility in late 1997 was slow, and that the situation was adversely affecting the Debtors' ability to perform its contractual obligations. (Ferro deposition - Exhibit "B" to USA Waste's *Sur* Reply brief; n.t. at 48) Indeed, Ferro states that at one point as many as 750 containers were backed up at the tipper. *Id.*. Together, this evidence confirms the existence of information which is once again clearly sufficient to have put the Debtors on inquiry notice of possible fraud.

The Trustee dismisses this, and suggests that the focus here is misdirected. The Trustee asserts that whether or not the Debtors' employees were on notice of the inadequacy of the tipping equipment is not the issue. Rather, says the Trustee, the proper question is whether USA Waste knew of the inadequacy, and endeavored to conceal it. The Trustee contends that USA Waste knew at the outset of the inadequacy of its Richmond Virginia equipment, and did in fact conceal the relevant facts from the Debtors. The Trustee contends it was only during late stage discovery in this lawsuit that he learned as much. The Trustee, however, provides no elaboration whatsoever on this point. The Trustee, for example, does not share anywhere in his moving papers or supporting documents what information has allegedly come recently to light, nor how it bears on the issue. While this itself is a serious shortcoming in the Trustee's presentation, the Trustee has missed the mark for a more basic reason. The Trustee overlooks the standard by which his motion must be measured in a setting wherein the applicable statute of limitations has clearly expired. Here there can be little quarrel with the proposition that there were very ominous "storm clouds" in the sky, such as to put the Debtors on inquiry notice of serious irregularities. This inquiry having been

awakened, direct diligence in furtherance thereof seems likely to have been successful. The portents, however, were never acted upon. Jones states that it was because the problem was purely academic, a proposition the Trustee does not attempt to refute. Regardless, the scenario presented is plainly one wherein the Trustee's reliance on the discovery rule to preserve the subject cause of action is unavailing. The Motion in this respect being futile, the request to amend complaint to raise the inadequacy of the tipper as the predicate to a claim of fraudulent inducement will be denied.

Despite otherwise extensive briefing, the parties have devoted scant attention to the third aspect of the Trustee's motion. The Trustee's proposed third count focuses on contractual commitments which the Debtors undertook to secure the requisite equipment they would need to perform their obligations under the 1997 Agreements. The thrust of the Trustee's complaint on this point is found at Paragraphs 76 and 77 of his proposed amended complaint, whereat the Trustee alleges that USA Waste intentionally used its financial resources to dominate and control the Debtors by wrongful means, and thereby interfered with the Debtors' ability to perform under certain equipment lease/purchase contracts. As alleged, this oppression took the form of denying the Debtors anticipated loans.

USA Waste argues that the Trustee's tortious interference count is subject to a two year statute of limitations, just as his fraudulent inducement claims. This would appear correct. *See* 42 Pa. C.S.A. § 5524 (two year limitation applies to any action to recover damages which is founded upon tortious conduct). USA Waste argues that the applicable two year Statute of Limitations expired in this case no later than February 22, 1998, that being the date on which the Debtors ceased business operations. USA Waste asserts that by this time all information relevant to the subject claim was known to the Debtors. USA Waste underscores that the Trustee has made no response

to this contention in any of his written submissions. This latter contention is surprising, yet accurate. The Trustee, despite three written submissions, and oral argument, does not address the Statute of Limitations issue as to his proposed tortious interference claim, nor does the Trustee attempt, at all, to bring that cause of action within the ambit of the discovery rule exception. On this record, being as it is devoid of any helpful elaboration, the question seems a straightforward one, and the Court is constrained to agree again that the Trustee's claim is clearly time barred. The Trustee's Motion to add this third count will accordingly be denied.

In closing, the Court adds a few observations. First, it is axiomatic that as the party seeks to toll the statute of limitations through recourse to the discovery rule, the Trustee bears the burden of proof. *Cochran v. GAF Corp.,* 542 Pa. 210, 666 A.2d 245, (1995). Second, the Court recognizes that where the issue raised is whether a plaintiff has been deprived of reasonable time within which to discover an injury, the factual determination is ordinarily one reserved for trial. *Id.*, Nevertheless, it is well established that where the facts are so clear that reasonable minds cannot differ, the commencement date of an applicable statutory period may be determined as a matter of law. Such a situation exists here. On this score the Court notes, in particular, relevant discussion by the Court of Appeals in *In re TMI*, 89 F.3d 1106, (3d Cir. 1996) *certiorari denied* 117 S.Ct. 739, 519 U.S. 1077, 136 L.Ed.2d 678. There the Circuit Court noted that in order to establish fraudulent concealment by a defendant, a plaintiff must prove an affirmative or independent act of concealment such as would divert or mislead the plaintiff from discovering an injury or its cause. The Trustee simply does not begin to satisfy this standard. There is no suggestion of any affirmative or independent act of concealment here, let alone evidence of the same. The Trustee relies, essentially, on alleged silence. It is clear, however, that mere silence will not toll the running of a statute of

limitations. *Deemer v. Weaver, supra.* The Trustee argues eloquently as to why USA would choose to conceal the truckload restriction and the limitation of the tipper, but the Trustee never suggests how it did so. The evidence, on the other hand, belies that there was any concealment. Indeed, the Court finds the evidence on this question clear to the point that reasonable minds cannot differ. Accordingly, the Court finds that as a matter of law, the discovery rule exception does not apply. This conclusion is fatal to the Trustee's Motion.

C. The denial of the Trustee's Motion on the basis of the statute of limitations obviates the need to consider all other issues but USA Waste's Cross Motion for sanctions

As noted earlier, the denial of the Trustee's Motion to amend his complaint based on the Statute of Limitation question makes it unnecessary to consider USA Waste's alternative argument to the Motion concerning the re-tender of consideration. It also makes it unnecessary to consider whether an independent bar to the Trustee's new causes of action might have existed by virtue of an adversary proceeding entitled *Eagle Enterprises, Inc. and Liberty Recovery Systems, Inc., Debtor, Joan B. Scherb, et al., v. Mitchell Miller, Trustee of the Estate of Liberty Recovery Systems Inc., and U.S.A. Waste Services, Inc.,* 98-363, which was commenced in this Court in June, 1998. The significance of this lawsuit lay in the fact that the Plaintiffs therein also sought recision of the 1997 Agreements and reinstatement of the earlier Waste Disposal Agreement. USA Waste has argued that the existence of the 1998 lawsuit and, in particular, the circumstances under which it arose, cut heavily against the Trustee's reliance on the discovery rule, and confirms the Trustee's attempt to bring new counts as simply a belated litigation strategy.

The Trustee rejects the foregoing assessment of the 1998 lawsuit and the appraisal of his

motives, agreeing that the 1998 lawsuit sought similar legal relief, but stressing that the Plaintiffs therein had proceeded on a decidedly different factual tack. The 1998 lawsuit was dismissed by Order of this Court dated September 29, 1998, for the reason that the Plaintiffs lacked standing to press causes of action which belonged to the bankruptcy estate. The Court here need not, and hence does not, determine whether the existence of the 1998 lawsuit would operate now to bar the Trustee, or to undermine his reliance on the discovery rule exception to the Statute of Limitations. Because the Court has considered the statute of limitations issue and the availability of the discovery rule question on their ultimate merits, and has found against the Trustee thereon, there is no need for the Court to belabor arguments which essentially are collateral or secondary in nature.

A sole remaining issue which the Court must adjudicate, however, is USA Waste's request for sanctions. USA Waste presses a request for monetary sanctions against the Trustee, arguing that the Trustee's Motion to amend complaint is frivolous, and alleging that the affidavits which the Trustee has offered in support of his motion have been interposed solely for the purpose of delay. The Trustee responds that the sanctions request is itself frivolous, and has been pressed by USA Waste purely in an attempt to intimidate the Trustee. Clearly, the parties view this question through opposite ends of the telescope.

The Court, for its part, finds neither party's contention to be entirely sound. While this contested matter involves a relatively intricate fact pattern, the Court does not find its merits to have presented an especially close call. That is to say that, when one examines the evidence carefully, the flaws in the Trustee's case are readily apparent. This is not to say, however, that the Court finds the affidavits which the Trustee has offered to have been submitted in bad faith, or solely for purposes of delay. To the contrary, the Trustee, by virtue of his position, is what one might characterize as

a derivative plaintiff. He must accept the evidence which falls to him in a failed Chapter 11 case, such as this, as it comes. There is internal inconsistency, clearly, in certain of Ferro's sworn testimony, and the presence of it did not help the Trustee. To have failed to avail himself of Ferro's complete testimony would arguably, however, have been irresponsible on the Trustee's part. As previously discussed, the Ferro affidavit has not proven to be determinative herein for either party. The Court, nevertheless, finds the Trustee's use of the Ferro affidavit to have been reasonable under all of the circumstances, despite its being unavailing. As a consequence of this conclusion, the Court will deny USA Waste's Motion for monetary sanctions against the Trustee.

Finally, pending at the time of oral argument herein was USA Waste's motion for summary judgment with respect to the Trustee's original complaint. That matter has been fully briefed, and was in fact scheduled for concurrent oral argument with the present motion. For the reasons stated in open court at oral argument, the Court considered it inefficient and hence inappropriate to address the pending summary judgment motion prior to the disposition of the present motion to amend complaint. Given the resolution reached herein, the pending summary judgment motion remains at issue. Oral argument on that motion will accordingly be scheduled in connection with the present disposition.

An appropriate Order follows.

By the Court:

_____
Stephen Raslavich
United States Bankruptcy Judge

Dated: March 23, 2001

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	: Chapter 7
	:
EAGLE ENTERPRISES, INC.	:

Debtor	: Bankruptcy No. 98-11297 SR
MITCHELL W. MILLER, as Trustee	:
Plaintiff	:
v.	:
USA WASTE SERVICES, INC. (now known as Waste Management Inc.) and	:
BLANK ROME COMISKY McCAULEY, LLP	:
	: Adversary No. 99-501
Defendants	:

ORDER

AND NOW, this 17th day of November, 2000, upon consideration of Trustee's Motion for for Leave to Amend his Complaint to Add Three Causes of Action against Defendant, USA Waste Services, Inc. (now known as Waste Management, Inc.,) ("USA Waste"), all other pleadings submitted in support of or in opposition thereto, and after hearing held October 12, 2000, it is hereby:

ORDERED, that the Trustee's Motion to Amend Complaint be and the same hereby is Denied; and it is further:

ORDERED, that the Cross-Motion of USA Waste for monetary sanctions be and the same hereby is Denied; and it is further:

ORDERED, that oral argument on the pending Motion of USA Waste for Summary Judgment be and the same hereby is scheduled for January 25, 2001, at 10:00 a.m. United States Bankruptcy Court, 900 Market Street, 2nd Floor, Courtroom No. 4, Philadelphia, Pennsylvania, 19107.

By the Court:

STEPHEN RASLAVICH
United States Bankruptcy Judge

Mark E. Felger, Esquire
1900 Market Street
The Atrium - 3rd Floor
Philadelphia PA 19103

John Stoviak, Esqire
Joseph F. O'Dea, Jr., Esquire
Nicholas J. Nastasi, Esquire
Saul, Ewing, Remick & Saul, LLP
1500 Market Street - 38th Floor
Centre Square West
Philadelphia PA 19102

Michael J. Regan, Esquire
107 Main Street - Suite B
Port Jefferson, NY 11777

David T. Sykes, Esquire
Duane, Morris & Heckscher
One Liberty Place
Philadelphia PA 19103-7396

Mark J. Packel, Esquire
Duane, Morris & Heckscher LLP
4200 One Liberty Place
1650 Market Street
Philadelphia PA 19103-7396

Joseph J.. McMahon, Esquire
Office Of The U.S. Trustee
950W Curtis Center
7th & Sansom Streets
Philadelphia PA 19106