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Bankruptcy: Amendment of the Bankrupt's Schedules After the Six Month Period

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RECENT DECISIONS

Bankruptcy: Amendment of the Bankrupt's Schedules After the Six Month Period: A recent Fifth Circuit Court of Appeals case, *Robinson v. Mann*,[1] concerned an appeal by a bankrupt from a decision of the District Court[2] affirming two separate orders of the Referee in Bankruptcy setting aside a conveyance of real estate as fraudulent[3] and denying the bankrupt's motion to amend the creditors schedule to include a debt owed to the Citizens and Southern National Bank. This article will not treat the efficacy of the first order of the District Court, which was affirmed by the Circuit Court, but will concern itself with the Circuit Court's reversal of the second order.

The bankruptcy petition in the *Robinson* case was filed on October 9, 1961, and the first meeting of creditors was held on October 26, 1961. The Citizens and Southern Bank was not scheduled as a creditor in the petition filed by the bankrupt, although the brief of the appellee (Trustee in Bankruptcy) reveals that the bankrupt continued to pay the bank its monthly installments as they became due. On December 28, 1962, approximately fourteen months after the first creditor's meeting, the bankrupt attempted to file an amendment to his schedules for the purpose of listing the bank as a creditor. The bankrupt alleged that his attorney had erroneously concluded that the debt was only a lien against the bankrupt's property and, since the bankrupt had conveyed this property four months earlier, he no longer was obligated. In point of fact, the bank had no lien and the appellant was personally liable on the note.

The Referee denied the amendment on the ground that such amendments, when attempted more than six months after the first meeting of creditors, were barred by Section 57, Sub.n, of the Bankruptcy Act, 11 U.S.C.A. Section 93, Sub.n. The District Court affirmed; but was reversed by the Court of Appeals.

To this write, the bankrupt has shown the Circuit Court absolutely no cause justifying amendment of his schedules. The fact that the amendment was allowed has resulted in case law that is untenable.

The mechanics of amendment are governed by General Order No. 11,[4] promulgated by the Supreme Court, which provides:

> The court may allow amendments to the petition and schedules, on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules the same must be made separately, with proper refer-

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[1] Robinson v. Mann, 339 F. 2d 547 (5th Cir. 1964).
[2] United States District Court for the Middle District of Georgia.
[3] Bankruptcy Act §67, sub. d(2); 11 U.S.C.A. §107, sub. d(2).
[4] 305 U.S. 679 (1939).

> ences. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.[5]

It should be noted that this order does not have a limitation on the time within which amendments may be had, for it would not be apropos for the General Order to undertake to abrogate the statutory provisions.

Amendment is within the court's discretion and amendments will usually be allowed when *they will serve a purpose* and when allowance will not prejudice other interested parties. Section 57, Sub.n., of the Bankruptcy Act provides that, ". . . claims which are not filed within six months after the first date set for the first meeting of creditors should not be allowed . . ." Thus, when the six months has elapsed, an amendment should be denied. An inclusion at this time *would serve no purpose* since the claim could not be scheduled in time for proof and allowance and would therefore not be dischargeable. Section 17(a), Sub. 3, states in essence that a discharge will not release a bankrupt from his provable debts if they have not been duly scheduled in time for proof and allowance, if known to the bankrupt, unless the creditor had actual knowledge of the proceedings. In this case, since the bankrupt was consistently paying the bank during the proceeding, the bank cannot be claimed to have had knowledge of the bankruptcy. To permit the amending to take place, the court would, in effect, be depriving the creditor of his day in court. It must also be noted here that the circumstances of this case do not fit any of the exceptions relaxing the six months rule and allowing amendment, to wit: (1) claims of the United States or any state or any subdivision thereof, (2) claims of infants and insane persons without guardians and without notice of the proceedings, and, (3) certain claims when a trustee is involved.[6]

The text writers are generally in agreement and support the proposition disallowing amendment after six months. In Professor Nadler's work, *The Law of Bankruptcy,*[7] he states:

> The bankrupt may amend his 'schedules' to either add or delete any of the items therein contained. Experience has shown that frequently the bankrupt has forgotten or inadvertently failed to list one or more of his creditors. This, of course, can be rectified by amending the schedules pertaining hereto. It is to be specially noted, however, that the court cannot, as a matter of law, grant an amendment to add on creditors omitted from the original schedule *unless such motion or petition to amend is filed within six months after the first date set for the first meeting of creditors.* The statute of limitations prohibits the allowance of any claims filed after the six months period and, on this basis, an amendment herefor will not be permitted. (Emphasis added, footnotes omitted)

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[5] *Id.* at 687.
[6] Bankruptcy Act §57, sub. n; 11 U.S.C.A. §93, sub. n.
[7] NADLER, THE LAW OF BANKRUPTCY, §181 (1948) at p. 169.

Collier on Bankruptcy,[8] is in complete argument with Nadler in holding the six month time limit to be absolute:

> General Order 11 prescribes no time within which amendments may be made. But after the time for filing has expired, the general rule is that the schedules may not be amended to include the name of an omitted creditor, regardless of whether or not the creditor had notice or knowledge of the bankruptcy proceedings.

The case law also lends further support to the creditor's position against amendment. Appellant-bankrupt in the principle case relied on two decisions to support the position that he should have the right to amend. A Third Circuit Court decision, *Fourteenth Avenue Security Loan Association v. Squire,*[9] state:

> The appellee contends that though no express provision of the Bankruptcy Act authorizes the setting aside of a bankrupt's discharge . . . none the less a court of bankruptcy being a court of equity, possesses general equitable powers to *amend,* alter, or set aside its decrees in conformity with the ends of justice. (Emphasis added.)

Thus the court in *Squire* felt that in vacating the discharge and permitting the scheduling of the appellant's claim, after six months, the district court had not abused its discretion because the appellant is put on equal terms with the other creditors, since the estate is devoid of assets.

In, *In The Matter of Boynton,*[10] the court said in essence that since General Order 11 allowed amendments, the court could reopen a bankruptcy proceeding when new assets were discovered and also, for sufficient reasons, could enlarge the time to file a claim and thereby allow a creditor to receive his distributive portion of the bankrupt's estate. The court went beyond the *Robinson* case when it said that in order to give all creditors an opportunity to have the privilege and rights granted by the bankruptcy, the case must be referred to the referee for the purpose of giving notice to all creditors, allowing time for both hearing and examination of the bankrupt and election of a Trustee.

The two above mentioned cases and their equity policies were answered adequately in the case of *In re Dunn,*[11] where the court said that even before the adoption of the *Chandler Act,* it was generally agreed that Setcion 57(n) did not allow the filing of claims or amending of petitions by the parties to the proceeding more than six months after the first meeting of the creditors. But some courts, for exceptional

[8] 1 COLLIER, BANKRUPTCY 993 (14th Edition).
[9] Fourteenth Ave. Security Loan Ass'n v. Squire, 96 F. 2d 799, 800 (3rd Cir. 1938).
[10] In re Boynton, 24 F. Supp. 267 (W.D. Wash. 1938).
[11] In re Dunn, 38 F. Supp. 1017 (W.D. Wash. 1941).

circumstances and guided by the aims of equity, did allow an extension of time for amendment. The court then said:

> Under the Chandler Act, however, it is clear that the court has not authority to allow any claims which are not filed within six months after the date set for the first meeting of creditors.[12]

The series of authorities supporting the appellee are numerous, among them is *In re Quine*[13] where the court held that Section 57(n) of the Bankruptcy Act, as amended, was an absolute bar against the creditor filing after six months because, "the omitted creditor would not be able to secure the allowance of any claim he might file."

In re Dunn, supra, answers the contention of the principle case that Section 57(n) is not to be applied so as to bar a bankrupt from amending and should be applied only where creditors attempt to amend. In that case, where the petition was barred the bankrupt was trying to amend.

In further support of the appellee's contention, the case of *In re Trosky*[15] states:

> Even if the omitted creditor's name were now to be added to the schedules, the debt owed to him would not be affected by any discharge that the bankrupt might obtain. Section 17 of the act (11 USCA §35) excepts from dischargeable debts those which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless the creditor had notice or knowledge of the bankruptcy proceedings.

The facts in the above case were almost identical with the present case. Another case in point and in the appellee's favor is the case of *Phillips v. Tarrier*[16] which also took place in the same Circuit as the principle case and which held adversely to the *Robinson* decision. The court held that in the absence of *exceptional circumstances,* after the six months has expired, the court should not permit the bankrupt to amend his schedules, in order that the dicharge may be effective against it. The court in this case never defined what it meant by "exceptional circumstances."

Conclusion

The above cited cases are only a few of the many cases which this writer has found supporting the appellee's claim.[17] An attempt to patternize the decisions into a geographic arrangement, i.e., by circuits,

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[12] *Id.* at 1018.
[13] In re Quine, 38 F. Supp. 869 (5th Cir. 1941).
[14] In re Dunn, 38 F. Supp. 1017 (W.D. Wash. 1941).
[15] Matter of Trosky, 55 F. 2d 995, 996 (S.D. N.Y. 1931).
[16] Phillips v. Tarrier Co., 93 F. 2d 674 (5th Cir. 1938).
[17] Milando v. Perrone, 157 F. 2d 1002 (2nd Cir. 1945); First National Bank v. Virginia Oil Co., 86 F. 2d 770 (5th Cir. 1936); Burton Coal v. Franklin Coal, 67 F. 2d 796, (8th Cir. 1933).

fails because one finds all jurisdictions generally holding consistently with the six months rule. Even the Fifth Circuit has held differently[18] than the principle case.

The *Robinson* case does not seem to fit into the "exceptional circumstances" situation which was exposed in the *Phillips*[19] case as a possibility of amendment. The amendment was attempted over fourteen months after the first creditors' meeting, during which time the bankrupt was continually paying the bank. Then the court allowed him to bring in the creditor so as to share in the insolvent estate. The question appears immediately—why allow amendment? It serves no purpose. This writer knows of no way in which the bank can properly be permitted to file a claim. The court, in its opinion did not point out any way by which the appellee could file a proof of claim.

The rule that can be deduced from the authorities, cases (and especially the *Phillips* case) is that the bankrupt may not amend his schedule to include a creditor who would be precluded from filing a proof of claim. The reason for the rule is obvious—why let a bankrupt amend if the creditor cannot file a proof of claim or elect a Trustee or have his day in court? In effect we have a "moot" decision, and all the bankrupt has accomplished is to add another paper to his file. The creditor cannot be affected by the amendment if the true meaning of the bankruptcy statutes is followed.

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Surety's Rights As Security Interest Under Art. 9 of the UCC—Each year, more and more state legislatures are adopting the Uniform Commercial Code as their basic legal structure for commercial transactions. The result of such adoptions is that attorneys who are faced with the everyday problems of protecting and securing the rights of their clients must review Article 9 of the Uniform Commercial Code with increasing interest. One of the basic purposes of Article 9 is to provide rules for the perfection of *security interests.*[1] The Article is formulated to show *when* and *how* a creditor shall go about protecting the interest that the debtor has given him in specific collateral against the claims of other creditors and a Trustee in Bankruptcy.

The basis of the perfection problem is found in Sections 9-302 and 9-401 of the Code.[2] Section 9-302 makes it necessary for the creditor to file a "financing statement" in order to have a "perfected" security interest. Section 9-401 tells the creditor where the statement must be filed.

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[18] Phillips v. Tarrier Co., 93 F. 2d 674 (5th Cir. 1938).
[19] *Ibid.*
[1] UNIFORM COMMERCIAL CODE §1-201(37). "Security Interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. (All references are to the 1962 Official Text with Comments.)
[2] WIS. STAT. §409 (1965), effective July 1, 1965, by Wis. Laws 1963, ch. 158.