Boston College Law Review

Volume 4 | Issue 3 Article 19

4-1-1963

Bankruptcy—Chapter XIII—Confirmation of Extension Plan Within Six Years of Previous Plan.—In re Holmes

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> the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) nondiscovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury, will not prevent the running of the statute.[33]

The plaintiff would be required to allege fraudulent concealment in the pleadings and "must prove both affirmative acts of concealment on the part of defendant and reasonable grounds for his own failure to penetrate the deception."[34] This basic procedure plus additional equitable rules on both sides should result in a workable standard. In no event should a result be reached whereby the wrongdoer is made secure from liability by fraudulently concealing the cause of action. It is obvious that many companies seem to think they have found a "loophole" in section 4B. This "loophole" has been filled by the federal courts in previous cases,[35] and the present litigation does not reveal any compelling reasons which prevent the application of the fraudulent concealment doctrine to this supposed gap in the law. On the other hand, there remains a possible gap in the law which, as previously stated, appears not to be covered by *Kansas City*. In the self-concealing conspiracy there may be no affirmative conduct by the wrongdoer, in which case the exception to the running of the statute may not be applied. Whether this gap will be closed is left to future case law.

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Bankruptcy—Chapter XIII—Confirmation of Extension Plan within Six Years of Previous Plan.—*In re Holmes*.[1]—In a Chapter XIII proceeding the debtor sought confirmation of an extension plan which would give him more time to repay his debts. The district court affirmed an order of the Referee in Bankruptcy dismissing the debtor's petition on the ground that section 14c(5) of Chapter III[2] taken together with section 656a(3) of Chapter XIII[3] operated as a bar to confirmation of an extension plan where

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[33] Id. at 752.

[34] Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles, 57 Nw. U.L. Rev. 29, 50 (1962).

[35] Bailey v. Glover, supra note 10, and cases cited, supra note 9.

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[1] 309 F.2d 748 (10th Cir. 1962).

[2] Bankruptcy Act § 14c, 52 Stat. 850 (1938), as amended, 11 U.S.C. § 32c (1958) provides:

> The court shall grant the discharge unless satisfied that the bankrupt has—
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> . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of composition or a wage earners' plan by way of a composition confirmed under this title . . . .

[3] Bankruptcy Act § 656a, 52 Stat. 935 (1938), 11 U.S.C. § 1056a (1958) provides:

> The Court shall confirm a plan if satisfied that—
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> . . . (4) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . .

the debtor had availed himself of similar relief within a six year period. On appeal the district court ruling was reversed. HELD: The bar of section 14c(5) was not intended to apply to those seeking extensions of time in a Chapter XIII proceeding (wage-earner plan), regardless of resort to a similar plan within six years.

Prior to the decision in the instant case, the cases dealing with this same issue had reached contrary conclusions. *In re Bingham*[4] had denied confirmation of a plan on the ground that Congress' intent in enacting section 14c(5) explicitly states that no discharge shall be granted if a wage-earner but also to prevent the growth of a class of habitual users of wage-earner plans. The court reasoned that unless section 14c(5) was so interpreted, abusive use of Chapter XIII relief would result.

Another district court opinion, *In re Autry*,[5] reached an opposite result, thereby setting the stage for the case at hand. Emphasizing that section 14c(5) explicitly states that no discharge shall be granted if a wage-earner plan by way of a composition has been confirmed within six years, the *Autry* court granted confirmation of the debtor's plan since the plan was for an extension of time only.[6] The court, interestingly enough, did not know whether the earlier plan in *Bingham* was an extension or a composition, and sought to reconcile the cases by assuming that the first plan in *Bingham* involved the latter.[7]

The court of appeals in the instant case, faced with this division, resolved the conflict by overruling *Bingham,* emphasizing that extension plans do not come "within the letter or the spirit of the bar in Section 14, sub. c(5)."[8]

It is submitted that the result reached in *Holmes* is unquestionably correct. Confirmation of a plan under Chapter XIII will be granted where the court finds that "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt." Section 14c(5) states the grounds for denial of a discharge in ordinary bankruptcy[9] and it is at once obvious that the statute is "noticeably silent with respect to extensions of time."[10] A literal reading of section 14c(5) reveals that it was proper for the court to confirm the subsequent extension plan.

Rather than rest the decision on this narrow ground, the court went further by remarking that wage-earner extension plans do not fall within the spirit of 14c(5). Support for this conclusion can be found in the fact that the fundamental aim of Chapter XIII is to provide a system under

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[4] 190 F. Supp. 219 (D. Kan. 1960).

[5] 204 F. Supp. 820 (D. Kan. 1962).

[6] Id. at 821.

[7] Ibid. Failure to disclose the precise facts involved in the *Bingham* case generated considerable confusion as to whether the earlier plan was an extension or a composition. The court in the instant case makes it clear that an extension plan was involved in *Bingham* and, therefore, in conflict with *Autry*.

[8] 309 F.2d at 749.

[9] Supra note 2.

[10] Examination of the legislative history of the Chandler Act, 52 Stat. 840 (1938), points out that Congress recognized the distinction between compositions and extensions and deliberately included only the former within section 14c(5). See generally H. Rep. No. 1409, 75th Cong., 1st Sess. 29 (1937).

which the debtor who finds himself in financial difficulties can pay his obligations, either in full or in part, out of his future earnings. The virtue of such a scheme lies not only in the fact that in most instances the debtor is able to avert the stigma of bankruptcy, which would in all probability result as his creditors became more and more insistent, but also in the fact that creditors themselves are generally repaid in full.[11] Public policy would, therefore, appear to dictate that the courts take a liberal view toward plans whose purpose is the financial rehabilitation of the wage earner, since under an extension plan "The debtor seeks to pay debts—not to discharge them."[12] The court in *Holmes* endorses these policy considerations in its ruling that extension plans do not fall within the "spirit" of section 14c(5).

Where the debtor has received a discharge in bankruptcy or has had a wage-earner plan by way of composition confirmed within a six year period, it would appear at first that section 14c(5) taken together with section 656a(3) would bar confirmation of a petition for a subsequent plan whether by way of extension or composition. The cases dealing with this problem are split,[13] the majority taking the view that the purposes behind section 14c(5) are so inconsistent with the aims of Chapter XIII relief that the former is inapplicable by virtue of section 602,[14] and this line of reasoning is cited with approval by the court in the instant case.

It is submitted that the conclusions reached in the majority of cases are correct, and when these rulings are read in conjunction with the decisions reached in the instant case and in *In re Autry*, a trend in favor of wider usage of Chapter XIII proceedings is clearly discernible.[15]

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[11] See discussion in note 15 infra of the striking success achieved under Chapter XIII, where it is pointed out that 98% of the total debts involved in the cases closed in fiscal 1960 were repaid.

[12] In re Sharp, 205 F. Supp. 786, 789 (N.D. Mo. 1962).

[13] In re Mahaley, 187 F. Supp. 229 (S.D. Cal. 1960) (confirmation approved); In re Sharp, supra note 13, (confirmation approved); In re Schlageter, 37 Ref. J. 24 (D.N.J. 1963) (confirmation denied).

[14] Bankruptcy Act § 602, 52 Stat. 930 (1938), 11 U.S.C. § 1002 (1958) states that "the provisions of Chapter I to VII inclusive, of this act, shall, insofar as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter. . . ."

[15] Examination of the Report of the Judicial Conference of the United States, Proceedings, at 209-10 (September 20-21, 1961) reveals that it is not surprising that the courts have sought to encourage more frequent resort to Chapter XIII relief. Between 1950 and 1960 the number of cases filed under the Bankruptcy Act increased from approximately 34,000 to 110,034 and to 146,643 by the end of 1961. Nearly 90% of the total bankruptcies filed in 1960-61 involved non-business groups, i.e., wage earners, (id. at 211) and it is at once clear that striking success has been achieved in Chapter XIII proceedings.

> During the fiscal year 1960, the *unpaid* liabilities scheduled in the 63,086 straight bankruptcy cases closed during the year were $469,865,567. During the same period the debts affected in the 5,920 Chapter XIII cases completed were $5,277,737, of which $5,168,251, or *98%* was paid to creditors. (Emphasis supplied.)

Id. at 91.