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Recent Amendments

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CURRENT LEGISLATION

BANKRUPTCY

RECENT AMENDMENTS

On November 13, 1963, the President approved several amendments[1] to the Bankruptcy Act which should have a significant impact on "arrangement" proceedings brought under chapter 11.

The amendments, which consist of four sections, have their foundation in the second section[2] which provides that Section 57n of the Act applies[3] to proceedings brought under section 322 (the usual manner under which chapter 11 proceedings are initiated). Section 57n requires that claims brought under chapters to which it applies must be filed within six months of the date set for the first meeting of creditors. Sections one, three and four of the amendments are primarily designed to cause related sections of the Act to conform to the basic changes created by section 2, but it appears that section 3 may well have an additional and far-reaching effect of its own.

Some indication of the reason for the amendments may be found in the report of the Senate committee[4] which recommended passage of the bill. According to this report, the Judicial Conference of the United States[5] was concerned by the possibility that where debts are not contingent, unliquidated or disputed, certain creditors could receive preferential treatment from a debtor desirous of maintaining particularly good relations with those particular creditors. It would seem that indeed such a possibility did exist, although research fails to provide us with evidence that such preferences were in fact granted. That such a condition could occur was, no doubt, due to the fact that creditors who were undisputed, liquidated, and not contingent were merely scheduled by the debtor.[6] A reading of the committee report and the recommendations of the Judicial Conference would indicate that elimination of this possibility represents the entire object of the amendments.

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[1] 77 Stat. 330 (1963).

[2] Section 2 provides: "Where a petition is filed under section 322 of this Act, subdivision n of section 57 of this Act shall apply."

[3] In In Re H. H. Buggie, Bankr. L. Rep. ¶ 56653 (D.C. Ct. Ohio 1950), it was held that section 57n was to be applied only to chapters of the Act which so expressly provided. The part of section 57n which is relevant to this discussion reads as follows:

> Except as otherwise provided in this Act, all claims provable . . . shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed. . . .

[4] 109 Cong. Rec. 19564 (daily ed.) Oct. 30, 1963.

[5] Cf. 1959 Report of the Judicial Conference of the United States, 309.

[6] Prior to the amendments this class of creditors was entitled to participate in a distribution on the basis of section 367(3) which provided that claims scheduled by the debtor only had to be filed if "contingent, unliquidated, or disputed."

However, the amendments, for a purpose which remains unexpressed—if not undisclosed—have been addressed to another question as well. Section 3 of the amendments[7] is, according to the "official explanation," designed to "make it clear that, to be entitled to participate in the distribution under the arrangement, creditors must file their claims within the time permitted. . . ."[8] However, a reading of section 3 indicates that it deals not only with creditors not previously required to file, but with *all* creditors, for the time limit of six months imposed by section 57n, covers creditors of every class. Before the amendments, creditors who had filed under the Act prior to the expiration of the six month period, could receive their dividends upon confirmation of the plan;[9] under the amendments they must wait at least six months.[10] Prior to the amendments, creditors could file any time before confirmation, which time could *exceed* six months;[11] under the amendments six months is the maximum time within which a creditor can file without being barred from sharing in the distribution.[12]

Section 1[13] of the amendments requires that when the notice of the first meeting is sent to the creditors, the last date for the filing of claims be stated. As previously noted, prior to the amendments, claims could be filed, or merely scheduled, at any time before confirmation of the arrangement. In view of the new requirement that all creditors file within a limited period, such notice would seem extremely important.

Section 4 of the amendments consists of two parts, both of which were designed to cause the executory contract claim provision of section 369[14] to conform to section 2 of the changes.[15] The first part adds the requirement that claims within the context of that section be *filed* as well as scheduled. The second provides that in cases where claims arise out of a rejection of executory contracts these claims must also be filed within the six month period. However, the observation has been made by one referee,[16] that inasmuch as rejection may be effective only upon *confirmation*, and that since effective rejection is necessary in order to have a valid claim which may be filed, it would be impossible for such a valid claim to be perfected within the required six month period. Nonetheless, it would seem possible

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[7] This section alters Section 367(3) of the Act by eliminating the provision that creditors merely scheduled by the debtor could participate in a distribution, and by inserting the provision that creditors, to participate, must have claims "which have been filed prior to the date of confirmation . . . or after the date of confirmation but within the time prescribed by section 355. . . ."

[8] Supra note 4.

[9] 1 Bankr. L. Rep. ¶ 9157.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] This section amending Section 334 of the Act has added the following sentence to the notice requirement, "The last date for filing shall be set forth in such notice."

[14] This section has been modified by changing the word "proved" in section 369(2) to "filed"; and in section 369(3) by making an identical change, and adding the clause "filed within the time prescribed by section 355 of the chapter. . . ."

[15] Supra note 4.

[16] 38 Ref. J. 23, 25 (Jan. 1964).

that the proviso found in section 57n[17] which allows for a grace period of thirty days can be construed to be included within the amendment to the "executory contract" provision so that timely filing can be possible.

It is clear that the amendments will, in addition to their expressed intended purpose, to wit, the elimination of preferences to creditors not previously required to file, provide a cutoff date after which confirmation of the plan can be accomplished with a degree of certainty. While, as we have seen, there are certain incidental drawbacks, the overall picture would seem to represent a positive step.

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CORPORATIONS

PROFESSIONAL INCORPORATION

Massachusetts recently amended the corporation section of its general laws by the addition of chapter 156A, the professional corporation statute.[1] This brings to forty the number of states which have enacted similar legislation. The primary purpose of the statute is to allow self-employed professionals to incorporate so that they may be recognized as "employees" within the definition of Internal Revenue Rulings,[2] and thus qualify for profit sharing and pension plans and the tax benefits to be derived therefrom. The enactment embraces specifically enumerated professions, *i.e.*, registered physicians and surgeons, chiropodists, physical therapists, dentists, veterinarians, optometrists and attorneys admitted to practice in the courts of the Commonwealth under chapter 221 of the Massachusetts General Laws.

Professional corporation statutes represent an attempt to eliminate the traditional and statutory prohibitions which have prevented the so-called professionals from rendering professional services through the corporate form. In Massachusetts, there are express statutory provisions prohibiting ordinary business corporations from practicing law[3] or dentistry.[4] While there are no similar statutory interdictions applicable to the other groups

[17] While this may involve a rather tenuous construction of such terms as "avoidance of lien" or "recovery" of funds, this would nonetheless seem to be a reasonable way to solve an apparently unforseen problem.

[1] Mass. Acts, 1963, ch. 654, adopted August 19, 1963, effective November 15, 1963. This note will be concerned primarily with the Massachusetts professional corporation statute. It is similar in most particulars to professional corporation and association statutes enacted in other jurisdictions. The purposes for which it was enacted and the policies which dictated its form and provisions are sufficiently identifiable with those of other jurisdictions so that it may serve to illustrate these purposes and policies and the functional possibilities made available by such enactments.

[2] Professional partnerships, composed of attorneys, physicians, etc., are entitled to the same privileges as corporations in the establishment of pension trusts for the benefit of bona fide employees of such partnerships. However, a general partner, as such, is not an employee of the partnership and is precluded from participating in the benefits of a trust. I.T. 3350, 1940-41 Cum. Bull. 65.

[3] Mass. Gen. Laws Ann. ch. 221, § 46 (1958).

[4] Mass. Gen. Laws Ann. ch. 112, § 49 (1958).