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Bankruptcy Legislation

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CURRENT LEGISLATION

BANKRUPTCY LEGISLATION

Congress recently enacted two amendments to the Bankruptcy Act[1] which will affect the court's power and control of the bankrupt's assets. The first of these amendments changes section 47(a)(2) of the Act.[2] Previously, this section had merely provided that one duty of the trustee in bankruptcy was to "deposit all money received . . . in designated depositories." The amendment to this section now permits the trustee, with the approval of the court, to deposit assets of the bankrupt in interest-bearing accounts after initially placing them in demand deposits.[3] The second amendment changes section 60(d) of the Act,[4] giving the court, on its own motion, the power to examine the reasonableness of any remuneration given in contemplation of filing a petition by the debtor to his attorney for services rendered or to be rendered.[5] In addition, this section now allows the court to examine, on its own motion or on that of the bankrupt, any agreement made by the bankrupt before or after filing to transfer money or property to an attorney after filing.[6] Previously, the court's examination of transfers in contemplation of bankruptcy was begun only upon petition of the trustee or a creditor, and there was no specific provision in this section for examination of agreements for post-filing transfers.[7]

While the original enactment of section 47 did not specifically prohibit the deposit of funds in interest-bearing accounts, two early cases restricted the trustee to use of demand deposits. In *Huttig Mfg. Co. v. Edwards*[8] and

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[1] 52 Stat. 840 (1938), 11 U.S.C. §§ 1-1255 (1958).

[2] 52 Stat. 860 (1938), 11 U.S.C. § 75(a)(2) (1958).

[3] 77 Stat. 14 (1963), 11 U.S.C.A. § 75(a)(2) (Supp. 1963). The amendment in full reads: "(2) deposit all money received by them in designated depositories initially in demand deposits; and subsequently, if authorized by the court, *in interest-bearing savings deposits*, time certificates of deposit, or time deposits-open account." [Emphasis supplied.]

[4] 52 Stat. 869 (1938), 11 U.S.C. § 96(d) (1958).

[5] 77 Stat. 14 (1963), 11 U.S.C.A. § 96(d) (Supp. 1963) provides that:

> If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services [rendered or] to be rendered, the transaction [may be examined by the court on its motion or] shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.
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> [If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt.] (Changes added by amendment are in brackets.)

[6] Supra note 5.

[7] Supra note 4.

[8] 160 Fed. 619 (8th Cir. 1908).

In Re Dayton Coal & Iron Co.,[9] the courts held that the duty of the trustee was to protect the assets for the creditors and that "the risk which always attends the making of profit should not be incurred. . . ."[10] These decisions reduced both the court's power to designate a depository and restricted the trustee to one type of deposit. In the sweeping amendments made to the Act in 1938, Congress did give the trustee slightly more leeway by allowing him to deposit funds in more than one of the designated depositories.[11] That enactment allowed the trustee to distribute the assets of a large estate among a number of banks. However, the deposits still were required to have instant-liquidity, which dictated the use of checking accounts by the trustee.

Though *Huttig* and *In re Dayton* recognized that interest-bearing accounts were possible if all parties concerned consented,[12] use of this device was unwieldy and time-consuming. As the Senate Judiciary Committee stated, "In a few instances in recent years bankruptcy courts have authorized trustees to deposit estate funds in interest-bearing accounts with the consent of creditors. This procedure, however, is very cumbersome and there would seem to be no reason why the deposits should not be permitted with proper security when authorized by the court."[13] The present amendment brought these hopes to fruition. The Act has always provided security for the deposits through section 61.[14] Realizing this fact and the fact that "sound fiscal management requires that funds of the bankrupt's estate shall not lie idle for long periods of time but should earn interest . . . ,"[15] the new amendment was passed on its second appearance in Congress.[16] It should be noted that under the amendment the court still must designate the depositories.[17]

It is evident from this change in the Act that Congress felt that while the Act's main purpose is to protect creditors, this does not always have to be done in the most stringent manner. Demand deposits give liquidity at the loss of potential income. Now the trustee of a large estate, which may require months or even years to close, will be able to decrease idle assets for the benefit of the creditors. While the courts will probably require the trustee to keep a percentage of the funds he controls in demand deposits, there is now no barrier to the placing of deposits in earning accounts in one or more depositories.

The amendment to section 60(d) was also designed to remedy problems of administration. Before the amendment, the review by the court of fees paid by the debtor to an attorney in contemplation of bankruptcy was a cumbersome process which was infrequently invoked except in the most flagrant cases. This resulted from the following factors: the trustees handling

[9] 239 Fed. 737 (E.D. Tenn. 1916).

[10] Supra note 8, at 623.

[11] Supra note 2. Prior to 1938 the trustee was limited to the use of one depository.

[12] Supra note 8, at 623, and supra note 9, at 738.

[13] U.S. Code Cong. & Ad. News 675, 676 (June 5, 1963).

[14] 66 Stat. 425 (1952), 11 U.S.C. § 101 (1958). This section requires the depositories to post either a bond with surety or securities in sufficient amount to cover deposit. No security is required if the deposits are insured by the FDIC.

[15] 1 Bankr. L. Rep. ¶ 5072 (May 16, 1963).

[16] U.S. Code Cong. & Ad. News 674 (June 5, 1963).

[17] Supra note 3.

the estate in bankruptcy are often loathe to accuse a fellow attorney of overcharging; his brother lawyers are reluctant to testify against him, and creditors are often ignorant of the facts.[18] For these reasons, Congress concluded that "experience has shown that this language [of section 60(d)] is inadequate to protect both the creditors and the bankrupt from excessive attorneys' fees. In bankruptcy, the motivations which normally prevent overcharge are often absent."[19] The new amendment to section 60(d) of this Act gives the court discretion on its own motion to examine the reasonableness of these fees.[20] The amendment also gives the court power to review agreements made before filing between the debtor and his attorney regarding post-filing fees.[21] These powers, together with those already present in section 62(a)(1),[22] give the court total control over fees paid by the debtor to an attorney, without having to wait for a petition from one of the parties.

The standard of review of these fees has already been established by section 60(d), which employs a test of reasonableness. What constitutes "reasonableness" in this context was best enunciated in the case of *In re Charles Ray Glass, Inc.*, the court saying: "It [time spent] is only one of the elements which enter into the determination of reasonableness. The other elements are the nature of the work, the necessity for spending the time claimed, the amount and character of the assets and liabilities, and the like."[23] While the aforementioned elements are not the only tests, they are likely to be part of any other test devised. In one case the District Court for the Southern District of New York held that the State Bar Association Code of Ethics test of reasonableness could be used.[24] The attorney receiving a fee from a debtor who is contemplating bankruptcy must remember that this test of reasonableness is applied not only for fees received for services "germane to the aims of the Bankruptcy Act,"[25] but also for any services as long as "the payment or transfer was in contemplation of bankruptcy."[26] Despite the factors to be considered, such as those set out in the *Glass* case, the courts do recognize that the value of an attorney's services cannot be measured with mathematical certainty and that the court's discretion is fairly wide.[27] This service must be of a legal nature, however, for the courts will not consider work which an auditor or a clerk could have done as part of a legal fee.[28]

The examinations under section 60(d) are carried out by summary process by the court "in the exercise of its general authority over the pro-

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18 Supra note 16, at 678.

19 Ibid.

20 Supra note 5.

21 Ibid.

22 52 Stat. 872 (1946), 11 U.S.C. § 102(a)(1) (1958). This section gives the court control of fees for post-filing services.

23 47 F. Supp. 428, 430 (S.D. Cal. 1942).

24 In the matter of Knickerbocker Leather & Novelty Co., 158 F. Supp. 236, 238 (S.D. N.Y. 1958), aff'd sub nom. Harr v. Oseland, 265 F.2d 218 (2d Cir. 1959).

25 Conrad v. Pender, 289 U.S. 472, 478 (1933).

26 Id. at 477.

27 In re Hamburger, 103 F.2d 664 (7th Cir. 1939).

28 Supra note 23, at 430.

fessional conduct of its attorneys, as officers of the court. . . ."[29] The Supreme Court has determined that this summary process does not violate the Seventh Amendment of the Constitution requiring jury trials.[30] Once the fee has been found unreasonable under section 60(d), the excess is recoverable from the attorney by the trustee or the bankrupt, as the case may be, by contempt proceedings rather than by a judgment.[31]

How much effect these two amendments will have will be demonstrated only after they have been given time to operate. It seems likely, however, that both the courts and the trustee will take advantage of the added powers given to them. This will permit creditors to receive increased assets and will require greater diligence by the debtor's attorney, who will feel the weight of an increased scrutiny of his fee.

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BLUE SKY LEGISLATION

UNIFORM SECURITIES ACT

There has been extensive legislation in the area of state security regulation, including many significant amendments to existing laws and the adoption or substantial adoption of the Uniform Securities Act[1] by Nevada[2] and Utah.[3] Codifying it in its entirety, Utah became the sixteenth state to adopt Professor Loss's Uniform Act.[4] The substitution by Utah of the Uniform Securities Act for its previous blue sky law continues a definite trend toward uniformity in this field of state regulation.[5]

Nevada, which previously did not have a blue sky law, has now enacted such legislation, adopting certain sections of the Uniform Act.[6] This leaves Delaware as the only state with no legislation in this area of the law.[7]

Nevada, rather than adopting the three methods of registration of securities prescribed by the Uniform Act,[8] selected only one method.[9] The

[29] In re Debbins, 53 F.2d 1018, 1020 (E.D. Mich. 1931).

[30] In re Wood and Henderson, 210 U.S. 246, 258 (1908).

[31] In the matter of A. & V. Appliance Co., 149 F. Supp. 3, 4 (E.D.N.Y. 1957).

[1] For an analysis of the Uniform Securities Act, its background and the extent of its adoption see Legislation, 3 B.C. Ind. & Com. L. Rev. 455 (1962); Blue Sky L. Rep. ¶ 4901-4953.

[2] Nev. Rev. Stat. §§ 7.2-.22 (Supp. 1963).

[3] Utah Code Ann. §§ 61-1-1 — 61-1-30 (1953).

[4] For a list of states accepting all or portions of the Uniform Securities Act see Blue Sky L. Rep. ¶ 4901.

[5] Supra note 3. For a brief analysis of the four basic parts of the Uniform Securities Act see Legislation, 3 B.C. Ind. & Com. L. Rev. 218 n.2 (1961).

[6] Supra note 2.

[7] Blue Sky L. Rep. ¶ 11,101.

[8] The Uniform Securities Act provides for registration by notification, § 302; coordination, § 303; qualification, § 304. For an explanation of these three types, see Legislation, 3 B.C. Ind. & Com. L. Rev. 461-64 (1962).

[9] Nev. Rev. Stat. §§ 7.15-.16 (Supp. 1963).