North Dakota Law Review

Volume 27 | Number 2 Article 8

1951

Bankruptcy - Excepting Judgment Claim from Discharge - Effect of Laches

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visions of the Uniform Act. To retain the desired uniformity, future legislators must watch with care their drafting of acts involving administrative agencies to be certain that such inconsistencies do not occur.[20]

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BANKRUPTCY—EXCEPTING JUDGMENT CLAIM FROM DISCHARGE—EFFECT OF LACHES. The debtor filed a voluntary petition in bankruptcy in the Eastern District of New York, and the creditor filed the only claim scheduled. The proceedings were subsequently dismissed. Although dismissal is equivalent to denial,[1] three years later the debtor again filed a voluntary petition in the Southern District of New York, listing the same claim. The court, unaware it was acting upon a non-dischargeable debt, granted a general discharge. Twelve years thereafter the claim was assigned to petitioner, who now seeks to have the court exempt the claim from the operation of the discharge granted in the second proceeding. *Held*: petition granted. The denial of the first discharge, for whatever reason, is res judicata, not to be questioned in a later proceeding. Laches does not bar the claim, and the court may correct its order at any time since it has been imposed upon. *Harris v. Warshawsky,* 184 F.2d 660 (2d Cir. 1950).

The instant case represents the view of the bankruptcy-experienced Second Circuit. However, the court's liberality in recognizing a claim where the claimant obviously had been guilty of laches, is opposed by respectable authority. One eminent bankruptcy scholar argues that "there must come a time when the discharge is irrevocable. An interested party should not be entitled to stand by indefinitely until it seems advantageous to present the defense of res judicata".[2] Under the doctrine of res judicata the bankruptcy courts have broadened the scope of debts which are non-dischargeable beyond those set forth in section 17 of the Bankruptcy Act. The pendency of a voluntary petition in bankruptcy,[3] the denial of a discharge in a prior proceeding,[4] the dismissal of the prior proceeding without the granting of a discharge,[5] or the failure to apply for a discharge[6] precludes con-

[20] For a further consideration of administrative law in North Dakota see Comment, 24 N.D. Bar Briefs 211 (1948).

[1] Perlman v. 322 West Seventy-Second Street Co., 127 F.2d 716 (2d Cir. 1942).

[2] Oglebay, *Some Developments in Bankruptcy Law,* 23 J.N.A. Ref. Bankr. 70, 72 (1949); also see Donnelly, *The Non-Dischargeability of Dischargeable Debts in Bankruptcy,* 36 Va. L. Rev. 207 *et seq.* (1950); *In re* Early, 34 F. Supp. 774 (E.D. Pa. 1940).

[3] Freshman v. Atkins, 269 U.S. 121 (1925); Bluthenthal v. Jones, 208 U.S. 64 (1908).

[4] *In re* Buchanan, 62 F. Supp. 964 (W.D. W.Va. 1945).

[5] Perlman v. 322 West Seventy-Second Street Co., 127 F.2d 716 (2d Cir. 1942).

[6] *In re* Cederbaum 27 F. Supp. 1014 (S.D.N.Y. 1939).

sideration of a second petition for a discharge of the same debts. The res judicata principle—that a debt once branded non-dischargeable must be so recognized in a later proceeding—is lucidly explained in In re *Feigenbaum*.[7] It is there stated that "a proceeding in bankruptcy is in the nature of a bill in equity where the bankrupt is the complainant and the creditors are the defendants. Where a discharge is denied on the merits, the judgment inures to the benefit of all the creditors. All parties to the proceedings are bound by it and none of them should be permitted to try the same question again; it is res judicata." As such it is binding on the parties involved.[8]

Clearly a bankruptcy court has the power to reopen a closed estate and vacate or amend its orders when equitable grounds are shown.[9] The court may do so on its own motion, taking judicial notice of the records of the earlier proceedings[10] in order to protect creditors.[11] However, there is a split of authority as to whether the creditor's laches should prevent the exception of his claim from the discharge. The Second Circuit has allowed a claim as ripe as fifteen years to be excepted.[12] Other jurisdictions have regarded laches as a valid defense to the motion.[13]

In these cases section 15 of the Bankruptcy Act imposing a one year limitation on revoking a discharge for the fraud of the bankrupt is not deemed applicable since the creditor moves to amend rather than revoke the order.[14] Particularly where the bankrupt abused the process of the court in failing to have the non-dischargeable claim excepted from the discharge,[15] there is valid argument in support of the result in the instant case. To hold otherwise, according to Judge Clark, would make the later proceeding ". . . a real boon to a debtor assiduous in bankruptcies if not in payments to his creditors."[16]

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[7] 121 Fed. 69, 70 (2d Cir. 1903).

[8] Gratiot County State Bank v. Johnson, 249 U.S. 246 (1919); *cf.* First National Bank v. Pothuisje, 217 Ind. 1, 25 N.E.2d 436 (1940); 1 Remington, Bankruptcy § 420 (5th ed. 1950). It should be noted that the first discharge in the instant case was not denied *on the merits;* instead the proceedings were dismissed merely because the debtor failed to furnish the required indemnity bond. However, the court expressly follows the established bankruptcy rule that a denial of a discharge, for whatever reason, is res judicata, not to be questioned in a later bankruptcy. *Id.* at 661.

[9] Grand Union Equipment Co. v. Lippner, 167 F.2d 958 (2d Cir. 1948); Grzenia v. Lucius, 66 F.2d 349 (7th Cir. 1933); *In re* Goldenberg v. Halbert, 286 Fed. 292 (E.D. Pa. 1923).

[10] *In re* Seiden, 174 F.2d 586 (2d Cir. 194)).

[11] *In re* Schindler, 73 F. Supp. 741 (E.D.N.Y. 1947).

[12] *In re* Potter, 82 F. Supp. 283 (E.D.N.Y. 1949); *In re* Seiden, 174 F.2d 586 (2d Cir. 1949) (eight years); *In re* Finkelstein, 62 F. Supp. 1015 (E.D.N.Y. 1945) (eleven years).

[13] Ginsberg v. Thomas, 170 F.2d 1 (10th Cir. 1948); *In re* Early, 34 F. Supp. 774 (E.D. Pa. 1940). These courts theorize that the discharge when granted in the second proceeding is not void but only voidable, and becomes res judicata when no steps are taken by the creditor to except his claim.

[14] *In re* Seiden, 174 F.2d 586 (2d Cir. 1949). *Contra: In re* Aasant, 7 F.2d 135 (D.N.D. 1925) (where Judge Amidon stated that the court lacked power to vacate a discharge on grounds other than those in section 15 of the Act.); *In re* Rudnick, 93 Fed. 787 (D. Mass. 1899).

[15] *In re* Seiden, 174 F.2d 586 (2d Cir. 1949); *In re* Finkelstein, 62 F. Supp. 1015 (E.D.N.Y. 1945).

[16] Harris v. Warshawsky, 184 F.2d 660, 662 (2d Cir. 1950).

It is submitted that social policy would be served better if the second discharge had been given effect. Under the spirit of the Bankruptcy Act some definite end to litigation must arrive. To hold otherwise may cause undue hardship on former bankrupts who have begun business anew, believing that their old debts had been discharged years before.

George M. Unruh

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MUNICIPAL CORPORATIONS—MILK ORDINANCES—VALIDITY. An ordinance of Madison, Wisconsin, prohibited the sale of milk (a) collected from farms located more than 25 miles, or (b) pasteurized at plants located more than 5 miles, from the central square of the city. Plaintiff Dean Milk Company, an Illinois corporation, applied for but was denied a license to sell its milk in Madison, solely because its sources and pasteurization plants were located in northern Illinois beyond the limits prescribed by the ordinance. Pointing out that its milk is inspected and rated "Grade A" by both Chicago and United States Public Health inspectors, the Dean Milk Company contended that both sections of the Madison ordinance violate the Commerce Clause and the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the United States, three justices dissenting, *held* that the challenged sections impose an undue burden upon interstate commerce and are therefore unconstitutional. *Dean Milk Co. v. City of Madison,* 71 Sup. Ct. 295 (1951). "In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce."[1]

The Court objected not to the purppse of the ordinance—to obviate health dangers created by sale of milk from remote areas—but rather to the means by which the city hoped to achieve its purpose. Both the Madison Health Commissioner and the sanitarian of the Wisconsin State Board of Health agreed that there were other workable alternatives, and the Court, in dictum, declared these preferable to the Madison ordinance. First, the city could accomplish satisfactory inspection of milk from outlying pasteurization plants by having its own officials conduct inspections and by charging "the actual and reasonable cost of such inspection to the importing producers and processors."[2] Second, the city could adopt a milk regulatory program based on section 11 of the Model Milk Ordinance recommended by the United States Public Health Service, which in effect permits sale of milk from other localities whose inspection standards are equivalent.[3]

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[1] *Id.* at 298.

[2] *Id.* at 298.

[3] Section 11 of the Model Milk Ordinance recommended by the United States Public Health Service reads, in part, as follows: "Milk and milk products from points beyond the limits of routine inspection of the city of . . . . may not be sold in the city of . . . . or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."