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TIME LIMIT ON BANKRUPTCY RESTRAINING ORDERS

Article I, section 8 of the federal constitution confers upon Congress the power to pass "uniform laws on the subject of bankruptcies throughout the United States." This provision is the genesis of the present Bankruptcy Act.

Under the Bankruptcy Act bankruptcy courts are vested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under the act.¹ Bankruptcy courts are courts of equity and have the power to issue all process, including restraining orders and preliminary and final injunctions, necessary to protect and effectuate its jurisdiction.² More specifically, the power of the bankruptcy court to grant injunctive relief in bankruptcy hearings is established by section 2(a)15 of the Bankruptcy Act which gives the court authority to

make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of provisions of this Act; provided, however, that an injunction to restrain a court may be issued by the judge only.³

The question examined in this note is whether the court in issuing a restraining order is limited by the procedural requirements of Rule 65(b) of the Federal Rules of Civil Procedure.⁴ Rule 65(b) provides that every temporary restraining order issued without notice "shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes. . . ."⁵

¹ BANKRUPTCY ACT § 2(a), 11 U.S.C. § 11.

² 7 MOORE, FEDERAL PRACTICE 1612 (2d ed. 1955); *In re Lustron Corp.*, 184 F. Supp. 789 (7th Cir. 1950).

³ 11 U.S.C. § 11.

⁴ For an excellent general discussion of the application of the Federal Rules of Civil Procedure to bankruptcy, see Yankwich, *The Impact of the Federal Rules of Civil Procedure on Bankruptcy*, 42 CALIF. L. REV. 738 (1954).

⁵ Rule 65(b) provides in part that:

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

BANKRUPTCY ACT AND FEDERAL RULES

Injunctions and restraining orders are frequently issued by bankruptcy courts to preserve the *status quo* and prevent creditors from harassing the bankrupt and draining assets from the estate.⁶ It is in these instances that the applicability of Rule 65(b) becomes significant. Both the Federal Rules of Civil Procedure and the Bankruptcy Act must be consulted. The Federal Rules provide: "These rules . . . do not apply to proceedings in bankruptcy . . . except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."⁷ Under the Bankruptcy Act, General Order 37 provides as follows: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, insofar as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."⁸ General Order 37 was promulgated by the Supreme Court; thus it would appear that the bankruptcy courts are under a mandate of the Supreme Court to apply the Federal Rules of Civil Procedure unless they are inconsistent with the Bankruptcy Act.⁹

In order to clarify the significance of the above provisions in relation to the applicability of Rule 65(b), the principal remedial devices available in a bankruptcy court will be treated separately. Thus Rule 65(b) and its bearing upon strict bankruptcy proceedings, Chapter XI Arrangements, and Wage Earner Plans under Chapter XIII will be treated independently.¹⁰

Further clarity in thought is aided if a distinction is drawn between summary and plenary actions and their relation to injunctions and temporary restraining orders. While this article is primarily concerned with temporary restraining orders, some mention of injunctions is proper at this point.

The bankruptcy court, as an incident to its powers to ascertain the rights of a bankrupt, may make use of the injunctive process to prevent interference with its jurisdiction. The Bankruptcy Act contains a special provision for injunctive relief against actions pending in other courts involving a claim from which a discharge

⁶ 1 COLLIER, BANKRUPTCY 343 (14th ed. 1962). For a practical discussion of injunctions and restraining orders in bankruptcy, see COWANS, BANKRUPTCY LAW AND PRACTICE 496 (1963).

⁷ FED. R. CIV. P. 81(a).

⁸ General Order in Bankruptcy 37; 305 U.S. 698 (1938); 11 U.S.C. following § 53 (1952).

⁹ See *In re Calif. Lumber Corp.*, 24 F.R.D. 190 (S.D. Calif. 1959).

¹⁰ *In re Arzaga*, 204 F. Supp. 617, 619 (S.D. Calif. 1962) indicates the importance of distinguishing the remedy sought.

would be a release.¹¹ Again, this article will not concern itself with the applicability of Rule 65(b) to this type of injunctive relief.

Similarly, the intricacies of summary and plenary actions preclude anything more than a general mention of fundamental elements. Basically, summary jurisdiction involves proceedings in bankruptcy and controversies arising in proceedings in bankruptcy, while plenary matters are those involving suits between the trustee and third parties brought in the form of ordinary civil actions.¹² The effects of the distinction between summary and plenary actions upon the applicability of Rule 65(b) will be discussed below.

The inconsistency with which the courts have applied the Federal Rules of Civil Procedure to bankruptcy proceedings leaves the practitioner and observer perplexed. Authorities heralded the Federal Rules of Civil Procedure as the vehicle by which consistency of procedure and uniformity of application would be introduced into the bankruptcy area.¹³ Judge Yankwich stated:

Procedure by rule in bankruptcy has an added significance, because of the importance of achieving uniformity in administration. It makes it possible to develop a unitary system of procedure aiming to attain in a uniform manner the primary object of the bankruptcy act, which to paraphrase an old decision, is to release the bankrupt from the obligation to pay the debts of his creditors and "secure a just distribution" of the bankrupt's property among them.¹⁴

In order to have uniformity of application, the authors of this article believe that a rule as to the application of Rule 65(b) should be formulated.

STRAIGHT BANKRUPTCY: CASE LAW

In the case of *In Re California Lumber Corp.*¹⁵ the referee without notice issued an order restraining the bankrupt's lessors and their attorney from instituting any proceeding against the trustee without an order from the court. The order also restrained them from interfering with peaceful possession of the leased premises

¹¹ BANKRUPTCY ACT § 11(a), 11 U.S.C. § 29(a). See COWANS, *BANKRUPTCY LAW AND PRACTICE* 496-502 (1963). It would seem that some argument could be made that § 65(b) is inconsistent with § 11(a) thus precluding its applicability. This possibility has not been forcefully argued in the cases.

¹² COWANS, *BANKRUPTCY LAW AND PRACTICE* 435 (1963); 2 COLLIER, *BANKRUPTCY* 431 (14th ed. 1962); NADLER, *CREDITOR AND DEBTOR RELATIONS* 364 (1956); 5A REMINGTON, *BANKRUPTCY* § 2350 (5th ed. 1953).

¹³ Friebolin, *Report of the Committee on Uniformity of Procedure and Practice*, 28 REF. J. 21 (1954).

¹⁴ Yankwich, *The Impact of the Federal Rules of Civil Procedure on Bankruptcy*, 42 CALIF. L. REV. 738, 740 (1954).

¹⁵ 24 F.R.D. 190 (S.D. Calif. 1959).

and taking any further action against the bankrupt corporation, premises, or trustee. Since the order did not specify an expiration date, the court strictly applied Rule 65(b) and held that the order expired ten days after its issuance. The court stated: "In the absence of inconsistencies referred to in General Order 37, the bankruptcy courts are under a mandate of the Supreme Court to apply the Rules of Civil Procedure."¹⁶

In *Benitez v. Anciani*¹⁷ the court also applied Rule 65(b) in a bankruptcy proceeding, holding that where an application for a temporary restraining order is granted without hearing or notice, the order will expire after ten days.

In the frequently cited case of *In re Lustron*¹⁸ a different result was reached when the court refused to apply Rule 65(b) to a bankruptcy proceeding. Following an injunction against Reconstruction Finance Corporation, procedural objections were raised alleging that the court did not comply with the requirement of Federal Rule 65(b). The court held that "we are inclined to believe that the paramount authority of the bankruptcy court under the Bankruptcy Act is such that the rules which apply to ordinary restraining orders are not applicable to restraints of courts and parties, in aid of the Bankruptcy Act."¹⁹ The court, in reaching this decision, drew a distinction between summary and plenary jurisdiction of the bankruptcy court. It indicated that if the proceedings involve summary jurisdiction, the Federal Rules of Civil Procedure should not apply, but in plenary actions the rules should be given their full force and effect.

The rationale in the *Lustron* case was also used in the case of *In re Hudzinski*.²⁰ Again the court refused to apply Federal Rules 65(b) and 65(c) to a bankruptcy proceeding.

The same confusion and lack of uniformity in application indicated above exists when other sections of Rule 65 are examined.²¹ Courts have used the plenary versus summary jurisdiction argument to hold that Rule 65(c)²² is also inapplicable to bank-

¹⁶ *Id.* at 192.

¹⁷ 127 F.2d 121 (1st Cir. 1942).

¹⁸ 184 F. Supp. 789 (7th Cir. 1950).

¹⁹ *Id.* at 797.

²⁰ 85 F. Supp. 341 (W.D. Pa. 1949).

²¹ *Halpert v. Engine Air Service, Inc.*, 212 F.2d 860 (2d Cir. 1954); *Chatz v. Freeman*, 204 F.2d 764 (7th Cir. 1953); *In re Hudzinski*, 85 F. Supp. 341 (W.D. Pa. 1949); see generally 103 U. PA. L. REV. 433 (1955); 67 HARV. L. REV. 512 (1955); 7 STAN. L. REV. 120 (1955).

²² Rule 65(c) provides:

Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems

ruptcy proceedings. The court in *Halpert v. Engine Air Service, Inc.*²³ held that the rule requiring posting of security by an applicant for a preliminary injunction is not a restriction on a court of bankruptcy in exercise of its powers. The district court had discretionary power to issue an injunction preserving the *status quo* pending determination of the trustee's plenary proceeding to recover alleged voidable transfers, without requiring bond.

In *Chatz v. Freeman*²⁴ the majority held that the trial court erred in issuing a temporary restraining order without providing for security as required by Rule 65(c). However, in a soundly reasoned dissenting opinion, Judge Major alluded to the *Lustron* case and concluded that by analogy Rule 65(c) is also inapplicable.

CHAPTER XI AND CHAPTER XIII

A logical distinction has been formulated between cases which grant relief in straight bankruptcy proceedings and those which fall under the rehabilitation provisions of Chapter XI and debtor relief provisions of Chapter XIII. The courts reject the contention that 65(b) applies to the latter rehabilitation proceedings on the ground that this would be inconsistent with section 314 of Chapter XI²⁵ and section 614 of Chapter XIII.²⁶

Judge Kirkpatrick, in the leading case of *In re Haines Lumber Co.*,²⁷ asserts that while section 314 of the act does not authorize an *ex parte* injunction, but does provide that the court may enjoin or stay a proceeding to enforce a lien upon notice and showing cause, it does not forbid the entry of a restraining order without notice in a proper case. In referring to jurisdiction to enter an order without notice, he quotes Collier:

That jurisdiction is derived from the power conferred by Section 2(a)(15) of the Act to make such order as may be necessary for the

proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

²³ 212 F.2d 860 (2d Cir. 1954).

²⁴ 204 F.2d 764 (7th Cir. 1953).

²⁵ BANKRUPTCY ACT § 314, 11 U.S.C. § 714:

The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.

²⁶ BANKRUPTCY ACT § 614, 11 U.S.C. § 1014. This section is identical with § 314, quoted in footnote 25 *supra*.

²⁷ 144 F. Supp. 108 (E.S. Pa. 1956).

enforcement of the provisions of the Act, from the power conferred by Section 262 of the Judicial Code to issue all writs which may be necessary for the exercise of the jurisdiction of the district court, and from the general equity powers of a court of bankruptcy. The temporary restraining order may be granted without notice to the adverse party if it clearly appears by affidavit or in the verified petition that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.²⁸

He reasons that the restraining order is issued merely upon the assumption that the petition is correct, and the court assumes so only until someone offers to prove otherwise. It is not based upon any fact findings of the court. It is issued upon a verified petition and contains a provision that any party in interest may move to vacate. He states:

No conceivable advantage could accrue from putting a ten day limitation upon a restraining order such as the present one. Not only would it be contrary to universally accepted practice but it would be inconvenient, burdensome and an unnecessary waste of time of the court and counsel to have the order renewed every ten days. The order itself provides that any party in interest may move to vacate it upon application to the court. The court will always entertain a motion to vacate, upon any showing of good cause.²⁹

The case of *In re Arzaga*³⁰ followed the rationale of the *Haines* case and held that Rule 65(b) was not applicable to a proceeding under section 614 of Chapter XIII. The decision of *In re California Lumber Co.* is distinguished as a decision under the straight bankruptcy chapter and thus not a precedent which would be binding under the facts of this case. The decisive distinction is that in ordinary bankruptcy proceedings Rule 65(b) is applicable because it is not inconsistent with the act. However, in Chapter XIII proceedings Congress has provided specific procedural requirements relating to injunctive relief in section 614. Since Rule 65(b) is inconsistent with section 614, it would not fall within the scope of General Order 37 and should have no application in Chapter XIII proceedings. A logical extension would be that since section 614 of Chapter XIII and section 314 of Chapter XI are substantially identical, this decision then would be applicable to Chapter XI proceedings as well as Chapter XIII.

A survey concerning the applicability of Rule 65(b) to bankruptcy proceedings was recently conducted by the Bankruptcy

²⁸ *Id.* at 109.

²⁹ *Ibid.*

³⁰ 204 F. Supp. 617 (S.D. Calif. 1962). For an excellent discussion of *In re Arzaga*, see Treister, *Ex Parte Restraining Orders in Rehabilitation Proceedings*, 36 REF. J. 110 (1962).

Committee of the Ninth Circuit Judicial Conference. In response to a questionnaire sent out by the Committee, those referees of the Ninth Circuit who replied indicated that little if any uniformity in practice and procedure exists. Some referees adhere to the limitations of Rule 65(b) while others do not. The split appears to be about equal; half of those questioned contended that Rule 65(b) applies to bankruptcy, while the remaining thought that it does not.

Those alleging that the Rule does not apply point out that crowded court calendars render it almost impossible to determine the matters within the ten day limitation. Others contend that the limitations are impractical, since many referees hold court in different cities where they often have hearing days only once a month. In such cases a hearing within ten days would be impossible.

CONCLUSION

As noted above many bankruptcy courts have reasoned that Rule 65(b) applies to ordinary bankruptcy proceedings because it is "not inconsistent with the Act."³¹ In other words, no provision appears in the Bankruptcy Act which would in any way conflict or be inconsistent with the application of Rule 65(b) to straight bankruptcy proceedings. Thus, regardless of crowded calendars or geographical inconvenience the bankruptcy court should accept Rule 65(b) as binding. As pointed out in a recent decision:

The drastic remedy of injunctive relief should issue only in extraordinary circumstances where the court is satisfied that a right is about to be destroyed or irreparably injured by an illegal act. Rule 65 was adopted to guard against abuse of the remedy.³²

On the other hand, it is the consensus of opinion that Rule 65(b) does not apply to the rehabilitation provisions of Chapters XI and XIII. Section 314 of Chapter XI and section 614 of Chapter XIII indicate that Congress intended that injunctive relief should be granted more liberally in the rehabilitative proceedings than in ordinary bankruptcy proceedings. Thus referees should not be bound by the ten day limitations in Chapter XI and XIII proceedings.

The practical obstacles that have occurred in attempts to adhere to the limitations of Rule 65(b) in strict bankruptcy proceedings indicate that some modifications are necessary. A possible solution might be a provision in the Bankruptcy Act which would extend the ten day period until the next hearing will take place, when the proceedings cannot be held within the limited time. At

³¹ See notes 15 and 17 and accompanying text *supra*.

³² *In re California Lumber Corp.*, 24 F.R.D. 190 (S.D. Calif. 1959).

the present time the failure of many to recognize that a problem exists has resulted in confusion and the arbitrary determination of the question presented. While a referee's discretion is often highly desirable, it seems in this instance that uniformity should prevail.

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