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# DILEMMAS OF PLEADING IN BANKRUPTCY PROCEEDINGS

by

Arthur L. Moller\*

“THE main purpose of the Bankruptcy Act is that the assets of an insolvent person who has committed an act or acts of bankruptcy within four months before the filing of an involuntary petition against him, shall be equally distributed among his creditors. It cannot be that Congress intended that this purpose should be defeated by a resort to technicalities in pleading.” This sensible, if somewhat idealistic, statement was enunciated by the Court of Appeals for the First Circuit in *In re Harris*.<sup>1</sup> Would that it were so!

The Supreme Court was originally given the authority to make rules and forms for bankruptcy proceedings by section 30 of the Bankruptcy Act.<sup>2</sup> Of the many adversary proceedings which take place in ordinary bankruptcy cases, the Court has seen fit to promulgate official forms for only two: the involuntary petition in bankruptcy (Official Form No. 5)<sup>3</sup> and specifications of objection to discharge (Official Form No. 44).<sup>4</sup> In all other adversary areas—turnovers, contests of claims, reclamations, counterclaims, etc.—the Court’s silence has left the bankruptcy courts free to apply the Federal Rules of Civil Procedure,<sup>5</sup> and in these areas questions regarding sufficiency of pleadings arise no more frequently than in other civil cases. Unfortunately such is not the case with regard to involuntary petitions and specifications of objection to discharge, where questions of the sufficiency of pleadings often occur.

After the adoption of the Federal Rules of Civil Procedure,<sup>6</sup> the Supreme Court revised the general orders and forms for bankruptcy proceedings. However, Official Forms Nos. 5 and 44 were left in essentially the same form and language as had been adopted in 1898. And during the thirty years of the Civil Rules, although the Supreme Court has further changed various of the General Orders to conform more nearly to the Rules, and although Congress has made compensating amendments to

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<sup>1</sup> 299 F. 395, 400 (1st Cir. 1924).

<sup>2</sup> Bankruptcy Act § 30, 11 U.S.C.A. § 53 (1968). Throughout this Article, section numbers referred to are those of the Bankruptcy Act. These are not the same as the section numbers in title 11 of the United States Code. For reasons known only to itself, Congress has never seen fit to make these numbers coincide. Section 30 reads: “All necessary rules, forms, and orders as to procedure for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court.” This section was repealed in 1964, but the prior rules, forms, and orders prescribed under the authority of § 30 have been preserved.

<sup>3</sup> 305 U.S. 741 (1939); 11 U.S.C. APP. at 2035 (1964).

<sup>4</sup> 305 U.S. 764 (1939); 11 U.S.C. APP. at 2047 (1964).

<sup>5</sup> General Order 37 provides: “In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding.” 305 U.S. 698 (1939); 11 U.S.C. APP. at 2014 (1964).

<sup>6</sup> The rewritten orders and forms were put into effect by the Court’s order dated January 16, 1939. 305 U.S. 681-785 (1939).

many of the procedural sections of the Bankruptcy Act, the Supreme Court has ignored the frequency with which the sufficiency of the allegations in involuntary petitions and specifications of objection to discharge consume the time and attention of the courts. Despite the wild confusion among the lower courts in the many opinions dealing with the subject, the Supreme Court has granted no writs and has left the two offending official forms unchanged on the books.

In 1964 Congress repealed section 30 of the Bankruptcy Act and enacted Public Law 88-623,<sup>7</sup> which gave the Supreme Court power to prescribe by general rules the forms of process, writs, pleadings, and motions and the practice and procedure under the Bankruptcy Act. After this enactment, the Supreme Court's Advisory Committee on Bankruptcy Rules, long in existence but not noticeably active during the past decade, was inspired with a new mission in life and began meeting with some regularity. In typical Advisory Committee fashion, its approach to the problem and its actions are more closely guarded than matters of national security. The last reports of its progress consist of only these cryptic items: "Judge Maris stated further that the Advisory Committees on Rules of Bankruptcy and Rules of Evidence are continuing intensive work on their tasks of preparing comprehensive drafts on rules in their respective fields. Much work remains to be done before drafts will be ready for submission to the bench and bar."<sup>8</sup> "[These Committees] are continuing intensive work."<sup>9</sup> "[These Committees] are carrying on intensive work with frequent committee meetings but neither committee is yet ready to make a report."<sup>10</sup>

It is apparent from these reports that bench and bar can expect to endure several more years of confusion regarding pleadings in bankruptcy proceedings. This Article is intended as a warning, and perhaps as an aid, to the bankruptcy practitioner, regular or occasional, in the drafting of pleadings and as a reminder to the Advisory Committee that there is at least one important unresolved problem which unquestionably merits its attention.

### I. INVOLUNTARY PETITIONS

Invoking the power of the bankruptcy court, from the standpoint of pleading, should not be difficult. The basic allegations are (1) that the debtor is a person<sup>11</sup> against whom an involuntary petition can be filed, and who owes debts of \$1,000 or more;<sup>12</sup> (2) that venue lies in the court;<sup>13</sup> (3) that the three petitioning creditors (or one petitioning creditor if the alleged bankrupt has less than twelve creditors) have provable claims amounting in the aggregate to \$500 or more;<sup>14</sup> and (4) that the alleged

<sup>7</sup> 28 U.S.C.A. § 2075 (1967). See also note 2 *supra*.

<sup>8</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROCEEDINGS, March 1967, at 23.

<sup>9</sup> *Id.*, September 1967, at 69.

<sup>10</sup> *Id.*, March 1968, at 16.

<sup>11</sup> See Bankruptcy Act § 1(23), 11 U.S.C.A. § 1(23) (1966).

<sup>12</sup> See Bankruptcy Act § 4b, 11 U.S.C.A. § 22(b) (1966).

<sup>13</sup> See Bankruptcy Act § 2a(1), 11 U.S.C.A. § 11a(1) (1966).

<sup>14</sup> See Bankruptcy Act § 59b, 11 U.S.C.A. § 95b (1968).

bankrupt has committed an act of bankruptcy<sup>15</sup> within four months of the filing of the petition.

The whole thing sounds simple, as indeed it should be and no doubt would be if the courts could agree upon the extent to which Rule 8 of the Federal Rules of Civil Procedure applies in bankruptcy proceedings. Many of the various circuit cases sound as if the judges have read no further than the second line in Federal Rule of Civil Procedure 81(a)(1), which reads: "[These rules] do not apply in proceedings in bankruptcy . . ." However, there is an important exception which seems to have eluded them. Rule 81(a)(1) continues: "except so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

One problem in determining the extent to which the "[bankruptcy] rules promulgated by the Supreme Court" make Federal Rule 8 applicable to bankruptcy proceedings lies in the difficulty of discovering what the bankruptcy rules are. For some strange reason the Supreme Court designated the bankruptcy rules General Orders, a term few general practitioners seem to recognize. Consequently, the General Orders have lain buried in the mysterious depths of title 11 of the United States Code for all these years of their existence. The confusion is now further compounded by the fact that the publisher of the United States Code Annotated recently issued a new volume of title 11—sans section 30, rules, and forms—and only a well-informed lawyer who knew and understood the terms of Public Law 88-623<sup>16</sup> will have retained the old volume in which the General Orders and Official Forms were carried.

In addition to the difficulty of finding the general orders, a more serious problem is created by the Supreme Court's ambiguous action with regard to them. By General Order 37,<sup>17</sup> as amended shortly after the effective date of the Federal Rules of Civil Procedure, the Supreme Court provided that the Federal Rules of Civil Procedure "*shall . . . be followed as nearly as may be.*" However, at the same time the Court left Official Form No. 5 as it originally had been promulgated and, still worse, did nothing about General Order 38,<sup>18</sup> which requires the use of forms promulgated by the Court. Paragraph 4 of Form 5, which contains the allegation of an act of bankruptcy, reads: "Within four months next preceding the filing of this petition, the said \_\_\_\_\_ committed an act of bankruptcy, in that he did heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, \_\_\_\_\_."

<sup>15</sup> Bankruptcy Act § 3a, 11 U.S.C.A. § 21a (1966) defines the acts of bankruptcy. These are that the debtor (1) made a transfer of his property with intent to hinder, delay, or defraud his creditors, or made a transfer which is fraudulent as to his creditors under provisions of the Act; (2) preferred one creditor over the others by payment on an antecedent debt; (3) permitted a creditor to obtain a judicial lien upon any of his property which he has not vacated within thirty days; (4) executed a general assignment for the benefit of his creditors; (5) had a receiver appointed to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudicated a bankrupt.

<sup>16</sup> 28 U.S.C.A. § 2075 (1967). See note 2 *supra*.

<sup>17</sup> Note 5 *supra*.

<sup>18</sup> This general order provides: "The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case." 305 U.S. 699 (1939); 11 U.S.C. App. at 2015 (1964).

This is a striking contrast to the sample forms appended to the Federal Rules of Civil Procedure, and therein lies the trap for the attorney who has had those Rules drummed into him since law school days. The Rules-oriented attorney will plead as he has been taught, only to fall victim to time-consuming attacks on his pleadings as being fatally defective because of the inadequacy of the allegations.

Alleged bankrupts take advantage of technical shortcomings in the pleadings in order to gain time, and also in the hope of obtaining dismissal of the petition. There are at least two important reasons why dismissal of an involuntary petition in bankruptcy can be particularly damaging to creditors. First, such a dismissal is far more serious than dismissal of a civil suit because almost invariably it is fatal to the petitioner's cause. Under the Bankruptcy Act an essential condition for adjudication is that an act of bankruptcy shall have occurred within four months prior to the filing of the petition.<sup>19</sup> This time period is quite short, and because a dismissal, if granted, usually occurs after the four months period has passed, a subsequent petition may be filed only if another act of bankruptcy has occurred within the proper time and has been discovered by the petitioner within that limited time. A second reason that sustaining the original involuntary petition is desirable is that once a single act of bankruptcy has occurred and the petition has been timely filed with adequate allegations, the power of the trustee to reach back and unscramble transactions which are vulnerable under specific sections of the Act (*e.g.*, sections 60, 67, 70)<sup>20</sup> is not restricted to those transactions that occurred within the four months filing period.<sup>21</sup> Equally important, this power is not restricted to those specific transactions alleged in the involuntary petition. A single act of bankruptcy triggers the whole thing—even an act of bankruptcy which is quite insignificant in terms of dollars or in relation to other suspect transactions not alleged in the involuntary petition.

Federal Rule of Civil Procedure 8(e) provides that each averment of a pleading shall be simple, concise, and direct; and Rule 8(a)(2)<sup>22</sup> requires merely "a short and plain statement." It should be noted especially that Rule 8 does not require the pleading of facts, as distinguished from conclusions of law. The simplicity of the standard required of a pleading under the Civil Rules has been set forth clearly by the Supreme Court in *Conley v. Gibson*.<sup>23</sup> There the Court reiterated that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. "To the contrary," the Court noted, "all the Rules require is a 'short plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it

<sup>19</sup> See note 15 *supra*.

<sup>20</sup> Bankruptcy Act §§ 60, 67, 70, 11 U.S.C.A. §§ 96 (1968), 107, 110 (1967).

<sup>21</sup> Some transactions are, of course, vulnerable for four months only. See, *e.g.*, Bankruptcy Act § 60, 11 U.S.C.A. § 96 (1968). The trustee's power under another section of the Act is not so restricted: "Section 70(e)(1) prescribes no conditions or time limits within which transactions are deemed voidable. It merely incorporates the applicable state or federal law in this regard. Consequently the four-month and one-year limitations established in §§ 60 and 67 are inapplicable in a suit under § 70e." 4A COLLIER ON BANKRUPTCY § 70.71 (14th ed. 1967).

<sup>22</sup> FED. R. CIV. P. 8(a)(2).

<sup>23</sup> 355 U.S. 41 (1957).

rests."<sup>24</sup> This simplified "notice pleading" is possible only because of the liberal opportunity for discovery and other pre-trial procedures established by the Rules to disclose precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. As the Court emphasized, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."<sup>25</sup>

Even in civil cases it has been quite difficult for courts to maintain this "positive rule simply expressed but which must constantly resist erosion from the subtle influence of the local state practice on sufficiency of pleadings,"<sup>26</sup> and in bankruptcy cases the inertia and habit of old and out-moded fact pleading simply have never been overcome. An involuntary petition which meets every requirement of the Civil Rules may still be met with the response from some courts that it "fails to state specific facts relied upon to constitute a preferential transfer" and that "the allegations should have included the date of the alleged transfer, a description of the property transferred, and a statement that it was made in satisfaction of an antecedent debt."<sup>27</sup> Often, involuntary petitions are challenged as being so "fatally defective" as to deprive the bankruptcy court of jurisdiction,<sup>28</sup> and a number of the cases have used the term "jurisdictional facts" as a basis for a particular procedural ruling.<sup>29</sup> On this specious basis petitioning creditors have been denied the right to amend, and their petitions have been dismissed. Recently, however, several courts have trended away from the "jurisdictional facts" concept. The Eighth Circuit put such a contention in proper perspective: "This contention overlooks the fact that the Congress, not the pleadings, vests the District Court with the power or right to act in bankruptcy proceedings. In the instant case, the District Court had jurisdiction of the subject matter by virtue of the federal bankruptcy act. . . . A defective petition in bankruptcy presents no different problem from a defective complaint generally. It does not deprive the court of jurisdiction and is subject to amendment."<sup>30</sup> Similarly, the First,<sup>31</sup> Second,<sup>32</sup> Third,<sup>33</sup> Fifth,<sup>34</sup> and Seventh<sup>35</sup> Circuits have recognized that the

<sup>24</sup> *Id.* at 47.

<sup>25</sup> *Id.* at 48.

<sup>26</sup> Judge John R. Brown in *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 366 (5th Cir. 1962); *cf. Millet v. Godchaux Sugars, Inc.*, 241 F.2d 264, 265 (5th Cir. 1957).

<sup>27</sup> *In re Timberline Lodge*, 139 F. Supp. 13, 14 (D. Ore. 1955).

<sup>28</sup> Typical of the older cases is *In re Fuller*, 15 F.2d 294 (2d Cir. 1926), where the court dismissed a petition alleging an act of bankruptcy substantially in the language of the statute. "A petitioning creditor must show that he has challenged the act of bankruptcy in season, and it is impossible to know whether he has, until he identifies what act he means." *Id.* at 295. The court refused to consider that this was merely a matter of form and entered an outright dismissal without leave to amend.

<sup>29</sup> 2 COLLIER ON BANKRUPTCY ¶ 18.05 (14th ed. 1967).

<sup>30</sup> *Commercial Credit Corp. v. Skutt*, 341 F.2d 177, 180 (8th Cir. 1965).

<sup>31</sup> *Harney Shoes, Inc. v. National Fabrics & Finishing Co.*, 44 F.2d 517 (1st Cir. 1930).

<sup>32</sup> *Minkoff v. Steven Jrs., Inc.*, 260 F.2d 588 (2d Cir. 1958); *South Suburban Safeway Lines, Inc. v. Carcards, Inc.*, 256 F.2d 934 (2d Cir. 1958).

<sup>33</sup> *Kay v. Federal Rubber Co.*, 46 F.2d 64 (3d Cir. 1930).

<sup>34</sup> *Abramson v. Boedeker*, 379 F.2d 741 (5th Cir. 1967).

<sup>35</sup> *Bixby v. First Nat'l Bank*, 250 F.2d 713 (7th Cir. 1957).

jurisdiction of the court is invoked by pleading in the words of the statute and have allowed amendment of the pleadings to correct the defects of generality.

Not long after the effective date of the Federal Rules of Civil Procedure, their effect on bankruptcy pleadings began to register in some areas. As early as 1942, in the case of *Glint Factors, Inc. v. Schnapp*, the Second Circuit relied upon the provision of Federal Rule of Civil Procedure 15(c) that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading," as authority for allowing the amendment of a defective allegation of an act of bankruptcy.<sup>36</sup> The court considered that this rule had become effective in bankruptcy by virtue of General Order 37<sup>37</sup> and had resulted in a liberalization of the former rule which denied the right to amend the petition.<sup>38</sup> In *Glint Factors*<sup>39</sup> the original petition had alleged the transfer to relatives of a sum in excess of \$2,300. This, the court held, was specific enough to enable the district judge to conclude that the amendment setting forth the transfer of \$2,250 in named amounts to named relatives arose out of the conduct, transaction, or occurrence attempted to be set forth in the original petition. Both the original petition and the amendment dealt with the manner by which the alleged bankrupt had transferred to relatives money she had received from the petitioning creditor; thus the original petition had given adequate notice to the alleged bankrupt of the petitioning creditor's claim.

Hopeful though this purported effort to conform to the Civil Rules may have been, the court destroyed the optimism which it had engendered when it went on to say: "We do not mean to be understood that a petition alleging such acts of bankruptcy merely in the words of the statute may be made good by amendment which will relate back to the date of the petition. There must be enough more to show that the pleader did know, and attempted to state, some definite conduct, transaction, or occurrence."<sup>40</sup> Inadvertent failure to allege the act of bankruptcy with sufficient particularity would now be ground for amendment under Rule 15(c), the court conceded, "though failure to plead the pertinent facts adequately *merely because they are not known* will have the same result as before."<sup>41</sup>

This imposition of a subjective test for amendment surely was never intended by Federal Rule of Civil Procedure 15(c).<sup>42</sup> Application of such a test would deprive the plaintiff in a civil case of the use of information gained through discovery. There is even less justification for its application in bankruptcy cases where, in addition to the discovery provisions of the Federal Rules of Civil Procedure<sup>43</sup> there are available the inquisitory pro-

<sup>36</sup> 126 F.2d 207, 209 (2d Cir. 1942).

<sup>37</sup> See note 5 *supra*.

<sup>38</sup> *In re Fuller*, 15 F.2d 294 (2d Cir. 1926).

<sup>39</sup> 126 F.2d 207 (2d Cir. 1942).

<sup>40</sup> *Id.* at 209.

<sup>41</sup> *Id.*

<sup>42</sup> 3 J. MOORE, FEDERAL PRACTICE ¶ 15.15(1) (2d ed. 1968).

<sup>43</sup> See Bankruptcy Act § 21k, 11 U.S.C. § 44k (1964).

cedures provided by sections 3d<sup>44</sup> and 21a<sup>45</sup> of the Bankruptcy Act. Section 3d would be entirely frustrated, and section 21a materially frustrated, should the petitioning creditors be barred from using information so learned to meet the demands of a motion to dismiss or a motion for more definite statement.<sup>46</sup> The Fifth Circuit has flatly rejected a subjective test, stating: "This is really but another facet of the argument we initially rejected that there is somehow something fatally defective if the creditors at the time of the filing of the initial petition in bankruptcy do not have all of the factual information they might later learn. To the extent that older decisions might affirm any such approach, they have long since lost their vitality. Bankruptcy is indeed a specialized branch of law and jurisdiction, but save in those areas still reserved to specialized treatment under General Order 37 . . . it is otherwise subject to the same approach as other civil litigation. The essence of that system, reflected by the Civil Rules, is that pleadings seldom are now the means by which the claim is to be determined, or notice given to the adversary as to what facts might be asserted. That is the function of discovery. . . . The very purpose of pretrial depositions, requests for admissions, written interrogatories, notice to produce documents, etc., is to obtain evidence not presently available to support a claim or defense asserted in good faith."<sup>47</sup>

In a recent case, *Abramson v. Boedeker*,<sup>48</sup> the Fifth Circuit took the last giant stride in its unrelenting effort to reconcile the apparent differences between Official Form No. 5 and the Federal Rules of Civil Procedure. In *Abramson* Chief Judge Brown<sup>49</sup> stated: "[W]hether the allegations of the involuntary petition are adequate is essentially a question of procedure. Through General Order 37 this brings directly into play the Federal Rules of Civil Procedure 'in so far as they are not inconsistent with the Act or with [the] general orders.' . . . Except that § 18c [of the Bankruptcy Act]<sup>50</sup> requires that 'petitions for both voluntary and involuntary bankruptcy shall be verified under oath,' 2 Collier ¶ 18.36, nothing in General Order 5 prescribing the content and form of the petition nor in the official forms, see General Order 38, is inconsistent with F.R. Civ. P. 8(a) (2)

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<sup>44</sup> Bankruptcy Act § 3d, 11 U.S.C. § 21d (1964). This section requires a person against whom a petition has been filed to appear with his books, papers, and accounts and to submit to an examination.

<sup>45</sup> Bankruptcy Act § 21a, 11 U.S.C. 44a (1964). This section allows the court, subject to certain exceptions and in response to application of any officer, bankrupt, or creditor, to order any designated person, including the bankrupt, to be examined concerning the acts, conduct, or property of a bankrupt.

<sup>46</sup> In an old case (1914) the Fifth Circuit held that a § 21a examination could not be used to obtain evidence to establish insolvency or the act or acts of bankruptcy alleged by the petitioning creditors. *Rawlins v. Hall-Epps Clothing Co.*, 217 F. 884 (5th Cir. 1914). The case has been cited frequently, and quite recently, as authority for this proposition. But the Fifth Circuit itself has abandoned this view and has expressly overruled *Rawlins*. *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 368 (5th Cir. 1962). Certainly the court's present view is to be preferred.

<sup>47</sup> *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 368 (5th Cir. 1962).

<sup>48</sup> 379 F.2d 741 (5th Cir. 1967).

<sup>49</sup> Judge John R. Brown, Chief Judge of the Fifth Circuit, wrote the Court's opinions in *Abramson* and *Georgia Jewelers*, which are relied upon so heavily in this Article. These and the opinions in *American Mannex Corp. v. Huffstutler*, 329 F.2d 499 (5th Cir. 1964) and *South Falls Corp. v. Rochelle*, 329 F.2d 611 (5th Cir. 1964), some of the better bankruptcy opinions in recent decades, have come from this fine intellectual.

<sup>50</sup> Bankruptcy Act § 18c, 11 U.S.C. § 41c (1964).



which requires merely a 'short and plain statement,' the standard under 8(e) being that each ' . . . averment of a pleading shall be simple, concise, and direct.' See 2 Collier § 18.09[2.2], citing 2 Moore, Federal Practice, § 8.12, it should 'be noted that . . . [Rule 8(a)(2)] does not require the pleading of facts as distinguished from conclusions of law.' There is no reason, therefore, why the involuntary petition should not be read with all of the liberality of the usual civil complaint.<sup>51</sup>

Opponents of the liberality of this most recent pronouncement from the Fifth Circuit can find some faint support in Federal Rule of Civil Procedure 9(b), at least insofar as allegations of the first act of bankruptcy<sup>52</sup> involving actual fraud (as distinguished from fraud presumed in law) are concerned. In pertinent part Rule 9(b) provides that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This requirement must, however, be harmonized with the general directives of Federal Rules of Civil Procedure 8(a) and 8(e) that the pleadings should contain "a short and plain statement of the claim" and that each averment should be "simple, concise, and direct." Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter,<sup>53</sup> and it does not support the factual detail required by so many of the bankruptcy cases, both those alleging fraud and those alleging one of the other acts of bankruptcy. It is interesting to note that none of the bankruptcy cases have relied upon Rule 9(b) to support the requirement of detailed factual pleading. Instead, all have treated the requirement as something inherent in bankruptcy jurisprudence and apparently have sought no support for it on the outside.

It should be observed that there is no rule in any circuit which would prevent an allegation in the amended petition of a totally new and different act of bankruptcy which occurred within four months of the date of the filing of the *amended* petition. Here, of course, there is no problem of attempting to relate this newly alleged act of bankruptcy back to the date of the filing of the original petition. In this situation, however, if adjudication does follow, the trustee takes title to the bankrupt's property *as of the date of the original petition*,<sup>54</sup> and he may recover property transferred by the bankrupt within four months<sup>55</sup> prior to the filing of the *original* petition. And this is so even though the act of bankruptcy alleged in the amended petition may have occurred *after* the filing of the original petition.<sup>56</sup>

## II. SPECIFICATIONS OF OBJECTION TO DISCHARGE

A discharge is defined as the release of a bankrupt from all of his debts

<sup>51</sup> 379 F.2d at 745.

<sup>52</sup> See note 15 *supra*.

<sup>53</sup> See 2A J. MOORE, FEDERAL PRACTICE § 9.03, at 1930 (2d ed. 1968).

<sup>54</sup> *International Bank v. Sherman*, 101 U.S. 403 (1879).

<sup>55</sup> Or longer; see note 21 *supra*.

<sup>56</sup> *International Bank v. Sherman*, 101 U.S. 403 (1879); 2 COLLIER ON BANKRUPTCY § 18.26 (14th ed. 1967). See also *Abramson v. Boedeker*, 379 F.2d 741 (5th Cir. 1967). The facts are stated in an earlier opinion, *In re Casco Chem. Co.*, 335 F.2d 645, 646-48 (5th Cir. 1964).

which are provable in bankruptcy, other than those excepted by the Bankruptcy Act.<sup>57</sup> While the primary purpose of the Bankruptcy Act is the collection and distribution of the debtor's estate to his creditors, the discharge of the bankrupt is a major, if secondary, purpose designed to give the honest debtor an opportunity to re-establish himself in the business community.

Congress did not intend that a discharge should be available to a dishonest debtor. To this end it has vested in the bankruptcy court which has jurisdiction over the bankruptcy proceeding the jurisdiction to grant or deny a discharge.<sup>58</sup> Section 14b of the Act<sup>59</sup> sets out the discharge procedure. The court must fix a date by which all objections to discharge must be filed. The general policy of the law seems to be that the bankrupt shall have his discharge as promptly as is feasible. Nevertheless the creditors and the trustee should have adequate opportunity to examine the bankrupt, to conduct further investigation into his affairs if the need is indicated,<sup>60</sup> and to prepare any objections they may have. It is for this reason that the date to be fixed for the filing of objections must be no less than thirty days after the first meeting of creditors. The court is given authority to extend such time, *sua sponte*, or upon the motion of an interested party.<sup>61</sup>

The grounds for objecting to a discharge are set out in section 14c of the Act.<sup>62</sup> These statutory grounds are exclusive, and unless one of these grounds has been timely specified and is proved, the discharge must be granted. Other conduct on the part of the bankrupt, no matter how outrageous or reprehensible, will not warrant denial of the discharge.<sup>63</sup> Failure to recognize this fact has resulted in the filing of irate but immaterial objections, which in one case were met with this sizzling response from the court:

If counsel preparing these objections had read the bankruptcy statute, or only consulted the section relating to discharges, he could not have failed to note that this section points out only two grounds [prior to the amendment of 1903] as justifying withholding discharge, and commands the court to grant discharge unless one of these two grounds is proven. He could scarcely fail to notice, if that section be now consulted by him, that the matters at-

<sup>57</sup> See Bankruptcy Act § 1(15), 11 U.S.C. § 1(15) (1964). Debts not affected by discharge are enumerated in Bankruptcy Act § 17, 11 U.S.C.A. § 35 (Supp. 1967).

<sup>58</sup> Bankruptcy Act § 2a(12), 11 U.S.C.A. § 11a(12) (1966).

<sup>59</sup> Bankruptcy Act § 14b, 11 U.S.C.A. § 32b (1967).

<sup>60</sup> Bankruptcy Act § 21a, 11 U.S.C. § 44a (1964) authorizes the calling as a witness any person who can shed any light upon the "acts, conduct, or property" of the bankrupt.

<sup>61</sup> See Bankruptcy Act § 14b, 11 U.S.C.A. § 32b (1967).

<sup>62</sup> The grounds set out in Bankruptcy Act § 14c, 11 U.S.C.A. § 32c (1967) are that the bankrupt (1) has committed an offense under 18 U.S.C. § 152; (2) has destroyed, concealed, or failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained; (3) has obtained for his business money or property on credit or as an extension or renewal of credit by making or publishing a materially false statement in writing respecting his financial condition; (4) at any time subsequent to twelve months preceding the filing of the petition in bankruptcy has transferred, removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; (5) has been granted a discharge in a proceeding under the Act commenced within six years prior to the filing of this petition; (6) in the course of the proceeding has refused to obey any lawful order of, or to answer any material question approved by, the court; (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities; or (8) has failed to pay the filing fees required to be paid by the Act.

<sup>63</sup> 1 COLLIER ON BANKRUPTCY § 14.07(1) (14th ed. 1967).

tempted (as we assume) to be stated by him are not embraced in either of these grounds.<sup>64</sup>

Under the provisions of the Act and General Order 32<sup>65</sup> as they existed before 1938, the courts felt that it was important to grant the bankrupt a discharge almost immediately, and it was difficult to obtain an extension of time for filing objections. This resulted in hasty preparation of specifications of objection which, for lack of information because of incomplete examination of the bankrupt, were often stated only in the language of the statute. Such specifications usually were dismissed outright.<sup>66</sup> This trend caused Congress to re-examine the mechanics of the discharge procedure. Section 14b of the Act<sup>67</sup> was rewritten in 1938 to express more clearly congressional intent regarding the time when further opportunity to file objections to discharge should be cut off. The following sentence was written into the Act:

If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the court may, upon its own motion or upon motion of the receiver, trustee, a creditor, or any other party in interest or for other cause, extend the time for filing such objections.

In order to make entirely clear its policy against permitting an unethical bankrupt to obtain a discharge, Congress at the same time added section 14d<sup>68</sup> to the Act, providing that when requested by the court the United States attorney "or such other attorney as the Attorney General may designate" shall examine into the acts and conduct of the bankrupt and, if satisfied that probable grounds exist for a denial of the discharge and that the public interest so warrants, shall oppose the discharge.<sup>69</sup>

Under section 14b<sup>70</sup> as presently cast, it is not contemplated that the time for filing objections to discharge shall be cut off until the bankrupt has been fully examined, and any investigation into his affairs through the questioning of others is completed. Accordingly the objector should be fully apprised of the grounds which probably can be sustained before he has to file any objections. It is obvious, then, that a poorly-drafted specification is filed out of either inadvertence or failure to understand the difference between the specificity of pleading which has been required by many courts in these matters and the less stringent requirements for pleadings under the Federal Rules of Civil Procedure. A substantial part of the misunderstanding is attributable to General Order 32 and the official form. This General Order provides: "Any person opposing a discharge shall, on or be-

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<sup>64</sup> *In re Frice*, 96 F. 611, 613 (C.C.S.D. Iowa 1899).

<sup>65</sup> 305 U.S. 696 (1939); 11 U.S.C. APP. at 2013 (1964).

<sup>66</sup> E.g., *In re Karp*, 11 F. Supp. 129 (D. Conn. 1935).

<sup>67</sup> Bankruptcy Act § 14b, 11 U.S.C.A. § 32b (1967).

<sup>68</sup> Bankruptcy Act § 14d, 11 U.S.C. § 32d (1964).

<sup>69</sup> In some instances the United States Attorney's investigation will reveal convincing evidence that a violation of one of the provisions of 18 U.S.C. § 152 has occurred but that there is not sufficient evidence to sustain the prosecution's burden of proof (beyond a reasonable doubt) in a criminal proceeding. In this situation a specification of objection to discharge may be filed. This is a civil proceeding, and the burden of proof is the usual one of preponderance of the evidence.

<sup>70</sup> Bankruptcy Act § 14b, 11 U.S.C.A. § 32b (1967).

fore the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition."<sup>71</sup>

As noted earlier, the Supreme Court has left Official Form No. 44 essentially unchanged from its 1898 language: "\_\_\_\_\_ . . . does hereby oppose the granting to the bankrupt of a discharge from his debts, and specifies the following grounds of objection: [Here specify in separately numbered paragraphs the grounds of objection.]" In keeping with this form, a number of cases,<sup>72</sup> relying on pre-Civil Rules cases, have required a pleading of factual detail which is diametrically opposed to the requirements of the Federal Rules of Civil Procedure regarding sufficiency of pleadings. For example, *In re Turdo*<sup>73</sup> affirmed an outright dismissal of specifications without leave to amend. There the court held that *In re Epstein*,<sup>74</sup> a 1917 case, was directly in point and, in reliance upon it, ruled that a bare recital in the specifications that the bankrupt had obtained money or property on credit by making a materially false financial statement in writing respecting his financial condition was insufficient if used without further language to show to whom the statements were made, from whom the goods were obtained, or what the false statements were.

The single area in which the cases have relied upon the Federal Rules of Civil Procedure is that of amendments to the objections. Here the cases have recognized that the specification of objection is a pleading, and therefore Federal Rule of Civil Procedure 15(a), made applicable by General Order 37, would suggest that leave to amend "be freely given when justice so requires."<sup>75</sup>

Some of the statutory grounds of objection to discharge contain elements suggesting fraud,<sup>76</sup> and as to these, support for more detailed pleading can be found in Federal Rule of Civil Procedure 9(b). However, as in the instance of similar counts in the involuntary petition, the cases do not rely on Rule 9(b). Certainly Rule 9 lends no support to the requirement of the evidentiary detail which is imposed by so many of the cases.

The cases have ignored the Federal Rules of Civil Procedure and for support in their results have resorted to cases dealing with common law pleadings, which were concerned only with how the parties had formulated the issues in the pleadings and gave no thought whatever to fair notice. These cases proceeded on the theory that the pleadings had to contain factual detail and that any variance in proof from those details must result in prejudice. "But this rests on the untenable ground that the parties know nothing of the matter in litigation except what has been stated in the pleading."<sup>77</sup> In objections to discharge, it is the bankrupt's conduct which is under attack; he should know better than anyone what he has done.

<sup>71</sup> See note 65 *supra*.

<sup>72</sup> Many of the cases are collected in 7 REMINGTON ON BANKRUPTCY 310-37 (6th ed. 1955). Most of these decisions are quite old, but so are the form and the theory of pleading which they represent.

<sup>73</sup> 99 F. Supp. 188 (D.N.J. 1951).

<sup>74</sup> 248 F. Supp. 191 (S.D. Fla. 1917).

<sup>75</sup> *In re Schmerel*, 120 F. Supp. 899 (D.N.J. 1954). To the same effect is *In re Black & White Cab Co.*, 35 F. Supp. 832 (W.D. Mo. 1940).

<sup>76</sup> E.g., the first, third and fourth grounds. See note 62 *supra*.

<sup>77</sup> 2A J. MOORE, FEDERAL PRACTICE ¶ 8.03, at 1614 (2d ed. 1968).

There is no logic whatever to support the application of the archaic rules of pleading suggested by Official Form No. 44 and blindly followed by the courts in these matters. As long as a pleading imparts fair notice to the adversary, it should be sufficient; there is no valid reason for a standard of pleading in objections to discharge which requires more.

### III. CONCLUSION

There simply is no justification for the long neglect by the Supreme Court of the impossible situation regarding pleadings in the two bankruptcy areas treated in this Article. This situation was bad enough before 1938; since the adoption of the Federal Rules of Civil Procedure, it has been intolerable.

The newly adopted Federal Rules of Appellate Procedure are an encouraging sign that there is some effort to do away with some of the idiosyncrasies of bankruptcy procedure. That Advisory Committee considered section 25 of the Bankruptcy Act a "potential trap for the uninitiated" and has now established in Appellate Rule 4 a time for filing notice of appeal which will apply uniformly to all civil cases.<sup>78</sup> It is to be hoped that the Advisory Committee on Bankruptcy Rules is of the same mind and will recommend to the Supreme Court the abolition of all pleading and other procedural variances in adversary proceedings in bankruptcy cases.<sup>79</sup>

Whatever the Committee may do, it is obvious that the new Bankruptcy Rules will not take effect for a number of years.<sup>80</sup> In an effort to make the wait a bit less strenuous, the Supreme Court would be well advised to abrogate Official Forms Nos. 5 and 44 immediately.

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<sup>78</sup> This repeal of § 25 of the Bankruptcy Act was made possible by Public Law 88-623, codified as 28 U.S.C. § 2075 (1967).

<sup>79</sup> Heretofore I have advocated a total merger of bankruptcy with the other jurisdictions of the United States District Court. See 39 REF. J. 72 (1965). I have not retreated from this stand. However, the address to the Referees' Conference in October 1965 by Professor Frank R. Kennedy, Reporter for the Advisory Committee on Bankruptcy Rules, implied strongly that the Committee has taken a different approach to its task.

<sup>80</sup> A preliminary draft of the Federal Rules of Appellate Procedure was submitted to the bench and bar in March 1964. The final Rules were adopted by the Supreme Court on December 4, 1967, and will not be effective until July 1, 1968, four years and three months after the publication of the preliminary draft. I do not represent this time lag as representative of the course of all rules; I merely cite it as an example.