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CORPORATIONS-SECTION 77B OF THE BANKRUPTCY ACT-TO WHAT CORPORATIONS IT APPLIES

CORPORATIONS — SECTION 77B OF THE BANKRUPTCY ACT — TO WHAT CORPORATIONS IT APPLIES — Creditors of a title and mortgage company which had gone into receiver's hands petitioned for a reorganization of the company under Section 77B of the Bankruptcy Act. *Held*, that the company was an insurance corporation. Insurance corporations are not amenable to Section 77B. Petition for reorganization dismissed. *In re New York Title and Mortgage Co.*, (D. C. N. Y. 1934) 9 F. Supp. 319.

What corporations come under the purview of Section 77B? The appropriate part of Section 77B (a) reads: "Any corporation which could become a bankrupt under section 4 of this title [1]. . . and any railroad or other transportation corporation, except [2]. . . may file an original petition or, before adjudication in an

[1] Section 4 (U. S. C. tit. 11, sec. 22) provides that no municipal, railroad, insurance, banking corporation, or building and loan association can become bankrupt.

[2] ". . . any railroad or other transportation corporation, except a railroad corporation authorized to file a petition or answer under the provisions of section 77 of this

involuntary proceeding, an answer, or in any proceeding pending in bankruptcy, whether filed before or after this section becomes effective, *provided the present operations of such corporation do not exclude it hereunder*,[3] and whether or not the corporation has been adjudicated a bankrupt, a petition . . ." for a reorganization of itself. Whether a corporation is one of those not amenable to Section 77B, e.g. an insurance corporation, is a question of fact. One must look to the charter and the type of business the corporation does.[4] In the principal case the court held that, prior to the receivership, the company was clearly an insurance corporation, since at least three-fourths of the company's income was from insurance business. The petitioners claimed, however, that during the receivership the receiver had not written any new insurance business and that the company had, therefore, ceased to be an insurance corporation. The court held that the company was still an insurance corporation, because: (1) one-half of the company's income was still from insurance business; and (2) no changes in the business of a corporation *while it is in the hands of a receiver* will be held to change the status of a corporation. A corporation may change from a class non-amenable to one amenable.[5] It cannot change by mere non-operation of its business.[6] Let us suppose that *X* company is doing a business, 90 per cent of which is insurance and 10 per cent of which is abstract service. Such a company is clearly an insurance company and non-amenable.[7] *X* company sells its insurance business and thenceforth all its assets and activities are devoted to the abstract business. That would

chapter, and except as hereinafter provided," is amenable to Section 77B (48 Stat. 912, U. S. C. tit. 11, sec. 207). Section 77 (47 Stat. 1474, U. S. C. tit. 11, sec. 205) deals with railroads engaged in interstate commerce. Section 77B (n) provides that no railway corporation owned and/or operated by a municipality is amenable to 77B. The conclusion is that any railroad except a municipal or interstate railroad is amenable to 77B.

[3] The italics are the writer's.

[4] The charter will ordinarily control as to what kind of corporation it is. Clemons v. Liberty Savings & Real Estate Corp., (C. C. A. 5th, 1932) 61 F. (2d) 448. But the charter is not conclusive. Bowers v. Lawyers Mtg. Co., 285 U. S. 182, 52 Sup. Ct. 350, 76 L. ed. 690 (1932); In re Coolidge Refrigeration & Car Co., 190 Fed. 908 (1911). The type of business may rebut the inference from the charter. In re Supreme Lodge of the Masons Annuity, (D. C. N. D. Ga. 1923) 286 Fed. 180; 1 REMINGTON, BANKRUPTCY 165 (1934).

[5] It is the actual occupation of the corporation that governs its status. 1 REMINGTON, BANKRUPTCY, sec. 92 (1934).

[6] Columbia Railway, Gas & Elec. Co. v. State of South Carolina, (C. C. A. 4th, 1928) 27 F. (2d) 52; Robertson v. Union Potteries Co., (D. C. W. D. Pa. 1909) 177 Fed. 279. In COLLIER, BANKRUPTCY, Annual Supplement 1935, p. 811, is stated that the effect of the "present operations" clause in Section 77B is that if a non-amenable corporation ceases doing business, it becomes amenable. This view of the clause is clearly erroneous; by no stretch of the rules of statutory construction can such a meaning be derived.

Dissolution of the corporation will not change the character of the business. In re C. Moench & Sons Co., (D. C. W. D. N. Y. 1903) 123 Fed. 965; In re American & British Mfg. Corp., (D. C. Conn. 1924) 300 Fed. 839.

[7] United States v. Home Title Ins. Co., 285 U. S. 191, 52 Sup. Ct. 319 (1932); In re Union Guarantee & Mortgage Co., (D. C. S. D. N. Y. 1934) 8 F. Supp. 281.

constitute a change of class and make the company amenable. Suppose, however, that this same change took place after the company had gone into receivership. There is language in the principal case and the case it cites for support [8] to the effect that no matter what changes are made in the company's business, if made by a receiver with court approval, no change in the status will result. In support of such a conclusion the writer submits the following analysis. When a creditor institutes bankruptcy proceedings against a corporation, the status of the corporation (e.g., whether it is an insurance corporation and hence non-amenable to bankruptcy) is determined as of the time of the act of bankruptcy.[9] Changes in the business subsequent to the act of bankruptcy will not affect the status of the corporation. When a creditor institutes reorganization proceedings under Section 77B, he must among other things show as a prerequisite either an act of bankruptcy, a pending proceeding in bankruptcy, or a pending equity receivership.[10] On analogy to the rule in bankruptcy proceedings, it is submitted that in reorganization proceedings the status of the corporation ought to be determined as of the time of the occurrence of one of these three prerequisites. From this it would follow that in our hypothetical case, the changes in the business having been made after the appointment of a receiver, the status of the company would not be affected. Petitioners argued against such a holding by submitting that Section 77B expressly provides that the status of the corporation is to be determined by its "present operations." [11] This "present operations" clause, quoted in its entirety in the first paragraph of this note, was added by amendment to the original draft of Section 77B. It is clearly ambiguous. In such instances, it is permissible to resort to congressional comments for aid,[12] but a search of the Congressional Record failed to throw any light on the true meaning of the clause. It is submitted, therefore, that the court was justified in holding the clause to be meaningless. Moreover, in the principal case, even under its present operations, the company was an insurance corporation, one-half of its income still coming from insurance business.

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[8] In re National Surety Co., (D. C. N. D. N. Y. 1934) 7 F. Supp. 959.

[9] Flickinger v. First Nat. Bank, (C. C. A. 6th, 1906) 145 Fed. 162; In re Beiseker & Martin, (D. C. Mont. 1921) 277 Fed. 1010; 1 REMINGTON, BANKRUPTCY, sec. 98 (1934).

[10] Section 77B (a) of the Bankruptcy Act [48 Stat. 912, U. S. C. tit. 11, sec. 207 (a)].

[11] COLLIER, BANKRUPTCY, Annual Supplement 1935, p. 811, submits the same interpretation of the "present operations" clause of Section 77B as the petitioners sought to maintain here.

[12] In re Boggs-Rice Co., Inc., (C. C. A. 4th, 1933) 66 F. (2d) 855; GORDON, BANKRUPTCY ACT, Introduction, p. 211 (1935).