IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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CLERK, U.S. BANKRUPTCY COURT
DEPUTY

IN RE:	§	
	§	Case No. 00-20720
EARLINE R. BIGBIE	§	
	§	
Debtor	§	Chapter 7

HIBERNIA NATIONAL BANK	§	
Plaintiff	§	
	§	Adversary No. 00-2070
v.	§	
	§	
EARLINE R. BIGBIE	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION

Before the Court for consideration is the Motion for Leave to Amend Complaint filed by the Plaintiff, Hibernia National Bank, in the above-referenced adversary proceeding. The Court conducted a hearing on the motion on February 7, 2000. At the conclusion of the hearing, the Court took the matter under advisement to review the authorities relied upon by each party. This memorandum of decision disposes of all issues pending before the Court.[1]

The Plaintiff seeks leave of the Court to amend its complaint objecting to the Debtor-Defendant's discharge. The Defendant objects to the Motion, asserting that the granting of such relief would effectively allow the Plaintiff to evade the effect of the clearly-stated deadline for the filing of an objection to discharge. Thus, the parties have presented conflicting interpretations of the interplay between Rules 4004 and 7015 of the Federal Rules of Bankruptcy

[1] This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter final orders in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(I) and (O).

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Procedure.

Fed. R. Bankr. P. 4004(a) provides, in relevant part, that:

> [i]n a Chapter 7 liquidation case a complaint objecting to the debtor's discharge under §727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a)....

The 4004(a) deadline acts as a limitations period for the filing of a complaint objecting to discharge and must be strictly construed. *See, Matter of Ichinose*, 946 F.2d 1169, 1172 (5th Cir.1991); *Gebhardt v. Thomas (In re Thomas)*, 203 B.R. 64, 68-69 (Bankr.E.D.Tex.1996). Thus, all parties must strictly observe that deadline since, under the provisions of Fed. R. Bankr. P. 9006(b)(3),[2] this Court has the power to extend that deadline only as authorized under the provisions of Rule 4004(b). Rule 4004(b) states that:

> [o]n motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

In contrast, Rule 15(a) of the Federal Rules of Civil Procedure, which is incorporated into

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[2] Fed. R. Bankr. P. 9006(b)(3) states:

> *Enlargement Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), **4004(a)**, 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules. (emphasis added).

Thus, this Rule proscribes the Court's usual discretion to enlarge a time period established under the Bankruptcy Rules for taking a particular action upon a showing of "excusable neglect." *See, e.g., Pioneer Investment Services Co. v. Brunswick Associates,* 507 U.S. 380, 113 S.Ct. 1489, 123 L. Ed. 2d 74 (1993); *In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998).

bankruptcy adversary proceedings by Fed. R. Bankr. P. 7015, is a rule of liberality. It provides that leave of court to amend a pleading "shall be freely given when justice so requires." The rule

> ...favors leave as a necessary companion to notice pleading and discovery. Not surprisingly, denying leave to amend, *absent articulable reason*, is "not an exercise of discretion" but rather "abuse of ... discretion...."

Lone Star Ladies Inv. Club v. Schlotzsky's Inc., ___ F.3d ____, 2001 WL 21259 (5th Cir. 2001), *citing Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)(emphasis added). Rule 15(c) further provides that "an amendment of a pleading relates back to the date of the original pleading... when the claim 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...." Such a link will often be found when "the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading." *Magno v. Rigsby (In re Magno)*, 216 B.R. 34, 39 (9th Cir. B.A.P. 1997); *see also Fort Knox Fed. Credit Union v. Brown (In re Brown)*, 224 B.R. 595, 598 (Bankr. W.D. Ky. 1998).

In seeking to balance these two rules in the context of a complaint objecting to a debtor's discharge, most courts have concluded that an amended claim relates back to the original complaint

> ...only if the original complaint has given fair notice of the facts underlying the newly-asserted claims to the debtor prior to the deadline for pleading such claims. Stated otherwise, where the text and substance of a newly-asserted claim requires no additional factual allegations besides those recited in the original complaint to support it, and the amendment merely seeks to add an additional legal ground by which the discharge...is challenged, an amendment to the pleadings may be allowable.

Michener v. Brady (In re Brady), 243 B.R. 253, 260 (E.D. Pa. 2000)(citations omitted). *See also, Mann v. CCR Financial Planning, Ltd. (In re McKoy)*, 211 B.R. 843, 847, n.7 (E.D. Va. 1997)["If the litigant has been advised at the outset of the general facts from which the belatedly asserted claim arises, the amendment will relate back even though the statute of limitations may have run in the interim."]; *Employers Mutual Cas. Co. v. Lazenby (In re Lazenby)*, 253 B.R. 536, 539 (Bankr. E.D. Ark. 2000)["The general inquiry is whether the defendant is on notice, as stated in the general fact situation set forth in the complaint, he may be held liable for particular conduct. Thus, if a defendant has notice that he is sought to be held liable for particular conduct or under a particular transaction, the plaintiff may later amend the complaint, beyond the time limitation, to add theories of liability, so long as liability is based upon that same conduct or transaction."].[3]

However, as Judge Scott correctly recognized in *Lazenby*, "it is often difficult to amend complaints to add separate theories of liability under section 727(a) because the theories of liability do require separate instances of conduct." *Id.* Indeed, some courts have found such amendments impossible. *See, e.g., Boan v. Damrill (In re Damrill)*, 232 B.R. 767, 774 (Bankr. W.D. Mo. 1999)["...once the time fixed by statute for filing a complaint objecting to discharge

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[3] The cases cited by the Plaintiff do not really contradict this standard. *See, e.g., In re Jenkin*, 83 B.R. 733, 735 (9th Cir. B.A.P. 1988); *In re Schwartzman*, 63 B.R. 348 (Bankr. S.D. Ohio 1986); *In re Sriberg*, 49 B.R. 80 (Bankr. D. Mass. 1984); *In re Klein*, 31 B.R. 947 (Bankr. E.D.N.Y. 1983). These cases generally allow a plaintiff to amend its discharge complaint to provide greater factual specificity in response to a motion for more definite statement or to avoid a Rule 12(b)(6) dismissal for failure to state a claim "if the debtor was put on notice of the general contentions respecting objections to discharge." *Klein*, 31 B.R. at 951. That did not occur here. The original complaint in this case was not technically defective, nor did it provide any notice of the facts which the Plaintiff now wishes to insert into its amended complaint. Thus, denial of the amendment in this instance is not an elevation of form over substance because of inartful pleading.

has expired, additional or new grounds for objection may not be added by way of amendment."], *citing, inter alia, In re Bozeman*, 223 B.R. 707, 709 (Bankr. W.D. Ark. 1998) and *Pan American World Airways v. Chiasson (In re Chiasson)*, 183 B.R. 293, 295 (Bankr. M.D. Fla. 1995).

In the case before the Court, the Plaintiff's original complaint singularly alleged that, on the basis of the Defendant-Debtor's transfer of assets into specified annuities within one year of filing for bankruptcy relief, the Debtor's discharge should be denied under §727(a)(2) as a transfer of the debtor's property within one year with the intent to hinder, delay, or defraud the Plaintiff or the bankruptcy trustee.[4] The Plaintiff's proposed amendments go far beyond the scope of the initial complaint. The proposed amendments would add new factual allegations regarding a purported transfer of $9,000.00 by the Debtor in the week prior to the filing of the bankruptcy case and, upon that factual basis, new theories of liability would be presented against the Debtor under §727(a)(3) and §727(a)(5). Another proposed amendment would seek relief under §727(a)(2)(B) based upon an alleged post-petition purchase of an annuity by the Debtor with estate property. Thus, it does not seem particularly difficult to conclude that the Plaintiff's original complaint did not give fair notice to the Debtor-Defendant of the facts underlying the newly-proffered claims under §727(a)(2)(B), §727(a)(3) or §727(a)(5) prior to the Rule 4004(a) deadline.

However, the Plaintiff asserts that leave to amend should be granted in the interests of justice because of its inability to assimilate all of the information it was obtaining from and about the Debtor prior to the complaint deadline. For example, the Plaintiff complains that it only

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[4] Thus, more precisely, the original complaint is based solely upon §727(a)(2)(A).

received a transcript of a Rule 2004 examination of the Debtor one day prior to the Rule 4004(a) deadline and one day after it had filed its original complaint. However, the Rule 2004 examination had been conducted by the Plaintiff at a time substantially prior to the Rule 4004(a) deadline.[5] It had earlier obtained information from the Debtor's testimony at the §341(a) meeting of creditors. Thus, the Plaintiff had more than an ample opportunity to file a timely motion to extend the deadline for filing the objection complaint under Rule 4004(b) so that it could fully review the elicited information and evaluate its position. It elected not to do so.

This Court cannot deny that the Rule 4004(a) deadline presents a rigorous standard that calls for the immediate attention and diligence of creditors who may wish to pursue an objection to discharge. However, the protection of that deadline is necessary to preserve the policy favoring finality in bankruptcy proceedings. As the Second Circuit has observed,

> Even though deadlines may lead to harsh results in particular cases, their observance by the bankruptcy bar and their enforcement by courts lead to the salutary result of bringing finality to bankruptcy proceedings. The interest of finality, advanced by the [Rule 4004(a)] deadline, furthers an important policy goal in bankruptcy law, that is, that a debtor should obtain a fresh start in life and an opportunity to move ahead free of financial distress as quickly as possible.

State Bank of India v. Chalasani (In re Chalasani), 92 F.3d 1300, 1310 (2d Cir. 1996). That presents not only an articulable, but a compelling, reason to construe Rule 7015 strictly in this context. Thus, the Court concludes that leave should not be granted so as to allow the new

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[5] The Rule 2004 examination was scheduled by court order for July 7, 2000, some two months prior to the complaint deadline. There is nothing in the record to indicate that the examination occurred on any date other than the scheduled date.

presentation of claims under §727(a)(2)(B), §727(a)(3) or §727(a)(5) through the auspices of Rule 7015.

Those same concerns are inapplicable, however, to the Plaintiff's request for leave to amend its complaint to include a request for declaratory relief that the purchase of the annuities referenced in the original complaint constituted fraudulent transfers under TEX. BUS. & COMM. CODE §24.001, et. seq. *See, Topalian v. Ehrman*, 954 F.2d 1125, 1139 (5th Cir.), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992)[finding that a court should examine several factors to determine whether to allow an amendment under Rule 15 including whether allowing the amendment would cause undue prejudice to the non-movants, undue delay in the proceedings and whether the movants are acting in bad faith.] There is no indication that the Plaintiff is proposing this amendment in bad faith. There are no apparent limitation issues pertaining to this proposed cause of action. The original complaint clearly apprised the Defendant-Debtor of the general facts upon which the new claim is based and, finally, the amendment is sought in the early stages of this adversary which substantially precludes any prejudicial effect upon the Defendant or her preparations for trial. While the Defendant-Debtor's objection regarding the Plaintiff's standing to bring such a complaint may be legitimate, that determination will wait for another day. For the purposes of this motion, the Court concludes that the Plaintiff may properly amend its complaint under Rule 7015 to include its request for declaratory relief.

Accordingly, for all of the foregoing reasons, the Motion for Leave to Amend Complaint filed by the Plaintiff, Hibernia National Bank, is granted in part and denied in part. The Plaintiff is hereby granted leave to amend its complaint in this proceeding within the next fifteen days to add its "Request for Declaratory Relief" as contained under "Count Four" in the proposed

"Amended Complaint Objecting to Discharge of the Debtor and Alternative Request for Declaratory Judgment" submitted by the Plaintiff in conjunction with its Motion for Leave. All other relief requested by the motion is denied. This memorandum of decision constitutes the Court's findings of fact and conclusions of law[6] pursuant to Fed. R. Civ. P. 52, as incorporated into bankruptcy adversary proceedings by Fed. R. Bankr. P. 7052. A separate order will be entered which is consistent with this opinion.

SIGNED this the 16th day of February, 2001.

BILL PARKER
UNITED STATES BANKRUPTCY COURT

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[6]To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.