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J. Dennis Hynes

*University of Colorado, School of Law*

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# The Charging Order: Conflicts Between Partners And Creditors

J. Dennis Hynes\*

## INTRODUCTION

The charging order provides a means by which an unpaid personal creditor of a partner can attach and, under some circumstances, sell the debtor's partnership interest.<sup>1</sup> Two recent California cases, *Centurion Corp. v. Crocker National Bank*<sup>2</sup> and *Hellman v. Anderson*,<sup>3</sup> have created doubts about full use of this process by increasing the restrictions on foreclosure and sale of a partnership interest.<sup>4</sup> The cases are significant

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\* Professor of Law, University of Colorado School of Law. I wish to acknowledge the always helpful and insightful comments of my colleague Professor Cliff Calhoun, and the valuable contribution of my research assistant Scott Renner.

1. UNIF. PARTNERSHIP ACT § 28, 6 U.L.A. 358 (1969). Section 28 reads in full as follows:

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing dissolution:

(a) With separate property, by one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

*Id.*

2. 208 Cal. App. 3d 1, 255 Cal. Rptr. 794 (1st Dist. 1989).

3. 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991).

4. The *Hellman* case in the Third District disagrees with the *Crocker* case from the First District, and proposes a different test. See *infra* notes 59 & 67-77 and accompanying text (evaluating the *Hellman* decision); *infra* notes 78-94 and accompanying text (discussing the *Hellman* test). This conflict between districts creates a situation ripe for appeal to the California Supreme Court whenever the issue is next raised in California. See *Centurion Corp. v. Crocker Nat'l Bank*, 208 Cal. App. 3d 1, 9, 255 Cal. Rptr. 794, 798 (1st Dist. 1989) (creating a consent limitation on charging orders); *Hellman v. Anderson*, 233 Cal. App. 3d 840, 852, 284 Cal. Rptr. 830, 837 (3d Dist. 1991) (creating an undue interference limitation on charging orders).

because they raise new and intriguing issues concerning charging orders. They were the subject of a thorough and careful student Comment in this Journal,<sup>5</sup> which supported *Hellman v. Anderson*,<sup>6</sup> the most recent of the two decisions. This Article argues that both cases add unnecessary uncertainty to the law and treat too lightly the legitimate interests of unpaid personal creditors, overlooking protections already provided to nondebtor partners by statute.<sup>7</sup>

Part I of this Article describes the charging order, its history, and the problem of foreclosure and sale.<sup>8</sup> Part II sets forth and evaluates the consent limitation imposed by the California court in the *Crocker* case.<sup>9</sup> Part III discusses and evaluates the undue interference limitation imposed by the *Hellman* court, and concludes that both the consent and the undue interference limitations add unnecessary burdens and complexity to the law.<sup>10</sup>

## I. BACKGROUND

### A. *The Charging Order*

The charging order remedy for unpaid personal creditors is contained in section 28 of the Uniform Partnership Act (UPA).<sup>11</sup> It allows a

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5. Andrew Ian Sriro, *California Charging Orders: Court Ordered Foreclosures Of Charged Partnership Interests*, 24 PAC. L.J. 181 (1992). Mr. Sriro's article thoroughly describes the background of the charging order and the cases raising the issues to be discussed in this article. *Id.* at 185-99. Some of the background material and case descriptions will again be covered here in the interest of not requiring the reader to read two articles in order to understand one. Nevertheless, no effort is made to duplicate Mr. Sriro's full treatment of this subject.

6. 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (1991).

7. *See infra* notes 80-89 and accompanying text (describing the protections provided to nondebtor partners). In that respect, this paper disagrees with Mr. Sriro's analysis, which approves of the undue interference test created by the most recent of the two California cases, *Hellman v. Anderson*, 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991). There is much to be said for the arguments advanced by Mr. Sriro and the *Hellman* court, as will be developed later in this article. *See infra* note 81 and accompanying text. This paper seeks only to add an argument or two and to suggest a contrary conclusion in recognition of the excessive cost to creditors of adopting the restrictions imposed by the two cases discussed in this Article, particularly when balanced against the protections already granted by the charging order process to the partnership and the nondebtor partners.

8. *See infra* notes 11-37 and accompanying text.

9. *See infra* notes 38-66 and accompanying text.

10. *See infra* notes 67-114 and accompanying text.

11. *See supra* note 1 (providing the full text of § 28 of UPA). The UPA has been adopted in all states except Louisiana. 6 U.L.A. 1 (Supp. 1992); *see* CAL. CORP. CODE §§ 15001-15045 (West 1991) (codifying UPA in California). The UPA was substantially revised by the National Conference of Commissioners on Uniform State Laws [hereinafter NCCUSL] and adopted as a new uniform act in 1992. UNIF. PARTNERSHIP ACT, 6 U.L.A. 214-46 (Supp. 1993); *see infra* notes 112-114 and accompanying text (commenting on § 504 of the 1992 Uniform Partnership Act, which is the counterpart provision to § 28 of UPA).

judgment creditor to apply to a court for an order charging the interest<sup>12</sup> of the debtor partner with payment of the unsatisfied amount of the judgment.<sup>13</sup> The order applies to the debtor's share of profits and to "any other money due or to fall due to him in respect of the partnership."<sup>14</sup> The statute also provides, somewhat indirectly, for foreclosure and sale of a partner's interest.<sup>15</sup> It is that part of the statute, dealing with foreclosure and sale, that is the focus of this Article.

### *B. The History of the Charging Order*

The charging order is an important part of a sophisticated statutory scheme designed to protect the interests of personal creditors and the partnership business.<sup>16</sup> At common law, the enforcement of judgments by personal creditors of a partner against the assets the debtor had in a partnership presented serious difficulties for the other partners. Execution of judgments at common law reached only tangible assets.<sup>17</sup> Courts at common law conceptualized the property rights of partners as joint ownership of the partnership assets.<sup>18</sup> Thus, creditors of partners were entitled to execute against specific assets owned by the partnership. This disrupted the partnership business and operated to the disadvantage of the nondebtor partners.<sup>19</sup> Equity intervened to protect the nondebtor

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12. See UNIF. PARTNERSHIP ACT § 26, 6 U.L.A. 349 (1969) (defining the interest of a partner as "his share of the profits and surplus, and the same in personal property.").

13. UNIF. PARTNERSHIP ACT § 28, 6 U.L.A. 358 (1969); see *supra* note 1 (quoting the text of § 28).

14. *Id.* at § 28(1).

15. *Id.* at § 28(2).

16. The charging order was first provided by statute in § 23(2) of the English Partnership Act, which was promulgated in 1890. 53-54 Vict. c. 39 (1890).

17. 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN ON PARTNERSHIP § 3:63 (1991).

18. *Id.*

19. A famous statement by Lord Justice Lindley of the English Court of Appeal summarized the problem: When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing to issue was a *fi. fa.*, and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in Chancery in order to get an injunction to take an account and pay over that which was due by the execution debtor. A more clumsy method of proceeding could hardly have grown up.

Brown, Janson & Co. v. Hutchinson & Co., 1 Q.B. 737, 738-39 (1895).

The phrase *fi. fa.* is an abbreviation of the Latin words *feri facias*, translated roughly as, "Means that you cause (it) to be done." BLACK'S LAW DICTIONARY 627 (6th ed. 1990). It was the common law writ of execution of a judgment, commanding the sheriff to levy upon the goods of the judgment debtor. *Id.* As mentioned above, the common law writs permitted seizure of physical property only. See *supra* note 17 and accompanying text.

partners,<sup>20</sup> but the overall process was confused and drawn out.<sup>21</sup> The charging order is an imaginative solution to this problem. It allows a creditor to reach a partner's interest in the partnership<sup>22</sup> without disrupting the operation of the business,<sup>23</sup> at least if foreclosure is not part of the relief granted by a court.

### *C. The Problem of Foreclosure and Sale*

Ordinarily a charging order functions to provide payment of a judgment out of the income distributed by a profit generating business.<sup>24</sup> The charging order creditor receives the debtor partner's share and applies it to the judgment.<sup>25</sup> Assuming that the judgment is not too large in relation to the income flow to the partners, it is paid off in a reasonable amount of time. The judgment is discharged and the debtor partner

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20. Equity recognized the nondebtor partner's right to apply partnership property to partnership purposes, which included the discharge of partnership liabilities, and gave priority to this right against the rights of creditors of an individual partner. BROMBERG & RIBSTEIN, *supra* note 17, at 3:64.

21. *Id.* at 3:63 (stating that "[n]o partnership property question was more confused at common law than the right of a partner's separate creditor to attach or levy execution on the partner's interest in the firm's property").

22. See UNIF. PARTNERSHIP ACT § 26, 6 U.L.A. 349 (1969) (defining the interest of a partner as "his share of the profits and surplus. . ."). The interest of a partner thus does not include a specific share of each item of partnership property.

The UPA defines the property rights of a partner as: "(1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management." UNIF. PARTNERSHIP ACT § 24, 6 U.L.A. 324 (1969); see *id.* at § 25(1), 6 U.L.A. at 326 (defining a partner's "rights in specific partnership property" as, a "co-owner with his partners of specific partnership property holding as a tenant in partnership."); *id.* at § 25(2)(a), 6 U.L.A. at 326 (noting that the incidents of this tenancy include "an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners."); *id.* at § 25(2)(b), 6 U.L.A. at 326 (stating that, "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property").

It is clear from UPA § 25 that a partner's ownership interest in specific partnership property is very limited, consisting largely of a joint right of possession for partnership purposes. In all other significant respects the property is owned by the partnership, in reality. Section 25 is drafted in the way it is due to the decision to base UPA on the aggregate theory and at the same time resolve some of the uncertainties concerning partnership property that existed at common law. BROMBERG & RIBSTEIN, *supra* note 17, at 1:23-1:25.

23. It is the partner's *interest* (an intangible) which is charged, not his *property* rights. A partner's property rights include a right to participate in management. UNIF. PARTNERSHIP ACT § 24, U.L.A. 324 (1969). Additionally, personal use and enjoyment of partnership property are denied without the consent of copartners. *Id.* at § 25, 6 U.L.A. at 325-26; see *supra* note 22 (discussing §§ 24 and 25 of UPA). Thus management rights are not affected when a charging order is issued, nor is the partnership's use and enjoyment of specific partnership property interfered with in any way.

24. The charging order also can reach any other distribution made by the partnership to the debtor partner, such as withdrawal of capital, if the wording of the order so provides. BROMBERG & RIBSTEIN, *supra* note 17, at 3:72.

25. See J. Gordon Gose, *The Charging Order Under The Uniform Partnership Act*, 28 WASH. L. REV. 1, 10-11 (1953) (discussing the charging order).

resumes receiving income and other distributions from the partnership.<sup>26</sup> Sometimes, however, the income flow from the business is small or nonexistent. This can easily be imagined with a partnership that holds vacant land for investment. No matter how valuable the land may be, there is no income to apply to the debt. Under that circumstance the charging order, standing alone, is of no practical value to the judgment creditor.<sup>27</sup> It is at this point that the remedy provided by section 28(2) of UPA becomes important to the creditor.

As noted briefly above, section 28 can be read to provide a remedy of foreclosure and sale to a creditor of an individual partner.<sup>28</sup> Section 28(2) deals primarily with the redemption rights of the nondebtor partners but also contains language stating that, “[t]he interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court. . . .”<sup>29</sup> Nearly all the cases construing section 28(2) have held that this language contemplates foreclosure and sale of the debtor partner’s interest,<sup>30</sup> a conclusion which seems inescapable considering the text of the statute. Unfortunately, that is all the statute says, which leaves a fair amount open to interpretation.

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26. *Id.* at 16.

27. It does, however, establish a lien priority for the creditor. *See* *Union Colony Bank v. United Bank of Greeley*, 832 P.2d 1112 (Colo. Ct. App. 1992).

28. *See supra* note 15 and accompanying text.

29. UNIF. PARTNERSHIP ACT § 28, 6 U.L.A. 358 (1969); *see supra* note 1 (providing the full text of UPA § 28).

30. *See* *Bohonus v. Amerco*, 602 P.2d 469, 470 (Ariz. 1979); *Centurion Corp. v. Crocker Nat’l Bank*, 208 Cal. App. 3d 1, 8, 255 Cal. Rptr. 794, 798 (1st Dist. 1989); *Hellman v. Anderson*, 233 Cal. App. 3d 840, 847, 284 Cal. Rptr. 830, 834-35 (3d Dist. 1991); *First Nat’l Bank of Denver v. District Court*, 652 P.2d 613, 617 (Colo. 1982); *Wills v. Wills*, 750 S.W.2d 567, 574 (Mo. Ct. App. 1988); *Tupper v. Kroc*, 494 P.2d 1275, 1278-79 (Nev. 1972); *FDIC v. Birchwood Builders*, 573 A.2d 182, 185 (N.J. Super. 1990); *Beckley v. Speaks*, 240 N.Y.S.2d 553, 557 (N.Y. Sup. Ct. 1963) (concluding that UPA § 28 allows for the foreclosure and sale of the partner’s interest). *But see* *Buckman v. Goldblatt*, 314 N.E.2d 188, 191 n.7 (Ohio Ct. App. 1974) (rejecting the remedy of foreclosure and sale). The *Buckman* court interpreted the word “foreclosure” in § 28 as referring to foreclosure in support of a judgment against the partnership only, stating that this interpretation was necessary in order to avoid “irreconcilable conflict” with UPA § 25(2)(c), which states that a partner’s right in specific partnership property is not subject to attachment or execution except on a claim against the partnership. *Id.* at 191. This confuses the distinction between a partner’s interest in the *partnership* and a partner’s interest in specific *partnership property*. *See supra* note 12 (defining partnership interests); *supra* note 22 (defining a partner’s interest in specific partnership property). It should be emphasized that the case itself involved an effort by a personal creditor to attach specific partnership property. The court rightly rejected that claim. *Buckman*, 314 N.E.2d at 190. The language concerning § 28 clearly was dictum, contained in a footnote to the opinion addressing the charging order as the remedy the creditor should have chosen. *Id.* Foreclosure and sale is denied by statute in Georgia. *See* GA. CODE ANN. § 14-8-28(b) (1989); *see also infra* notes 107-109 and accompanying text (citing Professor Ribstein’s analysis of the Georgia Statute).

Serious consequences result from foreclosure and sale of a partner's interest, although the purchaser does not acquire managerial powers, rights against specific partnership property, or become a partner.<sup>31</sup> As stated in one of the classic cases on the charging order, *Tupper v. Kroc*,<sup>32</sup> "when [the debtor partner's] interest in the partnerships was sold he was forever foreclosed from receiving any profits or surplus. . . ."<sup>33</sup> Also, at the sale, the purchaser acquires the power to dissolve the partnership under certain circumstances.<sup>34</sup> The power to dissolve the partnership is also given collectively to the nondebtor partners, even if the partnership is for a term.<sup>35</sup> Because of these consequences, it is well settled that a creditor cannot receive foreclosure on demand. Courts that have addressed the issue have held that the trial court has discretion to order a sale only if it is necessary in order to realize payment of the judgment within a reasonable time.<sup>36</sup>

The restriction that the power of foreclosure and sale is not available unless the judgment otherwise would not be paid within a reasonable time makes sense in light of the seriousness of a forced sale of a partnership

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31. See *supra* note 22 (explaining that § 24 includes managerial powers among the property rights of a partner). These powers are not sold when a partner's interest is sold. The drafters of UPA were careful to avoid the problem of the other partners having a stranger with managerial powers thrust upon them. The status of a purchaser of a partner's interest upon foreclosure is that of an assignee (by operation of law) of a partner's interest. 2 BROMBERG & RIBSTEIN, *supra* note 17, at 7:70 n.59. An assignee is not entitled to interfere in the management of the partnership, nor to demand any information about partnership business transactions or inspect partnership books. UNIF. PARTNERSHIP ACT § 27, 6 U.L.A. 353 (1969).

32. 494 P.2d 1275 (Nev. 1972).

33. *Tupper v. Kroc*, 494 P.2d 1275, 1278 n.2 (Nev. 1972).

34. UNIF. PARTNERSHIP ACT § 32(2), 6 U.L.A. 394 (1969) (stating that, "[o]n the application of the purchaser of a partner's interest under § . . . 28 [the court shall decree a dissolution] (a) After the termination of the specified term or particular undertaking, (b) At any time if the partnership was a partnership at will . . . when the charging order was issued").

35. *Id.* at § 31, 6 U.L.A. at 376 (defining the causes of dissolution). UPA § 31 states that, "[d]issolution is caused: (1) Without violation of the agreement between the partners, . . . (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking." *Id.*

36. This limitation is most clearly expressed in *FDIC v. Birchwood Builders, Inc.*, 573 A.2d 182, 186 (N.J. Super. Ct. App. Div. 1990), where the court stated that:

[T]he trial court should be circumspect in its decision to order a sale. If the court is convinced the creditor's claim will not be satisfied in a reasonably expedient manner by diverting the debtor's income from the partnership to satisfy the debt, then sale should be ordered. Otherwise, the sale should not be ordered so as to preclude the adverse effect such a sale may have on a solvent partnership. In the latter instance, the debtor partner has the burden of proving that the debt can be satisfied by other than sale since that partner is better able than the creditor to project the income status of the partnership and the prospects of its future success, if any.

*Id.*

interest. As noted earlier, two recent California cases have created additional restrictions, the consent limitation and the undue interference limitation,<sup>37</sup> as developed immediately below.

## II. THE CROCKER CASE AND THE LIMITATION OF CONSENT

### A. *The Consent Limitation*

The case of *Centurion Corp. v. Crocker National Bank*<sup>38</sup> involved an appeal from a trial court order mandating the sale of a limited partner's<sup>39</sup> partnership interest.<sup>40</sup> Respondent Crocker National Bank had earlier been granted a judgment for over \$1,400,000 against Perroton and shortly thereafter obtained an order charging Perroton's interest in a limited partnership known as Turn-Key Storage.<sup>41</sup> Ten months went by and the charging order produced no money.<sup>42</sup> Crocker moved for a foreclosure sale of Perroton's interest, apparently concluding that there was no reasonable prospect for payment of the judgment through routine distribution of partnership earnings.<sup>43</sup> Notice was served both on Perroton, the sole limited partner, and on his mother, the sole general partner of Turn-Key Storage.<sup>44</sup> Perroton's mother filed a statement of conditional non-opposition to the sale.<sup>45</sup> Crocker's motion was granted by the trial court.<sup>46</sup>

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37. See *supra* notes 2-4 and accompanying text.

38. 208 Cal. App. 3d 1, 255 Cal. Rptr. 794 (1st Dist. 1989). The *Crocker* case is cited as *Crocker Nat'l Bank v. Perroton* in *Hellman v. Anderson*, 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991).

39. Because a limited partnership is involved, one must first look to limited partnership legislation. See CAL. CORP. CODE §§ 15611-15723 (West 1991) (adopting the RULPA in 1983). See REV. UNIF. LTD. PARTNERSHIP ACT § 703, 6 U.L.A. 442 (Supp. 1993) (providing the charging order remedy to creditors of limited partners). RULPA § 703 is derived from § 22 of the original Uniform Limited Partnership Act. *Id.*, 6 U.L.A. at 443. Curiously, neither § 22 of ULPA nor § 703 of RULPA contain language authorizing foreclosure and sale. The absence of such language did not concern the court in the *Crocker* case. See also REV. UNIF. LTD. PARTNERSHIP ACT § 703 cmt. 3, 6 U.L.A. 442 cmt. 3 (Supp. 1992) (suggesting indirectly that the rules available to creditors of general partners will determine matters not covered in the terse § 703). This can be read to include the remedy of foreclosure and sale.

40. *Crocker*, 208 Cal. App. 3d at 3-4, 255 Cal. Rptr. at 795-96.

41. *Id.* at 3-4, 255 Cal. Rptr. at 795.

42. *Id.* at 4, 255 Cal. Rptr. at 795.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*



Perroton subsequently filed a motion to void the order of sale, arguing that it was inconsistent with the terms of the limited partnership agreement, which prohibited assignment of his interest.<sup>47</sup> The court denied the motion and Perroton appealed.<sup>48</sup> The appellate court rejected Perroton's argument, citing to and quoting from *Tupper v. Kroc*,<sup>49</sup> a case directly on point.<sup>50</sup> The *Crocker* court concluded that California law "seem[s] to contemplate" sale of a partnership interest "where three conditions are met: first, the creditor has previously obtained a charging order; second, the judgment nevertheless remains unsatisfied; and third, all partners other than the debtor have consented to the sale of the interest."<sup>51</sup>

The *Crocker* court does not explain its requirement that nondebtor partners must consent to the sale. That issue was not litigated because the only other partner in the partnership, Perroton's mother, had consented.<sup>52</sup> The court seems to base its three conditions upon language from an earlier case, *Taylor v. S & M Lamp Company*.<sup>53</sup> The court in *Taylor* had stated that the charging order provision was "not intended to protect a debtor partner against claims of his judgment creditors where no legitimate interest of the partnership, or of the remaining or former partners is to be served."<sup>54</sup> It is this general language upon which the *Crocker* court appears to rely.<sup>55</sup> The *Taylor* case did not itself set forth conditions of sale. Instead, it dealt with a situation where an interest had been sold without an order from a trial court directing the sale, a procedural flaw unrelated to the circumstance of the *Crocker* case.

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47. *Id.* at 9, 255 Cal. Rptr. at 799.

48. *Id.* at 4, 255 Cal. Rptr. at 796.

49. 494 P.2d 1275 (1972).

50. *Crocker*, 209 Cal. App. 3d at 10, 255 Cal. Rptr. at 799 (citing *Tupper v. Kroc*, 494 P.2d 1275 (1972)). The *Tupper* court held that, "[T]he partnership agreements could not divest the district court of its powers provided by statute to charge and sell an interest of a partner in a partnership." *Tupper*, 494 P.2d at 1280.

51. *Crocker*, 208 Cal. App. 3d at 9, 255 Cal. Rptr. at 798.

52. *Id.* at 4, 255 Cal. Rptr. at 795.

53. 190 Cal. App. 2d 700, 12 Cal. Rptr. 323 (1961), cited in *Crocker*, 208 Cal. App. 3d at 9, 255 Cal. Rptr. at 798.

54. *Taylor v. S & M Lamp Co.*, 190 Cal. App. 2d 700, 708, 12 Cal. Rptr. 323, 328 (1961).

55. The court in *Crocker* states that "[a]llowing sale in such instance is consistent with . . . the observation of *Taylor* that [a sale is permissible] 'where no legitimate interest of the partnership, or of the remaining or former partners is to be served.'" *Crocker*, 208 Cal. App. 3d at 9, 255 Cal. Rptr. at 798-99.

The court in *Crocker* apparently assumed it was in the “legitimate interest” of the nondebtor partners to require their consent before a sale.<sup>56</sup> Perhaps the reasoning underlying this was that a purchaser at the sale can under certain circumstances obtain a court ordered dissolution of the partnership, as noted above,<sup>57</sup> and this constitutes a sufficient interference with the partnership to justify requiring the consent of the partners. Or perhaps the court was simply restating the factual situation in front of it, without considering the implications of stating consent as a condition of sale.

### B. *Evaluation of the Consent Requirement*

The decision of the *Crocker* court to read the “legitimate interest” language in *Taylor* as support for a requirement of consent of the nondebtor partners is doubtful for several reasons. First, the statute itself expressly provides for consent of all the other partners where partnership property is being used to redeem the interest charged.<sup>58</sup> Yet, the statute does not require the consent of the other partners to the sale of the interest. This undermines the argument that such a requirement is consistent with the intent of the legislature. As stated subsequent to *Crocker*, in *Hellman v. Anderson*,<sup>59</sup> “plainly, if the Legislature wants to make partner consent a condition, it knows how to do so.”<sup>60</sup> Second, the interest of the nondebtor partners in protecting themselves from foreclosure and sale is expressly addressed in the redemption options granted them by the statute.<sup>61</sup> Also, the decision to impose the consent requirement is curious

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56. *Id.*; see *supra* note 54 and accompanying text (quoting the “legitimate interest” language in the *Taylor* opinion).

57. See *supra* note 34 (explaining how to obtain a court ordered dissolution of a partnership).

58. UNIF. PARTNERSHIP ACT § 28(2)(b), 6 U.L.A. 358 (1969); see *supra* note 1 (citing the full text of UPA § 28).

59. 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991); see *infra* notes 67-94 and accompanying text (discussing the *Hellman* decision).

60. *Hellman v. Anderson*, 233 Cal. App. 3d 840, 851, 284 Cal. Rptr. 830, 837 (3d Dist. 1991). The court in *Hellman* also quoted the following from *People v. Woodhead*, 43 Cal. 3d 1002, 1010, 741 P.2d 154, 157, 239 Cal. Rptr. 656, 660 (1987): “[W]hen the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded.” *Hellman*, 233 Cal. App. 3d at 851, 284 Cal. Rptr. at 837.

61. See *infra* notes 80-87 and accompanying text (discussing the redemption options granted to nondebtor partners).

because the *Taylor* case involved a general partnership, where one could at least argue that the managerial powers of the debtor partner may pose a threat to the partnership after foreclosure<sup>62</sup> because the partner no longer has an economic incentive to further the business.<sup>63</sup> However, the charged partner in *Crocker* was a limited partner, who probably had no right to exercise control in the business and thus would not have managerial powers.<sup>64</sup>

In addition to the above reservations, the requirement of consent of the nondebtor partners introduces an arbitrary element into the charging order process. The right of a creditor to reach the assets of the debtor partner is seriously impaired if consent is required of people who are likely to be hostile to the creditor's claim and thus may withhold their consent in an arbitrary manner.<sup>65</sup> The *Crocker* court in effect makes foreclosure and sale of a partnership interest unavailable to creditors, except in the rare instance when all the other partners consent to the sale. It seems unreasonable to assume that a legitimate interest of the partnership or the remaining partners always is served by requiring consent of the other partners. As the court in the *Hellman* case stated, the consent requirement of the *Crocker* court is "inflexible."<sup>66</sup> Because of this, it is doubtful that the limitation imposed by *Crocker* will find a permanent place in the law.

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62. It is a curious feature of the foreclosure and sale process that the partner whose interest is sold remains a partner of the firm, despite the lack of any economic interest in the firm. See *supra* notes 32-33 and accompanying text (discussing *Tupper v. Kroc*, 494 P.2d 1275 (Nev. 1972)). The court in *Tupper* held that the managerial powers of the sole general partner of a limited partnership were restored when the purchaser of the general partner's interest at a foreclosure sale mistakenly asked that a receiver for the partnership be discharged. *Id.* at 1280.

63. This argument assumes that the general language of *Taylor* includes a requirement of consent. The assumption is made for the sake of argument only. Nothing in the language or the facts of *Taylor* gives a hint of such a requirement. Also, the paradox that a partner can retain managerial powers without an economic stake in the firm has not troubled courts, perhaps for the reason that the other partners have means to protect themselves. See UNIF. PARTNERSHIP ACT § 31(1)(c), 6 U.L.A. 376 (1969); *supra* note 35 (discussing UPA § 31(1)(c)).

64. Limited partners ordinarily do not exercise control in the business. See CAL. CORP. CODE § 15632(a) (West Supp. 1993) (adopting the 1985 amendments to RULPA § 303(a), which state that a limited partner is not liable for any obligation of a limited partnership "unless . . . the limited partner participates in the control of the business"). This liability is limited to creditors who rely on a belief, based upon the limited partner's conduct, that the controlling limited partner is a general partner. *Id.* However, the risk of liability nevertheless is sufficient to discourage many limited partners from exercising control. See Joseph J. Basile, Jr., *Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule*, 38 VAND. L. REV. 1199, 1217-1218 (1985).

65. It is true that the only other partner consented to the sale in *Crocker*, the case may be unique because of the special circumstance that Perroton's mother consented to the sale. See *supra* note 44 and accompanying text (stating that Perroton's mother was the sole general partner of Turn-Key Storage).

66. *Hellman v. Anderson*, 233 Cal. App. 3d 840, 852, 284 Cal. Rptr. 830, 838 (3d Dist. 1991).

III. THE HELLMAN CASE AND ITS UNDUE INTERFERENCE TEST

A. *The "Undue Interference" Limitation*

Two years after the *Crocker* case was decided, the issue of foreclosure and sale of a partner's interest came up again in California. This time the issue of consent was directly litigated. In *Hellman v. Anderson*<sup>67</sup> a judgment of over \$400,000 had been entered in favor of Hellman against Anderson, a partner in a general partnership named RMI.<sup>68</sup> Hellman thereafter obtained a charging order,<sup>69</sup> but received no money.<sup>70</sup> Six months later, following a debtor's examination of Anderson in which Anderson said that RMI had not generated profits and was not expected to do so in the near future, Hellman filed a motion for a foreclosure sale of Anderson's interest.<sup>71</sup> The trial court granted the motion, accepting the argument that the charging order would not satisfy the judgment within a reasonable time and rejecting the *Crocker* case's consent requirement.<sup>72</sup> Tallstrom, Anderson's partner, appealed the order on the ground that he did not consent to the sale and that consent was required by California law.<sup>73</sup> The appellate court held that foreclosure and sale of a partner's interest in a partnership is proper even though the other partners do not consent to the sale,<sup>74</sup> "provided the foreclosure does not unduly interfere with the partnership business."<sup>75</sup> The appellate court reversed and remanded the case to the trial court because it had failed to conduct an inquiry into the issue of undue interference.<sup>76</sup>

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67. 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991).

68. *Id.* at 843, 284 Cal. Rptr. at 832.

69. *Id.*

70. *Id.*

71. *Id.* at 844, 284 Cal. Rptr. at 832.

72. *Id.* at 851, 284 Cal. Rptr. at 837.

73. *Id.* at 844, 284 Cal. Rptr. at 832. Anderson also appealed, as did a second creditor. *Id.* Another argument on appeal was that California Code of Civil Procedure § 699.720, which deals with the execution of judgments, prohibited execution on the interest of a partner where the partnership is not a judgment debtor. *Id.* at 848, 284 Cal. Rptr. at 835. The court in *Hellman* rejected this argument by pointing out that a writ of execution was different from a court-ordered foreclosure sale. *Id.*

74. *See supra* notes 60 and 66 and accompanying text (explaining the *Hellman* court's reasons for rejecting the consent requirement).

75. *Hellman*, 233 Cal. App. 3d at 842, 284 Cal. Rptr. at 831.

76. *Id.* at 853, 284 Cal. Rptr. at 838.

The *Hellman* court explained its decision by stating that:

[T]he policy underlying the Uniform Partnership Act [is] avoiding undue interference with partnership business. . . . In some cases, foreclosure might cause a partner with essential managerial skills to abandon the partnership. In other cases, foreclosure would appear to have no appreciable effect on the conduct of partnership business. Thus, the effect of foreclosure on the partnership should be evaluated on a case-by-case basis by the trial court in connection with its equitable power to order a foreclosure.<sup>77</sup>

*B. Evaluation of the Undue Interference Limitation*

The opinion of the court in *Hellman* handles a number of issues in a careful and thoughtful manner. With regard to its imposition of the undue interference requirement, the court invokes the history underlying the charging order and notes that it was created in order to avoid disruption of and interference with the partnership business.<sup>78</sup> The nondebtor partners in a charging order setting have had a situation thrust upon them which occurred outside of the course of partnership business and over which they had no control. A restriction on foreclosure, framed in terms of protecting the business from undue interference, seems sensible and appealing. Nevertheless, the undue interference rule has several troubling consequences.

One consequence of the *Hellman* rule is that it creates uncertainty in the law by requiring litigation of the somewhat open-ended and vague factual question of whether a sale will unduly interfere with the particular partnership before the court. It is true that the factual issue of whether the current income of the partnership is insufficient to pay the judgment within a reasonable time will be before a court every time a creditor seeks foreclosure and sale. However, that inquiry is strictly economic and is fairly straightforward, whereas the inquiry required by *Hellman* invites the

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77. *Id.* at 852, 284 Cal. Rptr. at 838. The appellate court remanded to the trial court for determination of this issue. *Id.* at 853, 284 Cal. Rptr. at 838. It placed the burden of proving undue interference on the defendant debtor partner because knowledge about the effect of foreclosure on the partnership "is peculiarly known to defendant in his capacity as partner. . . ." *Id.*

78. *Id.* at 845, 284 Cal. Rptr. at 833.

partners to make arguments about undue interference, with an unlimited range of real or imagined difficulties available to them. The *Hellman* rule encourages speculation by courts on the future impact on the business of sale of a partner's interest. Furthermore, to the extent it introduces uncertainty into the foreclosure remedy it undermines the threat of foreclosure, reducing the incentive of the charged partner to enter into whatever arrangements may be available to prevent it.

Uncertainty is a necessary byproduct whenever a rule sets a vague and fact-specific standard. That alone does not make a rule wrong.<sup>79</sup> However, it is important to recognize that uncertainty comes at a cost. Under the *Hellman* rule, a creditor will never know whether foreclosure is possible until the factual issue of undue interference is litigated and resolved. Also, parties will incur an additional expense in litigating this open-ended issue, and valuable court time will be devoted to controversies about undue interference. Strong reasons should be required for supporting such a rule.

With regard to the necessity for such a rule, the opinion in the *Hellman* case overlooks protection the statute itself makes available to the nondebtor partners. Section 28 of UPA grants the nondebtor partner redemption rights<sup>80</sup> which provide for payment of the charged interest with separate property by one or more of the partners or with partnership property by one or more of the partners with the consent of all the partners

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79. Mr. Sriro also recognizes the uncertainty created by the undue interference rule, noting in his concluding paragraph that "[t]he *Hellman* court's broad holding has opened the door for further debate regarding what undue interference actually means. . . ." See Sriro, *supra* note 5, at 219. Mr. Sriro accepts this uncertainty, calling the undue interference rule a "flexible standard" and part of achieving a "just result" in individual cases. *Id.* at 214. He also argues that "[t]he optimal undue interference test should satisfy the interests of creditors, the interests of society in promoting a stable economy, and the interests of the non-debtor partners." *Id.* at 216. These are worthy goals. The drawback is the uncertainty created by attempting to achieve them through the undue interference test. My concern focuses on the cost incurred in reaching those goals through a vague test that does not take the redemption rights of nondebtor partners into account. See *infra* notes 80-87 and accompanying text (discussing redemption rights).

80. See *supra* note 1 (providing the full text of UPA § 28).

whose interests are not charged.<sup>81</sup> Redemption can occur before foreclosure or at the sale.<sup>82</sup>

The drafters of the statute doubtlessly assumed that redemption, coupled with the carefully crafted limitations placed on the nature of the interest bought at a sale,<sup>83</sup> provides sufficient protection<sup>84</sup> for the nondebtor partners. It gives them, or any one of them, the choice to eliminate altogether the intrusion posed by the judgment creditor by buying the interest being charged, together with a choice of ways to proceed.<sup>85</sup> If redemption is not chosen, the purchaser at the sale cannot exercise management rights and has no right to possess partnership property.<sup>86</sup> It is true that the purchaser can obtain dissolution by decree of court, but this can be requested immediately only if the partnership is one at will.<sup>87</sup> Also, the statute provides the other partners broader rights<sup>88</sup> of

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81. *Id.* The opinion in *Hellman* does not mention redemption rights when discussing its undue interference limitation. See *Hellman v. Anderson*, 233 Cal. App. 3d 840, 852-54, 284 Cal. Rptr. 830, 837-39 (3d Dist. 1991). Also, Mr. Sriro does not discuss redemption rights in his text when addressing the undue interference test. Sriro, *supra* note 5, at 211-19. He does raise redemption in a footnote, but only in the context of the leverage a foreclosing creditor has against nondebtor partners. *Id.* at 213 n. 222. He notes at the beginning of his discussion that “[t]he *Hellman* court’s use of the term ‘undue interference’ appears to represent an attempt to carry out the intention of the drafters of UPA to avoid the consequential injustices of the direct execution [at common law] procedure.” *Id.* at 211. Mr. Sriro’s characterization of the intent of the *Hellman* court is doubtlessly accurate. The difficulty is that the undue interference limitation cannot be justified convincingly without first considering the redemption rights granted partners by UPA. Those rights are designed to address the issue of interference with the partnership business. It seems odd for *Hellman* to create a rule of undue interference without even considering language in the statute directed toward that same goal.

82. UNIF. PARTNERSHIP ACT § 28(2), 6 U.L.A. 358 (1969); see *supra* note 1 (providing the full text of UPA § 28(2)).

83. See *supra* notes 12 and 22 (describing the limited nature of the interest that a purchaser buys at the sale of a partnership interest). Managerial rights, even rights to information, are not included in the sale. See UNIF. PARTNERSHIP ACT § 27(1), 6 U.L.A. 353 (1969) (denying rights to information to an assignee); see also *supra* note 31 (stating that the purchaser at foreclosure of a partner’s interest is an assignee by operation of law).

84. There is a difference between “sufficient” protection and “perfect” protection, of course. The charging order process necessarily involves a balancing of conflicting interests, with an inevitable cost to one or the other interest.

85. This presumes that the other partners have the economic resources to exercise the choice the statute gives them. Sometimes that will not be true. But, to the extent that it is not true, the importance of giving the creditor access to the interest of its debtor is increased. That is, the lack of current economic resources available to the partners makes payment of the debt by any means other than foreclosure even less likely.

86. See *supra* note 31 (stating that managerial rights are not transferred with the sale of the partnership interest).

87. See *supra* note 34 (quoting the text of UPA § 32(2)).

88. The word “right” is used rather than “power” because the exercise of a right is privileged, incurring no liability, contractual or otherwise, to other persons. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (1919). Partners always have the *power* to dissolve the partnership, charging order or no charging order. UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. 376 (1969). But they, or any one of them, ordinarily do not have the contractual *right* to do so if the partnership has a term. BROMBERG & RIBSTEIN, *supra* note 17, at 7:17.

dissolution, since it extends their dissolution right to a term partnership under these circumstances.<sup>89</sup>

The above protections loom particularly large when one considers that the charging order *displaces* creditor remedies at common law.<sup>90</sup> That places a heavy burden of explanation on one seeking to add a gloss to the statute further restricting the rights of a judgment creditor to obtain satisfaction. The example of an undue interference given by the court is a deprivation of the managerial skills of the debtor.<sup>91</sup> This example does not seem sufficiently compelling to justify the vague undue interference rule. Nothing prevents the other partners from paying the debtor partner whose interest has been sold a salary to exercise managerial skills.<sup>92</sup> Also, even in the absence of a sale, the economic incentive of the charged partner to exercise managerial skills is weakened because all of the profits and the surplus of the charged partner are going to the creditor, underscoring the fact that this problem exists beyond the circumstance addressed by the *Hellman* court.

It is undeniable that the nondebtor partners are inconvenienced by the claims of a creditor of a fellow partner.<sup>93</sup> The charging order comes at a cost to the partnership and the nondebtor partners. The interest of the unpaid creditor is substantial, however, particularly under the circumstance

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89. See *supra* note 35 (stating the causes of dissolution).

90. See BROMBERG & RIBSTEIN, *supra* note 17, at 3:70 (noting that courts generally have interpreted UPA to say that a charging order is the exclusive process for a personal creditor of a partner). See also, UNIF. PARTNERSHIP ACT § 504(e), 6 U.L.A. 231 (Supp. 1993) (declaring that the charging order is the exclusive remedy for judgment creditors of partners).

91. *Hellman v. Anderson*, 233 Cal. App. 3d 840, 852, 284 Cal. Rptr. 830, 838 (3d Dist 1991).

92. It should be acknowledged that this would impose a cost on the other partners that they had not suffered prior to the foreclosure and sale, since compensation ordinarily is not paid to a partner. See UNIF. PARTNERSHIP ACT § 18(f), 6 U.L.A. 213 (1969) (providing that no partner is entitled to remuneration for acting in the partnership business absent agreement to the contrary). The assumption underlying § 18(f) doubtlessly is that the economic incentive to act is provided by a share of profits and surplus.

93. In some respects the inconvenience is similar to that suffered by employers who have to respond to garnishment orders: accounting burdens are incurred, risks of improper payment are run, changes of address have to be kept track of, and so forth. With regard to garnishment, see *Union Colony Bank v. United Bank*, 832 P.2d 1112, 1116-17 (Colo. Ct. App. 1992), comparing the charging order to garnishment in Colorado, a typical jurisdiction. See also J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. 1, 10 (1953) (stating that: "[T]he act seems to proceed on the theory that the primary method for satisfying the creditor's judgment shall be by means of an order diverting the debtor partner's share of the profits to his creditor in a manner somewhat like that used in garnishment proceedings"). Of course, foreclosure and sale are a step beyond the inconvenience of responding to garnishment of wages, but the fact remains that the realization of creditor's rights can impose costs on others in settings besides the law of partnership.



where a large portion of the debtor's assets are contained in the partnership. It is important that unpaid creditors have access to all assets of the debtor except those declared exempt by the state.<sup>94</sup> Inevitably the conflicting interests of the nondebtor partners and the unpaid creditor must be balanced. That is the goal of UPA section 28.

The case of *FDIC v. Birchwood Builders*<sup>95</sup> stands as recent authority against the approach of the *Hellman* case. In *FDIC*, the plaintiff obtained a judgment against defendant Raganella, who had a 40 percent interest in a partnership that owned a valuable tract of vacant land.<sup>96</sup> The plaintiff sought an order charging Raganella's partnership interest with the \$385,000 judgment and ordering sale of the interest.<sup>97</sup> The only evidence before the trial court was that the partnership had no income and the tract of land had an appraised value of \$600,000.<sup>98</sup> The trial court charged Raganella's interest, but denied the plaintiff's request for sale of the partnership interest.<sup>99</sup> The court reasoned that a sale of Raganella's interest would interfere with the development potential of the land and that the charging order provided the plaintiff with adequate security.<sup>100</sup> The

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94. This proposition can be justified on the moral grounds that debts should be paid as promised. It also can be justified on the economic grounds that it increases the cost of credit for all borrowers, particularly high-risk borrowers, if obstacles are placed in the way of collection of valid debts beyond the protection provided by exemption laws. See Daniel R. Fischel, *The Economics of Lender Liability*, 99 *YALE L.J.* 131, 151 (1989) (observing that placing increased risks on lenders does not come cost free to borrowers).

95. 573 A.2d 182 (N.J. Super. Ct. App. Div. 1990).

96. *FDIC v. Birchwood Builders, Inc.*, 573 A.2d 182, 183 (N.J. Super. Ct. App. Div. 1990).

97. *Id.* Including interest, the judgment had grown to over \$385,000. *Id.*

98. *Id.* at 186.

99. *Id.* at 183.

100. In this respect the approach of the trial court appears consistent with *Hellman*. See *supra* note 78 and accompanying text (discussing the burden placed on the defendant by the *Hellman* court). One can argue that it is an undue interference with the partnership business if sale of the debtor partner's interest takes place when the land of the partnership is close to being developed and will soon greatly increase in value. Although this may go beyond the facts of *FDIC* in the sense that there apparently was no prospect of immediate development in that case, nevertheless, taking the facts as hypothesized, an argument against the trial court's conclusion is that the prospect of immediate development both increases the incentive for the other partners to redeem and enhances their prospects of obtaining financing in order to do so. Also, if they do not redeem, the purchaser at the foreclosure sale buys only the debtor's interest, not a lien upon or right to sell the land owned by the partnership. Unless the partnership is at will, the nondebtor partners can develop at their leisure, unthreatened by dissolution rights of the purchaser. Furthermore, it is unlikely that the partnership would be classified as one at will. An argument for an implied term until the development is complete would be strong. See *Shannon v. Hudson*, 161 Cal. App. 2d, 325 P.2d 1022 (2d Dist. 1958) (holding that joint venture to construct, operate, and sell motel was not terminable at will, reasoning that an implied term existed until partnership property could be disposed of on favorable terms).

plaintiff appealed, arguing that the refusal to order a sale was in error.<sup>101</sup> The appellate court reversed, stating that:

When a judgment creditor seeks a charging order and the trial court enters the charging order, we do not read the [UPA]<sup>102</sup> to provide the trial court with the discretion to deny an order for sale in absence of proof that the debt will be satisfied from the debtor partner's share of the profits in a reasonable period of time. Additionally, we do not read the [UPA] to vest a trial court with the discretion to deny an order for sale on the speculative grounds identified here. A judgment creditor should not have to await suppositional development of the partnership property before it collects on its judgment. To hold otherwise would countervail the logic of the [UPA] which we have noted protects the remaining partners from an involuntary dissolution by allowing them to redeem the debtor-partner's interest after sale is ordered.<sup>103</sup>

Although the above language does not expressly address the matters of consent or undue interference, the philosophy expressed by the court is unmistakable. The only limitation on foreclosure recognized by the court is the requirement that the creditor must prove that there is insufficient income to pay off the judgment without sale of the interest. By necessary implication the court rejects any inquiry into consent or undue interference with the partnership business.

### C. *The Georgia Statute*

A statute in Georgia speaks directly to the issue of foreclosure and sale of a partnership interest in order to satisfy a personal claim against a partner.<sup>104</sup> The position of the Georgia statute is unique and calls attention to the policies underlying the above discussion. Thus, it is appropriate to treat it briefly at this stage.

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101. *FDIC v. Birchwood Builders, Inc.*, 573 A.2d 182, 183 (N.J. Super. Ct. App. Div. 1990).

102. The UPA was described by the court as "U.P.L." (meaning Uniform Partnership Law). The description in the text has been conformed to the usage in the remainder of the text for ease of reading.

103. *FDIC*, 573 A.2d at 186.

104. GA. CODE ANN. § 14-8-28 (1989).

Georgia is the most recent state to have adopted UPA.<sup>105</sup> It made a number of amendments to the Uniform Act, including amending UPA section 28 to state that an interest charged under the Act "is not liable to be seized and sold by the judgment creditor under execution."<sup>106</sup> A brief explanation for this reversal of the Uniform Act was made by Professor Larry E. Ribstein, the principal draftsman of the Georgia amendments. In his article entitled, *An Analysis of Georgia's New Partnership Law*,<sup>107</sup> Professor Ribstein states that the new section 28 "does not provide for foreclosure,<sup>108</sup> a procedure that could not be controlled by the partners and that might permit unwanted outsiders to compel dissolution of the firm."<sup>109</sup>

How one reacts to this depends on how one views creditors' rights versus the rights of partners to operate their business without interference. Viewed from the perspective of creditors, one can argue that it is inaccurate to say that the procedure cannot be controlled by the partners. Partners have substantial powers of control in their redemption rights. Also, a partnership agreement can anticipate dissolution and define liquidation rights, establish means of evaluating partnership interests, provide for payout periods to avoid liquidity problems, provide for continuation of the business by a vote of the remaining partners, and so forth. Planning ahead for dissolution is particularly advisable for partnerships at will, where the purchaser's dissolution right is most intrusive.

The intrusive effect of foreclosure and sale disappears when the redemption right is exercised by the other partners. Even when the redemption right is not exercised, the negative effect of foreclosure can be minimized for most partnerships by intelligent planning for dissolution. Because of this, it can be argued that the Georgia approach takes too little note of the legitimate interest of the unpaid creditor.

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105. See 6 U.L.A. at 1 (Supp. 1993) (stating that Georgia adopted UPA in 1985).

106. GA. CODE ANN. § 14-8-28 (1989).

107. Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 MERCER L. REV. 443 (1985).

108. There is a difference between a foreclosure sale and an execution sale. See *supra* note 73. The difference was addressed by the court in the *Hellman* case, in a portion of the opinion not relevant to this article. See *supra* note 66. The Georgia statute prohibits execution, not foreclosure. It is likely, however, that the Georgia statute will be interpreted in the way Professor Ribstein construes it.

109. Ribstein, *supra* note 107, at 490.

*D. The Uniform Partnership Act (1992)*

UPA was recently substantially revised by a drafting committee for the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>110</sup> The revised version was adopted by NCCUSL in 1992.<sup>111</sup> It is identified as the Uniform Partnership Act 1992, but for the convenience of those familiar with its drafting history, it will be referred to as the Revised Uniform Partnership Act (1992) (“RUPA”).

The charging order continues to be recognized in RUPA. Section 504(b) of RUPA is the provision setting forth the charging order process.<sup>112</sup> In it the remedy of foreclosure and sale of a partnership interest is expressly and directly recognized.<sup>113</sup> In terms of proposed uniform legislation, therefore, that remedy has recently been reaffirmed.<sup>114</sup>

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110. See generally J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. L. REV. 727 (1992).

111. See 6 U.L.A. 214 (Supp. 1993).

112. See REV. UNIF. PARTNERSHIP ACT § 504(b), 6 U.L.A. 231 (Supp. 1993); *infra* note 113 (providing the full text of § 504).

113. RUPA § 504 reads in full as follows:

Section 504. Partner's Transferable Interest Subject To Charging Order.

(a) On application by a judgment creditor of a partner or partner's transferee, a court having jurisdiction may charge the transferable interest of the debtor partner or transferee to satisfy the judgment. The court may appoint a receiver of the debtor's share of the distributions due or to become due to the debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the debtor might have made or which the circumstances of the case may require.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time and upon conditions it considers appropriate. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than partnership property, by one or more of the other partners; or

(3) with partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.

(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

UNIF. PARTNERSHIP ACT § 504, 6 U.L.A. 230-31 (Supp. 1993).

114. There are several features about § 504 of RUPA that seem worth a brief comment. First, the wording “transferable interest” in both the title and the text of § 504 is a little odd. It seems to imply that a nontransferable interest can exist and that it can be created by language in the partnership agreement prohibiting transfer of a partner's interest. That is not what is meant, however. Instead, the drafters of RUPA have chosen this route to make the point that a partner's interest in specific partnership property is not transferable, as specified in § 501 of RUPA. Thus, in this somewhat complicated way, the drafters of RUPA are simply expressing the same concept that existed in UPA with regard to protection of specific partnership property from the actions of individual partners or the claims of creditors of individual partners.

## CONCLUSION

As mentioned at the outset, the *Crocker* and *Hellman* cases raise new and intriguing issues about the scope of the charging order, forcing the reader to reconsider the history and policy behind this unique device. In each instance, however, the approach of the California courts seems inadvisable. Both *Crocker* and *Hellman* introduce vagueness and uncertainty into an area of law where this seems unnecessary to advance the interests of justice. The opinions exaggerate the difficulties faced by the nondebtor partners who have protective devices available to them within the statute itself, and treat too lightly the interests of creditors. By doing this, the decisions risk creating de facto and undisclosed exemption of partnership interests. Considering the redemption powers granted nondebtor partners by the statute and the limited nature of the interest being sold, it seems clear that the interests of creditors and nondebtor partners are adequately balanced without the added restrictions imposed by the *Crocker* and *Hellman* cases.

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Also, the remedy of dissolution which is available to a purchaser under § 32(2) of UPA is no longer so clearly defined. *See supra* note 34 (providing the relevant text of UPA § 32). In § 801 of RUPA, entitled "Events Causing Dissolution And Winding Up Of Partnership Business," it is stated that:

A partnership is dissolved, and its business must be wound up, only upon: . . .

(6) on application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:

- (i) if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to transfer, after the expiration of the term or completion of the undertaking; or
- (ii) if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer, at any time.

REV. UNIF. PARTNERSHIP ACT § 801, 6 U.L.A. 236-37 (Supp. 1993).

Dissolution is available on demand by a purchaser of a partner's interest under UPA if the partnership is at will. *See supra* note 34. Under RUPA, it is subject to a determination that it "is equitable" to wind up the business. REV. UNIF. PARTNERSHIP ACT § 801(6), 6 U.L.A. 327 (Supp. 1993). It is important not to confuse this discretionary standard with that imposed for decreeing sale of an interest. This standard applies *after* an interest has been purchased. *Id.* It thus seems to represent a change in the law. The latest edition available of the comments to § 801, however, state that, "[s]ection 801(6) continues with only minor modification the rule in UPA § 32(2)." UNIF. PARTNERSHIP ACT (1992), reprinted in BROMBERG & RIBSTEIN, *supra* note 17, at 246 (Supp. 1992) (providing comments to UPA § 801). It is questionable whether the difference between the words "the court shall decree" (UPA) and "determine that it is equitable" (RUPA) is indeed only a "minor" modification. RUPA is substituting a vague standard for a precise and clear one. The merits of doing so are not altogether clear.