Vanderbilt Law Review

Volume 38
Issue 4 *Issue 4 - Symposium on Bankruptcy*

Article 5

5-1985

The Discharge of Partnerships and Partners Under the Bankruptcy Code

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The provisions of the Bankruptcy Act applicable to partnerships, partners, and their creditors were cryptic. Significant changes in these provisions made by the Bankruptcy Reform Act of 1978 have not appreciably diminished the difficulties of administering the estates of partnerships and partners in cases under Title 11 of the United States Code. The rules governing discharge of partnerships and partners and the dischargeability of their debts have given rise to a number of special problems under both the Bankruptcy Act and the Bankruptcy Reform Act. This Article

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undertakes to identify and analyze these problems and to suggest solutions.

I. Discharge of a Partnership

Under the Bankruptcy Act[1] a partnership could be discharged in a straight bankruptcy case or in a Chapter XI or Chapter XII debtor relief case under the same circumstances as an individual could be discharged.[2] Since bankruptcy of a partnership results in dissolution,[3] and because discharge of the firm, at least ordinarily, does not affect the liability of the partners,[4] discharge of the partnership in a liquidation case under the Bankruptcy Act was inconsequential. The Bankruptcy Code authorizes a grant of discharge in a liquidation proceeding only to an individual,[5] but this change in the law can be characterized as insignificant.[6]

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1. Act of July 1, 1898, ch. 541, 30 Stat. 544, *amended by* Chandler Act of 1938, ch. 575, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Puh. L. No. 95-598, 92 Stat. 2549, 2682 [hereinafter citcd as Bankruptcy Act].

2. Under § 14a of the Bankruptcy Act an adjudication of any person, except a corporation, operated as an application for a discharge, and a corporation was authorized to apply for a discharge within six months after its adjudication. The former Rules of Bankruptcy Procedure eliminated the need for such constructive or actual applications for discharge. Former Bankruptcy Rule 404(d) required a discharge to be granted to any bankrupt on expiration of the time for filing a complaint objecting to discharge unless one of four specified conditions applied. In addition, former Bankruptcy Rule 404(b) required that notice of the discharge of an individual be given to creditors.

Confirmation of a Chapter XI or Chapter XII plan effected a discharge under the Bankruptcy Act regardless of the type of debtor involved. Bankruptcy Act §§ 371, 476; former Rules of Bankruptcy Procedure 11-43, 12-42; 11 U.S.C. app. (1982).

3. Unif. Partnership Act § 31(5) (1914); F. Mechem, Elements of a Partnership § 362 (2d ed. 1920).

4. Bankruptcy Act § 5j (first sentence); J. MacLachlan, Bankruptcy 425 (1956). The qualifying reference in the text to the ordinary situation allows for the unusual result reached in Levy v. Cohen, 19 Cal. 3d 165, 561 P.2d 252, 137 Cal. Rptr. 162, *cert. denied*, 434 U.S. 833 (1977) (discussed *infra* notes 102-05 and accompanying text).

5. 11 U.S.C. § 727(a)(1) (1982).

6. The legislative reports accompanying the bills that ultimately became the Bankruptcy Reform Act of 1978 explained that "[t]he change in policy will avoid trafficking in corporate shells and in bankruptcy partnerships." H.R. Rep. No. 595, 95th Cong., 1st Sess. 384 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 98 (1978). The Commission on Bankruptcy Laws of the United States recommended that a discharge be granted only to an individual debtor. Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93rd Cong., 1st Sess. 134 (1973) [hereinafter cited as Commission Report II]. The Commission's recommendation was accompanied by the following comment: "[E]liminating the discharge of corporate bankrupts restricts the manipulative use of bankrupt shells in violation of securities laws and other legislation protecting public investors in and creditors of corporations." *Id.* This comment reflected a concern informally expressed to the Commission by members of the staff of the Securities and Exchange Commission. The report did not mention the recommendation's expected effect upon trafficking in bankrupt

Provisions for the discharge of a partnership in a Chapter 11 case under the Bankruptcy Code are, on the other hand, more liberal than the provisions for discharge of an individual since the list of debts excepted from discharge in section 523 applies only to an individual.[7] Under section 1141(d)(1), the confirmation of a partnership's plan of reorganization constitutes a discharge of all partnership debts, unless the plan or the order confirming the plan provides otherwise.[8] Confirmation of a Chapter XI or Chapter XII plan under the Bankruptcy Act did not constitute a comprehensive discharge,[9] but Congress, when it enacted Chapter 11 of the Bankruptcy Reform Act, manifestly concluded that the reorganization of a business unit should not be subject to the handicap and hazards of undischarged liabilities.[10] Chapter 11 may be utilized to

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partnerships.

7. *See* 11 U.S.C. §§ 523, 1141(d)(2) (1982). Provisions for discharge of a corporation in a Chapter 11 case are likewise more liberal than for an individual. *See infra* note 10. An individual cannot obtain a discharge from debts listed in § 523 in either a Chapter 7 or a Chapter 11 case.

8. 11 U.S.C. § 1141(d)(1) (1982). A discharge under § 1141(d)(1)(A) is effective against (1) prepetition debts; (2) debts treated under § 502(g), (h), and (i) as if they were prepetition debts; and (3) debts that arose before the date of confirmation. Moreover, the discharge is effective whether a proof of claim is filed or deemed filed, and irrespective of whether the claim was allowed and of whether the holder of the claim accepted or rejected the plan. The scope of the discharge under subparagraph (d)(1)(A) of § 1114 is the same whether the debtor is a partnership, a corporation, or an individual. Discharge of the debt of a creditor who received no notice of the Chapter 11 proceeding, however, might be vulnerable to attack on constitutional grounds. *See infra* note 32 and accompanying text.

9. Confirmation of a plan under Chapter XI or XII discharged a debtor from all liabilities provided for in the plan as limited by the order of confirmation, but excluding debts not dischargeable under § 17. Bankruptcy Act §§ 371, 476.

10. The bill that the Senate originally passed to overhaul the Bankruptcy Act provided that confirmation of a Chapter 11 plan would not discharge taxes accorded priority under § 507 and tax liabilities accruing during and after the Chapter 11 case pursuant to a prepetition agreement. *See* S. 2266, 95th Cong., 2d Sess. (1978); S. REP. No. 989, *supra* note 6, at 129-30. These exceptions to the effect of a discharge under § 1141 were deleted in the reconciliation of the House and Senate bills with the following explanation:

> It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions. Retaining an exception for discharge with respect to nondischargeable taxes would leave an undesirable uncertainty surrounding reorganizations that is unacceptable.

124 CONG. REC. 32408 (1978) (statement of Rep. Edwards); *id.* at 34008 (statement of Sen. DeConcini); *see also id.* at 32416-17; *id.* at 34017.

An additional consideration warranting the grant of a broad discharge to a reorganized debtor is suggested by Weintraub & Resnick, *From the Bankruptcy Courts: Discharge for a Reorganizing Corporation—Beware of the Forgotten Creditor,* 17 U.C.C. L.J. 175, 175 (1984): "[D]ishonest management will most likely be replaced, and it will be undesirable to penalize new management, as well as shareholders and creditors, for the unscrupulous conduct of former employees [by denying discharge]." *Id.*

effect liquidation, however, and a discharge is not necessary when a debtor does not engage in credit transactions after confirmation. Accordingly, the confirmation of a Chapter 11 plan does not discharge a partnership if the plan provides for liquidation of substantially all the partnership's property and if the debtor does not engage in business after consummation of the plan.[11] The requirement that the debtor engage in business after consummation in order to obtain a discharge is vague and raises potentially troublesome questions. Does the business engaged in by the debtor after the consummation have to be either the same as or related to the business engaged in before the filing of the petition or the confirmation of the plan? How long must the debtor engage in postconsummation business in order to preserve the effect of the discharge? If the debtor engages in no postconsummation business of the requisite kind, do postconfirmation creditors have to compete on a parity with the preconfirmation creditors asserting undischarged claims? The legislative history is not helpful in answering these questions. In addition, the confirmation itself is irrevocable after 180 days following its entry, even if the confirmation was procured by fraud.[12]

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11. Paragraph (3) of 11 U.S.C. § 1141(d) negates the effect of confirmation as a discharge if

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
> (B) the debtor does not engage in business after consummation of the plan; and
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of the title.

11 U.S.C. § 1141(d)(3) (1982).

In order for a debtor to be discharged, subparagraph (A) requires the plan to provide for the continuity of the enterprise rather than its liquidation, and subparagraph (B) requires an actual engagement in business operation by the debtor after consummation of the plan. The term "consummation" is not defined in the Code, but "substantial consummation" means

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
> (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2) (1982). Inferably from this provision, consummation occurs when all of the property to be transferred has been transferred, all of the business or management of all of the property dealt with by the plan has been assumed, and distribution under the plan is complete.

The effect of subparagraph (C) of § 1141(d)(3) is to allow the discharge of an individual if there is no ground for objection under § 727(a). *See also infra* notes 94-95 and accompanying text.

12. 11 U.S.C. § 1144 (1982). Confirmation may never be revoked for any reason other

The strong congressional concern for protecting postconfirmation creditors argues for a construction of section 1141(d) that favors such creditors—particularly those creditors who extend business credit in reliance on the confirmation—as against creditors who seek to avoid the confirmation's effect as a discharge. The notion of conditional discharge has not been favored in this country,[13] and Congress most likely did not intend to adopt this mode of limiting debtor relief in Chapter 11. Nothing in section 1141(d) or its legislative history suggests that a discharge effected by confirmation is subject to termination or modification except by revocation for fraud.[14] Of course, whether a partnership is discharged is most likely an academic question once the partnership has been liquidated.

The Bankruptcy Code leaves an open question regarding the effects of a default in an executory or promissory provision of a confirmed plan or of any other event that might terminate the plan. Three paragraphs of section 1112(b) bear on this question. The bankruptcy court may convert a Chapter 11 case to a Chapter 7 case or may dismiss the case[15] if: (1) there is inability on the part of the debtor or other proponent of the plan to effectuate its substantial consummation;[16] (2) there is a material default by the debtor with respect to a confirmed plan;[17] or (3) the plan termi-

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than fraud and may not be revoked for that reason unless requested by a party in interest within 180 days after entry of the confirmation order. The requesting party must carry the burden of showing that the order of confirmation was procured by fraud, and the court is required to enter appropriate orders to protect creditors or others who relied on the confirmation. *Id.*

13. See Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 73-74, 113 (1982).

14. According to § 1141(d), the confirmation of a Chapter 11 plan discharges the debtor if the plan provides for a reorganization, whether or not the debtor actually continues in business. Confirmation of a plan providing for liquidation likewise constitutes a discharge if the debtor engages in business after consummation. As indicated in the text following the reference to note 12, the Congressional scheme will be best implemented if the application of § 1141(d)(3) is limited to situations in which the plan calls for liquidation and in which no business credit is extended in good faith to the debtor after confirmation. An anomaly would exist if postconfirmation creditors would be protected against competition from the preconfirmation creditors only if postconsummation credit were also extended.

15. The Bankruptcy Act contained comparable provisions allowing the court to convert or dismiss Chapter XI and Chapter XII cases after confirmation, but these grants of authority were conditioned on the court's having retained jurisdiction subsequent to confirmation. *See* Bankruptcy Act §§ 377, 482.

16. 11 U.S.C. § 1112(b)(7) (1982). "[S]ubstantial consummation" is defined in 11 U.S.C. § 1101(2) (1982). *See supra* note 11. A comparable provision was contained in § 236 of Chapter X of the Bankruptcy Act.

17. 11 U.S.C. § 1112(b)(8) (1982).

nates on the occurrence of a condition specified in the plan.[18] The Court's authority to convert does not extend to a case in which the debtor is a farmer[19] and may be exercised only on request of a party in interest and after notice and hearing.[20] The court's discretion to convert or dismiss is to be governed by its view of the best interests of creditors and the estate.[21]

If substantial consummation is not effectuated and the case has not been closed, then no jurisdictional issue can seriously be raised concerning the court's exercise of its authority to convert or dismiss. The statute is not clear, however, with respect to either the existence or extent of the court's authority when the default or terminal condition occurs after the case has been closed. The plan or the order of confirmation may include a provision purporting to authorize the court to convert or dismiss and to declare the effect of such action on the discharge provided for in section 1141(d).[22] Whether or not the court retains jurisdiction and converts or dismisses, there is no indication in the statute or in the legislative history that the discharge effected by the confirmation is revoked or modified in any way by the default or termination of the plan.[23]

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18. 11 U.S.C. § 1112(b)(9) (1982).

19. 11 U.S.C. § 1112(c) (1982). A partnership may be a farmer. *See* 11 U.S.C. § 101(17) (1982); Kennedy, *Partnerships and Partners Under the Bankruptcy Reform Act and the New (Proposed) Bankruptcy Rules*, 27 ST. LOUIS U.L.J. 507, 514-15 (1983).

20. 11 U.S.C. § 1112(b) (1982).

21. *Id.*

22. 11 U.S.C. § 1141(d) (1982). The plan or the order of confirmation may include a provision authorizing the court to retain jurisdiction until all executory features of the plan have been performed or until a condition terminating the plan occurs. Section 368 of the Bankruptcy Act was an open-ended grant of authority to the court to retain jurisdiction in a Chapter XI case "if so provided in the arrangement." Section 369 mandated retention of jurisdiction until the final allowance or disallowance of all claims affected by the arrangement if those claims were filed within the time and amount limitations prescribed by § 355 of the Bankruptcy Act. *Id.*

23. At common law, a default or breach with respect to the promissory provisions of a composition generally revived the debts subordinated or discharged in that composition. *In re Clarence A. Nachman Co.*, 6 F.2d 427, 429-30 (2d Cir. 1925); Warner Lambert Pharmaceutical Co. v. Sylk, 348 F. Supp. 1039, 1044 (E.D. Pa. 1971). *But cf. In re* Plaza Music Co., 10 F. Supp. 310, 311 (S.D.N.Y. 1934), *aff'd*, 77 F.2d 1010 (2d Cir. 1935) (default held not to revive indebtedness when composition evidenced a clear intention that precomposition indebtedness should be discharged and subordinated to claims of postcomposition creditors). *See generally* Note, *The Effect of Default by a Debtor Under a Composition Before and After the Bankruptcy Act*, 26 COLUM. L. REV. 77 (1926) (discussing *In re Clarence A. Nachman Co., supra*, and emphasizing superiority of composition under the Bankruptcy Act as a device for settling a debtor's obligations). The survival of a discharge effected by the confirmation of a plan notwithstanding a default or breach was recognized under the Bankruptcy Act. *See, e.g., In re* Mirkus, 289 F. 732 (2d Cir. 1923); 9 COLLIER ON BANKRUPTCY ¶ 9.32[14] (J. Moore 14th ed. 1975); G. GLENN, LIQUIDATION § 353 (1935). Nevertheless, confusing au-

In addition, no statutory provision or legislative history indicates the intended ranking of new debts—that is, debts arising after the confirmation—and of debts dealt with on a parity.[24]

Confirmation of a Chapter 11 plan for a partnership is binding on the creditors of the firm and its general partners, irrespective of whether their claims and interest are impaired and irrespective of whether they accepted the plan.[25] Moreover, section 1141(c) provides that, except as provided in subsection (d)(3) and except as

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thority held that if a Chapter XI case were dismissed rather than converted after confirmation, then the obligations of the debtor under the confirmed plan were extinguished and the preconfirmation debts were revived. *See* J. MacLachlan, Bankruptcy 413 (1956) (citing *In re* Setzler, 73 F. Supp. 314 (S.D. Cal. 1947)); *see also* Vogel v. Mohawk Elec. Sales Co., 126 F.2d 759, 761 (2d Cir. 1942) (court stated in dictum that if a court retains jurisdiction in a Chapter XI case pursuant to a provision in the plan, then the arrangement case must be dismissed in the event of a default "and that of course revives the old debts"; court gave no basis for this conclusion).

24. The Bankruptcy Act contained a medley of provisions dealing with the ranking of claims discharged hy a confirmed plan that failed to be carried out and claims of postconfirmation creditors. Section 64h of the Bankruptcy Act as enacted in 1938 awarded priority to claims of postconfirmation creditors over the provable claims of other creditors in the event of the setting aside of a confirmation. Section 64b was a recast of § 64c of the prior law and was intended to remedy the prior provision's defects, but neither provision was ever discussed in a reported opinion in the context of the setting aside of a confirmation. *But cf.* Vogel v. Mohawk Elec. Sales Co., 126 F.2d 759 (2d Cir. 1942) (court assumed in a Chapter XI case under the Bankruptcy Act that § 64b applied, although the case involved the failure of a confirmed plan to be carried out rather than a confirmation that was set aside; as a result, the postconfirmation creditors were awarded priority over the preconfirmation creditors), *criticized in* J. MacLachlan, Bankruptcy 416 n.10 (1956) (court should have applied "basic principles of equity," which would have "require[d] a conformity to the reasonable expectation [of the new creditors] to share with the old creditors on the basis of the old claims as they stood when the new credit was extended").

In 1952, "after an extensive exploration, a different approach and treatment were developed for dealing with the new debts." S. Rep. No. 1395, 82d Cong., 2d Sess. 5 (1952). Section 64b was repealed by Pub. L. No. 456, 66 Stat. 420, 426 (1952), and the new treatment of old and new debts were prescribed hy several new sections in Chapters XI, XII, and XIII:

> Under the set-up of the new sections, provided for [in] chapter XI (sec. 381), chapter XII (sec. 486) and chapter XIII (sec. 669), where there has been a default in the consummation of an arrangement or plan and an order is entered directing that bankruptcy be proceeded with, it is fair and equitable to provide that, in the ensuing bankruptcy liquidation, the new provable unsecured debts, incurred after the confirmation of the arrangement or plan and before the entry of the order directing bankruptcy, shall share on a parity with the old provable unsecured debts, and if scaled, then to the extent scaled, as provided by the arrangement of the plan, and less any payments made thereon thereunder. This treatment recognizes the reasonable expectancies of the new and old creditors, who acted in reliance upon the confirmed arrangement or plan. The new creditors, looking to the debtor's property for the payment of their debts, recognized that such property was also available to the old unsecured debts, scaled or otherwise, and provided by the confirmed arrangement plan; while the old creditors must expect that new credit will he extended and new debt incurred.

Sen. Rep. No. 1395, *supra*, at 6.

25. 11 U.S.C. § 1141(a) (1982).

the plan or order of confirmation provides otherwise,[26] confirmation of the plan vests the property of the estate in the partnership, free of all claims of creditors and the interests of the general partners.[27]

A partner's commission of an act specified in any of the paragraphs of section 727(a) ordinarily has no bearing on the question whether the partnership should be discharged. The partnership cannot get a discharge in a Chapter 7 case, and its right to discharge in a Chapter 11 case is ordinarily automatic on the confirmation of a plan of reorganization.[28] A plan or a court order might conceivably qualify the confirmation by reference to an act of a partner, but confirmation is not subject to statutory objection based on section 727(a).

Paragraph (4) of section 1141(d) authorizes the court to approve a written waiver of discharge executed by the debtor after

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26. To the extent that a confirmed plan or the order of confirmation provides for payment of a claim, that claim is not discharged. Thus, the court may expressly condition the discharge resulting from confirmation on the final determination of issues raised in litigation pending in another court. Bittner v. Borne Chem. Co. (*In re* Borne Chem. Co.), 16 Bankr. 509, 514 (Bankr. D.N.J. 1981), *aff'd*, 691 F.2d 134 (3d Cir. 1982); *cf.* Slaw Constr. Corp. v. Hughes Foulkrod Const. Co. (*In re* Slaw Constr. Corp.), 17 Bankr. 744 (Bankr. E.D. Pa. 1982) (confirmation does not preclude assertion of counterclaim against debtor in litigation involving executory contract that was neither assumed nor rejected by the debtor). The bankruptcy court acknowledged in *Borne* tbat in effect it was requiring a conditional waiver of discharge by the debtor with respect to the claims being litigated in a state court action. 16 Bankr. at 514.

27. The language excepting the provision in 11 U.S.C. § 1141(d)(3) from the operational effect of the order of confirmation was added by § 513(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 387. The effect of a confirmation order under § 1141(c) prior to the amendment apparently has not been considered in any reported case.

28. The discharge may not be automatic if: (1) the plan or order of confirmation provides otherwise, pursuant to the exception introducing § 1141(d)(1); or (2) the three conditions specified in § 1141(d)(3) exist. With respect to conditions in the plan or order of confirmation qualifying the discharge, see *supra* note 26 and accompanying text. With respect to the three conditions of § 1141(d)(3), see *supra* notes 11-14 and accompanying text. Whether the three conditions of § 1141(d)(3) exist will be determined ordinarily when a creditor seeks to enforce an obligation of the debtor in disregard of the terms of the confirmed plan. Under § 524(a)(2), a discharge effected by § 1141 operates as an injunction against any attempt to enforce a personal liability of the debtor. The effect of the confirmation may be litigated in a court other than a bankruptcy court, but a proceeding in the bankruptcy court to determine the effect of confirmation or to enforce the statutory injunction predicated on a discharge by § 524(a)(2) is probably a core proceeding. Whether a given act against a partnership would violate the injunction depends on the court's resolution of the issues raised under § 1141(d)(3). Neither the statute nor any rule of procedure indicates who has the burden of proof in a proceeding testing or challenging a discharge, but in view of the exceptional character of a proceeding based on § 1141(d)(3), the burden would likely fall on the creditor seeking recovery. *Cf.* Bankruptcy Rule 4005.

the entry of on order for relief.[29] This provision is similar to a proviso in section 14a of the Bankruptcy Act, which was modified by former Bankruptcy Rule 405.[30] Neither the legislative history of paragraph (4) nor previous case law illuminates the question whether fewer than all general partners may execute such a waiver. Therefore, considerations outside the realm of bankruptcy law, including the terms of the partnership agreement that define the scope of non-unanimous partner actions, must govern the determination of this question.[31]

Notwithstanding the apparent breadth and unconditional character of the discharge effected by a confirmation of a Chapter 11 plan, exceptions have been engrafted by judicial construction. Thus, at least one court has held that a prepetition claim which was not listed or scheduled may not be discharged consistently with due process guaranties if the claimant received no notice or knowledge of the pendency of the bankruptcy case in time to file the claim.[32] Another court has ruled that if an executory contract neither is assumed nor rejected before confirmation, a claim arising out of the contract may be asserted against a reorganized debtor notwithstanding the omission of any reference to the claim in the plan or order of confirmation.[33]

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29. 11 U.S.C. § 1141(d)(4) (1982). Paragraph (4) of § 1141(d) was included in the bill that the Senate originally passed to overhaul the Bankruptcy Act, but was not included in the House's version of the bill. *See* S. 2266, 95th Cong. 2d Sess. (1978); H.R. 8200, 95th Cong., 2d Sess. (1978); S. REP. No. 989, *supra* note 6, at 130; 124 CONG. REC. 34008 (1978) (statement of Sen. DeConcini); *Id.* 32408 (1978) (statement of Rep. Edwards).

30. Former Bankruptcy Rule 405 eliminated the requirement of § 14a's proviso for a waiver before the hearing on an application for discharge, by eliminating altogether the necessity of such an application. 11 U.S.C. app. at 216 (1982). The current Bankruptcy Rules contain no provision relating to waiver of discharge.

31. *See* Kennedy, *supra* note 19, at 519-20 nn.52-54.

32. Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620 (10th Cir. 1984); *see also* 5 COLLIER ON BANKRUPTCY ¶ 1141.01[4][b] (L. King 15th ed. 1984); Weintraub & Resnick, *From the Bankruptcy Courts: Discharge for a Reorganizing Corporation—Beware of the Forgotten Creditor*, 17 U.C.C. L.J. 175 (1984). Discharge of an omitted creditor was denied in the *Reliable Elec. Co.* case although shortly after the filing of the Chapter 11 petition, the debtor's attorney had given notice of the filing to the creditor's attorney by telephone. 726 F.2d at 621.

33. *See* Slaw Constr. Corp. v. Hughes Foulkrod Constr. Co. (*In re* Slaw Constr. Corp.), 17 Bankr. 744 (Bankr. E.D. Pa. 1982); *cf.* Mt. Wheeler Power v. Gallagher, 98 Nev. 479, 653 P.2d 1212 (1982) (claim ruled enforceable against partners after close of partnership's bankruptcy).

The court in *Slaw Constr. Corp.* did not rule finally on the collectibility of a creditor's claim against the reorganized debtor, but still declined to dismiss the creditor's counterclaim on several alternate grounds: (1) the counterclaim might be entitled to payment as an administrative expense; (2) because the debtor did not include the creditor's claim in the schedule or plan, the creditor received no notice of the necessity of filing a claim and thus

Although the grant of discharge under section 1141 constitutes a bar to a second discharge in a case commenced within six years after the filing of the petition in the case in which the first discharge was obtained, this bar appears only in section 727(a). Therefore, because section 727 does not apply in any other way to the discharge effected under Chapter 11, there is no six-year bar to a second discharge of a partnership.[34]

II. Discharge of a General Partner

A. In a Chapter 7 Case

Under the Bankruptcy Code, as was the case under the Bankruptcy Act, a partner may be discharged from his liability for partnership debts as well as for his "nonpartnership"[35] debts in a liquidation case, whether or not the partnership estate is administered under the bankruptcy law.[36] The Code follows prior law by not

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should be given an opportunity to prove its claim; (3) the debtor did not notify the court of the pendency of the counterclaim at the time the court confirmed the plan; (4) if the debtor's plan did not provide for the claim, then the claim would not be discharged; and (5) notwithstanding § 524(a)(2), mutual debts may be "set off" against each other, regardless of when suit thereon is instituted and regardless of whether the defendant's claim against the plaintiff has been discharged. 17 Bankr. at 746-48.

The *Mt. Wheeler Power* court took the extraordinary step of declaring that a claim based on services rendered a debtor in possession pursuant to an executory contract was enforceable after the close of bankruptcy. The debtor was a partnership, presumably no longer in existence and devoid of assets in any event, but the court, ignoring the considerations tbat had impelled a dismissal below, ruled that there was an implied assumption of the electrical service contract by the debtor in possession and tbat the partners were liable for the services rendered although they were not debtors in the case. 98 Nev. at 482-83, 653 P.2d at 1214.

34. The six-year bar applied to the discharge of a partnership under § 14c(5) of the Bankruptcy Act, but, by virtue of the ease with which a partnership could add, drop, or change partners, the provision caused little difficulty for a partnership seeking a discharge under that Act. *See, e.g., In re* Neyland & McKeithen, 184 F. 144, 150 (S.D. Miss. 1910) (six-year bar afforded no ground of objection to grant of discharge to a partnership having one partner in common with partnership discharged in an earlier case). A change in membership of a partnership ordinarily effects a dissolution. F. Mechem, Elements of Partnership §§ 57, 359 (2d ed. 1920).

35. Section 421(f)(1) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 substituted "nonpartnership" for the term "separate" in identifying a partner's property and debts that are not attributable to his membership in the firm. Pub. L. No. 98-353, 98 Stat. 333, 368.

36. The grant or denial of a discharge in a liquidation case is governed by § 727. As pointed out in the text accompanying *supra* note 5, only an individual may be discharged under § 727(1), and thus a corporate partner or a partnership that is itself a partner in a debtor partnership cannot obtain a discharge from the partnership debts in a liquidation case.

The second sentence of § 5j of the Bankruptcy Act explicitly authorized a discharge of a partner from both his partnership and his individual debts whether he was adjudicated providing for discharge of the partners as a result of the administration of the partnership estate in bankruptcy.[37] Even though the trustee of the partnership may have recovered nonpartnership property from one or more of the partners to meet a deficiency of

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bankrupt separately or along with the partnership in a concurrent case. Some early cases under the Bankruptcy Act held that there could be no discharge of either a partner or a partnership from partnership debts without a partnership adjudication and administration of the partnership's estate. *See, e.g., In re* Mercur, 122 F. 384, 389-90 (3d Cir. 1903); *In re* Meyers, 96 F. 408, 411-12 (S.D.N.Y. 1899). The second sentence of § 5j codified the position taken in the preponderant number of cases decided before 1938, the year that the Chandler Act, ch. 575, 52 Stat. 840, 846 [hereinafter cited as Chandler Act], added § 5j to the Bankruptcy Act. *See, e.g., In re* Diamond, 149 F. 407 (2d Cir. 1906).

The Bankruptcy Reform Act's absence of any counterpart for § 5j affords no basis for an argument that discharge of a partner is dependent on administration of the partnership estate. Under § 723(c), the partnership trustee competes ratably with the separate creditors of the partner in the administration of the partner's estate. 11 U.S.C. § 723(c) (1982). The partnership creditors are arguably entitled likewise to share ratably with the partner's separate creditors when only the partner's estate is being administered under the Code. *See* Kennedy, *Partnerships and Partners Under the Bankruptcy Code: Claims and Distribution*, 40 WASH. & LEE L. REV. 55, 76-77 (1983).

37. Cases antedating the Chandler Act of 1938 generally held that the discharge of a partnership would not discharge the partners from the partnership debts. *See, e.g., In re* Neyland & McKeithen, 184 F. 144, 150-51 (S.D. Miss. 1910); *In re* Pincus, 147 F. 621, 625 (S.D.N.Y. 1906). A few cases, however, had held that the discharge of a partnersbip would discharge the partners from the firm's debts if the partners and their separate property were "drawn into" the administration of the partnership estate. *See, e.g.,* Armstrong v. Norris, 247 F. 253, 255-56 (8th Cir. 1917); *cf.* Abbott v. Anderson, 265 Ill. 285, 291, 106 N.E. 782, 784 (1914) (partners held to be discharged by composition in bankruptcy although partners' assets were not drawn into the administration of the case); 1A COLLIER ON BANKRUPTCY ¶ 5.15, at 717 (J. Moore 14th ed. 1978) ("Under the Act of 1898 most cases held that where the partnership alone was adjudicated, firm debts only would be barred by the discharge of the firm"). The Chandler Act settled this conflict by adding Bankruptcy Act § 5j, which provided that "[t]he discharge of partnership shall not discharge the individual partners thereof from the partnership debts."

For an elaborate argument that an individual partner should be discharged whenever his estate has also been subjected to administration, whether or not he was adjudicated or bankrupt, see Legislative Note, *Partnership Bankruptcy Under the Chandler Act*, 87 U. PA. L. REV. 105, 112-14 (1938). The notewriter argued that the first sentence of § 5j of the Bankruptcy Act imposed an inequitable burden on tbe partner, particularly when the provision left the partner saddled with joint obligations notwithstanding administration of both the partnership and partner's estates. *Id.* at 112. The author thought that the rule imposed by the Chandler Act would have "the practical effect of forcing the individual member to seek protection in the less desired form of adjudication under voluntary proceedings." *Id.* at 114. The note did not indicate what is undesirable about an adjudication of an individual partner in a voluntary bankruptcy case.

The "incongruity" of denying a discharge to a partner from firm debts after all the firm creditors' rights have been satisfied against the partnership and partner's estate was also lamented in Comment, *Unaccomplished Reforms in Partnership Bankruptcy Under the Chandler Act*, 49 YALE L.J. 908, 924 (1940). This comment regarded as harsh and unjustifiable the requirement that a bankrupt partner submit all his property to the bankruptcy court in order to be discharged from firm debts. *Id.* The author did not elaborate a need for a split discharge from such debts.

the partnership assets to cover the partnership debts,[38] the partners' contribution to the payment of these debts constitutes no basis for their discharge. An order for relief concerning a debtor must ordinarily have been entered in order for a discharge to be obtained,[39] but unless a statutory ground for objecting to discharge is timely asserted and sustained, the court does not have discretion to withhold a discharge of an individual debtor.[40]

1. Standing to Object

Objections to discharge in a liquidation case are governed by section 727 of Title 11. Under section 727(c)(1), "[t]he trustee or a creditor may object to discharge under subsection (a) of this section."[41] The procedure for determining whether a discharge should be granted or denied is prescribed by Bankruptcy Rule 4004. The trustee in a liquidation case is not only authorized to object to the debtor's discharge,[42] but indeed has a duty to object when advisable.[43] Because the statutory provisions empowering and authorizing a trustee to object to a discharge refer only to the trustee of the debtor, the question arises whether the trustee of the partnership nevertheless may object to the discharge of a general partner. Under the Bankruptcy Act, one person typically served as trustee

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38. *See* 11 U.S.C. § 723(a), (b) (1982).

39. The proposition that an order for relief concerning a debtor is a prerequisite to discharge is subject to the qualification that a court might occasionally disregard the requirement. *See* Levy v. Cohen, 19 Cal. 3d 165, 561 P.2d 252, 137 Cal. Rptr. 162, *cert. denied*, 434 U.S. 833 (1977) (discussed *infra* notes 102-05 and accompanying text); *see also* 11 U.S.C. § 524(a)(3) (1982) (recognizing that a discharge may protect community property acquired after the filing of a petition from community creditors of a nondebtor spouse as well as the debtor spouse).

Occasionally the partnership trustee will release a partner pursuant to a litigation settlement. *See* Nichols v. Emerson, 241 N.Y. 531, 150 N.E. 542 (1925) (settlement between a partnership trustee and a limited partner); Engelhardt v. Lehrenkrauss, 260 A.D. 943, 943, 23 N.Y.S.2d 263, 264 (1940) (general releases executed by partnership trustee held to discharge partners from individual liability for partnership debts).

40. "The court shall grant the debtor a discharge unless" one of ten enumerated grounds of objection is shown to exist. 11 U.S.C. § 727(a) (1982). As under the Bankruptcy Act, the court is not authorized to make an objection to discharge on its own initiative. *Id.*

41. 11 U.S.C. § 727(c)(1) (1982). The objecting creditor may be a copartner who has a claim for contribution or indemnity against the debtor-partner arising out of payment of a partnership debt. *In re* McCrady, 23 Bankr. 193, 194 (Bankr. W.D. Ky. 1982). That the copartner's claim against the debtor's estate may be contingent and subordinated to other creditors' claims is inconsequential. *Cf.* Kennedy, *supra* note 36, at 79 (copartner's right to contribution qualifies as a claim although it is subordinate to unpaid creditors of the partnership).

42. 11 U.S.C. § 727(c)(1) (1982).

43. 11 U.S.C. § 704(5) (1982).

of both the partnership and partners' estates when the estates were administered concurrently.[44] The simultaneous representation of multiple estates seems not to have raised any question of the trustee's standing to object to the discharge of any debtors whose estates are being administered. If the same person may serve as trustee of both the partnership estate and a partner's estate under the Bankruptcy Code, as the House Report suggested,[45] then the authority and duty to object to the discharge of the partner should be unaffected by the dual character of the trustee's representation.

The reported cases under the Bankruptcy Act did not consider the standing of a partnership trustee to object to the discharge of a partner when the partner's estate was being administered by a different trustee. The issue is more likely to arise under the Bankruptcy Code. Since a creditor is also authorized to object to the discharge of a debtor under section 727(c)(1), the partnership trustee arguably has standing as a creditor of the debtor.[46] On the other hand, the purpose of giving the partnership trustee a claim against a partner's estate is to facilitate distribution out of the partner's estate while minimizing the risk of double proof of partnership creditors.[47] This legislative purpose is furthered by disal-

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44. *See* Kennedy, *supra* note 19, at 572-74.

45. *See* H.R. REP. No. 595, *supra* note 6, at 198. The double trusteeship suggestion rested on the absence of any statutory prohibition on such dual representation. The Report, however, recognized the risk of a conflict of interest in such representation. *See id.*

46. A "creditor" as defined in 11 U.S.C. § 101(9) (1982) includes an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Under § 723(c), the trustee of a partnership has a claim against the estate of a partner who is a debtor in a Chapter 7 case. The partnership trustee's § 723(c) claim arguably does not arise unless and until two events concur: the entry of an order for relief in the partner's case and the qualification of the partnership trustee under § 322. If the qualification occurs after the entry of the order for relief in the partner's case, it could be contended that the partnership trustee is not a creditor of the partner's estate—if indeed he is such a creditor under any circumstances. This argument, however, would ignore the nature of the partnership trustee's claim, which is simply the aggregate of all the partnership creditors' claims against the debtor's estate. The validity, amount, and priority of the partnership trustee's claims are unaffected by statutory transfer, and it would be astonishing if the effect of the statutory transfer were to leave the claims without a creditor to hold them.

Independent of § 723(c) implications, however, the partnership has a claim against a partner's estate for the amount necessary to enable the partnership to pay its debts. UNIF. PARTNERSHIP ACT § 40(a)(II) (1914); H. R. REP. No. 595, *supra* note 6, at 198; *see* Kennedy, *supra* note 36, at 77-79. The partnership's claim against the partner's estate was recognized even more explicitly under § 5h of the Bankruptcy Act. The contingent nature of the partnership's claim alone does not warrant disqualification of the partnership's or the partnership trustee's right to object to the partner's discharge. *See In re* McCrady, 23 Bankr. 193, 195 (Bankr. W.D. Ky. 1982); *Ex parte* Traphagen, 24 F. Cas. 134, 135 (S.D.N.Y. 1842) (No. 14,140).

47. *See* H. R. REP. No. 595, *supra* note 6, at 381; S. REP. No. 989, *supra* note 6, at 95.

lowance of the partnership creditors' claims against the partner's estate because only the partnership trustee's claim on behalf of all the creditors he represents will be considered and paid. Implementation of this legislative purpose, however, does not require that only the partnership trustee be authorized to object to the discharge of the partner. If the partnership estate does not have a trustee, then the standing of a partnership creditor to object to the partner's discharge pursuant to section 727(c)(1) cannot be doubted.[48] Ordinarily,[49] there is no reason why a partnership creditor should not have as much standing to object to a partner's discharge as do the partner's nonpartnership creditors, whether or not there is also a partnership trustee who might file an objection. The bankruptcy courts have not been swamped with objections to discharge. The policy of centering in the trustee the right and duty to object to claims[50] has not been extended to the filing of objections to discharge. Courts should be receptive to objections to discharge of a partner, whether filed by the trustee of the partner's estate or of the partnership estate or by a separate creditor or a partnership creditor. This conclusion is consonant with the congressional policy reflected in section 15727(a)(1), which authorizes the United States trustee as well as the trustee or a creditor of the debtor to object to discharge in a pilot district.[51]

48. A partnership creditor is entitled to share in the distribution of the partner's estate ratably with nonpartnership creditors. *See* Kennedy, *supra* note 36, at 61-63.

49. The statement in the text would arguably not apply when all the partnership creditors have been or will be paid if one or more nonpartnership creditors remain or will remain unpaid after the administration of the partner's estate. This possibility may occur because, notwithstanding the right of the partner's creditors to share ratably with the partnership creditors in the partner's estate, the partnership estate may suffice to pay all the partnership creditors. Standing to object to a debtor's discharge, however, clearly is not limited only to creditors injured by the act or conduct that is the ground for objection. *See* Pugh v. ADCO, Inc., 329 F.2d 362, 364-65 (5th Cir. 1964); Cunningham v. Elco Distrib., Inc., 189 F.2d 87, 89-91 (6th Cir. 1951); *In re* Wells, 248 F. Supp. 224, 227-28 (N.D. Ala. 1965).

50. "While the debtor's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object [to a claim] is generally exercised by the trustee. Pursuant to § 502(a) of the Code, however, any party in interest may object to a claim." FED. R. BANKR. 3007 advisory committee note.

51. The conclusion in the text may be subject to the technical objection that it treats both the partnership trustee and the partnership creditors as creditors of a partner in respect to the same claims. Equal treatment, however, conforms to reality. The partnership trustee is simply a statutory assignee for the purpose of enforcement of the partnership creditors' claims against the estate and may appropriately be treated as a creditor of the estate for certain purposes. The statutory assignment is not intended to deprive the partnership creditors of their substantive rights against the partner or his estate. For example, § 723(c) clearly does not deprive a partnership creditor of the right to seek a determination

Additional evidence reveals congressional intent that objection to a debtor's discharge not fail because of lack of an objector. Any "party in interest" may request the court to order the trustee[52] or, in a pilot district, the United States trustee[53] to examine the acts and conduct of a debtor to determine whether a ground exists for denial of discharge. A "party in interest" is not defined in the Bankruptcy Reform Act,[54] but in a partner's case the term certainly includes a creditor of the partner's estate and, arguably, either the partnership trustee or a partnership creditor. No stated bankruptcy policy would be served by a niggling construction of the term "party in interest" as used in the provision for requesting examination of the debtor's acts and conduct.

2. Grounds of Objection to Discharge

The original justification for a discharge in bankruptcy was to reward cooperating debtors.[55] Grounds of objection to discharge continue to include acts of obstruction and failure to cooperate in

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that his claim was not dischargeable under § 523. The policy of § 727 is furthered best if both the partnership trustee and the partnership creditors have standing to object to the partner's discharge.

52. 11 U.S.C. § 727(c)(2) (1982).

53. 11 U.S.C. § 15727(a)(2) (1982).

54. "The phrase . . . 'on request of a party in interest' . . . is intended to restrict the court from acting sua sponte. Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question . . . ." 124 CONG. REC. 33993 (1978) (statement of Sen. DeConcini); *id.* at 32393 (1978) (statement of Rep. Edwards).

An indication that Congress did not intend that a restrictive approach be taken with respect to tbe standing of a creditor with a contingent claim is found in 11 U.S.C. § 502(a). Section 502(a) explicitly recognizes that a creditor of a partner is a party in interest for the purpose of objecting to a claim against a partnership debtor. Because the partnership trustee may seek recovery of a deficiency of the partnership property to pay partnership debts from the partner's estate or may assert a claim against a debtor partner's estate in the aggregate amount of all the partnership's creditors' claims, a partner's separate creditor may be adversely affected by the allowance of inflated claims of partnership creditors against the partnership estate. *See* 124 CONG. REC. 32396 (1978) (statement of Rep. Edwards); *id.* at 33996 (1978) (statement of Sen. DeConcini). This injury may be real although the partner's creditor may not assert a claim directly against the partnership estate in competition with the partnership's creditors. Because a partnership's creditor is in direct competition with a partner's crediters in seeking collection from the partner or his estate, the argument for according standing to the partnership's creditor, or to the partnership trustee as his surrogate, to object to the partner's discharge is more compelling.

55. *See* United States v. Kras, 409 U.S. 434, 447 (1973) (quoting and citing J. MACLACHLAN, BANKRUPTCY 20-21, 88 (1956)); *see also* Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 434-435 (1974) (discharge encourages prompt surrender of the debtor's assets).

connection with the administration of the debtor's estate,[56] but today acts of dishonesty and prejudice or potential prejudice to creditors occurring before the commencement of the debtor's case also constitute such grounds.[57] An additional ground of objection to discharge—namely, that the debtor had obtained a discharge in a prior case under the bankruptcy laws within a prescribed period,[58]—does not fit easily within either of these two classes of objections.

Several specifications of the grounds of objection to discharge in section 727(a) of the Bankruptcy Reform Act refer to the property of the debtor or the estate, the debtor's financial affairs or condition, or the debtor's business transactions.[59] A debtor who is also a partner may plausibly contend that an act or conduct which is engaged in on behalf of the partnership or that involves only the partnership's property does not constitute a ground for objecting to or denying his discharge. At least under section 14c(3) of the Bankruptcy Act, however, if a partner obtained money on credit for his partnership by issuing a false financial statement regarding the partnership's financial condition, then he would not be relieved from accountability.[60] The reported cases held that the partner's

56. *See* 11 U.S.C. § 727(a)(4)-(7) (1982).

57. *See* 11 U.S.C. § 727(a)(2), (3), (7) (1982).

58. *See* 11 U.S.C. § 727(a)(8), (9) (1982).

59. *See* 11 U.S.C. § 727(a)(2) (1982) (referring to "property of the debtor" and "property of the estate"); 11 U.S.C. § 727(a) (3) (1982) (referring to "the debtor's financial condition or business transactions"); 11 U.S.C. § 727(a) (4)(D) (1982) (referring to "the debtor's property or financial affairs").

60. *See* Marimura, Arai & Co. v. Taback, 279 U.S. 24, 33 (1929); Bernstein v. Associates Discount Corp. (*In re* Bernstein), 197 F.2d 378, 381-82 (7th Cir. 1952); Woolen Corp. of America v. Gitnig, 33 F.2d 259, 260-61 (3d Cir. 1929); Ragan, Malone & Co. v. Cotton & Preston, 200 F. 546, 550 (5th Cir. 1912); *In re* Fineberg, 36 F.2d 392, 393-94 (W.D.N.Y. 1929); *see also* Levy v. Industrial Fin. Corp., 276 U.S. 281 (1928) (denying discharge to a bankrupt because he had obtained money by use of a false financial statement for a corporation that he controlled).

The *Bernstein* court was not deterred from denying discharge merely because § 14c(3), the relevant provision of the Bankruptcy Act, required the bankrupt's false statement to relate to "his financial condition." Section 14c(3) was later amended to grant expressly a ground of objection to discharge with respect to a debtor wbo

> *while engaged in business as a sole proprietor, partnership, or as an executive of a corporation* obtained *for such 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 *or the financial condition of such partnership or corporation* . . . .

74 Stat. 408 (1960) (emphasis added); *see* H.R. REP. No. 1111, 86th Cong. 1st Sess. (1959). The primary purpose of this amendment was to preclude denial of discharge to a consumer debtor on the ground of misrepresentation of financial condition. The amendment, however, also served to codify the position taken in the *Bernstein* case.

personal involvement in the transaction was a sufficient basis for denial of his discharge. Although the Bankruptcy Code does not contain a counterpart of section 14c(3) of the Bankruptcy Act,[61] the construction given section 14c(3) should nevertheless be persuasive in construing section 727 of the Bankruptcy Code.[62]

As was pointed out in 1A COLLIER ON BANKRUPTCY D 14.39, at 1391-92 (J. Moore 14th ed. 1978), the amendment was susceptible of a narrow construction:

> A logical interpretation of the clause, and one in accord with the general statutory rule of construction known as reddendo singula singulis, would be that only where the individual is in business as a sole proprietor would a false statement concerning his individual financial condition operate as a bar to his discharge.
>
> Such a construction, however, would appear to weaken the clause more than is warranted or needed to meet the rationale of the 1960 amendment. Where a person gives a statement of his own finances for the purposes of inducing a creditor to lend money to a business in which he is interested, or to which he bears a relationship, whether this operates to bar his discharge should not depend on the form of the business, *viz.*, corporate, partnership or sole proprietorship. There is no reason to believe that the abuses which led to the 1960 amendment will be cured by such an interpretation, and sound practical reasons dictate a contrary construction. It is self-evident that in the case of a partnership the potential creditor has a real interest in the individual financial picture of the partners for their property can be reached to satisfy partnership debts.

The construction suggested in *Collier* was followed in *In re* Wells, 248 F. Supp. 224 (N.D. Ala. 1965), in which a corporate executive was denied a discharge on account of false financial statements relative to partnership and corporate business without regard to whether bis individual creditors suffered any detriment as a result of the misrepresentations.

61. Obtaining credit by false representation, however, is the basis for an exception to discharge under § 523(a)(2)(A). *See infra* note 116; *infra* notes 126-31 and accompanying text.

62. When the debtor is a partner, one might argue tbat an act of obstruction or prejudice to partnership creditors should be grounds for objection to his discharge only from partnersbip debts, and that discharge from separate debts should be denied only for an act injurious to separate creditors. Even if such an argument has been made, it has not been sustained. The notion of a split discharge has generally been eschewed by Congress and the courts. As pointed out in *supra* note 39, creditors nevertheless argued, and in a few cases courts decided, under the Bankruptey Act of 1898 that wben the separate property of unadjudicated partners has been administered in the course of a partnership bankruptcy, the partners should be discharged from partnership debts.

Congress has prescribed grounds of objection to tbe grant of a discharge witbout any limitation on the scope of the grant or denial according to the character of the indebtedness as either separate or partnership. When a ground for objection to discharge is found to exist, discbarge of all debts is denied, and all creditors may pursue their claims against the debtor. If a ground for objection is not asserted or sustained, only creditors whose claims are explicitly excepted by § 523 or are secured by liens tbat survive tbe administration of tbe case can enforce their claims after discharge. If a discharge of a partner were to be limited by reference to whether the debts were partnership or nonpartnership obligations, it would be difficult and often impracticable to distinguish between those acts or conduct of a partner prejudicial only to partnership creditors and those detrimental only to nonpartnersbip creditors. Since, as pointed out in *supra* note 48, partnership creditors share ratably with separate creditors in the distribution of a partner's estate, any conduct of a partner coming within

A partner might argue with some plausibility that his failure to explain a loss or a deficiency in the assets of a partnership to meet its liabilities does not constitute a ground of objection to his discharge, at least when the partnership is not a debtor in a case under the Code. Section 727(a)(5), however, does not limit the scope of the implied duty of explanation to the assets of the debtor,[63] and the partnership's liabilities also *are* considered liabilities of the partner.[64] Accordingly, the partner's argument against the applicability of section 727(a)(5) to his failure to explain the disappearance of partnership assets should fail.[65]

Under the Bankruptcy Act, an act of one partner barring his discharge would not operate to bar the discharge of his copartners unless they participated in, or in some way ratified, the act.[66] Thus, even though the fraudulent conduct of a partner resulted in the partnership's obtaining property, the conduct did not bar the discharge of his innocent partner.[67] The case law that developed

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the literal language and purpose of § 727 likely is equally objectionable to partnership and nonpartnership creditors.

63. Partnership assets are not considered property of the partner debtor. H. R. REP. No. 595, *supra* note 6, at 199-200.

64. Section 476(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 381, amended § 723(a) of the Bankruptcy Code to limit the liabilities of a general partner enforceable by a partnership trustee to claims for which the partner is "personally liable." The amendment would seem to imply that a general partner is not, or at least might not be, personally liable for all partnership debts. As the legislative history makes clear, however, the intention of the amendment is only to preclude the trustee from seeking recourse against a partner with respect to nonrecourse claims. Although § 1111(b) entitles the holder of a nonrecourse claim to allowances as if the holder had recourse, that provision is not applicable in a Chapter 7 case.

65. *See In re* Miller & Miller, 52 F. Supp. 526 (S.D. Fla. 1943); Third Nat'l Bank v. Trew (*In re* Trew), 23 COLLIER BANKR. CAS. 2d (MB) 700, 705-10 (Bankr. M.D. Tenn. 1980). The courts in these cases gave no significance to the fact that the challenged losses or deficiencies related to partnership property and partnership liabilities. The *Miller* court emphasized that the duty of explanation of a deficiency of partnership assets falls "upon all members of the partnership actively connected therewith." 52 F. Supp. at 527.

66. *See, e.g., In re* Richter, 57 F.2d 159, 161 (2d Cir. 1932) (discussed *infra* note 77). *See generally* 1A COLLIER ON BANKRUPTCY D 14.31 (J. Moore 14th ed. 1978) (falsification of books by bankrupt's partner will not bar discharge if the hankrupt is ignorant of the wrongdoing).

67. *See* Doyle v. First Nat'l Bank, 231 F. 649 (4th Cir. 1916) (denial of partner's discharge under former § 14c(3) of the Bankruptcy Act reversed because the partner did not participate in preparing the false financial statement issued by his firm and did not know of its contents or its falsity); Hardie v. Swafford Bros. Dry Goods Co., 165 F. 588 (5th Cir. 1908) (similar to *Doyle*); Annot., 133 A.L.R. 676 (1941). *But cf. In re* Simon Weltman & Co., 2 F.2d 759, 761 (S.D.N.Y. 1924) (burden on partners seeking discharge to show that they did not know of false financial statement used by another partner to obtain goods on credit for the partnership).

Note that obtaining money or property by means of a false financial statement is no under the Bankruptcy Act regarding the effect of a debtor's conduct on the right of his partner to a discharge should remain pertinent in the construction of section 727.

Clarification of the effect of a partner's conduct on the right to a discharge in another case concerning his partnership or his copartner is provided by section 727(a)(7). Paragraph (7) allows certain of the acts specified as grounds for denial of discharge in other paragraphs of section 727(a) to be equally available, whether committed in connection with the debtor's own case or that of an insider.[68] This provision is intended to codify and extend the doctrine of a group of cases decided under the Bankruptcy Act.[69] These cases made the conduct of a bankrupt in a case concerning another debtor a ground of objection if the conduct came within the literal language of section 14c of the Bankruptcy Act and was reasonably related to the case in which the objection was made.[70]

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longer a ground for denying discharge, § 523(a)(2)(A), but may give rise to a nondischargeable liability. *See infra* notes 116, 126-31 and accompanying text.

68. The term "insider" is defined in 11 U.S.C. § 101(25) (1982) and includes the partnership in which the debtor is a partner, a general partner of the debtor, or a relative of a general partner.

69. Section 727(a)(7) was derived from § 4-505(a)(6) of the Bankruptcy Act proposed by the Commission of Bankruptcy Laws. *See* COMMISSION REPORT II, *supra* note 6, at 132, 135.

70. These cases concerned the question whether an act or conduct of an officer or dominant stockholder in connection with the bankruptcy of a corporation should be a ground of objection to the discharge of the actor in a subsequent bankruptcy.

An early decision, *In re* Blalock, 118 F. 679 (D.S.C. 1902), sustained a discharge of a bankrupt notwithstanding his making a false oath in the bankruptcy case of a corporation in which he had an interest because the court found an insufficient relationship between the two bankruptcies. District Judge Learned Hand followed *Blalock* in *In re* Lesser, 232 F. 368 (S.D.N.Y. 1916), in which the bankrupt had committed perjury in a prior bankruptcy case involving a corporation, but this ruling was reversed on appeal in 234 F. 65 (2d Cir. 1916). The appellate court's ruling in the *Lesser* case established for nearly 30 years the doctrine that conduct defined by the Bankruptcy Act in § 14c(1) (*i.e.*, an offense punishable under 18 U.S.C. § 152 (1982)) or in § 14c(6) (*i.e.*, refusal to obey an order of court or to answer a question approved by the court) could be the basis for denial of a discharge, irrespective of the time interval or the relationship between the act and the subsequent bankruptcy. *See* Schwartz, *Opposition to a Discharge by Reason of Acts or Conduct in Another Bankruptcy Proceeding*, 20 REF. J. 57 (1946) (citing six cases).

The *Lesser* case was explicitly overruled, however, in Raphiel v. Morris Plan Indus. Bank, 146 F.2d 340 (2d Cir. 1944), *cert. denied*, 324 U.S. 879 (1945), which adopted the view taken by Judge Hand in the *Lesser* case. The *Raphiel* case held that conviction of a fraudulent concealment of assets in connection with an earlier bankruptcy case should not bar a discharge in a case commenced 15 years after the filing of the first case. The discharge in the second case was declared to be inoperative, however, for debts provable in the first bankruptcy. The *Raphiel* case was the genesis of the doctrine that conduct coming within the literal language of § 14c(1) constituted a bar to a subsequent discharge only if the conduct bore a reasonable relationship to the case in which the discharge issue arose. *See* Pugh v.

The doctrine of these cases was uncertain in scope, however, and was susceptible of an application that would bar discharge of a debtor because of conduct many years earlier in a case involving a connected debtor.[71] Therefore, the Bankruptcy Code restricts the scope of an objection based on conduct in another case in three ways: first, the act must be specified in paragraph (2), (3), (4), (5), or (6) of section 727(a);[72] second, the act must have been committed within one year before the commencement of the debtor's own case or during its pendency;[73] and third, the debtor in the case in which the act occurred must be an insider.[74]

While the thrust of section 727(a)(7) is clear enough, it may

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ADCO, Inc., 329 F.2d 362 (5th Cir. 1964); Schieffelin & Co. v. Harold, 222 F.2d 262 (2d Cir. 1955).

The *Raphiel* doctrine was amenable to application to conduct described in paragraphs other than § 14c(1), because most of the grounds of objection to discharge under the Bankruptcy Act—all but those prescribed by paragraphs (4), (5), and (8)—did not require the objectionable conduct to occur in or in connection with the case in which the discharge issue arose. Thus, a district court denied a discharge under § 14c(6) to a bankrupt who had refused to answer a material question in the prior bankruptcy of a corporation of which he was the president and sole stockholder. *See In re* Marcus, 149 F. Supp. 496, 497-500 (S.D.N.Y. 1957), *aff'd*, 253 F.2d 685 (2d Cir. 1958), *discussed in* Comment, *Bankruptcy—Individual Bankrupt Denied Discharge for Refusing to Testify in Corporation Bankruptcy Proceeding*, 43 IOWA L. REV. 406 (1958). The objection to the discharge was made hy the trustee of the corporation, who had obtained a substantial judgment against the bankrupt owner for debts arising out of his dealings with the corporation. On appeal the court of appeals bypassed this ground of objection but affirmed the denial of discharge on the ground that the debtor had obtained money by making a false statement respecting the financial condition of his wholly owned corporation. *In re* Marcus, 253 F.2d 685, 687-88 (2d Cir. 1958); *cf. In re* Sugarman, 3 F. Supp. 502, 506-07 (E.D.N.Y. 1933) (declining to sustain an objection grounded on the bankrupt's refusal to answer questions in the bankruptcy of a corporation in which he held a one-half interest).

In *In re* Cole, 88 F. Supp. 842 (E.D.N.Y. 1950), two bankrupts who had been the two principal officers of a corporate debtor in a Chapter XI case were denied a discharge because of their failure to keep adequate records after confirmation of an arrangement and because of their having transferred and received property of the corporate debtor with intent to defeat the Bankruptcy Act. Because the bankrupts were individually liable on the obligations of the corporate debtor and because these obligatious remained unpaid when the individuals filed their bankruptcy petitions, the reasonable relationship requirement was easily satisfied.

71. *See* Comment, *supra* note 70, at 409-10.

72. The acts specified in § 727 include the fraudulent disposition of or injury to property of the debtor or the estate (§ 727(a)(2)), the failure to keep books (§ 727(a)(3)), the making of a false claim or accepting a bribe for acting or forbearing to act (§ 727(a)(4)), the failure to explain a loss or deficiency of assets (§ 727(a)(5)), and the refusal to answer a material question or to obey a lawful order of the court (§ 727(a)(6)). 11 U.S.C. § 727 (1982).

73. 11 U.S.C. § 727(a)(7) (1982). Section 480(a)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 382, amended § 727(a)(7) to make it applicable to the debtor's act committed in another case, whether that case arose under the Bankruptcy Act or the Bankruptcy Code.

74. See *supra* note 68 for the Code's definition of "insider."

present difficulties in application. The provision applies when a partner is a debtor, but the act or conduct that gives rise to the objection must occur in or in connection with the case of another debtor who is an insider. Thus a partner's act or conduct involving the insider's property, estate, financial affairs or condition, or business transactions may be unavailable as a ground of objection to the partner's discharge under section 727(a)(7) because the insider was never a debtor in a case under Title 11. Even when the requirement of two cases of related debtors is satisfied, there is ambiguity in the statute whether the property, estate, financial affairs or condition, or business transactions involved in the act or conduct must be those of the debtor whose discharge is at issue or may be those of the insider.[75] Relying on cases construing section 14c of the Bankruptcy Act,[76] courts may find actions or conduct of an insider sufficiently related to the partner's own property, condition, affairs, or transactions to sustain an objection to the partner's discharge.

Interpretive problems arising in a partner's case under section 727 may be illustrated by a series of hypothetical situations:

(1) Suppose the debtor/partner, with intent to defraud a creditor of the partnership of which he was a member, transferred or concealed property of the partnership. An objection to the partner's discharge can be based on section 727(a)(2) only if the debtor has transferred or concealed his property. If the partnership becomes a debtor in a case under Title 11 within the time prescribed by section 727(a)(7), has the debtor/partner committed an act constituting a ground for an objection to discharge of the partner under that provision? The debtor's act can be the basis for such an objection only if the partnership property is regarded as property of the debtor. While the partner does have a potential interest in property of the partnership, that interest is quite tenuous when the partnership is insolvent, as it is likely to be in this situation. The logical difficulty presented by an objection to discharge of a partner based on his transfer of partnership property was not even considered, however, in cases denying a discharge under the Bankruptcy Act to a partner participating in the transfer.[77] Neverthe-

75. *See supra* note 59 and accompanying text.

76. *See supra* note 60 and accompanying text; *infra* notes 77, 84, and accompanying text.

77. *See* Charles Edward & Assoc. v. England, 301 F.2d 572, 575 (9th Cir. 1962); *In re* Richter, 57 F.2d 159, 161 (2d Cir. 1932). In *Richter*, discharge was denied to a partner who withdrew partnership funds and applied them to personal expenditures, but was granted to

less, an argument upholding the applicability of section 727(a) in the supposititious situation might proceed as follows:

(a) Because the debtor has a contingent or potential interest in the partnership property to the extent that a surplus may remain after the partnership obligations are paid, the separate creditors of the partner should have standing to object to a concealment or transfer that defeats or impairs that potential interest.[78]

(b) Similarly, because the partnership's creditors are creditors of the partner,[79] they likewise have standing to object to his concealment or transfer of partnership property to the prejudice of their rights in such property.

(c) The act of the partner respecting the partnership property under his control can be regarded as an act respecting his own property by an extension of the cases assimilating the partnership's financial condition to that of the partner for the purpose of applying former section 14c(3) of the Bankruptcy Act.[80]

Alternatively, the references to "debtor" in paragraphs (2) and (7) of section 727(a) might refer to different persons. Thus, the partner whose discharge is in question is the debtor who committed the act specified in section 727(a)(2), but the property transferred or concealed is that of the partnership estate being administered in the insider's case. The word "debtor" thus is taken to refer to the partner in section 727(a)(7) and the first time the term is used in section 727(a)(2), but to refer to the partnership the second time it is used in paragraph (2). The references in paragraph (2) to "a creditor or an officer of the estate" and to "property of the estate" must then specify a creditor, officer, and property of the estate of the partnership. Mental acrobatics are required to

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a partner who likewise withdrew partnership funds but applied them to effect a preferential payment of a partnership obligation.

78. The partner's creditors' right to reach the partner's interest in the partnership property is recognized in § 28 of the Uniform Partnership Act. For a discussion of creditors' rights with respect to a partner's interest in partnership property, see J. CRANE & A. BROMBERG, THE LAW OF PARTNERSHIP § 43 (1968).

79. *See supra* note 64 and accompanying text.

80. *See supra* note 60 and accompanying text. The force of the argument made in the text should have been strongest when the claims of the nonpartnership creditors of the partner exceeded the nonpartnership property of the partner but there was a surplus of partnership property over partnership liabilities at the time of the partner's transfer or concealment of the partnership property. *Cf. In re* Jacob Berry & Co., 146 F. 623, 624 (S.D.N.Y. 1906) (indicating that a partner should be denied a discharge where a firm employee, acting within the scope of his authority, made a fraudulent disposition of firm property), *aff'd*, 174 F. 409 (2d Cir. 1909).

give any significant effect to the incorporation of paragraph (2) into section 727(a)(7). Limiting the applicability of paragraph (7)'s reference to paragraph (2) to fraudulent transfers or concealments of the partner's own property would render the reference largely nugatory and useless to reach the kind of conduct by a partner in or in connection with a partnership case that is most likely to injure or prejudice the partner's creditors.[81]

(2) Assume that a partner has concealed or otherwise failed to maintain information from which the partnership's financial condition or business transactions might be ascertained. If the partnership becomes a debtor in a Title 11 case, a creditor may easily base an objection on section 727(a)(7) by arguing that the partner has committed an act specified in paragraph (3) of section 727(a) in connection with another case concerning an insider.[82] If the partnership does not become a debtor in a Title 11 case, however, an objection to the discharge of the partner still can be predicated on section 727(a)(3) by arguing that the debtor's concealment or failure to keep information respecting the partnership's financial condition or business transactions constituted an act or failure respecting the partner's own condition or transactions.[83] Again, case law predating the Bankruptcy Reform Act points the way to a construction sustaining a creditor's objection to the partner's discharge.[84]

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81. Similarly, intellectual agility may be required in order to enable the trustee of a corporation to object to the discharge of an officer or other person in control on the ground that such person transferred or concealed property of the corporation.

82. A partnership in which the debtor is a general partner is regarded as an "insider." *See* 11 U.S.C. § 101(25)(A)(ii) (1982).

83. *See* Charles Edward & Assoc. v. England, 301 F.2d 572, 574 (9th Cir. 1962).

84. The courts did not acknowledge any difficulty in denying discharge to a partner under § 14c(2) of the Bankruptcy Act when the partner failed to keep books of account or records from which the financial condition and business transactions of the partnership could be ascertained. *See, e.g.,* Rameson Bros. v. Goggin, 241 F.2d 271, 275 (9th Cir. 1957); *In re* Herzog, 121 F.2d 581, 582 (2d Cir. 1941), *cert. denied,* 315 U.S. 807 (1942); *In re* Fineberg, 36 F.2d 392, 393 (W.D.N.Y. 1929); *In re* Currie, 23 AM. BANKR. REP. (MB) 539, 547-48 (Ref. E.D. Mich. 1910). The rights and liabilities of the partner that arise out of partnership transactions or its financial condition suffice to justify the conclusion that an act of omission or commission impairing the adequacy of the partnership records necessarily hampers ascertainment of the financial condition of the partner. A partner who has no responsibility for the preparation and preservation of the partnership books and records has frequently been granted a discharge, however, notwithstanding the inadequacy or unavailability of the partnership books of record. *See, e.g., In re* Livermore, 96 F.2d 93, 95 (2d Cir. 1938) (partner in Europe had no control of partnership books in New York); *In re* Poff, 211 F. Supp. 495, 497 (W.D. Va. 1962) (bankrupt had sold his interest in partnership before the petition was filed and was unable to obtain partnership records from the purchaser); *In re* Harrell, 263 F. 954, 956 (N.D. Ga. 1920) (partner was ill and did not have knowledge of, or

(3) Assume that a partner in or in connection with a Title 11 case concerning his partnership makes a false oath or account, presents or uses a false claim, or gives or receives consideration for an act or forbearance.[85] The partner's act comes within section 727(a)(7) because the act would be in connection with another case concerning an insider.[86] If there is no Title 11 case including the partnership, however, the partner's act would not satisfy section 727(a)(4) or (7) unless the false oath or other conduct, referred to in one of the first three clauses of section 727(a)(4), is in or connected with the partner's case.[87]

(4) Suppose a partner withholds from a trustee of the partnership recorded information relating to the partnership's property or financial affairs. This act falls squarely within section 727(a)(7) if the partnership is the "debtor" in the reference in section 727(a)(4)(D) to "the debtor's property or financial affairs." If the partnership is not regarded as the debtor for this purpose, however, an act within section 727(a)(4)(D) cannot be found unless the partnership's property or financial affairs are simply assimilated, as in pre-Code law, to the property or affairs of the partner.

(5) If the partner fails to explain satisfactorily a loss of partnership assets or a deficiency of those assets to meet the partnership's liabilities and the partnership is a debtor in a Title 11 case, then the situation comes within section 727(a)(7). The partner's conduct is a ground of objection, only if the partner can be the

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actively participate in, conduct of partnership business).

When a partner has sought to escape the consequences of a failure to keep adequate partnership records by alleging innocence or lack of participation in the failure, the courts have placed the burden of proving such assertions on the partner seeking discharge. *See, e.g.,* Charles Edward & Assoc. v. England, 301 F.2d 572, 575 (9th Cir. 1962); *In re* Fineberg, 36 F.2d at 393; *In re* Schachter, 170 F. 683, 686 (S.D.N.Y. 1909); *In re* Currie, 23 AM. BANKR. REP. (MB) at 549. Bankruptcy Rule 4005, which places the burden of proof on the person objecting to a discharge, does not necessarily overrule these cases. As the advisory committee note accompanying Rule 4005 explains, the provision leaves to the courts the formulation of rules governing the burden of going forward with the evidence. *See also* Third Nat'l Bank v. Trew (*In re* Trew), 23 COLLIER BANKR. CAS. 2d (MB) 700, 703-05 (Bankr. M.D. Tenn. 1980). The rule applied in all these cases may be viewed as shifting the burden of going forward after the objector shows that there has heen a failure to keep adequate partnership books.

85. These acts are listed in § 727(a)(4)(A), (B), and (C), and the introductory language of paragraph (4) requires the acts to be committed "in or in connection with the case." 11 U.S.C. § 727 (1982).

86. As pointed out in *supra* note 82, a partnership in which the debtor is a general partner is regarded as an insider.

87. The alternative rationales suggested in the text accompanying notes 80-87 may be viewed as simple variants of a single argument. Either way the same result is reached—a result that permits the drafters' purpose to be effectuated.

"debtor" in his own case under paragraph (7) and in the insider's case under paragraph (5) when he fails to explain, but the partnership can be the debtor in the insider's case whose liabilities are not met. The requirement of section 727(a)(5) that the failure to explain occur before determination of denial of discharge will not ordinarily cause difficulty since a partnership does not obtain a discharge in a Chapter 7 case, and even in a Chapter 11 case there is usually no determination of a denial of discharge.[88] If the partnership does not become a debtor under Title 11, the partner/debtor cannot be guilty of failing to explain satisfactorily any loss or deficiency within the literal language of section 727(a)(5), but as pointed out earlier,[89] there should be no difficulty in sustaining an objection to the debtor's discharge grounded on that provision.

(6) Assume that a partner refuses in a partnership case to obey a lawful order of the court or, without justification, refuses to respond to a material question approved by the court. The partner's act falls within section 727(a)(7), but only if the partnership was a debtor in a Title 11 case witbin the time limits prescribed in that paragraph.

As these hypothetical situations illustrate, if the debtor's property, financial condition, financial affairs, or liabilities referred to in paragraph (2), (3), (4), (5), or (6) of section 727(a) cannot include the partnership's property, condition, affairs, or liabilities when objection to a partner's discharge is based on paragraph (7), the latter paragraph rarely will be of any use against a partner. A stultifying construction of section 727(a)(7) can and should be avoided by giving effect to the manifest purpose of the provision.

Similar, but distinguishable, problems arise when an objection to the discharge of a debtor/partner under section 727(a)(7) is based on his act in a case involving a copartner. A general partner of the debtor is regarded as an insider,[90] but treating a copartner's property, financial condition, financial affairs, or liabilities as those of the debtor for purposes of applying paragraph (7) involves a leap of logic not warranted by any view of the relationship between

88. If confirmation of a plan is denied in a Chapter 11 case regarding a partnership debtor, there might be a denial of discharge within the meaning of § 727(a)(5), but the denial is not likely to have any relation to this Chapter 7 provision. Confirmation of a Chapter 11 plan may not always constitute a discharge, *see* 11 U.S.C. § 1141(d)(3) (1982), but even in that eventuality the court is unlikely to make a "determination of denial of discharge" within § 727(a)(5) in a partnership case.

89. *See supra* note 64 and accompanying text.

90. *See* 11 U.S.C. § 101(25)(A)(iii) (1982).

the partners. On the other hand, a partner's refusal to obey a lawful court order to testify in a case concerning a copartner may ground an objection to the partner's discharge in his own case under paragraph (7).[91]

Finally, a previous discharge is a ground of objection to a discharge in a subsequent case under paragraph (7) or (8) of section 727(a), but only if the debtors in the two cases are the same.

B. Chapter 11 Cases

1. Discharge of a General Partner as a Debtor

Discharge in a Chapter 11 case is governed by section 1141 rather than section 727. An order confirming a Chapter 11 plan discharges the debtor not only from prepetition debts but also from any other debts that arise prior to confirmation. The scope of the discharge of an individual partner is no broader in a case under Chapter 11, however, than in a Chapter 7 case because the exceptions from discharge set out in section 523 apply equally to individual partners under each chapter.[92] On the other hand, a Chapter 11 discharge of a corporate partner or a partnership that is itself a partner is not subject to the exceptions to the scope of a discharge prescribed in section 523.

The objections to discharge available under section 727 do not ordinarily lie against the discharge that results from confirmation of a plan of reorganization under Chapter 11. To forestall resort to Chapter 11 as a means of circumventing section 727, however, the grounds of objection specified in the section become available to a Chapter 11 creditor when three conditions concur:

(1) the Chapter 11 plan provides for liquidation of all or substantially all of the debtor's property;

(2) the debtor does not engage in business after consummation of the plan; *and*

(3) the debtor would be denied a discharge under section 727(a) if the debtor's case were administered under Chapter 7.[93]

An individual partner who would not be vulnerable to an objection to discharge in a Chapter 7 case may thus be discharged by

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91. The partner's refusal may actually have occurred in a case concerning a copartner's relative and still constitute grounds for an objection to the debtor/partner's discharge. *See* 11 U.S.C. § 101(25)(A)(i) (1982) (defining an "insider" to include a relative of a general partner of the debtor).

92. *See* 11 U.S.C. § 1141(d)(2) (1982).

93. 11 U.S.C. § 1141(d)(3) (1982) (set out in *supra* note 11).

virtue of a confirmation under Chapter 11, and it is immaterial whether the confirmed plan is one of liquidation or of reorganization and whether the debtor continues or terminates his business after consummation. Moreover, it is immaterial whether the plan is one proposed by the debtor, the creditors, or another party in interest. Even if the individual debtor could not have obtained a discharge in a Chapter 7 case because of an objection that might have been made pursuant to section 727, the confirmation nevertheless constitutes a discharge if the plan provides for a continuation rather than a liquidation of the debtor's property. Indeed, it appears that if the individual debtor engages in business after consummation of the plan, the confirmation of even a liquidation plan constitutes a discharge notwithstanding the availability of a ground of objection under section 727 if the debtor's case had been administered under Chapter 7.

As pointed out in connection with the discussion of the discharge of a partnership,[94] the Code does not specify the nature, extent, or duration of the business operations required to be conducted subsequent to consummation of the plan in order for the debtor to save his discharge. To avoid frustrating the purpose of section 1141(d)(3), however, an individual who could not have obtained a discharge in a Chapter 7 case should not be able to obtain discharge under Chapter 11 unless a discharge is necessary and appropriate to protect a bona fide effort to reorganize a business or to liquidate more advantageously for creditors than would have been possible through a Chapter 7 liquidation.[95]

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94. *See supra* text accompanying notes 11-14.

95. The drafters of § 1141(d)(3)(B), which sets out the debtor's lack of business activity after consummation of the plan as one of the conditions required in order for the section 727 grounds of objection to be available in a Chapter 11 case, presumably intended or assumed that the clause would not be satisfied if the debtor continues some aspect of the former business for at least a significant period of time. If the individual does continue the business after consummation, the confirmation of the plan would discharge his debts as provided in § 1141(d). Presumably, subsequent death, illness, or retirement from the business will not revive the debts once discharged by the confirmation. For reasons indicated in *supra* note 14 and accompanying text, postconfirmation creditors relying in good faith on the effectiveness of the confirmation, as well as the debtor himself, should be protected by the discharge.

If an individual could avoid the hurdles presented by § 727(a) simply by engaging in some business activity after a Chapter 11 liquidation, well-advised individuals seeking debtor relief under the Bankruptcy Code could be expected routinely to file petitions under Chapter 11. Such a development would undoubtedly trigger litigation challenging the good faith of Chapter 11 petitions filed by individual debtors. The exploitation of Chapter 11 as a pathway around § 727(a) could be curbed, of course, by court dismissals of Chapter 11 petitions filed for such a purpose.

If a corporate partner or a partnership that is a partner is the debtor in a confirmed Chapter 11 plan, the confirmation constitutes a discharge if the confirmed plan provides for a reorganization rather than a liquidation or if the debtor engages in business after the consummation of a liquidation plan. In either event it is immaterial whether the debtor committed an act that would have constituted an objection to discharge under section 727(a). If the debtor/partner could not have obtained a discharge under section 727, however, the partner would not be discharged by the confirmation of a Chapter 11 plan of liquidation unless it continued in business after consummation of the plan.

As the discussion of the discharge of a partnership showed, the Bankruptcy Code is silent regarding the effects of a default in an executory provision of a confirmed plan or of any other event that might terminate the plan.[96] The conclusion that the discharge should be deemed unaffected by the default or termination is as applicable to the confirmation of a plan for an individual debtor as to the confirmation of a partnership plan. As was pointed out in the discussion of the discharge of a partnership in a Chapter 11 case, however, judicial qualifications may be engrafted or the discharge effected by the confirmation of a Chapter 11 plan.[97]

2. Discharge of a General Partner as an Incident to Discharge of the Partnership

The Bankruptcy Act provided that the discharge of a partnership did not discharge a member of the partnership.[98] The partner was generally required to become an adjudicated bankrupt or a petitioner in a Chapter XI, XII, or XIII case in order to obtain the benefit of a discharge.[99] The Bankruptcy Code, on the other hand,

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96. *See supra* text accompanying notes 15-24.

97. *See supra* text accompanying notes 32-33.

98. Bankruptcy Act § 5j. The first sentence of § 5j, added by the Chandler Act of 1938, settled a conflict in the cases as to whether a discharge of a partnership operated to release the individual partners from firm debts. 1A COLLIER ON BANKRUPTCY ¶ 5.15, at 717 (J. Moore 14th ed. 1974). The Supreme Court held in Myers v. International Trust Co., 273 U.S. 380, 382-85 (1927), that the discharge of a partnership did not release partners from liability on their personal endorsements on notes given to partnership creditors but refrained from ruling on the effect of a partnership discharge on the liabilities of the partners to partnership creditors in the absence of any personal guaranty or assumption of the separate obligation. *See generally* Note, *The Effect of a Discharge of a Partner or a Partnership in Bankruptcy*, 5 TEX. L. REV. 400 (1927) (discussing *Myers*).

99. *See, e.g.*, Acme Tool, Inc. v. Flesher (*In re* Rogers-Fain Drilling Co.), 309 F.2d 636 (10th Cir. 1962); Schram v. Perkins, 38 F. Supp. 404 (E.D. Mich. 1941); Larson v. Morris Black & Sons, Inc. (*In re* Carver House), 5 BANKR. CT. DEC. (CRR) 1193, 1194-95 (Bankr.

contains no language purporting to deal with the effect of a partnership discharge on the liability of the partners. Section 1141(d), however, limits the discharge effected by confirmation of a plan to the debtor, and the "debtor" is defined in section 101(12) to be a person concerning whom a case under Title 11 has been commenced. Moreover, section 524(e) declares that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Accordingly, it is not surprising that efforts by sureties and other co-obligors to obtain the benefits of a discharge without having been "debtors" themselves have been generally unavailing.[100] Declarations that the bankruptcy court has no power to discharge a debt of an entity that is not a debtor under the Code are frequently encountered in judicial opinions.[101] Two cases decided under the Bankruptcy Act warrant a closer examination of this statement of the prevailing law.

E.D. Pa. 1979); *see also* First Nat'l Bank v. Poland Union, 109 F.2d 54 (2d Cir.), *cert. denied*, 309 U.S. 682 (1940).

In *Poland Union* the court declined to approve the issuance of a perpetual injunction against the filing of suits by the creditors of an unincorporated association to collect their claims against tbe members of the association. Although tbe court acknowledged tbat no plan of reorganization for the association was practicable unless suits against the shareholders were perpetually restrained, the court declared that such relief, which would have been tantamount to a discharge of the members without an administration of their separate estates, was beyond the court's power. The association was identified as a partnership in its articles of association, but the court observed that its legal status had never been determined. 109 F.2d at 55-56.

100. Courts have given short shrift to arguments that seek to predicate discharge of the nondebtor obligor on participation of the creditor or obligor in the debtor's case, on waiver or estoppel, or on a broad construction of the discharge provisions in the debtor's plan or the order of confirmation. *See* United States v. Stribling Flying Serv., 734 F.2d 221, 223-24 (5th Cir. 1984) (rejecting arguments that creditor was barred from pursuing guarantor by the restructuring and reduction of the debt in the debtor's plan confirmed in a Chapter 11 case, by collateral estoppel, and by res judicata); Beconta, Inc. v. Schneider, 587 F. Supp. 1024 (E.D. Mich. 1984) (alteration of debtor's liability by confirmed Chapter 11 plan to 30% of allowed amount of creditors' claims held not to alter guarantor's liability); United States v. Kurtz, 525 F. Supp. 734, 741-44 (E.D. Pa. 1981) (rejecting arguments that creditor's participation in debtor's Chapter XI case worked an estoppel and accord and satisfaction with respect to a guarantor's liability for unpaid deficiencies), *aff'd per curiam*, 688 F.2d 827 (3d Cir.), *cert. denied*, 459 U.S. 991 (1982); United States v. George A. Fuller Co., 250 F. Supp. 649, 656-58 (D. Mont. 1966) (participation by creditor in debtor's Chapter XI case and general language of settlement embodied in confirmed plan held not to relieve sureties on Miller Act bond).

101. *See, e.g.*, Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982); R.I.D.C. Indus. Dev. Fund v. Snyder, 539 F.2d 487, 490 n.3 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977); United States v. George A. Fuller Co., 250 F. Supp. 649, 656 (D. Mont. 1966).

The first case, *Levy v. Cohen*,[102] arose from a collateral attack by a partnership creditor on a bankruptcy court order confirming the partnership's Chapter XII plan that had expressly released the partners from liability on the partnership debts even though the partners were not debtors in the Chapter XII case. The objecting creditor did not timely file a proof of claim and received no distribution under the plan, but he did receive notice of the meeting at which confirmation of the debtor's plan was considered.[103] Although the court's statement of the facts does not reveal whether the notice gave warning of a proposed release of the partners, the court emphasized that the objecting creditors who did not appear at the meeting had an opportunity to object to the bankruptcy court's jurisdiction to discharge the partners.[104] When the ob-

102. 19 Cal. 3d 165, 561 P.2d 252, 137 Cal. Rptr. 162, *cert. denied*, 434 U.S. 833 (1977).

103. *Id.* at 174, 561 P.2d at 258, 137 Cal. Rptr. at 168. The objecting creditor likely did not file an acceptance of the plan, but the opinion does not state whether the creditor voted on tbe plan.

104. *Id.* at 173-74, 561 P.2d at 257-58, 137 Cal. Rptr. at 167-68. In evaluating a collateral attack on an order of the bankruptcy court grounded on lack of jurisdiction, it is necessary to distinguish between jurisdiction of the subject matter and jurisdiction of the person. Under the Bankruptcy Act, a bankruptcy court clearly had jurisdiction to grant a discharge to a partner even though only the partnership was a debtor in the case. *See* Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) (Supreme Court upholding cancellation of a guaranty of an obligation of a debtor in an order confirming a plan filed by the principal debtor under § 77B). In *Stoll* the jurisdiction of the subject matter had been litigated in the bankruptcy court on a motion to vacate the order of confirmation, and the objector's motion had been denied. *Id.* at 169. Two years latcr, in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), tbe Court rejectcd a collatcral attack on a decree confirming a plan under former Chapter IX notwithstanding that the chapter had been held unconstitutional in otber litigation intervening between the entry of the challenged decree and the collateral attack. The Supreme Court ruled that tbe fact that there had been no litigation of the constitutional and jurisdictional issues in the court in which the challenged confirmation order had been entered was immatcrial; "*res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in tbe earlier proceeding, 'but also as respects any other available matter which might have been presentcd to tbat end.'" 308 U.S. at 378 (quoting Grubb v. Public Util. Comm'n, 281 U.S. 470, 479 (1930)); *see also* Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 YALE L.J. 1, 3, 7-10 (1958); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 180 (1977).

The ruling in *Levy* and tbe implications of *Stoll* and *Chicot County Drainage* were ignored in Union Carbide Corp. v. Newboles, 686 F.2d 593 (7th Cir. 1982). In *Newboles*, a creditor was allowed to enforce a corporate obligation against the corporation's president as a guarantor notwithstanding the creditor's approval of a provision in a confirmed Chapter XI plan that discharged the president as well as the corporation. *See also* R.I.D.C. Indus. Dev. Fund v. Snyder, 539 F.2d 487, 490 n.3 (5th Cir. 1976) (declaring in dicta tbat a bankruptcy court has no power to affect the obligation of a guarantor of a Chapter XI debtor's indebtedness), *cert. denied*, 429 U.S. 1095 (1977).

Whether an order of a bankruptcy judge purporting to discharge a partner in a Chapter 11 case involving only the partnership would be sustained today depends on the finality jecting creditor thereafter sought to collect the unpaid portion of his claim from the partners by suing them in state court, the bankruptcy court's order discharging the partners was held to be res judicata.[105]

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accorded orders of bankruptcy judges under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. When there has been a reference pursuant to 28 U.S.C. § 157(a), section 157(b) appears to confer jurisdiction on a bankruptcy judge to enter final orders in hearings on confirmation (D(2)(L)), objections to discharge (D(2)(J)), and proceedings to determine the dischargeability of debts (D(2)(I)). 98 Stat. at 340 (to be codified at 28 U.S.C. § 157). The language of § 157(b) does not require straining to regard an order of confirmation of a partnership plan that discharges the partners as well as the partnership from partnership debts as one entered in a core proceeding. The 1984 amendments and accompanying legislative history make sense only on the assumption that the bankruptcy court's jurisdiction and orders entered in core proceedings, including those listed in the three enumerated subparagraphs, are to be accorded the same respect as orders entered by the bankruptcy court in the exercise of summary jurisdiction under the Bankruptcy Act. The Supreme Court never explicitly faced the question whether the bankruptcy court's summary jurisdiction rested on a constitutional base. Justice Brennan observed in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 n.31 (1982), that the "adjunct functions" of the referees in bankruptcy "have never been explicitly endorsed by this Court," but, as Justice White pointed out in Katchen v. Landy, 382 U.S. 323, 328 (1966), the summary jurisdiction of the bankruptcy court under the Bankruptcy Act was largely fashioned by the Supreme Court itself. It would have ill behooved the Court that permitted and shaped the development of the bankruptcy court's summary jurisdiction over the course of 80 years to declare the institution for which it bore such responsibility to be constitutionally unsound.

The constitutionality of both the structure established by 28 U.S.C. §§ 157, 158, and 1334 as amended and the allocation of jurisdiction to the units of the structure raises new questions, and it is not at all clear that the lines drawn by the legislation enacted on July 10, 1984, have a constitutional legitimacy superior to those formulated and applied during the regime of the Bankruptcy Act. If the substance of due process is to prevail over form, however, the orders entered in core proceedings ought to be accorded no less finality and respect than those that are entered in related proceedings.

In any event, the proposition was clear under the Bankruptcy Act, as it is under the Bankruptcy Reform Act and the Bankruptcy Amendments and Federal Judgeship Act, that any creditor of the partnership who did not get notice of the proposed order to discharge the partners with an opportunity to raise timely objections would have a legitimate ground for attacking the confirmation order under the fifth amendment. His right of recovery against the partners would have been taken away without due process. *See* Note, *supra*, at 188, 210; *see also supra* notes 32-33 and accompanying text.

105. *Levy*, 19 Cal. 3d at 173, 561 P.2d at 257, 137 Cal. Rptr. at 167; *see also* Schraer v. G.A.C. Fin. Corp., 408 F.2d 891, 895 (6th Cir. 1969) (holding that a Chapter XIII plan releasing a surety on the debtor's obligation was binding on a creditor who had approved the plan); *cf.* City Loan and Sav. Co. v. Betts (*In re* Betts), 8 Bankr. 799, 801 (Bankr. S.D. Ohio 1981) (creditor barred from obtaining relief from automatic stay prescribed by § 1301 by provision in confirmed Chapter 13 plan, not objected to by creditor, that prohibited collection from a codebtor until completion of payments under the debtor's plan or until dismissal of the case). *But see In re* Neyland & McKeithen, 184 F. 144, 149-50 (S.D. Miss. 1910) (treating purported discharge of partners as surplusage when only the partnership was adjudicated—the result being to eliminate the six-year bar to a discharge in a subsequent case involving another partnership with a common partner); Curlee Clothing Co. v. Hamm, 160 Ark. 483, 486, 254 S.W. 818, 818 (1923) (disregarding as "surplusage" language in an order

The second case, *Consolidated Motor Inns v. B.V.A. Credit Corp.* (In re *Consolidated Motor Inns*),[106] required two trips to the Court of Appeals for the Fifth Circuit before a final disposition was obtained. The original order of confirmation of a Chapter XII plan had barred claims of 400 creditors of the debtor partnership against the partners and their spouses, and the distribution checks required the payees to release the debtor, the partners, and their spouses. On appeal, the district court reversed on the ground that the partners had no standing in the partnership's case to receive a discharge. An appeal from the district court judgment to the court of appeals was dismissed over the objection of the debtor to the failure of the court of appeals to vacate the judgment of the district court, and the Supreme Court denied certiorari.[107] On remand to the bankruptcy court the discharge of the partners was voided, and the district court affirmed. On second appeal, the court of appeals reversed the district court on the ground tbat its avoidance of the partners' discharge would frustrate the congressional purpose to enable partners to obtain a fresh start under Chapter XII.[108] A creditor who had not consented to the plan obtained an en banc reconsideration of this second ruling of the court of appeals. By a final vote of 12 to 2, the district court judgment was affirmed insofar as it held the confirmation inoperative to discharge claims of "nonassenting creditors" against the partners and their spouses.[109]

Although *Levy v. Cohen* was not cited or apparently even considered by the Court of Appeals for the Fifth Circuit, the final results of the two cases are entirely reconcilable: a partner may be discharged by the confirmation of a plan in a case commenced by

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confirming a composition of a partnership's debts that purported to discharge individual members of the firm from their liability for partnership and individual debts, because the order was broader than the record warranted).

106. 632 F.2d 1178 (5th Cir. 1980), *vacated on petition for en banc reconsideration*, 666 F.2d 189, *cert. denied*, 457 U.S. 1140 (1982).

107. 632 F.2d at 1180. The Supreme Court denied certiorari on the first appeal in Consolidated Motor Inns v. Alias Enter., 436 U.S. 935 (1978).

108. 632 F.2d at 1183. The court of appeals held § 5(j) of the Bankruptcy Act, requiring a partner to be separately adjudged a bankrupt in order to be discharged from partnership debts, to be inconsistent with Chapter XII and therefore rendered inapplicable in a Chapter XII case by § 402 of the Bankruptcy Act. *Id.* The court feebly distinguished the ruling to the contrary in Acme Tool, Inc. v. Flesher, 309 F.2d 636 (10th Cir. 1962), but acknowledged that it found the "general comment" in *Flesher* as to the applicability of § 5(j) in a Chapter XII case to be "unpersuasive." 632 F.2d at 1183 n.6. The court stated that it was unaware of any other case addressing the issue, *id.*, and made no reference to the *Carber House, Poland Union,* and *Levy* cases cited in *supra* notes 99 and 102.

109. 666 F.2d at 191.

or against a partnership if the plan provides for such a discharge, but the confirmation does not operate to discharge claims against the partners held by creditors who did not accept the plan and who take timely steps to preserve their rights against the partners. *Levy* indicates that withholding consent to the plan may not suffice to save the partnership creditor's rights against the partners; timely objection to confirmation in the bankruptcy court is required. The *Consolidated Motor Inns* case, on the other hand, illustrates that neither the votes of other creditors nor the power of the bankruptcy court to confirm a plan over the objections of creditors can operate to release an objecting partnership creditor's claim against a partner in a partnership case. Finally, both *Levy* and *Consolidated Motor Inns* reveal the possibility that some, but not all, partnership creditors' claims against partners may be discharged by the operation of waiver and res judicata.[110] The rulings in both cases appear to be entirely compatible with the Bankruptcy Code.

C. Chapter 13 Cases

Although a partner may be an eligible petitioner in a Chapter 13 case,[111] it is not a likely possibility. Nevertheless, a partner who can meet the requirements of section 109(3), propose a plan meeting the requirements of section 1325, obtain confirmation of his plan, and complete payments under the plan is entitled to a discharge as provided under section 1328(a) of Title 11. The discharge operates for all debts provided for under the plan,[112] including debts owed to partnership creditors, with two exceptions:

> (1) any debt becoming due after the date on which the last payment under the plan is due; and
> (2) any obligation to a spouse or child for alimony, maintenance, or

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110. The final opinion in the *Consolidated Motor Inns* case did not indicate any intent to disturb the effect of the confirmation as a discharge of the claims of the assenting creditors against the partners. 666 F.2d at 191.

111. *See* Kennedy, *supra* note 19, at 513.

112. Chapter 13 does not explicitly define what debts may be provided for in a plan. Claims that may be *allowed* in a Chapter 13 case include not only prepetition claims but also two classes of postpetition claims: (1) claims for taxes that become payable during the pendency of the case; and (2) claims for property or services necessary for the debtor's performance of the plan. 11 U.S.C. *Id.* § 1305(a) (1982). The second class of claims is subject to disallowance, however, if the claimant knew or should have known that obtaining the trustee's prior approval of the incurring of the debt was practicable, and such approval was not obtained. *Id.* § 1305(c). Debts may be deemed to be provided for in a Chapter 13 plan although no payment of the debts is required to be made by the plan. *See In re* Gregory, 705 F.2d 1118 (9th Cir. 1983).

support.[113]

Notably, only one of the exceptions to the effect of a discharge granted in a Chapter 7 case applies to the discharge granted to a Chapter 13 debtor under section 1328(a). If a debtor does not complete the payments under a confirmed Chapter 13 plan because of circumstances for which the debtor is not responsible, the debtor may nevertheless obtain a discharge under section 1328(b). Two additional requisites, however, must be satisfied: distributions under the plan must equal or exceed in value what would have been distributable to the creditors in a Chapter 7 liquidation on the effective date of the plan; and modification of the plan pursuant to section 1329 must be impracticable.

A discharge obtainable under section 1322(b), like a discharge under section 1322(a), does not affect debts that become due after the last payment under the plan is due but, unlike a discharge under section 1322(a), is subject to all the exceptions specified in section 523(a).[114] A discharge of a Chapter 13 debtor under either section 1327(a) or section 1328(b), however, does not discharge any postpetition consumer debt, even though allowed under section 1305(a)(2) as debt incurred for property or services necessary for the debtor's performance under the plan, unless prior approval by the trustee was either obtained or was impracticable to obtain.[115]

III. Dischargeability of Debts of General Partners

Section 523(a) contains a list of ten exceptions to discharge.[116] The list includes most of the exceptions set out in section 17a of

113. 11 U.S.C. § 1328(a) (1982).

114. See *infra* note 116 for the text of § 523(a).

115. 11 U.S.C. § 1328(d) (1982). Section 1305(b) and (c) apparently authorize the *allowance* of a claim for a postpetition consumer debt incurred for property or services necessary for the debter's performance under the plan although the trustee did not approve the incurring of the debt if the crediter did not know and was not chargeable with knowing that the trustee's approval was required and obtainable. Section 1328(d), however, precludes discharge of such a claim if prior approval by the trustee was nevertheless obtainable but was not obtained.

116. 11 U.S.C. § 523(a) (1982), as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 353, 364, provides:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt —

(1) for a tax or customs duty —

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) [should be "507(a)(7)"] of this title, whether or not a claim for such tax was filed or allowed:

(B) with respect to which a return, if required —

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by —

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing —

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for 'luxury goods or services' incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; 'luxury goods or services' do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit —

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraphs (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, property settlement agreement, but not to the extent that —

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act; or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, mainthe Bankruptcy Act,[117] and the case law construing section 17a

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tenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty —

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of filing of the petition;

(8) for an educational loan, made, insured, or guaranteed hy a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless —

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such deht from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) to any entity to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred hy such debtor as a result of the dehtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or the territories wherein such motor vehicle was operated and within which such liability was incurred; or

(9) [should be redesignated as "(10)"] that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

117. Following is a table of rough correspondence between the paragraphs of former § 17a and Bankruptcy Code § 523(a):

§ 17a	§ 523(a)
(1)	(1)
(2)	(2) and (6)
(3)	(3)
(4)	(4)
(5)	none
(6)	none
(7)	(5)
(8)	(6)
(9)	none
(9) (should be "(10)")	(8)

As indicated in the chart, there are no counterparts in the Code for § 17a(5), excepting certain debts or wages and commissions, and § 17a(6), excepting debts of employers arising out of bonds given by employees to secure their employment obligations. Section 523(a)(7), excepting noncompensatory fines, penalties, and forfeitures payable to or for the benefit of governmental units, and the first paragraph designated as "523(a)(9)," excepting a liability that results from driving a motor vehicle while intoxicated, are new. The second of the paragraphs designated as § 523(a)(9) is an adaptation of the second sentence of § 17b of the Bankruptcy Act.

continues to be persuasive, if not controlling, in the application of the corresponding exceptions in section 523(a) of the Bankruptcy Code. Congress included a liability resulting from operation of a motor vehicle while intoxicated as a new exception in the Bankruptcy Amendments and Federal Judgeship Act of 1984[118] and also added a presumption that certain consumer debts incurred on the eve of the entry of the order for relief are nondischargeable.[119] The scope of section 523(a) is considerably narrower than that of former section 17a, and that difference must be borne in mind in assessing the current relevance and weight of the cases decided under the Bankruptcy Act. The exceptions of section 523(a) apply to all discharges obtained by individual debtors under the Code, including partners, except discharges obtained on completion of payments under confirmed Chapter 13 plans.[120] On the other hand, section 523(a) does not apply to cases in which partnerships or corporate partners are debtors. A partnership or a corporate partner cannot obtain a discharge of any debts in a case under Chapter 7, but confirmation of a Chapter 11 plan ordinarily constitutes a comprehensive discharge of a corporate or partnership debtor undiminished by any of the exceptions of section 523(a).[121]

The application of section 523(a) in a case involving an individual partner presents few special problems.[122] Debts owed to

118. Pub. L. No. 98-353, § 371, 98 Stat. 333, 364.

119. *Id.* § 307(a)(3), 98 Stat. at 353-54.

120. An individual debtor, including a partner, may obtain a discharge under § 1328(a) from all but two classes of debts on completing payments under a Chapter 13 plan. *See supra* text accompanying note 113.

121. Confirmation of a Chapter 11 plan does not constitute a discharge of any debts if the three conditions specified in § 1141(d)(3) concur. *See supra* notes 11-14, 93-95, and accompanying text. Section 1141(d)(1) also recognizes that discharge in a Chapter 11 case may be qualified by a provision in the plan or order of confirmation. *See supra* note 26 and accompanying text.

122. Creditors unsuccessfully argued in Horner v. Hamner, 249 F. 134 (4th Cir. 1918), that the failure of a partnership to apply for and obtain a discharge in a previous bankruptcy case precluded a member of the partnership from obtaining a discharge in his subsequent bankruptcy. The Bankruptcy Code includes in § 523(a)(9) a codification of the rule that excepts from the operation of a discharge any debt that was dischargeable but was not discharged in a prior case concerning the same debtor. Although a partnership is no longer eligible for a discharge in a liquidation case, the issue presented in *Horner* could arise if a partnership failed to obtain a discharge in a prior Chapter 11 case. In such an event the *Horner* rationale remains viable and should enable the partner to obtain a discharge from the partnership debts as well as his nonpartnership debts.

In Paro v. Tetzlaff (*In re* Tetzlaff), 44 Bankr. 177 (Bankr. E.D. Wis. 1984), a copartner of a debtor/partner sought to have his claims for fraud and contribution against the debtor arising out of participation in the partnership business excepted from the debtor's discharge under § 523(a)(2) and (4). Relief was denied for failure of the complainant's evidence to partnership creditors are generally dischargeable to the same extent and in the same way as debts owed to nonpartnership creditors.[123] As under the Bankruptcy Act the partner must ordinarily schedule partnership debts properly, along with the nonpartnership debts, in order to obtain a full discharge.[124] Notwithstanding the partner's failure properly to list or schedule a debt, however, the debt may be discharged if the creditor holding the claim received notice or otherwise had knowledge of the partner's case in time to file a proof of claim and a request for determination of dischargeability.[125]

A problem analogous to one that arises more often under section 727 is presented when a creditor of a partnership seeks a determination of nondischargeability in a partner's case on the basis of a false representation respecting the partnership's financial condition.[126] The partner/debtor may contend that section 523(a)(2) does not apply because he did not obtain any money, property, or credit as a result of the representation, and because he made no representation respecting *his* financial condition. The second contention is anticipated and neutralized by explicit language in section 523(a)(2) that makes a false representation respecting an insider's financial condition as much a basis for nondischargeability as is a representation respecting the debtor's own financial condition. An "insider's financial condition" includes that of the debtor's partnership and, indeed, the financial condition of each

support his allegations.

123. *See In re* Russell, 97 F. 32 (N.D. Iowa 1899) (vacating an adjudication of a partner on his voluntary petition under the Bankruptcy Act for failure to allege his membership in a partnership and to request a discharge from partnership and individual creditors).

124. 11 U.S.C. § 523(a)(3) (1982). Section 521(1) requires the debtor to file a list of creditors and, unless tbe court orders otherwise, a schedule of liabilities. Bankruptcy Rule 1007 governs the filing of the list and the schedule. Proper listing and scbeduling require that the name and address of each creditor known to the debtor be included so that timely notice of the creditors' meeting and other needful information can be given. Altbough Rule 1007 generally requires the listing and scheduling to be accomplished within 15 days of the entry of the order for relief, extensions are authorized, and a creditor cannot complain of a delay in the listing or scheduling unless the creditor is thereby prevented from filing a timely proof of claim or request for determination of dichargeability. The creditor is allowed, by Rule 3002(c), at least 90 days after the first date set for the first meeting of creditors in which to file a proof of claim in a Chapter 7 or Chapter 13 case, but the time allowed in a Chapter 11 case is left to the discretion of the court by Rule 3003(c)(3). There is no time limit on the filing of a request for determination of the dischargeability of a claim unless the creditor seeks a determination of dischargeability under paragraph (2), (4), or (6) of § 523(a). Rule 4007(c) requires a complaint requesting such a determination to be filed ordinarily within 60 days after the first date set for the first meeting of creditors.

125. *See supra* note 124.

126. *See supra* notes 60-62 and accompanying text.

general partner of the debtor and of the relatives of each such partner.[127] The first contention is not so easily disposed of by reference to the language of the provision, but section 17a(2) of the Bankruptcy Act, the predecessor of section 523(a)(2) of the Code and which contains similar language, was uniformly construed to render a liability nondischargeable although the money, property, or credit obtained by the false representation was intended for another.[128] The same construction has been given to the similar language in section 523(a)(8).[129]

As previously noted, a partner's discharge is not ordinarily denied because of conduct of a copartner in which the debtor/partner personally was not involved.[130] When the issue is whether a copartner's conduct may render the liability of a debtor/partner on a partnership debt nondischargeable, however, a contrasting result is frequently encountered. Thus a partnership debt has been held nondischargeable with respect to all partners when money or property was obtained by the partnership by false pretenses or false representations—the fraudulent conduct of one partner being attributed to the other partners.[131] Likewise a willful and malicious conversion of property of another committed by one partner in the ordinary course of the partnership business has been held to create

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127. 11 U.S.C. § 101(25)(A) (1982).

128. *See, e.g., In re* Kunkle, 40 F.2d 563 (E.D. Mich. 1930) (section 17a(2) applied to a debtor who had obtained money on behalf of others for whom he acted as agent); McCloud v. Woods, 23 Bankr. 563 (Bankr. E.D. Tenn. 1982) (section 17a(2) applied although individual debtor obtained money for a corporation); Harris v. Pirnie, 16 Bankr. 65 (Bankr. D. Mass. 1981) (section 17a(2) applied where bankrupt obtained property for a trust of which he was trustee and the "moving force"). *But cf.* Rudstrom v. Sheridan, 122 Minn. 262, 142 N.W. 313 (1913) (objection to dischargeability denied when debtor received no property as a result of allegedly fraudulent representations).

129. *See, e.g,* First Nat'l Bank v. Mann (*In re* Mann), 40 Bankr. 496, 499 (Bankr. D. Mass. 1984) (section 523(a)(2) applied to debtor who obtained money and credit for corporation of which he was president, director, and shareholder; financial benefit to debtor sufficed to trigger applicability); Century First Nat'l Bank v. Holwerda (*In re* Holwerda), 29 Bankr. 486, 489 (Bankr. M.D. Fla. 1983) (section 523(a)(2) applied to debtor who obtained money for corporation of which he was a "principal").

130. *See supra* text accompanying notes 66-67.

131. *See* Strang v. Bradner, 114 U.S. 555, 561 (1885); *In re* Lubbers, 1 BANKR. CT. DEC. (CRR) 1293, 1295 (Bankr. W.D. Mich. 1975); A. Sam & Sons Produce Co. v. Campese, 14 A.D.2d 487, 487, 217 N.Y.S.2d 275, 277 (1961); Griffin v. Bergeda, 152 Tenn. 512, 516, 279 S.W. 385, 386 (1926). Although the Supreme Court in *Strang* noted that the innocent partners "received and appropriated the fruits of the fraudulent conduct of their associate in business," 114 U.S. at 561, the courts have generally not required a showing of ratification or acceptance of the benefits of a partner's wrongdoing in denying dischargeability from partnership debts.

a nondischargeable liability for all partners.[132]

The cases insulating nonparticipating partners from the effect of wrongful acts of their partner for the purpose of determining the right to a discharge but not for determining dischargeability are reconcilable in light of the different purposes and assumptions underlying the relevant provisions. The enumeration of grounds of objection to discharge is designed to deter acts injurious to creditors and to encourage cooperation in the administration of the estate. Denial of discharge because of the conduct of a person other than the debtor would only indirectly deter misconduct and noncooperation and could result in harsh application of the discharge provisions. The exceptions from dischargeability, on the other hand, are not designed so much to affect the conduct of the bankrupt as they are to protect certain classes of creditors from loss of their just claims even as against an honest, deserving, but financially distressed debtor. In this light the cases relieving an innocent partner from the consequences of another partner's misdeeds when seeking a discharge from all nonexcepted debts but making his nonparticipation irrelevant when a creditor seeks collection of an excepted debt can at least be rationalized.

Administrative expense claims are not dischargeable, but they are generally not enforceable against a debtor because the obligor is the estate rather than the debtor whose estate is being administered.[133] A recent state court nonetheless took the extraordinary

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132. *See* McIntyre v. Kavanaugh, 242 U.S. 138 (1916); *cf.* G.F.C. Credit Corp. v. Hankins (*In re* Hankins), 2 BANKR. CT. DEC. (CRR) 409 (Bankr. S.D. Ala. 1976) (discharged partners held not liable for conversion of collateral although each gave a security interest in the same partnership asset to different lender, because such actions were not willful and malicious).

133. *See, e.g.*, McNulta v. Lochridge, 141 U.S. 327, 332 (1891) (judgments against equity receiver payable only from the funds in his hands); *In re* Mann, 4 BANKR. CT. DEC. (CRR) 514, 515 (Bankr. S.D. Tex. 1978) (while administrative expense claimants held to be compensable only out of estate, attorney for debtor allowed to be compensated out of postpetition acquisitions of debtor for postpetition services to debtor in seeking discharge); *cf.* Bright v. Fred C. Sproul, Inc., 616 P.2d 189 (Colo. App. 1980) (action filed in state court by attorney to collect fee for services rendered to Chapter XI debtor in possession dismissed for lack of jurisdiction).

In according administrative expense priority to the claims of victims of the negligence of a Chapter XI receiver's employee, the Supreme Court cited *McNulta* with approval in Reading Co. v. Brown, 391 U.S. 471 (1968), but the Court was at pains to point out that it did not reach and did not "mean to reaffirm the implication of *McNulta* that an action against the . . . debtor after termination of the receivership would never lie under any circumstances." *Id.* at 478 n.7. A debtor was held liable for a tort inflicted during the operation of its properties by an equity receiver in Texas & Pac. Ry. Co. v. Bloom's Adm'r, 164 U.S. 636 (1897), but the circumstances were atypical. The debtor had procured or at least acquiesced in the termination of the receivership without a sale of the assets, and the restoration step of declaring the enforceability of an administrative expense claim incurred in a partnership case against the partners after the close of the case.[134] Because the partners were not debtors in the case under Title 11, the litigation was not barred by any discharge granted to the partnership. Enforced collection of administrative expense claims from any obligor other than the estate or one who has assumed the obligation, however, is not authorized by the bankruptcy law or any legal principle.[135]

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of the assets to the debtor was deemed to be subject to an assumption by the debtor of liability for valid, unpaid claims against the receiver. 164 U.S. at 639-41.

134. *See* Mt. Wheeler Power v. Gallagber, 653 P.2d 1212 (Nev. 1982). The partnership debtor had filed a Chapter XII petition under tbe Bankruptcy Act, and the case had later been converted into a straight bankruptcy case on the debtor's motion. The court held that there had been an implied assumption of an executory contract for the delivery of electricity by virtue of tbe acceptance by the debtor in possession of continued performance of the contract. *Id.* at 1214. There is less basis for such an implication under §§ 365(a) and 366 of the Bankruptey Code, however. Although assumption gives rise to administrative expense priority under the Code as under the Bankruptcy Act, there is no basis under either law for treating the administrative expense obligation as nondischargeable.

When an executory contract is assumed by the debtor in possession or by the trustee, the contract obligations to the other party become administrative expense claims entitled to first priority under § 503(b)(1) and § 597(a)(1). Assumption converts any prepetition claim arising out of the contract and therefore constituting only a general, nonpriority claim into one entitled to the highest priority against the unencumbered estate. When the case is closed, the court's order shonld provide for payment of all administrative expense claims out of funds of the estate. If tbere are insufficient funds in tbe estate to defray all administrative expenses, there is no basis in law for imposing liability on any surviving debtor, or on the owners of the debtor if it is a corporation or partnership, for any unpaid administrative expense. On the other hand, there may indeed be a contractual or equitable basis for imposing liability on a surviving debtor or its owners for the value of services or goods delivered pursuant to an assumed executcry contract. Such a rationale may have underlain the court's decision in *Mt. Wheeler Power v. Gallaher.* The bankruptcy of the partnership dissolved the partnership, hut the dissolution may have appeared to the court to have been an insufficient basis for relieving the former owners of liability for the value of services delivered to and accepted and used by the firm under tbeir management. 653 P.2d at 1214; *see also supra* notc 33.

135. *See In re* Higgins, 29 Bankr. 196, 199 n.5 (Bankr. N.D. Iowa 1983) (tax claims said to be discharged if classifiable as an administrative expense); *In re* Western Farmers Ass'n, 13 Bankr. 132 (Bankr. W.D. Wash. 1981) (administrative expense claims acknowledged to he worthless if the estate would not he sufficient to pay them). An unpaid administrative expense claimant was nonetheless held free to proceed against a discharged individual hankrupt in Birminghain Elec. Battery Co. v. Elmer's Auto Parts (*In re* Elmer's Auto Parts), 34 Bankr. 63 (Bankr. N.D. Ala. 1983). As in the *Mt. Wheeler Power* case cited in *supra* note 134, the administrative expense had been incurred by a debtor in possession during an ahorted reorganization effort. In neither case was authority cited for allowing recovery of administrative expenses from a source of payment other than the estate.

IV. Discharge of a Limited Partnership or a Limited Partner and Dischargeability of the Partnership's or the Partner's Debts

The discharge of a limited partnership and the dischargeability of debts owed by it requires considerations no different than those applicable to any other partnership or, indeed, to most other types of debtors. The discharge of a limited partner and the dischargeability of the debts of such a partner raise few special problems. The liability of such a partner for his contribution to the partnership estate is likely to be dischargeable under section 523, and the limited partner's relationship to the firm, its creditors, and his nonpartnership creditors does not seem to generate any difficulties, particular or generic. If a limited partner is a debtor, either a general partner or a relative of a general partner may be an insider of the debtor, and, in such a case, the perplexing problems presented by section 727(a)(7)[136] may arise. Thus, if a limited partner who is a debtor was guilty of any of the acts specified in section 727(a)(2), (3), (4), (5), or (6) in connection with a case concerning such an insider, the limited partner may be denied a discharge.

A limited partner is not an insider of the partnership or of any of the other partners, either general or limited, and accordingly the interpretive problems concerning section 727(a)(7) do not ordinarily arise in a case of a partnership with which the limited partner is associated or any of the partners in that partnership.

V. Conclusion

The rules governing the discharge of partnerships and partners and the dischargeability of debts owed by them are for the most part straightforward and are consonant with the rules applicable to other types of debtors. The discharge of partnership is treated in much the same way as the discharge of a corporation: an entity of neither type is discharged in a liquidation case under Chapter 7, but an entity of either type may obtain a comprehensive discharge in a case under Chapter 11.

An individual partner's ability to obtain a discharge and the dischargeability of his debts are generally governed by the same rules that apply to other individuals. The effect of a discharge of a general partner and the dischargeability of his debts are generally

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136. *See supra* notes 68-91 and accompanying text.

subject to the same rules with respect to debts owed to partnership creditors as apply to his nonpartnership debts. Perplexing interpretive problems arise under section 727(a)(7), however, when a debtor who is a partner has committed an act that constitutes a ground of objection to discharge in connection with a case concerning an insider. An insider may be the partnership of which the debtor is a member, a copartner of the debtor, or a relative of a copartner. Whether section 727(a)(7) will serve its intended purpose will depend to a considerable extent on courts' willingness to construe the provision's langnage in light of stated legislative purpose and prior judicial interpretations of even less apt language in the Bankruptcy Act.

The acts of a debtor's copartner are generally not attributed to the debtor so as to deprive the latter of the benefit of a discharge unless the debtor participated in or ratified the copartner's act. When the question is the dischargeability of a partnership debt owed by a partner, however, the courts are more prone to hold the partnership debt to be a nondischargeable obligation of each partner/debtor, notwithstanding the partner's protestations of lack of involvement in the circumstances giving rise to the nondischargeability of the debt.

Ordinarily a partner does not and cannot obtain a discharge from either a partnership or a nonpartnership debt unless an order for relief has been entered on behalf of or against the partner, even though the trustee of the partnership draws the partner's property into the estate of the partnership and administers it for the benefit of the partnership's creditors. Nonetheless, there is authority sustaining the discharge of a partner pursuant to a provision of an order confirming a partnership plan when the creditor, having notice and an opportunity to object to the discharge provision, failed to avail himself of the opportunity.

Finally, the discharge and dischargeability of limited partnerships' and limited partners' liabilities give rise to no special issues.