Partnership Bankruptcy Under the New Act

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The Bankruptcy Reform Act of 19781 (Act), which takes effect October 1, 1979, represents the most comprehensive revision of federal bankruptcy law since 1898. The product of almost a decade of governmental study, the Act both modernizes the machinery of bankruptcy administration and changes much of the substantive law of bankruptcy.2 One aspect of the Act which received relatively little attention as it moved through the legislative process was its effect on the administration of partnership bankruptcy.3

The impact of the Act in this area is all the more significant in light of the evolution of partnership bankruptcy, which has been marked by a proliferation of special statutory provisions intended to force a partnership’s bankruptcy into the mold of an individual proceeding while accommodating special needs arising from the nature of the partnership relationship.

In the Bankruptcy Act of 1898,4 Congress introduced the “entity theory” of partnership to federal bankruptcy. The 1898 Act provided for the adjudication of a partnership as an entity separate and distinct from its members and, in section 5, set forth particular rules governing the commencement, trusteeship, administration, and conclusion of pro-

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3. “Partnership bankruptcy” is used broadly in this Article to encompass both partnership proceedings and those aspects of individual proceedings attributable to the debtor’s status as a partner. This Article focuses largely on bankruptcy liquidation rather than reorganization, although much of the discussion is relevant to either type of case.
ceedings by or against a partnership. The guidance of section 5 was less than complete, however, and a variety of procedural questions arose, particularly concerning bankruptcy administration when a partnership and some of its partners were adjudicated concurrently. In 1938, Congress responded with the Chandler Act in an effort to establish a more workable system of partnership bankruptcy by adding several provisions to section 5.

The reforms of the Chandler Act in turn were criticized as incomplete, and in 1962 legislation was proposed to rewrite in even greater detail these particularized partnership rules. This legislation was not adopted, and today the administration of partnership bankruptcy is governed by at least a dozen statutory subsections.

The 1978 Act is an historic reversal of this trend of ever increasing detail. The Act contains only three brief provisions specifically directed to partnership bankruptcy. This simplification of the statute is indicative of the substantive reforms Congress has enacted to streamline partnership bankruptcy. Commencement of a proceeding will be considerably easier for partnership creditors because Congress has revised certain pleading and proof requirements which have proven unnecessarily onerous. The Act also will eliminate disputes over the dischargeability of a partnership debtor or a particular partnership debt by denying the partnership any right to discharge at all. Perhaps most importantly, the Act eliminates the heavily criticized and frequently re-

5. Note, Unaccomplished Reforms in Partnership Bankruptcy Under the Chandler Act, 49 YALE L.J. 908, 912 (1940) [hereinafter cited as Unaccomplished Reforms].
8. H.R. 10009, 87th Cong., 2d Sess., 108 CONG. REC. 1385 (1962). The bill was proposed by and introduced at the request of the National Bankruptcy Conference. See Letter from Charles A. Horsky to Hon. Emanuel Celler and enclosed Memorandum to Accompany Proposed Partnership Amendments (Jan. 25, 1962) (on file with The Hastings Law Journal) [hereinafter cited as Horsky Memorandum]. The bill was the product of several years of study and drafting by the Partnership and Drafting Committees of the Conference. See generally Rifkind, Proposed Revision of Bankruptcy Act Relating to Partnership Administration, 34 J. NAT'L A. REF. BANKR. 72 (1960) [hereinafter cited as Proposed Revision]; Rifkind, Automatic Adjudication of Partnerships Under Section 5(i) of the Bankruptcy Act, 64 COM. L.J. 321 (1959). The bill was not without its critics, even within the Conference. See Kennedy, A New Deal for Partnership Bankruptcy, 60 COLUM. L. REV. 610 (1960) [hereinafter cited as Kennedy]; MacLachlan, Partnership Bankruptcy, 65 COM. L.J. 253 (1960) [hereinafter cited as MacLachlan].
10. 1978 Act, supra note 1, §§303(b), 548(b), 723.
sisted subordination which partnership creditors suffer in the bankruptcy proceedings of partners in the firm. Significantly, each of these reforms eradicates a potential source of costly dispute and delay.

The Act, however, is not without its shortcomings. Its brevity casts considerable doubt over the selection and powers of the trustee in both partnership and partner proceedings. For example, the Act sheds no light on the prerogatives of a partnership trustee to marshal both the partnership estate and the assets of solvent and insolvent partners, currently an area of considerable uncertainty.

This Article considers the changes worked by the new Act on partnership bankruptcy, considering the effect on definitions, the bankruptcy petition, administration of estates, exemptions, distributions, and discharge provisions of current law. This analysis highlights the substantial reforms which will become effective this October and concludes that only thoughtful construction of the statute by the courts will produce an efficient and equitable system of partnership bankruptcy.

Definitions

Reflecting the entity theory of partnership introduced by the Act of 1898, current bankruptcy law treats an insolvent partnership as a "person" entitled to the protections afforded insolvent individuals.\(^{11}\) The federal statute does not define the prerequisites of a partnership, and generally the bankruptcy court looks to the state law of the domicile of a particular association to determine whether it is entitled to proceed as a partnership.\(^{12}\) In this regard, because bankruptcy courts refuse to recognize partnership by estoppel,\(^{13}\) the point is frequently

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\(^{11}\) Section 1(23) (codified at 11 U.S.C. § 1(23) (1976)). References in this Article to specific provisions of the current law are by the commonly-used Bankruptcy Act sections, with codified section numbers indicated parenthetically.

One result of the treatment of a partnership as a separate entity is that the adjudication of a partnership may proceed even though one of the partners is not subject to bankruptcy because of either a disability, such as insanity or infancy, or the applicability of the statutory exemptions for wage earners and farmers. See 1A COLLIER ON BANKRUPTCY ¶¶ 5.08-10 (14th ed. 1978).

\(^{12}\) In re 2111 Associates-Chicago, 580 F.2d 705 (4th Cir. 1978); Kaufman-Brown Potato Co. v. Long, 182 F.2d 594 (9th Cir. 1950); In re Segal, 157 F. Supp. 232 (S.D. Cal. 1957). However, occasionally the court will conclude that an organization which does not constitute a partnership under state law has enough attributes of a partnership to justify treating it as such in bankruptcy. See, e.g., Benitez v. Bank of Nova Scotia, 110 F.2d 169 (1st Cir. 1940) (Puerto Rican "Comunidad"); In re Matherly, 2 Bankr. Ct. Dec. 1091 (N.D. Ga. 1976) (joint venture); In re Bank of Crowell, 53 F.2d 682 (N.D. Tex. 1931) (banking corporation); Burkhart v. German-American Bank, 137 F. 958 (S.D. Ohio 1904) (unincorporated banking associations).

\(^{13}\) Tatum v. Acadian Prod. Corp. of Louisiana, 35 F. Supp. 40 (E.D. La. 1940); In re
made that to proceed there must be a showing of an "actual" partnership. The burden of proving the existence of and membership in an actual partnership rests with the parties commencing the action, be they the petitioning creditors in an involuntary proceeding or the petitioning partnership or partner in a voluntary action.

The new Act represents no change in this view of when a partnership exists for purposes of bankruptcy. Partnerships are included within the definition of "person" in the Act. Furthermore, the legislative history of the Act indicates a Congressional intent to work no reform in this area.

One provision of existing law not carried into the new Act is section 5(a), which provides that a partnership may be adjudged a bankrupt "during the continuation of the partnership business or after its dissolution and before the final settlement thereof." This authorization was enacted in 1898 to resolve uncertainty over whether a proceeding could be maintained against a partnership after it had been dissolved under state law, either by the act or death of a general partner, the conduct of a creditor, or for other reasons. While prior to the 1898 Act most courts had held that the partnership continued to exist for purposes of bankruptcy administration, a minority disagreed when the partnership held no assets. Section 5(a) expressly resolved

Ganaposki, 27 F. Supp. 41 (M.D. Pa. 1939); Note, Bankruptcy—Partnerships—Partnerships in Bankruptcy, 31 N.C.L. Rev. 457 (1953). The cases so holding generally do so in reliance on the principle of state law that the mere fact a purported member of a partnership holds him- or herself out as a partner does not ordinarily give rise to a partnership liability. See, e.g., Uniform Partnership Act § 16.


15. Utter v. Irvin, 132 F.2d 416 (5th Cir. 1942).


18. Section 5(a) (codified at 11 U.S.C. § 23(a) (1976)).

19. In re Gorham, 10 F. Cas. 823 (N.D. Ill. 1878) (No. 5,624); In re Noonan, 18 F. Cas. 298 (E.D. Wis. 1873) (No. 10,292); Hunt v. Pooke, 12 F. Cas. 930 (D.R.I. 1872) (No. 6,846); In re Stowers, 23 F. Cas. 209 (D. Mass. 1871) (No. 13,516); In re Williams, 30 F. Cas. 1322 (D. Mass. 1869) (No. 17,703); In re Foster, 9 F. Cas. 521 (S.D.N.Y. 1869) (No. 4,962); In re Crockett, 6 F. Cas. 836 (S.D.N.Y. 1868) (No. 3,402).

20. Hopkins v. Carpenter, 12 F. Cas. 492 (S.D.N.Y. 1878) (No. 6,868); In re Hartough,
that split by providing that proceedings could be maintained after dissolu-
tion. The new Act's elimination of this statutory directive should not be considered an invitation to revise this point of law. The near-universal adoption of the Uniform Partnership Act has solidified the common law principle that a partnership continues to exist after disso-
lution with respect to past transactions, existing assets, and accrued lia-
bilities, until such time as the winding up of partnership affairs is completed. In view of Congress' reliance on state law to govern the existence and membership of partnerships in bankruptcy, there should be no obstacle to a proceeding in bankruptcy brought by or against a partnership already dissolved but not yet wound up. A rule to the contrary would seriously cripple the utility of bankruptcy as a means of settling the liabilities of a financially embarrassed partnership.

Petition for Order for Relief

The new law significantly simplifies both the commencement of a debtor proceeding in bankruptcy and the terminology involved. Although this reform was not directed specifically at the improvement of procedures in partnership bankruptcy, it is particularly important in that context because of the difficulties imposed by existing provisions in the peculiar setting of a partnership proceeding.

Involuntary Petition by Partnership Creditors

Existing law specifies the circumstances under which creditors may commence a proceeding by filing a petition against a debtor. Generally, such a petition may be filed by three or more creditors who have

11 F. Cas. 707 (S.D.N.Y. 1870) (No. 6,164); In re Crockett, 6 F. Cas. 836 (S.D.N.Y. 1868) (No. 3,402).
24. Under current law, upon the required showing by the petitioners, a debtor, whether a partnership or any other "person" eligible for relief under the bankruptcy law, is the sub-
ject of an "adjudication" that it is a bankrupt. Sections 1(2), 18 (codified at 11 U.S.C.
§§ 1(2), 41(f) (1976)). Adjudication sets in motion the machinery for administration and li-
quidation and, in most cases, serves as an application for a discharge. Section 14(a) (codi-
fied at 11 U.S.C. § 32(a) (1976)). Under the new Act, the concept of adjudication has been replaced by an "order for relief," 1978 Act, supra note 1, §§ 301, 303, a term deemed more suit-
able and less pejorative because of the availability of voluntary bankruptcy proceedings.
S. REP. NO. 95-989, supra note 17, at 31.
noncontingent, provable claims in excess of a specified minimum amount. If, however, there is a total of less than twelve creditors, the petition may be filed by any creditor or creditors having a claim in excess of the minimum amount.25 There is no existing provision differentiating partnership creditors' rights from those of other creditors in this respect. The new Act generally retains these requirements, although it raises the dollar amount prerequisite from $500 to $5,000 and permits an involuntary reorganization proceeding under certain circumstances in which the proceedings were not available previously.26

Under current law, a petition by partnership creditors, like any other involuntary petition, must allege that the debtor committed one or more of six enumerated acts of bankruptcy.27 Ostensibly justified as a measure of protection for debtors against oppression by creditors, this pleading and proof requirement has been the subject of considerable criticism.28 The requirement has proven particularly troublesome in partnership bankruptcy because it raises subtle questions of fact susceptible of time consuming dispute. Moreover, consistent with the treatment of a partnership as a separate entity for purposes of filing and adjudication, the alleged act of bankruptcy must have been committed by the partnership, with respect to partnership assets.29 This judicial requirement has triggered frequent dispute about whether the misconduct of one partner can be attributed to the partnership.30 These disputes have been exacerbated by uncertainty in state law governing the authority of a partner to engage in creditor-defeating conduct without committing an act of bankruptcy.31

25. Section 59 (codified at 11 U.S.C. § 95(b) (1976)).
26. See 1978 Act, supra note 1, § 303; S. REP. No. 95-989, supra note 17, at 33.
27. Section 3 (codified at 11 U.S.C. § 21(a) (1976)).
30. This dispute is seen in several areas of partnership bankruptcy. For example, the issue resurfaces with respect to bars to and exceptions from discharge. See text accompanying notes 203-06 infra.
31. An act of bankruptcy need not be committed by all the partners to be the act of the partnership. In re Forbes, 128 F. 137 (D. Mass. 1904). Generally, if an act of any partner is within the scope of that partner's acting authority, and relates to partnership assets, it will constitute an act of the partnership. 1A COLLIER ON BANKRUPTCY ¶ 5.05, at 696 (14th ed. 1978). Uncertainty in state law governing the authority of a partner to evade creditor's claims without committing an act of bankruptcy on the part of the partnership has led some courts to refuse to place a partnership in bankruptcy by reason of the act of one member unless all partners either consented to or were aware of the misconduct. Donadio v. Robet-
The 1978 Act abolishes the acts of bankruptcy. If the creditors' petition is controverted by an alleged bankrupt partnership, an order for relief is available upon a demonstration at trial that the debtor was insolvent or that within 120 days prior to the filing of the petition a custodian was appointed or was in possession of substantially all the partnership property. Thus, the Act eliminates the need for review of the past deeds of partners and the capacity in which they acted, thereby simplifying the preliminary proceedings.

The acts of bankruptcy enumerated in current law either expressly or impliedly embrace a concept of insolvency, and an analysis of whether the debtor is or was insolvent almost invariably is triggered by the act of bankruptcy allegation. Current law utilizes a balance sheet definition of insolvency: a person is deemed insolvent when the aggregate of that person's property, exclusive of those assets fraudulently concealed or conveyed, is, at fair valuation, insufficient to meet existing debts.

In partnership bankruptcies, the application of this concept of insolvency has been difficult. A principal concern has been whether part-
ners' individual properties should be considered in determining partnership insolvency. In the absence of a general statutory directive, the rule has evolved that a court must consider not only partnership assets and liabilities but also the assets of each individual partner, if any, in excess of personal liabilities. The premise of this approach is that the partners' obligations to contribute capital sufficient to enable the partnership to discharge its own liabilities should be considered a partnership "asset." In the words of the United States Supreme Court, "ordinarily it would be impossible that a firm should be insolvent while the members of it remain able to pay its debts with money available for that end."

Given this ultimate liability of partners, the only realistic and practical alternative is to evaluate their solvencies before determining whether to engage the machinery of bankruptcy administration.

Criticism of this rule has been raised on both theoretical and pragmatic grounds. In the years immediately following the Act of 1898, a minority of courts condemned the approach as conceptually incompatible with the separate entity principles which the new law embraced. This objection soon gave way to more practical criticisms that such an approach was both an undue burden and a trap for the unwary. First, while a petitioner clearly must prove the insolvency of the partners to establish a partnership insolvency, whether such insolvency must be pleaded was, and is, uncertain. Some courts view such a pleading as desirable but not necessary, at least one decision considers such a pleading a jurisdictional prerequisite. A second criticism was that the administrative burden of identifying and evaluating the assets and liabilities of every partner in a firm can be substantial and even insurmountable, particularly when the assets of uncooperative partners are

35. A statutory definition of partnership insolvency only for purposes of invalidating fraudulent conveyances is provided in § 67(d)(1) (codified at 11 U.S.C. § 107(d)(1) (1976)). It utilizes the majority rule described in the text.
36. Kaufman-Brown Potato Co. v. Long, 182 F.2d 594, 601-02 (9th Cir. 1950); Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943); In re Segal, 157 F. Supp. 232 (S.D. Cal. 1957).
38. See, e.g., Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943); Kennedy, supra note 8, at 613-14.
located outside of this country. Finally, critics argued, the rule that a partner’s exempt assets be considered in the aggregate analysis of partnership insolvency is illogical because the bankruptcy court could not compel the contribution of such assets to the partnership trustee.

Persuaded by such criticisms, the National Bankruptcy Conference in 1961 condemned this rule of partnership insolvency as an “onerous burden on partnership creditors, or one of the partners, seeking an adjudication.” The Conference proposed an amendment to the law specifying that partnership insolvency should be determined solely by reference to partnership assets and liabilities. This proposal in turn drew criticism that such an amendment would precipitate premature and unnecessary proceedings against partnerships whose partners had sufficient creditworthiness or which otherwise should not be subject to administration. Ultimately, the proposal was shelved. Thus, the required showing of partnership insolvency has remained an uncertain, yet substantial and potentially insurmountable burden for partnership creditors.

In the 1978 Act, Congress has cured the shortcomings of the present concept of partnership insolvency. Although the Act codifies the existing concept as the definition of “partnership insolvency,” the requirement of proof of partnership insolvency prior to the entry of an order for relief has been eliminated. The only prerequisite to such an order is a showing by the petitioning creditors that the partnership “is generally not paying such debtor’s debts as such debts become due.” This is the “equitable test” of insolvency which had been federal law prior to the Act of 1898 and which is the law today under state proceedings. The adoption of the equitable test eliminates the burden of locating and evaluating partners’ assets and liabilities, the incongruous treatment of exempt partner assets, and all uncertainties about pleading with respect to partner solvency. Yet, perhaps unlike the reform proposed in 1961, the new test is consistent with realities of the credit mar-

42. Horsky Memorandum, supra note 8, at 2-3.
43. See, e.g., McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 U. CHI. L. REV. 369, 370 (1937).
44. Horsky Memorandum, supra note 8, at 2.
45. See, e.g., Kennedy, supra note 8, at 615; MacLachlan, supra note 8, at 257.
46. 1978 Act, supra note 1, § 101(26)(B). The current rule is modified in one respect, in that the partner’s exempt individual assets are now excluded from consideration in determining the surplus of individual assets over liabilities. S. REP. No. 95-989, supra note 17, at 25; H.R. REP. No. 95-595, supra note 17, at 312.
47. 1978 Act, supra note 1, § 303(h)(1). Relief is also available upon a showing that a custodian was appointed or took possession of substantially all the debtor’s assets within 120 days prior to the filing of the petition. Id. § 303(h)(2).
ketplace. In the case of an asset-poor partnership which has been loaneled funds in reliance on partner assets, the creditors of the partnership justifiably have cause for concern when the partner assets are not tendered directly or indirectly in satisfaction of partnership debts. Under the new Act, however, the asset-poor partnership whose partners act responsibly in light of their ultimate partnership liabilities is protected from bankruptcy administration.

Petitions by Partners

Under current law a partnership may seek a voluntary adjudication by a petition filed by all the general partners on behalf of the partnership.48 Such a petition is treated as any other voluntary petition and leads to an automatic adjudication. In addition, a petition seeking an adjudication may be filed on behalf of the partnership by fewer than all general partners. While similar to a voluntary petition in that the filing partners need not plead and prove an act of bankruptcy by the partnership, such a petition must allege partnership insolvency.49 Such a petition must be served upon, and may be opposed by, the nonfiling partners,50 who may advance any defense that normally would be available to a debtor opposing a petition by creditors.51 Additionally, certain defenses peculiar to the partnership exist. The nonfiling partners may deny existence of a partnership,52 deny either partnership or partner insolvency,53 or deny the filing partners' authority under either state law or the governing partnership agreement to file a petition in bankruptcy.54

Although praiseworthy for its pragmatism, the current law governing partnership petitions is in at least one respect too narrow. A trustee conceivably may discover in the course of an individual proceeding the debtor's participation in a partnership, which could be a source of creditor comfort either by furnishing assets in satisfaction of

49. Section 5(b) (codified at 11 U.S.C. § 23(b) (1976)).
52. See, e.g., Brandt & Brandt Printers v. Klein, 220 F.2d 935 (2d Cir. 1955); Kaufman-Brown Potato Co. v. Long, 182 F.2d 594 (9th Cir. 1950); Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943); In re Segal, 157 F. Supp. 232 (S.D. Cal. 1957).
53. Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943).
the debtor's interest or by the payment of obligations previously believed to be the separate debts of the bankrupt. Although the trustee has statutory authority to administer the assets of the newly-discovered partnership upon the consent of the other partners, the trustee essentially is powerless in the face of opposition by those partners. Although the bankruptcy court has jurisdiction over the partnership if a petition seeking adjudication of the partnership is on file, the trustee of an individual partner, who neither represents the creditors of the partnership nor is authorized to file as a general partner on behalf of the partnership, cannot file such a petition. The absence of broader statutory authorization arguably has been the cause of fragmentation and duplication in bankruptcy administration.

The 1978 Act generally retains the substance of current law in this regard. Unlike current law, however, there is no provision expressly authorizing general partners to file a petition on behalf of their partnership; the Act simply provides that voluntary petitions can be filed by the debtor. Ordinarily, a partnership may act through less than all of its general partners, but the Act expressly classifies any petition filed on behalf of a partnership by fewer than all its general partners as an "involuntary case." The import is that a partnership can commence a voluntary proceeding only by the petition of all its general partners.

A suit commenced by less than all the general partners is treated much like any other involuntary proceeding under the new law. The filing partners are treated as creditors for purposes of various provisions incident to filing, such as statutory liability for a wrongfully filed petition and the requirement of an indemnity bond. The Act authorizes nonjoining general partners to file an answer in opposition and allows a trial on all defenses raised in opposition. Thus, the Act retains the basic contours of the adversary process when a partnership proceeding is commenced by less than all partners.

In addition, the 1978 Act authorizes the trustee of a general partner undergoing an individual proceeding to file an involuntary petition

55. Section 5(i) (codified at 11 U.S.C. § 23(i) (1976)).
57. 1978 Act, supra note 1, § 301.
58. Id. § 303(b)(3)(A).
59. S. REP. No. 95-989, supra note 17, at 33.
60. 1978 Act, supra note 1, § 303(i)(2).
61. Id. § 303(e).
62. Id. § 303(d).
63. Id. § 303(h).
for the partnership if all of the general partners are in bankruptcy. Because of the absence of broader authorization for the partner trustee, in all likelihood bankruptcy courts will continue to be ill-equipped to handle promptly and effectively those situations involving a "newly discovered" partnership.

Partnership Petition When Partners Are Adjudicated

Existing law directs that when all general partners are adjudged bankrupt, the partnership also will be adjudged bankrupt. Such an adjudication is available upon a petition by "any party in interest"; opposition to the petition is not authorized under current law. Thus, the formality of adjudicating the bankruptcy of a partnership when all the partners have been adjudicated bankrupt will be undertaken only if it is of some value to a party in interest.

The new Act retains this approach, expressly authorizing a petition against a partnership by any general partner, trustee, or creditor of the partnership after all the partners are in proceedings. Although a non-filing general partner is authorized to file an answer to such a petition, absent a denial of the existence of a partnership it is difficult to imagine what defense might be raised under such circumstances.

Administration of the Estate

Selection of the Trustee

Existing law provides for creditors to meet after an adjudication of a debtor and appoint a trustee to perform a variety of duties leading to the ultimate liquidation of the estate. This procedure also applies to partnership proceedings. The law directs that the trustee of an adjudicated partnership serve both in that capacity and as the trustee of the individual estate of any general partner which is also being administered, unless the partner's individual creditors show cause for appointment of a separate trustee. This statutory authorization of a separate

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64. Id. § 303(b)(3)(B).
65. Section 5(i) (codified at 11 U.S.C. § 23(i) (1976)).
66. FED. R. BANKR. P. 105(d).
68. 1978 Act, supra note 1, § 303(b)(3)(B).
69. Id. § 303(d).
70. Sections 44, 45 (codified at 11 U.S.C. §§ 72(a), 73 (1976)).
trustee for individual estates was added by the Chandler Act in 1938 to resolve judicial uncertainty about the court’s prerogatives. By that time, courts had recognized that, while administrative convenience ordinarily justified the appointment of a single trustee, a conflict could arise between a trustee’s responsibilities to the partnership estate and to the estates of individual partners. Such conflicts arose, for example, when the partnership appeared to have a significant claim against a partner or when a partner was bound contractually to indemnify a third party against claims asserted by the partnership. Although many courts prior to 1938 concluded that in such instances they had implicit authority to appoint a separate trustee, at least one court declined to do so for want of express statutory authorization.

The new Act discards this specific authorization, returning uncertainty to this area. Partnership creditors will no longer control the selection of the partner’s trustee, and thus a greater frequency of multiple trustees in joint proceedings may result. Absent a conflict of interest, the election of multiple trustees would appear to be wasteful. The new Act’s elimination of judicial scrutiny of the trustee selection process is, in this respect, unfortunate. On the other hand, if a single trustee is used and a true conflict of interest does arise, the court can exercise authority under the new Act to remove the trustee from the administration of one estate or the other. If necessary, the court arguably could go a step further and appoint a separate trustee for the estate of the individual partner, invoking its general authority to issue appropriate orders to carry out the provisions of the Act.

Administration by the Partnership Trustee

The rights and responsibilities of the trustee of an adjudicated partnership have been the subject of much discussion, particularly as they bear upon the assets of partners. In the case of adjudicated partners, for whom the partnership trustee ordinarily is serving as trustee,

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73. See, e.g., In re Coe, 154 F. 162 (S.D.N.Y. 1907).
75. See, e.g., In re Wood, 248 F. 246 (6th Cir. 1918); In re Currie, 197 F. 1012 (E.D. Mich. 1910); In re Beck, 110 F. 140 (D. Mass. 1901).
77. 1978 Act, supra note 1, § 702. Of course, where partnership creditors have filed a majority of the claims against an individual debtor, they will in fact control the election of the individual trustee.
78. Id. § 324.
79. Id. § 105(a); See S. Rep. No. 95-989, supra note 17, at 92; H.R. Rep. No. 95-595, supra note 17, at 198.
current law offers fairly clear guidance. The trustee must keep separate accounts of partnership and partner assets and expenses, marshal the assets of each estate, and, after claims are received, apply the net proceeds of partnership assets for the satisfaction of partnership debts while applying the net proceeds of partner assets for the satisfaction of the separate debts of the partner.  

The rights and duties of the trustee with respect to assets of partners not then adjudicated are a matter of much greater uncertainty. The present statute does not address the subject explicitly, and developments in this area have been more judicial policymaking than statutory construction. The landmark case was *Francis v. McNeal*, in which the Supreme Court sustained an order of the bankruptcy court requiring a nonadjudicated, although insolvent, partner to turn over individual assets for administration by the partnership trustee. From this and similar cases emerged the doctrine that, in appropriate circumstances, a partnership trustee may administer the personal estates of nonadjudicated partners in the course of a partnership bankruptcy even when such a partner personally has not committed any act of bankruptcy, may be statutorily exempt from proceedings in bankruptcy, and will not obtain a discharge at the conclusion of the administration.  

The premise of these powers is the fundamental precept of "liability *in solido": each partner is jointly and severally liable for partnership obligations remaining unsatisfied after the application of partnership assets. The current bankruptcy statute expressly directs that the surplus separate property of each partner is to be applied to any such deficiency. Further, the partnership trustee is entitled to that surplus, considered a partnership asset, regardless of whether the partners are in bankruptcy, are solvent or insolvent, or are acquiescent or truculent toward the trustee. The courts have found this authorization to administer the estate of a nonadjudicated bankrupt implicit in the partnership trustee's duty to collect the surplus.

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80. Sections 5(e)-5(h) (codified at 11 U.S.C. §§ 23(e)-23(h) (1976)). Any proceeds remaining in either estate are applied to the creditors of the other. See text accompanying notes 135-36 infra.  
81. 228 U.S. 695 (1913).  
84. Section 5(g) (codified at 11 U.S.C. § 23(g) (1976)).  
85. Kennedy, *supra* note 8, at 625.  
86. See, e.g., *In re Ira Haupt & Co.*, 240 F. Supp. 369 (S.D.N.Y. 1965). Since limited partners do not face liability *in solido*, one court quite properly concluded that the trustee of
Although one might challenge the logic of this reasoning, most critics instead have lamented the myriad uncertainties involved in an administration of separate property by the partnership trustee. Trustees routinely have required that the nonadjudicated partner file a schedule of assets and liabilities. The authority of the trustee in this regard is now provided by rule. In appropriate situations, a trustee can secure the issuance of a turnover order directed at a portion or all of the separate estate although a court may first require a showing by the trustee that the partnership assets are in fact insufficient to meet partnership liabilities.

Whether the trustee must secure such an order regarding the entire separate estate is unclear. One court has indicated that the nonadjudicated partner remains free to encumber or dispose of his or her estate until the partnership trustee either obtains title thereto under a court order or takes possession of the assets. The contours of the trustee's existing duties with respect to separate assets, however, remain ill-defined. There are neither simple procedures by which the trustee can determine the value of the surplus of such assets nor criteria for the selection of assets to be liquidated and applied to the partnership deficiency. While most authorities agree that separate assets seized but

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88. See, e.g., Kennedy, supra note 8, at 626; MacLachlan, supra note 8; Note, Partnership Bankruptcy Under the Chandler Act, 87 U. Pa. L. Rev. 105 (1940); Unaccomplished Reforms, supra note 5, at 923-24.
92. In re Petroleum Corp. of America, 417 F.2d 929 (8th Cir. 1969).
95. One issue of recent controversy is the power of a bankruptcy court, at the request of the partnership trustee, to enjoin enforcement of liens on the assets of nonadjudicated partners. The Supreme Court's opinion in Liberty National Bank v. Bear, 276 U.S. 215 (1928), contains broad language to the effect that liensors and creditors of separate partners cannot be affected by a partnership proceeding. Subsequent lower court decisions have narrowed this principle, concluding that while courts cannot interfere with the efforts of a creditor to
not so applied should be returned to the partner rather than individual creditors, even this is not entirely free from doubt.\(^9\) Finally, there is considerable uncertainty about the manner in which the trustee and the court should respond if an individual proceeding by or against the partner commences after the partnership proceeding is well underway.

The lack of clear statutory authority for such trustee prerogatives, uncertainty as to their limits, and a sense of the unfairness of subjecting a nonadjudicated partner to the burdens of bankruptcy administration have engendered considerable criticism of this expanded authority of the partnership trustee. In 1962, the National Bankruptcy Conference proposed that section 5(d) of the current bankruptcy law be amended to provide a more formal and precise procedure. That proposal, although not enacted, would have allowed the bankruptcy court entertaining a partnership proceeding, upon proper notice and hearing, to determine the amount of deficiency of partnership assets and render a judgment in the amount of such deficiency against each of the general partners in favor of the trustee. The proposal also would have allowed the court to enter an order fixing an amount of security for payment of that deficiency.\(^9\)

Now, more than sixteen years later, Congress has adopted an approach strikingly similar to that proposal. Under the new Act, each general partner in a debtor partnership will be liable to the partnership trustee for any deficiency in partnership assets.\(^9\) The Act also directs secure an \textit{in personam} judgment against the nonadjudicated partner, it may enjoin attempts to satisfy that judgment by levy of execution or foreclosure. See, e.g., First Nat'l Bank of Herkimer v. Polan Union, 109 F.2d 54 (2d Cir. 1940). Accordingly, two partnership trustees recently have sought and secured injunctions against the foreclosure of liens on the separate assets or legal title of a nonadjudicated general partner. In re Elemar Assocs., 3 Bankr. Ct. Dec. 1151 (N.D. Ga. 1976). This development, largely justified as necessary to preserve the surplus in an individual's estate, is another instance of extending partnership trustee powers beyond those suggested by a strict entity theory of partnership.

\(^96\) Unaccomplished Reforms, supra note 5, at 923 n.117.

\(^97\) H.R. 10009, 87th Cong., 2d Sess., 108 CONG. REC. 1385 (1962). See note 8 supra. The Conference considered a proposal, but did not recommend, that the bankruptcy court have jurisdiction to enter an order vesting title to all the property of nonadjudicated general partners, save for exempt assets, in the partnership trustee. As to such property, following vesting the trustee would enjoy all the rights of a "perfected lien creditor" under §§ 67 and 70 (codified at 11 U.S.C. §§ 107, 110 (1976)). See Rifkind, \textit{Proposed Revision of Bankruptcy Act Relating to Partnership Administration}, 34 J. NAT'L A. REF. BANKR. 72 (1960). That approach has been more than once advocated by commentators critical of the current uncertainties in this field. See, e.g., Unaccomplished Reforms, supra note 5.

\(^98\) 1978 Act, supra note 1, § 723(a). Section 723 provides in full:

"(a) If there is a deficiency of property of the estate to pay in full all claims allowed in a case under this title concerning a partnership, then each general partner in such partnership is liable to the trustee for the full amount of such deficiency."
the trustee to first seek recovery of the deficiency from nonadjudicated
general partners.99 In addition, even prior to determining the extent of
the deficiency, the trustee may seek from the court an order directing
that security be posted by a nonadjudicated general partner to ensure
that there is no dissipation of that partner's separate property.100

Lurking behind this reform, however, remains the question of
whether the partnership trustee continues to enjoy prerogatives to col-
lect, evaluate, preserve, liquidate, and otherwise manage the separate
estates of the nonadjudicated partners. As noted above,101 these pre-
rogatives were not strictly dependent on particular statutory language,
and thus the elimination of almost all of section 5 is not necessarily
determinative.

Circumstances surrounding this reform suggest that the trustee
should not continue to have such powers. First, the partnership is
given an express statutory cause of action for the amount of any defi-
ciency. The legislative history of this provision reveals the congres-
sional intent to create a right of action which is not self-executing, but
which the partnership trustee must initiate to enforce, presumably in a
judicial forum.102 Second, the revision is conceptually, if not linguisti-

99. Id. § 723(b).
100. Id.
101. See text accompanying notes 81-86 supra.
102. H.R. Rep. No. 95-595, supra note 17, at 200. Actually the partnership trustee may
have several causes of action against the nonadjudicated partner, and, as noted in the legis-
lative history, they are not entirely congruous. Section 723(a) provides a cause of action
against nonadjudicated partners for any deficiency in payment of all claims allowed. In
contrast, the trustee has a cause of action under § 723(c) against adjudicated partners for the
cally, strikingly similar to the National Bankruptcy Conference proposal, which was, in a real sense, a recommendation to retract the partnership trustee's authority to roam.103

Despite this analysis, in light of the broad discretion of the court under the new Act,104 partnership trustees probably will continue to seek a variety of managerial orders regarding the estates of nonadjudicated partners. The rules will continue to require the filing of a schedule of assets and liabilities,105 which arguably is necessary to determine whether security for a deficiency is required.106 In some circumstances, particularly after the rendition of a judgment against the partner, a court may grant the trustee's request for a turnover order, although it is doubtful that one should ever apply to the assets of an exempt partner. Finally, the legislative history of the Act suggests that the court's authority to enjoin a partner's creditor from levying on the separate property of the partner is continued.107

Administration of Partnership Estate by Partner Trustee

A mirror image of the foregoing issues appears when a general

“full amount of all claims of creditors allowed.” The Act directs that the trustee shall seek recovery of the deficiency first from nonadjudicated general partners, and apparently the trustee has complete prosecutorial discretion if there is more than one partner against whom he or she might proceed. In turn, however, the nonadjudicated partner who contributes more than a proportionate share of assets, based on his or her interest in partnership profits, in satisfaction of a partnership deficiency would probably have a claim against those not contributing their fair share. See Glasswell v. Prentiss, 175 Cal. App. 2d 599, 346 P.2d 895 (1959); Uniform Partnership Act § 40(f).

Generally the partnership trustee also has a cause of action under state law against nonadjudicated partners for contribution in the event of any deficiency in assets. Uniform Partnership Act § 40. This cause is a part of the partnership estate and may be asserted by the trustee. 1978 Act, supra note 1, § 541(a); H.R. Rep. No. 95-595, supra note 17, at 200. However, such matters can be subject to an agreement between the partners limiting the liability of a particular partner, and among them and their successors such agreements are effective. See, e.g., Roberts v. Roberts, 118 Colo. 524, 198 P.2d 453 (1948).

103. As noted above, the Conference originally considered a statutory amendment providing for a court order vesting in the trustee title to the entire separate estate of each nonadjudicated partner and giving him or her perfected lien rights in such assets. See note 97 supra. This suggestion was condemned as unnecessarily increasing the unilateral intrusion of the trustee into the affairs of potentially solvent partners, and as aggravating the uncertainties as to practice and procedure attendant to this form of aggregate asset administration. See, e.g., MacLachlan, supra note 8, at 258; Kennedy, supra note 8, at 633. In the face of such criticisms, the provision was dropped from the Conference's final proposal in favor of an approach considered more certain and less intrusive.

104. 1978 Act, supra note 1, § 105.
106. See note 99 supra.
partner is adjudicated while the partnership in which he or she has an interest is not: What are the rights of the partner's trustee with respect to partnership property?

There is considerably greater statutory guidance to answer this question. Current law provides:

In the event of one or more but not all of the general partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt.108

Ordinarily, the bankruptcy of a general partner dissolves the partnership and initiates the process of winding up its affairs.109 The bankruptcy law reflects the congressional judgment that in most cases winding up the affairs of the partnership outside the bankruptcy process will be more convenient and productive for all concerned. Based on this rationale several courts have held that a bankruptcy court has no jurisdiction to administer partnership assets under such circumstances absent the consent of all nonadjudicated partners.110 Further, the only right of the partner's trustee is to demand settlement of the partner's interest in the partnership,111 to which the trustee succeeded upon the filing of the petition.112 Despite such holdings, not only do partner trustees continue to influence the management of partnership assets, but there is authority for the proposition that a trustee may seek and secure from the bankruptcy court an order enjoining foreclosure upon or disposition of partnership assets.113 Such control of the partnership estate is justified as necessary to the performance of the trustee's duty to protect and preserve the partner's interest in the partnership. Other courts, however, have found the granting of such relief inconsistent with the restriction on jurisdiction imposed by section 5(i) and have denied the trustee even this measure of control.114

108. Section 5(i) (codified at 11 U.S.C. § 23(i) (1976)).
109. Uniform Partnership Act § 31(5).
111. Turner v. Central Nat'l Bank of Mattson, 468 F.2d 590 (7th Cir. 1972); In re Dixon, 1 Bankr. Ct. Dec. 1648 (S.D. Ohio 1975). This rule differs from state law, which generally entitles every partner, including successors in interest, to participate in the winding up of the partnership affairs. Uniform Partnership Act § 37.
112. Kerry v. Schneider, 239 F.2d 896 (9th Cir. 1957).
114. Hammerman v. Arlington Fed. Sav. & Loan Ass'n, 385 F.2d 835 (4th Cir. 1967);
The 1978 Act defines the partner's estate to include his or her interest in a partnership, but contains no provision comparable to section 5(i). The implications of the elimination of that section remain unclear. In the absence of an express prohibition against administration of the partnership estate, courts may enjoin more readily the foreclosure or disposition of such assets, or possibly grant other forms of relief amounting to trustee interference in partnership affairs. Conceivably, the full panoply of filings, turnovers, and the like seen in the partnership proceeding may occur in a partner proceeding, although the justification for such administrative practices against a nonadjudicated person in this instance is weaker. In light of this prospect of increased interference in and supervision of partnership affairs by the partner trustee, the alternative of consensual administration in the bankruptcy court may seem less forbidding to the solvent partners.

Ironically, the express authorization for consensual administration has been eliminated by the new Act. The source of authority for the trustee and court to undertake such management is consequently quite uncertain. A number of cases have intimated that the jurisdiction or power of the court and trustee to administer the partnership estate would not exist but for the specific language of section 5(i) and the consent of the nonadjudicated partners. Hopefully, where welcomed by the partners out of bankruptcy, such consensual administrations will be continued in the absence of a specific statutory reference.

Exemptions

Current bankruptcy law embraces bankruptcy exemptions from creditor claims created by state law as well as the few exemptions created by other federal law. With respect to partners and partnerships, state laws are not particularly generous. Apparently no state recognizes a partnership as a separate judicial entity entitled to the benefit of an exemption or homestead. While partners who are natural persons usually may avail themselves of such laws, only a very few states, fol-


115. In In re Dixon, 1 Bankr. Ct. Dec. 1648 (S.D. Ohio 1975), the court felt itself bound to deny the petition of a partner trustee for an order invalidating the transfer of partnership property to a relative of the general partners in satisfaction of an antecedent debt. The court reasoned that it was prohibited from granting such relief by the presence of § 5(i), which it termed a "horse and buggy jurisdictional requirement." Id. at 1649.

116. See note 110 supra.

117. Section 6 (codified at 11 U.S.C. § 24 (1976)).

118. D. Cowan, Bankruptcy Law & Practice § 726 (2d ed. 1978).
ollowing what might be characterized as a "pure" aggregate theory, permit individual partners to shield partnership assets with their individual exemptions. As a result, a powerful incentive exists for partners to transfer partnership assets to their individual accounts prior to an anticipated insolvency. In turn, the prevalence of such transfers led to the enactment of a special provision condemning as fraud on partnership creditors all such transfers within one year of the partnership insolvency. Any asset subject to such recovery in a partnership proceeding probably cannot be claimed as exempt in a partner's individual proceeding.

The new Act represents a significant reform with respect to exemptions, making available a set of federal bankruptcy exemptions as an alternative to state law exemptions. The Act has very few implications for partnership and partner proceedings, however, as only "individual debtors" are entitled to the alternate federal exemptions—apparently evidencing a congressional intent to make the exemptions unavailable to partnerships. Furthermore, partners are not necessarily favored more under the federal exemptions than under current state law because the federal exemptions may be applied only to assets that would otherwise be in the debtor's estate. Thus, a partner cannot shield partnership assets under either the new federal or current state exemptions.

**Trustee Avoidance Powers**

A fundamental premise of the bankruptcy law is that similarly situated creditors should receive proportionately equal benefit from the debtor's estate irrespective of individual collection efforts during, or immediately preceding, the onset of formal bankruptcy. Accordingly, the trustee in bankruptcy is given powers to invalidate certain transactions occurring prior to bankruptcy which would have the effect of distorting an otherwise proportionate distribution. Perhaps most

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119. Texas, for example. See Phillips v. C. Palomo & Sons, 270 F.2d 791 (5th Cir. 1959). In most states the Uniform Partnership Act bars partners from claiming homestead or other exemptions in partnership property. Uniform Partnership Act § 25(2)(c).

120. See, e.g., In re Reese, 223 F. Supp. 626 (N.D. Cal. 1963).


122. Section 6 (codified at 11 U.S.C. § 24 (1976)) is not directly applicable, and no case squarely on point has been found. See generally 1A Collier on Bankruptcy ¶ 6.11[2] (14th ed. 1978).

123. 1978 Act, supra note 1, § 522.

124. Id. § 522(b).
important among these are the power to nullify certain transactions in which a legitimate creditor's position was improved by receiving payment or security in the debtor's assets (a "preference")\(^{125}\) and the power to invalidate gifts and transfers intended to hinder, delay or defraud creditors ("fraudulent conveyances").\(^{126}\)

Preferences

Any transfer within four months prior to the filing of the debtor's petition of the debtor's property to, or for the benefit of, a creditor for an existing debt occurring while the debtor is insolvent is deemed a preference if its effect is to enable the recipient to receive satisfaction of a greater percentage of the debt than similarly situated creditors will receive in the proceeding.\(^{127}\) A preference may be avoided by the trustee if either the creditor or the creditor's agent had, at the time of the transfer, reasonable cause to believe the debtor was insolvent.\(^{128}\) In the partnership setting, a transfer by a debtor partner to a separate creditor is potentially voidable, as is a transfer by a partnership to a partnership creditor.\(^{129}\) In addition, under the line of cases exemplified by *Mills v. J.H. Fisher & Co.*,\(^{130}\) a transfer by a debtor partner to a creditor of the partnership is also voidable by the partner's trustee because a partnership creditor is also the creditor of the individual partner, and the transfer impermissibly favors one individual creditor over others.

Authority also exists for the obverse rule: a transfer by a partnership of partnership assets to an individual creditor constitutes a preference voidable by the partnership trustee.\(^{131}\) The cases so holding, however, fail to persuasively justify this conclusion which seems to have been adopted simply because of its superficial symmetry to the *Mills* rule. Such a conclusion is not appropriate as it is doubtful

\(^{125}\) Section 60 (codified at 11 U.S.C. § 96 (1976)).

\(^{126}\) Section 67(d) (codified at 11 U.S.C. § 107(d) (1976)). The trustee also has the power to nullify certain liens against the bankrupt obtained prior to bankruptcy, §§ 67(a)-67(c) (codified at 11 U.S.C. §§ 107(a)-107(c) (1976)), the power to nullify transfers and liens ineffective under state law, § 70(e) (codified at 11 U.S.C. § 110(e) (1976)), and the powers of a lien creditor under nonbankruptcy law, § 70(c) (codified at 11 U.S.C. § 110(c) (1976)).

\(^{127}\) Section 60(a) (codified at 11 U.S.C. § 96(a) (1976)).

\(^{128}\) Section 60(b) (codified at 11 U.S.C. § 96(b) (1976)).

\(^{129}\) Logically, the former is not avoidable by the partnership's trustee in the partnership proceeding, and the latter is not avoidable by a partner's trustee in an individual proceeding. *See, e.g.*, Turner v. Central Nat'l Bank of Mattson, 468 F.2d 590 (7th Cir. 1972); *In re Merrill*, 2 Bankr. Ct. Dec. 236 (D. Vt. 1975). Here the entity theory is strictly observed.

\(^{130}\) 159 F. 897 (6th Cir. 1908).

\(^{131}\) Gooch v. Stone, 257 F. 631 (6th Cir. 1919); *In re W.J. Floyd & Co.*, 156 F. 206 (E.D.N.C. 1907); *In re Jones*, 100 F. 781 (E.D. Mo. 1900); *In re Gillette*, 104 F. 769 (W.D.N.Y. 1900).
whether such a transfer meets the definitional prerequisites of a preference. The separate creditor of a partner in the bankrupt partnership is not a creditor of the debtor within the meaning of the provision (despite the creditor's indirect, yet very real, interest in any surplus partnership property distributable to the partner).\textsuperscript{132} Quite unlike the \textit{Mills} circumstances, there is no liability \textit{in solido}, and the transfer would not prefer one partnership creditor over another.\textsuperscript{133} Under many circumstances, however, such transfers should constitute a fraudulent conveyance and should be attacked on that ground.\textsuperscript{134}

The 1978 Act significantly revises some aspects of the preference provisions and modernizes the terminology involved. The revisions enhance the trustee's powers generally by eliminating the need to prove the creditor's state of mind for transfers within ninety days of bankruptcy and by creating a presumption of insolvency during that period. Unfortunately, the changes do not have specific implications for either partnership or partner proceedings and leave the partnership preference rules in their current, imperfect state.\textsuperscript{135}

\textbf{Fraudulent Conveyances}

Current law gives the trustee the right to set aside as a fraud upon the creditors transfers of assets or obligations incurred by the debtor. In some circumstances, a transfer or obligation made or incurred within twelve months prior to the filing of the debtor's petition can be challenged,\textsuperscript{136} although in other instances only a transfer or obligation within four months is suspect.\textsuperscript{137} These powers are fully available to the trustee in either a partnership or partner proceeding.\textsuperscript{138}

Current law specifically grants to the partnership trustee an additional power of considerable significance. Under present law, a trans-

\textsuperscript{132} \textit{In re} Ginsberg, 219 F.2d 472, 473 (3d Cir. 1955).

\textsuperscript{133} There may be other reasons for concluding this transfer is not a § 60 preference. For example, the individual partner transferring partnership assets to an individual creditor is probably acting beyond the scope of his or her authority, so it can be said that the debtor, \textit{i.e.}, the partnership, has taken no action at all.

\textsuperscript{134} \textit{See In re} Jercyn Dress Shop, 516 F.2d 864, 867 (2d Cir. 1975).

\textsuperscript{135} 1978 Act, \textit{supra} note 1, § 547. \textit{See generally} H.R. REP. No. 95-595, \textit{supra} note 17, at 177-79. Another reform, the rejection of the "jingle rule," may provide inspiration for the courts to rectify this problem, as both aberrations stem from a mistaken appreciation for superficial symmetry. \textit{See notes} 152-53 \& accompanying text \textit{infra}.

\textsuperscript{136} Section 67(d)(2) (codified at 11 U.S.C. § 107(d)(2) (1976)).

\textsuperscript{137} Section 67(d)(3) (codified at 11 U.S.C. § 107(d)(3) (1976)). In addition, the trustee may attack such transfer on state law grounds. Section 70(e) (codified at 11 U.S.C. § 110(e) (1976)).

\textsuperscript{138} \textit{See, e.g., In re} Clark Supply Co., 172 F.2d 248 (7th Cir. 1949).
fer of partnership property or the incurring of a partnership obligation within one year prior to the filing of a petition by or against the partnership is fraudulent as to the partnership creditors without regard to the actual intent of the partnership or its partners if two conditions are met. First, the partnership must be insolvent at the time of the transfer or be rendered insolvent thereby. Second, the transfer or obligation must be made to or incurred by a partner, or be made to or incurred by one other than a partner without fair consideration to the partnership.139 This provision effectively condemns not only most transfers of property from a partnership in financial distress to either a partner or that partner's separate creditor, but also the assumption of obligations of these persons by such a partnership. The purpose of the provision is to protect the legitimate partnership creditor whose right to have partnership property applied in payment of partnership debts is impaired by such transfers and obligations and who would otherwise be relegated to a subordinate status.140

One prerequisite to the exercise of this power is that the partnership be insolvent at the time of the transfer or thereby rendered insolvent. Neither the consent or good faith of the partners, nor the ignorance of the transferee, can save a transfer of partnership property or the incurring of a partnership obligation when partnership insolvency is shown.141 For this purpose, partnership insolvency is defined expressly in the statute as existing when partnership liabilities exceed partnership assets and surplus individual assets.142

Most importantly, once insolvency is demonstrated, the fact that the recipient partner gave fair consideration in exchange for the transferred asset or obligation is no defense. This prophylactic rule is intended to preclude a defense based upon the partner’s promise to a dying partnership to pay for the assets received by it. Absent such a rule, a transfer in consideration for an unfulfilled promise would reduce the ultimate recovery of the partnership creditors in favor of the partner’s separate creditors.143 The rule goes somewhat further, however, condemning all transfers to a partner and obligations in favor of a partner within one year of the partnership’s bankruptcy, including transfers and obligations between a firm and one of its partners or creditors of that partner, which do not injure the partnership creditors and,

143. 4 COLLIER ON BANKRUPTCY ¶ 67.39, at 564-65 (14th ed. 1978).
in fact, can facilitate the orderly winding up of partnership affairs. The new Act generally continues the existing law in this area. The Act retains those powers to challenge fraudulent conveyances which are available to any trustee, including one in a partnership bankruptcy. In addition, the Act contains a special grant of power to the partnership trustee in terms quite similar to current section 67(d)(4). A transfer of partnership property or the incurring of an obligation by the partnership will be subject to attack if made to a general partner within one year prior to the proceeding and if the debtor was insolvent on the date of transfer or obligation or became insolvent as a result.

Because the new Act continues to condemn partnership transfers and obligations without regard to whether any consideration is given in exchange by the recipient partner, the criticism that the law unnecessarily invalidates legitimate transactions will continue to be heard. The historical purpose of the rule was to protect partnership creditors from the subordination they would suffer if they were forced to claim against individual assets rather than partnership assets. As discussed below, however, the partnership creditor will enjoy equal status with other creditors under the new Act, which should reduce somewhat the problem to be solved by section 67(d)(4). Thus, criticism of the overbreadth of the rule is perhaps even more forceful after the 1978 Act.

**Distributions**

Distribution of the debtor's assets in partnership bankruptcy has been governed for more than a century by a rule of dual priorities. This rule states that partnership creditors enjoy priority in partnership assets, and individual creditors of a partner enjoy priority in the part-

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144. See, e.g., Kennedy, supra note 8, at 622-24; MacLachlan, supra note 8, at 258.
145. Horsky Memorandum, supra note 8, at 8.
146. Id.
147. 1978 Act, supra note 1, § 548(a); see H.R. REP. NO. 95-595, supra note 17, at 199.
148. 1978 Act, supra note 1, § 548(b).
150. Deleted from new § 548(b) is the provision in current § 67(d)(4)(b) (codified at 11 U.S.C. § 107(d)(4)(b) (1976)) with respect to conveyances to third parties for less than fair consideration. However, such transfers and obligations are generally condemned under § 548(a) of the 1978 Act.
151. See notes 193-94 & accompanying text infra.
ner's separate assets, with any remainder going to the benefit of the other group of creditors.\textsuperscript{152} This so-called "jingle rule"\textsuperscript{153} has been codified in both the current bankruptcy law and the Uniform Partnership Act and controls both federal bankruptcy and state insolvency proceedings. The new Act represents a dramatic revision of this rule.

**Partnership Proceedings**

Under the current law, claims against a partnership estate may be filed by a partnership creditor, by the estate of a partner,\textsuperscript{154} or by a partner's separate creditor.\textsuperscript{155} The claim of the partner's estate or separate creditor, however, is subordinated expressly by statute\textsuperscript{156} to the claims of the partnership creditors.\textsuperscript{157} Partnership assets are applied first in satisfaction of the filed claims of partnership creditors and administrative expenses. If any assets remain, they are distributed to solvent and insolvent partners, or the trustees or creditors of the latter, in proportion to their interests in the partnership. Thus, absolute priority in partnership assets is given to partnership creditors, which may well leave nothing from the partnership estate.\textsuperscript{158} This subordination is warranted because of the nature of the partnership agreement, which requires that partnership debts be satisfied before the equities between the partners are settled.\textsuperscript{159}

If the partnership assets are insufficient to meet partnership liabilities, the trustee will apply surplus individual assets, which are subject to trustee management throughout the proceeding, to that deficiency. There are no statutory provisions or rules in current law outlining the procedures to be followed or the order in which surplus individual assets are to be utilized.

The 1978 Act is characterized by broad definitions including an expansive definition of "claim" which arguably includes the contingent interest of a partner and the partner's trustee and creditors in partner-

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\textsuperscript{152} See generally J. Crane & A. Bromberg, Law of Partnership §§ 91, 93 (1968) [hereinafter cited as Crane & Bromberg].

\textsuperscript{153} See Kennedy, supra note 8, at 630 n.86.

\textsuperscript{154} Section 5(h) (codified at 11 U.S.C. § 23(h) (1976)).

\textsuperscript{155} 1a collier on bankruptcy ¶ 5.22, at 731 n.4 (14th ed. 1978).

\textsuperscript{156} Section 5(g) (codified at 11 U.S.C. § 23(g) (1976)).


\textsuperscript{158} For obvious reasons an individual creditor may attempt to characterize his or her claim as a partnership debt. See, e.g., Eads Hide & Wool Co. v. Merrill, 252 F.2d 80 (10th Cir. 1958); In re Tuerk, 1 Bankr. Ct. Dec. 223 (S.D. Fla. 1974); In re Rudy, 25 F. Supp. 912 (W.D. Ky. 1939).

\textsuperscript{159} Crane & Bromberg, supra note 152, § 91A.
ship assets. Such entities apparently are authorized to file proofs of claim in partnership proceedings. Moreover, the Act does not expressly subordinate the interests of these claimants to those of the partnership creditors, and under the Act's rule of priorities in distribution, such claimants would seem to be deserving of equal treatment. The Act should not be so construed, however, because to do so would eliminate the priority in partnership assets to which partnership creditors are entitled by the nature of partnership. There is no indication in the Act's legislative history of any congressional intent to eliminate this long-standing priority.

The priority provisions of the new Act direct the final distribution of remaining assets in an estate "to the debtor." In the case of a partnership proceeding, however, the effect of liquidation is to complete the winding up of the affairs of a dissolved partnership; at its conclusion the debtor no longer exists. With respect to these proceedings, therefore, this provision should be interpreted as directing the distribution of any surplus of partnership property to the individual partners or their estates in bankruptcy in accordance with their interests in the partnership.

If partnership assets are insufficient to satisfy partnership debts, the trustee has a claim against nonadjudicated partners and, if recovery from their estates is insufficient, against debtor partners undergoing individual proceedings. Against insolvent partners, the trustee has a claim for the "full amount of all claims of [partnership] creditors," which is potentially much larger than that for only the deficiency of partnership assets, thereby enhancing the relief given partnership creditors. Although the language does not seem to so indicate, the legislative history of this provision states that the trustee's claim includes a claim for unpaid administrative expenses.

If the aggregate amount recovered from the estates of debtor partners exceeds the partnership's deficiency, the Act directs the court to

160. 1978 Act, supra note 1, § 101(4).
161. Id. § 501.
162. Id. § 726.
163. Id. § 726(a)(6).
164. Id. § 723(b).
165. Id. § 723(c).
166. Under state law, the partnership has only the right to claim against partners for unpaid deficiencies, to which right the trustee succeeds by operation of law. UNIFORM PARTNERSHIP ACT § 40; H.R. REP. No. 95-595, supra note 17, at 200. This § 723 claim is significantly broader and favors partnership creditors to the disadvantage of individual creditors.
distribute equitably that excess to the estates of the general partners. The Act does not specify a particular equitable formula for redistribution, however, and competing formulae have been proposed.\textsuperscript{168} Uncertainty thus remains regarding the formula that will be followed by the courts.

**Partner Proceedings**

Probably the single most important and most warranted reform in partnership bankruptcy is the change brought by the new Act in the rule governing distribution of the estate of a partner in bankruptcy. Under existing law, claims may be filed against a partner's estate by separate creditors, by partnership creditors, and by the partnership estate itself.\textsuperscript{169} Section 5(g) imposes a rule of priorities for distribution in satisfaction of these claims that is the second stanza of the jingle rule: the net proceeds of the individual estate must be applied first to payment of the "individual debts," and any remaining surplus must be added to the partnership assets and applied to the payment of partnership debts. The statutory terminology is regrettably imprecise, as each partner is individually liable \textit{in solido} for the debts of the partnership;\textsuperscript{170} most courts hold that a partnership creditor claiming against a partner only on that theory is not asserting an "individual debt" within the meaning of section 5(g).\textsuperscript{171} The result is to favor a partner's separate creditors over partnership creditors seeking to hold the partner accountable for the partnership's obligation.

This priority has been the subject of scathing criticism. Since the claim of the partnership creditor to individual assets is in some sense stronger than the claim of the individual creditor against partnership assets, some commentators argue that to relegate the two classes to the

\textsuperscript{168} Compare H.R. Rep. No. 95-595, supra note 17, at 201 (endorsing distribution according to responsibility for partnership liabilities) \textit{with id.} at 381 (suggesting various factors) \textit{and S. Rep. No. 95-989, supra note 17, at 95 (same).}

\textsuperscript{169} Section 5(h) (codified at 11 U.S.C. \S 23(h) (1976)). The partnership creditors may claim, of course, because each partner is liable \textit{in solido} for the debts of the partnership.

\textsuperscript{170} \textit{See, e.g.}, Rochelle v. United States, 521 F.2d 844 (5th Cir. 1975).

same subordinated status is illogical and unfair. More pragmatically, the rule disregards the realities of the credit marketplace in which partnership creditors, in reliance on the principle of liability in solido, consider the creditworthiness of individual partners when extending credit to the partnership. Finally, because the lot of the partnership creditor in a partner's proceeding is ordinarily such a poor one, the rule has placed considerable weight on the issue of whether particular conduct of a partner gave rise to a partnership liability or only a personal liability. That issue usually turns on a close parsing of all the facts and circumstances, with delay and expense the inevitable by-products.

The justifications for this priority have never persuasively answered these criticisms. The adoption of this two hundred year old common law rule in the federal bankruptcy act was explained as necessary to maintain harmony with existing state law. The most frequent rationale for the priority has been that the rule is an integral component of a set of dual priorities that provides a workable, if somewhat crude, compromise between the interests of partnership and individual creditors which does justice for both groups. The priority also has been defended on the grounds of its venerability and national acceptance, and was in fact defended on those grounds by the Department of Justice in hearings on the new Act.

None of these rationales was persuasive to the National Bankruptcy Conference which, in 1962, recommended elimination of this priority. Congress did not enact that recommendation then, but has done so in the new Act.

As under current law, the new Act provides that claims may be

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172. See, e.g., Shroder, Distribution of Assets of Bankrupt Partnerships and Partners, 18 HARV. L. REV. 495 (1905) (criticizing rule and the common law from which it was derived).
174. See, e.g., cases cited in 1A COLLIERS ON BANKRUPTCY ¶ 5.30-.32 (14th ed. 1978).
175. See generally Kennedy, supra note 8, at 630-32.
176. Kennedy, supra note 8, at 631. One critic retorts that this rationale reduces to a sympathy for "superficial symmetry and lyrical euphony." MacLachlan, supra note 8, at 256.
177. CRANE & BROMBERG, supra note 152, § 91A at 533; Unaccomplished Reforms, supra note 5, at 920. The universality of this priority in this country has been assured by the adoption of the Uniform Partnership Act, which embraces it. UNIFORM PARTNERSHIP ACT § 40(b).
179. Horsky Memorandum, supra note 8, at 5.
filed against a partner's estate by that partner's separate creditors, by partnership creditors,¹⁸⁰ and by a partnership trustee.¹⁸¹ The priority of such claimants in the partner's estate is addressed only in section 723(c) of the 1978 Act which provides:

Notwithstanding section 728(c) of this title, the trustee has a claim against the estate of each general partner in such partnership that is a debtor in a case under this title for the full amount of all claims of creditors allowed in the case concerning such partnership. Notwithstanding section 502 of this title, there shall not be allowed in such a case a claim against such partner on which both such partner and such partnership are liable, except to any extent that such claim is secured only by property of such partner and not by property of such partnership. The claim of the trustee under this subsection is entitled to distribution in such case under section 726(a) of this title the same as any other claim of the kind specified in such section.¹⁸²

This measure is subject to criticism on two points. First, while it clarifies that the claim of the partnership trustee no longer will be subordinated to that of a separate creditor, it fails to address the priorities between partnership and separate creditors in the absence of a trustee claimant. The legislative history evidences an intent to eliminate any subordination of the interests of partnership creditors regardless of how they are advanced.¹⁸³ While that subordination arguably is inherent in the nature of partnership and applies as a matter of state law, in the absence of federal rule to the contrary, courts should be moved by the spirit of the 1978 Act to conclude that partnership and partner creditors are to be treated alike in any partner proceeding.

The second criticism is that the confusing disallowance language in the second sentence of the provision obscures the apparent legislative intent. Its literal import seems to disable the partnership trustee from proceeding against a debtor partner to the extent that partnership creditors individually have filed claims against the partner based on liability in solido. This of course encourages, or at least tolerates, fragmented, multi-party proceedings. Quite to the contrary, however, the legislative history of the provision reveals an intent that the creditors' claims should be disallowed when an order for relief is entered in favor of the partnership trustee on the section 723(c) claim.¹⁸⁴ The latter ap-

¹⁸⁰. 1978 Act, supra note 1, § 303; H.R. REP. No. 95-595, supra note 17, at 198.
¹⁸¹. 1978 Act, supra note 1, § 723(c).
¹⁸². Id.
¹⁸³. H.R. REP. No. 95-595, supra note 17, at 200; S. REP. No. 95-989, supra note 17, at 95.
¹⁸⁴. The procedures to be followed in these circumstances remain uncertain, as the legislative history states that as this trustee claim "is automatically entitled to distribution, it need not be filed, nor allowed." H.R. REP. No. 95-595, supra note 17, at 200.
This reform is another instance in which the 1978 Act will eliminate collateral disputes and, if the critics of the jingle rule are to be believed, will protect the expectations of partnership creditors although at the expense of the separate creditors. Federal bankruptcy law will now diverge from state law governing state insolvency and receivership proceedings, at least until the state legislatures revise the widely enacted Uniform Partnership Act. Whenever partnership creditors have unsatisfied claims of the amount necessary to commence a federal proceeding, they almost certainly will resort to the federal forum in the years ahead.

Partners and Partnerships as Creditors

The treatment in bankruptcy of a purported debtor-creditor relationship between a partnership and one of its partners deserves special attention. A partner may assume the mantle of a “true” creditor of the partnership, claiming not on the basis of an ownership interest and right to receive a pro rata share of net partnership assets, but on the strength of an independent loan to the partnership. Similarly, a partnership may claim against one of its partners for repayment of a loan, a claim distinct from a call for an additional capital contribution in the face of excessive firm liabilities.

Under current law such claims have fared poorly. Although ordinarily allowed in the proceeding, the creditor claim of the partner against the partnership is subordinated to the claims of partnership creditors, and the creditor claim of the partnership against its partner is subordinated to the claim of that partner’s separate creditors. By and large the courts so holding are guided by the jingle rule of section 5(g), which is viewed as not only disabling the partner or his or her trustee from partaking in the partnership estate on any basis until the partnership creditors have been satisfied, but also disabling the partner-

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185. Ironically, it was the federal bankruptcy law’s embrace of the jingle rule which persuaded the drafters of the Uniform Partnership Act to adopt it in the interest of harmony between the federal and state systems. Kennedy, supra note 8, at 631-32.

186. The partner’s “true” loan to the partnership is to be distinguished from his or her right to return of the initial capital contribution, Uniform Partnership Act §§ 18, 40(b), and from his or her interest in the partnership, which is the right to a pro rata share of the profits. Uniform Partnership Act § 26.

187. In re Hess, 1 F.2d 342 (W.D. Pa. 1923); In re Effinger, 184 F. 728 (D. Md. 1911); In re Rice, 164 F. 509 (D. Pa. 1908).

188. In re Telfer, 184 F. 224 (6th Cir. 1910); In re Lane, 14 F. Cas. 1070 (C.D. Mass. 1874) (No. 8,004); Potts v. Schmucker, 84 Md. 535, 36 A. 592 (1897).
ship or its trustee from sharing *pari passu* with the separate creditors in the estate of the partner.\textsuperscript{189} To hold otherwise would effectively permit the partner or the partnership to compete with its own creditors.\textsuperscript{190}

The fairness of these principles is subject to question when applied in a case in which there is a legitimate claim between a partnership and one of its partners arising from a transaction independent of the partnership relationship.\textsuperscript{191} The great benefit of these principles, however, is that they obviate the need for close scrutiny of the nature of the particular arrangement or events giving rise to the claim. Partnership accountings frequently are not kept with great rigor and are susceptible to reinterpretation and even revision by the partners as financial distress sets in.\textsuperscript{192} The identification of particular contributions to a partnership as either equity or debt may be kept only in the mind of the managing partner and may not make much difference to the outside creditor who, perhaps naively, views all such funds as augmenting the operating resources and creditworthiness of the partnership.\textsuperscript{193}

Under the 1978 Act, somewhat different results are likely to be obtained. The elevation of partnership creditors to equality with separate creditors in a partner estate dictates that the claim of a partnership *qua* creditor can no longer be subordinated. This may require greater scrutiny of such claims to ensure they are more than a call for an unpaid capital contribution. With respect to the claims of a partner as creditor, the priority of partnership creditors in partnership assets presumably will be continued. The 1978 Act does not contain a blanket disability for partners such as that derived from present section 5(g), however, and this omission may induce courts to reconsider the question of whether and when a partner may have a claim against the partnership which deserves treatment equal to that of any outside creditor.

\textsuperscript{189} See, \textit{e.g.}, In re Telfer, 184 F. 224 (6th Cir. 1910); In re Effinger, 184 F. 728 (D. Md. 1911).

\textsuperscript{190} See \textit{In re} Effinger, 184 F. 728 (D. Md. 1911).

\textsuperscript{191} Their unfairness is particularly poignant when the claim of a partnership is a tort claim against a partner for wrongful conversion of partnership property; in such circumstances the partnership claimant has been permitted to stand on equal footing with the partner’s separate creditors. McElroy v. Allfree, 131 Iowa 518, 108 N.W. 119 (1906). See also Ryan v. Cavanagh, 238 F. 604 (D. Iowa 1916).

\textsuperscript{192} See, \textit{e.g.}, In re Ervin, 109 F. 135 (E.D. Pa. 1901), \textit{aff’d sub nom.} Wallerstein v. Ervin, 112 F. 124 (3d Cir. 1901).

\textsuperscript{193} Wallerstein v. Ervin, 112 F. 124, 125 (3d Cir. 1901).
Discharge

With certain exceptions noted below,\textsuperscript{194} under current law any person adjudicated a bankrupt may obtain a discharge from those debts properly scheduled in the proceeding.\textsuperscript{195} Accordingly, a partnership may be discharged from its debts by undergoing administration in bankruptcy although ordinarily such a discharge is sought only when there exists statutory or contractual authorization to continue the partnership’s business and avoid completely winding up partnership affairs.\textsuperscript{196} Similarly, an adjudicated partner can obtain a discharge from both individual debts, including, in some circumstances, liabilities to other partners arising from partnership affairs\textsuperscript{197} and partnership debts.\textsuperscript{198} However, the discharge of a partner alone does not operate as a discharge of the partnership or of other partners.\textsuperscript{199} Generally, a partnership may still be sued, either in its common name or in the name of a nonbankrupt partner,\textsuperscript{200} for partnership debts for which a general partner is no longer accountable.

Conversely, the discharge of a partnership has no effect on the liability of partners for partnership debts.\textsuperscript{201} This rule has been criticized heavily on the ground that it treats unfairly the solvent partner whose assets and liabilities are evaluated in determining partnership insolvency and who suffers most of the burdens of bankruptcy through the administration of his or her estate by the partnership trustee.\textsuperscript{202}

The new Act prohibits granting a discharge to a partnership in an attempt to prevent “trafficking . . . in bankrupt partnerships.”\textsuperscript{203} Although the magnitude of this trafficking under current law remains shrouded in the legislative process, one undeniable effect of this reform

\textsuperscript{194} See notes 196-98 & accompanying text infra.
\textsuperscript{195} Sections 14(a), 17(a)(3) (codified at 11 U.S.C. §§ 32(a), 35(a)(3) (1976)).
\textsuperscript{196} See generally Crane & Bromberg, supra note 152, § 83A, at 474-75. It has been doubted that a partnership would ever seek a discharge. In re Forbes, 128 F. 137, 139 (D. Mass. 1904).
\textsuperscript{197} D. Cowan, Bankruptcy Law & Practice § 725, at 467 (2d ed. 1978).
\textsuperscript{198} In addition to the generally applicable provisions, discharge of the partner debtor is specifically authorized by § 5(j) (codified at 11 U.S.C. § 23(j) (1976)).
\textsuperscript{199} See Kimmel v. State, 75 Ind. App. 168, 128 N.E. 708 (1920).
\textsuperscript{200} Crane & Bromberg, supra note 152, § 96, at 560.
\textsuperscript{201} Section 5(j) (codified at 11 U.S.C. § 23(j) (1976)). Prior to its codification in 1938 as part of the Chandler Act, this rule had been developed by the courts as an implicit term of the Act of 1898. See Unaccomplished Reforms, supra note 5, at 924.
\textsuperscript{202} See, e.g., Note, Bankruptcy—Partnerships—Partnerships in Bankruptcy, 31 N.C.L. Rev. 457, 466 (1953); Unaccomplished Reforms, supra note 5, at 924; Comment, Partnership Bankruptcy Under the Chandler Act, 87 U. Pa. L. Rev. 105, 112 (1938).
\textsuperscript{203} S. Rep. No. 95-989, supra note 8, at 98; see 1978 Act, supra note 1, § 727(a)(1).
is to make continued use of a particular partnership shell after administration in bankruptcy undesirable, if it ever was otherwise. The continued relevance of the criticism that individual, solvent partners should be discharged of partnership debts at the conclusion of a partnership administration will remain unresolved until the courts determine the extent of the power the partnership trustee has over nondebtor partners.

Under existing law, a discharge is barred if the debtor has committed one of the wilful offenses or other forms of misconduct enumerated in section 14(c).\textsuperscript{204} Further, a discharge does not encompass certain nondischargeable debts enumerated in section 17.\textsuperscript{205} In partnership proceedings, these restrictions can raise the familiar and fiercely contested question of whether a particular act or debt was that of the partnership or merely that of an individual partner. The general principle that any action taken or debt made by a partner within the scope of authority will be attributed to the partnership doubtless controls,\textsuperscript{206} but this remains a factual question capable of provoking intense litigation and requiring close scrutiny by the court. The elimination of the partnership discharge in the 1978 Act also eliminates this source of potential dispute and delay.

The section 14 bar to, and the section 17 exceptions from, discharge also have posed difficulties in partner proceedings. A court will conclude fairly quickly that a section 14 act by one partner within the scope of authority will bar the discharge of both the partnership and that of the individual.\textsuperscript{207} Similarly, a section 17 debt incurred by a partner for the partnership is not dischargeable in either the partnership or the individual proceedings.\textsuperscript{208} An issue more often litigated, and one given inconsistent treatment by the courts, is whether a partnership’s section 14 offense of section 17 debt will be attributed to partners other than the partner actually committing the offense or incurring the debt for the partnership.\textsuperscript{209} With respect to section 14, the issue has proven particularly troublesome in those cases where one element of

\textsuperscript{204} Section 14(c) (codified at 11 U.S.C. § 32(c) (1976)).

\textsuperscript{205} Section 17 (codified at 11 U.S.C. § 35 (1976)).

\textsuperscript{206} \textsc{Uniform Partnership Act} § 13; \textit{see also} Frank v. Michigan Paper Co., 179 F. 776 (4th Cir. 1910).

\textsuperscript{207} Charles Edward & Assoc. v. England, 301 F.2d 572 (9th Cir. 1962); \textit{In re} Bernstein, 197 F.2d 378 (7th Cir. 1952); \textit{In re} Perri, [1968] \textsc{Bankr. L. Rep.} (CCH) ¶ 63,188.


\textsuperscript{209} One ordinarily does not attribute a partnership act of bankruptcy to all the partners for purposes of that requirement. \textit{In re} Jercyn Dress Shop, 516 F.2d 864 (2d Cir. 1975).
the offense requires some measure of intent or wilfulness behind the conduct, such as the destruction of financial records\textsuperscript{210} or the giving of false financial statements.\textsuperscript{211} In these cases the courts generally recognize a presumption of knowledge by all partners of wrongful acts and consequently impose a burden on the partner asking for discharge to show actual innocence.\textsuperscript{212}

Section 17 excepts from discharge certain debts arising from misconduct, such as a debt for moneys obtained by false financial statements and liability for wilful or malicious injury to or conversion of property, raising the same issue of attribution. Here, however, every partner is held responsible for the misconduct giving rise to that debt, and the debt is held nondischargeable as to every partner.\textsuperscript{213} The difference in treatment from that seen under section 14 is rationalized on the ground that while section 14 concerns the right of discharge, section 17 only concerns the effect of a discharge.\textsuperscript{214} The difference is perhaps better explained as the reflection of a suitable compromise whereby partners not actually involved in the misconduct are spared the disproportionate punishment of denial of discharge, yet are denied any unjust enrichment that might flow from such misconduct at the expense of the injured creditor.

The new Act largely carries over the substance of sections 14\textsuperscript{215} and 17,\textsuperscript{216} and those refinements Congress has made, with one exception,\textsuperscript{217} are not especially germane to partnership and partner bankruptcy. The vague principles governing attribution of partnership misconduct to ostensibly innocent partners for discharge purposes will

\begin{itemize}
\item \textsuperscript{210} See 1978 Act, supra note 1, § 14(c)(2).
\item \textsuperscript{211} See id. § 14(c)(3).
\item \textsuperscript{212} Morimura, Arai & Co. v. Taback, 279 U.S. 24 (1929); In re Herzog, 121 F.2d 581 (2d Cir. 1941), cert. denied sub nom. Herzog v. Dorman, 315 U.S. 807 (1942); cf. In re Schacter, 170 F. 683 (S.D.N.Y. 1907) (fraudulent act of one partner injures only that partner's rights to discharge).
\item \textsuperscript{215} 1978 Act, supra note 1, § 727(a).
\item \textsuperscript{216} Id. § 523.
\item \textsuperscript{217} It does add a new bar to discharge of potential significance on partnership proceedings: a discharge will be denied if the debtor commits any of the other enumerated offenses "in connection with another case concerning an insider." 1978 Act, supra note 1, § 727(a)(7). Since a partnership is an insider of a general partner, any misconduct by a general partner with respect to the partnership's assets and financial records is now explicit grounds for a later bar to individual discharge. Id. § 101(25)(A)(ii).
\end{itemize}
require further explanation by the courts before any generalizations can be made.

**Conclusion**

The Bankruptcy Reform Act of 1978 achieves a largely unheralded reform of the administration of partnership bankruptcy. It eliminates most of the special rules for such proceedings and several general provisions whose application has proven particularly troublesome in the partnership setting. Most significantly, the Act revises the much-criticized distribution rule of dual priorities. Congress has left certain questions unanswered, however, particularly concerning the selection and powers of a partnership trustee. Until such matters are resolved by further legislation, judicial decision, or rule, the partnership bankruptcy process will continue to be subject to criticism and dispute.