DISCHARGEABILITY: A NEW PERSPECTIVE

On November 3, 1970, the President signed into law Public Law 91-467,[1] enacted to amend the Bankruptcy Act.[2] The new provisions supply striking changes in the discharge proceedings under the Bankruptcy Act. To appreciate the significance of the new legislation and to understand its purpose, some knowledge of the problem that inspired the new amendments is necessary.

I. THE DISCHARGE PRIOR TO THE 1970 AMENDMENTS

Much of the focus of the new amendments is on the operation of bankruptcy practice in relation to the ordinary wage earner. To the ordinary wage earner, one of the most significant areas of bankruptcy practice is the discharge. The importance of the discharge corresponds to the evolution of the direction of our bankruptcy laws from a sole concern for the creditors to a major concern for the debtor.[3] However, it was as to the ordinary wage earner that the abuses of the bankruptcy discharge most frequently occurred.[4]

The problems that followed the liberalization and availability of bankruptcy and discharge were many. A philosophy that was based upon a process in which an honest debtor, overburdened with debt, could make his assets available for distribution equitably among his creditors, and thereafter be released from all debts for a new start in life was subject to many frailties. The problems can be initially traced to an early rule laid down by federal courts that made the right to a discharge separate and distinct from the effect of a discharge.[5] While the bankruptcy court determined whether bankrupt was entitled to a general discharge, the effect of the discharge as to any particular debt was a matter for any court in which the creditor sought to enforce his claim.[6] Such a dichotomy was apparently conceived to reduce the load of litigation in the federal courts and to expedite the administration of bankrupt estates.[7]

The procedure was for the bankruptcy court to make a determination, pursuant to § 14, as to whether the bankrupt was deserving of the privilege of a discharge. When an order of discharge became final, it bound

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[1] 84 Stat. 990 (1970).

[2] 11 U.S.C. §§ 1-1255 (1964) [Individual sections of the Bankruptcy Act old & new will hereinafter be cited as § xx without further citation or footnoting].

[3] For detailed discussion of the historical evolution of bankruptcy law *see* Joslin, *The Philosophy of Bankruptcy—A Re-examination*, 17 U. FLA. L. REV. 189 (1964).

[4] H. REP. NO. 91-1502, 12 U.S. CODE CONG. & AD. NEWS 4855 (1970).

[5] Smedley, *Bankruptcy Courts as Forums for Determining the Dischargeability of Debts*, 39 MINN. L. REV. 651 (1955).

[6] *In re* Mirkus, 289 Fed. 732 (2d Cir. 1923); Teubert v. Kessler, 296 Fed. 472 (3d Cir. 1924).

[7] *See* Smedley, *supra* note 5, at 652.

all other courts on the issue of whether the debtor was entitled to be released from legal liability for the debts covered by the general terms of the discharge.[8] The order, however, being general in its terms, did not determine whether any specific debt was within its operation.[9] The practical result of this was that the bankrupt was not secure against being sued in the state courts on his pre-bankruptcy debts.

Although the Bankruptcy Act declared that a discharge "shall release" the bankrupt from all his excepted debts, the established rule was that a release was effective only if asserted as a defense to an action by a creditor to enforce a debt, and that the defense was waived unless affirmatively pleaded by the bankrupt.[10] The creditor's failure to oppose the discharge did not prevent him from claiming the benefits of § 17, if his claim came within the exceptions set forth therein as to debts not affected by a discharge. Furthermore, if a creditor did oppose a discharge on the grounds specified in § 14c, the determination that the bankrupt nevertheless was entitled to a discharge was not res judicata as to the dischargeability of the creditor's claim.[11] Accordingly, the overwhelming majority of courts held that as a general rule, it was neither proper nor sound policy for the bankruptcy court upon determining the right to discharge to also determine whether certain debts so claimed were nondischargeable within § 17. Thus, the court in *In re Grover*,[12] concluded that "[n]ormally the court in which the debt is proceeded upon is the proper forum to determine whether a discharge releases a particular debt." This was because "[t]he right to a discharge is one thing, and the effect of it, when granted, is another, and wholly distinct, proposition."[13]

The objections and abuses of such a procedure were many. The creditor often found it objectionable since the bankruptcy court's incapacity to determine the effect of a discharge on a particular debt precluded him from having even an obviously nondischargeable claim exempted from the terms of the general discharge. His only remedy was a time consuming often costly suit in a court of general jurisdiction to enforce his debt and then overcome the debtor's defense of discharge by proving that his debt came within the § 17a exceptions of debts not affected by discharge. The result was to relieve the bankruptcy court of considerable work but at the same time to put the parties upon the mercies

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[8] 1 COLLIER, BANKRUPTCY ¶ 17.27 (14th ed. 1940).

[9] *Id.*

[10] Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942); *In re* Weisberg, 253 Fed. 833 (E.D. Mich. 1918).

[11] *In re* Scandiffie, 63 F. Supp. 264 (E. D. N. Y. 1945).

[12] *In re* Grover, 63 F. Supp. 644, 647 (D. Minn. 1945).

[13] *In re* Rhutassel, 96 Fed. 597, 598 (N. D. Iowa 1899).

of state courts for determination of whether the discharge decree prevented enforcement of a bankrupt's debts.

Outrageous abuses were most prevalent with unscrupluous creditors. The result of the divided jurisdiction was that debtors were frequently harassed and coerced by creditors into paying debts that may have been discharged. The common method employed was for the creditor to wait until the bankruptcy proceeding had been closed and the discharge granted and then sue in state court alleging that the debt was not discharged under § 17 of the Bankruptcy Act. These creditors usually relied on the allegation that the discharge did not release the debtor from liability because he had obtained money or property by false pretenses or obtained property on credit upon a materially false statement in writing respecting his financial condition with intent to deceive. It was not difficult to construe that a debtor had made a false statement in a loan or credit application since often such applications were hastily and carelessly completed.[14] As though this was not abusive enough of the spirit of the Bankruptcy Act, some creditors even resorted to outright fraud in relation to loan applications.[15] Even though the creditor's suit often was groundless the institution of the suit itself often provided the necessary leverage either to force a settlement or to cause the debtor to sign a new—and most significantly—undischargeable promissory note. These abuses of the discharge procedure effectively nullified any gain from the discharge.

Tactics such as these had been all too common for many years. As long ago as 1931, Mr. Justice Douglas[16] noted that victimization by small loan companies of those least able to fight and protect themselves was a common occurrence. Almost three decades later, in the Senate Report on the 1960 Amendment to § 17a,[17] it was noted in the legislative history that its purpose was mainly to curb the abuse by small loan companies.

Thus, when suit on the discharged debt was filed in state court, the

[14] *Supra* note 4, at 4856.

[15] A news release from the May 12, 1967, edition of the *Nashville Banner* revealed such a fraud:

> The standard loan application form used by many loan companies in Nashville says a person seeking a loan must list all his debts on the form before he can get a loan. But . . . some loan company officials have instructed the borrower to sign the loan application without listing all his debts as required.
>
> Later, the borrower goes into bankruptcy . . . and his lawful debts are discharged. Thereafter, the loan company sues the borrower to collect the loan in the state court, claiming that the borrower obtained the loan by fraud because he did not list all his debts on the loan application form.
>
> In other instances, instead of suing him, some loan companies have brought other kinds of pressure. . . Taking advantage of the ignorance of debtors, they have threatened the debtor with loss of his job and other penalties unless he pays the debt of which he has been discharged in bankruptcy.

[16] Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L. J. 329, 349 (1932).

[17] S. REP. NO. 1688, 2 U.S. CODE CONG. & AD. NEWS 2954 (1960).

bankrupt had to answer, pleading his discharge as a defense; otherwise, judgment went to the creditor by default. However, all too frequently the bankrupt did not realize the consequences of ignoring the state court proceeding. In many cases the bankrupt's failure to assert the defense of the discharge was neither deliberate nor based upon an intention to be bound by the obligation, but was due to inadvertance or misunderstanding on his part. Many debtors mistakenly supposed that the discharge operated automatically to release them from liability. Nevertheless, having failed to respond to the creditor's suit, the debtor had a default judgment entered against him without the matter of dischargeability ever being passed on by any court.[18] The courts generally showed no inclination to disapprove of a practice which produced such unsatisfactory results in so many instances.[19] Furthermore, only an occasional protest was ever raised.[20]

In his article, *A Plea for 'One Stop Service' in Bankruptcy*,[21] Referee Coleman abhorred a rule that the referee must grant or deny a discharge *in toto*; nondischargeability of particular debts being decided by state courts alone. He stated:

> In my mind this is a bad rule. It makes the referee a mere machine . . . mechanically turning out discharges according to a prescribed form, as if all bankrupts were alike. The referee lives with the case. . . . Why should he not be given authority to except debts from the discharge? Why should this question not be settled at the time the discharge is granted? There would be an end to litigation. . . . Why is the State Court better qualified or equipped to pass on this question?[22]

Under this system which permitted or, perhaps, forced creditors to seek determination of their claims in state courts, the bankruptcy court issued "a strange form of decree which must be taken to another court for an interpretation of its effect."[23]

II. LOCAL LOAN CO. V. HUNT

In 1934, the question of the bankruptcy courts' jurisdiction to pass on the dischargeability of a debt and to enjoin a creditor from enforcing a dischargeable debt was presented to the Court in *Local Loan Co. v. Hunt*.[24] In adopting the 1970 amendments, Congress so as to more

[18] *See* cases cited *supra* note 10. *See also* Beneficial Loan Co. v. Noble, 129 F.2d 425 (10th Cir. 1942).

[19] *In re* Innis, 140 F.2d 479 (7th Cir. 1944); Beneficial Loan Co. v. Noble, 129 F.2d 425 (10th Cir. 1942).

[20] Helms v. Holmes, 129 F.2d 263, 269 (4th Cir. 1942).

[21] 25 REF. J. 31 (1951).

[22] *Id.*

[23] Twinem, *Discharge—What Court Determines the Effect Thereof*, 21 REF. J. 33, 34 (1946).

[24] 292 U. S. 234 (1934).

fully effectuate the policy and philosophy of a bankruptcy discharge, broadened that which the U. S. Supreme Court only initiated at the threshold in *Local Loan*.

In that landmark case Local Loan challenged the jurisdiction of the bankruptcy Court to enjoin it from prosecuting a suit in the Municipal Court of Chicago against the bankrupt's employer to enforce a wage assignment which the bankrupt, Hunt, had executed as security for a loan. The debt had been included in Hunt's schedule of liabilities in a bankruptcy proceeding, and the federal court had previously entered an order discharging him from all provable debts and claims. However, Local Loan Co. contended its right to collect the indebtedness out of the debtor's future earnings was unaffected by the bankruptcy proceeding because the Illinois Supreme Court had ruled that an assignment of future wages created a lien which was not invalidated by the discharge in bankruptcy. Furthermore, the federal court was bound by the decision in view of the well recognized rule that the effect of the discharge was a matter to be determined by the court in which the discharge was to be pleaded as a defense.

The Supreme Court in sweeping terms established the jurisdiction of the bankruptcy court to issue the injunction. The Court declared that:

> [A] federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court . . . to secure or preserve the fruits and advantages of a judgement or decree rendered therein. . . .[25]

The Court said that such an action was not within the jurisdiction of a state court. Moreover, it was held that decisions by other federal courts refusing to hear similar suits on the ground that the effect of a discharge was a matter to be determined by any court in which the discharge may be pleaded were not in harmony with the rule the Court had announced.

The existence of the bankruptcy court's authority to determine the effect of the adjudication and enjoin the loan company's threatened interference having been broadly confirmed, the Court immediately advised restraint in the use of this authority:

> It does not follow, however, that the Court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist.[26]

The existence of the bankruptcy courts' power to intervene to prevent enforcement of a discharged debt in a state court thus was finally established. However, after such an admirable beginning, the Court spoke no further on the matter.

Unfortunately, the limiting factors in *Local Loan* gained immediate support and greatly impaired its precedential value for the proposi-

[25] *Id.* at 239.

[26] *Id.* at 241.

tion that the referee had the power to determine the dischargeability of specific claims. Although *Local Loan* made it appear that a claim of no jurisdiction in the bankruptcy court would fail, it nearly became settled law that the parties could not insist that the matter be heard by the bankruptcy court as a matter of right.[27] Although usually refusing to interfere with a creditor's enforcement efforts, the bankruptcy courts generally have recognized their power to take such action, but have stressed the Supreme Court's reference which cautioned against the exercise of this power except under "unusual circumstances." This attitude was probably further engendered by the desire to protect the jurisdiction of state courts and by a fear of overburdening the bankruptcy courts with the addition of this function to their already heavy load. Thus, the bankruptcy courts would usually not interfere on behalf of the debtor.[28]

In implementing this restrictive attitude, decisions specifically rejected the arguments of the bankrupt that certain commonly recurring situations presented sufficiently "unusual circumstances" to justify action by the bankruptcy court.[29] It was reasoned that if the debt was actually discharged, the bankrupt could have a state court declare the enforcement proceedings invalid. No relief was given against the creditor's enforcement of a judgment obtained as a result of a state court's having erroneously applied the state law in ruling the debt nondischargeable.[30] The debtor's remedy was said to be an appeal to a higher state court to reverse the erroneous trial court's judgment. Nor was the threat of the bankrupt being imprisoned under a body execution for failing to satisfy the creditor's judgment regarded as a serious enough invasion of the debtor's rights to sustain interference by the bankruptcy court.[31] The most coldly technical attitude displayed by the courts, however, was found in the cases refusing to grant relief against enforcement of a creditor's judgment even though the bankrupt pleaded that he was unable financially to carry an appeal to higher state courts to correct the trial

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[27] Walters v. Wilson, 142 F.2d 59 (9th Cir. 1944).

[28] Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942) (unless the state remedy was inadequate); Ciavarella v. Salituri, 153 F.2d 343 (2d Cir. 1946), *and In re* Risser, 177 F.2d 567 (4th Cir. 1949) (unless the failure of the bankruptcy court to act would cause special embarrassment or irreparable injury to the bankrupt); *In re* Marshall, 24 F. Supp. 1012 (S.D.N.Y. 1938) (unless there are special conditions calling for intervention); Beneficial Loan Co. v. Noble, 129 F.2d 425 (10th Cir. 1942) (unless action by the bankruptcy court was necessary to effectuate its order or discharge); State Finance Co. v. Morrow, 216 F.2d 676 (10th Cir. 1954) (unless action by the bankruptcy court was necessary to prevent the impairment or defeat of its jurisdiction).

[29] Ciavarella v. Salituri, 153 F.2d 343 (2d Cir. 1946); *In re* Stoller, 25 F. Supp. 226 (S. D. N.Y. 1938); *In re* Harris, 28 F. Supp. 487, (E.D. Ill. 1939).

[30] Cstarai v. General Finance Corp., 173 F.2d 798 (6th Cir. 1949); *In re* Ulen, 46 F. Supp. 437 (S. D. N. Y. 1941).

[31] *In re* Devereaux, 76 F.2d 522 (2d Cir. 1935); Csatari v. General Finance Corp., 173 F.2d 798 (6th Cir. 1949).

court's error in finding the debt nondischargeable.[32] Ignoring the fact that the court was dealing with a person who had recently surrendered his assets for distribution to his creditors, the same court which presided over that proceeding took the position that if a remedy was legally available to the bankrupt in the regular judicial processes of the state, then, even though he could not afford to invoke that remedy, he did not need the special protection of the bankruptcy court.

The rationale throughout all the decisions denying relief was that the bankrupt's remedy in the state courts was adequate if it was theoretically available—even if not practically available—and that *Local Loan* did not apply unless the state courts in which the bankrupt was sued would erroneously deny the dischargeability of the obligation. It was emphasized that the bankrupt either had or could have appeared in the state court proceeding to assert his discharge in defense, and could have appealed the adverse decision to a higher state court—which presumably would have corrected the lower court's decision if it was in error—or the bankrupt could have gone to the United States Supreme Court by certiorari. By this reasoning a number of decisions declared that the principles of res judicata precluded the bankrupt from relitigating the issue of dischargeability in the bankruptcy court after an adverse decision in a state court.[33] Other courts ruled that in failing to assert his discharge as a defense in the state court action, the bankrupt was guilty of gross negligence as to disqualify himself from the equitable relief which the bankruptcy court could grant in proper circumstances.[34] As an equity court, it could intervene to prevent enforcement of a judgment of another court only if the bankrupt's failure to assert his rights was due to fraud, accident, or mistake not resulting from his own neglect.

Thus, the *Local Loan* doctrine answered one particular problem, but the results of the doctrine were not the most effective procedure for achieving the discharge purpose of the Bankruptcy Act. The differing interpretations of "unusual circumstances" failed to give guidance on a national level as to the action a bankruptcy court would take upon a petition to determine the effect of a discharge. There was no effective test as to what facts should exist before a bankruptcy court would determine the effect of the discharge by exercising its ancillary jurisdiction. Thus, the basic factor which led to the criticisms of the traditional procedure and the *Local Loan* doctrine as applied—that is, to the abuses

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[32] Beneficial Loan Co. v. Noble, 129 F.2d 425 (10th Cir. 1942); *In re* Innis, 140 F.2d 479 (7th Cir. 1944).

[33] *In re* Devereaux, 76 F.2d 522 (2d Cir. 1935); Beneficial Loan Co. v. Noble, 129 F.2d 425 (10th Cir. 1942); Walters v. Wilson, 142 F.2d 59 (9th Cir. 1944); *In re* Risser, 177 F.2d 567 (4th Cir. 1949).

[34] Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942); *In re* Innis, 140 F.2d 479 (7th Cir. 1944).

of the bankrupt usually by small loan companies—precipitated the enactment of the 1970 amendments to the Bankruptcy Act.

III. The 1970 Amendments to the Bankruptcy Act

The major purpose of the amendments is to effectuate more fully the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. This purpose required amendment of the Act since the means for the abuses were found in the Act itself.

Section 2a(12) and § 38(4), respectively, were amended to give to courts of bankruptcy and referees in bankruptcy additional jurisdiction to "determine the dischargeability of debts, and render judgments thereon." Section 14b was also amended to require the court to fix a time both for filing of objections to discharge and for filing applications to have dischargeability of debts determined.[35]

The matter of dischargeability of the types of debts most commonly giving rise to the abuse of harassing creditors are now within the exclusive jurisdiction of the bankruptcy court. New § 17c(2) provides, with one partial exception,[36] that a creditor invoking the grounds of:

1. 17a(2) (false pretenses, false representations, false financial statements and wilful and malicious conversion);
2. 17a(4) (fraud or defalcation by an officer or a fiduciary); or
3. 17a(8) (other wilful and malicious injuries to person or property)

must apply to the bankruptcy court within the time fixed to determine the dischargeability of his debt and, "unless the application is timely filed the debt shall be discharged."

"Discharge" appears to be used in the sense that the debts will be deemed discharged for purposes of later attempts to invoke any of the above grounds to except a debt from discharge by creditors who failed to make application.[37] This new subsection is specifically enforceable by other new provisions. New § 17c(4) authorizes the bankruptcy court to enjoin a creditor from instituting or continuing actions in other courts "prior to or during the pendency of a proceeding to determine . . . dischargeability under § 17c." Further, the new discharge, pursuant to new § 14f, makes any judgment obtained in any other court null and void as a determination of the personal liability of the bankrupt

[35] The times fixed for each purpose need not be the same, but neither may be less than 30 days after the date set for the first creditor's meeting. Normally, neither may be more than 90 days after that date, but the court is given discretion to extend the time for either.

[36] If the creditor contends that his debt is excepted by § 17a(8) (wilful and malicious injuries to person or property) and the "right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if either the bankrupt or a creditor submits a signed statement of an intention to do so," the creditor is not required to submit the dischargeability issue to the bankruptcy court.

[37] Countryman, *The New Dischargeability Law*, 45 Am. Bankr. L. J. 1, 26 (1971).

with respect to debts discharged under new § 17c(2) and enjoins all creditors from instituting or continuing any action to collect such debts as personal liabilities of the bankrupt.

Thus, the new amendments attempt to correct earlier abuses of discharge proceedings by removing from the jurisdiction of nonbankruptcy courts all of the grounds for exception from the discharge which proved susceptible to earlier abuses. Now if the creditor wishes to invoke any of the grounds for exception from the discharge, he must do so in the bankruptcy court within the time fixed by the amendments. If he does not do so, the exceptions are no longer available to him. If he attempts to invoke them elsewhere prior to discharge, he may be enjoined. After the discharge he is permanently enjoined from invoking them to establish liability or to attempt to collect a prebankruptcy judgment.

The new amendments also cure the creditor objection that the incapacity of a bankruptcy court to determine the effect of a discharge on a particular debt precluded the creditor from having even an obviously nondischargeable claim exempt from the terms of the general discharge.

New § 17c(1) provides that "[t]he bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt." This provision is optional and dischargeability would be determined by the bankruptcy court only if the option is exercised, otherwise the issue of dischargeability would be left for determination by a nonbankruptcy court. Nonbankruptcy courts only have such jurisdiction if neither the creditor nor the debtor submits the issue to the bankruptcy court. Once one of them does however, new §§ 17c(4) and 14f again operate to effectively enforce the jurisdiction of the bankruptcy court. It appears that there is no time limit fixed for invoking the concurrent jurisdiction of the bankruptcy court. The time fixed for filing such applications applies only to those applications which a creditor is required to file under new § 17c(2).[38] In fact, the implication of new § 17c(6) concerning reopening of a bankruptcy case is closed.[39]

Whether the application to determine dischargeability is under the optional new § 17c(1) or the mandatory new § 17c(2), the subsequent proceedings are governed by new § 17c(3). The bankruptcy court is to determine the dischargeability issue after hearing upon notice. If the bankruptcy court determines a debt is dischargeable, it makes "such orders as

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[38] "As to all other debts . . . the bankruptcy court is given concurrent jurisdiction with the State courts under § 17c(1). Either the bankrupt or the creditor may apply to the bankruptcy court for a determination of dischargeability and these applications are not subject to the time limits of section 14b." NBC Memo of January 21, 1970, 116 Cong. Rec. H9550 (Daily ed. Oct. 5, 1970).

[39] *Supra* note 37, at 30-31.

are necessary to protect or effectuate" such determination. On the other hand, if it determines that a claim is not dischargeable, it "determine[s] the remaining issues, render[s] judgment, and make[s] all orders[s] necessary for the enforcement" of its determination.[40] This is intended to make clear that the bankruptcy court's determination may be enforced as federal court judgments usually are enforced, including writ of execution and proceedings in aid thereof."[41]

New § 14g, an adaptation of 28 U.S.C. § 1963 for the registration of judgments of federal district courts, provides that a final order may be registered in any other federal district and when so registered shall have the same effect as an order of the bankruptcy court of the district where registered. This supplements and effectuates the enjoining feature of the discharge order for a debtor who moves to another district.

The new amendments also clarify the law concerning the discharge of debts in a subsequent proceeding after the denial of discharge for certain reasons in an earlier proceeding. Where a discharge was denied in an earlier proceeding under § 14c(5) because the bankrupt had obtained a discharge in a still earlier proceeding initiated within the prior six years, some courts entertaining a third proceeding concluded the denial of discharge in the second proceeding should not be taken as an adjudication that the debtor would not later be entitled to a discharge of debts scheduled in the second proceeding.[42] Other courts disagreed.[43] New § 17b(1) provides that denial of a discharge solely under § 14c(5) in the second proceeding does not bar the release of debts in a subsequent proceeding. A denial of a discharge solely under § 14c(8) also does not bar release of debts in a subsequent proceeding since such a denial does not represent an adjudication on the merits that the debtor was not entitled to a discharge.[44] New § 17b(2) provides that dismissal of a prior proceeding "without prejudice for failure to pay filing fees or secure costs" will not bar a release of debts in a subsequent proceeding. A final saving provision relates to a debt which is excepted from discharge because it was not scheduled in time for proof and allowance and the creditor did not receive timely notice or knowledge of the bankruptcy proceeding. Such a debt may be released by discharge in a subsequent proceeding.

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[40] In order to avoid any implication that the new law was intended to pressure a creditor into filing an application for determination of dischargeability which could then be treated as a consent to summary proceedings on counterclaims asserted by the trustee, it was provided in § 17c(3) that a creditor who files an application for determination of dischargeability "does not submit himself to the jurisdiction of the court for any purposes other than those specified in . . . subdivision c."

[41] *Supra* note 37, at 31.

[42] Turner v. Boston, 393 F.2d 683 (9th Cir. 1968); *In re* Masterson, 240 F. Supp. 543 (N. D. Cal. 1963).

[43] Chopnick v. Tokatyan, 128 F.2d 521 (2d Cir. 1942), *cert. denied*, 317 U. S. 667 (1942).

[44] *Hearings before Subcomm. of House Comm. on the Judiciary on S. J. Res. 88, H. R. 6665 and H. R. 12250*, 91st Cong., 1st Sess. 86 (1969).

The amendments also afford greater protection to creditors by expanding causes for which a discharge, once granted, can be revoked. Previously, the bankruptcy court had little control over a bankrupt once his discharge had been granted. Section 15, as amended, authorizes revocation of discharge for refusal to obey an order of, or to answer a material question approved by the court and to allow an application to revoke to be filed at any time during pendency of the proceeding or within one year after discharge is granted, whichever period is longer. Additionally, § 15 now authorizes revocation of a discharge on the ground that the bankrupt "before or after discharge, received or became entitled to receive property of any kind which is or which becomes a part of the bankrupt estate" if he "knowingly and fraudulently fails to report or to deliver such property to the trustee."

Generally, the new amendments provide for an all inclusive updating of the procedural aspects of the discharge to protect more fully the interests of both honest bankrupts and creditors without changing the policy in determining when and as to what debts a discharge may be obtained.[45] However the amendments were not enacted without objection. In commenting upon a similar bill introduced in the 86th Congress, Referee Sherman Warner wrote:

> [I]f this or a similar proposal should become law, the court would be burdened with an avalanche of attempts by creditors . . . to have their claims excepted. . . .
>
> The enactment of the bill would create many administrative problems. . . . Would sufficient referees and referee personnel be designated to handle the extra work?[46]

The criticisms of Referee Warner are searching and honest, but the fact is that the majority of judges and referees who have expressed their views regard these objections as superficial and irrelevant. When it becomes generally understood that the bankruptcy courts have jurisdiction to determine the effect of a discharge as well as the right to it, the litigation should dwindle away; attempts by certain creditors to defeat the clear intent of the Bankruptcy Act will be ceased. Even assuming there is a marked increase in litigation creating new administrative and legal problems, this should not obstruct change where change is needed. Furthermore, the bankruptcy courts should readily accept the extra burdens in order to protect the integrity of the courts and to assure that the rights of the honest but unfortunate bankrupt are protected.

Several objections are raised to the extension of the bankruptcy court's jurisdiction. It is argued that there is a distinction between the discharge

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[45] *Supra* note 4, at 4855.

[46] Warner, *Discharge in Bankruptcy; May Objections be Withdrawn?*, 31 REF. J. 25, 29 (1957).

itself and its effect as barring a particular debt. This difference is reflected in the Act, it is argued, since the statutes treating obtaining a discharge, § 14, and the debts which are dischargeable or nondischargeable, § 17, are separate. Also it is argued that prior law gave both creditor and debtor adequate protection in state courts. As already mentioned the adequate protection was merely illusory. It was of little comfort or assurance to the discharged bankrupt who usually was without adequate funds to institute and maintain the requisite litigation. Thus, any attempt to discredit the new amendments because of adequate protection existing under the state law does not reflect cogent analysis. Further objections have been raised to suggest that compelling either the bankrupt or the creditor to submit certain questions of fact to a summary procedure would contstitute unjust deprivation of the right to trial by jury. This objection has been highly controversial. Requests for jury trials in straight bankruptcy proceedings are not commonplace—as distinguished from Chapter X, XI, XII proceedings. They are especially rare in cases involving consumer or individual bankrupts. Although a bankruptcy proceeding is largely an equity proceeding, jury trials are granted when requested and the case is referred back to a district court judge.[47]

All in all, these arguments and objections seem to emphasize technicalities at the expense of actualities—precedent at the expense of progress. The amendments eliminate the present uncertainty caused by the undefined "unusual circumstances" qualification of *Local Loan*, and vest the bankruptcy court with the full and final authority to determine dischargeability or nondischargeability of debts in all cases—not merely those cases in which the court recognized the existence of the hazily defined "unusual circumstances." This necessarily lends more certainty and predictability to the law. Furthermore, there is the benefit of a highly qualified court. Both the creditor and the bankrupt will have issues decided by a court well-versed in the problems of bankruptcy. The bankruptcy court, being directly involved with the operation of the bankruptcy system, is in a better position than the state courts to view the matter in proper perspective. To leave the determination of the effect of a bankruptcy discharge in the hands of innumerable state courts of varying types and qualities is to destroy all hope of ever achieving any semblance of uniformity of decision.[48] Also if the bankruptcy court should determine that an obligation is dischargeable, the creditor cannot confront the debtor with future actions in state court. Therefore, the creditor has lost a weapon formerly used to abuse and harass the bankrupt.

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[47] *Supra* note 4, at 4857.

[48] *In re* American Falls Canal & Power Co., 219 Fed. 408, 415 (9th Cir. 1915).

IV. CONCLUSION

As the overriding consideration in support of the new amendments, it is submitted that they provide for greater furtherance of the purposes of the Bankruptcy Act. The aims of the Act are twofold:

> 1. [T]o insure prompt and efficient realization and pro rata distribution, without preference, of the assets of insolvent debtors. . . .[49]
> 2. [T]o relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.[50]

The referee's immediate determination best insures "prompt and efficient realization and pro rata distribution" of the bankrupt's assets. It avoids the time consuming procedure of the state courts. It eliminates duplication of effort and expense by two court systems. And it allows the tribunal already familiar with the facts and the law of the case to make the ultimate decision.

The referee's determination as to dischargeability best permits the bankrupt to start afresh, unhampered by the pressure and discouragement of pre-existing debt. It enables the bankrupt to know immediately the effect of the discharge. Knowing his own position, the bankrupt will no longer be a target for harassing creditors threatening state court action. He will be able to begin a new opportunity in life with a clear field for future endeavor with only a minimum of mental anxiety over past indebtedness.

George W. Birch

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[49] McKenzie, *Suspended or Conditional Discharges*, 19 REF. J. 45 (1945).

[50] William v. United States Fidelity and Guaranty Co., 236 U. S. 549, 554-55 (1915).