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Settling Objections to Discharge in Bankruptcy Cases: An Unsettling Look at Very Unsettled Law

Terence L. Michael

Michael R. Pacewicz

ARTICLES

SETTLING OBJECTIONS TO DISCHARGE IN BANKRUPTCY CASES: AN UNSETTLING LOOK AT VERY UNSETTLED LAW

Terrence L. Michael* and Michael R. Pacewicz**

I. INTRODUCTION[1]

Much has been said and written about the increase in the number of bankruptcy filings in the past decade. Since 1996, over one million bankruptcy cases have been filed each year—the vast majority of which are individual (non-business) cases.[2] Of those non-business cases, approximately seventy percent were Chapter 7, or straight liquidation cases.[3] One of the principal motivations for an individual filing a Chapter 7 bankruptcy case is to obtain a discharge.

The path to a discharge is not always smooth. Creditors and the trustee in the bankruptcy case have the right to review the debtor's conduct and contest the debtor's right to a discharge. These actions are brought as adversary proceedings, in essence separate lawsuits under the umbrella of the bankruptcy case, under § 523 or § 727 of the Bankruptcy Code.[4] Under § 523, a party may seek to have one or more particular

* United States Bankruptcy Judge for the Northern District of Oklahoma. B.A., *magna cum laude*, Doane College, Crete, Nebraska, 1980; J.D., Gould School of Law, University of Southern California, 1983.

** Law clerk to the Honorable Terrence L. Michael. B.A., *cum laude*, Northeastern State University, Tahlequah, Oklahoma, 1995; J.D., *summa cum laude*, The University of Tulsa College of Law, 2000.

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2. *Judicial Facts and Figures*, Table 5-2 <http://156.119.80.10/library/judfact/tables5-2htm> (accessed Dec. 18, 2001).

3. *See id.*; *Judicial Business of the U.S. Courts 2000* 29 (Admin. Office of the U.S. Courts 2001).

4. Unless otherwise noted, all statutory references are to the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2001).

debts declared non-dischargeable. This type of action deals only with the debts owed to the creditor filing the action, and has no effect upon the discharge of debts that are not the subject of the action. On the other hand, an action brought under § 727, if successful, results in a complete denial of the debtor's discharge. In that case, the debtor remains personally liable for all debts existing when the case was filed.

Litigation relating to the bankruptcy discharge shares several traits with other types of litigation. It is the subject of discovery, pre-trial practice, and trial. It is also often the subject of negotiation and settlement. The issues of whether, how, when, and on what terms these actions may be settled have been the topic of much litigation. As one might expect, court decisions vary both in result and reasoning. This Article will briefly explore the nature of the bankruptcy discharge, the various bases for objection both to the dischargeability of a particular debt and the denial of the discharge as a whole, and then take a detailed look at the differing positions taken by the courts with respect to settlement of such actions.

II. THE BANKRUPTCY DISCHARGE

The concept of bankruptcy as a mechanism for the protection of debtors is a relatively recent phenomenon, originating in this country with the passage of the Bankruptcy Act of 1898.[5] The English bankruptcy laws that foreshadowed the American bankruptcy system were intended primarily to assist creditors in recovering payment from delinquent debtors.[6] Prior to 1898, early United States bankruptcy legislation strongly favored creditors. For example, under the Bankruptcy Act of 1800, the approval of the bankruptcy commissioners and the creditors was a prerequisite to the granting of a discharge.[7] Furthermore, creditors were not automatically enjoined from attempting to collect on debts that had been discharged. Instead, the debtor had to raise the discharge as an affirmative defense in the event a creditor initiated collection proceedings.[8]

In *Local Loan Co. v. Hunt*,[9] the United States Supreme Court coined the oft-cited phrase that bankruptcy laws exist to provide "the honest but

5. As Professor Tabb noted:

> [T]he 1898 law recognized formally for the first time the overriding public interest in granting a discharge to 'honest but unfortunate' debtors. The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. That debtor then is able to resume his or her place as a productive member of society. Furthermore, societal forgiveness of the debts of the honest unfortunate is considered to be humane.

Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Amer. Bankr. L.J. 325, 364-65 (1991) (footnotes omitted).

6. *See id.* at 326-37.

7. *See id.* at 346.

8. *See id.* at 347.

9. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[10] The legal tool used to "clear the field" for the bankruptcy debtor is the order of discharge. This discharge, as outlined in § 524(a) of the Bankruptcy Code, operates as an injunction against all efforts to recover debts owed prior to the filing of the bankruptcy case as a personal liability of the debtor.[11] Commentators have noted that the United States has one of the most liberal discharge provisions in the world today.[12]

The benefit of a discharge is not without its burdens. Debtors are required to file a list of all assets and liabilities, under penalty of perjury.[13] Debtors are required to appear at a meeting of creditors and testify under oath as to their financial affairs.[14] Debtors are expected to cooperate with the Chapter 7 trustee and, when appropriate, surrender all non-exempt property to the trustee so that it may be liquidated and the proceeds paid to creditors. Failure to perform these duties creates the prospect that the debtor's discharge may be denied.

III. GROUNDS FOR DENIAL OF DISCHARGE

The grounds for denial of a discharge are contained in § 727(a).[15]

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10. *Id.* at 244 (citations omitted).

11. 11. U.S.C. § 524(a) of the Bankruptcy Code states that:

> (a) A discharge in a case under this title—
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C.A. § 524(a) (West 2001).

12. *See e.g.* Rafael Erfat, *The Fresh-Start Policy in Bankruptcy in Modern Day Israel*, 7 Am. Bankr. Inst. L. Rev. 555 (1999); Tabb, *supra* n. 5; John C. McCoid, *Discharge: The Most Important Development in Bankruptcy History*, 70 Amer. Bankr. L.J. 163 (1996).

13. *See* Fed. R. Bankr. P. 1007(b) (West 2001).

14. *See* 11 U.S.C.A. § 343 (West 2001).

15. 11 U.S.C. § 727(a) reads as follows:

Several of these grounds relate to the conduct of the debtor during the bankruptcy case; *i.e.*, has the debtor behaved as one would expect an

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§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case•

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

11 U.S.C.A. § 727(a) (West 2001).

"honest but unfortunate debtor" to behave? Discharges are denied where a debtor has acted fraudulently in submitting financial information to the trustee or the court,[16] concealed assets with the goal of keeping them free of the claims of creditors,[17] or failed to cooperate with the trustee in the administration of the case.[18] Performance of each of these duties is essential to the integrity and proper functioning of the bankruptcy system. In the case of *In re Moore*,[19] Judge Clive Bare stated it thusly:

> Discharge, the principal objective of a chapter 7 debtor, is a statutory right involving public policy considerations. It is not a proper subject for contractual negotiation. Discharge is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its continuance in the future. In a sense the question has passed beyond the creditors and is one of public policy . . . .[20]

Under this analysis, which has been phrased in other ways by other courts,[21] creditors who decide to file objections to discharge assume duties to the other creditors, and to the bankruptcy system as a whole.

IV. COMPLAINTS TO DETERMINE THE DISCHARGEABILITY OF PARTICULAR DEBTS

Actions to determine the dischargeability of a particular debt, under § 523, concern conduct between the debtor and a particular creditor, rather than the conduct of the debtor during the administration of the bankruptcy case.[22] If a creditor prevails on its complaint to determine

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16. 11 U.S.C.A. § 727(a)(4)(A) (West 2001).
17. 11 U.S.C.A. § 727(a)(2) (West 2001).
18. 11 U.S.C.A. § 727(a)(4)(D) (West 2001).
19. 50 B.R. 661, 664 (Bankr. E.D. Tenn. 1985).
20. *Id.* (citations and quotations omitted).
21. *See e.g. In re Hiller*, 179 B.R. 253, 261 (Bankr. D. Colo. 1994) ("§ 727 is the gatekeeper for allowing only honest debtors the extraordinary relief afforded by the Bankruptcy Code. It is a guardian of the bankruptcy system; it proscribes dishonest, deceptive, and disingenuous debtor conduct that is part of or related to the bankruptcy system; it upholds the integrity and stature of the bankruptcy process.").
22. The relevant portions of 11 U.S.C. § 523 provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required—
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

dischargeability, only the particular debt at issue is not discharged. The debtor receives a discharge of all other debts. As such, dischargeability complaints are treated as private causes of action. Although some courts have indicated that court approval of settlements of § 523 complaints is required,[23] there is very little authority on the issue. It appears that most courts allow parties to settle dischargeability complaints on their own terms so long as the complaints do not also contain allegations that the debtor's discharge should (or in the alternative) be denied in its entirety under § 727.[24]

(B) use of a statement in writing—
(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

. . .

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

. . .

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

. . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

11 U.S.C.A. § 523 (West 2001).

23. *See e.g.* Loc. R. 7090-1 (Bankr. N.D.N.Y.) (requiring court approval of a compromise of an action brought under § 523); Loc. R. 4007-2(a) (Bankr. S.D.N.Y) (same).

24. *See e.g.* Loc. R. 9019(a)(3) (Bankr. W.D. Tex) ("No application to compromise an adversary proceeding need be filed in order to settle a nondischargeability action filed pursuant to Section 523.").

V. THE CONCEPT OF COMPROMISE

In many ways, bankruptcy courts are courts of economics. The primary relationship in every bankruptcy case is the relationship between debtor and creditor. The debtor seeks an economic fresh start through discharge of pre-petition debt, while the creditor hopes to maximize its recovery with a minimum of additional expense. In many cases, compromise is the best way to achieve both goals. Compromise is the linchpin of bankruptcy practice. Without it, the business of the bankruptcy courts would slow considerably, if not come to a screeching halt. An overwhelming number of disputes in bankruptcy cases are settled short of trial on the merits. When compromises are reached, the rules of bankruptcy subject the agreement to court review and approval.[25] It is well established that, "[t]he decision of whether to approve a proposed settlement is within the sound discretion of the bankruptcy court."[26] One court has stated:

> In exercising this discretion, the court must consider and weigh the following criteria:
>
> (1) The probability of success on the merits in the litigation;
>
> (2) The difficulties, if any, to be encountered in collection of any judgment that might be obtained;
>
> (3) The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;
>
> (4) The paramount interests of creditors and the proper deference to their reasonable views in the premises; and
>
> (5) Whether the conclusion of the litigation promotes the integrity of the

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25. Bankruptcy Rule 9019 provides:

> (a) Compromise
>
> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States Trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.
>
> (b) Authority to compromise or settle controversies within classes
>
> After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.
>
> (c) Arbitration
>
> On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Fed. R. Bankr. P. 9019 (West 2001).

26. *In re Bates*, 211 B.R. 338, 343 (Bankr. D. Minn. 1997) (citations omitted); *see generally In re Taylor*, 190 B.R. 413, 417 (Bankr. D. Colo. 1995) (implicit in Rule 7041 is the exercise of judicial discretion) (citations omitted).

judicial system.[27]

A bankruptcy court is not bound to substitute its judgment for the judgment of the parties, but rather should consider whether the settlement falls within the range of reasonable compromises for such litigation.[28]

VI. SETTLEMENT OF § 727 COMPLAINTS

Special attention is paid under the bankruptcy rules to compromises of objections to discharge. As noted above, objections to discharge are presented to the bankruptcy court in the form of adversary proceedings, which constitute separate lawsuits within the bankruptcy case.[29] Unlike complaints to determine the dischargeability of a particular debt, settlement of § 727 claims is a matter in which most, if not all, courts take some degree of interest. Some of that interest is mandated by Bankruptcy Rule 7041, which provides that

> a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States Trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper.[30]

Not surprisingly, bankruptcy courts have often been asked to approve settlements between debtors and creditors or debtors and the bankruptcy trustee which call for dismissal of an objection to discharge. What is surprising is the range of answers given by the bankruptcy courts.

A. Settlement Disapproved as Always Contrary to Public Policy

Cases which prohibit the settlement of objections to discharge predate the enactment of the Bankruptcy Code. In the case of *In re Levy*,[31] a case decided under the Bankruptcy Act of 1898, it was alleged that the debtor converted assets from his business immediately prior to filing his bankruptcy case. An action was brought to compel the debtor to turn these monies over to the bankruptcy estate.[32] The debtor proposed to settle the turnover action by making a cash payment of $5,000 to the trustee and "on condition that there be no opposition to the discharge."[33] The district court approved the compromise and allowed the debtor his discharge.[34] One of the creditors appealed the decision. In reversing the decision of the district court, the court of appeals held that

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27. *Bates*, 211 B.R. at 343 (citations omitted).
28. *See id.*
29. *See* Fed. R. Bankr. P. 7001 *et seq.* (West 2001).
30. Fed. R. Bankr. P. 7041 (West 2001).
31. 127 F.2d 62 (3d Cir. 1942).
32. *See id.* at 63.
33. *Id.*
34. *Id.*

> Any offer of that character is wholly illegal. The reason is plain. Discharge is not personal to the creditors. It is general to the public and particularly that part of it which constitutes the world of commerce. Persons with undesirable business ethics are not to be turned loose to prey on their fellow merchants. This general protection cannot be waived by particular creditors whose private greed outruns their community spirit.[35]

The court of appeals not only disapproved the compromise; it found that grounds existed to revoke the debtor's discharge.[36] More recently, the United States Court of Appeals for the Second Circuit noted that the granting of a discharge "is not the proper subject for negotiation and the exchange of a *quid pro quo*."[37]

In the case *In re Moore*,[38] both the Chapter 7 trustee and a creditor brought separate objections to discharge. The parties negotiated a settlement whereby all objections to discharge, as well as three adversary proceedings filed to avoid pre-petition transfers by the debtor, would be dismissed with prejudice in exchange for a $1.3 million[39] payment by the debtor to the bankruptcy estate. Notice of the proposed compromise and dismissal of litigation was given to all creditors and parties in interest.[40] There were no objections.[41] Nonetheless, the court refused to approve the compromise, noting that

> During his testimony supporting the compromise, which represents a bargained for exchange, the trustee spoke of the debtor 'buying his discharge.' Because it involves questions of public policy previously determined by the Congress, a discharge in bankruptcy is not an appropriate element of a quid pro quo. Tying withdrawal of objections to discharge to the settlement of other actions is contrary to public policy. Under no circumstances, not even where the intent is innocent, may a debtor purchase a repose from objections to discharge. A discharge in bankruptcy depends on the debtor's conduct; it is not an object of bargain.[42]

Similarly, in the case of *In re Vickers*,[43] the bankruptcy trustee sought approval of a compromise where the debtor would pay $24,000 to the bankruptcy estate in exchange for dismissal with prejudice of a complaint objecting to discharge. In support of the compromise, the trustee argued that there was no money in the estate to fund the discharge litigation and

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35. *Id.* at 63.
36. *Id.*
37. *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996) (citation omitted).
38. 50 B.R. 661 (Bankr. E.D. Tenn. 1985).
39. *Id.* at 662.
40. *Id.* at 661.
41. *Id.*
42. *Id.* at 664 (emphasis in original).
43. 176 B.R. 287 (Bankr. N.D. Ga. 1994).

that the risk of nonpayment of attorney's fees incurred by the trustee was too great to justify continued litigation.[44] The bankruptcy court, showing an obvious distaste for the trustee's position, held as follows:

> Either the discharges ought to be granted or they ought to be denied. Nothing in the Bankruptcy Code authorizes a trustee to seek funds from a debtor or to release a non-debtor entity as a price for giving up on a discharge complaint. Discharges are not property of the estate and are not for sale. It is against public policy to sell discharges. The reasons are obvious. Selling discharges would be a disease that would attack the heart of the bankruptcy process, its integrity. A trustee seeking to get paid may coerce an honest debtor into paying something to get rid of a complaint that has no merit. A dishonest debtor may cover up even greater sins than those that gave rise to the complaint in the first place. The conduct described in these hypothetical situations may be criminal bankruptcy fraud. By contrast, what appears to be happening here is that the trustee is seeking to settle two different types of claims that may be related by facts but not by the type of relief available to the estate. Public policy forbids him to offer to settle one in order to settle the other.[45]

In a recent decision, the United States Bankruptcy Court for the District of Colorado reached the same result, noting "it is simply improper for a debtor and creditor to horsetrade over a discharge."[46]

B. Settlement Prohibited by Local Rule

Some bankruptcy courts have implemented local rules that make it impossible to dismiss an objection to discharge in exchange for any sort of consideration.[47] In Minnesota, a claim objecting to discharge may not be dismissed unless the plaintiff "shall file an affidavit stating that nothing has been received by or promised to the plaintiff in consideration of the request for dismissal."[48] Similar rules are found in the Eastern District of Michigan,[49] the Middle District of Louisiana,[50] the District of Connecticut,[51]

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44. *Id.* at 289.

45. *Id.* at 290 (citations omitted).

46. *Pennwell Printing Co. v. Stout (In re Stout)*, 262 B.R. 862, 864 (Bankr. D. Colo. 2001) (citation omitted).

47. A number of other courts have adopted a slightly different approach, formulating local rules that require the disclosure of any consideration provided to the plaintiff in exchange for dismissing or withdrawing a complaint objecting to the debtor's discharge. *See e.g.* Loc. R. 7041-1 (Bankr. E.D. Va.); Loc. R. 9019(b)(2) (Bankr. W.D. Tex.); Loc. R. 7090-1 (Bankr. N.D.N.Y.); Loc. R. 4004-2 (Bankr. E.D.N.Y.); Loc. R. 7001-1(B) (Bankr. D. Neb.); Loc. R. 7041-1(B) (Bankr. E.D. La.); Loc. R. 19(e)(2) (Bankr. S.D. Iowa.); Loc. R. 4004-2(a) (Bankr. N.D. Iowa); Loc. R. B-4004-2(b) (Bankr. S.D. Ind.); Loc. R. 7041-2(b) (Bankr. N.D. Ind.); Loc. R. 502 (Bankr. N.D. Ill.); Loc. R. 7041-1(a) (Bankr. D.D.C.); Loc. R. 7041-1(a) (Bankr. D. Alaska); Loc. R. 4007(a) (Bankr. D. Vt.).

48. Loc. R. 7041-1 (Bankr. D. Minn.).

49. Loc. R. 7041-1 (Bankr. E.D. Mich.).

50. Loc. R. 7041-1 (Bankr. M.D. La.).

51. Loc. R. 7041-1(b) (Bankr. D. Conn.).

the Southern District of New York,[52] and the Southern District of California.[53] This approach has been viewed favorably by the drafters of the Federal Rules of Bankruptcy Procedure. The Committee Notes to Bankruptcy Rule 7041 state:

> Dismissal of a complaint objecting to a discharge raises special concerns because the plaintiff may have been induced to dismiss by an advantage given or promised by the debtor or someone acting in his interest. Some courts by local rule or order have required the debtor and his attorney or the plaintiff to file an affidavit that nothing has been promised to the plaintiff in consideration of the withdrawal of the objection. By specifically authorizing the court to impose conditions in the order of dismissal this rule permits continuation of this salutary practice.[54]

The effect of this "salutary practice" is that objections to discharge may never be settled in the face of such rules.

At least one court has relied on its local rule in refusing to approve a compromise of a § 727 claim. In *Migoscha, S.A. v. Meffert (In re Meffert)*,[55] the debtor agreed to make cash payments to an objecting creditor in exchange for withdrawal of the § 727 complaint. The bankruptcy court denied the debtor's motion to approve the settlement solely on the ground that the settlement violated the court's local rule, which prohibits the granting of a discharge where a § 727 complaint is withdrawn, unless the debtor files an affidavit and the debtor's attorney files a certification that no consideration was provided in exchange.[56] Interestingly, the court noted that the settlement may have been appropriate had the complaint included a § 523 claim and had the § 727 claim lacked merit.[57]

The policy embodied in these decisions and rules—namely the prohibition against the sale or purchase of discharges—is laudable. However, an argument can be made that this approach relies upon two suspect assumptions. The first assumption is that every objection to discharge has merit. In effect, these courts are taking the position that once an objection to discharge is filed, it is valid on its face until it is defeated at trial. Such a "guilty until proven innocent" view is rarely espoused in the world of civil litigation. It is also contrary to the proposition that "[i]n order to fulfill the primary purpose of the Bankruptcy Code of providing debtors with a 'fresh start,' objections to discharge under Section 727 are construed strictly against the plaintiff and liberally in favor of the debtor."[58]

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52. Loc. R. 4007-2(a) (Bankr. S.D.N.Y.).
53. Loc. R. 7041-4(b) (Bankr. S.D. Cal.).
54. Fed. R. Bankr. P. 7041 (West 2001) (quoting the advisory committee notes).
55. 232 B.R. 71, 73 (Bankr. S.D.N.Y. 1998).
56. *Id.* at 73-74.
57. *Id.* at 74 n. 3.
58. *In re Constantini*, 201 B.R. 312, 315 (Bankr. M.D. Fla. 1996) (citations and emphasis omitted); *see generally In re Black*, 787 F.2d 503, 505 (10th Cir. 1986).

In addition, these decisions assume that objections to discharge are filed in every case where grounds for them exist. Although it would be difficult, if not impossible, to gather empirical evidence on this point, it seems likely that situations exist where it makes no economic sense for a creditor to pursue an objection to discharge even where valid grounds are present. It is not uncommon for a practicing bankruptcy attorney to advise creditors that the net effect of a successful objection to discharge would be to allow that creditor, together with all other creditors in the case, to continue to pursue collection against a debtor who in all likelihood is judgment proof. On many occasions, the creditor will decline to throw good money after bad. Similarly, it is equally likely that many Chapter 7 trustees decline to file objections to discharge when faced with the prospect of going unpaid. Thus, if the goal of these courts is to ensure that only the "honest but unfortunate debtor" obtains a discharge in each and every case, prohibiting the settlement of all § 727 litigation does not necessarily further that goal.

C. *Settlement Allowed after Notice and an Opportunity to Intervene*

A minority of courts have held that a complaint objecting to discharge may always be settled after proper notice and an opportunity to assume prosecution of the complaint is given to all other creditors and parties in interest, when there are no objections to the settlement and none of the other parties wish to assume prosecution of the objection to discharge. These courts have looked at the discharge litigation as more of a civil matter. They note the importance of settlements in the administration of bankruptcy cases and the practical difficulty of forcing the prosecution of an action by an unwilling plaintiff.

In the case of *In re Margolin*,[59] a bank filed an action seeking to deny the debtor's discharge under § 727, or in the alternative, hold the debt owed to the bank non-dischargeable under § 523. The factual basis for both causes of action was that the debtor had provided the bank with a financial statement showing a significant net worth, all of which had seemingly dissipated without explanation in the five-year period between the time the debtor gave the bank the financial statement and the time the debtor filed for bankruptcy protection.[60] The bank reasoned that either the debtor had failed to explain the loss of assets or had provided the bank with a false financial statement at the time he obtained the loan, which are both grounds for holding a debt non-dischargeable under § 523. During discovery, the bank determined that the debtor had never held the assets that he had listed on the financial statement, a conclusion that "vitiated all

59. 135 B.R. 671 (Bankr. D. Colo. 1992).
60. *Id.* at 672.

of the [bank's] § 727 allegations."[61] The debtor and the bank then entered into a settlement in which the bank agreed to dismiss its § 727 cause of action in exchange for a judgment of non-dischargeability in the amount of $97,501.36, which the debtor could satisfy in full through the payment of $25,000 to the bank.[62] Notice of the proposed settlement was given to all creditors and parties in interest, including the trustee.[63] Only the trustee objected to the settlement, on the grounds that by filing the complaint, the bank had assumed a fiduciary duty to all creditors and was thus precluded from settling the § 727 action for its own personal gain.[64]

The court overruled the trustee's objection and approved the settlement. In doing so, the court expressly rejected the ruling in *Moore*.

> This court, as did Judge Boe in the case of *In re Nicolosi*, has extreme difficulty with that holding. The solution found by other courts to this tension between vindication of the public interest in upholding the policies behind § 727, and the public interest in fostering the peaceful, just, speedy and inexpensive resolution of disputes, is to (1) provide notice and full disclosure of the terms of such agreements between the original complaining creditor and debtor to all parties in interest; and (2) to allow other creditors and/or the trustee to intervene or be substituted for the original complaining creditor in order to prosecute the § 727 complaint. This court adopts that solution.[65]

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61. *Id.*
62. *Id.* at 672-73.
63. *Id.* at 673.
64. *Id.*
65. *Margolin*, 135 B.R. at 673 (citations omitted). The footnote from the *Nicolosi* case relied upon by Judge Brumbaugh is equally enlightening:

> With these safeguards available, I have extreme difficulty with the holdings in Moore and Levy, supra, that a section 727(a) objection to discharge cannot be compromised. The purposes of the justice system are the peaceful, just, speedy and inexpensive resolution of disputes. The law normally favors compromise to achieve these ends. If voluntary compromise can be effected, the justice reached by the parties themselves may be superior to that judicially imposed. Compromise also reduces burdens on the public treasury and lessens judicial backlog. Reduction in backlog allows cases to be brought to trial before the memories of witnesses dim and documents are lost, thus brightening the prospect that, in other cases awaiting trial, justice will truly be done. Compromise also reduces the costs and burdens that society imposes on 'innocent bystanders', nonlitigants whose documents or testimony is subpoenaed.
>
> The practical effect of determining that a section 727(a) objection to discharge can never be compromised could severely chill the rights of plaintiffs to allege section 727(a) causes of action. Once the adversary complaint alleged such a cause of action, there presumably could be no compromise of the complaint even when other, meritorious causes of action were alleged in the same complaint, e.g., exceptions to discharge under section 523(a). Even if a plaintiff bifurcated his causes and dismissed the section 727 cause under Rule 7041 and then settled the section 523 action, a court could not determine whether an advantage was given for the dismissal of the section 727 objection to discharge. Unless the plaintiff simply dismissed, litigants would be forced to go to trial whenever section 727(a) and section 523(a) causes of action were alleged by the same plaintiff. This Court has well over one hundred such hybrid adversary complaints currently pending. There is a simple explanation for this. Even though section 727(a) and

The court went on to note that no creditors opposed the settlement, and none sought permission to continue the § 727 action.[66] In addition, in the two months since she had been notified of the proposed settlement, the trustee had not sought to assume prosecution of the § 727 complaint. Instead, she sought an order compelling the bank to continue the prosecution.[67] The court declined to enter such an order, and approved the settlement.[68]

Two cases from Louisiana in the mid-1980s reached the same result. In the case of *In re Short*,[69] both a creditor and the Chapter 7 trustee filed objections to discharge based upon the debtor's alleged failure to disclose certain assets and preferential transfers in his schedules. Both of these adversaries were tried, and the court entered orders in each denying the debtor's discharge.[70] Each of these decisions was appealed. While on appeal, the debtor reached settlements with both the creditor and the trustee.[71] Under the terms of the settlements, the debtor paid an undisclosed sum to the creditor, and $12,709.95 to the trustee, in exchange for dismissal of the objections to discharge.[72] The court, after noting that "in both of these proceedings the plaintiffs are receiving an advantage in exchange for which they will dismiss the complaint,"[73] approved the settlements subject to notice and an opportunity to object to all creditors.[74]

> section 523(a) causes of action are distinct, and with differing burdens of proof, they can have many factual elements in common. Compare section 727(a)(4) with section 523(a)(2) and (a)(4) and section 727(a)(2) and (a)(3) with section 523(a)(6). Without the opportunity to compromise, a litigant is left with 'no way out' except to give up or to pursue the martial arts of litigation to their ultimate conclusion.

In re Nicolosi, 86 B.R. 882, 889 n. 4 (Bankr. W.D. La. 1988).

66. *Margolin*, 135 B.R. at 673.

67. *Id.*

68. *Id.* at 673-74.

69. 60 B.R. 951 (Bankr. M.D. La. 1986).

70. One of the decisions was published. *See id.* Neither the opinion on the objection to discharge nor the opinion dealing with the settlement discloses why two separate complaints objecting to discharge were actually tried. In most cases, the court will only try one objection to discharge for the simple reason that once a discharge is denied, all further litigation relating to discharge or dischargeability is rendered moot.

71. *Short*, 60 B.R. at 952.

72. *Id.*

73. *Id.* at 953.

74. The following passage from *Short* is most insightful:

> Since Rule 7041 requires that the trustee receive notice of the dismissal of a complaint to deny the debtor's discharge and since the rule also allows the Court to set terms and conditions that it deems proper, the Court will require a notice to all creditors and parties in interest of the motion to dismiss. The notice will further state that the complaint will be dismissed unless, within 20 days, a creditor or other interested party requests to be substituted as plaintiff and/or objects to the dismissal. It will also state the advantage that the Debtor is providing in exchange for the plaintiff's motion to dismiss. This condition of full disclosure will provide all interested parties with the right to object to the dismissal and with the right to continue prosecution of the complaint to deny the Debtor's discharge if they wish to do so. *If no creditor cares to pursue and if the*

Less than a year later, the same bankruptcy judge was presented with a similar situation. In the case of *In re Corban*,[75] the creditor brought an objection to discharge under § 727(a)(2), alleging that the debtors "intentionally disposed of fully encumbered property to the prejudice of the secured creditor."[76] After the debtors filed an answer, but before the case could be tried, the creditor sought to dismiss the adversary proceeding "upon the grounds that the petitioner and the defendants have reached an amicable settlement."[77] The terms of the settlement were quite simple: the debtors agreed to reaffirm the debt owed to the particular creditor in exchange for dismissal of the complaint objecting to discharge.[78]

In considering the settlement, the court noted the distinction between complaints brought under § 727 and § 523. However, in this case, the court considered the complaint to be "a hybrid of these two concepts."[79] The court then approved the settlement using the following analysis:

> This proceeding involves an allegation of misconduct under § 727 that, if true, would have direct effect only between the Debtors and the complaining creditor since the complaint alleges that the Debtors disposed of fully encumbered property with the intent to hinder, defraud, or delay creditors. The only effect of the conduct, if proved to be true, is that the Plaintiff/creditor would retain a minimal unsecured debt whereas if the conduct alleged were not true the creditor would be fully secured. The proceeding currently under discussion, therefore, has bases in the objectives both of § 523 and of § 727.
>
> . . .
>
> Since the Debtors are represented by counsel and have agreed to settlement, and after consideration of all facts and circumstances peculiar to the case, I conclude that it is not inequitable for the Debtors to make good the results of its alleged misconduct. The alleged misconduct has minimal or no effect on other creditors, is of limited significance as public policy, and is apparently remedied by the proposed method of settlement. The trustee has been noticed of the proposed settlement and has no objection.[80]

The court went on to approve the settlement, but did require an additional certification by the attorney for the debtors regarding his negotiations of the settlement.[81]

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trustee does not wish to pursue denial of a discharge, the Court can see no authority to deny the dismissal and no way to achieve the prosecution of the case.

Id. (emphasis added).

75. 71 B.R. 327 (Bankr. M.D. La. 1987).
76. *Id.* at 328.
77. *Id.* at 328-29.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Corban*, 71 B.R. at 330.

These decisions raise several interesting issues. In *Short*, settlements were reached *after* the court had conducted a trial on the merits and determined that the debtor was not entitled to his discharge. On that basis, a very strong argument can be made that the debtor was clearly "buying his discharge," both from the objecting creditor and the trustee. In both cases, the court had no concern as to where the consideration was ultimately paid for the settlements; i.e., to the objecting creditor or to the trustee. The statements in *Corban* that analogize the § 727 claim to a § 523 claim are quite interesting. The court seems to be saying that some claims under § 727 have less public policy implications than others and that where conduct which violates § 727 adversely effects only one creditor (i.e., conversion of collateral), settlement of a § 727 claim is not tantamount to buying a discharge.

D. Settlement Considered on a Case-by-Case Basis

Not surprisingly, the majority of courts fall between the two extremes discussed above. In general, these courts permit § 727 claims to be settled, provided two requirements are met. First, the consideration paid in exchange for dismissing the complaint must inure to the benefit of all creditors in the case. Second, all creditors must be afforded the opportunity to assume prosecution of the § 727 claim, should they so desire.[82]

In the case of *In re Bates*,[83] the debtor filed his Chapter 7 bankruptcy and received a discharge. Thereafter, the bankruptcy trustee discovered various unscheduled assets and potentially avoidable pre-petition transfers.[84] The trustee filed an action to revoke the debtor's discharge based upon the debtor's alleged concealment.[85] The debtor strongly denied the trustee's accusations, contending that any insufficient disclosure was the result of oversight or innocent mistake.[86] After negotiations, the trustee and the debtor entered into a settlement where the debtor would pay the estate $250,000 over a three-year period in exchange for dismissal of all pending litigation against the debtor, including the action to revoke his discharge.[87] The settlement would result in a distribution to unsecured

82. Not surprisingly, there is a split of authority on the issue of whether a creditor may be substituted as a party plaintiff in a § 727 action where the time for filing such complaints has expired. *Compare Hage v. Joseph (In re Joseph)*, 121 B.R. 679 (Bankr. N.D.N.Y. 1990) (allowing such substitution) *with State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300 (2d Cir. 1996) (holding such substitution to be expressly prohibited under Federal Rule of Civil Procedure 25); *Pennwell Printing Co. v. Stout (In re Stout)*, 262 B.R. 862 (Bankr. D. Colo. 2001) (reaching the same result in reliance upon *Chalasani*).

83. 211 B.R. 338 (Bankr. D. Minn. 1997).

84. *Id.* at 340.

85. *Id.*

86. *Id.* at 342.

87. *Id.*

creditors of approximately 63 percent of their total claims.[88] Notice of the proposed settlement was given to all creditors and parties in interest.[89] The only objections to the settlement were filed by the United States Trustee and the Internal Revenue Service ("IRS").[90] Both of these entities objected on the basis that the debtor was "buying his discharge" which was contrary to public policy.[91] The IRS admitted that the settlement was in its best economic interests.[92] There is nothing in the record to indicate that either the United States Trustee or the IRS sought permission to continue the prosecution of the action.

After thorough consideration, the court approved the settlement.[93] In doing so, the court relied upon three basic legal principles. First, the court ruled that when an individual creditor files an action objecting to or seeking to revoke a debtor's discharge, that creditor "assumes a duty to act in the best interests of the general creditor body."[94] Due to the existence of this duty, the court concluded that it would be "*per se* inappropriate" to approve any settlement of a § 727 claim where the consideration was paid to a single creditor rather than to the trustee for the benefit of all creditors.[95] In reaching this conclusion, the court relied in part upon a local rule that required a plaintiff objecting to discharge to file an affidavit "stating that nothing has been received by or promised to the plaintiff in consideration of the request for dismissal."[96] The court went on to note that the local rule did not place such a restriction upon the settlement of a § 727 complaint filed by the Chapter 7 trustee or the United States Trustee.[97] The court found the settlement to be proper because the monies to be paid would be available for distribution to all creditors.[98] Finally, the court ruled that where the merits of a discharge action have yet to be determined, settlement of the action does not constitute the "buying of the

88. *Id.* at 345.
89. *Bates*, 211 B.R. at 342.
90. *Id.* at 343.
91. *Id.*
92. *Id.*
93. *Id.* at 348.
94. *Id.* at 346 (citations omitted).
95. *Bates*, 211 B.R. at 346-47. Several other courts have reached the same conclusion. *See e.g. In re Smith*, 207 B.R. 177, 178 (Bankr. N.D. Ind. 1997) (and cases cited therein) ("Some things are black and white and this is one of them. If the successful prosecution of a proceeding will benefit the entire creditor body, that action may not be settled in return for a private benefit. Unless the same parties that would benefit from the successful prosecution of a particular action also receive the benefits of its settlement, the settlement is improper. No amount of notice, absence of objection, or lack of creditor interest can change this principle or remove the fundamental impropriety which taints a settlement which does not comply with it."); *In re Taylor*, 190 B.R. 413, 416 (Bankr. D. Colo. 1995) ("When bringing a complaint objecting to the discharge, a creditor becomes, in effect, the trustee of that action as it inures to all creditors.").
96. *Id.* at 347 (citing Loc. R. 7041-1 (Bankr. D. Minn.)).
97. *Id.*
98. *Id.*

discharge."[99]

The result can be different when the discharge has been denied after a trial on the merits. In the case of *In re Speece*,[100] a creditor filed an objection to discharge alleging that the debtor concealed interests in real and personal property with the intent to defraud creditors of the bankruptcy estate. After a two-day trial, the bankruptcy court found in favor of the creditor and entered an order denying the discharge.[101] The debtor appealed.[102] While the appeal was pending, the creditor and the debtor reached a settlement wherein the debtor would pay $3,000 and convey his interest in certain real property to the creditor in exchange for retention of a motor vehicle and dismissal with prejudice of the discharge complaint.[103] Notice was given to all creditors and parties in interest, with the United States Trustee filing the lone opposition to the settlement.[104] The court refused to approve the settlement, noting that: (1) all consideration for the settlement was to be paid to the creditor, and not to the estate as a whole; (2) the effect of the settlement would be to allow the debtor to buy a discharge when the court had determined, after trial, that debtor was not entitled to a discharge; (3) the settlement would also have the effect of barring creditors from pursuing the debtor for collection, and thus was not in their best interests; and (4) that "[p]ermitting parties to bargain to vacate the judgment denying discharge would discourage pretrial settlements and would confer an inappropriate windfall on the winning party in the form of an opportunity to gain a more favorable settlement by selling off the public advantages of the judgment."[105] The

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99. In the words of the court:

> Furthermore, to the extent that the *Vickers* and *Moore* cases hold that the *per se* rule against settlement of § 727 cases should be extended to cases brought by the trustee because such a settlement would constitute a 'buying of the discharge,' this Court disagrees. A debtor cannot be guilty of 'buying the discharge' unless he is not entitled to the discharge in the first place. In this case, the Trustee's allegations of Debtor misconduct have not yet been tried and the Debtor's entitlement to a discharge is as likely as it is not. Under these circumstances, where the debtor's fraudulent misconduct has not been judicially determined, the Court holds that approval of the proposed settlement does not constitute a 'buying of the discharge' and does not compromise the integrity of the judicial system. Instead, the proposed settlement represents an attempt by the Trustee to act in the best interests of the estate by limiting the estate's exposure to the risks and expenses of trial in the face of an uncertain outcome. In light of the public policy concerns necessarily implicated by §727 proceedings, settlements of this type are to be viewed with skepticism and are subject to especially close scrutiny by the bankruptcy court. Nevertheless, a *per se* rule against settlement in all cases is inappropriate, as such a rule would wholly deny the benefits of compromise in cases where settlement is in the best interests of the estate.

Id. at 347-48.

100. 159 B.R. 314 (Bankr. E.D. Cal. 1993).

101. *Id.* at 322.

102. *Id.* at 316.

103. *Id.*

104. *Id.* at 316-17.

105. *Id.* at 320-21 (citation omitted).

latter comment is interesting, since it implies a willingness to consider (if not encourage) settlement of § 727 actions prior to trial.

A case that purports to follow the principles outlined above but reaches a markedly different result is *In re Mavrode.*[106] In *Mavrode,* a creditor filed a § 727 action alleging that the debtor intentionally failed to schedule certain property.[107] Prior to trial, a settlement was reached whereby the debtor's son would pay the creditor $15,000 in exchange for dismissal of the adversary proceeding with prejudice.[108] Notice of the settlement was given to all creditors, the United States Trustee and the Chapter 7 trustee.[109] No objection to the settlement was made.[110] The *Mavrode* court showed no concern with the fact that the monies at issue would be paid to the objecting creditor.[111] Instead, the court found that the settlement benefitted the entire estate because: (1) expensive and time-consuming litigation would be rendered unnecessary; (2) the creditor whose claim was being paid would no longer seek recovery from the bankruptcy estate; and (3) the settlement of litigation could result in additional assets being available for distribution to creditors.[112]

The *Mavrode* analysis is perplexing for several reasons. First, the litigation was brought by a creditor and not the Chapter 7 trustee. It is therefore difficult to understand how the fees and expenses incurred in this action would be borne by the bankruptcy estate. If fees are not borne by the bankruptcy estate, continuation of the litigation does not operate to the estate's detriment.[113] Furthermore, the effect of the settlement was to

106. 205 B.R. 716 (Bankr. D.N.J. 1997).
107. *Id.* at 719.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 721.
112. *Mavrode,* 205 B.R. at 721.
113. Although at least one court has indicated that a creditor who successfully objects to discharge may be entitled to recovery of fees and expenses, *See In re Speece,* 159 B.R. 314, 321 (Bankr. E.D. Cal. 1993), there does not appear to be any statutory authority for such an award. The *Speece* court relied upon § 503(b)(3) and (4). § 503(b)(3) provides that:

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including . . . (3) the actual, necessary expenses other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> (A) a creditor that files a petition under section 303 of this title;
>
> (B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;
>
> (C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
>
> (E) a custodian superceded under section 543 of this title, and compensation for the services of such custodian; or
>
> (F) a member of a committee appointed under section 1102 of this title, if

preclude all creditors from taking any further action to pursue the debtor. The opinion in *Mavrode* is curiously silent as to what, if any, assets were available for distribution to creditors. If such assets existed, they were available for distribution to creditors regardless of whether the debtor received his discharge. It is difficult to understand how the *Mavrode* court determined that the settlement was in the best interests of all creditors and the estate. It is equally problematic to harmonize *Mavrode* with the decisions set forth above.

In one of the most recent cases addressing the question, a Chapter 7 trustee objected to the debtors' discharge, alleging that the debtors' provided false information in their bankruptcy schedules.[114] The trustee then sought court approval of a settlement whereby the debtors would pay $5,000 into the estate in exchange for withdrawal of the objection to discharge.[115] All of the debtors' creditors and the United States Trustee were notified of the proposed settlement, and no one objected.[116] The bankruptcy court, citing both *Moore* and *Vickers*, denied the trustee's motion on the ground that neither the Bankruptcy Code nor the Bankruptcy Rules permit the compromise of a § 727 complaint.[117] The bankruptcy court also found that such compromises violate public policy and endanger the integrity of the bankruptcy system.[118] Finally, the bankruptcy court pronounced its unequivocal intention to refrain from approving settlements of § 727 claims in the future.[119]

On appeal, the district court rejected the blanket ban on settlement of

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> such expenses are incurred in the performance of the duties of such committee;

11 U.S.C.A. § 503(b)(3) (West 2001). § 503(b)(4) provides:

> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual necessary expenses incurred by such attorney or accountant;

11 U.S.C.A. § 503(b)(4) (West 2001). There is nothing in these sections that discusses the ability of a creditor pursuing a § 727 claim to recover its fees and expenses.

114. *In re Maynard*, 269 B.R. 535 (Bankr. D. Vt. 2001).

115. *Id.* at 537-38.

116. *Id.*

117. *Wolinsky v. Maynard (In re Maynard)*, 258 B.R. 91, 94 (Bankr. D. Vt. 2001).

118. *Id.* The court stated:

> To allow trustees to settle objections to discharge would be to endorse an unacceptable derogation of the integrity of the bankruptcy system and to encourage what could be a disturbing abuse of power by trustees. Trustees should not seek to put debtors in a position where they can defeat an adversary proceeding filed under § 727 by paying funds to the bankruptcy estate. If the debtor is entitled to a discharge, any demand for payment is improper and the complaint must be dismissed; if the debtor is not entitled to a discharge, the objection to discharge action should proceed and should not be withdrawn based upon a payment of any sum of money from the debtor to the plaintiff.

Id.

119. *Id.* at 95.

Notwithstanding the failure of any party to object, the court held a hearing at which it declined to approve the settlement.[130] As it did so, the court ruled that the creditor had undertaken a fiduciary responsibility in bringing the § 727 claim.[131] The creditor could not rid itself of that duty by assigning the consideration for any proposed settlement to its § 523 claim.[132] The court further found that notice of the proposed settlement was defective due to failure to disclose the proposed consideration the creditor was to receive.[133] The court also noted that in any event, should the creditor desire to pursue the settlement further, any and all monies under the terms of the settlement must be paid to the estate for distribution to all creditors.[134]

It should come as no surprise that a different bankruptcy court reached an entirely opposite result. In *Palmer v. Hayden (In re Hayden)*,[135] the creditor brought a complaint originally sounding only in § 727. The creditor later sought and obtained permission to amend the complaint to include causes of action under § 523(a)(2), (4), and (6). The debtor did not oppose the requested amendment. The parties reached an agreement whereby the creditor would dismiss the § 727 claim in exchange for a judgment of non-dischargeability as to its debt. Notice of the proposed settlement was given. Only the United States Trustee objected, on the basis that: (1) it was not served with the various pleadings filed in the adversary proceeding; (2) the settlement was tantamount to the debtor buying his discharge; and (3) the amendment of the complaint to include an action under § 523 was improper, as the amendment was allowed after the deadline for filing § 523 complaints.[136] Although given the opportunity to do so, the United States Trustee declined to be substituted as a party plaintiff in the discharge action, and filed a "Statement and Recommendation" in which the United States Trustee affirmatively alleged that "there appears no grounds for a § 727 action."[137]

After a hearing, the court approved the settlement. The court specifically found that the agreement to hold the specific debt non-dischargeable was not "tied to the threat of the § 727 action."[138] The court further noted that the consent to the entry of a judgment of non-dischargeability was not the same as offering a cash payment to the creditor, because "admitting the non-dischargeability of the debt does not mean that the insolvent Debtor is agreeing to or will pay anything towards

130. *Id.* at 60.
131. *Id.* at 57.
132. *DeArmond*, 240 B.R. at 58.
133. *Id.* at 60.
134. *Id.* at 59.
135. 246 B.R. 795 (Bankr. D.S.C. 1999).
136. *Id.* at 798.
137. *Id.*
138. *Id.* at 798.

§ 727 claims.[120] The court first cast aside concerns about "trafficking in discharges" by pointing out that the allegations of debtor misconduct contained in the complaint had yet to be judicially determined.[121] The court then addressed the public policy considerations, concluding that:

> In addition to the important public interest in upholding the integrity of the bankruptcy system and preventing tainted compromise, there is a public interest in encouraging just, speedy, inexpensive and final resolution of disputes. Furthermore, a determination that a § 727 objection to discharge can never be compromised could have the practical effect of deterring plaintiffs from bringing meritorious complaints, or of depriving defendant debtors of the full protection of the bankruptcy court's oversight.[122]

The district court remanded the case to the bankruptcy court with instructions to determine whether the terms of the proposed compromise were fair and equitable and in the best interests of the estate.[123] The bankruptcy court was also instructed "to fashion case-appropriate terms and conditions if necessary to protect other creditors."[124] The district court's decision reflects a growing body of case law moving away from a *per se* rule against settling objections to discharge, and toward a case-by-case analysis.[125]

VII. SETTLEMENT OF COMPLAINTS SOUNDING IN BOTH § 523 AND § 727

In another common scenario, a creditor will file a complaint which objects to the granting of the debtor's discharge under § 727 and, in the alternative, seek a finding that the debt owed to the particular creditor is non-dischargeable under § 523. The results in those cases also vary. In the case of *In re DeArmond*,[126] a creditor brought claims under both § 523 and § 727. The debtor and the creditor then entered into a settlement whereby the entire action would be dismissed in exchange for a payment of $8,000 to the creditor over a three and one-half year period.[127] The creditor filed a motion to approve the settlement, providing notice that the settlement would result in the dismissal of the § 727 claim but failing to provide notice of the consideration to be paid.[128] There were no objections to the proposed settlement.[129]

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120. *Maynard*, 269 B.R. at 542.
121. *Id.*
122. *Id.*
123. *Id.* at 543.
124. *Id.*
125. On remand, the bankruptcy court determined that the proposed settlement was not fair and equitable and denied the trustee's motion. *See Wolinksky v. Maynard (In re Maynard)*, 273 B.R. 369, 373-74 (Bankr. D. Vt. 2002).
126. 240 B.R. 51 (Bankr. C.D. Cal. 1999).
127. *Id.* at 54.
128. *Id.* at 59.
129. *Id.*

the debt."[139] The court further found that the facts pled in the original complaint put the debtor on sufficient notice of the § 523 claims.[140] In addition, the court noted that the United States Trustee declined the opportunity to be substituted as party plaintiff, specifically stating its belief that the § 727 complaint was without merit. Finally, the court stated its support for "the policy that if the objecting party does not wish to be substituted, then it should not be heard to complain and the action may be dismissed."[141]

In a similar situation, a creditor filed an action under both § 523 and § 727, and then sought to settle the litigation in its entirety in exchange for a judgment of non-dischargeability.[142] The court at first refused to approve the settlement, and then reconsidered, apparently on the basis that the § 727 complaint was without merit.[143] The opinion is silent as to what notice of the proposed settlement was given to creditors and parties in interest.[144]

VIII. CONCLUSIONS TO BE DRAWN (IF ANY)

What are we to take from this broad spectrum of analyses, approaches and results? In many cases, the compromises at issue were unopposed. Notwithstanding that fact, many courts felt compelled not only to disapprove the compromise, but to write and publish on the issue. Bankruptcy courts are in essence trial courts–published opinions represent a tiny fraction of their business. While the decisions reviewed here give some insight into the approaches taken by the courts which have chosen to publish on the issue, there may well be a much larger body of unpublished law governing the issue of § 727 settlements.

The question raised by these cases goes to the role of the discharge in the American bankruptcy system. It could be described as whether the granting of a bankruptcy discharge is a matter of micro-economics (the economics of the bankruptcy case) or macro-morality (discharges should only be given to the "honest but unfortunate" debtor). It appears that many courts are moving away from the view that a bankruptcy discharge is a privilege that may never be soiled by the taint of compromise. Such a

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139. *Id.* at 799.

140. *Id.* at 800-01.

141. *Hayden*, 246 B.R. at 799 (citation omitted).

142. *SouthTrust Natl. Bank v. Parcus (In re Parcus)*, 269 B.R. 457 (Bankr. N.D. Ala. 2001).

143. The following portion of the opinion is instructive:

> It appears that counsel in the case before the Court was not aware of the consequences of joining a potentially frivolous cause of action under § 727 to deny the debtor's entire discharge with a complaint to determine dischargeability under § 523 of a single debt. It is therefore ORDERED, ADJUDGED and DECREED that the settlement agreement proposed by the parties is hereby approved with the warning that § 727 should not be used as a negotiation tactic.

Id. at 458.

144. The United States Bankruptcy Court for the Northern District of Alabama does not appear to have a local rule governing notice of such settlements.

view may be founded in the realism that most parties to a bankruptcy case are driven by economic concerns instead of a sense of moral right and wrong.

For the practitioner, the lessons to be learned can perhaps be summed up in three general "tenets:" (1) know thy local rules; (2) know thy judge; and (3) know the merits of thy § 727 complaint. Where the local rules (or the judge) prohibit settlement, then one must be ready to try the § 727 complaint, and should only file those complaints which one is prepared to try. At a minimum, the client should be aware of the potential pitfalls, and be made aware early in the process that the spoils of any settlement may end up in the collective hands of all of the estate's creditors.

The cases that view the compromise of § 727 actions under the same standards as compromises in other litigation, coupled with an appreciation of the role the discharge plays in bankruptcy from a public policy standpoint, have the most appeal, both intellectually and practically. Those cases recognize the difficulty that a court faces in forcing litigation by a reluctant plaintiff. They also recognize that the mere filing of an objection to discharge is not tantamount to a determination that a debtor has acted improperly. Finally, they recognize that the decision of whether to approve a § 727 compromise, as with any other compromise, is best considered as a fact-specific matter, to be determined on a case-by-case basis.