1992

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WHAT DO YOU MEAN MY PARTNERSHIP HAS BEEN PETITIONED INTO BANKRUPTCY?

I. Introduction

Under present bankruptcy law, an involuntary petition may be commenced against a partnership by fewer than all of the general partners in such partnership. If an involuntary petition is not contested by any of the non-filing partners, the bankruptcy court will order relief for that partnership. However, if an involuntary petition, filed by fewer than all of the general partners, is contested by any or all of the non-filing partners, the bankruptcy court will order relief only if it can be shown that the debtor-partnership was "generally not paying" its debts as they became due. In comparison to previous bankruptcy law, this "generally not paying" test or filing standard, regarding partners' involuntary filings against their partnership, is the most lenient to date. The Bankruptcy Code does not define what "generally not paying" means. However, the legislative history of the Code provides that "the court orders relief, after a trial only if the debtor is generally unable to pay its debts as they mature. . . ."

Bankruptcy law regarding partnerships differs from bankruptcy law pertaining to individuals and corporations. Only a partnership can be involuntarily petitioned into bankruptcy by individuals within the organization. If fewer than all of the general partners petition the partnership into bankruptcy, the petition is considered an involuntary one. The threat of an involuntary petition can be a useful bargaining

5. Id.
6. For corporations and individuals there are only two ways to file for bankruptcy. A voluntary petition filed by the corporation or individual, or an involuntary petition filed by the requisite number of creditors as specified by the applicable Code sections. 11 U.S.C. § 303(b) (1992). For partnerships, however, there are three possible ways to file for bankruptcy. A voluntary petition can be filed by all of the general partners, an involuntary petition can be filed by the appropriate amount of creditors or an involuntary petition can be filed by less than all of the general partners of the partnership. Partnerships are the only entities which can be involuntarily petitioned into bankruptcy by members within the organization itself. 11 U.S.C. § 303 (a),(b) (1992).
7. Id.
chip for petitioning partners. Since the bankruptcy court has a number of powers which can be used to protect individual partners and their assets, the lenient filing requirements under which partners can petition their partnerships into bankruptcy may encourage partners who can personally benefit from filing to do so, even if the act would be to the detriment of the partnership.8

A partnership is a unique organization form. Under the Uniform Partnership Act,9 a partnership is not recognized as an entity. Absent a statute to the contrary, it is impossible to bring suit against a partnership.10 It is necessary, therefore, to hold partners personally liable for their partnership's obligations.11 A partner is either jointly or jointly and severally liable depending on the attendant circumstances.12 A partner who is jointly liable is responsible for only his particular share of the obligation. A partner who is jointly and severally liable, however, is responsible for the entire obligation regardless of his share.13

In a Chapter 1114 reorganization case, the problem regarding involuntary petitions by partners against a partnership is whether involuntary relief in the form of a reorganization should be imposed on the partnership at the behest of fewer than all of the general partners.15

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8. Partners have a fiduciary duty to one another. Uniform Partnership Act § 21 (1990) (hereinafter U.P.A.). There are no cases indicating that the filing of an involuntary petition is a breach of that duty. Justice Cardozo once described this duty stating, "[m]any forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Meinhard v. Salmon, 249 N.Y. 458, 460, 164 N.E. 545, 546 (1928).
12. The U.P.A. prescribes that partners are only jointly liable. U.P.A. § 15 (1990). Thus, in order to sue a partnership an individual must normally join all of the partners in the suit. Many states disagree with this result and resolve the problem by either making the partnership an entity that can be sued, or by establishing joint and several liability, therefore, making the joining of partners in a suit unnecessary. E.g., Cal. Civ. Proc. Code § 410.70 (West 1973).
13. He is, however, entitled to contribution from the other partners. U.P.A. § 18.
15. Frank R. Kennedy, excerpt from an unpublished treatise, in Gerald K. Smith, The Financially Distressed Limited Partnership, ALI-ABA Resource Materials Partnerships: UPA, ULPA, Securities, Taxation, and Bankruptcy 693-94 (4th ed. 1983). Professor Kennedy argued, "[t]he statute unquestionably purports to provide for such relief, but if a statute attempts to legislate an impossible result it may be discarded. Is it conceivable that a partnership may be reorganized against its will?" Id.
Based on their personal liability, individual partners of the debtor-partnership primarily focus on limiting the extent of their liability. These partners' concerns often clash with the concerns of the partnership as a whole, creating an atmosphere which may hinder efforts to effectuate a reorganization.

Under previous bankruptcy law regarding partners' involuntary petitions against their partnerships, relief was not granted unless there was a finding that the partnership was insolvent. For the most part, prior to the Bankruptcy Act of 1978, insolvency was defined by the balance sheet test. However, in 1978, Congress enacted the more lenient "generally not paying" standard as the required criteria for all involuntary petitions. Although there is evidence that Congress intended to enact this easier "generally not paying" standard to benefit involuntary petitions by creditors, there are no indications or statements regarding partners' involuntary petitions against their partnerships. Additionally, Congress enacted this change in the face of proposed legislation which acknowledged the special nature of a partner's petition against the partnership and the need either to eliminate this type of petition or to make this standard more difficult with respect to partners' petitions against the partnership. The Congressional record surrounding the enactment of the generally not paying standard, however, fails to address these contrasting views regarding the partner's ability to commence an involuntary proceeding against the partnership.

Currently the ease with which a partner can file under the "generally not paying" test, coupled with the advantages the bankruptcy court affords individual partners, encourages partners to file. Stricter standards need to be implemented to ensure that partnership funds


17. See Kennedy, supra note 15, at 653-54 (asking if involuntary reorganization can be imposed on a partnership). For example, suppose that two of a partnership's five general partners file an involuntary Chapter 11 petition against the partnership. Pursuant to § 303(d) of the Code, two of the three non-filing partners can answer the petition objecting to the bankruptcy and seeking dismissal of the case. If after a hearing, the court denies this motion to dismiss, the bankruptcy court is then faced with a partnership split three ways. Two general partners want reorganization, two general partners want to retain the status quo and one general partner has yet to express his opinion and will be bound by what the bankruptcy court decides.


available to pay partnership obligations are not wasted on a self-serving bankruptcy filing. Additionally, these stricter standards are necessary to ensure that the bankruptcy court's time and energy are expended only on those partnerships in serious need of bankruptcy relief.

This Note argues that in the case of a partner's petition against the partnership, the "generally not paying" filing requirement is subject to abuse by petitioning partners seeking to use the lenient filing standard to their personal advantage. Part II of the Note summarizes the history of partner against partnership filings. Part III examines the protections the bankruptcy court affords partnerships and analyzes possible malevolent motives a partner might have for filing against his or her partnership. Part IV explores court and legislative solutions to the problems presented by partners' filings against their partnership. This Note concludes with a recommendation for Congress to enact a stricter filing standard for involuntary petitions by partners against the partnership, encompassing both a reversion to a strict equity insolvency test and the requirement that petitioning partners' capital account balances constitute at least ten percent of the partnership's total capital.

II. Legislative History

A. The Bankruptcy Acts

Bankruptcy law has almost always provided a cause of action for a partner to file an involuntary petition against the partnership.\textsuperscript{22} The Bankruptcy Acts of 1841,\textsuperscript{23} 1867\textsuperscript{24} and 1938\textsuperscript{25} expressly provided for a petition filed by less than all of the general partners of a partnership. Courts also inferred that the 1898 Act provided such a cause of action.\textsuperscript{26} Each Act required partnership insolvency before relief could be granted. However, until the Act of 1898, insolvency remained undefined by Congress, leaving courts to determine their own definitions of insolvency\textsuperscript{27} or to define insolvency on a case by case basis.

\textsuperscript{23} Bankruptcy Act of 1841 § 14, 5 Stat. 448 (1841).
\textsuperscript{24} Bankruptcy Act of 1867 § 36, 14 Stat. 517, 536 (1867).
\textsuperscript{25} Bankruptcy Act of 1898 § 5(b) (revised 1938).
\textsuperscript{26} Meek v. Centre County Co. 268 U.S. 426, 434 (1925).
\textsuperscript{27} John C. McCoid II, \textit{The Occasion for Involuntary Bankruptcy}, 61 AM. BANKR. L.J 195, 195-200 (1987). Congress and the courts were not always clear on whether insolvency should be measured by the balance sheet test or by the equity test. The balance sheet test requires that the debtor's liabilities exceed his assets. The equity test requires that the debtor's current liabilities exceed his current assets. \textit{Id.} at 195-96.
The Act of 1841 expressly provided for a partner against partnership cause of action.\(^2\) Section 14 of that Act provided "where two or more persons who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them ...."\(^2\) The Act, however, failed to define insolvency.\(^3\) Therefore, courts chose either the balance sheet test\(^3\) or the equity test\(^3\) for insolvency depending on the circumstances of the case.\(^3\)

Similarly, the Bankruptcy Act of 1867 expressly provided for a partner against partnership cause of action.\(^3\) The statute provided that a partnership's property should be taken and administered in cases "where two or more persons who are partners ... shall be adjudged bankrupt, either on the petition of such partners or any one of them ..."\(^3\) General Order XVIII provided that a non-consenting partner had the defense of partnership solvency.\(^3\) Like the Act of 1841, the Act of 1867 failed to provide a definition of insolvency, thus leaving the courts to formulate their own definitions.\(^3\)

Departing from the previous Acts, the Bankruptcy Act of 1898 did not specifically grant or deny a partner's right to file an involuntary petition against the partnership. Section 5(a) of the Act provided that "[a] partnership during the continuation of the partnership business or after its dissolution ... may be adjudged a bankrupt."\(^3\) The Act permitted only two types of petitions, voluntary or involuntary by creditors, through which a person, including a partnership,\(^3\) could be adjudged bankrupt. Supplementing the Act, however, was General Order VIII, which provided a non-consenting partner the defense of partnership solvency.\(^3\) Therefore, some courts inferred that because the defense for the cause of action existed, the partner against partnership cause of action also existed.\(^3\)

A partner's ability to file an involuntary petition against the part-

\(^2\) Bankruptcy Act of 1841 § 14.
\(^2\) Id.
\(^3\) Id.
\(^3\) For a definition of the balance sheet test, see supra note 27.
\(^3\) For a definition of the equity test, see supra note 27.
\(^3\) See McCoid, supra note 19, at 195-200.
\(^3\) Bankruptcy Act of 1867 § 36.
\(^3\) Id.
\(^3\) Bankruptcy Act of 1867, General Order No. XVIII.
\(^3\) Bankruptcy Act of 1867 § 39. See also McCoid, supra note 19.
\(^3\) Bankruptcy Act of 1898 § 5(a).
\(^3\) Bankruptcy Act of 1898 § 1(19).
\(^3\) Bankruptcy Act of 1898, General Order No. VIII.
\(^3\) Meek v. Centre County Co., 268 U.S. 426, 429-31 (1925).
nership and the non-consenting partners' defense of partnership solvency retained their effective status until 1925. In 1925 the Supreme Court in *Meek v. Centre County Banking Co.*,\(^{42}\) nullified the Act of 1898's General Order VIII.\(^{43}\) The Court held that a petition filed by one partner against the partnership and its non-consenting members was an involuntary petition unauthorized by the Act.\(^{44}\) The Court reasoned that General Order VIII, in purporting to authorize the filing by one or less than all of the partners, did not relate to the execution of any of the provisions of the Act itself. Therefore the order was without statutory warrant and had no effect.\(^{45}\)

A partner's ability to file an involuntary petition against the partnership remained dormant until the Act of 1938. Section 5(b) of that Act provided:

[a] petition may be filed by one or more or all of the general partners in the separate behalf of a partnership or jointly in behalf of a partnership and of the general partner or partners filing the same: Provided, however, [t]hat where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent. A petition may be filed separately against a partnership or jointly against a partnership and one or more or all of its general partners.\(^{46}\)

Consistent with the earlier General Orders XVIII and VIII, section 18 of the Act permitted non-consenting partners the defense of solvency of the partnership.\(^{47}\)

Nothing in the 1938 Act indicated substantive reasons for permitting a partner to file an involuntary petition against the partnership.\(^{48}\) Rather, as the House Judiciary Committee Report stated, the changes were procedural in nature.\(^{49}\) Under section 9 of the report entitled "Amendments To Provide A More Workable Partnership Section," the Committee explained that the Act of 1898 did not provide for the filing of a joint petition by or against the partnership. The Committee stated that this inability resulted in confusion in procedure.\(^{50}\) The report implied that by allowing these causes of action, confusion

\(^{42}\) 268 U.S. 426 (1925).
\(^{43}\) *Id.*
\(^{44}\) *Id.* at 432.
\(^{45}\) *Id.*
\(^{46}\) Bankruptcy Act of 1938 § 5(b). Insolvency was defined by the balance sheet test.
\(^{47}\) Section 18 provided that a non-assenting partner had the right to controvert the allegation of insolvency. Bankruptcy Act of 1938 § 18. *See also* Mason v. Mitchell, 135 F.2d 599, 601 (9th Cir. 1943).
\(^{48}\) Mitchell, 135 F. 2d at 601.
\(^{50}\) *Id.* at § 9(a)-(b).
would cease and a more expeditious practice would result.\textsuperscript{51}

Despite numerous proposals in Congress, from 1938 to 1978, the law controlling partners' petitions against the partnership remained unchanged.\textsuperscript{52} In July 1973, the Report of the Commission on the Bankruptcy Laws expressed concern that a partner might use the ability to file against the partnership for personal benefit. Voicing this concern, the report stated:

\begin{quote}
[i]f one general partner does not concur, the petition by the other partners is involuntary. The essential difference between the partners' petition and a creditor's involuntary petition is the ground for filing. Under this subdivision, [dealing with a partner's petition] the sole test is insolvency . . . . To avoid the possibility of undue pressure by a partner with little to lose, the value of each partner's net worth, if any . . . is added to the value of the partnership property.\textsuperscript{53}
\end{quote}

Congress never passed this amendment.

Also, Congress did not enact the original version of the Reform Act of 1978.\textsuperscript{54} This version lacked a provision permitting the filing by less than all of the general partners against the partnership. The accompanying explanatory notes to House Report 8200 highlighted this omission, declaring, "[t]here is no provision similar to section 5(b) of the Bankruptcy Act [1938] permitting an involuntary petition to be filed against a partnership by less than all of the partners on the grounds of its insolvency."\textsuperscript{55} These notes reasoned that providing for such a cause of action was unnecessary because partners would collectively take voluntary action when necessary.\textsuperscript{56}

\section*{B. Insolvency and the Three Filing Standards}

Insolvency is generally defined by one of two commonly accepted definitions. First, under balance sheet insolvency, a debtor is insolvent when his total liabilities exceed his total assets.\textsuperscript{57} In contrast, under the second definition, equity insolvency, a debtor is insolvent when his current liabilities exceed his current assets.\textsuperscript{58}

Although only two definitions of insolvency exist, there are three

\footnotesize

\textsuperscript{51} Id. See also Mitchell, 135 F.2d at 601.
\textsuperscript{52} See COLLIER ON BANKRUPTCY (15th ed. 1979) (Legislative History Appendix).
\textsuperscript{55} Id.
\textsuperscript{56} Id. ("Rather, it is contemplated that voluntary action would be taken under 11 U.S.C. 301 . . . .")
\textsuperscript{57} See McCoid, supra note 19 at 195-97.
\textsuperscript{58} Id.
filing standards regarding partners’ petitions against the partnership: the equity insolvency test, the balance sheet insolvency test and the “generally not paying” test. The tests for both equity insolvency and balance sheet insolvency are relatively simple. The equity insolvency test measures whether current liabilities exceed current assets and the balance sheet insolvency test determines whether total liabilities exceed total assets. The “generally not paying” test, however, is not as straightforward as the insolvency tests. Although the Code’s legislative history suggests that the “generally not paying” test is synonymous with the equity insolvency test, it is possible to be generally not paying one’s debts when due and still have current assets in excess of current liabilities. Therefore, the Code incorrectly equates the equity insolvency test and the “generally not paying” test, since, when applied to the same facts, the two tests may yield different results.

Today, less than all of the general partners can file an involuntary petition against the partnership. The partnership need only be generally not paying its debts as they become due in order for a filing partner to successfully petition his partnership into bankruptcy.

The legislative history of section 303 states that the generally not paying test is the most significant departure from the 1938 law concerning the grounds for involuntary bankruptcy, which required balance sheet insolvency and an act of bankruptcy.

III. Bankruptcy Court Protection for Partners and Partnerships

The current “generally not paying” standard presents an easier burden for filing partners, in turn, opening avenues to bankruptcy court previously unavailable to partners and their partnerships. Problems inherent in a partner’s ability to file an involuntary petition against the partnership fall into two general categories. First, there exist ar-

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60. See also Michael J. Grindstaff & Thomas M. Hacke, Note, Involuntary Bankruptcy: The Generally Not Paying Standard, 33 Mercer L. Rev. 903, 905 (1983). Equity insolvency . . . focused on the debtor’s inability to meet his obligations. The equity insolvency test under section 303(h)(1) of the Code deletes any mention of inability, but instead looks to whether the debtor is generally not paying his debts as they become due. Id.
63. An act of bankruptcy occurred when a person conveyed, transferred, concealed or removed, part of his property with the intent to defraud, delay, or hinder his creditors; or when a person transferred while insolvent a portion of his property to one or more creditors with the intent to prefer such creditors over the others. Bankruptcy Act of 1898 § 3.
65. Id.
eas of protection provided by the Code which, by their nature, are vulnerable to abuse by a partner seeking to serve personal interests.66 Second, in Chapter 11 reorganization cases, a bankruptcy court is faced with piecing back together a partnership unbalanced because of partners who are only concerned with limiting the extent of their personal liability.

To understand how a partner may personally benefit from filing against the partnership, knowledge of the benefits of the Code to a debtor-partnership is necessary. One of the fundamental protections provided by the Bankruptcy Code is the automatic stay.67 The automatic stay gives the partner and debtor-partnership a breathing spell from their creditors.68 The stay also protects creditors by providing the time necessary to effectuate an orderly reorganization or liquidation procedure.69 Although the automatic stay provides the debtor, property of the debtor and property of the estate protection,70 the primary area of protection focuses on securing the property of the estate from creditor actions.71 The moment the bankruptcy petition is filed, the protections of the stay take effect.72

Another source of protection provided by the Code is found in section 105.73 Section 105 states: "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."74 This power is often referred to as the bankruptcy courts’ equitable power.75

The protection of partnership property held in the partner’s name is one area of particular interest to partners. Regarding protection of these ownership interests from partnership creditor actions, the Bankruptcy Court for the District of Colorado held that liens filed after the petition was filed, against partnership property purchased and maintained with partnership funds but not held in the partnership name, were invalid.76 The court reasoned that unless a contrary intention is
apparent, the bankruptcy estate includes any equitable interests of the partnership in the property because partnership funds were used to purchase the property. The property, held only in the partner’s name, was protected as though it were actually property of the debtor-partnership itself.

Certain Code protections extended to the individual partners of a debtor-partnership highlight the possibility of use or misuse of the Bankruptcy Code for the personal benefit of the individual partners. With respect to collection actions by creditors against partners, courts have used sections 105 and 362 to determine the extent of protection to afford partners of a debtor-partnership. In *In re Northlake Building Partners*, a secured creditor was denied relief from the automatic stay to proceed against principals of the debtor partnership. Included in those the creditor pursued was a general partner who had personally guaranteed the partnership’s secured debt. The court refused to lift the stay, indicating that the stay could be extended to protect general partners of the debtor-partnership.

In addition to the automatic stay, the bankruptcy court has broad powers under section 105 which may also be used to protect debtor-partnerships and their partners. Applying this power to collection actions against individual partners of debtor-partnerships, a Michigan bankruptcy court enjoined collection actions against individual partners. Section 105 requires that the court only use this power to ad-

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77. Id. at 833.
78. 11 U.S.C. 105.
80. 25 B.R. 543 (Bankr. N.D. Ill. 1982).
81. While this case has the effect of protecting the partners, the court’s reasoning extended only to the fact that the creditor was oversecured and therefore adequately protected. Id.
82. Id. at 544.
83. Id. at 545. *Contra In re Aboussie Bros. Constr. Co.*, 8 B.R. 302 (Bankr. E.D. Mo. 1981) (holding that the automatic stay only extends to the partnership debtor and not the legally distinct general partners; *In re Autobahn Classics*, Inc., 29 B.R. 625 (Bankr. S.D.N.Y 1983) (recognizing the separate identities of the partner and partnership and holding that the lessor could proceed against the nonbankrupt partner who was the lessee on the lease as an individual).
84. 11 U.S.C. § 105(a) (1992). Section 105 states: [t]he court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary to enforce or implement court orders or rules, or to prevent an abuse of process.

Id.

The bankruptcy court in Old Orchard Investment Co. v. A.D.I. Distributors, Inc. stated that because the individual partners are personally liable for partnership debts, any depletion of the partner's assets necessarily affects the partnership's ability to reorganize, and therefore collection actions against individual partners are related to the partnership bankruptcy case. The court stressed that there would be important repercussions to the debtor-partnership if some creditors were allowed unrestricted access to a partner's assets.

In addition to the bankruptcy court's power under sections 105 and 362, the court may protect individual partners by confirming a reorganization plan which limits or even extinguishes the extent of personal liability each partner has to the partnership creditors. In the Chapter 11 bankruptcy case for the Myerson and Kuhn law partnership, the Bankruptcy Court for the Southern District of New York confirmed a reorganization plan which prohibited the partnership's creditors from proceeding against the individual partners, even though those partners were liable under the joint and several theories of liability.

This personal protection afforded general partners by some bankruptcy courts may be a contributing factor to a partner's decision to

In Landmark the partnership financed the purchase of an aircraft through a bank. Nine general partners personally guaranteed the note, also giving a security interest in the aircraft. The bank received a judgement against the partners and partnership when both defaulted. Immediately, six of the general partners filed an involuntary Chapter 11 petition against the partnership. The partnership and seven of its general partners moved to enjoin the bank from undertaking collection efforts against the individual partners. The court declined to issue an order under section 105 of the Code. After deciding the partnership had been organized for the purpose of utilizing an investment tax credit, the court concluded "[t]he issuance of an injunction to protect them from the risk of liability they voluntarily assumed, it would seem, would promote the use of a tax avoidance scheme of questionable benefit to the public which . . . would hinder the efforts of bona fide creditors to collect their just due." Id. at 560.

86. Id. at 601.
87. Id. at 599.
88. U.P.A. §§ 21, 22.
90. Although this dictum tends to indicate the possibility that the court's power under section 105 may be extended to protect partners' interests other than collection suits relating to debts of the partnership, the court limited its holding to enjoining only claims that could have been brought against the partnership.
92. Id.
93. For an explanation of a partner's joint and/or several liability for partnership obligations, see supra note 12 and accompanying text.
94. See supra note 91.
file an involuntary petition against a partnership. Although there is no express requirement that a Chapter 11 petition must be filed in good faith, some courts have held that there is an implied good faith requirement. 95 Since it is often unclear which actions constitute bad faith, 96 some courts are reluctant to dismiss petitions based on seemingly bad faith. 97 The "generally not paying" test adds to the difficulty in determining bad faith filings by permitting easy access to the bankruptcy court. Consequently, with the possible personal protection partners may gain through filing an involuntary petition, coupled with the lack of an effective good faith filing requirement to deter frivolous filings, partners have little to lose from filing an involuntary petition against the partnership.

Additionally, filing partners may gain a strategic advantage from the procedural structure of the Code. Although non-filing partners are permitted to answer 98 an involuntary petition, creditors are not. 99 Creditors lack an efficient means to attract immediate court attention to possible malevolent filing motives of the partner. Therefore, while the court may later determine it appropriate to dismiss, the filing partner will have already received a stalling benefit.

The second problem with this relaxed filing standard relates only to Chapter 11 cases. The filing standard requires the court to piece back together a partnership where one or more partners have filed for bankruptcy without the consent of, or against the will of, the other partners. 100 In In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 101 the Bankruptcy Court for the Southern District of New York acknowledged how difficult it could be to adjudicate a partnership bankruptcy. 102 In this case the general partners of the partnership sought appointment of a general partners' committee in order to assist in the reorganization. 103 The court refused to appoint a committee of general partners reasoning that one of the primary purposes of a committee is to negotiate, where as in this in-

95. In re Winshall Settlor's Trust, 758 F.2d 1136, (6th Cir. 1985); In re Albany Partners Ltd., 749 F.2d 670 (11th Cir. 1984).
99. Id.
100. One of the most interesting questions presented by Code provisions is whether involuntary relief can be imposed on a partnership. Kennedy, supra note 15.
102. Id. at 16-18.
103. Id.
stance, each partner was racing to minimize or avoid the personal liability to the debtor-partnership's creditors.\textsuperscript{104}

Moreover, in some cases where the personal concerns of the partners inhibit the reorganization, a court's reluctance to find bad faith results in a waste of valuable court time and the partnership debtor's money which reasonably should be used to pay the partnership obligations. For example, in \textit{In re Wedgewood Golf Associates, Ltd.}\textsuperscript{105} the Bankruptcy Court for the Middle District of Florida dismissed one voluntary petition for and two involuntary petitions against the debtor-partnership, all of which were filed by two of the general partners of such partnership.\textsuperscript{106} Although the first two petitions, \textit{Wedgewood I} (voluntary) and \textit{Wedgewood II} (first involuntary), were dismissed based on technical failure to meet Code requirements,\textsuperscript{107} \textit{Wedgewood III} (second involuntary) was dismissed based on the finding that the debtor-limited partnership would not be able to effectuate a meaningful reorganization because of an irreconcilable dissension among the internal management of the partnership.\textsuperscript{108} Even though the court inferred that the involuntary petition was intentionally filed to forestall a creditor action against the partnership,\textsuperscript{109} \textit{Wedgewood} held that internal strife alone was not sufficient to establish that alleged general partners or counsel acted in bad faith in filing the bankruptcy petitions.\textsuperscript{110}

Resolution of \textit{Wedgewood} required court evaluation of the partnership's internal difficulties.\textsuperscript{111} When the ultimate outcome results in dismissal and more appropriate remedies exist,\textsuperscript{112} such extensive court

\textsuperscript{104. Id. at 18.}
\textsuperscript{105. 90 B.R. 510 (Bankr. M.D. Fla. 1988).}
\textsuperscript{106. Id. at 512.}
\textsuperscript{107. SPI, a general partner of Wedgewood, objected to the voluntary petition because it did not consent to the filing. Id. at 511. The court dismissed the petition (\textit{Wedgewood I}) finding that it was an unauthorized voluntary petition. The filing general partners were joined by one other general partner in the filing of the first involuntary petition (\textit{Wedgewood II}). The court dismissed \textit{Wedgewood II} on the basis that the petition was not verified, and accordingly was in violation of 28 U.S.C. § 1746 and Bankruptcy Rule 1008. Id.}
\textsuperscript{108. Id.}
\textsuperscript{109. The court infers that the petition was filed to stall this creditors foreclosure action. Id. at 513.}
\textsuperscript{110. \textit{In re Wedgewood Golf Assocs., Ltd.}, 90 B.R. 570, 513 (Bankr. M.D. Fla. 1988).}
\textsuperscript{111. Id.}
\textsuperscript{112. For example, in \textit{In re Williamsburg Suites, Ltd.}, the court dismissed an involuntary petition filed by a general partner reasoning that applicable Virginia partnership law established comprehensive and detailed procedure for determination of rights of general partners and creditors, and therefore the creditors and debtor partnership would be better of with state procedures than the often cumbersome and expensive bankruptcy process. 117 B.R. 216, 219-20 (Bankr. E.D. Va. 1990).}
participation is judicially wasteful, and unnecessarily depletes the amount of funds a partnership has to pay off its obligations.

Similarly, in In re Williamsburg Suites, Ltd.\textsuperscript{113} the Bankruptcy Court for the Eastern District of Virginia dismissed an involuntary Chapter 11 petition filed by a general partner against the partnership because discord among the partners made continuation of the partnership impossible.\textsuperscript{114} This discord is highlighted in the facts surrounding this case. A general partner filed in state court for dissolution of the partnership alleging that the partnership was dissolved by acts of the general partners and also by operation of law.\textsuperscript{115} Prior to a decision by the state court, a creditor of the partnership filed a notice of default on a note secured by a deed of trust on the partnership's principal asset.\textsuperscript{116} That same day, one of the other general partners, a defendant in the state court dissolution action, filed an involuntary bankruptcy petition against the partnership, staying the dissolution proceeding as well as any other action against the partnership.\textsuperscript{117} The partner in the state court dissolution action sought relief from the stay regarding that action. The stay was lifted and the state court entered a decree dissolving the partnership.\textsuperscript{118}

Eventually, the Williamsburg court dismissed the involuntary petition, reasoning that applicable Virginia partnership law established comprehensive and detailed procedures for determination of rights of general partners and creditors.\textsuperscript{119} Thus it was in the parties' best interests to dismiss the case.\textsuperscript{120} If the partner filing the involuntary petition had not immediately filed, the state court would have entered its decision and the partnership would have been dissolved according to state law procedures. Since this outcome was the same as that ultimately reached by the bankruptcy court,\textsuperscript{121} the bankruptcy court's participation was judicially wasteful and its participation unnecessarily depleted the amount of partnership funds available to pay off partnership obligations.

\begin{footnotes}
\item 113. Id.
\item 114. Id.
\item 115. Id. at 217.
\item 116. Id.
\item 118. Id. at 217.
\item 119. Id. at 219.
\item 120. Id. at 219-20.
\item 121. Evidenced in the transcript of the circuit courts bench ruling, the court intended to appoint a receiver to take control and distribute the partnership assets, but the imposition of the bankruptcy case precluded such a measure. Id.
\end{footnotes}
IV. Legislative and Judicial Solutions

Partners can use the Code and the present "generally not paying" standard to their strategic advantage. When this personal advantage contradicts the purpose of the Bankruptcy Code, bankruptcy courts must dispose of the situation as the law warrants. This disposition generally means an expensive bankruptcy proceeding which may leave many creditors empty-handed.

Solutions to the problem are troublesome. Applications of already operative Code sections require scrupulous, often wasteful, court evaluation of partner filings against the partnership under the "generally not paying" standard, as illustrated in the Wedgewood and Williamsburg cases. Nonetheless, the potential for misuse and judicial waste presented by the involuntary petitions by partners against the partnership requires implementation of an effective solution.

One solution is to rewrite the filing standard in an attempt to ensure that the needs of the partnership and not those of the filing partner prompt the involuntary filing of the bankruptcy petition by a partner. Reversion to a strict equity insolvency test with an additional requirement that filing partners' capital account balances constitute at least ten percent of the total capital of the partnership is one way of accomplishing this assurance. The stricter equity insolvency standard avoids requiring the bankruptcy courts' exertion of judicial resources on a partnership by confirming that the partnership no longer maintains enough current assets to pay its current obligations. Such a standard prevents partners from being able to use the protection provided by the bankruptcy court to their personal advantage. This standard also forces partners seeking to file a bankruptcy petition to resolve their differences with other partners in order to file a voluntary petition, or if such differences cannot be resolved, to file instead with the state for a state dissolution of the partnership. Additionally, requiring filing partners to have a sufficient percentage of capital invested in the partnership serves to ensure that they have enough of an interest in the partnership to be concerned with a successful reorganization of their partnership.

The stricter filing standard, by limiting easy access to the bankruptcy court, forces all partners to participate actively in the decision to file for bankruptcy. Since partners are generally personally liable

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122. See supra notes 105, 112 and accompanying text.
124. This requirement is similar to the requirement for creditors' involuntary petitions mandating that petitioning creditors or of a certain number and are due at least "X" amount of dollars. See 11 U.S.C. §§ 303 (b)(1), (2).
for partnership debts, access to the bankruptcy court is an important resource for partners. Switching to a strict equity insolvency standard would be effective in saving judicial resources because it would force partners in financially deteriorating partnerships to resolve differences and file voluntarily for bankruptcy, thus saving court time and partnership money which would have been required to resolve these differences in bankruptcy court.

This filing standard change would not affect the creditor filing standard. Creditors would still be able to file an involuntary petition against a partnership under the “generally not paying” test when such partnership was generally not paying its debts as they became due, regardless of the filing standard applied to a partner’s petition against the partnership.

Moreover, the current “generally not paying” filing standard for partners’ petitions against their partnership was rejected as the appropriate standard by the Report of the Commission of the Bankruptcy Laws of the United States. Although the Commission’s recommendations detailed the need for involuntary relief based on the “generally not paying” filing standard for creditors, the report firmly stated that partners did not need such a lenient filing standard.

The Commission instead recommended that involuntary relief against a partnership on a petition by less than all the general partners should remain available when the partnership is insolvent under the balance sheet test, taking into account the value of each partner’s net worth. Since the balance-sheet insolvency test can be met by stretching debt obligations over the long term, it is an easier filing requirement than the equity insolvency test, which measures the short term. However, by requiring that the total amount of the partnership’s assets be increased by the value of each partner’s net worth, the Commission recommended a very strict filing standard.

This standard, although stricter and thus better than the “generally not paying” standard, placed the expensive burden of producing evi-

126. H.R. Doc. No. 137.
127. Id.
128. Id. In arguing for the abandonment of the concept of the acts of bankruptcy and the balance sheet test, the report stated “[i]t is time to abandon the complex, litigation-producing constraints and substitute the test of inability or failure to pay debts as the basis for initiating involuntary bankruptcy. . . . It is better policy to accommodate a proceeding for the benefit of all creditors under the federal legislation than to require individual creditor action which only benefits the aggressive creditor.” While detailing the great need for involuntary relief based on the lenient “generally not paying” filing standard in the context of a creditor’s filing, the report never extended this need to involuntary filings by partners against partnerships. Id.
128. Id.
dence of the value of each general partner's property on the partners contesting the involuntary petition. Since contesting a petition would deplete partnership assets which should be used to pay the partnership's obligations, the standard proposed by the Commission fails to adequately protect the creditors of the partnership.

Reverting to a strict equity insolvency standard is not without flaws. The equity standard is more difficult to meet and thus keeps the financially deteriorating partnership outside the Code's protection. However, based on the personal liability shared by partners for debts of the partnership, there exists a strong incentive for the partnership to seek reorganization so partners will not be called on to answer for the debts of the partnership. Thus, partners may find it necessary to resolve differences and file a voluntary bankruptcy petition in order to reorganize their partnership successfully and to avoid liability.

So apparent was this incentive to legislators, that in the original version of the Reform Act of 1978 they left out a provision permitting the filing by less than all of the general partners against the partnership. The notes proposed that the cause of action was unnecessary because partners would take voluntary action when necessary. There is a strong indication, therefore, that a stricter filing standard would not keep financially wrought partnerships out of bankruptcy, but would create a greater incentive for a voluntary filing, based on consent of all general partners, which is necessary to petition the partnership into bankruptcy.

Additionally, a stricter filing standard is needed since the court's sanctioning power under the Code does not effectively deter partners from filing unnecessary petitions. Section 303(i)(2) provides that if the court dismisses a petition under this section other than on consent of

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129. In discussing the vast problems with current bankruptcy law concerning partners and partnerships, Professor Frank R. Kennedy and Professor Gerald K. Smith stated [t]here are good reasons for the number and scope of unsettled questions that arise in the cases that involve partnerships and partners. One is a healthy skepticism as to the likelihood that legislation can be drafted, let alone enacted, which will provide more satisfactory solutions to particular problems than can be formulated by the parties their counsel, trustees, the United States trustee, and the courts. Another is the difficulty of developing a consensus required for the formulation of statutory language with respect to such matters as the role of a managing partner during the pendency of a partnership reorganization case. Frank R. Kennedy & Gerald K. Smith, Some Issues In Partnership and Partner Bankruptcy Cases and Recommendations for Legislative Change, in ALI-ABA RESOURCE MATERIALS PARTNERSHIPS: UPA, ULPA, SECURITIES, TAXATION, AND BANKRUPTCY (9th ed. 1990).

130. See supra note 20.

131. See supra note 55.
all petitioners and the debtor against any petitioner that filed the petition in bad faith, the court can award damages.\textsuperscript{132} The \textit{Wedgewood} court declined to impose sanctions after dismissing three separate petitions.\textsuperscript{133} Since imposition of sanctions requires the finding of bad faith,\textsuperscript{134} there is an unwillingness to impose sanctions.\textsuperscript{135} This unwillingness undermines the effectiveness of this section of the Code with regard to partners’ involuntary petitions against their partnerships.

Section 305 is also ineffective in dealing with partners’ involuntary petitions against the partnership. In \textit{Williamsburg} the court dismissed the petition under section 305.\textsuperscript{136} Section 305 provides “[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if: (1) the interests of creditors and the debtor would be better served by such dismissal or suspension . . .”\textsuperscript{137} The \textit{Williamsburg} court determined that because of the expense and inconvenience of the bankruptcy process, it was in the creditors’ and debtor-partnership’s best interest to dismiss the case when state dissolution procedures were more efficient.\textsuperscript{138} However, the court’s determination regarding what was in the best interests of the parties required valuable court resources which could have been saved had a stricter filing standard been in place to permit only those partnerships which were truly in financial difficulty to file initially.\textsuperscript{139}

When a bankruptcy court is confronted with a partner’s involuntary petition against the partnership, the court must probe the filing partners’ motives for filing. Implementation of a stricter filing standard will save valuable court time because fewer partners will be capable of meeting the stricter standard and will therefore be forced to mend their differences and file a voluntary bankruptcy petition. Therefore, the stricter filing standard would save court time that would have been required to resolve these differences during the bankruptcy proceedings. Without enactment of the stricter filing standard for partner against partnership actions, the bankruptcy court will

\begin{itemize}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} 11 U.S.C. § 303 (i)(2) (1992).
  \item \textsuperscript{136} \textit{In re Williamsburg Suites, Ltd.}, 117 B.R. 216 (Bankr. E.D. Va. 1990).
  \item \textsuperscript{138} 117 B.R. at 220.
  \item \textsuperscript{139} \textit{See Williamsburg}, 117 B.R. 216.
\end{itemize}
need to expend its time and energy to determine if dismissal is necessary.

V. Conclusion

Under present bankruptcy law, an involuntary petition may be commenced against a partnership by fewer than all of the general partners in such partnership. In comparison to prior bankruptcy provisions governing a partner's involuntary petition against the partnership, the "generally not paying" test is the most lenient to date. Because a partner's filing against the partnership under the "generally not paying" test entangles such enormous bankruptcy court participation in mediating partnership disputes and in evaluating possible ill will of filing partners, the Code, creditors and non-filing partners would be better served with a stricter filing standard for involuntary petitions against the partnership. Congress, therefore, should enact a new filing standard for these types of petitions, requiring two things: first, that partners filing the involuntary petition have capital account balances totalling at least ten percent of the total capital of the partnership; and second, that the partnership must be insolvent under a strict equity insolvency test.

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