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The Code and the Constitution: Fifth Amendment Limits on the Debtor's Discharge in Bankruptcy

Nicholas A. Franke*

INTRODUCTION

While most debtors invoke the bankruptcy process to obtain forgiveness or discharge¹ of their indebtedness, the power of the court to grant a discharge is not without limitation. The Supreme Court and several courts of appeal have identified a constitutional limitation on bankruptcy discharge not found in the Bankruptcy Code.² The decisions of these courts have established that the fifth amendment³ limits discharge and requires the debtor to provide adequate notice to creditors before extinguishing their claims.

To correctly define the due process limitation on bankruptcy discharge, individual and nonindividual debtors⁴ as well as each type of

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1. "Discharge" is a bankruptcy term of art that generally refers to the extinguishment of debts or claims against the debtor. See 11 U.S.C. §§ 727, 1141 (1988).

2. *Id.* §§ 101-1330. "Bankruptcy Code" refers to The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 33, further amended by The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

Some cases cited in this article were decided under the predecessor of the Bankruptcy Code, the Bankruptcy Act of 1898. The enactment of the Code has not disturbed the rationale of the cases decided under the Act for purposes of this article, but if a change in law has affected the validity of any decision cited herein, that effect will be disclosed when appropriate. All references herein are to the Bankruptcy Code, as amended, unless specifically stated otherwise.

3. The fifth amendment states in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

4. Any person "that resides or has a domicile, a place of business, or property in

bankruptcy proceeding⁵ must be separately considered. This article primarily discusses the due process limitation on a nonindividual debtor in a Chapter 11 reorganization.⁶ Although materials involving individual debtors and different chapters of the Bankruptcy Code are referenced when helpful to the analysis, those subjects are beyond the scope of this treatment.

Section II of this article briefly outlines the discharge concept and the limitations placed on it by the Bankruptcy Code. Section III highlights relevant case law prior to and after the identification of a due process limitation on discharge. Section IV outlines the conflicts between the case law and the Bankruptcy Code on discharge. Section V defines the type of notice necessary to satisfy the due process requirements of discharge. Finally, Section VI suggests methods to protect a debtor from exceptions to its discharge caused by constitutionally inadequate notice to creditors.

II. DISCHARGE AND THE BANKRUPTCY CODE

A bankruptcy case commences upon the filing of a petition.⁷ In a Chapter 11 case, the debtor then generally compiles and seeks creditor acceptance of a plan of reorganization.⁸ When the debtor obtains the creditors' acceptance of the plan and the approval of the court, the plan is "confirmed."⁹

Several consequences flow from confirmation of a plan of reorganization,¹⁰ including the discharge of the debtor's debts. Section 1141 of the Bankruptcy Code states, in part: "Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—(A) discharges the debtor from any debt

the United States, or a municipality" may be a debtor under the Bankruptcy Code, subject to very narrow exclusions. 11 U.S.C. § 109 (1989). "[P]erson' includes individual, partnership and corporation, but does not include governmental unit . . ." *Id.* § 101(35).

5. The Bankruptcy Code generally provides for five types of proceedings. The law applicable to each type of proceeding is set forth in individually numbered chapters: Chapter 7 applies to liquidation cases; Chapter 9 to proceedings for municipalities; Chapter 11 to reorganizations; Chapter 12 to family farm reorganization; and Chapter 13 to individual debt adjustment cases. Section 109 specifies debtor eligibility requirements for relief under each of the five chapters. *Id.* § 109.

6. *See id.* §§ 1101-1174.

7. *Id.* § 301.

8. A plan of reorganization designates the manner in which the claims of creditors will be paid and what disposition will be made of the debtor's property. For most of the provisions dealing with the plan process, *see id.* §§ 1121-1129.

9. *Id.* §§ 1128, 1129 (bearing on confirmation of plan).

10. *Id.* § 1141. Confirmation of a plan binds the debtor and all creditors to its terms, revests all property of the bankruptcy estate in the debtor, frees all property of the bankruptcy estate from liens and equity interests, and enjoins actions against the debtor based on preconfirmation obligations. *See also id.* § 524.

that arose before the date of such confirmation"¹¹

By its terms, section 1141 discharges all preconfirmation debts, whether or not a proof of claim¹² is filed or deemed filed,¹³ whether or not the claim is allowed,¹⁴ and whether or not the creditor has accepted the plan of reorganization.¹⁵ Section 1141 contains only four express exceptions to its broad grant of discharge. These exceptions are discussed below.

A. Exceptions to Discharge at Confirmation

Two of the four exceptions to the Chapter 11 discharge contained in section 1141 occur during the confirmation process. Confirmation of a plan of reorganization does not extinguish any debt excluded from discharge in the plan or the order confirming the plan.¹⁶ A plan, therefore, can except claims from discharge, and the court can make exceptions to discharge when it confirms a plan of

11. *Id.* § 1141(d)(1)(A). A Chapter 7 debtor receives a discharge of all claims "that arose before the date of the order for relief." *Id.* § 727(b). An order for relief in a voluntary case occurs on the date the petition commencing the case is filed. *Id.* § 301. Additionally, subject to limited exceptions, a Chapter 13 debtor is discharged from all debts "provided for" by the plan. *Id.* § 1328(a).

A discharge under Chapter 7, 11, or 12 will not discharge the ten types of debts specified in section 523(a) *if the debtor is an individual*. See *id.* § 523(a) (exceptions to discharge). However, creditors must pursue certain exceptions to the debtor's discharge, or the exception is waived. See *id.* § 523(a)(2), (4), (6), (c).

12. A proof of claim is a document filed with the bankruptcy court by a creditor to notify both the court and the debtor that the creditor asserts a claim against the debtor. See *id.* § 501. Unless the debtor has included the creditor and its claim in the debtor's schedules filed with the court at the commencement of the case, and the debtor does not dispute the claim, a creditor must file a proof of claim to receive payment on its claim in a Chapter 11 case. BANKR. R. 3003.

13. In a Chapter 11 proceeding, a creditor may file a timely proof of claim at any time prior to the bar date. The bar date is a specific date set by the court, usually at the request of the debtor, by which all proofs of claim must be filed to be considered timely and to receive payment in the case. In a Chapter 7 case, proofs of claim must be filed within 90 days of the first meeting of creditors. BANKR. R. 3002(c).

In a Chapter 11 case, a proof of claim is deemed filed if the debtor includes the claim in its schedules and does not designate the claim as disputed, unliquidated, or contingent. *Id.* § 3003(b)(1). In a Chapter 7 case, because the debtor's schedules are for informational purposes only, a creditor must file a claim to participate in the distribution. *Id.* § 3002(a).

14. A claim is deemed allowed unless an objection to the claim is made, or the debtor has scheduled the claim as disputed, contingent or unliquidated. 11 U.S.C. § 502 (1988). A "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" *Id.* § 101(4).

15. *Id.* § 1126 (acceptance of plan).

16. *Id.* § 1141(d)(2).

reorganization.¹⁷

B. Exceptions to the Discharge of an Individual Debtor

Section 1141 incorporates the ten bases for excepting a claim¹⁸ from an individual's discharge found in section 523 into the chapter 11 scheme.¹⁹ Those exceptions to discharge apply only to individual debtors and do not apply in any bankruptcy case in which the debtor is not an individual.²⁰

Only one of the ten bases for excepting a claim from discharge protects the creditor who has no knowledge of the bankruptcy case.²¹ This exception generally provides that the creditor's claim will not be discharged if the debtor does not list a creditor in the debtor's bankruptcy petition and schedules²² in time for the creditor to file a timely proof of claim.²³ However, the exception also has an exception. If the creditor had actual knowledge of the bankruptcy case

17. *Id.*; see also *id.* § 524(d); BANKR. R. 4008.

18. See *supra* note 14.

19. Section 523(a) generally excepts from discharge claims based upon certain tax obligations, alimony and child support, claims made in prior bankruptcies, certain educational loans and claims based on the debtor's fraud or misconduct. See 11 U.S.C. § 523(a) (1988).

Although § 1141(d)(2) incorporates § 523, thereby making a Chapter 11 discharge subject to the ten types of claims excepted from discharge by § 523(a), the incorporation is unnecessary. The provisions of Chapters 1, 3, and 5 apply in Chapter 7, 11, 12, and 13 proceedings, with only limited exceptions in railroad reorganizations. *Id.* § 103(a).

20. *Yamaha Motor Corp. v. Shadco, Inc.*, 762 F.2d 668, 670 (8th Cir. 1985) (discharge exceptions for willful and malicious injuries do not apply to corporate debtors); see also *Beard v. A.H. Robins Co.*, 828 F.2d 1029 (4th Cir. 1987).

21. Section 523 reads, in pertinent part:

A discharge under section 727, [sic] 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .

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

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

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

11 U.S.C. § 523(a) (1988) (emphasis added).

22. "The debtor shall—(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs . . ." *Id.* § 521(1).

Upon motion by the United States Trustee, the court may convert to Chapter 7 or dismiss a Chapter 11 proceeding if the debtor fails to file the schedules required by section 521(1). *Id.* § 1112(e); see also *id.* § 707(a)(3).

23. See *supra* note 13.

early enough to file a timely proof of claim,²⁴ that creditor's claim will be discharged regardless of whether the debtor listed the creditor in the schedules.²⁵

C. Liquidating Plan Exception to Discharge

The final section 1141 exception to discharge²⁶ differs from the previous three in that it denies discharge completely; the other three exceptions only eliminate the discharge as to one debt. Thus, this exception is commonly referred to as a "global" denial of discharge, while the other exceptions often are referred to as "rifle-shot" exceptions to discharge.

For a Chapter 11 discharge to be globally denied pursuant to section 1141(d)(3), notwithstanding the confirmation of a plan, the plan must provide for the liquidation of the debtor,²⁷ the debtor must not engage in business after the plan, and the debtor must be ineligible for a discharge in a hypothetical Chapter 7 case.²⁸ This subsection generally denies discharge to nonindividual debtors that confirm plans providing for the liquidation of most of their assets, and indi-

24. A proof of claim is timely in a Chapter 11 proceeding if filed prior to the bar date for filing claims set by the court. *See id.* However, a question remains as to how long before the bar date a creditor must receive actual knowledge of the case to have knowledge "in time" to file a timely proof of claim pursuant to § 523(a)(3). Consider the case of a creditor who obtains actual knowledge of the case the day before the bar date and waits two days to file a proof of claim.

25. The author doubts the constitutionality of the actual knowledge exception to the § 523(a)(3) exception to discharge, and discusses his rationale later in this treatment.

26. Section 1141(d)(3) states:

The confirmation of a plan does not discharge a debtor if—

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

11 U.S.C. § 1141(d)(3) (1988).

27. To satisfy this element of § 1141(d)(3), the plan must provide for the liquidation "of all or substantially all of the property of the estate." *Id.* § 1141(d)(3)(A). "Property of the estate" is a phrase of art in the Bankruptcy Code that generally refers to all property interests of the debtor at the commencement of the case, in addition to certain interests acquired after the case commences. *See id.* § 541.

28. This element considers whether the debtor could obtain a discharge if it were a Chapter 7 debtor. *See id.* § 727(a) (grounds for denial of discharge in Chapter 7). The first of the ten grounds for denial of discharge in a Chapter 7 case applies when the debtor is not an individual. *Id.* § 727(a)(1).

vidual debtors that liquidate and have committed wrongful acts or have received a discharge within the preceding six years.

III. THE EVOLUTION OF DISCHARGE IN THE COMMON LAW

A. Cases Prior to 1953

Section 1141 of the Bankruptcy Code describes the debtor's discharge in terms very similar to the corollary provision of the Bankruptcy Act of 1898.²⁹ Both sections provide for nearly unlimited discharge of all preconfirmation debts. Neither the Bankruptcy Act of 1898 nor the current Bankruptcy Code requires the debtor to give notice of the proceeding to a creditor as a condition to discharge of that creditor's claim.³⁰

During the fifty years following the enactment of the Bankruptcy Act, courts literally applied the discharge provision³¹ and discharged the claims of creditors that did not receive official notice of the bankruptcy case. *Evans v. Dearborn Machinery Movers*³² illustrates the literal application of the discharge provision. In *Evans*, the debtor did not schedule a certain creditor and that creditor received no notice from the court of the bankruptcy proceeding. The debtor confirmed a plan, but the creditor did not participate in the confirmation process. After confirmation, the creditor brought an action against the debtor on its claim. Although the creditor had actual knowledge of the bankruptcy, the court held that the creditor's claim would have been discharged even if he had not known of the case, and even though the debtor did not schedule the creditor. In affirming the injunction against the continuation of the creditor's action against the debtor, the court stated its holding served "to secure and preserve for [the debtor] the fruits and advantages of [the confirmation] decree, and to stay the state court proceedings which interfered with (the bankruptcy court's) exclusive jurisdiction and violated its prior express orders."³³

29. Bankruptcy Act of 1898, ch. 541, 30 Stat. 550; *see supra* note 2.

30. Section 523(a)(3) is the only section of the Bankruptcy Code that conditions a debtor's discharge on any type of notice to or knowledge by a creditor. However, § 523 only applies when the debtor is an individual, and allows the discharge of a creditor's claim when the creditor has actual knowledge of the case in time to file a timely proof of claim. *See supra* note 21. Thus, under the terms of the Bankruptcy Code, a claim can be discharged without notice by the debtor to a creditor if that creditor has actual knowledge of the case early enough to file a timely proof of claim.

Similarly, although the Bankruptcy Rules require notice of certain events in the bankruptcy case, they do not condition a debtor's discharge on providing adequate notice to creditors. *See* BANKR. R. 2002 (notice of bar date and confirmation hearing); *id.* § 3017(d) (notice of confirmation hearing).

31. 11 U.S.C. § 1141 (1988).

32. 200 F.2d 125 (6th Cir. 1953).

33. *Id.* at 128.

The *Evans* court failed to consider whether the creditor had received notice of the bankruptcy, and focused instead on the fact that the debtor had received a discharge. Virtually all courts prior to 1953 followed the *Evans* rationale³⁴ and read the discharge provision literally.³⁵

B. New York Railroad and Due Process

In 1953, the Supreme Court held in *City of New York v. New York, New Haven & Hartford Railroad*³⁶ that the due process protection of the fifth amendment³⁷ entitled a creditor to adequate notice before its claim could be discharged. Although the Court previously had held that the fifth amendment limited the bankruptcy clause,³⁸ it had not used due process to create a judicial or constitutional exception to a debtor's discharge.

The *New York Railroad* case involved the attempted enforcement of public improvement liens claimed by the City of New York against the real property of a reorganized railroad.³⁹ The railroad obtained a bar date for filing claims⁴⁰ and mailed notice of that date to voluntary mortgage trustees, their counsel, and creditors who had appeared in the proceedings. The railroad also published notice of the bar date on two separate occasions in five newspapers of general cir-

34. See *North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938 (2d Cir. 1944).

35. Although the *Evans* case was decided under the Bankruptcy Act, the discharge provisions of the Bankruptcy Act and Bankruptcy Code are substantially similar. See *supra* note 29.

36. 344 U.S. 293, 297 (1953).

37. See *supra* note 3.

38. The "bankruptcy clause" refers to the fourth clause of article I, § 8, of the United States Constitution, which states that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

Numerous decisions have recognized the fifth amendment limitation on the bankruptcy clause. See, e.g., *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502 (1938); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *In re Phillips*, 13 Bankr. 82 (Bankr. C.D. Ill. 1981).

39. While special provisions apply to railroad reorganizations, those provisions do not impact directly the constitutional issue of adequate notice. Section 77(c)(8) of the Bankruptcy Act, applicable in the *New York Railroad* case, required "reasonable notice of the period in which claims may be filed." Bankruptcy Act of 1898, 11 U.S.C. § 205(c)(8), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. IV, § 401(a), 92 Stat. 2682 (1978). For notice requirements of the bar date and confirmation hearing under current law, see 11 U.S.C. § 1128 (1988); BANKR. R. 2002, 3017. Chapter 11 contains the Bankruptcy Code provisions concerning railroad reorganizations. See 11 U.S.C. §§ 1161-1174 (1988).

40. See *supra* note 13.

culatation.⁴¹ Although the City had actual knowledge of the bankruptcy proceeding, it did not receive official notice of the bar date and did not file a claim in the case. The court freed the railroad properties from the City's liens in its reorganization order. When the City attempted to enforce the liens after the reorganization, the district court enjoined the enforcement, which the appellate court subsequently affirmed.⁴²

The Supreme Court reversed,⁴³ holding that the City was entitled to official notice of the bar date and the reorganization proceedings before its liens could be extinguished.⁴⁴ After recognizing the inferiority of constructive notice by publication to notice by mail, the Court held that when a debtor knows of the existence of a creditor, constructive notice does not satisfy due process and the creditor's claim cannot be discharged.⁴⁵

The Court further rejected the railroad's argument that the City's actual knowledge of the bankruptcy proceeding rendered mailed notice to the City unnecessary. The Court distinguished knowledge of the reorganization proceeding in general from knowledge of an order setting a bar date for filing claims, and stated that a creditor with knowledge of the proceeding did not have a duty to investigate whether a bar date had been set, but could wait for notice of the bar date order from the debtor.⁴⁶ The Court therefore held that actual knowledge of the bankruptcy alone did not provide the due process

41. The notice was published once a week for two weeks in the *Wall Street Journal* and four other daily newspapers located in Connecticut, Massachusetts, and Rhode Island. *City of New York*, 344 U.S. at 294 n.2.

42. *Id.* at 295.

43. *Id.* at 297.

44. The Court based its decision on the finding that the notice employed by the railroad was not "reasonable," as required by section 77(c)(8) of the Bankruptcy Act. Although the Court did not predicate its holding expressly on due process grounds, it did cite its seminal due process case. *Id.* at 296 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Further, the Court defined "reasonable" in language similar to the standard used in procedural due process cases. "The statutory command for notice (Section 77(c)(8)) embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *Id.* at 297.

45. The Court found notice by publication to be appropriate only in certain circumstances, none of which was present in the case before it. "[W]hen the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication." *Id.* at 296 (citing *Mullane*, 339 U.S. 306).

46. Because a creditor would continually need to inquire whether a bar date for filing claims had been set in a reorganization case, the Supreme Court held that a creditor's actual knowledge of the case in general was not adequate notice, but that the creditor was entitled to official notice of the bar date.

The Court's rationale, however, does not apply equally in a Chapter 7 case. In such a case, timely claims must be filed within 90 days of the first date set for the meeting of creditors. *See supra* note 13. The meeting of creditors must be held between 20 and 40 days after the commencement of the case. BANKR. R. 2003(a). Therefore, a creditor with actual knowledge of a Chapter 7 case does not have to inquire about a bar date.

required to discharge a creditor's claim.⁴⁷

C. *The Progeny of New York Railroad*

No less than four federal circuit courts of appeal have published decisions following *New York Railroad*.⁴⁸ Although many courts have recognized the due process limitation on discharge, courts have cited *In re Harbor Tank Storage*⁴⁹ and *In re Intaco Puerto Rico*⁵⁰ most frequently after *New York Railroad*.

Harbor Tank Storage and *Intaco Puerto Rico* contain very similar facts. In each case, the creditors knew of the debtor's bankruptcy and the bankruptcy trustees knew that the creditors held claims against the debtors. The trustees published notice of the bar date and the date of the hearing to consider plan confirmation. In *Harbor Tank Storage*, the creditor read the published notice of the confirmation hearing. Neither creditor received mailed notice of the bar date or confirmation hearing. Both courts allowed the creditors to file late claims.

The most important part of both the *Harbor Tank Storage* and *Intaco Puerto Rico* decisions is the willingness of the courts of appeal to extend the Supreme Court's holding in *New York Railroad* to protect the claims of general, unsecured creditors. *New York Railroad* required a debtor to satisfy due process requirements before a secured creditor's lien on the debtor's property could be avoided.⁵¹ *Harbor Tank Storage* and *Intaco Puerto Rico* required the same type of no-

Rather, the creditor can mathematically calculate when the deadline for filing timely claims is based upon the date the case was commenced.

Similarly, courts consistently have held that actual notice of the bankruptcy is sufficient notice of the deadline for filing dischargeability complaints because the deadline is a statutorily fixed number of days after the commencement of the case. See Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987); *In re Rhodes*, 61 Bankr. 626, 629 (Bankr. 9th Cir. 1986); *In re Walker*, 91 Bankr. 968, 978-80 (Bankr. D. Utah 1988); cf. *In re Alton*, 837 F.2d 457, 460 (11th Cir. 1988) (requiring official notice of the deadline "before [the creditor] is under a duty to make inquiries" would conflict with the actual knowledge exception of section 523(a)(3)). But see *In re Ricketts*, 80 Bankr. 495, 498 (Bankr. 9th Cir. 1987) (Jones, B.J., concurring in the result) (actual knowledge of bankruptcy proceeding not sufficient notice of deadline for filing complaint).

47. *New York Railroad*, 344 U.S. at 297.

48. See, e.g., *Broomall Indus. v. Data Design Logic Sys.*, 786 F.2d 401, 405 (Fed. Cir. 1986); *Reliable Elec. Co. v. Olson Const. Co.* (*In re Reliable Elec. Co.*), 726 F.2d 620 (10th Cir. 1984); see also *infra* notes 49-50.

49. 385 F.2d 111 (3d Cir. 1967).

50. 494 F.2d 94 (1st Cir. 1974).

51. The Bankruptcy Code generally refers to secured debt as an interest in property, and unsecured debt as a claim. Cf. 11 U.S.C. §§ 502, 506 (1988).

tice to be given to known, unsecured creditors before the discharge of their claims. Other courts have cited and applied this extension of the *New York Railroad* holding without substantial question.⁵²

IV. RECONCILING THE BANKRUPTCY CODE AND *NEW YORK RAILROAD*

Although enacted approximately twenty-five years after publication of the Supreme Court's decision, the Bankruptcy Code does not incorporate the due process principle enunciated in *New York Railroad*.⁵³ The Bankruptcy Code's requirements of notice to creditors and the statutory consequence of insufficient notice fall significantly short of the exception to discharge that resulted from constitutionally inadequate notice to the City of New York.⁵⁴

A. *Discharge of an Individual*

Neither *New York Railroad* nor any subsequently reported case facing the issue has found the type of debtor relevant in determining the notice constitutionally required to discharge a creditor's claim. The Bankruptcy Code sets forth different consequences when inadequate notice is given to creditors and the debtor is an individual, and when inadequate notice is given and the debtor is not an individual.⁵⁵

The Bankruptcy Code provides for the discharge of all preconfirmation claims in a Chapter 11 case upon confirmation of a plan of reorganization.⁵⁶ However, section 1141 expressly excepts the categories of claims listed in section 523 from discharge if the debtor is an individual.⁵⁷ Section 523(a)(3) generally excepts a claim from discharge if the creditor does not receive notice or have actual knowledge of the case in time to file a timely proof of claim.⁵⁸ The Bankruptcy Code contains no corollary exception when the debtor is not an individual.

Because section 523 applies only to individual debtors, the Code implies that nonindividual debtors receive a discharge of all preconfirmation claims when a plan is confirmed regardless of the notice given to creditors. *New York Railroad* and its progeny make this im-

52. See *supra* note 48.

53. See *supra* note 30.

54. The only sanction found in the Bankruptcy Code for inadequate notice to creditors applies only when the debtor is an individual and the creditor does not have actual knowledge of the bankruptcy proceeding. See 11 U.S.C. § 523(a)(3) (1988); see also *supra* note 30. Bankruptcy Rules 2002 and 3017 require notice to creditors, but do not provide a penalty for inadequate notice. See BANKR. R. 2002, 3017.

55. See *supra* notes 20-21, 30.

56. 11 U.S.C. § 1141 (1988).

57. *Id.* § 1141(d)(2).

58. See *supra* note 21.

plication constitutionally impermissible. However, some courts have strictly applied the terms of the Bankruptcy Code and discharged claims without notice to creditors notwithstanding the Supreme Court's holding to the contrary.⁵⁹

B. Discharge Based on Actual Notice

As previously stated, when the debtor is an individual, section 523(a)(3) of the Bankruptcy Code generally excepts from discharge the claims of creditors who do not receive notice of the case soon enough to file a timely proof of claim.⁶⁰ However, regardless of the notice given to the creditor, the claim would be discharged pursuant to section 525 if the creditor had actual knowledge of the bankruptcy case in time to file a claim.

Although section 523(a)(3) codifies the main precept of *New York Railroad*,⁶¹ the statute adds the "actual knowledge" exception⁶² which was expressly rejected by the Supreme Court. The creditors in *New York Railroad*, *Harbor Tank Storage*, and *Intaco Puerto Rico* all had actual knowledge of the bankruptcy case, yet their claims were not discharged because they did not receive official notice of either the bar date for filing claims or the confirmation hearing. The Supreme Court held that a creditor can wait for official notice of these dates even if that creditor has actual knowledge of the bankruptcy proceeding.⁶³ Therefore, the "actual knowledge" exception contained in section 523(a)(3) violates the due process requirements of the fifth amendment when applied in a Chapter 11 case in which the debtor knows of the existence of a creditor and that creditor's claim.⁶⁴

59. See, e.g., *Nebraska Security Bank v. Sanitary and Improvement Dist. No. 7*, 119 Bankr. 193 (1990); *In re International Resorts, Inc.*, 74 Bankr. 428 (Bankr. N.D. Ala. 1987); *In re Safeguard Co.*, 35 Bankr. 44 (Bankr. W.D. Pa. 1983); *In re Torres*, 15 Bankr. 794 (Bankr. E.D.N.Y. 1981); see also *Bank of Marin v. England*, 352 F.2d 186, 192 (9th Cir. 1965) ("The filing of a bankruptcy petition has long been regarded as a caveat to all the world.") (emphasis in original), *rev'd*, 385 U.S. 99 (1966); *In re Bowen*, 89 Bankr. 800, 805 (Bankr. Minn. 1988) ("[Section 523(a)(3)] is not intended as a safe haven for creditors with actual knowledge of a pending bankruptcy case who neglect to promptly evaluate and advance their interests in the case.").

60. See *supra* note 30.

61. *New York Railroad*, 344 U.S. at 297 (claims of creditors without adequate notice cannot be discharged).

62. See *supra* note 21.

63. *New York Railroad*, 344 U.S. at 297.

64. While the author believes actual knowledge of the case should be sufficient to satisfy due process when the debtor does not know and has no reason to know of a creditor, this position is not reflected either in the case law.

C. Discharge Without Notice

With the sole exception of section 523(a)(3), the Bankruptcy Code does not require notice to a creditor as a prerequisite to discharge of that creditor's claim. Section 1141, which applies to Chapter 11 cases, provides for a discharge of all preconfirmation debts upon confirmation.⁶⁵ Because section 523(a)(3) requires notice to creditors before discharging their claims only when the debtor is an individual, and because no corollary provision exists when the debtor is not an individual, the Bankruptcy Code apparently takes the position that claims can be discharged without notice to the claimholder when the debtor is not an individual.

Even though the debtor in *New York Railroad* was not an individual, no logical basis exists for the application of its holding solely to cases in which the debtor is not an individual. The due process required by *New York Railroad* protects creditors. Therefore, the type of debtor should be irrelevant to the notice a creditor should receive. Creditors in all bankruptcy cases must be given official notice of the relevant dates in the case, as required by *New York Railroad* and its progeny.⁶⁶

D. Reconciling the Code and the Cases

As discussed above, the discharge described by the Bankruptcy Code violates the fifth amendment standard set by the Supreme Court in *New York Railroad*. To be constitutionally permissible, the discharge provisions of the Bankruptcy Code must be read subject to the *New York Railroad* holding.⁶⁷

The limitation section 523(a)(3) imposes on the discharge of an individual debtor cannot withstand constitutional scrutiny for two reasons. First, because section 523 applies only to individual debtor cases,⁶⁸ it wrongfully implies that the fifth amendment requires no notice to creditors in nonindividual debtor cases.⁶⁹ A constitutional

65. See *supra* note 11.

66. See *supra* notes 48-50.

67. To pass constitutional muster, grant of the discharge must be subject to the fifth amendment requirement of adequate notice. Both the "actual knowledge" caveat to the section 523(a)(3) discharge exception and that exception's application solely to individual debtor cases would also have to be eliminated. See *supra* note 30.

68. See *supra* note 20.

69. The language of the fifth amendment does not exclude individuals from its application. In fact, the amendment states: "No *person* shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.

No rational reason exists to require official notice to creditors when the debtor is not an individual without requiring the same notice when the debtor is an individual. Notice is for the benefit of creditors, not debtors, and creditors are entitled to adequate notice irrespective of the type of debtor. See generally *City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293, 296 (1953); *In re Adams*, 734 F.2d 1094 (5th Cir. 1984); *In re Moseley*, 74 Bankr. 791 (Bankr. C.D. Cal. 1987).

reading of section 523(a)(3) must include its application to cases in which the debtor is not an individual, contrary to that section's language. Second, section 523(a)(3) fails to satisfy fifth amendment requirements because it allows the discharge of claims when a creditor has actual knowledge of the case despite inadequate official notice of the relevant dates in the case. Discharge without notice to creditors contradicts the Supreme Court's holding that the fifth amendment requires formal notice before a claim can be discharged in bankruptcy.⁷⁰ Thus, section 523(a)(3) cannot be reconciled with *New York Railroad* and is unconstitutional.⁷¹

V. DETERMINING WHAT PROCESS IS DUE

The notice required by the fifth amendment before a creditor's rights are adversely affected cannot be rigidly defined because it often depends upon the circumstances.⁷² In probably the most frequently cited decision on the subject, the Supreme Court recognized the different types of notice and the appropriateness of each type in certain situations.⁷³ The notice to creditors required before discharge may differ depending on certain factors. Generally, courts have described the type of notice satisfying due process requirements as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁷⁴ Even though static rules on the type of notice required invite danger, general principles can be found in the applicable case law.

A. When Creditors Should Receive Notice

Before determining how notice should be given, it must be determined which events in the case must be noticed to creditors prior to a discharge of their claims. The two critical events requiring notice to creditors before claims can be discharged are the bar date for filing claims,⁷⁵ and the hearing on confirmation of the plan of

70. *New York Railroad*, 344 U.S. at 296.

71. See *supra* note 67.

72. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1982); *New York Railroad*, 344 U.S. at 296.

73. *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306 (1950).

74. *Id.* at 314 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Grannis v. Ordean*, 234 U.S. 385, 392-98 (1914); *Priest v. Board of Trustees of Las Vegas*, 232 U.S. 604, 615 (1914); *Roller v. Holly*, 176 U.S. 398, 409-13 (1900)).

75. *Kay v. Hogan (In re Gulfo Investment Corp.)*, 593 F.2d 933, 934 (10th Cir. 1979); *In re American Properties, Inc.*, 30 Bankr. 247, 251 (Bankr. D. Kan. 1983).

reorganization.⁷⁶

In most cases, notice of the bar date for filing claims may be the only notice necessary to discharge a creditor's claim. If the creditor has been notified of the bar date, has not been scheduled by the debtor and fails to file a proof of claim, that creditor will not have an allowed claim in the case.⁷⁷ A creditor without an allowed claim has no right to vote on a plan of reorganization and will not receive payment on its debt.

The importance of the bar date and the timely filing of a proof of claim are shown best by example. In *Chicago, Rock Island and Pacific Railroad*,⁷⁸ a minor was injured on the debtor railroad.⁷⁹ The debtor mailed the minor's mother a claim form that contained the bar date, but neither the minor nor his mother filed a claim and the railroad received its discharge. The minor, upon reaching majority, sued to recover damages for his injuries. The court enjoined the action against the railroad holding the claim discharged,⁸⁰ although the minor had not received any compensation in the reorganization for his injuries.

Under certain circumstances, notice of the confirmation hearing may be the most critical notice given to a creditor. As described above, if the creditor has not been scheduled and has not filed a claim in the case after notice of the bar date, notice to that creditor of the confirmation hearing may be surplusage and unnecessary.⁸¹ However, creditors with allowed claims in the case must be given notice of the confirmation hearing.

In one case, a subcontractor withdrew from a construction project, filed a Chapter 11 petition, and did not schedule the general contractor as a creditor.⁸² The general contractor sued the debtor in state court for breach of contract. The action was removed to bankruptcy court, and the debtor counterclaimed against the general contractor. The general contractor prevailed in the action and the debtor filed a proof of claim on the general contractor's behalf. The debtor then

76. *Reliable Elec. Co. v. Olson Const. Co. (In re Reliable Elec. Co.)*, 726 F.2d 620, 623 (10th Cir. 1984); *In re General Oil Distrib.*, 68 Bankr. 603, 604 (Bankr. E.D.N.Y. 1986).

77. If the debtor has scheduled the claim as contingent, unliquidated, or disputed, the claimholder must file a proof of claim to have an allowed claim and be treated as a creditor in the case. BANKR. R. 3003(c)(2); *see also supra* note 14. All creditors must file a proof of claim in a Chapter 7 proceeding. BANKR. R. 3002(a).

78. *In re Chicago, R.I. & P. R.R.*, 788 F.2d 1280 (7th Cir. 1986).

79. *See supra* note 39.

80. *Chicago R.R.*, 788 F.2d at 1283.

81. A creditor that does not file a proof of claim, or that is not scheduled by the debtor in a Chapter 11 case other than as contingent, disputed or unliquidated, does not have a claim in the case. BANKR. R. 3003; *see supra* note 14; *infra* note 135.

82. *Reliable Elec. Co. v. Olson Const. Co. (In re Reliable Elec. Co.)*, 726 F.2d 620 (10th Cir. 1984).

sought to have the general contractor bound by its previously confirmed plan of reorganization and to have the claim declared discharged. In denying discharge of the claim, the court held that although the general contractor had a claim in the case, it had not received adequate notice of the confirmation hearing and was not given an opportunity to be heard.⁸³

Notice of the bar date must be given to all creditors to provide them with the opportunity to file a timely proof of claim.⁸⁴ If the creditor does not file a proof of claim prior to the confirmation hearing, the debtor may not be required to give notice of the confirmation hearing to that creditor.⁸⁵ However, the cautious debtor will give notice of both the bar date and the confirmation hearing to all parties to best protect its discharge.⁸⁶

Once a creditor has an allowed claim in the case, either through inclusion in the debtor's schedules or by filing a proof of claim, the debtor must give that creditor notice of the confirmation hearing in time for the creditor to have an opportunity to be heard.⁸⁷ Although other notices to creditors may be necessary in the case, the bar date and confirmation hearing have the greatest impact on the debtor's discharge.

B. Known Creditors

The most important factor in defining adequate notice of either the bar date or the confirmation hearing is the debtor's knowledge of the creditor's existence. Courts consistently have held that when the debtor knows of an entity's claim, the debtor must give notice of the

83. *Id.* at 622.

84. Even creditors scheduled by a Chapter 11 debtor must be given notice of the bar date because a proof of claim filed by a creditor supersedes the scheduling of its claim. BANKR. R. 3003(c)(4). A creditor must be given the opportunity to file a claim of a type or in an amount different than that scheduled by the debtor.

85. Arguably, creditors attempting to file claims after the bar date may not be entitled to notice of the confirmation hearing because they are not entitled to vote or to receive distributions on their claims. See *id.* 3003(c)(2). Presumably, the only claimholders the debtor will know of that do not file proofs of claims are claimholders scheduled by the debtor. A claimholder scheduled as contingent, disputed, or unliquidated that does not file a proof of claim may not be entitled to notice of the confirmation hearing. See also *id.* 2002(h); *supra* note 135.

86. The better practice is to give notice of the confirmation hearing to all creditors, regardless of whether they have filed proofs of claim or how they are scheduled. By providing notice to all creditors, the debtor may avoid a constitutional challenge to the notice given.

87. *In re Nevada Emergency Serv.*, 39 Bankr. 859, 863 (Bankr. D. Nev. 1984).

relevant dates to that creditor.⁸⁸ "Claim" for these purposes must be defined broadly.⁸⁹ The term includes contingent claims and claims that are not ripe. In order to receive the most inclusive discharge possible, a debtor that knows of a possible claim against it should give the creditor notice of the relevant dates.

In a 1984 case, the debtor asserted a counterclaim against the plaintiff in an action that had been removed to the bankruptcy court.⁹⁰ Because the debtor believed it would prevail on its counterclaim and defeat the plaintiff's action, it did not schedule the plaintiff as a creditor or give the plaintiff notice of the confirmation hearing. When the plaintiff received judgment in its favor, the debtor filed a proof of claim on the plaintiff's behalf. The court held that the plaintiff's claim was not discharged because it did not receive notice of the confirmation hearing.⁹¹ If the debtor had given the plaintiff notice of the confirmation hearing, the claim could have been discharged.⁹² Therefore, all potential claimants against a debtor should be given notice of both the bar date and confirmation hearing to ensure discharge of all claims.

Constructive notice to a known claimholder is insufficient to discharge its claim.⁹³ In *New York Railroad*, the City of New York had recorded liens on certain parcels of real property owned by the debtor railroad. Although the debtor gave mailed notice to consensual real property mortgagees, it relied on notice published in certain newspapers to inform the City of the reorganization and its effect on the City's rights. Finding that the City's liens were not avoided in the reorganization, the Court determined that the identity and address of the City appeared in the real property records and was easily ascertainable by the debtor. Thus, the Court held that constructive notice by publication did not provide adequate notice to the City under the fifth amendment.⁹⁴

C. Unknown Creditors

Because of the expansive definition given to the term "claim" in

88. See *City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293 (1953); *In re Intaco Puerto Rico*, 494 F.2d 94 (1st Cir. 1975); *In re Harbor Tank Storage*, 385 F.2d 111 (3d Cir. 1967) (published notice to known creditor not adequate, even though creditor read published notice).

89. See 11 U.S.C. § 101(4) (1988); see also *supra* note 14.

90. *Reliable Elec. Co. v. Olson Const. Co. (In re Reliable Elec. Co.)*, 726 F.2d 620 (10th Cir. 1984).

91. *Id.* at 622.

92. See 11 U.S.C. § 1141(d)(1) (1988).

93. *City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293 (1953); see also *In re Harbor Tank Storage*, 385 F.2d 111 (3d Cir. 1967).

94. *New York Railroad*, 344 U.S. at 297.

the Bankruptcy Code,⁹⁵ persons not known to the debtor may have claims in the case. Unless these creditors receive notice of either the bar date or the confirmation hearing, their claims will survive the bankruptcy to haunt the debtor and interfere with its fresh start.⁹⁶ To receive a complete discharge, the debtor must provide notice of the relevant dates to all creditors.

A debtor obviously cannot schedule or give notice to a creditor it does not know exists. Courts have weighed the tension between the difficulty of giving unknown creditors adequate notice of the bankruptcy and the policy favoring discharge of all claims against the debtor.⁹⁷ In several cases, courts have held claims not known to the debtor to be discharged if the debtor published, or gave "constructive notice," of the relevant dates to creditors.⁹⁸

The United States Court of Appeals for the Tenth Circuit refused to allow a creditor to file a late claim, despite the fact that no reorganization plan had been confirmed, because notice of the bar date had been published.⁹⁹ In that case, the creditor was not aware of the bankruptcy, and the trustee did not know of the creditor's existence. The court found publication to be sufficient notice to the creditor of the bar date and, therefore, refused to allow the late filing of the claim.

Conversely, claims have survived discharge when published notice was not given. Subsequent to confirmation, a creditor in one case commenced a state court action against the debtor on a pre-petition debt. The debtor did not know about the claim. Until its state court action was removed by the debtor to the bankruptcy court, the creditor did not know about the bankruptcy. On the debtor's motion to dismiss the state court action, the court noted the need for published notice in certain circumstances, held the creditor's claim was not discharged, and denied the debtor's motion to dismiss.¹⁰⁰

95. 11 U.S.C. § 101(4) (1988); *see also supra* note 14.

96. *See* *Reliable Elec. Co. v. Olson Const. Co.* (*In re* *Reliable Elec. Co.*), 726 F.2d 620 (10th Cir. 1984); *In re* *Intaco Puerto Rico*, 494 F.2d 94 (1st Cir. 1974).

97. *See generally In re* *Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988).

98. *In re* *Chicago Pac. Corp.*, 773 F.2d 909, 917 (7th Cir. 1985); *In re* *Production Plating*, 90 Bankr. 277 (Bankr. E.D. Mich. 1988); *see also New York Railroad*, 344 U.S. at 296 ("When the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication."); *Broomall Indus. v. Data Design Logic Sys.*, 786 F.2d 401, 404 (Fed. Cir. 1986).

99. *In re* *Gulfcro Inv. Corp.*, 593 F.2d 933 (10th Cir. 1979).

100. *Reliable Electric*, 726 F.2d at 620.

In *Mullane v. Central Hanover Bank & Trust Company*,¹⁰¹ the Supreme Court recognized that personal service or mailed notice might be too burdensome in certain situations, and that due process does not always require actual notice. Courts have allowed notice by publication to discernible creditors if mailed notice would be too burdensome. The Eleventh Circuit limited mailed notice to a certain number of creditors, and found published notice to the remaining creditors adequate.¹⁰² The court set a bar date and required notice of that date to be mailed to approximately 280,000 potential claimants and interest holders. Additionally, the court required notice of the bar date to be published twice in fifty-three newspapers worldwide.¹⁰³ Past debentureholders who did not receive mailed notice of the bar date filed late claims and the trustee objected. In finding due process satisfied by the notice given, the appellate court stated that mailed notice to past debentureholders of the debtor in addition to the 280,000 other parties given mailed notice would have been too burdensome and costly, and thus was not required by the fifth amendment. Accordingly, the court sustained the trustee's objections to the late claims.¹⁰⁴

D. Discharge Based on Actual Notice

A creditor's knowledge of the bankruptcy does not affect the notice to which the creditor is entitled¹⁰⁵ and is irrelevant to the due process inquiry when the debtor is not an individual. In *Broomall Industries v. Data Design Logic Systems*,¹⁰⁶ a creditor commenced suit against a discharged debtor for patent infringement. The district court granted the debtor's motion for summary judgment based on its defense of discharge in bankruptcy. On appeal, the court found that the creditor knew about the bankruptcy but chose not to participate in it. However, the debtor did not know about the creditor and did not give the creditor notice of the relevant dates in the case. On these facts the court reversed the summary judgment in favor of the debtor, stating that the creditor's actual notice of the bankruptcy did not obviate the need for formal notice to the creditor of relevant

101. 339 U.S. 306, 313-18 (1950) (notice by publication sufficient if location and identity of creditor are unknown).

102. *In re GAC Corp.*, 681 F.2d 1295 (11th Cir. 1982).

103. Notice was published in 53 newspapers worldwide, including the *Wall Street Journal* and *The New York Times*. Cf. *City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293, 294 (1953) (requiring railroad to mail notice to mortgage trustees and all creditors who had appeared in court, and to publish notice in only five newspapers, including the *Wall Street Journal*).

104. *GAC Corp.*, 681 F.2d at 1300.

105. *New York Railroad*, 344 U.S. at 297.

106. 786 F.2d 401 (Fed. Cir. 1986).

dates in the case.¹⁰⁷

*In re Production Plating*¹⁰⁸ demonstrates the risk a creditor with knowledge of the bankruptcy takes by not informing the debtor of her claim or participating in the case. In this case, the debtor did not know about, and thus did not schedule, a wrongful death claimant. However, the debtor published notice of the case. Approximately two months before confirmation, the creditor learned of the bankruptcy during the deposition of an officer of the debtor. After confirmation, the creditor amended her complaint to add the debtor as a defendant in the wrongful death action. The court found the published notice sufficient and granted the debtor's motion to dismiss based on the recently received discharge in bankruptcy.

If the debtor is an individual, the Bankruptcy Code provides for discharge of the claims of creditors that obtain actual knowledge of the case in time to file a timely proof of claim.¹⁰⁹ Section 523 specifies ten exceptions to discharge, applicable only when the debtor is an individual. One of those exceptions, section 523(a)(3), provides that when a creditor is not scheduled by the debtor its claim is not discharged "unless such creditor had notice or actual knowledge of the case in time for such timely filing"¹¹⁰ of a proof of claim. At least one published appellate decision has recognized this principle.¹¹¹

It is difficult to determine whether the Bankruptcy Code intended to discharge the claims of creditors with actual knowledge of the bankruptcy in all cases, or whether it intended to provide for the discharge of those claims only when the debtor is an individual. If the discharge of creditors with actual notice is intended to apply in all cases, the inclusion of this language in section 523, which applies only to individual bankruptcy, can only be attributed to a drafting error.

The strongest argument that the Bankruptcy Code intended to discharge the claims of creditors with actual knowledge only in individual cases is the placement of that provision in section 523. That section applies only to cases filed by individuals. Expression of one thing is exclusion of all others.¹¹² Therefore, because the Bankruptcy Code states that claims of creditors with actual knowledge are

107. *Id.* at 405.

108. 90 Bankr. 277 (Bankr. E.D. Mich. 1988).

109. 11 U.S.C. § 523(a)(3) (1988).

110. *Id.*; see *supra* note 21.

111. See *In re Adams*, 734 F.2d 1094, 1098 (5th Cir. 1984).

112. This common law maxim is more traditionally expressed as "*expressio unius est exclusio alterius*."

discharged when the debtor is an individual,¹¹³ and it is silent on the issue when the debtor is not an individual, the negative implication is that the provision was consciously omitted in nonindividual cases.

The better rule requires formal notice to creditors before discharging their claims, without considering the creditor's actual knowledge or the type of debtor,¹¹⁴ when the debtor knew or should have known of the creditor's claim. The debtor has a duty to schedule¹¹⁵ and give notice to creditors of the relevant dates in the bankruptcy.¹¹⁶ Even when a creditor knows a bankruptcy has been commenced, it does not necessarily know when the relevant dates are set,¹¹⁷ unless it stays in frequent contact with the debtor or its attorney or constantly reviews the court's docket. This burden of investigation should not be placed on the creditor that is involuntarily drawn into the bankruptcy process. The burden should be on the party seeking relief, the debtor, to accurately and completely schedule its creditors and to give the required notices to all parties entitled to receive them.¹¹⁸ Section 523(a)(3) should be disregarded to the extent it discharges the claim of a creditor with actual knowledge of the bankruptcy, but without official notice of the relevant dates, when the debtor knew or should have known of the existence of a claim.¹¹⁹

The application of section 523(a)(3) achieves the proper result when the debtor does not know of the claim against it and has no reason to know of the claim. The debtor cannot be expected to schedule and give mailed notice to creditors it has no reason to be-

113. The Bankruptcy Code actually only provides for the discharge of the claims of creditors that have actual knowledge of the case in time to file a timely proof of claim. 11 U.S.C. § 523(a)(3) (1988).

114. Section 523(a), which provides for the discharge of claims whose holders have actual knowledge of the case, applies only in cases in which the debtor is an individual. *See id.* § 523(a); *see also supra* note 21.

115. The Bankruptcy Code requires the debtor to file a schedule of its creditors. *See supra* note 22. Inclusion in the debtor's schedules increases a creditor's chances of receiving official notice of relevant dates in the case because most notice lists will be compiled at least in part from the schedules. The schedules will be an important source for a creditor that gives notice to parties interested in the action. *See generally* BANKR. R. 2002.

116. *See* BANKR. R. 2002, 3017(d).

117. The term "relevant dates" is used throughout herein to refer to the bar date and the date of the confirmation hearing. These dates are "relevant" because most courts focusing on the due process and discharge issue find notice of these dates to be the most constitutionally significant. *See supra* note 13; *see also* 11 U.S.C. § 1128; BANKR. R. 2002(f), 3017(d). *See generally In re Production Plating*, 90 Bankr. 277 (Bankr. E.D. Mich. 1988) (published notice of commencement of the case sufficient to discharge unknown claims). *But see City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293, 297 (1953).

118. Section 521(1) places an affirmative duty on the debtor to file a schedule of its creditors. The United States Trustee can seek dismissal or conversion of the case for the debtor's failure to comply with this reporting requirement. 11 U.S.C. § 521(1) (1988); *see supra* note 22.

119. *See supra* notes 64 and 69.

lieve hold claims against it. The burden of inquiry is properly placed on the creditor with actual knowledge of the case when the debtor has no reason to know of the creditor.¹²⁰ The important goal of granting the debtor a discharge of all claims against it requires unknown creditors with actual knowledge of the case to make their claims in the bankruptcy.¹²¹ The failure of such creditors to participate in the case will result in the discharge of their claims without payment if the debtor gives notice by publication of the relevant dates.¹²²

Although the debtor's knowledge of a creditor's claim should determine whether the creditor's actual knowledge of the bankruptcy affects the dischargeability of the creditor's claim, the type of debtor involved remains irrelevant to the inquiry.¹²³ The purpose of requiring notice to creditors before the discharge of their claims is to protect creditors. A creditor with a claim against an individual debtor is not entitled to any less notice of the relevant dates in that bankruptcy than the same creditor with a claim against a debtor corporation or partnership. Discharge has the same effect on the creditor in both cases.¹²⁴ Therefore, the applicability of section 523(a)(3) solely to cases of individual debtors should be disregarded.

E. Future Tort Claimants

"Future tort claimants" describes persons injured by an object or circumstance when the injuries will not be detectable for a substantial period of time.¹²⁵ The impossibility of identifying all future tort claimants poses the practical problem of how to notify these claim-

120. Although this approach seems to conflict with the holding in *New York Railroad* that a creditor with actual knowledge has no duty of inquiry, in that case the creditor was listed in the official real property records of the debtor's domicile, its identity was easily ascertainable, and the debtor possibly knew of the creditor's claim. When the debtor has no reason to know of a claim, and the creditor has actual knowledge of the case, constructive notice by publication seems unnecessary to satisfy due process. "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *New York Railroad*, 344 U.S. at 296 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). See generally *Production Plating*, 90 Bankr. at 277 (claim of unknown creditor with actual knowledge of case discharged after constructive notice).

121. *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985).

122. See *Broomall Indus. v. Data Design Logic Sys.*, 786 F.2d 401, 404 (Fed. Cir. 1986); *Production Plating*, 90 Bankr. at 277; see also *supra* note 120.

123. *Contra* 11 U.S.C. § 523(a) (1988). See *supra* note 30.

124. See 11 U.S.C. § 1141 (1988).

125. See *Amatex*, 755 F.2d at 1043 (claimants exposed to asbestos but had not yet developed symptoms).

ants of the relevant dates in the bankruptcy of the alleged tortfeasor. In many circumstances, future tort claimants will be creditors who are unknown to the debtor and who are unaware that they have claims against the debtor.¹²⁶ Courts have found notice by publication to satisfy due process requirements when a creditor's claim is not known to the debtor.¹²⁷ However, the due process standard fashioned in *Mullane* creates a special difficulty with respect to these claimants. Will notice by publication "apprise interested parties of the pendency of the action,"¹²⁸ even if a future tort claimant reads the published notice? The future tort claimant may read the published notice and not realize she has a claim against the debtor because her injury has not been detected.

The converse consideration must be the discharge and fresh start of the debtor. A debtor's most significant and troublesome debt may be liability to future tort claimants.¹²⁹ Because their claims against the debtor may become known to future tort claimants over a long period of time, discharge will never free the debtor of this financial burden unless it applies to all existing future tort claimants, regardless of when their claims become known.¹³⁰

VI. PROTECTING THE DEBTOR'S DISCHARGE

Enough certainty exists in the Bankruptcy Code and reported decisions to determine what notice should be given to a creditor to obtain a discharge of its claim. Attorneys representing debtors must be cognizant of these rules and decisions in order to achieve the fresh start their clients seek when entering the reorganization arena.

The debtor's schedules¹³¹ provide the first opportunity for an error or omission to result in the exception of a claim from discharge. Most service lists for providing notice of the relevant dates in the case will be compiled from the schedules. A debtor should err on the

126. For a case deciding whether a future tort claimant is a creditor in a bankruptcy and thus bound by the discharge, see *In re Pettibone Corp.*, 90 Bankr. 918 (Bankr. N.D. Ill. 1988); Moreau, *Who Are Creditors in a Reorganization Proceeding?*, 26 WASH. U.L.Q. 27 (1940).

127. *City of N.Y. v. New York, N.H. & H. R.R.*, 344 U.S. 293 (1953); *In re Production Plating*, 90 Bankr. 277 (Bankr. E.D. Mich. 1988).

128. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

129. *Amatex*, 755 F.2d at 1043; *American Serv. Co. v. Henderson*, 120 F.2d 525, 529 (4th Cir. 1941), *quoted in* *Beard v. A.H. Robins Co.*, 828 F.2d 1029, 1032 (4th Cir. 1987).

130. The author seeks only to point out the due process issue that exists with respect to future tort claimants, and does not express an opinion on the correct rule or result. Such an analysis is beyond the scope of this article, and such decisions are better left to legislators. See generally *Amatex*, 755 F.2d at 1043, n.9; Rowe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984); Comment, *The Case of the Disappearing Defendant*, 132 U. PA. L. REV. 145 (1983); Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983).

131. See *supra* note 22.

side of overinclusion of creditors when compiling its schedules. Obviously, known creditors should be scheduled, but the debtor also should consider scheduling persons who might become creditors during the case and those who allege claims that the debtor believes have no merit.¹³² Additionally, the debtor should amend its schedules during the case to include all claimants discovered after the commencement of the case or mistakenly omitted from the original schedules.¹³³

Notice of the relevant dates¹³⁴ in the case is the most critical step of the reorganization for protecting the discharge of a debtor who seeks to confirm a plan of reorganization. Great care should be taken to mail notice of the relevant dates to all creditors, even if their claims are contingent, disputed, or unliquidated, to avoid future due process defenses to the discharge.¹³⁵

The debtor must decide whether the case warrants notice of the relevant dates by publication. The facts of each case will determine

132. Claims can be scheduled as disputed, contingent, or unliquidated in the debtor's schedules, and will not be treated as claims unless the creditor files a proof of claim. *See supra* note 13. Thus, the debtor can schedule a disputed creditor's claim, and give the creditor official notice of the proceedings to protect the debtor's discharge from a constitutional challenge, without admitting the validity of the claim. *See* BANKR. R. 3003(c)(2).

133. The schedules in a voluntary case can be amended by the debtor at any time before the case is closed. BANKR. R. 1009. Further, a debtor can file a proof of claim on a creditor's behalf, subject to certain time restrictions. *Id.* § 3004. An amendment to the schedules has an advantage over filing a proof of claim on a creditor's behalf because the claim can be listed as contingent, disputed, or unliquidated in the schedules. *See supra* note 132. If a claim is made through a proof of claim, it is allowed unless an objection is made. 11 U.S.C. § 502(a) (1988).

An amendment to the schedules also is advisable when a debtor's name or address is listed incorrectly. *See In re Adams*, 734 F.2d 1094 (5th Cir. 1984) (claim not discharged because notice sent to wrong address).

134. *See supra* note 117.

135. A creditor scheduled as contingent, disputed, or unliquidated, that does not file a proof of claim, cannot vote on the plan, and may not be entitled to notice of the confirmation hearing. However, any "party in interest" may object to the plan's confirmation. 11 U.S.C. § 1128(b) (1988). A creditor is a party in interest. *Id.* § 1109(b). The Bankruptcy Code defines "creditor" broadly, and does not require a person to have a valid claim in the estate in order to be a creditor. *Id.* § 101(9). Further, Bankruptcy Rule 3017(d) requires that notice of the confirmation hearing be given to all creditors, even though that rule expressly recognizes that certain creditors may not be entitled to vote on the plan. BANKR. R. 3017(d). When a person complains of a lack of due process, "it is no answer to say that in his particular case due process of law would have led to the same result." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

For these reasons, the cautious debtor will give notice of the confirmation hearing to all creditors, including those listed as contingent, disputed, or unliquidated that do not file proofs of claim.

whether notice of these dates should be published.¹³⁶ The debtor should consider the possibility of unknown claims against it, the possible size of any such claims, the cost of publishing the notice, and the effect published notice of its bankruptcy will have on its business. For instance, a wholesaler with a limited number of employees that does business with an easily identifiable group of other businesses may be able to identify all of its creditors and thus avoid published notice. However, the owner of a fleet of taxi cabs that may have been involved in accidents not reported to the debtor, or a retail store that trades with the public at large, might discharge unknown claims by publishing notice. Publication of the relevant dates provides a debtor with the best protection against unknown creditors who may later assert preconfirmation claims against the debtor that could have been discharged in the bankruptcy.

If a debtor decides to give notice by publication, it must then decide how frequently to publish the notice, what the notice should contain, and where to publish it. Notice by publication should conform to the principle that it be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹³⁷ The debtor first should look to the bankruptcy court for guidance as to how often and where the notice should be published.¹³⁸ A court order specifying the type of published notice that is adequate, given the circumstances of the case, provides the debtor with its first line of defense to a future attack by an unknown creditor to the sufficiency of the published notice.

VII. CONCLUSION

The Bankruptcy Code defines the discharge in a reorganization proceeding expansively, providing for a discharge of all preconfirmation obligations of the debtor, subject to ten narrow exceptions. The Supreme Court and numerous decisions by lower courts have held that the United States Constitution limits the Bankruptcy Code discharge language and requires notice of certain bankruptcy events to a creditor before its claim can be discharged.

The Bankruptcy Code excepts unscheduled claims from discharge when the debtor is an individual, unless the claimholder has actual

136. See *supra* note 127.

137. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

138. "The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice." BANKR. R. 2002(k).

"Whenever these rules require or authorize service or notice by publication, the court shall, to the extent not otherwise specified in these rules, determine the form and manner thereof, including the newspaper or other medium to be used and the number of publications." *Id.* 9008.

For examples of published notice ordered by the courts, see *supra* notes 41, 103.

knowledge of the bankruptcy case. The problem with this exception is twofold: (1) if the exception is valid, it should apply equally in those cases in which the debtor is not an individual; and (2) courts have held that actual knowledge of the bankruptcy case does not obviate the due process requirement of official notice to the creditor of relevant events in the case prior to discharge.

Therefore, debtors must give adequate notice of relevant events in the case, such as the bar date for filing claims and the date set for the confirmation hearing, to all creditors as a prerequisite to discharging their claims. Creditors not known to the debtor can be given adequate notice of the relevant events in the case through published notice. Thus, a debtor must give notice by publication to ensure the discharge of all preconfirmation claims against it.

