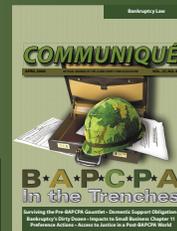


The Protection of “Domestic Support Obligations” under the New Bankruptcy Code: What Family Lawyers Should Know

By Amy N. Tirre

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A local family lawyer called me in a panic last week because his client's former spouse had filed a Chapter 7 bankruptcy petition seeking to discharge the obligations owed to his client that he (the lawyer) had so painstakingly documented in the parties' property settlement agreement. While the situation was not as dire as he thought because bankruptcy laws protect and except alimony, child support and other family support obligations from a bankruptcy discharge, his call prompted me to write this article so that family lawyers will not be caught unaware. Fortunately, the potential landmines for family lawyers have been significantly reduced under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which rigorously expands the protections afforded to marital dissolution obligations under the Bankruptcy Code, 11 U.S.C. 101, et seq. BAPCPA is effective for those bankruptcy cases commenced on or after October 17, 2005.

The history of family support obligations and discharge in bankruptcy

Prior to BAPCPA, the Code drew a distinction between a debt that is in the nature of alimony, maintenance or support and a debt that is a "property settlement obligation" incurred in the course of a divorce or separation. Self-explanatory examples of the former are alimony or child support and examples of the latter are the debtor's obligation to pay the mortgage for the family residence in which the non-debtor former spouse and the children reside or the former spouse's entitlement to half of the debtor's pension. The distinction between the two types of debts was critical in evaluating the dischargeability of the debt under Section 523(a) of the Bankruptcy Code: the debt in the nature of alimony, maintenance or support was simply not discharged under Section 523(a)(5) (unless it had been assigned to a governmental entity); however, the property settlement obligation would be discharged unless the non-debtor former spouse filed a complaint to except the debt from discharge and satisfied a balancing of the hardships test under Section 523(a)(15).

"Domestic Support Obligations" under BAPCPA

The former distinction between a nondischargeable support obligation and a dischargeable property settlement obligation is abolished by the BAPCPA. The BAPCPA creates a new defined term, a "domestic support obligation," in Section 101(14A) of the code:

"[D]omestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

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The definition of a domestic support obligation is designed to encompass all alimony, maintenance or support obligations regardless to whom they are owed; the amendment to Section 523(a)(5) simply states that domestic support obligations are not discharged.

Property settlement obligations under BAPCPA are now nondischargeable

The amendment to Section 523(a)(15) omits the balancing of the hardships test and makes nondischargeable what were previously considered dischargeable property settlement obligations. It provides that a debtor is not discharged from any debt owing:

to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

Under Section 523(a)(15), the former spouse will still be entitled to the obligations owed by the debtor under the property settlement agreement, e.g. ½ of the pension. In

sum, if it is a marital dissolution obligation in the nature of support, it is nondischargeable under Section 523(a)(5) and if it is a marital dissolution obligation not in the nature of support, it is now made nondischargeable by Section 523(a)(15).

What other protections exist under BAPCPA for domestic support obligations?

- **Priority:** Domestic support obligations are now at the top of the list of claims that take priority in the distributions to creditors. In first position is support payable to a spouse or child and in second position is support assigned to a governmental entity. 11 U.S.C. 507(a)(1)(A).

- **Exempt assets liable:** The debtor's otherwise exempt assets are now apparently liable for domestic support obligations "notwithstanding any provision of applicable bankruptcy law to the contrary." (There's a constitutional challenge in the making.) 11 U.S.C. § 522(c).

- **Protection from lien avoidance:** A judicial lien for a domestic support obligation is not avoidable by the debtor. 11 U.S.C. § 522(f)(1)(A)

- **Protection from avoidance as a preference:** A payment made to a former spouse for a domestic support obligation is not avoidable and therefore, recoverable by the trustee as a preferential payment to a creditor. 11 U.S.C. § 547(c)(7).

- **Delay in confirmation of plan:** Multiple new provisions delay the confirmation of plans in Chapters 11, 12 or 13 until the debtor is current on domestic support obligations. 11 U.S.C. §§ 1129(a)(14), 1225(a)(7) 1325(a)(8) (plan cannot be confirmed if support is not current).

- **Ground for conversion to Chapter 7 from Chapter 13:** The failure to pay post-petition domestic support obligations is a ground for conversion to chapter 7. 11 U.S.C. § 1307(c)(11).

Of course, there is probably more for the family lawyer to know, but this article provides the basics under the BAPCPA. If you need to know more, please call a bankruptcy lawyer! **G**

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