



THE ENFORCER

BY DAVID FINDLING

THE FINDLING LAW FIRM

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UH OH, THE OTHER SIDE FILED FOR BANKRUPTCY

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 grants domestic support creditors rights unavailable to other creditors. The remedies for support creditors are drastically different between a chapter 7 and 13 case. A chapter 13 case precludes collection outside of the debtor's payment plan. However, a chapter 7 filing gives support creditors an often overlooked option.

While domestic support obligations are not dischargeable in bankruptcy,¹ filing bankruptcy still throws a kink in enforcement. Many support payees do not have the means to wait 6 months, or more, for the debtor's discharge before they begin collecting against the support debtor's property. A careful reading of the Bankruptcy Code, however, reveals that support creditors of a chapter 7 debtor have another option – collecting from property that is not subject to administration in bankruptcy.

When a debtor files for bankruptcy, essentially all of his/her property becomes property of the bankruptcy estate and subject to administration by the trustee.² In a chapter 7 bankruptcy, "all legal or equitable interests of the debtor in property as of the commencement of the case"³ becomes "property of the estate."⁴ Additionally, any income that this property generates, such as rent and dividends, is included.⁵ The trustee administers and distributes the property according to the priorities set forth in the Bankruptcy Code.

During the pendency of a chapter 7, the automatic stay prohibits proceedings to collect against property of the estate and the debtor.⁶ The automatic stay preserves property for the benefit of all creditors. This eliminates a race to collect against the debtor's property. While the Bankruptcy Code favors support creditors at the expense of general creditors, they are still prohibited from collecting against the debtor's pre-petition property.⁷

However, the Bankruptcy Code provides a support creditor with a collection option while a chapter 7 bankruptcy proceeding is pending. Filing a chapter 7 bankruptcy petition does not stay "the collection of a domestic support obligation from property that is *not* property of the estate."⁸

If "property of the estate" is everything the debtor has at the moment the case is filed, what is "not property of the estate?" Almost everything that the debtor obtains post petition, save inheritances within 6 months after filing,⁹ is not subject to administration by the bankruptcy trustee. This includes wages, gifts and post petition deposits at banks. While the bankruptcy is pending, the support creditor is free to execute upon everything the debtor accumulates post petition. However, proceed with caution. Should you inadvertently attach bankruptcy estate property, you will have violated the automatic stay.

Practitioners must recognize the different definition the Bankruptcy Code gives to "property of the estate" in a chapter 13. In a chapter 13, "property of the estate" includes everything the debtor owned before the petition was filed and:

- (1) all property . . . that the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted . . . and
- (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted.¹⁰

Therefore, in a chapter 13, even a support creditor is barred from executing on the debtor's pre and post-petition property to satisfy an arrearage. In a chapter 13, all property the debtor owns and/or acquires is effectively off limits to the support creditor until the debtor is discharged, which can be as long as 5 years. Explaining the complexity of the chapter 13 process and the rights of support creditors therein would require more space than is allocated to this column. However, a future article will be devoted to explaining the support creditor's rights against a chapter 13 support debtor.

Once the support debtor files a chapter 7 bankruptcy petition, practitioners must diligently review the support debtor's bankruptcy schedules. This is the first step to determining what is "not property of the estate." However, do not rely solely upon what the debtor alleges he owned prior to bankruptcy. If you identify property not listed on the debtor's schedules, be sure to verify that this was acquired



post-petition; otherwise, you could face sanctions and contempt proceedings. Property not listed on a debtor's schedules but acquired before the commencement of the case is still property of the estate. So long as it is not "property of the estate", the bankruptcy code does not prohibit action against that property by a domestic support obligation creditor.

3. *Id.*
4. *Id.*
5. *Id.*
6. 11 USC §362(A)
7. *Id.*
8. 11 USC §362(B)(2)(B)
9. 11 USC §541
10. 11 USC §1306

ENDNOTES

1. 11 USC §§ 523(A)(4) AND 1328(A)(2)
2. 11 USC §541(A)

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