



THE ENFORCER

BY DAVID FINDLING

THE FINDLING LAW FIRM

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Don't you hate it when a party to a divorce files for bankruptcy right after the entry of the Judgment of Divorce? In the past, the bankruptcy code didn't make it easy to fight the dischargeability of obligations under a Judgment of Divorce. Many resorted to "anti-bankruptcy" clauses in the hope this would frustrate a bankruptcy filing. In 2005, Congress amended the bankruptcy code and passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). It effectively made all obligations incurred in actions for divorce, separate maintenance and for support (child and spousal) non-dischargeable.

For purposes of a chapter 7 bankruptcy, two types of debts arise in family law. "Domestic support obligations" ("DSOs") are debts that are "in the nature of support," whether or not they are so labeled as support.¹ These DSOs have previously been covered in this column (See February 2007, Support and Property Settlements Under the New Bankruptcy Code). The other debts (everything else) are those that are not DSOs and are:

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

("(a)(15) Debt").² Post-BAPCPA, an (a)(15) Debt can be owed to "a spouse, former spouse, or child of the debtor" ("(a)(15) Creditor").³

BAPCPA has been widely criticized for limits it places on the ability of consumers to file for bankruptcy protection. While BAPCPA has created many hurdles for debtors, it has removed barriers for (a)(15) Creditors. BAPCPA drastically altered the scope of (a)(15) Debts and the process in which they are excepted from a debtor's discharge.

Prior to BAPCPA, preserving an (a)(15) Debt was onerous and they were non dischargeable unless:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the

maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.⁴

This was known as the "balancing test."⁵ Proving the "ability" of a debtor to pay an (a)(15) Debt, pre-BAPCPA was not simple. The process for excepting an (a)(15) Debt from discharge required filing an "adversary proceeding."⁶ An adversary proceeding is a federal lawsuit within the debtor's bankruptcy case. Adversary proceedings, when defended, are costly, time consuming and time sensitive, as it had to be filed within 60 days from the first meeting of creditors.⁷ Obtaining a favorable judgment in the adversary payment still required the (a)(15) Creditor to collect on the debt.

BAPCPA deleted the above quoted "balancing test" and also the requirement of an adversary proceeding. Now the debtor's ability to pay the (a)(15) Debt has no bearing on its dischargeability. Since the debtor's ability to pay is irrelevant, Congress determined the requirement of an adversary proceeding to be superfluous. After all, if an (a)(15) Creditor is not burdened with having to prove the debtor's ability to pay, it only needs to prove the existence of the (a)(15) Debt.

BAPCPA, however, did not modify the automatic stay to permit an (a)(15) Creditor to attempt collection efforts while the bankruptcy is pending. Accordingly, an (a)(15) Creditor must wait until the debtor receives a discharge before attempting to enforce an (a)(15) Debt.⁹ Once the debtor receives a discharge, the (a)(15) Creditor can proceed as though the chapter 7 bankruptcy never occurred.

Preserving and enforcing an (a)(15) Creditor's rights under a Judgment of Divorce in bankruptcy requires diligence on two fronts. As mentioned above, do not take any action against the debtor until the bankruptcy court has issued a



discharge, dismissed the case or granted your client relief from the automatic stay, which is unlikely for an (a)(15) Debt. Most importantly, know the chapter under which the debtor filed for relief. This article identifies the rights and process when a debtor files under chapter 7, as opposed to a chapter 13. If a debtor files for bankruptcy under chapter 13 and successfully completes his payment plan, (a)(15) Debts are dischargeable and other actions should be taken.¹⁰

Endnotes

1. 11 U.S.C. § 101(14A); See also *Long v Calhoun (In re Calhoun)*, 715 F.2d 1103, 1107 (6th Cir 1983)
2. 11 U.S.C. § 523(a)(15)

3. *Id.*
4. 11 U.S.C. § 523(a)(15) (2004)
5. *In re Dumontier*, 389 B.R. 890, (Bkrcty.D.Mont.,2008)
6. 11 U.S.C. § 523(c) (2004)
7. F.R.Bankr.P. 4007 (2004)
8. *Dumontier, supra*
9. *Id.*
10. 11 U.S.C. § 1328

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