



THE ENFORCER

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Support and Property Settlements Under the New Bankruptcy Code

You have just put the finishing touches on a judgment of divorce and had it entered by the court, when you receive a phone call from the client who informs you that the ex has just filed for bankruptcy. How does the revised bankruptcy code affect the support and property division provisions of the newly entered judgment of divorce? Does it make a difference if it is a Chapter 7 or Chapter 13 bankruptcy?

The good news is that under the new bankruptcy code, family and support obligations are much more difficult to avoid. Now, both support obligations and property settlements are non-dischargeable in a Chapter 7 bankruptcy proceeding. However, property divisions may still be compromised in a Chapter 13 bankruptcy.

Discharge of Debts Created by a Judgement of Divorce

There are two main provisions in the bankruptcy code which govern the dischargeability of debts created by a judgment of divorce, 11 U.S.C. §523(a)(5) and 11 U.S.C. §523(a)(15). It should be noted that both these provisions were substantially changed in November of 2005, when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

11 U.S.C. §523(a)(5)

Under BAPCPA, Section 523(a)(5) excepts a "domestic support obligation¹" from discharge. This exception to discharge occurs automatically and no action needs to be taken for the exception to take effect.² The new term domestic support obligation includes, inter alia, debts that accrue before or after the commencement of a bankruptcy case, and interest that accrues on the domestic support obligation.

11 U.S.C. §523(a)(15)

11 U.S.C. §523(a)(15) also provides that certain debts

arising out of a divorce are nondischargeable. The Bankruptcy court uses a two part analysis in determining whether a debt is nondischargeable under §523(a)(15).³ First, the debt must not be a debt which is nondischargeable under 523 (a)(5).⁴ Second, the debt must be either:

1. incurred by the debtor during the course of a divorce or separation; or
2. incurred in connection with a separation agreement, divorce decree, order of a court of record, or from a determination made by a governmental unit in accordance with applicable state or territorial law.⁵

The practical effect of this provision, combined with 523(a)(5), is that all marital and domestic relations obligations, whether support or property division, are non-dischargeable in a Chapter 7 bankruptcy.⁶ This is a substantial change from the pre-BAPCPA bankruptcy code. Under the former code, if a debtor met certain requirements, such as inability to pay, a property settlement or division was dischargeable in a Chapter 7 bankruptcy. However, the new law closes this loophole. But, counsel should be aware that a property division can still be compromised in a Chapter 13 bankruptcy. As a result, there will be no litigation in a Chapter 7 bankruptcy over whether a provision in a judgment of divorce is support or a property settlement. Rather, such an inquiry will become important in a Chapter 13 bankruptcy filing.

Summary Of Changes Under BAPCPA

- New and expanded definition – "Domestic Support Obligation";
- Domestic Support Obligations and property settlements are not dischargeable in a Chapter 7 Bankruptcy under the expanded language of Section 523 (a)(5) and (a)(15);
- The Domestic Support Obligation and property settlement exceptions to discharge arise automatically in a Chapter 7 bankruptcy; no adversary proceeding is needed;



- An adversary proceeding may be needed in a Chapter 13 bankruptcy, as property settlements are dischargeable in a Chapter 13 proceeding.

Endnotes

1. 11 U.S.C. §101(14A) defines a domestic support obligation as: a debt that accrues before, on, or after the date of... [a bankruptcy case], 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
 - C whether such debt is expressly so designated; 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
2. 11 U.S.C. §523(a)
3. 11 U.S.C. §523(a)(15)
4. *Id.*
5. *Id.*
6. 11 U.S.C. §1328(a)(2), 11 U.S.C. §523(a)(5), (15)

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Ms. Chiamp is among the first attorneys in Michigan to be designated as a Family Law Court-Approved Mediator. For more than 30 years she has been appointed mediator, facilitator, and arbitrator in cases ranging from negligence, probate and contract law to civil rights and family law.

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