

# Bankruptcy and Divorce: Critical Issues for Attorneys (and the Start of a Sad Country Song)

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**Expecting the Unexpected: Unusual Domestic Relations Law Issues in Bankruptcy**

Monty Python's Flying Circus<sup>1</sup> and bankruptcy presentations make strange bedfellows, much like the current federal bankruptcy law<sup>2</sup> ("Bankruptcy Code") and the various states' laws relating to dissolution of marriage, child support and related matters ("Domestic Relations Law"). However, while the passage ten years ago of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),<sup>3</sup> was initially to resolve a number of critical issues concerning the Bankruptcy Code and Domestic Relations Law, Monty Python's "The Spanish Inquisition"<sup>4</sup> is a useful warning to expect that unexpected issues will arise under BAPCPA.

**I. Introduction: Mystery Bankruptcy Theater: Expected, Unexpected and Obscure Domestic Relations Law Issues**

As noted by numerous commentators over the past thirty years,<sup>5</sup> provisions of the Bankruptcy Code have often been at odds with various forms of relief provided to parties ending

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<sup>1</sup> The Funniest Television Comedy Series in history which starred Graham Chapman, John Cleese, Eric Idle, Terry Jones and Michael Palin (© Monty Python Pictures Limited 1970).

<sup>2</sup> Currently codified at 11 U.S.C. §§101-1532 (2005). The Pre-BAPCPA Bankruptcy Code will be cited as 11 U.S.C. § \_\_\_\_ (2004). For a history of U.S. bankruptcy law, See Skeel, Debt's Dominion: A History of Bankruptcy Law in America (Princeton Press 2001).

<sup>3</sup> Publ. No. 109-8, 119 Stat 23 (2005) (hereinafter as "BAPCPA")

<sup>4</sup> Monty Python's Flying Circus Episode 15.

<sup>5</sup> Howlett and Nixon, Surprising Consequences of State Domestic Relations Law, 33 Am. Bank. Inst. LJ 62 (May 2014); Alexander, Better Than Traditional Marriage?: The Bankruptcy Benefits to a Divorce Following a Same-Sex Marriage, Domestic Partnering or Civil Union, 20 Am. Bankr. Inst. L.R. 271 (Spring 2012); Vance, Till Debt Do Us Part: Irreconcilable Differences in the Un-Happy Union of Bankruptcy and Divorce, 45 Buff. L. Rev. 369 (1997). Bowles & Allmand, What Divorce Court Giveth, Bankruptcy Court Taketh Away: The Dischargeability of Domestic Obligations After the Bankruptcy Reform Act of 1994, 34 U. Louisville J. Fam. L. 521 (1995-1996) (hereinafter "Divorce Court II," Peter C. Alexander, Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy, 43 CATH. U.L. REV. 351 (1994); Otilie Bello, Bankruptcy and Divorce: The Courts send a Message to Congress, 13 PACE L. REV. 643 (1993); Jana B. Singer, Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction, 30 HARV. J. ON LEGIS. 43 (1993); David M. Susswein, Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Contest: A Distinction Without a Difference?, 22 HOFSTRA L. REV. 679 (1994); Freeburger & Bowles, What Divorce Court Giveth, Bankruptcy Court Taketh Away, 24 U. Louisville J. Family Law 587 (1985-1986) (hereinafter "Divorce Court I").

their marriage by Domestic Relations Law.<sup>6</sup> The problems the Bankruptcy Code heretofore presented to Domestic Relations Law attorneys, (“Domestic Attorneys”) primarily related to the discharge of debts which arose under Domestic Relations Law, including awards of support to spouses, former spouses and children of a debtor (“Support Obligations”), property settlements, and other similar monetary and property awards (“Property Obligations”) (collectively Support Obligations and Property Obligations are hereinafter referred to as “Domestic Obligations”)<sup>7</sup> and the impact of the automatic stay on Domestic Relations Law Proceeding.<sup>8</sup>

The threat of bankruptcy discharge to Domestic Obligations was largely eliminated with the passage of the BAPCPA which eliminates the dischargeability of such debts except for 11 U.S.C. § 523(a)(15) debts in Chapter 13 cases. Also BAPCPA also greatly reduced the impact of the automatic stay in Domestic Relations Law.<sup>9</sup> This article will briefly show how the current Bankruptcy Code impacts Domestic Attorneys in unexpected ways and provide suggestions as to how the Bankruptcy Code could be used to address some of the serious economic problems that may arise in the context of the breakdown of a marriage.

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<sup>6</sup> The conflict between the Bankruptcy Code and Domestic Relations Law has been going on since prior to the American Civil War. See Hawes v. Cooksey, 13 Ohio 242, 243 (1844) (holding that father of illegitimate child could receive a discharge of child support obligations by filing bankruptcy under the Bankruptcy Act of 1841).

<sup>7</sup> See Brigner & Bowles, Bankruptcy and Divorce Law: Can an Unholy Alliance Make the End of an Unhappy Marriage Less Painful? 13 AM J. Fam. L. 148 (1999) (hereinafter Bankruptcy and Divorce). Please note that the overview of the Bankruptcy Code portion of this article is out of date in light of BAPCPA.

<sup>8</sup> 11 U.S.C. § 362 (2005).

<sup>9</sup> For a discussion of dischargeability and automatic stay issues under BAPCPA, See Richards, A Guide to Spousal Support and Property Division Claims Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 41 Fam. L. Q. 227 (Summer 2007); Cordry and Strauss, Domestic Support Issues from a Governmental Perspective 41 Fam. L.Q. 321 (Summer 2007); “Governmental Perspectives”) Satz and Brandt, Representing Victims of Domestic Violence in Property Distribution of Proceedings After the Bankruptcy Abuse and Consumer Protection Act of 2005, 41 Fam. L. Q. 275 (Summer 2007); (hereinafter “Victims”); White and Caher, The Dog that Didn’t Bark Domestic Support Obligations and Exempt Property After BAPCPA, 41 Fam. L. Q. 299 (Summer 2007) (hereinafter “Dog that Didn’t Bark”).

A. **The Core Issue: Are Domestic Obligations Dischargeable Under the Bankruptcy Code?**

For an excellent discussion of which domestic obligations constitute support obligation and which are property obligations. See Exhibit A.

B. **One Statute to Rule Them All 11 U.S.C. § 101(14A)**

The most important change made by BAPCPA involving Domestic Relations Law Issues is the creation of Domestic Support Obligations (“DSO”). A new section was added to the Bankruptcy Code, 11 U.S.C. § 101(14A), which in some respects replaces old 11 U.S.C. § 101(12A)<sup>10</sup> which previously defined “debt for child support.”<sup>11</sup> 11 U.S.C. § 101 (14A) defines a new term “Domestic Support Obligation” (“DSO”) as follows:

*(14A) The term 'domestic 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,*

<sup>10</sup> 11 U.S.C. § 101(12A) provided: “debt for child support” means a debt of a kind specified in Section 523(a)(5) of this title for maintenance or support of a child of the debtor.

<sup>11</sup> This definition was of little value as it was referenced to 11 U.S.C. § 523(a)(5). See Divorce Court II at 537-38.

*child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.*<sup>12</sup>

This definitional section replaces the pre-BAPCPA language found in 11 U.S.C. § 523(a)(5) which previously defined which debts were non-dischargeable as support obligations. 11 U.S.C. § 523(a)(5) was amended by BAPCPA to read as follows:

*(5) for a domestic support obligation;*<sup>13</sup>

The new definition of DSO significantly expands prior law's scope of non-dischargeable Support Obligations and what constitutes exempt alimony under 11 U.S.C. § 522(d)(10)(D). (See In re Konoin, 379 B.R. 80 (Bkrtcy. W.D. Pa. 2007)) in several important respects. First, the broad concept of pre BAPCPA 11 U.S.C. § 523(a)(5) that debts had to be in nature of alimony maintenance or support,<sup>14</sup> in order to be non-dischargeable Support Obligations, has been retained in the definition of DSO's. Indeed, at least one court has held that the text of former 11 U.S.C. § 523(a)(5) on this issue is "comparable to and largely mirrors"<sup>15</sup> the DSO definition of 11 U.S.C. § 101(14A). Therefore pre-BAPCPA caselaw tests<sup>16</sup> concerning whether Domestic Obligations are in the nature of alimony maintenance or support should be applicable to determining whether they are in the nature of alimony maintenance or support for purposes of DSO's.<sup>17</sup>

<sup>12</sup> 11 U.S.C. § 101 (14A) (2005). Italics denote provisions added to the Bankruptcy Code by the BAPCPA. Strike outs denote provisions deleted from the Bankruptcy Code by the BAPCPA.

<sup>13</sup> 11 U.S.C. § 523(a)(5) (2005).

<sup>14</sup> See Divorce Court II at 562-63, 576.

<sup>15</sup> In re O'Brien, 339 B.R. 529, 531 n.2 (Bankr. D. Mass. 2006).

<sup>16</sup> For a discussion of the various tests of which Domestic Obligations are in the nature of alimony maintenance support, See Divorce II at 576-593; Bullock, Family Law issues in Consumer Bankruptcy, 060304 ABI-CLE67 (2004).

<sup>17</sup> See In re Cheathan, 2009 WL 2827951 (Bankr. N.D. Ohio Sept. 2, 2009) (Pre BAPCPA decision of In re Sorak, 163 F. 3d 397 (6<sup>th</sup> Cir. 1999) governs determinations of whether an obligation is a DSO or a property settlement debt). In re Loehrs, 2007 WL 188364 at p. 3-n3. (Slip op. Bankr. N.D. Okla. Jan. 22, 2007) ("Caselaw construing what constituted non-dischargeable alimony maintenance and support under former Section 523(a)(5) is relevant in determining what constitutes a debt "in the nature of alimony maintenance or support under Section 101(14A)."

Second, the definition of DSOs expands the types of debts which are non-dischargeable under 11 U.S.C. § 523(a)(5). Under pre-BAPCPA 11 U.S.C. § 523(a)(5), debts had to arise in connection with (1) separation agreement; (2) divorce decree; (3) order of a court of record; or (4) determination by a governmental unit<sup>18</sup> made in accordance with state or territorial law in order to be non-dischargeable.

Under the new definition of DSOs, debts which:

- a. accrue either before, on or after the date an order of relief is entered in the debtor's case;<sup>19</sup>
- b. will be established or are subject to establishment before, on or after the date an order of relief; and<sup>20</sup>
- c. have arisen "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<sup>21</sup>

are non-dischargeable DSOs under 11 U.S.C. § 523(a)(5)

This expansive definition means that DSOs can consist of debts which either: 1) were established prior to the debtor's bankruptcy; 2) are in the process of being established when the debtors' bankruptcy is filed; or 3) will be established after the date of the filing of the debtor's bankruptcy. However, exact timing may still be impacted. As noted in *In re Burnett*,<sup>22</sup> prepetition DSO claims may be barred by plan confirmation while post-petition DSO cannot be

<sup>18</sup> 11 U.S.C. § 101(27) (2004) defines "governmental unit" as the United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

<sup>19</sup> 11 U.S.C. § 101(14A) (2005).

<sup>20</sup> 11 U.S.C. § 101(14A)(C) (2005).

<sup>21</sup> *Id.*

<sup>22</sup> 646 F.3d 575 (8<sup>th</sup> Cir. 2011).

barred. Indeed, given the “future” accrual and establishment language of this definition, it is arguable that any potential claim to a Support Obligation which a party might be entitled to, could constitute a DSO and be non-dischargeable.<sup>23</sup> An early decision under BAPCPA, In re O’Brien, briefly discussed the expanded types of debts covered by the new 11 U.S.C. § 523(a)(5)<sup>24</sup> in considering the extent to which attorney fees arising from a divorce can constitute DSOs. Unfortunately the O’Brien opinion offers little legal guidance on this point as it holds that an evidentiary hearing must be held to determine the extent to which debts constituted DSOs.<sup>25</sup>

In the Chapter 11 case of In re Wyly, 525 B.R. 644 (Bankr. N.D. Tx. 2015), the Bankruptcy Court held that a guaranteed return on an investment of \$5,000,000 was a DSO. Recent decisions have attempted to provide some clarity as to what kinds of debt are considered DSO debts. The First Circuit, in In re Smith, 586 F. 3d 69 (1<sup>st</sup> Cir. 2009) found that a \$50 per day charge for every day an alimony payment was late, was not so connected to the alimony that it functioned as an obligation in the nature of support and held that the debtors obligation for these late fees was dischargeable in his Chapter 13 case. However, the bankruptcy court, in In re Ashly, 485 B.R. 567 (Bankr. W.D. Ky. 2013) held that a requirement that a former spouse of the debtor be employed as a consultant in a family business was a DSO.

An unusual line of cases involve the return or repayment of state law support overpayments. In the Tenth Circuit case of Cross v. Cross, 737 F.3d 670 (10<sup>th</sup> Cir. 2013), the

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<sup>23</sup> Under prior law it was questionable whether Support Obligations which had not arisen prior to a debtor’s bankruptcy would be non-dischargeable under U.S.C. § 523(a)(5). Compare In re Arleaux, 149 F.3d 1186 (8<sup>th</sup> Cir. 1998) and Neier v. Neier, 45 B.R. 740 (Bankr. N.D. Ohio 1985) discussing that debts arising from post-petition divorces were post-petition claims not subject to discharge with In re Ellis, 72 F.3d 628 (8<sup>th</sup> Cir. 1995) finding obligation to pay a portion of pension plan’s assets when they were distributed was actually a pre-petition dischargeable debt under broad definition of claim. See 11 U.S.C. § 101(5) (2005) See also Jutus v. Jutus, 581 N.E.2d 1265 (Ind. App. 1991) (discussing claim under antenuptial agreement).

<sup>24</sup> 339 BR at 531.

<sup>25</sup> Id.



Court held that repayment of overpaid spousal support had to be in the nature of support to the overpayor. The fact it was paid as a support obligation is irrelevant. It did find the overpayment obligation was non-dischargeable under 11 U.S.C. § 523(a)(15). In contrast, the Court, in In re Norbut, 387 B.R. 199 (Bankr. S.D. Ohio 2008), found that a debtor's obligation to repay overpayments of support payments made to her pre-petition by her non-debtor former spouse were DSO obligations, finding that the underlying nature of the payments and their return to the payor were in the nature of support.

Third, the definition of DSOs expands the classes of parties who can assert DSO claims by adding the term “recoverable”<sup>26</sup> parents, legal guardians and “responsible relatives”<sup>27</sup> of a child of the debtor to the list of creditors who can be owed a non-dischargeable debt under 11 U.S.C. § 523(a)(5) (“Eligible Creditors”). However, who is owed the debt is still an important issue. In the case of In re Forgette, 379 B.R. 623 (Bkrcty. W.D. Va. 2007), the Bankruptcy Court held that the State Court order which held the debtor “obligated” on a bank loan on a car owned by his ex-wife did not constitute a DSO as the debtor owed no debt to his wife under that order. The Court, in Tuck v. Oliver, 423 B.R. 378 (W.D. Okla. 2010), found that debts owed to former daughter-in-law were not DSO, as she was not a creditor which could be owed a DSO. The Court, in In re Hudson, 2007 WL 4219421 (Bkrcty C.D. Ill. 2007), however, found an award of attorney fees to a parent of a child of the debtor's attorney fees was a DSO. This position was rejected by In re Brooks, 371 B.R. 761 (Bkrcty. N.D. Tx. 2007) which held that attorneys of a non-debtor spouse could not have a DSO claim. Further, in Tucker v. Oliver, 2010 WL 125575

<sup>26</sup> See also, Government Perspectives at 325 (Discussing importance of addition of phrase “recoverable” to DSO definition).

<sup>27</sup> Who is a responsible relative of a child of the debtor is not defined in either the statute or legislative history, to the extent legislative history may exist for BAPCPA. See H.R. 109-31(I). As noted by In re Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007), the legislative history of the 2005 Act was very limited and consisted of the House Judiciary Report, which only represents the views of one committee of one house of Congress. No joint statement of a conference committee exists that reflects the views of both the House and Senate because there was no conference committee.

(W.D. Okla. 2010) the Court held that the attorney fees of grandparents who attempted to establish visitation rights were not parties which could hold a DSO claim.

Perhaps the strangest non-DSO case is In re Kloeponer, 460 B.R. 759 (Bkrtcy. D. Minn. 2011). In this case the Creditor paid a significant amount of child support to the debtor. However, a paternity test established that he was not the child's father. He obtained a Judgment for the child support he paid and the debtor filed bankruptcy. The Creditor filed an application to have the child support determined to be non-dischargeable under either 1191 U.S.C § 523(a)(5) or (a)(15). Both the Bankruptcy and District Court found that the Creditor was not a creditor which could have a non-dischargeable debt under (a)(5) or (a)(15), the Judgment was not covered by either (a)(5) or (a)(15), and it was not issued in connection with a divorce decree, separation agreement or property settlement agreement.

The BAPCPA change makes non-dischargeable, debts in the nature of alimony maintenance or support, which a debtor owes, or could owe, to individuals to whom the debtor was never married or who was not the Debtor's child.<sup>28</sup> Recently, two Courts have held that fees owed guardians ad litem and court appointed representatives of children constituted DSOs, even though they were not owed to one of the parents listed in the definition of a DSO.<sup>29</sup> In certain states, parties other than a debtor's spouse or former spouse (generally mothers of a debtor's child) may have claims related to the support of a child against a debtor even though they were never married to the debtor. This change directly impacts these obligations.

A fourth major change made by 11 U.S.C. § 101(14A) permits nongovernmental otherwise non-Eligible Parties that have been "assigned voluntarily" Support Obligations "for the purpose of collecting the debt" which otherwise qualify as DSOs, to file 11 U.S.C.

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<sup>28</sup> See 11 U.S.C. § 101(14A) (2005). See also H.R. Rep. 109-31(I) at 59-61.

<sup>29</sup> Levin v. Greco, 415 B.R. 663 (N.D. Ill. 2009); In re Rose, 2008 WL 4205364 (Slip.op Bkrtcy. E.D. Tenn. September 10, 2008).

§ 523(a)(5) actions against debtors and hold DSOs. This change is potentially harmful to the spouses, former spouses and children of debtors holding DSOs as under most state laws, alimony and child support obligations (which are DSOs) are generally exempt from the claims of creditors.<sup>30</sup> However, if such claims can be “voluntarily assigned” to creditors of spouses, former spouses of debtors, and possibly even legal guardians or responsible relatives of children of a debtor, for purposes of collection and payment of those debts, then the ability to exempt DSOs may be lost. While there is language in the legislative history of BAPCPA, HR Rep. 109-31(I) at 59 which seems to limit the assignability of DSO: “[DSO protection] does not apply to a debt assigned to a non-governmental entity, unless it was assigned voluntarily by the spouse, former spouse, child or parent solely for the purpose of collecting the debt.” This limiting language is not in 11 U.S.C. § 101(14A). As discussed later in Section II F of this article, while these changes eliminate certain technical defenses to 11 U.S.C. § 523(a)(5) actions, it also may lead to transfers of the right to receive support obligations to the detriment of a debtor’s children and former spouse.

C. **Domestic Relation Law and the Automatic Stay.**

11 U.S.C. § 362 provides for an “automatic stay” or injunction which arises upon the filing of a petition in bankruptcy and which prohibits most actions to collect, liquidate or otherwise enforce claims<sup>31</sup> which arise prior to the debtor filing bankruptcy. BAP CPA greatly

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<sup>30</sup> See generally 11 U.S.C. § 522(d)(10)(D); OCGA § 44-13-100(a)(2) (Ga. 2006).

<sup>31</sup> 11 U.S.C. § 101(5) defines claims broadly as:

(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; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

expands statutory exceptions from the automatic stay set forth in 11 U.S.C. § 362(b)(2) for domestic relation issues and now provides:

*(2) under subsection (a)--*

*(A) of the commencement or continuation of a civil action or proceeding-*

*(i) for the establishment of paternity;*

*(ii) for the establishment or modification of an order for domestic support obligations;*

*(iii) concerning child custody or visitation;*

*(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or*

*(v) regarding domestic violence;*

*(B) of the collection of a domestic support obligation from property that is not property of the estate;*

*(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;*

*(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;*

*(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;*

*(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or*

*(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;*

This change removes most domestic relation actions, except for actions to collect DSO from assets which are property of the estate<sup>32</sup>from the provisions of the automatic stay. In the case of In re Hemphill, \_\_\_ B.R. \_\_\_ 2012 WL 260117 (Bkrcty N.D. Ill. 2012) the Court found that withholding renewal of drivers licenses to collect DSO is excepted from the automatic stay.

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<sup>32</sup> In re Moore, 2009 WL 1616019 (Bkrcty. N.D. Ohio 2009); (See In re Caffey, 2008 WL 234236 (Bkrcty. S. D. Ala. 2008)).

It is still advisable (if timing permits) to seek a determination from the Bankruptcy Court that the automatic stay either does not apply or should be terminated, in order not to have your actions determined to be stay violation and either declared void and be subject to sanctions.<sup>33</sup>

However, stay violations can still arise if contempt and actions to collect property of the estate are pursued post-petition. In Stemberg v. Johnston,<sup>34</sup> an attorney was sanctioned over \$20,000 for violating the stay by having the state court enter an “over broad order” and later defended that order in subsequent proceedings rather than remedying the stay violation.<sup>35</sup>

**D. The DSO Exception to the means test: 11 U.S.C. § 707**

One of the largest overall changes made to the Bankruptcy Code by the BAPCPA is the amendment of 11 U.S.C. § 707.<sup>36</sup> This provision establishes a “means” test for eligibility for consumer debtors to obtain relief under the Bankruptcy Code. The means test imposes strict limits on debtors filing a chapter 7 case when the debtor earns more than the median annual income for a similar sized family for the applicable state. The details of this incredibly complex provision are far beyond the scope of the article<sup>37</sup> and will not be discussed further except to address two provisions of the BAPCPA amendments, which directly impact Domestic Obligations.

First, new 11 U.S.C. § 707(b)(2)(A)(iv) permits debtors to deduct all priority claims “(including priority child support and alimony claims)” in calculating whether a debtor can meet

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<sup>33</sup> See generally Far Out Productions v. Oskar, 247 F.3d 986 (9<sup>th</sup> Cir. 2001) (actions taken in violation of automatic stay void); Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6<sup>th</sup> Cir. 1993) (actions voidable).

<sup>34</sup> 595 F.3d 937 (9<sup>th</sup> Cir. 2010). The violation was having an award entered against a debtor in a Chapter 11 case, which the debtor had to pay or go to jail.

<sup>35</sup> Id. At 948.

<sup>36</sup> 11 U.S.C. § 707(b) (2005). See also Culhane & White Catching Can-pay Debtors: Is the Means test the only way? 13 Am. Bankr. Inst. L. R. 665 (Winter 2005).

<sup>37</sup> For an excellent discussion of the means test See Brown and Ahern, 2005 Bankruptcy Reform Legislation with Analysis, (2005).

the means test. Although it is unclear why the new term DSO was not used in this provision, as DSOs seem to clearly be “priority claims” under the Bankruptcy Code, it appears that DSO payments can be deducted from a debtor’s income in calculating whether a debtor passes the means test.

Second, and more importantly, 11 U.S.C. § 707(c)(3) prohibits a court from dismissing a chapter 7 case under the new provisions of 11 U.S.C. § 707 means test, if the debtor establishes, by a preponderance of the evidence, “that the filing of a case under this chapter is necessary to satisfy a claim for a Domestic Support Obligation.” This means that if a debtor can show the discharge of his or her other debts is necessary to permit the payment of DSOs, the debtor can file and remain in a chapter 7 bankruptcy even if the debtor’s case would otherwise be subject to dismissal under 11 U.S.C. § 707(b).

E. **Chapter 11 Changes Related to Domestic Obligations**

While Chapter 11 proceedings are generally used by companies to reorganize their business operations, individuals can use them to restructure their personal affairs and debts, including, under previous law, Domestic Obligations.<sup>38</sup> BAPCPA made numerous changes impacting Domestic Obligations in Chapter 11s.

1. **Requirements to Pay DSOs During Chapter 11 Case**

11 U.S.C. § 1112<sup>39</sup> of the Bankruptcy Code governs motions to dismiss or convert chapter 11 cases. The BAPCPA adds to this, 11 U.S.C. § 1112(b)(4)(P), which provides that “absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate” a court shall

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<sup>38</sup> See generally In re Davis, 170 F.3d 475 (5<sup>th</sup> Cir. 1999).

<sup>39</sup> 11 U.S.C. § 1112 (2005).

convert a chapter 11 to a chapter 7 case or dismiss the chapter 11 if a debtor fails to pay a DSO “that first becomes payable after the date of the filing of the petition.”<sup>40</sup>

This provision was enacted to help ensure payment of DSOs during chapter 11 cases. However, there are unresolved questions as to what impact the new version of 11 U.S.C. § 362 will have on the requirement to make such payment obligations and determining when a DSO “first becomes payable.”<sup>41</sup> See also In re DeWakar, 2007 WL 4353800 (Bkrcty. E.E. Va 2007) (Former spouse who had no current claims against Debtor was entitled to Notice of Bankruptcy).

## 2. Chapter 11 Plan Requirements

The BAPCPA also amended 11 U.S.C. § 1129<sup>42</sup> which governs the terms under which chapter 11 plans can be confirmed by Bankruptcy Courts. The BAPCPA added subsection (a)(14) to Section 1129 to require a chapter 11 debtor to pay all DSOs, which (i) the “debtor is required by a judicial or administrative order, or by statute to pay;” and (ii) which first became due after the date of the filing of a bankruptcy petition, in order to have a chapter 11 plan confirmed. As discussed above, the issue of when a debt first became payable may pose serious problems to Domestic Attorneys.

However, confirmation of a Chapter 11 plan which purportedly discharges all debts, may not discharge a child support obligation. The District Court in In re Davis, 2011 (WL4055598 M.D. Fla. 2011) reversed the Bankruptcy Court’s ruling that the confirmation of the Plan and the state’s failure to file a claim discharged what was otherwise a DSO. The District Court relied on the 11<sup>th</sup> circuit’s decision in In re Diaz, 647 F.3d (11th Cir. 12011) which limited, under the Doctrine of sovereign immunity, the impact of a confirmed plan.

<sup>40</sup> There is an embarrassing typo in 11 U.S.C. § 1112 which appears to require a sharing of all provisions of 11 U.S.C. § 1112(b) in order to have a case dismissed or converted by changing the word “or” in listing grounds for dismissal or convert to “and.” See In re TCR of Denver, LLC 338 B.R. 494 (Bankr. D.Col. 2006).

<sup>41</sup> See generally In re Moore, 359 B.R. 665 (Bankr. E.D. Tenn. 2006) and Section I.I. infra.

<sup>42</sup> 11 U.S.C. § 1129 (2005).

F. Chapter 13 Issues Related to Domestic Obligations

Chapter 13 cases are reorganization cases for individuals with a regular income<sup>43</sup> who meet certain debt limits.<sup>44</sup> BAPCPA made numerous changes to how DSOs and Property Obligations are treated on Chapter 13s.

1. Conversion or Dismissal of Chapter 13 Cases

The BAPCPA also amends section 1307(c)(11)<sup>45</sup> of the Bankruptcy Code to provide, as a ground under which a court may dismiss a chapter 13 case, the “failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.” This change conforms to the changes made to 11 U.S.C. § 1112 relating to dismissal of chapter 11 cases. However, as property obligations are dischargeable in Chapter 13 cases, there has been significant litigation over whether filing a Chapter 13 to discharge a non-dischargeable 11 U.S.C. § 523(a)(15) debt is a good faith use of the Bankruptcy Code. Numerous courts, led by In re Fleury, 306 B.R. 722 (1<sup>st</sup> Cir. BAP 2004) have found, using a facts and circumstances analysis, that using Chapter 13 to avoid paying property obligations can lead to the dismissal of a case for a bad faith filing, especially where the sole or primary purpose of the Chapter 13 is to prevent a former spouse from collecting on their debts.<sup>46</sup> However, in some cases, such as In re McKinney, 507 B.R. 534 (Bankr. W.D. Pa. 2014) and In re McCreary, 2009 WL 5215587 (Bkrcty. C.D. Ill. December 29, 2009), Courts have found that Debtors did not file Chapter 13s in bad faith for the primary purpose of discharging his non DSO Domestic Obligation, despite obligations by creditors.

2. Dischargeability of 11 USC § 523(a)(15) Debts in Chapter 13 Cases

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<sup>43</sup> 11 U.S.C. § 1307(c)(11) (2005).

<sup>44</sup> 11 U.S.C. § 109(h) (2005).

<sup>45</sup> 11 U.S.C. § 1307(c)(11) (2005).

<sup>46</sup> See also, e.g., In re Cammings, 523 B.R. 93 (Bankr. W.D. Mich. 2014); In re Page, 519 B.R. 908 (Bankr. MD NC 2014).



11 U.S.C. § 523(a)(15) provides that debts: 1) owed to a spouse, former spouse or child of the debtor; 2) which are not of the kind described in 11 U.S.C. § 523(a)(5); and 3) which were incurred in the course of a divorce or separation, or in connection with a separation agreement, divorce decrees or other order of a court of record or a determination made in accordance with State or territorial law by a governmental unit, are non-dischargeable in chapter 7, 11 and 12 cases.<sup>47</sup> However, the nondischargeability provisions 523(a)(15) do not apply to Chapter 13 cases, as this section was not incorporated, by BAPCPA, into the discharge provisions of 11 U.S.C. § 1328<sup>48</sup> which governs discharge in Chapter 13 cases.

In Chapter 13 cases, debtors will still be able to litigate both the dischargeability and the priority of Domestic Obligations, primarily by challenging whether a claim qualifies as a DSO. Post-BAPCPA litigation on the issue of a claim's qualification as a DSO in Chapter 13 have generally used pre-BAPCPA caselaw under 523(a)(5) in determining whether a debt is a Support Obligations or Property Obligations. See In re Smith, 586 F.3d 69 (1<sup>st</sup> Cir. 2009); In re Trentadire, 527 B.R. 328 (Bankr. E.D. Wis. 2015).<sup>49</sup>

### 3. Confirmation of Chapter 13 Plan

Finally, the BAPCPA makes several changes to 11 U.S.C. §§ 1322<sup>50</sup> and 1325<sup>51</sup> that govern the confirmation of Chapter 13 plans.

Initially, 11 U.S.C. § 1322(a)(2) requires all priority claims under 11 U.S.C. § 507 be paid in full in deferred cash payments in order to confirm a plan unless the holder of a claim agrees to a different treatment. This includes 11 U.S.C. § 507(a)(1) DSOs.<sup>52</sup>

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<sup>47</sup> 11 U.S.C. § 523(a)(15) (2005).

<sup>48</sup> 11 U.S.C. § 1328 (2005).

<sup>49</sup> See also notes 15-17 *supra*. See also Turner, *The Vampire Rises: Discharge of Property Division Obligations under Chapter 13 of the Bankruptcy Code in Post-2005 Litigation*, 19 *Divorce Litigation* 1, (Jan. 2007).

<sup>50</sup> 11 U.S.C. § 1322 (2005).

<sup>51</sup> 11 U.S.C. § 1325 (2005).

<sup>52</sup> See notes 50-59 *infra* for a further discussion of the timing of these payments.

However, 11 U.S.C. § 1322(a)(4) allows the possibility of payment of less than 100% of DSOs assigned to governmental units (“507(a)(1)(B) Claims”) if all of the debtors’ projected disposable income for a 5-year period is applied to “make payments under the Plan.”<sup>53</sup>

Under new 11 U.S.C. § 1325(a)(8), the debtor must have paid prior to confirmation of the Chapter 13 plan all DSOs: 1) which first become payable after the bankruptcy filing; and 2) which the debtor is required to pay by statute or judicial or administrative order, in order for his or her Chapter 13 plan to be confirmed.<sup>54</sup> 11 U.S.C. § 1325(b)(2)(A)(i) also gives special protection to DSOs in calculating disposable income for purposes of the Chapter 13 plan.<sup>55</sup>

While the changes made to Chapter 13 related to DSO gave great protections to DSO claimholders, that protection was not universal. One of the first issues to be litigated concerning DSO has been the question of when pre-petition DSO arrearages must be paid under a Chapter 13 Plan. While 11 U.S.C. § 1322(b)<sup>56</sup> clearly provides for full payment of DSO claims and other claims entitled to priority under 11 U.S.C. § 507 over the life of a Chapter 13 plan, the Bankruptcy Code provisions governing under Chapter 13, 11 U.S.C. § 1326(b)(1)<sup>57</sup> was modified by BAPCPA to require that 11 U.S.C. § 507(a)(2)<sup>58</sup> claims (traditional administrative expense claims), as opposed to DSOs, be paid first under Chapter 13 plans.

In the three earliest published cases, which addressed this issue, In re Reid,<sup>59</sup> In re Vinnie<sup>60</sup> and In re Sanders,<sup>61</sup> the Courts have held that 11 U.S.C. § 1322(b) permits other claims

<sup>53</sup> 11 U.S.C. § 1322(a)(4) (2005). See also In re Sanders, 341 B.R. 47, 50 (Bankr. N.Dak. 2006).

<sup>54</sup> See generally In re Reid 2006 W.L. 2077572 (Slip. Op. July 17, 2006 Bankr. M.D. N.C. 2006).

<sup>55</sup> See generally In re Nevitt, 2006 WL 2433 491 (Bankr. N.D. Ill. 2006).

<sup>56</sup> See 11 U.S.C. § 1322(b)(2) (all priority claims under 11 U.S.C. § 507) and (b)(4) (exception for full payment of 11 U.S.C. § 507(a)(1)(B) claims).

<sup>57</sup> 11 U.S.C. § 1326(b)(1) (2005).

<sup>58</sup> 11 U.S.C. § 507(a)(2) which grants priority to administrative expenses allowed under 11 U.S.C. § 503(b) and fees and charges allowed under Chapter 123 of Title 28.

<sup>59</sup> 2006 WL 2077572 (slip op July 19, 2006).

<sup>60</sup> 345 B.R. 386 (Bankr. M.D. Ala. 2006).

<sup>61</sup> 341 B.R. 47 (Bankr. M.D. Ala.) aff’d 347 B.R. 776 (M.d. ala 2006)

to be paid under Chapter 13 Plans concurrently with DSOs. In fact, the Vinnie case noted, in dicta, that 11 U.S.C. § 507(a)(2) claims could be paid prior to DSO claims.<sup>62</sup>

While this interpretation of the provisions of Chapter 13 appears correct from the statutory language, it could easily lead to an analogous result. If a Chapter 13 case “fails” and is converted to a Chapter 7, the DSO will clearly have priority over any 11 U.S.C. § 507(a)(2) payments made under the Plan.<sup>63</sup> Could DSO creditors seek disgorgement<sup>64</sup> of previously paid 507(a)(1) payments made under a Chapter 13 plan? Disgorgement is becoming an increasingly common problem in Chapter 11<sup>65</sup> and these problems may descend on Chapter 13 in cases involving DSO’s.

Finally it is important to note that confirmation of a Chapter 13 plan can have a res judicata effect on DSO. In the recent case of in re Burnett, 646 F.3d 575, 581-82 (8<sup>th</sup> Cir. 2011) the court held that the confirmation of a Chapter 13 plan which allowed the Creditor to return to State Court to obtain an award of interest on pre-petition interest in child support precluded the creditor from going to State Court to obtain an award of pre-petition interest on spousal support. But see In re Diaz, 647 F.3d 1073 (11<sup>th</sup> Cir. 2011)

#### G. DSOs and Exemptions Under 11 U.S.C. § 522

As an additional protection for holders of DSOs, the BAPCPA amended 11 U.S.C. § 522 which governs the exemption of property, by adding 11 U.S.C. § 522(c)(1).<sup>66</sup> Under 11 U.S.C. § 522, if permitted by state law,<sup>67</sup> a debtor may shelter or exempt certain property under the federal exemption provisions of 11 U.S.C. § 522, from the claims of creditors which arose prior

<sup>62</sup> 345 B.R. at 388-89.

<sup>63</sup> See 11 U.S.C. § 725 (2005). See also 347 B.R. 776, 780 (discussing the differences in priority payment schemes between Chapter 7 and Chapter 13).

<sup>64</sup> For a discussion of failed Chapter 11 disgorgement issues, See Miller, Protecting Professional Fees From Disgorgement, 25 Am. Bankr. Inst. J. 40 (June-August 2006).

<sup>65</sup> Id. See also Specker Motor Sales, Co. v. Eisen, 393 F.3d 659 (6<sup>th</sup> Cir. 2004).

<sup>66</sup> 11 U.S.C. § 522(c)(1) (2005).

<sup>67</sup> States may “opt out” of Federal Exemptions. See 11 U.S.C. § 522(b) (2005).

to the debtor's bankruptcy filing. However, the federal exemptions are specifically prohibited from being used to shelter assets from claims which qualify as DSOs. In fact, 11 U.S.C. § 522(c)(1) goes further and provides "notwithstanding any provision of applicable non-bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in Section 523(a)(5)."<sup>68</sup>

11 U.S.C. § 522(c) as modified by BAPCPA provides:

**(c)** Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

**(1)** a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

This provision, on its face, does not carve out a limited exception to the 11 U.S.C. § 522 federal exemption but instead makes "property exempted under this Section ... notwithstanding any provision of applicable nonbankruptcy law to the contrary ... liable for a debt of a kind specified in Section 523(a)(5)" which are DSO's.

From a literal reading of this provision, neither Section 522 of the Bankruptcy Code nor any other law can exempt any form of property from being liable for DSOs.<sup>69</sup> Indeed as noted by the Supreme Court in the Patterson v. Shumate<sup>70</sup> case, the phrase "applicable nonbankruptcy law," includes both state laws and all other federal laws including ERISA.<sup>71</sup> Therefore an argument can be made that even property of a debtor in bankruptcy subject to otherwise valid

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<sup>68</sup> See also Dog that Didn't Bark for a discussion of a Bankruptcy Trustee's ability to liquidate exempt assets to pay DSOs.

<sup>69</sup> An interesting question arises as to whether a determination of nondischargeability under 11 U.S.C. § 523 (a)(5) is necessary for this exemption limitation to apply.

<sup>70</sup> 504 U.S. 753 (1992).

<sup>71</sup> Id. at 758-59.

anti-alienation (not exemption) provisions could be subject to DSO claims. Caselaw and practice will determine whether there is any merit to this theoretical reasoning.

#### H. Read the Fine Print: Bankruptcy Plans and DSO

In “The Devil and Daniel Webster,”<sup>72</sup> the importance of the fine print was pointed out to Jabez Stone, the farmer who sold his soul to the devil’s agent, Mr. Scratch.<sup>73</sup> Under the Bankruptcy Code, provisions of confirmed plans are also generally considered binding, under the doctrine of res judicata, on the parties to the plan.<sup>74</sup> It is therefore possible that debtors could attempt to use plan provisions to classify Domestic Obligations as non-priority, non-DSO obligations or even as dischargeable obligations.

While most courts have held that attempts to discharge otherwise non-dischargeable debts through a Plan are improper, both as being in violation of the creditor’s due process rights and procedurally inappropriate,<sup>75</sup> some courts have permitted discharge by declaration.<sup>76</sup> Therefore holders of DSOs must carefully review plans for claim discharge provisions.

Further, even in jurisdictions where discharge by plan declaration is impermissible, DSO creditors should carefully review proposed plans to see if a debtor is attempting to establish their priority status by declaration in bankruptcy plans.<sup>77</sup>

In 2009, two bankruptcy cases, In re Burnett, 408 B.R. 545 (BAP 8<sup>th</sup> Cir. 2009) and In re Westerfield, 403 B.R. 545 (Bkrcty. E.D. Tenn. 2009) both held that confirmation of a Chapter 13 Plan did not affect whether a debt was in the nature of a DSO.

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<sup>72</sup> Benet, Devil and Daniel Webster (1937).

<sup>73</sup> Id.

<sup>74</sup> See Generally In re Layo, 460 F.3d 289 (2<sup>nd</sup> Cir. 2006); Browning v. Levy, 283 F.3d 761 (6<sup>th</sup> Cir. 2002).

<sup>75</sup> See generally In re Hansen, 397 F.3d 482 (7<sup>th</sup> Cir. 2005); In re Kaufman, 122 Fed. Appx. 815 (6<sup>th</sup> Cir. 2004) (Chapter 11 Plan).

<sup>76</sup> See generally In re Andersen, 179 F.3d 1253 (3<sup>rd</sup> Cir. 1999). But See Poland v. Edu. Credit Mgmt. Corp., 382 F.3d 1185 (10<sup>th</sup> Cir. 2004) (limiting Andersen).

<sup>77</sup> See In re Smith, 315 B.R. 77 (Bankr. W.D. Ark. 2004) (discussing how to properly identify treatment of a claim in a plan so that its priority could be established in the plan and subject to res judicata).

I. Excalibur?: Can Priority Lending Under 11 U.S.C. § 364 and Trump DSOs?

In the tales of King Arthur and the Knights of the Round Table,<sup>78</sup> Excalibur is King Arthur's magical sword which could cut through any material. 11 U.S.C. § 364 allows a Chapter 11, 12 or 13 debtor to incur debt with priority over "any or all administrative expenses of the kind specified in **Section 503(b) or 507(b)**" [emphasis added] or secured by either a junior or senior on the debtor's assets.<sup>79</sup> This language means there is a serious issue as to whether an unsecured super-priority claim under 11 USC § 364 can have priority over an 11 U.S.C. § 507(a)(1) DSO, which is not a claim whose priority is established by either 503(b) or 507(b) even with a proper court order.

However, it appears clear the 11 U.S.C. § 364 liens on Debtor's assets will be entitled to payment before DSOs as there is no provision of the Bankruptcy Code which permits a trustee or DSO creditor to collect DSO claims "from property securing an allowed claim" unless a court finds 11 U.S.C. § 506(c)<sup>80</sup> applies to the DSO.

Assuming a trustee or debtor in possession would or could invoke 11 U.S.C. § 506(c) for the benefit of a DSO creditor,<sup>81</sup> then an issue arises of whether a creditor holding either a pre- or post-petition secured claim could agree to carve out<sup>82</sup> from their collateral amounts to pay professional fees or other administrative expenses, which otherwise would not have priority over DSOs.

<sup>78</sup> See generally, Coghlan, Encyclopaedia of Arthurian Legends (1991). See also In re Robotic Vision Systems, Inc., \_\_\_ B.R. \_\_\_ 2007 WL 841286 (1<sup>st</sup> Cir. BAP 2007).

<sup>79</sup> See 11 U.S.C. § 364 (2005).

<sup>80</sup> 11 U.S.C. § 506(c) (2005).

<sup>81</sup> Only trustees or debtors in possession can assert Section 506(c) claims. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000). However there is some question as to whether a creditor could assert a 506(c) claim for a specific creditor. See In re Resource Technology Corp., 2006 W.L. 3487723 (Bankr. N.D. Ill. 2006).

<sup>82</sup> For a discussion of carveouts, See Bowles, Your Retainer Pocket Aces or a 7-2 Off suit? 24 Am. Bankr. Inst. O.J. 28 (May 2005); In re Nuclear Imaging Systems, 270 B.R. 365 (Bankr. E.D. Pa. 2001).

As carveouts are generally enforced per their terms,<sup>83</sup> they could permit professionals retained by a debtor or trustee to be paid before DSO claims were satisfied. This should not be a large problem as there should be relatively fewer individual chapter 11s<sup>84</sup> under BAPCPA. However, in those cases where there are significant assets, DSOs and post- petition financing, this should be a hotly contested issue.

J. **Judicial Polytheism: Issues Relating to Jurisdiction over DSO Determination Between State and Federal Courts**

Much like Pantheons of Greek and Roman gods, State and Federal Courts are similar, powerful but entirely separate groups. When the BAPCPA was enacted, it attempted to protect DSO claimants by expanding state court jurisdiction over Domestic Obligations. This was accomplished primarily by amendments to 11 U.S.C. § 101(14A),<sup>85</sup> 362<sup>86</sup> and 523(c).<sup>87</sup> However, these changes have raised serious jurisdictional issues in the area of determinations of the dischargeability of Support Obligations and the determination of a claim's priority status as a DSO.

1. **Pre-Petition Determinations of the Dischargeability of Domestic Obligations by State Court.**

Initially, it is beyond dispute that under the BAPCPA amendments, state courts have the jurisdiction to determine the dischargeability of debts under both 11 U.S.C. §§ 523(a)(5) and (a)(15) after a bankruptcy case is filed.<sup>88</sup> An interesting question, however, is whether a state court can determine the dischargeability of a

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<sup>83</sup> 270 B.R. at 374-75.

<sup>84</sup> See Bowles, Schaaf & Stosberg, *Ghosts of Individual Chapter 11 Debtors*, 25 Am. Bank. Inst. J. 461, Jan. 2007); Bowles Schaaf & Stosberg, *Ghosts of Individual Chapter 11 Debtors Yet to Come*, 26 Am. Bank. Inst. J. 36 (Feb. 2007).

<sup>85</sup> See notes 11-28, *supra*, and accompanying text.

<sup>86</sup> See 11 U.S.C. § 362 (2005).

<sup>87</sup> See 11 U.S.C. . § 523(c) (2005).

<sup>88</sup> *Id.*

debt under 11 U.S.C. § 523(a)(5)<sup>89</sup> prior to a debtor's filing a bankruptcy case. It appears to be settled law that state law determinations made during the bankruptcy case to govern DSO determinations in bankruptcy cases.

Under pre-BAPCPA bankruptcy law, it was well settled that pre-bankruptcy contractual waivers or state court judgment determinations of the nondischargeability of marital obligations were unenforceable as against public policy.<sup>90</sup> However, the definition<sup>91</sup> of DSO includes debts which accrue "before," on, or after the date of the order of relief in a case under [the Bankruptcy Code] (emphasis added). As neither 11 U.S.C. § 523(c) nor Bankruptcy Rule 4007 expressly require that a bankruptcy case be commenced before a determination of dischargeability under 11 U.S.C. § 523(a)(5), an argument could be made that pre-bankruptcy determinations of the dischargeability of debts under 11 U.S.C. § 523(a)(5) by State Courts are now supported by public policy and bankruptcy law. If such a determination is made, then under the Rooker-Feldman<sup>92</sup> doctrine, bankruptcy and most other federal courts will be barred from reviewing or challenging these pre-petition determinations.

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<sup>89</sup> The definition of debts under 11 U.S.C. § 523(a)(15) does not include the expansive timing language under 11 U.S.C. § 523(a)(5).

<sup>90</sup> See e.g. In re Cole, 226 B.R. 647 (9<sup>th</sup> Cir. BAP 1998); In re Eikenberg, 107 B.R. 139 (Bankr. N.D. Ohio 1989).

<sup>91</sup> 11 U.S.C. § 101(14A) (2005).

<sup>92</sup> The Fourth Circuit, in its decision of In Re Sasson, 424 F.3d 864 (9<sup>th</sup> Cir. ,2005) described the Rooker-Feldman doctrine as follows:

The Rooker-Feldman doctrine is based on the statutory proposition that federal district courts are courts of original, not appellate, jurisdiction. See 28 U.S.C. §§ 1331, 1332. Therefore, federal district courts have "no authority to review the final determinations of a state court in judicial proceedings." Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9<sup>th</sup> Cir.1986). Only the Supreme Court has original jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). As the Supreme Court has recently explained, the Rooker-Feldman doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus., --- U.S. ---, --- - ---, 125 S.Ct. 1517, 1521-22, 161 L.Ed.2d 454 (2005).



Two post-BAPCPA decisions, Cline v. Cline, 2007 WL 4439639 (10<sup>th</sup> Cir. 2007) (discussing a pre-BAPCPA case) and In re Schwartz 376 B.R. 364 (Bkrtcy. D. Mass. 2007) (post-BAPCPA case) discuss the Rooker-Feldman doctrine in the context of bankruptcy and divorce.

In Cline, the Tenth Circuit considered the Rooker-Feldman doctrine in the context of an agreed state court divorce order which denominated a \$250,000.00 lump sum award as part of the property settlement provisions of that order and the non-debtor spouse expressly waived all rights to alimony. The 10<sup>th</sup> Circuit held that the Rooker-Feldman doctrine did not apply in this case as the state court did not decide the issue of whether the property settlement was in the nature of alimony maintenance or support and affirmed the Bankruptcy Court's determination that the \$250,000.00 award was in the nature of alimony and therefore non-dischargeable under 523(a)(5).

In Schwartz, a case involving an affidavit of support in an immigration proceeding as well as a state court divorce order also ruling on the debtor's support obligations. The Bankruptcy Court held that it lacked jurisdiction to review the State Court Divorce Decree even though the State Court did not expressly give any

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FN3. The doctrine takes its name from Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Rooker held that federal statutory jurisdiction over direct appeals from state courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of federal district courts. 263 U.S. at 415-16, 44 S.Ct. 149. Feldman held that this jurisdictional bar extends to particular claims that are "inextricably intertwined" with those a state court has already decided. 460 U.S. at 486-87, 103 S.Ct. 1303.

Application of the Rooker-Feldman doctrine in bankruptcy is limited by the separate jurisdictional statutes that govern federal bankruptcy law. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1079 (9th Cir.2000) (en banc). The Rooker-Feldman doctrine has little or no application to bankruptcy proceedings that invoke substantive rights under the Bankruptcy Code or that, by their nature, could arise only in the context of a federal bankruptcy case. Id. at 1081. In the exercise of federal bankruptcy power, bankruptcy courts may avoid state judgments in core bankruptcy proceedings, See, e.g., 11 U.S.C. §§ 544, 547, 548, 549, may modify judgments, See, e.g., 11 U.S.C. §§ 1129, 1325, and, of primary importance in this context, may discharge them, See, e.g., 11 U.S.C. §§ \_\_\_\_\_, 727, \_\_\_\_\_, 1141, \_\_\_\_\_, 1328.

reasoning for its Divorce Decree. The Court dismissed the AP seeking to have the obligations under the affidavit of support held to be DSOs for lack of jurisdiction.

2. Pre- and Post-Petition Determination of a Debt's Priority as a DSO.

Prior to the enactment of BAPCPA, it was clear that state courts could not determine whether debts qualified as priority claims under 11 U.S.C. § 507(a)(1) as determinations of the allowance of administrative expense claims<sup>93</sup> were purely a matter of federal law.

However, under BAPCPA, a determination of whether a debt is non-dischargeable now requires a determination of whether a debt is a DSO under 11 U.S.C. § 101(14A).<sup>94</sup> Therefore, under the plain meaning of the statute, it appears somewhat surprisingly, that a debt's status as a DSO can be (1) established by a state court judgment in connection with a dischargeability determination;<sup>95</sup> (2) without the participation other creditors of the debtor; and (3) that bankruptcy courts will be bound by those state court determinations under the Rooker-Feldman doctrine.<sup>96</sup> Further, as under 11 USC § 362(b)(2)(A)(ii) state courts can establish or modify DSOs, without running afoul of the automatic stay, a state court could either establish a new DSO or modify a DSO so that it first becomes due after the bankruptcy was filed. This could have a serious impact on the payments a debtor needs to make in the course of a Chapter 11 or Chapter 13 under the Bankruptcy Code provisions discussed in Section I.C. and I.D., supra. The policy considerations of whether state courts should be able to control determines the highest priority of unsecured claim in

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<sup>93</sup> 11U.S.C. § 503(b) (2004).

<sup>94</sup> See Section I.A., supra.

<sup>95</sup> See 11 U.S.C. § 523(c) (2005).

<sup>96</sup> See note 85, supra.

bankruptcy proceedings are beyond the scope of this article, but such a result could be highly troubling and lead to significant litigation.

K. **The Sting: Will DSO Lead to More Fraudulent Bankruptcies?**

Fraud, on creditors through a collusive divorce, is an ancient practice<sup>97</sup> by which many couples have attempted to evade the claims of one of the spouse's creditors.<sup>98</sup> These cases generally involve actual<sup>99</sup> as opposed to constructive fraud<sup>100</sup> on the part of one or both of the former spouses. The fraud may arise from a sham or collusive divorce where the relationship of the parties does not markedly change after the divorce.<sup>101</sup> Fraud can also be present in an actual divorce where the parties collude to have assets transferred to the other to evade the claims of other spouse's creditors.<sup>102</sup>

With the new DSO priority under the Bankruptcy Code, it is possible that parties will not have to actually transfer property to remove them from the reach of third party creditors. Instead a married couple could "divorce," have the spouse with fewer creditors be awarded a large pre-bankruptcy DSO<sup>103</sup> in an amount exceeding the soon to be debtor's assets and then have the debtor file bankruptcy. The DSO's priority could then permit the nondebtor spouse to receive all of the unencumbered assets of the debtor former spouse. Assuming that state courts are determined to have jurisdiction to enter pre-petition DSOs, challenging such state court

<sup>97</sup> See generally Granfinanciera S.A. v. Norberg, 492 U.S. 33, 45 (1989) discussing Hobbs v. Hull, 1 Cox 445, 29 Eng. Rep. 1242 (Ch. 1788) which concerned a fraudulent conveyance of land in return for the relinquishment of a right of divorce.

<sup>98</sup> See generally In re Williams, 159 B.R. 648 (Bankr. D.R.I. 1993), remanded by 190 B.R. 728 (D.R.I. 1996); In re Hill, 342 B.R. 183 (Bankr. D.N.J. 2006); In re Boba, 280 B.R. 430 (Bankr. N.D.Ill. 2002); In re Chevie, 2001 W.L. 120132 (Bankr. N.D.Ill. 2001).

<sup>99</sup> See 11 U.S.C. § 548(a)(1)(A) (2005). See also In re Hill 342 B.R. at 198.

<sup>100</sup> See 11 U.S.C. § 548(a)(1)(B).

<sup>101</sup> See In re Boba, 280 B.R. at 434-35; In re Chevie, 2001 W.L. 120132.

<sup>102</sup> See In re Hill 342 B.R. at 196-97 (discussing different types of actual fraud); In re Williams, 159 B.R. at 657-661.

<sup>103</sup> The DSO could be awarded by the court in a contested matter under the state court jurisdiction discussed in Section I.I. supra or by a "settlement agreement" entered into by the parties.

judgments will be difficult in light of the Rooker-Feldman doctrine.<sup>104</sup> While bankruptcy courts can easily set aside judgments as fraudulent conveyances, setting aside a determination of the nature of a debt as a DSO could prove to be far more difficult.<sup>105</sup>

## II. **Bankruptcy to the Rescue?: How Bankruptcy Planning Could Ease the Financial Sting of Divorce**

In enacting the BAPCPA Congress decided, as a policy matter, that most Domestic Obligations, including alimony, child support and, property settlements arising from dissolution of marriage, are entitled to far greater protection than previously been afforded by the Bankruptcy Code. Now, spouses, former spouses and children of debtors will no longer have to worry about their financial support and property distributions being discharged through bankruptcy proceedings.<sup>106</sup> Further, DSOs also enjoy a greatly enhanced priority for distribution and as to assets liable for its payment. However, in light of other changes, particularly those relating to the assignability of DSOs under the BAPCPA, couples who are facing both a divorce and serious financial problems must fully consider the issue of whether they wish to take certain joint bankruptcy actions, in order to alleviate the financial strain on their family, prior to completing their divorce or dissolution of marriage.

In many cases<sup>107</sup> state courts overseeing divorces (“State Courts”) are severely limited in their ability to enter appropriate judgments or approve settlement agreements which fully provide for the future financial well being of the families of people undergoing divorce as these families are burdened with significant debt.

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<sup>104</sup> See note I.I., supra.

<sup>105</sup> Id.

<sup>106</sup> See generally Mickler v. Mickler, 2009 WL 1097966 (Ky. App. Oct. 21, 2009) (awarding fees for litigation in Debtors Badfaith Bankruptcy) (Mickler II) Mickler v. Mickler 245 S.W. 2d 809 (Ct. App. 2008) (Noting Debtors Bad faith in attempting to use bankruptcy to discharge domestic obligations).

<sup>107</sup> Bankruptcy and Divorce at p. 52; Gary & Meyer, How Bankruptcy Before Divorce May be Better Than After Divorce, The Matrimonial Strategist, Jan. 1999 at p. 6.

While State Courts, are the leading authorities in determining what constitutes appropriate levels of support which families need to have in the aftermath of the dissolution of a marriage, this expertise often cannot be used.<sup>108</sup> As the U.S. Constitution prohibits the impairment of contracts by courts outside of bankruptcy, State Courts can do absolutely nothing to attempt to discharge or relieve a particular parent of their liability to third party creditors, under joint or individually owed debts in domestic relations proceedings.<sup>109</sup> Only Bankruptcy Courts, under the provisions of Bankruptcy Code can discharge debts, contracts and other obligations to third parties.

In light of the limitations under which State Courts operate, bankruptcy under the new BAPCPA now becomes an avenue for a more “cooperative” effort between a debtor and their former spouse in attempting to reorder their financial lives (if such relief is necessary) in order to fully provide for the needs of the family. Therefore, there are three issues that should be considered both by Domestic Attorneys and, the domestic relations judiciary in considering the problems of financially strapped individuals face when entering into a divorce or dissolution proceedings.

A. **On Last Act Together: File Bankruptcy First**

The easiest option that can be considered in this area is for parties who are considering a divorce and, who are experiencing sever financial distress to speak either individually or jointly<sup>110</sup> with a bankruptcy attorney to determine whether either a joint or individual bankruptcy for each spouse would be an appropriate way to discharge some of their obligations. If, after evaluation by the bankruptcy attorneys, this is an appropriate course of action, the parties can file

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<sup>108</sup> Id.

<sup>109</sup> See Section I.F., *supra*.

<sup>110</sup> Representing parties who are planning to undergo a divorce in a “joint bankruptcy filing” before they actually divorce, presents ethical issues for bankruptcy practitioners. See Bowles, *Goldilocks Bankruptcy and Divorce: Are Adversarial Relationships Too Much, Too Little or Just Right?*, 21 Am Bank Inst J. 20 (2002).

bankruptcy, and later, conclude their divorce proceedings. With little or no unsecured debt to deal with after bankruptcy, State Courts could then be able to make more realistic financial provisions for the parties in their divorce without having to worry about the burden of the parties' debt. Further, Chapter 13 may be a possibility in certain situations in order to the preserve the family home or, the family transportation which would otherwise be lost to foreclosing creditors.

**B. Judicially Ordered Bankruptcy**

Finally, as noted by Judge V. Michael Brigner in Divorce & Bankruptcy,<sup>111</sup> Domestic Attorneys may wish to consider the possibility of seeking to have a State Court require a reluctant spouse to file bankruptcy in order to put their financial house in order. While at the present time, the author has been unable to find any reported decision where a State Court judge has ordered a party to file bankruptcy as a condition of either obtaining a divorce, or being awarded certain property as part of that divorce, such a course of action cannot be lightly dismissed. In many cases, for a variety of reasons, certain spouses will absolutely refuse to cooperate with the other spouse even, when such cooperation would lead to a great financial benefit to the family unit as a whole. State Courts, have broad powers under Domestic Relations Law, including the ability to order people to jail for failure to pay debt, holding parties in contempt for failure to properly dispose of assets or, punishing parties for failing to secure appropriate employment. In light of the significant nature of these State Court powers, the ability to order a party to exercise their federally guaranteed privilege of filing for bankruptcy protection does not seem to be totally out of line and, should be considered by State Courts appropriate cases.

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<sup>111</sup> Divorce & Bankruptcy at p. 152-53.

III. Conclusion

BAPCPA has forever changed the already complex interface between the Bankruptcy Code and Domestic Relations Law. In light of the amendments made to the Bankruptcy Code by BAPCPA, Domestic Attorneys can ponder an ancient adage, attributed to various cultures and numerous great speakers of: “be careful what you wish for, you just may very well get it.” Domestic Attorneys have been relieved for the threat of a discharge of Domestic Obligations in bankruptcy proceedings in return for the uncertain impact of the other provisions of the BAPCPA and the potential to be considered “Debt Relief Agencies.” Whether this new law will be a boon or, new form of an old curse still remains to be seen.

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