

Debtors and Creditors, Keep in Mind the Treatment of Support Obligations and Property Settlements under the New Bankruptcy Laws

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Historically, support obligations and alimony were non-dischargeable in a bankruptcy case and property settlements were dischargeable in a bankruptcy case. With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCPA") in 2005, significant changes were made to the "family law" sections in the Bankruptcy Code. Section 523(a)(5) of the Bankruptcy Code provides that a domestic support obligation, including alimony, is non-dischargeable in a bankruptcy case. *See*, 11 U.S.C. § 523(a)(5). In addition, importantly, section 523(a)(15) of the Bankruptcy Code provides that debts owed "to a spouse, former spouse, or child of the debtor [that is not a domestic support obligation] 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" are generally non-dischargeable in a bankruptcy case, as discussed further below. 11 U.S.C. § 523(a)(15).

The below represents a brief discussion of sections 523(a)(5) and (a)(15) in the Bankruptcy Code, and is not intended to be an exhaustive discussion of all issues relating to or concerning these sections.

While the pertinent case law is clear that section 523(a)(5) debts are non-dischargeable in a bankruptcy case, there are instances where section 523(a)(15) debts may be dischargeable in a bankruptcy case, even following the enactment of the BAPCPA. According to the applicable case law, section 523(a)(15) debts or "property settlement debts" are non-dischargeable in a chapter 7 bankruptcy case and in a chapter 11 bankruptcy case, but may be dischargeable in a chapter 13 bankruptcy case. Section 1328(a) of the Bankruptcy Code "permits the discharge of 523(a)(15) debts for debtors that obtain confirmed [chapter 13] plans and complete [their] plan payments. Thus, a chapter 13 debtor could propose a plan that pays less than 100% [of a property settlement]." *In re Douglas*, 369 B.R. 462, 465 (Bankr. E.D. Ark. 2007). Nevertheless, if a chapter 13 debtor fails to complete his or her chapter 13 plan payments, and receives a discharge pursuant to section 1328(b), section 523(a)(15) debts are non-dischargeable. However, in a chapter 13 case, domestic support obligations, pursuant to section 523(a)(5), must be paid in full and are non-dischargeable. *Id.*

With respect to a chapter 11 bankruptcy case, the applicable case law provides that a debtor owing a property settlement may reorganize under a chapter 11, but only if the chapter 11 reorganization plan contemplates paying the property settlement in full. *Id.* Therefore, in a chapter 11 case, a property settlement obligation, under section 523(a)(15), is non-dischargeable, and a domestic support obligation, under section 523(a)(5), is non-dischargeable. *In re Tracy*, 2007 WL 420252, 2 (Bankr. D. Idaho 2007). Similarly, with respect to a chapter 7 bankruptcy case, both 523(a)(15) and (a)(5) debts are non-dischargeable. *Id.*

In addition, following the BAPCPA, there is no need for a creditor to file an adversary proceeding complaint to determine that either sections 523(a)(5) or (a)(15) debts are non-dischargeable, as these debts are, generally speaking, automatically excluded from a debtor's discharge. Prior to the BAPCPA, it was necessary to file an adversary proceeding complaint to

determine that a section 523(a)(15) debt was non-dischargeable. However, the BAPCPA deleted section 523(a)(15) debts from section 523(c) of the Bankruptcy Code, which required an adversary proceeding complaint to be filed within 60 days of the debtor's 341 meeting of creditors and if the complaint was not filed, the debt would be dischargeable. *See*, 9 Norton Bankr. L. & Prac. 3d § 175:46.

Furthermore, following the BAPCPA, both the state court and the bankruptcy court have concurrent jurisdiction to determine the non-dischargeability of debts owed pursuant to sections 523(a)(5) and (a)(15). *See*, 9 Norton Bankr. L. & Prac. 3d § 175:51.

Even though it is not necessary to file an adversary proceeding to determine the non-dischargeability of these debts, as stated above, there may be some practical reasons for doing so. For example, in a chapter 13 bankruptcy case, since property settlement debts pursuant to section 523(a)(15) may be dischargeable in certain instances, a creditor may choose to object to a debtor's chapter 13 plan and file an adversary proceeding complaint to determine that their claim is in the nature of a non-dischargeable domestic support obligation pursuant to section 523(a)(5).

In conclusion, if your family law client is contemplating filing a bankruptcy, it is imperative that that you advise them to consult with a bankruptcy attorney prior to their executing any separation agreement, divorce decree or property settlement, if possible, so that they can gain an understanding of how their obligations will be treated in a bankruptcy case. In addition, if you have a client that is seeking to collect a debt in the nature of support, alimony or property settlement, from a debtor in a bankruptcy case or soon to be filing, you should recommend that they meet with a bankruptcy attorney immediately to understand their rights as a creditor under the new bankruptcy laws.

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