FOR DEBTOR OR WORSE: DISCHARGE OF MARITAL DEBT OBLIGATIONS UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

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C. What Are Domestic Support Obligations and How Do They Arise?

Support obligations come in many forms and arise under a broad set of circumstances and assumptions. The most common are direct-pay obligations, where the debtor is under obligation to pay state-mandated spousal support or child support directly to the ex-spouse in a specific amount each month. Such obligations typically end upon the emancipation of a minor, in the case of child support, or upon death or remarriage of the payee spouse or for a fixed period of years, in the case of spousal support. These types of payments are usually, but not always, made in incremental installments, such as monthly installments, although lump sum payments can also constitute support. Support obligations can also include the obligation to pay the mortgage for the ex-spouse’s residence or to make car payments. These types of debts are payments by the payee to third parties for on-going essential needs of the former spouse. Still another type of obligation is the allocation of debt incurred during the marriage. This means that one spouse has agreed or has been ordered to be liable for payment of the parties’ marital debt, and to make those payments directly to the third-party creditor. Credit card debt often comes under this category, and usually takes the form of an assumption of debt or a “hold harmless” agreement. This type of debt differs from direct payments for a mortgage or car payments, in that the debt being paid has already been incurred, and therefore arguably offers no direct support benefit to the other spouse. Other types of indirect payments include payments to the attorney of an ex-spouse for fees incurred in connection with nondischargeable debt. In contrast to support obligations, other types of marital obligations are generally termed as equitable distribution of property or property division by parties to the divorce agreement and in domestic relations courts. These
typically include payments in one or more lump sums, often with interest, that are not terminable upon death or remarriage of the payee spouse. These payments are sometimes, but not always, tied to the sale or division of specific marital property, such as a house or business.

Domestic support obligations may be characterized as alimony or property distribution for tax reasons. Alimony is deductible for the payor and taxable for the payee, whereas property distribution is not a taxable event. In addition, in most states, alimony is modifiable in state court, but property division is not.

While divorce courts have the right to allocate the responsibility to pay jointly-incurred marital debt to one party or another, the allocation does not, as a matter of law, affect the rights of a creditor. A creditor's right to proceed against one or both parties is not extinguished simply because a divorce agreement requires one party to pay the debt. If the party responsible does not pay the debt, the creditor may proceed against the other party, notwithstanding the divorce agreement. This has important implications for parties to a divorce agreement. Divorce settlements are often structured to provide for one party to pay a joint debt. When the payor spouse repudiates the debt and seeks to have it discharged in bankruptcy, then the creditor may look to the other party to pay the debt. The parties may have already considered this when they created the settlement agreement and specifically labeled the obligation as a form of support. Or, if discharge litigation arises, the payee spouse may seek to prove that the obligation of one spouse to pay a joint debt directly to a creditor should be deemed support, even if it is not actually labeled as such.
B. BAPCPA Amendments to §§ 523(a)(5) and (15)

The BAPCPA amendments to §§ 523(a)(5) and (15) are at once simple and dramatic (the revised language is in italics):

§523 Exceptions to Discharge
A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

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(5) for a domestic support obligation
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(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) 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, or a determination made in accordance with State or territorial law by a government unit. . . . 122

The BAPCPA pared down the pre-BAPCPA verbiage of §§ 523 (a)(5) and (15) from 311 words to 97, and at first glance appears to pretty much close off any debate over whether a divorce- or separation-related debt can ever be discharged. The BAPCPA also introduces a new term, “domestic support obligation,” in revised § 523(a)(5), and defines that term in new § 101(14A). That section contains a four-factor definition of “domestic support obligation,” as follows:

The term “domestic support obligation” means a debt that accrues before or after the entry of an order for relief 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 or after entry of an order for relief 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, or parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt. 123

Obviously, new § 104(14A) mirrors the former § 523(a)(5), retaining the same “actually in the nature of” language that gave rise to so much litigation and divergence of judicial opinion under the pre-BAPCPA Code. It further qualifies the debt as one “owed to or recoverable by”—a “spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative.” 124 The term “domestic support obligation” is used throughout the revised Code and replaces the previous references to “alimony, maintenance, or support.”

Structurally, here is what the revised §§ 523(a)(5) and (15) accomplishes: first, the former § 523(a)(5) necessitated a two-step inquiry: it required debts to be (1) “designated as alimony, maintenance, and support,” and (2) the debts must be “actually in the nature of alimony, maintenance, and support.” Section 101(14A) retains the same “in the nature of alimony, maintenance, or support” language as former § 523(a)(5), but drops the requirement that the support obligation be so designated. Thus, the “in the nature of” inquiry that was previously the source of discharge litigation has been shunted to new § 101(14A).

The second major change is the elimination of any discharge of non-support debt under former § 523(a)(15). Section 523(a)(15)(A) allowed for potential discharge of non-support marital debt (generally this meant property division) if the debtor did not have the ability to pay the debt, or,
under (B) if the benefit to the debtor outweighed the detriment to the creditor spouse. In cases in which a debt was intended as property distribution, and the debtor believed he or she could satisfy the hardship or balancing of the equities criteria, debtors had incentive to seek distinguish between support and property division in order to discharge the debt under § 523(a)(15). That language is now gone.\textsuperscript{125}

At the same time that the BAPCPA closes off avenues for discharge of marital debt, it keeps one avenue pointedly open by distinguishing between two types of creditors. Section 101(14A) (which governs debts excepted from discharge in § 523(a)(5)), applies to a debt "owed to or recoverable by" the creditor spouse or child.\textsuperscript{126} In contrast, § 523(a)(15) only applies to a debt "to a spouse, former spouse, or child of the debtor."\textsuperscript{127} It must be assumed that the omission of the words "recoverable by" is intentional, drawing a clear distinction between (a)(5) creditors and (a)(15) creditors. Section 523(a)(5) is plainly a wider category than (a)(15).

What does the distinction mean? No cases have dealt with this issue, and so any answer here is speculative. Here is what the distinction appears to mean: debts that are "owed to" a spouse or child are debts so designated in an agreement or decree as payable to that person. Debts "recoverable by" a spouse or child are debts that, through state court legal process, the creditor spouse or child could enforce. This would include debts incurred in a divorce or separation that are designated as payable directly to a third party, such as a loan assumption agreement, or "hold harmless" agreement where the debtor has agreed to pay a debt owed by both parties. However, since § 523(a)(15) pointedly omits the "recoverable by" language, it can be presumed that the drafters of the BAPCPA intended to leave open the option of a debtor to discharge third-party debt if the debt is not "in the nature of alimony, support, or maintenance." Again, this analysis is speculative, but in as much as the distinction between (a)(5) creditors and (a)(15) is clearly deliberate, this appears to be the intention of the revised
V. Litigation over Marital Debt Under the BAPCPA: The Shape of (Fewer) Things to Come

Here’s what we have learned from our review of past cases and the dynamics of divorce and bankruptcy: Spouses will continue to file for divorce. Debtors will continue to file for bankruptcy. Most debtors will want to discharge or modify as much debt as possible, including, in many instances, debts arising from a divorce or separation. And, for each such debtor, there will almost always be an aggrieved ex-spouse equally determined to see that the debt gets paid.

Debtors and their lawyers who would have seen fit to litigate over marital debt discharge before the BAPCPA will have to consider the revised BAPCPA §§ 523(a)(5) and (15), and act accordingly. This means that if the debt is “owed to or recoverable by” a spouse, former spouse, or child (and, for § 523(a)(5), a qualified relative or guardian), then the debtor can be assured in advance that discharge of the obligation is almost certainly going to be denied. But, for marital debt that is not “in the nature of alimony, support, or maintenance” (as per the definition in § 101(14A)) and that is “owed” to someone other than a spouse, former spouse, or child of the debtor, discharge is still an option under § 523(a)(15) of the BAPCPA.

Since debt owed to a third party is fair game for discharge under § 523(a)(15), litigation is going to continue over whether such debts meet the “in the nature of alimony, maintenance, or support” test of § 101(14A). If it is, then the discharge exception applies pursuant to § 523(a)(5) and the debt cannot be discharged. But if the debt is not support, then debt payable to a third-party can be discharged because such debts are not covered under § 523(a)(15), and the discharge presumption of § 727 will
So, in order to determine the nature of the debt that is to be paid to a third-party creditor, the same intent criteria, multi-factor tests, and other rules and precedents that have evolved among federal circuits will be applied, but in a more narrow range and probably fewer number of cases. Of course, nothing in revised §§ 523(a)(5) and (15) speaks to the unique discharge rules of the Sixth Circuit, therefore nondischargeable debt is still subject to discharge in that jurisdiction, to the extent that the debt exceeds the debtor’s ability to pay.

Some courts have considered whether there is a difference between debts paid directly to a spouse or former spouse, and debts to be paid to a third-party. In the Sixth Circuit, the case of In re Calhoun concerned payments owed to a third-party creditor. But in In re Sorah, where the debt was payable directly to the spouse, the court applied the Calhoun discharge criteria irrespective of the payee. In In re Hammermeister, the bankruptcy court held that although an assumption obligation was an indicia that the debt was not alimony, it was only one of several factors to consider. However the court in Hanjora v. Hanjora (In re Hanjora), held that a debt assumption agreement, standing alone, did not create a support obligation. However, most decisions from the Sixth Circuit do not treat payments to a spouse differently from those to a creditor, and most courts in other circuits hold likewise.

Although the weight of authority is that there should not be a difference between debts paid directly to a spouse and those payable to a third-party creditor, all of the cases dealing with this subject were decided before the BAPCPA, and therefore were not interpreting the revised BAPCPA § 523(a)(15). Section 523(a)(15) now expressly distinguishes between a debt "owed to or recoverable by" a spouse, former spouse, or child, and a debt that is merely "to" a spouse, former spouse, or child. There is no case law that negates the clear distinction between BAPCPA § 523(a)(5) and § 523(a)(15) debts.
VI. CONCLUSION

What will become of marital debt discharge under the BAPCPA? One answer is that there is certainly going to be less of it. Because § 523(a)(15) no longer allows for potential discharge of property distribution debts owed to a spouse, former spouse or child, an obligation that is payable directly to a spouse, former spouse, or child, will be nondischargeable. Whether it is for support or property division does not matter. This was a source of much of the pre-BAPCPA marital debt discharge litigation. However, if a debt is payable to a third-party creditor, and the debtor believes that the debt is not “in the nature of” support, then the distinction is germane because § 523(a)(15) omits third-party debt from the discharge exceptions. In such cases, litigation may follow, governed by the particular rules and precedents of the jurisdiction where the debtor filed.

As for the Sixth Circuit rule allowing for discharge of even nondischargeable debt, it may be that courts in that jurisdiction will read into the new BAPCPA a renewed Congressional intent that “nondischargeable” really means nondischargeable—to any degree—no matter what the debtor’s circumstances. But there is no reason yet to assume this will happen, and to date, the unique rule of the Sixth Circuit is alive. Even though the Sixth Circuit position is the minority one, one hopes it will endure. Despite the obvious semantic conflict between the Sixth Circuit rule and the actual wording of § 523(a)(5)—can a “nondischargeable” debt really be dischargeable, even in part?—the Sixth Circuit approach is more logical than some of the decisions resulting from a mechanical application of the statute, such as Hoggarth v. Hoggarth or In re Wilbur. What the BAPCPA accomplishes overall is to narrow the flexibility of courts to construct a feasible outcome matched to the reality of the parties. And little flexibility would be a good thing where the lives and livelihood of millions of future debtors, and their marital creditors, are at stake.