



Bankruptcy's Fresh Start Versus Family Law's Marital Obligations—Part I

by Kathy A. Higby

Editors' Note:

This is the first part of a two-part article. Part I discusses the bankruptcy court's framework and legislative policy to provide relief for a client whose ex-spouse attempts to discharge marital debts earlier ordered by a divorce court to be paid by that ex-spouse. The author introduces the concepts of debts "in the nature of support" and a balancing test, both designed to avoid dischargeability of marital debts. Part II, to be published in the May 1999 issue, will examine the applicable case law regarding both the U.S.C. §§ 523(a)(5) and 523(a)(15) objections to discharge, and the effect of nondischargeability of debts.

The financial security obtained by a client in a dissolution action can be detrimentally affected by an ex-spouse subsequently filing a bankruptcy petition. This is a growing concern to family law practitioners with the increasing number of bankruptcy petitions filed annually. Family law practitioners have varying levels of familiarity with the U.S. Bankruptcy Code ("Code"). Most are aware that child support, maintenance, and attorney fee awards payable by the debtor for the ex-spouse's benefit are not dischargeable. However, these debts constitute a small portion of debts that may be deemed nondischargeable.

Code §§ 523(a)(5) and 523(a)(15) are of particular significance to family law practitioners. These subsections impact a debt-

or's ability to discharge debts and obligations established in an underlying dissolution of marriage action. A practitioner may not be able to preserve all of the financial benefits obtained for a client in a dissolution action once an ex-spouse seeks relief in the bankruptcy court. However, careful consideration of the potential risks and knowledge of applicable bankruptcy law can ensure that the client's benefits are not inadvertently relinquished.

This article provides the practitioner with information regarding applicable procedures and relevant statutory and case law involved in Code § 523(a)(5) or (15) objections to the discharge of certain debts in a Chapter 7 filing. The article also addresses how a finding that the debts are "in the nature of support" could affect the underlying property division in the dissolution action. Procedures objecting to Chapter 13 and other Chapter filings are beyond the scope of this article.

Deadline for Objections

Usually, the first indication that the ex-spouse is seeking to discharge the marital obligations in bankruptcy is the receipt of a Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates. This notice contains the deadline within which to file a complaint objecting to the discharge of the debtor or to determine dischargeability of certain types of debts. The deadline is not later than sixty days following the first date set for the meeting of creditors.¹ Prior to this deadline, a Discharge of Debtor may be issued by the bankruptcy court. This discharge releases a debtor from all dischargeable debts and, therefore, does not affect the pending determination as to the dischargeability of objectionable debts.²

Code § 523(a)(5) designates nondischargeable debts as alimony to, mainte-

nance for, or support of such spouse or child. It is important to note that these debts, by statutory definition, are nondischargeable and, accordingly, are not affected by a Discharge of Debtor. Conversely, other marital debts that may not be dischargeable are designated in 11 U.S.C. § 523(a)(15) as debts incurred in connection with a dissolution of marriage action. These debts are dischargeable unless, on request and a hearing, the court determines the debts are excepted from discharge.³

The non-debtor spouse's failure to file a timely request for determination of dischargeability of § 523(a)(15) debts has dire consequences. As stated in a recent Colorado Court of Appeals case, implementation of 11 U.S.C. § 523(a)(15) exemption to dischargeability of certain debts hinges on the § 523(c)(1) requirement for a request and hearing. Failure to request a determination forfeits the right to object to a discharge of § 523(a)(15) debts or to later seek equitable relief in the state court dissolution case.⁴ A Discharge of Debtor will discharge § 523(a)(15) debts if a request for determination of dischargeability is not filed in a timely manner.

Automatic Stay

The filing of the bankruptcy petition operates as an automatic stay against, among other things, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."⁵ The automatic

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stay does not apply to the establishment or modification of an order for alimony, maintenance, or support, or collection of those awards, from property that is not property of the bankruptcy estate.⁶

Assets and income acquired after the filing of the bankruptcy petition are not considered "property of the estate" in a Chapter 7 bankruptcy. Therefore, the automatic stay does not prohibit the enforcement of alimony, maintenance, or support obligations against the post-petition assets and income of the debtor in a Chapter 7 case. The bankruptcy court has exclusive jurisdiction to grant relief from the automatic stay.⁷

Applicable Procedure

Part VII of the Code governs adversary proceedings.⁸ To initiate the process requesting a determination as to the dischargeability of certain debts, the objecting spouse must, within the time designated in the notice, file a complaint with the court in which the case under the Code is pending.⁹ The complaint is filed in an adversarial proceeding, which means it is not filed in the Chapter 7 proceeding, but in a separate action. A complaint form with the appropriate caption to be used in an adversarial proceeding is set out in the Code under Official Forms, Form 16.

The complaint must contain an allegation of jurisdiction and a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. The complaint also must contain a statement that the proceeding is "core" or "non-core." Determinations as to the dischargeability of particular debts are core in nature.¹⁰ A request for an award of attorney fees for filing the complaint shall be pleaded as a claim in the complaint.¹¹

An adversary proceeding cover sheet must be filed with the complaint and summons. An original and two copies of all documents should be filed with the bankruptcy clerk. The local bankruptcy form 102.2 cover sheet can be obtained from the bankruptcy court. A filing fee of \$150 must be paid at the time of filing the action. A sample of the required Summons in Adversarial Proceedings is set forth in Form B 250A in the Procedural Forms section of the Code.

The summons must be served within ten days of issuance.¹² The clerk of the court issues the summons, and the moving party is responsible for service of process. The service can be made by first-class

mail, postage prepaid.¹³ If the service is to be made by any authorized form of mail, the summons and complaint should be deposited in the mail within ten days of issuance of the summons. If the summons is not served within the ten days, an alias summons must be issued and served.¹⁴ It is necessary to file a motion for re-issuance of the summons to obtain an alias summons. The proceeding may be dismissed for failure to serve a summons within 120 days of the filing of the complaint.¹⁵

"Code §§ 523(a)(5) and (15) impact a debtor's ability to discharge debts and obligations established in an underlying dissolution of marriage action."

Generally, within thirty days of issuance of the summons, an answer is due.¹⁶ Failure to respond to the summons will be deemed to be consent to entry of a judgment by the bankruptcy court, and judgment by default may be taken for the relief demanded in the complaint.¹⁷

Applicable Statutes

Pursuant to 11 U.S.C. § 523(a)(5), a non-assigned debt is excepted from discharge if owed to a former spouse or child for alimony, maintenance, or support in connection with a separation agreement, divorce decree, or other order of a court to the extent the debt is actually in the nature of alimony, maintenance, or support.¹⁸ Debts in the nature of alimony, maintenance, or child support are easily identified. However, the statute distinguishes debts "in the nature of support of a spouse" from alimony or maintenance. The term "support" is entitled to broad application.¹⁹ The Bankruptcy Reform Act of 1994 expanded the exceptions to discharge.

If a debt is determined not to be in the class of debts exempted from discharge as a § 523(a)(5) debt defined above, it may yet be determined to be nondischargeable if it meets the criteria set forth in § 523(a)(15). This section states that a debt incurred in connection with a dissolution of marriage action will be determined nondischargeable unless (1) the debtor is unable to pay the debt or (2) the benefit to the debtor of discharging the debt outweighs the detrimental consequences to the ex-spouse.²⁰

Under this balancing test, the debt will be discharged if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents, or the ex-spouse would suffer little detriment as a consequence of liability for the debt. Rarely is this later consequence a reality for clients.

The legislative history of this new exception, set out in § 523(a)(15), signifies that § 523(a) is intended to provide greater protection against discharge of marital obligations than those clearly determined to be alimony, maintenance, and support obligations owing to or for the benefit of a spouse, former spouse, or child of a debtor in bankruptcy. The congressional committee affirmed its belief that a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.²¹

The exception of debts "in the nature of support" set out in § 523(a)(5) and the balancing test established under § 523(a)(15) safeguard an ex-spouse's interest in many financial obligations established in an underlying dissolution of marriage action. The determination as to whether debts arising from prior marital obligations are excepted from discharge is the source of much litigation.

Jurisdiction

There is concurrent jurisdiction in a bankruptcy court and a state domestic relations court to determine the dischargeability of debts under 11 U.S.C. § 523(a)(5) of domestic debts alleged to be in the nature of support.²² Notwithstanding this concurrent jurisdiction, whether a domestic obligation constitutes alimony, maintenance, or support under § 523(a)(5) is a question of federal bankruptcy law, not state law. Hence, a state court deciding the issue must use federal law.²³

If the issue of dischargeability was actually litigated and necessarily decided in one forum, the parties may be collaterally estopped from relitigating the issue in another forum.²⁴ Conversely, federal courts have exclusive jurisdiction over § 523(a)(15) claims.²⁵ A complaint that alleges nondischargeability based on a § 523(a)(5) argument, and, alternatively, alleges nondischargeability based on a § 523(a)(15) claim, raises the issue of concurrent and exclusive jurisdiction.

Conclusion

The avenues for relief available to the nondebtor spouse have expanded within the Bankruptcy Code. These same ave-

nues may have created an opportunity to avoid dischargeability problems through careful drafting of settlement agreements. Part II of this article will give the details and case law to support these objections to discharge, and will discuss the critical importance under current Colorado case law of acting quickly when faced with a potential discharge in bankruptcy.

NOTES

1. B.R. 4007(c).
2. 11 U.S.C. § 727(b).

3. 11 U.S.C. § 523(c)(1).
4. *In Re: Marriage of Hall*, 28 Colo.Law. 139 (Feb. 1999) (App. No. 97CA1553, *ann'cd* 12/10/98).
5. 11 U.S.C. § 362(a)(6).
6. 11 U.S.C. § 362(b)(2)(A).
7. *In re Marriage of Barber*, 811 P.d 451 (Colo.App. 1991).
8. B.R. 7001 *et seq.*
9. B.R. 7003, B.R. 5005(a).
10. 28 U.S.C. § 157(b)(2)(I).
11. B.R. 7008(b).
12. B.R. 7004(e).
13. B.R. 7004(b).
14. B.R. 7004(e).

15. B.R. 7004(a); F.R.Civ.P., Rule 4(m).
16. B.R. 7012(a).
17. B.R. 7055; F.R.Civ.P., Rule 55.
18. 11 U.S.C. § 523(a)(5).
19. *In re Jones*, 9 F.3d 828, 881 (10th Cir. 1993).
20. 11 U.S.C § 523(a)(15).
21. 140 Cong.Rec. H10,770 (10/4/94).
22. *Barber, supra*, note 7 at 455.
23. *Id.*
24. *Id.*
25. 11 U.S.C. § 523(c)(1).



Arapahoe County Bar Plans Two Events on April 30

The Arapahoe County Bar Association ("ACBA") will sponsor two events on April 30. At noon, the ACBA will present its annual Law Day Luncheon at the Franciscan Events Center in Englewood. The topic, "Independence of the Judiciary," will be introduced by former Colorado Supreme Court Chief Justice Anthony Volland, after which Doug Campbell and Phil Figa will debate the topic. Former Colorado Attorney General Duane Woodard will serve as the debate moderator. Margaret Atencio, a lay member of the Second J.D. Performance Review Commission, will give a brief explanation of how judicial performance review is conducted and how it makes judges accountable. For more information about the luncheon, call the ACBA office at (303) 797-2227.

That evening, ACBA members and guests will travel to Heritage Square Music Hall for a performance of "Swords of Zorra." Forty seats have been reserved for the ACBA for this entertaining vaudeville-style show. The cost is \$28 per person for dinner and the performance. Details are available by calling Jim Evans at (303) 755-1001.

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