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***267** BAPCPA AT TEN: ENHANCED DOMESTIC CREDITOR PROTECTIONS AND ENFORCEMENT RIGHTS

INTRODUCTION

Ten years have passed since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) generated the most sweeping changes to the Bankruptcy Code in over twenty-five years. Prominent among these amendments were provisions for increasing protections and enhancing enforcement rights for domestic creditors in bankruptcy cases. Domestic support enforcement agencies and other state and federal governmental agencies were at the forefront supporting these domestic creditor amendments.[1] Their support was motivated by perceived deficiencies in domestic support creditor protections in bankruptcy.[2] Three decades prior, in 1975, the Federal Child Support Enforcement Program was established to enable the federal government to assist the States in increasing the effectiveness of their child support enforcement programs.[3] A decade later, the Child Support Enforcement Amendments of 1984 mandated that States' attorneys general and district attorneys implement these federal enforcement procedures.[4]

Historically, and to this day, family and bankruptcy courts have approached their dockets with a largely divergent focus.[5] Family courts seek to ***268** equitably distribute marital assets in order to provide a "fair start" to both spouses and ensure adequate support for the family unit. Bankruptcy courts seek to give debtors a "fresh start" while distributing assets to all creditors in accordance with the Bankruptcy Code's priority scheme. Lending further to this divide, one commentator theorized that the advent of no-fault divorce in family law encouraged bankruptcy courts to treat non-debtor spouses with less concern.[6] No-fault divorce also blurred the line between marital property distributions and support orders.[7] Undertaking to ease the impact of the competing interests of families and creditors, Congress enacted the 1994 Bankruptcy Code amendments ("1994 Amendments"), which provided limited protections to non-debtor spouses and dependents in bankruptcy proceedings.[8]

Despite nationalized child support enforcement efforts, the House Congressional Record for May 5, 1999, chronicling one of the many consumer bankruptcy reform hearings that spanned eight years and led to enactment of BABCPA, reported these remarks of Congresswoman Roukema of New Jersey: "It's a national disgrace that our child support enforcement system continues to allow so many parents who can afford to pay for their children's support to shirk these obligations . . . despite these reforms, the so-called 'enforcement gap'--the difference between how much child support could be collected and how much child support is collected--has been estimated at $34 billion."[9] By the final Senate hearing on consumer bankruptcy reform, occurring March 10, 2005, bankruptcy was cited as a major loophole to closing this gap.[10] BAPCPA passed by a substantial majority and the elevation in status of domestic support creditors and enhancement of their enforcement rights were a cornerstone of the bill.[11]

***269** Although it is frequently reported that the United States' divorce rate is fifty percent and climbing, in December 2014, a New York Times blogger debunked this as a myth, reporting: "Despite hand-wringing about the institution of marriage, marriages in this country are stronger today than they have been in a long time. The divorce rate peaked in the 1970s and early 1980s and has been declining for three decades since."[12] However, the blogger observed that on closer examination of the data, "marriage trends . . . [are] a force behind rising economic and social inequality, because the decline in divorce is concentrated among people with college degrees. For the less educated, divorce rates are closer to those of the peak divorce years."[13] Therefore, among economically and socially disadvantaged populations, and specifically those seeking bankruptcy relief, the complex interplay between divorce and bankruptcy persists, even if the overall divorce rate is declining.

With each domestic creditor amendment to the Bankruptcy Code since 1994, domestic creditors have gained recognition and protection.[14] Together, the 1994 Amendments and BAPCPA significantly elevated the status of domestic creditors in bankruptcy, encompassing five areas of enhanced protections and enforcement rights. These include: (1) elevation of domestic support priority status; (2) shrinking of the automatic stay through added domestic support creditor exceptions; (3) expansion and ease of establishing nondischargeability of domestic support and other divorce-related domestic debts; (4) enhanced jurisdiction of family courts to adjudicate the rights of domestic creditors in concurrent and sequential divorce and bankruptcy cases; and (5) mandatory noticing of collection and enforcement rights to domestic support creditors and state enforcement agencies by trustees in all chapters where individuals seek bankruptcy relief.

This article addresses these five areas of enhanced domestic creditor protections and enforcement rights, with particular focus on areas where there has been greater impact and caselaw development since enactment of BAPCPA. Also discussed are interpretations and procedural applications of some of these amendments that could potentially lead to greater utilization of ***270** the enhancements Congress intended to create. Before addressing these five areas of domestic creditor enhancements, it is important to note the Supreme Court's recent decisions in *United States v. Windsor*[15] and *Obergefell v. Hodges*,[16] and their impact in extending these rights and protections to same-sex couples in bankruptcy and domestic relations matters.

In *Windsor*, the Supreme Court ruled that § 3 of the Defense of Marriage Act (DOMA)[17] violated the Due Process Clause of the Fifth Amendment and the federal government could not thereby deprive same-sex married couples of the benefits that the States permitted.[18] The repeal of DOMA § 3 also expanded recognition of same-sex marriages in federal legal matters, including bankruptcy proceedings. In *Obergefell*, the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, States must license a marriage between two people of the same sex, and must recognize a same-sex marriage when lawfully licensed and performed out-of-state.[19] The Court determined that marriage is a fundamental right that applies with equal force to same-sex couples.[20] As such, these couples cannot be deprived of the fundamental right to marry, they can legally marry in all States, and States must recognize lawful same-sex marriages performed in other States.[21]

The repeal of DOMA § 3 and nation-wide legalization of same-sex marriage expands the availability of both marriage and bankruptcy to same-sex couples throughout the United States, diminishing eligibility issues and conflict of law tensions that same-sex couples previously encountered regarding the adjudication of divorce and bankruptcy matters.[22] Thus, the enhanced protections and enforcement rights discussed in this article now apply with equal force to all same-sex married couples that become involved in domestic relations and bankruptcy proceedings across the country.

I. ELEVATION OF DOMESTIC SUPPORT PRIORITY STATUS

Before the 1994 Amendments, support claims were nondischargeable, but ***271** held no priority status.[23] As general unsecured claims, they were also vulnerable to preference attacks.[24] Under the 1994 Amendments, child and spousal support claims were upgraded to priority status, ranked seventh of nine priority categories--below administrative expenses but above tax claims. These amendments also precluded a trustee from avoiding preferential transfers to a spouse, former spouse, or child for payment of spousal or child support debts.[25] This exception did not apply to support debts assigned, voluntarily or by operation of law, to another entity.[26] BAPCPA also codified the holding of *Farrey v Sanderfoot*,[27] where the Supreme Court determined, under the facts of that case, that a judicial lien for domestic support was not subject to avoidance to the extent it impaired a debtor's exemption.[28] Therefore, since the 1994 Amendments, a debtor is precluded from avoiding a judicial lien

impairing an exemption if the lien to be avoided secures a domestic support claim.[29]

A. "DOMESTIC SUPPORT OBLIGATIONS"

BAPCPA dramatically elevated the priority status of domestic support creditors, moving domestic support claims from seventh to a first priority position.[30] BAPCPA struck all references to "alimony, maintenance or support," instead referring to "domestic support obligations," a defined term added at Code § 101(14A).[31] This definition of "domestic support obligation" ***272** expands the scope of protected support claims, now including accruing interest and support debts owed to or recoverable by a governmental unit.[32] Thus, governmental enforcement agencies, chief proponents of BAPCPA's domestic support provisions, are now encompassed within the scope of the Code's definition of domestic support creditors--entitled to the enhanced protections and enforcement rights bestowed on domestic support creditors through BAPCPA. In addition to spouses, former spouses, children and parents of children of debtors, this first priority now expressly extends to obligations owed to or recoverable by legal guardians or responsible relatives of these support dependents.[33]

Whether a debt is a domestic support obligation is a question of federal law, and courts deciding this issue must evaluate whether the debt is: (1) owed to or recoverable by the claimant; (2) in the nature of support; and (3) established or subject to establishment by reason of a separation agreement, divorce decree, property settlement agreement or court order.[34] In making this determination, courts evaluate the true nature of the debt, rather than titles written into divorce decrees and support orders.[35] Accordingly, state law decrees and orders utilizing support terms are not binding although they are considered by a bankruptcy court in making its determination.[36]

The standard for evaluating what is actually in the nature of support under federal law has not changed under BAPCPA.[37] Thus, courts continue to examine the intent of the state court, or the parties if by agreement, and the function the award was intended to serve at the time the support order or divorce decree entered.[38] There is no definitive test for determining intent ***273** and courts have considered a variety of factors or indicators in making their determinations.[39] For example, several courts have utilized, and commenters have suggested, a test which considers: (1) the language and substance of the state court's order; (2) the parties' financial circumstances at the time of the order; and (3) the function served by the obligation at the time of the order.[40] Another court evaluated the amount of the obligation in light of traditional concepts of support to determine whether it was excessive.[41]

The Maryland federal district court cited an exhaustive factor list in its analysis of whether the fees awarded to an attorney representing the debtor's ex-spouse and two minor children were domestic support obligations:

> [T]he nature of the obligation, whether there are dependent children, the relative earning power of the spouses and an indication that the obligation was an attempt to balance it, the adequacy of the dependent spouse's support without the assumption of the obligation, dependent spouse's receipt of inadequate assets in settlement, status of the obligation upon death or remarriage, timing of payments (lump sum or periodic), the payee (direct vs. indirect), waivers of maintenance, whether the obligation is modifiable, location of the paragraph containing the obligation within the agreement (whether or not it is located within the property distribution section), and the tax treatment of the obligation.[42]

In addition, when determining whether an obligation is a domestic support obligation entitled to priority status under § 507(a)(1), courts often use nondischargeability cases under § 523(a)(5) for guidance inasmuch as there is ***274** abundant caselaw in this area which remains valid under BAPCPA.[43] Indeed, enactment of BAPCPA only enhanced the rights of domestic support creditors, thus prior legal analysis in the nondischargeability context remains relevant and persuasive.[44] Therefore, further guidelines for establishing a claim as a domestic support obligation are contained in Part III below, discussing nondischargeability issues.

Although Code § 101(14A) identifies parties entitled to domestic support creditor status, both pre- and post-BAPCPA caselaw indicates that other parties involved in domestic relations matters may also be entitled to domestic support creditor status.[45] Specifically, exceptions to the plain text of § 101(14A) apply when an obligation is payable to a third party employed

or appointed to assist non-debtor dependents in resolving child welfare and domestic support matters pending in the family court.[46] Most courts interpreting § 101(14A) have upheld the rationale of pre-BAPCPA caselaw that it is the nature of the debt and not the identity of the creditor that controls.[47] This is so even if the debtor and non-debtor party are not jointly liable to the third party for the obligation, or the non-debtor would not otherwise be adversely impacted if the debt was discharged.[48] Indeed, prior to BAPCPA, six circuits had examined whether fees owed or payable directly to third parties could be support obligations; they all ruled that it was the substance of the liability that controlled, and if the fees related to maintenance or support matters, they could be nondischargeable support.[49]

Since enactment of BAPCPA, there has been a plenitude of caselaw on ***275** this issue. For example, the Illinois federal district court held that fees of a "child representative"--in this instance an attorney appointed to represent the debtor's children's interests in the divorce case-- were a domestic support obligation, even though not included under the Code's definition, because the fees were directly related to child support.[50] Similarly, a Missouri bankruptcy court determined that guardian ad litem fees were a domestic support obligation, and a Massachusetts bankruptcy court held that attorney's fees for post-divorce litigation were a domestic support obligation, where the fees in both instances related to establishing child support.[51] Recently, the Wisconsin district court upheld the bankruptcy court's decision determining that attorney's fees attributable to a debtor's "overtrial" of issues regarding the welfare of his minor children was in the nature of support.[52] The court catalogued a litany of cases similarly holding that attorney's fees incurred in litigation concerning a child's welfare were in the nature of support and therefore domestic support obligations.[53] Likewise, the Ohio bankruptcy court chronicled a series of recent cases where courts ruled that fees incurred by guardians ad litem and other child representatives were domestic support obligations within the meaning of § 101(14A) even though the debtors were solely liable for the outstanding fees.[54]

***276** Code § 507(a)(1) delineates support claims into two subcategories in the context of priority of claims. Subsection (A) includes the support claimants themselves, usually custodial parents or ex-spouses. Subsection (B) includes governmental support claims, which are claims owed to or assigned to the government (but not including assignment solely for collection purposes which remains an (A) claim).[55] The utility of this delineation appears somewhat limited. In a chapter 13, the debtor need not pay a (B) claim in full if all projected disposable income is committed over a five year plan, and there is not enough to satisfy the (B) claim.[56] This provision subordinates payment of government support claims to the claims of custodial parents and ex-spouses, and even to other priority creditors, inasmuch as all lesser priority claims must still be paid in full under the plan unless the holder agrees otherwise.[57] These subordinated government support claims include things such as food stamp overpayments and recoupment of welfare or other government support benefits.[58] They do not include support debts actually owed to custodial parents and ex-spouses where the proofs of claim are filed by the government ***277** on the domestic support creditor's behalf.[59]

Nonetheless, these unpaid (B) claims remain nondischargeable support priorities, and must be paid in full once the plan is concluded.[60] These nondischargeable (B) claims include accrued interest if interest is allowed under applicable nonbankruptcy law.[61] Thus, the only reason a debtor would take advantage of this subordination provision is to lend feasibility to a plan that provides other important relief or benefit, such as the curing of mortgage arrearages or strip off of a wholly unsecured subordinate mortgage on a residence.[62] Otherwise, this unpaid claim, potentially with accruing interest, will mount during the five-year pendency of the plan, with the government free to pursue collection, using all of its enforcement powers, once the case is over.[63] Therefore, in most instances, a debtor will not benefit by delineating (A) and (B) claims and not paying the (B) claims in full under the plan.[64]

Of course, another consequence of this § 507(a)(1) (A) and (B) delineation is that in a chapter 7 liquidation and distribution under the Code's priority scheme, (A) claims are paid in full before any payment to (B) claims.[65] As seen later in this article, whether a debt is a priority domestic support obligation under Code § 507(a)(1)(A) and (B) comes up in several bankruptcy contexts, including exceptions to the automatic stay, nondischargeability, the ability to seek collection against a debtor's exempt assets, and entitlement to payments under the Code's priority scheme.

B. EXEMPT ASSETS AVAILABLE TO SATISFY DOMESTIC SUPPORT OBLIGATIONS

Even though domestic support obligations are now ranked first in the Code's priority scheme, they are paid after certain administrative expenses of trustees. Section 507(a)(1)(C) provides a "carve out" to ensure trustees are compensated for prosecuting claims and liquidating assets to pay domestic ***278** support creditors.[66] Significantly, BAPCPA limits a debtor's ability to protect assets from the reach of domestic support creditors through enactment of amended exemption provisions. In a radical departure from the Code's policy of protecting exemptions in furtherance of a debtor's fresh start, amended § 522(c)(1) provides that exempt property is available to pay domestic support obligations even if the property would be exempt from such claims under state law. This provision overrules pre-BAPCPA cases holding that state exemption laws continue to protect a debtor's exempt property from support creditors after bankruptcy.[67] Accordingly, post-BAPCPA, a debtor's exempt property is subject to execution, levy and sale, to satisfy domestic support obligations.[68]

Initially, it was presumed that the purpose of this new carve-out provision in § 522(a)(1)(C) was to incentivize trustees to liquidate assets "otherwise available to pay DSO claims"--vague terminology appearing nowhere elsewhere in the Code. In the aftermath of BAPCPA, trustees argued that this provision, together with § 522(c)(1), provided authority for trustees to administer exempt assets to pay domestic support obligations.[69]

In *In re Quezada*, the Florida bankruptcy court provided a thorough analysis of this issue, opining that it had jurisdiction to issue an execution on a domestic support judgment, enabling domestic support creditors to liquidate exempt assets to pay their claims through the federal bankruptcy process.[70] However, the court determined that the trustee was not authorized to effectuate the sale of exempt property solely for the purpose of paying the domestic support obligation creditor.[71] The court reasoned that the trustee's duty under § 704(a)(1) was to liquidate "property of the estate;" and § 507(a)(1)(C)'s obscure terminology was insufficient authority to sell exempt assets in light of § 704(a)(1)'s clear and express limitation.[72]

The *Quezada* court offered a potential policy argument, suggesting that exempt property should perhaps be liquidated to pay a domestic support ***279** creditor so that general unsecured creditors would get what otherwise would go to the support creditor, thus benefitting unsecured creditors.[73] The court rejected its self-advanced proposition, observing that the "heart of § 522(c)" is the protection of exempt assets during and after a bankruptcy case in furtherance of fresh start policy and "one should not overlook the fact that liability of exempt assets to satisfy nondischargeable DSO and tax claims is just that--an exception."[74] Moreover, the court was skeptical of selling exempt property to benefit unsecured creditors; a strategy the court observed to be in direct conflict with overriding exemption policy.[75]

The *Quezada* line of cases discuss exempt property "leaving the estate," and trustees being prohibited from selling non-estate property. These cases predate *Schwab v. Reilly*, where the Supreme Court reinforced the principle that exempting an interest in property does not equate to property leaving the estate unless it is an exemption "in kind" which protects the entire asset, as opposed to an interest in the asset.[76] As reiterated by the Fourth Circuit in *Reeves v. Calloway*, there is a "distinction between exempting an asset itself from the bankruptcy estate and exempting an interest in such asset . . . ."[77] Therefore, contrary to the "leaving the estate" reasoning of these early post-BAPCPA cases, most property in which debtors claim exemptions are subject to monetary caps, and remain property of the estate even if there is no equity above liens and exemptions. In fact, as of December 2014, only six states had unlimited homestead exemptions, and the remainder of states have homestead exemptions that are capped at varying amounts.[78]

In any proposed sale of a fully encumbered asset free and clear of liens, § 363(b) and (f) implicate a trustee's business judgment, and in virtually all cases this boils down to whether the proposed sale benefits the estate and the requirements of subsection (f) are satisfied. In *In re Childers*, the South Carolina bankruptcy court approved the sale of a debtor's homestead, reasoning that the trustee had demonstrated sound business judgment since the proposed sale would result in a meaningful distribution to unsecured creditors from payment on account of an avoided and preserved lien.[79] In doing so, the ***280** Childers court rejected *In re Traverse*, where the First Circuit denied the trustee's proposed sale of a debtor's homestead property in which the trustee had avoided and preserved a mortgage lien, but there was no non-exempt equity above the avoided lien and exemption.[80] The *Traverse* court reasoned that the preserved mortgage created no equity for the estate since the trustee simply stepped into the shoes of the mortgagee, holding a secured claim, and the "underlying property has been exempted and withdrawn from the 'property of the estate' for the purposes of § 363 . . . ."[81]

The *Childers* court criticized *Traverse's* limited viewpoint, instead reasoning:

> Sections 544 and 551 operate separately and distinctly from § 363 and neither § 544 nor § 551 provides a basis for nor a prohibition against a Chapter 7 Trustee's ability to sell. Furthermore, if the Chapter 7 Trustee meets the requirements of § 363, the sale of the property of the estate should be approved regardless of any lien avoidance . . . There is no requirement under § 363(b) or § 704(a) that there be equity in property of the estate above any existing liens or interests before the Court can approve a sale.[82]

Applying *Childers*' holistic rationale, which incorporates the reasoning of *Schwab v. Reilly* and *Reeves v. Calloway,* it follows that sale of estate property subject to an exemption claim, which proposes to pay a domestic support obligation from the exempt proceeds and thereby free up estate funds to pay lesser priorities, should be permissible if there is an independent basis for approving the sale. However, without a lien or levy by the domestic support creditor, the trustee is obligated to pay the debtor's exemption claim from the proceeds. Therefore, in order for the trustee to pay the domestic support obligation, the domestic support creditor must obtain an execution and seek to levy against the exempt proceeds in the trustee's account once the sale proceeds are on deposit. A similar procedure succeeded in *In re Wolf*, where the Internal Revenue Service (IRS) levied against exempt proceeds in the trustee's account after sale of the debtor's homestead.[83] Section 522(c)(1) provides that exempt property is liable for both domestic support obligations and nondischargeable ***281** tax claims. In *Wolf*, the Kentucky bankruptcy court held that the IRS's levy did not violate the automatic stay because the exempt proceeds were no longer property of the estate. Therefore, there was no statutory impediment to the trustee's compliance with the IRS's levy, and the court allowed the trustee's motion to pay the federal tax levy from the debtor's exempt proceeds.[84]

Obviously, the success of this procedure to pay the domestic support obligation from exempt proceeds requires cooperation from the domestic support creditor in obtaining the execution, and coordinating the levy so that it is served on the trustee once the exempt proceeds hit the estate's account.[85] An incentive for doing so could be that the domestic support creditor has other non-priority domestic debts that could be paid, at least in part, from a distribution to general unsecured creditors.

An alternative method could have the trustee filing an interpleader and depositing the exempt proceeds with the family court where the domestic support obligation arose.[86] This would require the family court's willingness to execute on assets that may be exempt under state law. The *Quezada* court recognized the potential drawback to calling on state courts to enforce the sale of exempt assets to pay domestic support obligations: "Although, in theory, a state court judge is perfectly capable of applying federal law, in practical terms, it appears awkward for a DSO creditor to seek relief in state court to pursue assets which are exempt from execution under state law."[87]

To avert potential issues concerning domestic support creditor cooperation, timing the levy against the trustee's account, and interpleader actions or other collection and enforcement proceedings in state court, a trustee should first seek a provision as part of a sale order which directs disbursement to the domestic support creditor on account of her statutory rights in the exempt proceeds under § 522(c)(1) and § 507(a)(1). If the disbursement order enters, then this is the most efficient method for getting the domestic support claims paid from exempt assets, and potentially freeing up other proceeds to pay claims with lesser priorities, including taxes and general unsecured claims, which may include non-priority domestic claims.

If a trustee is unsuccessful in efforts to sell property of the estate subject to an exemption claim in a case with a domestic support creditor, this still leaves the domestic support creditor with the right to seek collection against exempt property in the bankruptcy court.[88] The difficulty is that federal ***282** courts look to state law for collection procedures. Indeed, Rule 7069 of the Federal Rules of Bankruptcy Procedure provides that execution on a judgment is in accordance with the practices and procedures of the state where the bankruptcy district is located.[89] Even though the state's procedures prohibit sale of the exempt property, a state's collection laws and sale procedures for non-exempt property should provide sufficient guidance for the bankruptcy court to issue an execution that would allow the domestic support creditor to levy against the exempt property.

As an alternative, once the exempt property is abandoned, a lift stay order enters, or the case closes, the domestic support creditor can seek enforcement of her judgment in the state court. Here, again, the issue is the state court's willingness to enforce § 522(c) if its state laws exempt the property, even though § 522(c) clearly preempts such laws. However, as the *Quezada* court suggested, "a state court judge is perfectly capable of applying federal law," and this seems especially true

when the federal law looks to the state's collection laws for guidance.[90] Furthermore, family courts have indicated their willingness to liquidate or order the transfer of a debtor's exempt assets to pay a non-debtor ex-spouse her domestic support obligations during a bankruptcy case, so they should be able and willing to do so after the bankruptcy case closes.[91]

C. REORGANIZATION AND DEBT READJUSTMENT PLANS

BAPCPA also expanded domestic support creditor protections in reorganizations, and addressing these claims is an essential part of reorganization ***283** and debt readjustment plans.[92] Plan confirmation now requires that all domestic support obligations incurred since the petition date be current.[93] Chapter 12 and chapter 13 plans must pay domestic support arrearages in full as a first priority unless the holder agrees otherwise.[94] Interest accruing on these arrearage claims, to the extent allowed under state law, must also be paid once general unsecured claims have been paid in full.[95]

Before a discharge order enters, chapter 12 and chapter 13 debtors must certify that all pre and postpetition domestic support obligations through the date of the certification have been paid; this includes all arrearage claims to the extent provided for under a confirmed plan.[96] In a chapter 11 individual case, postpetition domestic support obligations need not be current for the discharge to enter.[97] However, under BAPCPA, failure to pay a postpetition domestic support obligation is now cause for conversion or dismissal in all chapters.[98]

Issues arise where chapter 13 plans do not provide for priority treatment or payment in full of domestic support obligations, and the plan is confirmed under § 1327, binding the debtor and each creditor to its terms.[99] The Bankruptcy Appellate Panel for the First Circuit warned: "The United States Supreme Court has emphasized that plan confirmation orders are final and binding regardless of pre-confirmation rights held by creditors."[100] Accordingly, under the Supreme Court's decision in *United Student Aid Funds v. Espinosa*, if notice is sufficient to satisfy due process considerations, a confirmation order denying priority treatment can have a preclusive impact.[101] Conversely, a debtor who contends that a claim is not a domestic support obligation and fails to provide adequate notice of non-priority treatment ***284** under the plan, cannot use a resulting confirmation order as a finding that the claim is not a domestic support obligation.[102]

In *Espinosa* the Supreme Court ruled that an order confirming a chapter 13 plan which discharged a portion of the debtor's student loans, without the filing of an adversary proceeding and finding of undue hardship, was not void.[103] While the Court noted that the bankruptcy court's prior ruling confirming the plan was clear error, it determined that this only provided grounds for a timely appeal.[104] Thus, under *Espinosa,* a confirmation order that discharges a domestic support obligation may be enforceable if the creditor had notice of the error and failed to object or appeal. Then, once confirmed, the treatment and payment of the domestic support obligation under the plan is *res judicata*, as long as due process was satisfied.[105]

Due process requires that the domestic support creditor have notice and an opportunity to litigate whether her claim is a domestic support obligation prior to being bound by a confirmation order.[106] A debtor's plan is not binding with regard to any issues not sufficiently identified and explained in the plan.[107] Accordingly, a bankruptcy court determined that confirmation of a debtor's chapter 13 plan--which did not include or expressly deal with a hold-harmless obligation to make mortgage payments to his ex-wife as contained in their divorce decree--had no impact on the obligation, which remained payable as a first priority domestic support obligation.[108]

Furthermore, in chapter 12 and chapter 13 plans, domestic support arrearages must be paid in full as a first priority "unless the holder agrees otherwise."[109] In *In re Burnett*, the Eighth Circuit held that express affirmation of consent to different treatment of a domestic support obligation is required under § 1322 (a)(2), and simply not objecting to the debtor's plan was insufficient consent.[110] However, once again, if the plan is confirmed, § 1327(a) governs and a confirmed plan which includes a provision paying less than the full amount owed, and to which the domestic support creditor has not affirmatively consented, is still binding.[111] Nonetheless, as discussed later in this ***285** article, the amount not paid, plus accruing interest under nonbankruptcy law, remains a nondischargeable priority and the debtor is not absolved of his duty to pay this balance in full once the bankruptcy case is over.[112] Likewise, since a property division (or other non-support marital debt) can be discharged in chapter 13, it is critical that a creditor who believes an obligation is for support, and not a property division, objects to plan confirmation since failing to do so can result in *res judicata* as to this mischaracterization.[113]

The *Burnett* court echoed *Espinosa*'s admonition that bankruptcy courts exercise their independent duty to review plans for compliance with the Code so that violative provisions are not improvidently confirmed.[114] However, if due process is satisfied, the violative plan is *res judicata* and significant domestic support creditor protections and enforcement rights can be inadvertently relinquished.[115] This issue is further explored in context of the following discussion of the automatic stay, where the interplay of § 1322(a)(2), § 1327, and the automatic stay exceptions for domestic support obligations is examined in greater detail.

II. EXPANDED EXCEPTIONS TO THE AUTOMATIC STAY

The scope of the automatic stay has been increasingly narrowed with respect to domestic support creditors. Under the 1994 Amendments, a bankruptcy petition no longer operated as a stay against commencement or continuation of a proceeding to establish paternity, dissolve a marriage or resolve "alimony, maintenance or support obligations."[116] Also, the stay did not apply to the collection of "alimony, maintenance or support" from non-estate property. BAPCPA further restricted the scope of the stay. It retained the substance of the 1994 Amendments, but significantly broadened the automatic stay exceptions for domestic creditors, in part by the expanded definition of "domestic support obligations."[117] Indeed, it is widely acknowledged that under BAPCPA, "the automatic stay became narrower, and exceptions ***286** to the stay became broader" as regards domestic support creditors.[118] As one commentator noted, "the [automatic stay] amendments give a lawyer a great deal more latitude to proceed to represent a support creditor, in the presence of a bankruptcy filing, than was the case pre-BAPCPA."[119]

Under BAPCPA, the adjudication and enforcement of domestic support obligations are excepted from the scope of the automatic stay.[120] The filing of a petition no longer operates as a stay regarding the collection of a domestic support obligation from property that is not property of the bankruptcy estate, or the withholding of income that is property of the estate or of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute.[121] Also, rights granted to domestic support creditors under the Social Security Act were incorporated as exceptions to the automatic stay under BAPCPA.[122] Specifically, a petition no longer operates as a stay with respect to the withholding, suspension or restriction of a driver's license, a professional or occupational license, or a recreational license for the nonpayment of domestic support obligations; the reporting of overdue support owed by a parent to any consumer reporting agency; the interception of a tax refund for payment of a domestic support obligation; or the enforcement of a medical obligation.[123]

For example, a debtor's estranged wife did not violate the automatic stay by commencing an action to establish an order to withhold his income for payment of a domestic support obligation.[124] Another court held that it did not violate the stay for a state department of family services to cause a debtor's license to be suspended because of an unpaid domestic support obligation.[125] Likewise, an ex-spouse's attorney fee award resulting from child support litigation with the debtor was held to be a domestic support obligation that could be collected from the debtor's exempt retirement account ***287** without seeking stay relief.[126]

On the other hand, where the threat of incarceration is used to compel a debtor to pay support from property of the estate, the action violates the stay.[127] If the state court acts on its own in ordering incarceration, a domestic support creditor and her attorney can be sanctioned for failing to take corrective action once aware of the stay violation.[128] Also, where an ex-spouse and her counsel brought a contempt action in state court under the guise of a criminal proceeding and obtained an order assessing costs and determining the order was a domestic support obligation, the bankruptcy court held that the stay had been violated.[129] Even where the contempt is punitive and therefore quasi-criminal, if the relief sought includes the payment of a debt or surrender of estate property, the stay is implicated.[130]

These cases illustrate the effectiveness of the stay exceptions enacted through BAPCPA, as well as potential pitfalls in proceeding in state court when assertion of a stay exception is questionable. Caution is also required insofar as an action to collect a domestic support obligation can violate the provisions of a confirmed plan, even where it would not constitute a violation of the automatic stay.[131] This situation is analyzed in greater detail below in context of the automatic stay and chapter 13 plans.

A. THE AUTOMATIC STAY AND DOMESTIC SUPPORT OBLIGATIONS UNDER CHAPTER 13 PLANS

As discussed in Part I above, domestic support arrearages must be paid in full under a chapter 13 plan unless the holder agrees otherwise.[132] If a plan provides for lesser treatment or payment, the ultimate amount owed to the domestic support creditor is not altered and remains a nondischargeable priority claim.[133] As one commentator observed:

> While *Espinosa* might allow the amount of the DSO claim that will be approved for payment under the plan to be altered by virtue of an explicit plan term, it has never been ***288** held that doing so automatically discharges any remaining balance asserted by the DSO creditors. Merely stating the payment amount in the plan is not the same as a provision explicitly stating that any further amounts would be discharged and the Supreme Court explicitly reserved ruling on whether it would apply its analysis regarding student loans to a plan provision that attempted to discharge debts that are categorically excepted from discharge.[134]

The Code provides that in a chapter 13 case, property vests in the debtor upon confirmation unless the plan or the confirmation order states otherwise.[135] Therefore, during the term of a confirmed plan, it is not a stay violation to collect any portion of a domestic support arrearage that is not covered by the plan and the creditor has not consented to having treated otherwise.[136] Some jurisdictions have local rules and confirmation orders providing that property does not vest in the debtor until the plan is concluded.[137] However, where confirmation effectuates vesting in the debtor, there is no stay violation to pursue collection against the debtor for any portion of a domestic support obligation that is not being paid through the confirmed plan, unless clear injunction language prohibiting collection is included in the plan.[138]

Conflicts often arise where debtors bring contempt actions against state enforcement agencies because a confirmed plan does not provide for the full amount of the domestic support obligation and the agency pursues collection outside the plan. In these situations, the state agency will garnish wages, intercept tax refunds, suspend licenses, and employ other collection measures excepted from the stay, in pursuit of collecting amounts not provided for under the plan. In such instances, if the bankruptcy court determines that due process was satisfied, and the plan language explicitly prohibits collection outside the plan, then the plan is *res judicata* and the enforcement agency will be enjoined and sometimes held in contempt for these collection actions--even though the domestic support creditor seeks collection solely against non-estate assets or the collection measures are expressly excepted from the automatic stay.[139]

***289** On the other hand, the First Circuit Bankruptcy Appellate Panel held that because the debtor's confirmed chapter 13 plan did not "explicitly and conspicuously" preclude tax refund intercepts, and tax intercepts are excepted from the automatic stay, there was no stay violation and the state was free to continue its interceptions as a means to satisfy its domestic support obligation more expeditiously, outside the plan.[140] A contrary result occurred in *Burnett*, where a chapter 13 debtor's confirmed plan authorized his ex-spouse to litigate accrued interest on the child support arrearage only. The Eighth Circuit held that the ex-spouse was forever barred from seeking interest on the spousal support arrearage even though the plan had improperly modified an agreed order allowing the ex-spouse to pursue interest on both child and spousal support.[141] *Burnett* signifies the critical importance of objecting to violative plan provisions so that stay exceptions enacted by Congress for the express purpose of easing and enhancing the collection rights of domestic support creditors are not nullified.[142]

B. "FOR CAUSE" STAY RELIEF TO ADJUDICATE DIVISION OF MARITAL PROPERTY

Stay relief is still required to seek adjudication of property rights in marital assets during the pendency of a bankruptcy case.[143] Bankruptcy courts often grant relief "for cause" to allow the adjudication of property division in the family court.[144] Absent stay relief, the family court could only set the amount of support and determine child custody issues. The practical problem, as recognized by bankruptcy judges, is undertaking such piecemeal litigation in courts that are accustomed to taking a holistic approach to establishing support and dividing marital assets.[145] Therefore, in the spirit of comity and judicial efficiency, deference is given to family courts so they not only establish support and custody issues, but can also distribute marital property in a cohesive manner, with the best interests of the family in mind.

Moreover, the equitable division of marital assets between divorcing ***290** spouses "is uniquely a problem of interpretation

and application of domestic relations laws . . . [and] it is appropriate for bankruptcy courts to avoid incursions into family law matters out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters."[146] Section IV below discusses in greater detail this comity and acknowledgment of family courts' expertise in the realm of domestic relations matters, including, and most relevant here, determination of the equitable distribution of marital property.

In deciding whether to grant relief from stay to allow a state court to adjudicate property division issues, bankruptcy courts balance the potential prejudice to a debtor's estate against the hardship that would befall a movant if relief was denied.[147] The Colorado bankruptcy court provided a thorough analysis in deciding whether to grant relief to the debtor's estranged common law spouse who sought relief to obtain a division of marital property in a pending divorce action.[148] The court observed that it retained jurisdiction to adjudicate the impact of the state court's property division, and since relief was limited to entry of judgment, any enforcement of that judgment needed to occur in the bankruptcy court.[149] Even though there were allegations of fraud and collusion between the debtor and his estranged spouse, the court determined that such "game playing . . . should not distract this court from acknowledging that, absent extraordinary circumstances, the divorce court is the best forum for the division of marital assets."[150]

Stay relief was similarly granted to allow a former spouse to seek enforcement of an obligation previously imposed by the state court, where the bankruptcy court determined that the debtor's petition was, at least in part, an attempt to frustrate the collection rights imposed by that order.[151] Another bankruptcy court observed "[r]elief is liberally granted out of concern that bankruptcy will be used as a weapon in an ongoing battle between former spouses."[152]

A New York bankruptcy court likewise analyzed numerous factors in granting stay relief to permit the family court to enter an order to equitably ***291** distribute the marital assets, with the bankruptcy court retaining jurisdiction to enforce the judgment, establish the priorities of claims, and otherwise protect creditors' rights under the Code.[153] Thus, once the family court determines the property rights of the divorcing spouses, the bankruptcy court addresses the impact of that determination in the debtor's bankruptcy case.[154] Conversely, a Virginia bankruptcy court determined there was no cause to lift the stay for a property division in the state court, where the property could be more efficiently administered in the bankruptcy case through a sale by the trustee.[155] Similarly, stay relief was denied to the debtor's ex-spouse because there was equity in property above her lien and enforcement of the family court's property division would defeat the debtor's means of effectuating his chapter 13 plan.[156]

Where relief from stay is granted for the family court to determine the division of marital assets, then a chapter 7 trustee may intervene in the pending divorce action to ensure that creditors' interests are properly considered by the family court in its determination.[157] In addition, and of particular concern, is the potential for divorcing spouses to collude in formulating a divorce agreement that places title to all or substantially all of the marital assets in the non-debtor spouse, and then seek the family court's approval of this agreement. The trustee's intervention in the state court proceeding, and the bankruptcy court's entry of a lift stay order that reserves jurisdiction over enforcement of any judgment, can help alleviate these concerns.[158] At least one court has indicated, however, that intervention is inappropriate because the trustee is not in privity with parties to the divorce action.[159] Instead, the court suggested that the rights of creditors could be protected by a ***292** trustee's avoidance action or pursuit of other remedies such as the imposition of a constructive trust, on property awarded to the non-debtor party.[160]

Lastly, as an alternative to lifting the say, a bankruptcy court can abstain from an action and remand it back to state court, if the pending case involves state divorce law and related issues. The bankruptcy court's authority to abstain from hearing a matter derives from 28 U.S.C. § 1334(c)(1), which provides for discretionary abstention "in the interest of justice, or in the interest of comity with State courts or respect for State law."[161] Bankruptcy courts weigh various court-created factors to determine whether to exercise their discretion to permissively abstain from hearing a bankruptcy proceeding involving pending state domestic law issues.[162]

III. NONDISCHARGEABILITY OF SUPPORT AND OTHER DOMESTIC RELATIONS DEBTS

BAPCPA has significantly extended the reach of nondischargeable support and divorce-related debts under § 523(a)(5) and (a)(15) of the Bankruptcy Code. Under BAPCPA, these two divorce-related exceptions now exclude all marital and domestic relations debts from discharge, regardless of whether they are in the nature of support or property division, with the only requirements being that they were incurred by a spouse, former spouse or child of the debtor in connection with a separation or divorce, or an action related to a divorce. The amendments to the nondischargeability provisions have been so expansive that the debtor's discharge now automatically excludes both § 523(a)(5) and (a)(15) debts from discharge in chapter 7, unless the debtor files a complaint resulting in a dischargeable determination.[163]

***293 A. SECTION 523(A)(5)**

Section 523(a)(5) of the Bankruptcy Code prevents discharge of domestic support obligations.[164] Obligations in the nature of support have been excepted from discharge since enactment of the Bankruptcy Code in 1978, thus being the first real protection afforded to domestic creditors in bankruptcy proceedings.[165] The Welfare Reform Act of 1996 altered the Bankruptcy Code and Social Security Act[166] to add § 523(a)(18)--which provided that a debt owed under state law to a state or municipality that was in the nature of support, and enforceable under Title IV-D of the Social Security Act, was not discharged.[167] Prior to BAPCPA, § 523(a)(18) was applicable in chapter 7 and chapter 11 cases, but not in chapter 13 because § 1328(a), regarding discharge in chapter 13 cases, was not amended to include (a)(18) in its list of exceptions from discharge.[168] Because of the expanded scope of the defined term "domestic support obligation" under BAPCPA, these governmental claims are now included under the nondischargeability provision relating to domestic support obligations in §523(a)(5), and § 523(a)(18) was rendered obsolete.

Before BAPCPA, adjudication under § 523(a)(5) required that courts determine what was "actually in the nature of alimony, maintenance and support"; post-BAPCPA, that analysis has not changed, and the same precedents apply.[169] When issuing nondischargeability determinations, bankruptcy courts must render independent findings regarding whether obligations labeled support are actually in the nature of support, as that term is defined under federal law.[170] A party seeking nondischargeability under § 523(a)(5) bears the burden of proof on all elements by a preponderance of the evidence.[171] Neither issue preclusion nor collateral estoppel prevents a bankruptcy ***294** court from making an independent § 523(a)(5) determination, despite a state court's labelling of an order as support in a divorce or other domestic relations matter.[172]

Bankruptcy courts look at the totality of circumstances in making their independent findings regarding whether an obligation labeled support is actually in the nature of support under federal law.[173] In doing so, courts evaluate the intent of the court in its order, or the parties in their agreement, at the time the order or agreement (as approved by the family court) arose.[174] While there is no exclusive list, factors determining intent that frequently appear in bankruptcy court decisions include:

> [T]he language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments.[175]

Utilizing these and other factors, a variety of expenses have been determined to be nondischargeable support obligations, including mortgage payments, education expenses, medical expenses, and health and life insurance costs.[176] Large lump sum and installment payments, and even a debt assumption provision, have been held to be nondischargeable support obligations.[177] ***295** Also, professional fees for attorneys representing a dependent of the debtor, guardian ad litem fees, and psychologist and accountant fees, have all been held to be nondischargeable support obligations.[178] Generally speaking, if the professional fees are incidental to obtaining a domestic support obligation, they will be treated at nondischargeable; in others words, the fees follow the nature of the principal award.[179]

B. SECTION 523(A)(15)

Section 523(a)(15) was added to the Bankruptcy Code in the 1994 Amendments to restrain the discharge of property division, hold harmless and debt assumption obligations in a divorce decree or separation agreement.[180] Section 523(a)(5)'s limitation to nondischarge of support debts had previously allowed debtors to leave ex-spouses saddled with marital debt and little or no alimony.[181] Former § 523(a)(15) required that the non-debtor plaintiff file an adversary proceeding to establish that the debtor had the ability to pay the marital debt and the detriment to the plaintiff outweighed the benefit to the debtor in having the debt discharged.[182] Prior to BAPCPA, § 523(a)(15) claims were routinely defeated based on the debtor's inability to pay.[183]

BAPCPA revamped the substantive requirements of nondischargeability under § 523(a)(15) by completely eliminating this balancing test.[184] Now, ***296** nondischargeability under § 523(a)(15), like § 523(a)(5), is automatic, with no need to file an adversary proceeding.[185] Consequently, § 523(a)(15) now effectively provides an automatic exception to discharge for all non-support marital debts to a spouse, former spouse or child of the debtor incurred by the debtor either in the course of a divorce or separation, or in connection with a divorce or separation-related agreement or decree. Recent caselaw likewise construes § 523(a)(15) broadly to include non-support marital claims for attorney's fees of a non-debtor ex-spouse incurred in litigating property and other non-support marital dissolution matters.[186] Other, more typical examples of nondischargeable non-support marital debts under § 523(a)(15) include property and debt division obligations such as lump sum and other one-time payments or obligations;[187] debts for mortgage and car payments;[188] property equalization payments;[189] and hold harmless and indemnity provisions.[190]

*297 C. ADJUDICATING NONDISCHARGEABILITY OF SUPPORT AND OTHER DOMESTIC DEBTS

State courts have had concurrent jurisdiction to adjudicate cases arising under § 523(a)(5) since enactment of the Code in 1978.[191] BAPCPA expanded the concurrent jurisdiction of family courts to include adjudication of § 523(a)(15) claims.[192] This shared jurisdiction arises from the deletion of § 523(a)(15) from the list of exclusive jurisdiction exceptions contained in § 523(c) of the Code.

While the notion of automatic nondischargeablity indicates that a domestic creditor in theory no longer must file an adversary proceeding under § 523 to protect her claim, there remain practical and legal reasons for doing so.[193] In a chapter 13 case, domestic obligations not in the nature of support, which are nondischargeable under § 523(a)(15), can still be discharged through plan confirmation pursuant to § 1328(a).[194] Accordingly, domestic creditors must protect their rights in reorganization cases by objecting to plans that mischaracterize domestic support obligations; and, if necessary, file a complaint to determine that a claim is in the nature of a nondischargeable domestic support obligation under § 523(a)(5).[195] A debtor also might file an action to determine that a claim constitutes a property interest within the meaning of § 523(a)(15), rather than a domestic support obligation, in order to prevent liquidation of exempt property to satisfy the claim, as allowed by § 522(c)(1).[196] BAPCPA also amended the timing requirements for bringing a § 523(a)(15) claim. A party seeking to commence a § 523(a)(15) action can do so at any time, just like one seeking to adjudicate a § 523(a)(5) claim, and the litigant is no longer restricted to commencing this nondischargeability action within sixty days after the first date set for the § 341 meeting of creditors.[197]

*298 IV. COMITY AND THE EXPANDED JURISDICTION OF FAMILY COURTS

In practice, most bankruptcy and family courts respect the distinct role each court plays in the process of determining the impact of a divorce or other domestic relations matter on a debtor's bankruptcy case, and vice versa. Although comity exists, the rules regarding the exclusive and intersecting jurisdictions of bankruptcy and family courts are nonetheless complex.

A. COMITY BETWEEN THE COURTS

Federal courts have not sought to invade state court rulings in the area of domestic relations, and have generally deferred to family courts whenever possible, as the court with specialized expertise in this area.[198] Overall, bankruptcy courts recognize their role in considering the impact of domestic support obligations and other family law issues that arise in a bankruptcy

case, but are careful not to "second-guess" the actions of the state court, or "plough" new territory regarding state law.[199] A bankruptcy court reviewing a state court divorce decision noted "[t]his Court is not seeking to, nor does it have any interest in, re-litigating the property division between [the Debtor's ex-spouse] and the Debtor."[200] Faced with a motion filed by the debtor's ex-spouse seeking approval and enforcement of a final divorce decree, the bankruptcy court limited its role to analyzing the impact of the state court's ruling regarding the equitable division of marital property on the debtor's bankruptcy estate.[201]

Many bankruptcy decisions similarly reflect bankruptcy courts' inclination to refrain from review of state court decisions in the area of domestic relations.[202] These cases portray a tendency to foster comity between the two jurisdictions and suggest a mutual goal of fair adjudication in both forums.[203] For the most part, there are very few situations where the bankruptcy court will entertain issues typically decided in the family court, or re- ***299** litigate issues already decided there. Indeed, it would usually be a waste of judicial resources to do so.[204] As a result, most state court decisions are left undisturbed, with the bankruptcy court's role limited to determining a decision's impact in the debtor's case.

B. EXCLUSIVE JURISDICTION OF THE COURTS

The bankruptcy court's grant of jurisdiction derives, in part, from 28 U.S.C. § 1334(e), which states that the district court has exclusive jurisdiction over all property of the debtor and the bankruptcy estate as of the petition date.[205] Therefore, the bankruptcy court has exclusive jurisdiction to determine what constitutes property of the estate, and likewise to modify or terminate the automatic stay.[206] Accordingly, most courts determine that any modification of the automatic stay by state court action constitutes intrusion into an area of law vested exclusively in the bankruptcy court, and a state court that modifies or dissolves the stay without obtaining bankruptcy court approval risks having its final judgment declared void.[207]

The family court has exclusive jurisdiction to establish or modify an order for domestic support or to collect a domestic support obligation from property that is not property of the estate. As such, the automatic stay specifically excludes from its scope the commencement or continuation of actions regarding the establishment or enforcement of domestic support obligations.[208] Also, as a general matter, and as discussed above in Part II, family ***300** courts can now deal with all non-economic matters without the need for lift stay orders.

C. CONCURRENT AND INTERSECTING JURISDICTION OF THE COURTS

Family courts now share jurisdiction with bankruptcy courts to determine many of the bankruptcy issues that can impact a divorce proceeding. Family courts have concurrent jurisdiction to determine whether, upon the filing of a bankruptcy petition, a matter pending before it is subject to the automatic stay.[209] However, the family court must explicitly rule on whether the automatic stay applies prior to acting on the underlying matter.[210] Because the bankruptcy court has exclusive jurisdiction to adjudicate whether the automatic stay should be terminated or modified, controversy arises in situations where a bankruptcy court views a state court's prior decision that the stay did not apply as erroneous.[211]

If a state court correctly determines that the automatic stay does not apply, and then litigates and decides a matter, then the bankruptcy court is barred by the *Rooker-Feldman* doctrine from exercising what would amount to appellate jurisdiction over any claim that is so intertwined with the state court's decision that exercise of jurisdiction would result in a reversal or modification of the state court's judgment.[212]

Even if the bankruptcy court determines that a party is not barred by the *Rooker-Feldman* doctrine from bringing an action, the bankruptcy court can ***301** nonetheless decide that an action is an improper collateral attack on a prior judgment of the state court.[213] Also, as previously discussed, when a pending proceeding over which the courts share jurisdiction is removed to the bankruptcy court upon the filing of a petition, the bankruptcy court, through its abstention powers, can remand the proceeding back to the state court, where it had a history and could be timely adjudicated.[214]

In addition, and as discussed above in Part III, federal courts have long recognized that divorce courts and bankruptcy courts

have concurrent jurisdiction to determine whether a debt constitutes a domestic support obligation for purposes of ruling on dischargeability under

§ 523(a)(5).[215] Under BAPCPA, this concurrent jurisdiction now extends to property settlements and other non-support marital debts excepted from discharge under § 523(a)(15).[216] Both courts also have concurrent jurisdiction to adjudicate and enforce a violation of the discharge injunction, which prohibits a state court from amending or modifying a divorce decree in an attempt to reinstate marital debts discharged in bankruptcy.[217]

D. PREFERENCES AND FRAUDULENT TRANSFERS

Another issue that arises during concurrent and sequential divorce and bankruptcy proceedings is the existence of preferential or fraudulent transfers. Generally, and subject to the requirements and limitations of § 547 of the Bankruptcy Code, a bankruptcy trustee can avoid a transfer of the debtor's property to pay a debt made within ninety days of the petition, if the debtor was insolvent at the time of the transfer. Payments or transfers of property to satisfy domestic support obligations are excepted from this general ***302** rule by operation of § 547(c)(7).[218] Conversely, payments on account of a non-support domestic claim made within ninety days of the petition, and one year if to an insider, are not excepted from preference liability and are often pursued by trustees.[219]

Similarly, subject to the requirements and limitations of § 548 of the Bankruptcy Code, a bankruptcy trustee can avoid a transfer of the debtor's property made within two years of the petition if the debtor made the transfer with the actual intent to hinder, delay or defraud creditors, or if the debtor received less than reasonably equivalent value for the transfer and made the transfer when insolvent or became insolvent as a result of the transfer.[220] The trustee can also exercise her "strong arm powers" under § 544 to utilize state fraudulent transfer laws, which generally include both actual and constructive fraud provisions and increase the look-back period to four years.[221]

A trustee's fraudulent transfer action commenced in the bankruptcy court does not constitute appellate review of a state court's judgment sanctioning the challenged transfer, and is therefore not barred by the *Rooker-Feldman* doctrine.[222] Thus, generally speaking, domestic support obligations created, property settlement agreements approved, or property transfers effectuated between the parties, especially if voluntarily agreed to or exercised, ***303** can all be subject to unraveling in the bankruptcy court as a fraudulent transfer if the requisite elements are proven.[223] Nonetheless, the Fifth Circuit expressed its hesitation to permit a trustee to bring a fraudulent transfer action where the property division went to trial in the family court.[224] And, at least two bankruptcy courts, relying on the Supreme Court's decision in *BFP v. Resolution Trust Corp.*, have held that an equitable division of marital assets as part of a regularly conducted divorce proceeding, with no evidence of fraud or collusion, conclusively established reasonably equivalent value.[225]

E. CONCERNS IN RELATION TO BANKRUPTCY DISCHARGE

The permanent discharge injunction contained in § 524(a) voids judgments against the debtor based on the debtor's personal liability for discharged debts.[226] This means that provisions in divorce decrees and separation agreements are void to the extent the debtor assumes or is imposed with liability for discharged debts.[227] The discharge also enjoins the commencement or continuation of an action against the debtor, or property of the debtor, to collect, recover or offset any discharged debt.[228] As discussed above in Part IB, a domestic creditor with a nondischargeable, non-support marital debt is prohibited from pursuing a debtor's exempt assets, whereas a creditor with a nondischargeable domestic support obligation is not enjoined from doing so. Finally, as indicated previously, the discharge injunction precludes a state court from amending or modifying a divorce decree to reinstate discharged debts.[229]

Family and bankruptcy courts have concurrent jurisdiction to entertain a complaint for violation of the discharge injunction, and to enforce the discharge injunction. Importantly, post-BAPCPA, the Bankruptcy Code now automatically excludes from discharge all domestic support obligations and many other property settlement and marital debts, thereby rendering the discharge ***304** inapplicable to most domestic relations debts.[230] Therefore, the scope of a debtor's discharge as it relates to

support and other marital debts is substantially restricted under BAPCPA. When violation of the discharge arises in the domestic relations context, it is likely that the ultimate issue will be whether the debt at issue falls under the § 523(a)(5) or (a)(15) exception to discharge. In chapter 7 cases, either category of domestic debt is excepted from discharge. But if the debtor obtained a chapter 13 discharge, then § 523(a)(15) domestic claims are discharged and the collection efforts would constitute a violation of the discharge injunction.

V. TRUSTEE'S NOTICES TO DOMESTIC SUPPORT CREDITORS AND STATE SUPPORT ENFORCEMENT AGENCIES

On the Senate Floor, shortly before the vote leading to enactment of BAPCPA, then Senator Biden praised the BAPCPA provisions requiring trustees to notify domestic support creditors and family support collection professionals about a debtor's bankruptcy filing and related information. Senator Biden argued at length in favor of the pending bill and its domestic creditor enhancements, largely aimed at protecting women and children, inasmuch as women represent approximately 82% of custodial parents, whereas men represent approximately 18%.[231] Senator Biden described these notice provisions as follows:

> ***305** Bankruptcy Trustees [must] notify a woman of her rights to use the services of her state child support enforcement agency and gives her the agency's address and phone number. Better yet, the Trustee likewise notifies the agency independently of the woman's claim. This is striking.
>
> Women who need help will get the information they need, because the bankruptcy system is charged with reaching out to the family support professionals--acting under the federal family support collection law--and putting them at the service of the women and children who need them.
>
> . . . .
>
> This legislation requires the bankruptcy Trustee to notify both the woman and the family support collection professionals about the dad's release from bankruptcy, his last known address, the name and address of his employer, and a list naming all the bill collectors who will still be collecting from dad.
>
> . . . .
>
> Because of this monitoring, which would be put in place by the bankruptcy system under this bill, mothers and collection agencies can more easily go to court and get that portion of a father's wages that now really belongs to them. Dad may complete his bankruptcy plan, but his obligations do not stop.
>
> . . . .
>
> This legislation builds on the existing Federal Child Support Enforcement Program, that exists to help women of all walks of life receive their support payments.[232]

As enacted, the BAPCPA provisions described by Senator Biden impose a statutory duty on trustees under all chapters of the Code to inform domestic support creditors about their rights in bankruptcy and the resources available to them for assistance in collecting domestic support claims.[233] To this end, pursuant to § 704(c)(1)(A), at case commencement, trustees must notify domestic support obligation creditors regarding their right to use the services of their state's child support enforcement agency.[234] Pursuant to § 704(c)(1)(B), trustees must also notify the state's child support enforcement agency of a debtor's bankruptcy filing and the existence of a domestic support ***306** obligation creditor.[235]

Once a discharge is granted, pursuant to § 704(c)(1)(C), trustees must notify domestic support obligation creditors and state child support enforcement agencies of the entry of the discharge order and provide the address of the debtor and his employer, and include a list of any nondischargeable claims and reaffirmed debts that remain as obligations of a debtor post-bankruptcy.[236]

CONCLUSION

Through BAPCPA, Congress intended to afford greater protections and enforcement rights to ex-spouses and the families of debtors in bankruptcy proceedings. These areas of enhancement for domestic support creditors include the highest priority ranking under the Code, reduced applicability of the automatic stay, increased collection mechanisms, and new notice requirements. The family court's jurisdiction is also expanded to include adjudication of nondischargeability for all non-support domestic claims. As this article demonstrates, through these enhancements, BAPCPA has, for the most part, been successful in achieving its goals in relation to domestic creditors. The success of BAPCPA with regard to domestic creditors has also been bolstered by the history of mutual comity between family and bankruptcy courts, which has largely prevailed in the decade following BAPCPA's enactment.

Footnotes

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1 *See* 151 Cong. Rec. S2463 (Mar. 10, 2005) (statement of Sen. Biden).

2 *See* 145 CONG. REC. H2660-H2661 (May 5, 1999) (statement of Rep. Roukema), *available at* http://origin.www.gpo.gov/fdsys/pkg/CREC-1999-05-05/html/CREC-1999-05-05-pt1-PgH2655-2.htm; 151 Cong. Rec. S2463-S2465 (statement of Sen. Biden).

3 Title IV-D of the Social Security Act: Child Support Enforcement Program, Pub. L. No. 93-647 (1975) (codified at 42 U.S.C. §§ 651-69b (2014)).

4 Pub. L. No. 98-378 (1984) (amending Title IV-D of the Social Security Act to require new and expanded State practices under the Federal Child Support Enforcement Program).

5 *See In re* Dryja, 425 B.R. 608, 613 (Bankr. D. Colo. 2010) ("The unfortunate facts of this case, and many others that involve the interplay between bankruptcy and divorce law, is that there is a need to adjudicate two separate claims to the marital assets: the claims of the spouses and the claims of the creditors. Those interests are very different and the parties to the disputes are different."). *See also* Ellen Vergos, *Bankruptcy Issues Arising in Divorce Practice*, 24 MEM. ST. U.L. REV. 697 (Summer 1994); Roger Adams et al., *Divorce and Separation*, 24 AM. JUR. 2D DIVORCE AND SEPARATION § 477.

6 *See* Alyson Finkelstein, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting From*

Divorce, 18 BANKR. DEV. J. 169 (2001) (hereinafter "Finkelstein").

[7] Finkelstein, *supra*, at 172.

[8] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4134 (1994). Prior to the 1994 Amendments, the Bankruptcy Code did except obligations in the nature of support from discharge. *See* 11 U.S.C. § 34(a)(7) (1978).

[9] 145 CONG. REC. H2660-H2661.

[10] *See* 151 CONG. REC. S2463-2465. Surprisingly, the FY 2014 Support Enforcement Preliminary Report, Table P-5 Cumulative Total Distributed Collections Fiscal Years 1976-2014, indicates that in the decade since passage of BAPCPA, the percentage increase in governmental support collections on average has declined as compared to the 10-year period prior to BAPCPA. OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2014 PRELIMINARY REPORT (2015), *available at* http://www.acf.hhs.gov/programs/css/resource/fy-2014-preliminary-report. The Cumulative Total Distributed Collections for this thirty-eight-year period, which begins with enactment of the Federal Child Support Enforcement Program in 1975, is over $501.5 billion.

[11] *See* 151 CONG. REC. S2474 (yeas-74; nays-25; non-voting-1); S2462-S2465. Another cornerstone of BAPCPA is the "means test," also enacted to curb abuse. Under the means test, an individual can file under chapter 7 only if analysis of the debtor's income and expenses shows that he or she cannot repay a minimum predetermined amount or percentage to unsecured creditors. 11 U.S.C. § 707(b). Domestic support obligations received by the debtor must be included as income under the means test; correspondingly, domestic support obligations paid by the debtor are includable as expenses. 11 U.S.C. § 707(b)(2).

[12] Claire Cain Miller, *The Divorce Surge is Over, but the Myth Lives On*, N. Y. TIMES, T HE U PSHOT B LOG (Dec. 2, 2014), *available at* http://www.nytimes.com/2014/12/02/upshot/the-divorce-surge-is-over-but-the-myth-lives-on.html.

[13] *Id.*

[14] *But see* Andrew Cosgrove, *Breaking Up Is Hard To Do* ... Especially When Bankruptcy Is Involved, Note, AM. BANKR. INST. L. REV. 235, 271 (2006) (hereinafter "Cosgrove"); Finkelstein, *supra*, at 193 (both authors concluding further amendments to the Bankruptcy Code are necessary to give domestic support creditors all rights and protections due to them).

[15] 570 U.S.--, 133 S.Ct. 2675 (2013).

[16] 576 U.S.--, 135 S.Ct. 2584 (2015).

[17] Pub. L. No. 104-199, 110 Stat. 2419 (1996).

[18] *Windsor*, 133 S.Ct. at 2695-96.

[19] *Obergefell,* 135 S.Ct. at 2604-2608

[20] *Id*.

[21] *Id*.

[22] *See generally*, Jackie Gardina, *Bankruptcy and the Unresolved DOMA Questions*, 22 J. BANKR. L. & PRAC. 2 Art. 1 (Feb. 2013); Jackie Gardina, *Same-Sex Marriages in Bankruptcy:*
A Path Out of the Public Policy Quagmire, NORT. ANN. SURV. OF BANKR. LAW (2013); Jackie Gardina, *The Questions that* United States v. Windsor *Didn't Answer*, 33 AM. BANKR. INST. J. 39 (March 2014) (noting that Windsor only declared DOMA § 3 unconstitutional and that § 2 remained intact, still creating confusion regarding interstate recognition of same-sex marriages). *Obergefell* cleared up this lingering confusion.

[23] *See* 11 U.S.C. § 34(a)(7) (1978).

[24] However, as indicated in note 7 *supra*, since enactment of the Bankruptcy Code in 1978, obligations in the nature of support were excepted from discharge. *See* 11 U.S.C. § 34(a)(7) (1978).

[25] 11 U.S.C. § 547(c)(7). In addition, an uncodified amendment allows child support creditors or their representatives to appear and intervene in bankruptcy proceedings without charge or meeting local rules, provided the creditor or representative files a form in the bankruptcy court detailing the child support debt, its status, and its characteristics. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4134 (1994).

[26] 11 U.S.C. § 547(c)(7).

[27] 500 U.S. 291 (1991) (holding that under state law the debtor did not possess interest to which lien could attach; therefore ex-spouse could not avoid "fixing of a lien" on interest debtor did not have at the time).

[28] *Id.*

[29] *See* 11 U.S.C. § 522(f)(1).

[30] *See* Liz A. Carson, *The Domestic Support Obligation Under BAPCPA*, NORTON BANKR. L. ADVISER 2 (No. 6 2006) (hereinafter "Carson") (noting that BAPCPA treated domestic support creditors favorably); Dennis Bezanson and Gary Rudolph, *The"Super-Priority" of a "Domestic Support Obligation*," JOURNAL OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES, Spring 2006, at 20, 22 (hereinafter "Bezanson and Rudolph") (numerous provisions within BAPCPA evidence clear congressional intent to ensure payment of domestic support creditors' claims).

[31] 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, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt. 11 U.S.C. § 101(14A).

[32] *See* Carson, *supra*, at 1-2. *See* discussion regarding entitlement to interest on support claim, note 61.

[33] 11 U.S.C. § 507(a)(1). *See* David C. Hoskins & Ellen R. Welner, *Bankruptcy and Divorce: What Divorce Counsel Should Know about Bankruptcy*, 37 COLO. LAW. 35, 36 (Oct. 2008) (hereinafter "Hoskins and Welner") (discussing cases interpreting BAPCPA's new definition of "domestic support obligation").

[34] 11 U.S.C. §101(14A). *See* Rodriguez v. Rodriguez (*In re* Rodriguez), 456 B.R. 532 (Bankr. D.N.M. 2011); *see also* Deemer v. Deemer (*In re* Deemer), 360 B.R. 278 (Bankr. N.D. Iowa 2007*);* In re O'Brien, 339 B.R. 529, 531 (Bankr. D. Mass. 2006).

[35] *In re* Trentadue, 527 B.R. 328 (Bankr. E.D. Wis. 2015), *aff'd sub nom.* Trentadue v. Gay, 538 B.R. 770 (E.D. Wis. 2015) (citing Alan N. Resnick & Henry J. Sommer, 4 COLLIER ON BANKRUPTCY P 523.11[6] (16th ed. 2014)); 8B C.J.S. BANKRUPTCY § 1073 (updated Sept. 2014). *See also* Werthen v. Werthen (*In re* Werthen), 329 F.3d 269, 272 (1st Cir. 2003); *In re* Krueger, 457 B.R. 465 (Bankr. D.S.C. 2011).

[36] *See Werthen*, 329 F.3d at 272.

[37] McNeil v. Drazin, 499 B.R. 484 (D. Md. 2013).

[38] *See, e.g.,* Phegley v. Phegley (*In re* Phegley), 443 B.R. 154, 157 (B.A.P. 8th Cir. 2011); *In re* Angelo, 480 B.R. 70 (Bankr. D. Mass. 2012); *see also In re* Anthony, 453 B.R. 782 (Bankr. D.N.J. 2011); Maes v. Maes (*In re* Maes), 342 B.R. 259 (Bankr. W.D. Ky. 2006); Wilson v. Wilson (*In re* Wilson), 342 B.R. 268 (Bankr. W.D. Ky. 2006); Petrosky v. Petrosky (*In re* Petrosky), 325 B.R. 475 (Bankr. M.D. Fla. 2005).

[39] Trentadue v. Gay, 538 B.R. at 774; *In re* Butler, 308 B.R. 1 (Bankr. S.D.N.Y. 2004) (no factor list is exclusive and all evidence, direct or circumstantial, contributing to determination of intent is relevant); *cf. In re* O'Brien, 339 B.R. 529 (issues of fact regarding intent precluded court from summarily deciding whether attorney's fees were domestic support obligation.).

[40] *See* Smith v. Pritchett (*In re* Smith), 398 B.R. 715, 721-22 (B.A.P. 1st Cir. 2008); *In re* Trentadue, 527 B.R. at 333 (citing Henry J. Sommer & Margaret Dee McGarity, COLLIER FAMILY LAW AND THE BANKRUPTCY CODE P 6.04[2] (1991, Suppl. 2014)); 9D AM.JUR.2d BANKRUPTCY § 3646 (updated Aug. 2014).

[41] *See In re* Westerfield, 403 B.R. 545, 554 (Bankr. E.D. Tenn. 2009) (debtor's hold-harmless obligation to ex-wife for making mortgage payments was not excessive, and was nondischargeable domestic support obligation)*; cf. In re Smith*, 398 B.R. at 721-22 (daily sanction imposed on debtor for failure to make alimony payment was sufficiently high so as not to have been intended as support, but rather was punitive).

[42] McNeil v. Drazin, 499 B.R. 484, 493 (citing *In re* Baker, No. 12-01090-8-SWH, 2012 WL 6186683, at *4 (Bankr. E.D.N.C. Dec. 12, 2012) (citing numerous decisions concluding attorney's fees arising from divorce proceeding were in nature of maintenance or support)).

[43] *In re Trentadue*, 527 B.R. at 333.

[44] *Id.*; *see also* Aldrich v. Papi (*In re* Papi), 427 B.R. 457, 462 n.5 (Bankr. N.D. Ill. 2010) ("Although [BAPCPA] ... added the term 'DSO' to the Code, that term was developed from the definition of nondischargeable debt for alimony, maintenance, and support in former Section 523(a)(5).").

[45] Kassicieh v. Battisti (*In re* Kassicieh), 467 B.R. 445 (Bankr. S.D. Ohio 2012*)*, *aff'd* 482 B.R. 190 (B.A.P. 6th Cir. 2012) (exploring three lines of pre-and post-BAPCPA cases on this issue: "(1) the plain-meaning approach, requiring that the payee of the debt fall within one of the specifically-named categories; (2) a limited exception to the plain-meaning rule for obligations on which there is joint liability, or for which the nondebtor party would otherwise suffer an adverse impact if the debt were to be discharged; and (3) the view that the nature of the obligation, rather than the identity of the payee, controls.").

[46] *See, e.g.*, *In re* Marshall, 489 B.R. 630 (Bankr. S.D. Ga. 2013); *In re* Ballinger, 502 B.R. 558, 564 (Bankr. E.D. Ark. 2013); *In re* Johnson, 445 B.R. 50 (Bankr. D. Mass. 2011); *In re* Andrews, 434 B.R. 541, 548 (Bankr. W.D. Ark. 2010); Kassicieh v. Battisti (*In re* Kassicieh), 425 B.R. 467, 477 (Bankr. S.D. Ohio 2010); Simon, Schindler & Sandberg v. Gentilini (*In re* Gentilini), 365 B.R. 251, 256 (Bankr. S.D. Fla. 2007*)*.

[47] *In re* Kassicieh, 482 B.R. 190 (B.A.P. 6th Cir. 2012) (affirming bankruptcy court's "well-reasoned opinion" which provided thorough analysis of three views as outlined in note 45 *supra*, determining third view to be the majority and better reasoned view).

[48] *Kassicieh,* 467 B.R. at 451, *aff'd*, 482 B.R. 190; *but see In re* Murphy, 473 B.R. 197, 200 (Bankr. E.D. Mich. 2011) (consent judgment for payment of ex-wife's attorney's fees directly to attorney not domestic support obligation because not payable to spouse, former spouse, or child of debtor).

[49] Holiday v. Kline (*In re* Kline), 65 F.3d 749, 750 (8th Cir.1995); Miller v. Gentry (*In re* Miller), 55 F.3d 1487, 1490 (10th Cir.1995); Dvorak v. Carlson (*In re* Dvorak), 986 F.2d 940, 941 (5th Cir.1993); Peters v. Hennenhoeffer (*In re* Peters), 964 F.2d 166, 167 (2d Cir. 1992); Long v. Calhoun (*In re* Calhoun), 715 F.2d 1103 (6th Cir.1983); Pauley v. Spong (*In re* Spong), 661 F.2d 6, 7 (2d Cir.1981).

[50] *See* Levin v. Greco*,* 415 B.R. 663, 667 (N.D. Ill. 2009).

[51] Kelly v. Burnes (*In re* Burnes), 405 B.R. 654 (Bankr. W.D. Mo. 2009); *see also O'Brien*, 339 B.R. at 531.

[52] *In re Trentadue*, 527 B.R. 328.

[53] *In re Trentadue*, 538 B.R. at 775 (citing Macy v. Macy, 114 F.3d 1 (1st Cir. 1997)); *In re* Maddigan, 312 F.3d 589, 594 (2d Cir. 2002); *In re* Peters 964 F.2d 166, 167 (2nd Cir. 1992); In re Hudson, 107 F.3d 355, 357 (5th Cir. 1997); Rogers v. Morin, 189 F. App'x 299, 302 (5th Cir. 2006); *In re* Dvorak, 986 F.2d 940, 941 (5th Cir. 1993); In re Rehkow, No. AZ-05-1395-AMOS, 2006 WL 6811011, at *3-4 (B.A.P. 9th Cir. Aug. 17, 2006) aff'd, 239 F. App'x 341 (9th Cir. 2007); *In re* Catlow, 663 F.2d 960, 963 (9th Cir.1981); *In re* Miller, 55 F.3d 1487, 1490 (10th Cir.1995); *In re* Jones, 9 F.3d 878, 882 (10th Cir.1993); In re Ratcliff, 195 B.R. 466, 468 (Bankr.C.D.Cal.1996); *In re* Gionis, 170 B.R. 675, 683 n.11 (B.A.P. 9th Cir. 1994), *aff'd* 92 F.3d 1192 (9th Cir.1996); Prensky v. Clair Greifer LLP, No. 09-6200, 2010 WL 2674039 (D.N.J. June 30, 2010); *In re* Johnson, 445 B.R. 50, 58-60 (Bankr.D.Mass.2011); *In re* Tarone, 434 B.R. 41 (Bankr. E.D.N.Y. 2010); *In re* Andrews, 434 B.R. 541 (Bankr. W.D. Ark. 2010); *In re* Papi, 427 B.R. 457 (Bankr. N.D. Ill. 2010); *In re* Sullivan, 423 B.R. 881 (Bankr. E.D. Mo. 2010); *In re* Fricke, Adv. No. A01170, 2010 WL 5475808 (Bankr. N.D. Ill. Dec. 30, 2010)).

[54] *In re Kassicieh,* 467 B.R. 445, 450-51, citing as follows:
See Lauderdale v. Papadopoulos (*In re* Lauderdale), [No. 06-20879,] 2012 WL 407097, at *1 (5th Cir. Feb. 9, 2012) ("[A]ttorney fees owed to the guardian/attorney ad litem of a child are not dischargeable."); *In re* Anderson, 463 B.R. 871, 876 (Bankr. N.D.Ill. 2011) ("[F]ees due to a child representative [are] held to be within the domestic support exception of § 523(a)(5)."); *In re* Laskero, [No. 05 B 53494,] 2011 WL 4828843, at *3 (Bankr.N.D.Ill. Oct. 11, 2011) (upholding post-discharge state court ruling that guardian ad litem fees were not discharged in debtor's bankruptcy case); Dinicola v. Slimak (*In re* Dinicola), [No. 10-19506,] 2011 WL 3759468, at *3 (Bankr.N.D.Ohio Aug. 25, 2011) ("This Court is persuaded by the extensive case law finding guardian ad litem fees nondischargeable. The current facts involve a court appointed guardian ad litem whose assigned duties were in the nature of support of the debtor's children throughout the debtor's divorce proceedings. Accordingly, the debt owed to the defendant is a

'domestic support obligation' excepted from discharge pursuant to 11 U.S.C. § 523(a)(5)."); O'Brine v. Gove (*In re* Gove), [No. 09-22405-JNF,] 2011 WL 111155, at *7-8 (Bankr. D.Mass. Jan. 13, 2011) (finding debt to guardian ad litem to be nondischargeable because debt: (1) was incurred for support of the child; (2) was incurred in connection with an order of a court of record, and (3) had not been assigned to a non-governmental entity); Cnty. of LaCrosse v. Stevens (*In re* Stevens), 436 B.R. 107, 109 (Bankr. W.D. Wis. 2010) ("The services of a guardian ad litem in the primary divorce proceeding, though extending beyond support to custody and visitation, are generally sufficiently connected to the core concern of the Code for protection of family obligations to except a reasonable fee for such services from discharge ... Although [courts in] dicta have speculated that a guardian ad litem's fees might be dischargeable if they lacked a logical nexus with the support of the child, that situation must be exceedingly rare. It is not present here." (citations and internal quotation marks omitted)); Epstein v. Defilippi (*In re* Defilippi), 430 B.R. 1, 3-5 (Bankr.D.Me.2010) (debt to guardian ad litem incurred by debtors--grandparents named as "de facto parents" by the state--was excepted from discharge under § 523(a)(5)).

[55] 11 U.S.C. § 507(a)(1)(A), (B); *see* BANKRUPTCY AND DOMESTIC RELATIONS MANUAL, Chapter 12, § 12:4.

[56] 11 U.S.C. § 1322(a)(4). The only requirement for entitlement to this subordination is that "the plan provides that all of the debtor's projected disposable income for a 5-year period ... will be applied to make payments under the plan." *Id.*

[57] 11 U.S.C. § 1322(a)(2). As indicated *supra*, note 56, there is no requirement that subordinated (B) claims get paid before the priorities that follow in § 507, as long as all of the debtor's projected disposable income is being devoted to the plan. Since all other priority claims must be paid in full unless the holder agrees otherwise, it follows that other priorities could be paid in full but the § 507(a)(1)(B) claim is paid in part, or not at all, under the plan.

[58] Wisconsin Dept. of Workforce Dev. v. Ratliff, 390 B.R. 607 (E.D. Wis. 2008); *In re* Sosa, No. 09-13389-SSM, 2010 WL 318484 (Bankr. E.D. Va. Jan. 21, 2010).

[59] Bankr. and Dom. Rel. Manual, § 12:4.

[60] *See* 11 U.S.C. § 1328(a)(2).

[61] Interest is allowed on nondischargeable § 507(a)(1)(A) priority claims as well. *See In re* Diaz, 647 F.3d 1073 (11th Cir. 2011); *In re* Anthony, 453 B.R. 782 (state law provided family courts with discretion to award interest on support arrears; no indication state court had elected to award interest and bankruptcy court declined to do so as well); *In re* Wright, 438 B.R. 550 (Bankr. M.D.N.C. 2010). *See also* Bankr. and Dom. Rel. Manual, § 12:4 (Although some cases hold that only the prepetition domestic support obligation is an allowed claim and that interest on this arrearage is not entitled to priority, the better interpretation is that interest is also a nondischargeable priority.).

[62] *See Sosa*, 2010 WL 318484 at *1 (debtors plan stated intent to strip off wholly unsecured deed of trust).

[63] *See* 11 U.S.C. § 1328(a)(2); *see also In re Sosa*, 2010 WL 318484, *2 ("There is no free lunch [and] any amount not paid at the conclusion of the plan is not discharged and may still be collected from the debtor.").

[64] *See In re* Wheeler, No. 09-41866-JRR-13, 2010 WL 503112 (Bankr. N.D. Ala. Feb. 5, 2010).

[65] *See* 11 U.S.C. § 507(a)(1) (A), (B).

[66] 11 U.S.C. § 507(a)(1); *see also* former 11 U.S.C. § 507(a)(7).

[67] *See* Davis. v. Davis (*In re* Davis), 170 F.3d 475 (5th Cir. 1999) (holding § 522(c) is ambiguous and exempt property remains liable after bankruptcy to a domestic support creditor "only to the extent it would have been exposed if the bankruptcy had not occurred").

[68] *See* MICHAELA WHITE, MARIANNE CULHANE & NATHALIE MARTIN, WHEN WORLDS COLLIDE: BANKRUPTCY AND ITS IMPACT ON DOMESTIC RELATIONS AND FAMILY LAW 27 (ABI 3d ed. 2005) (hereinafter "White, Culhane & Martin"); William Houston Brown, *Taking Exception to a Debtor's Discharge*, 79 AM. BANKR. L.J. 419, 436 (2005) (hereinafter "Brown") (noting that amendment overrules prior state law to contrary).

[69] *See e.g.*, *In re* Quezada, 368 B.R. 44 (Bankr. S.D. Fla. 2007); *In re* Vandeventer, 368 B.R. 50 (Bankr. C.D. Ill. 2007); *In re* Ruppel, 363 B.R. 42 (Bankr. D. Or. 2007); *In re* Covington, 368 B.R. 38 (Bankr. E.D. Cal. 2006).

[70] *Quezada*, 368 B.R. at 49.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 560 U.S. 770, 130 S.Ct. 2652 (2009); *see* 11 U.S.C. § 522(d) for federal exemptions with capped monetary limits, as opposed to an unlimited exemption in the asset itself. There are far fewer federal exemptions in the asset itself, a/k/a "in kind" exemptions, which are limited to things such as professionally prescribed health aids, social security, veteran's and disability benefits. *Id.*

[77] 546 F. App'x 235, 239 (4th Cir. 2013).

[78] *See* Stephen L. Sepinuck et al., State Homestead Exemptions Applicable in Bankruptcy as of December 1, 2014, http://sepinuckruschbankruptcy.com/forms/SR_Homestead_Exemption_Table_2014.pdf (last visited November 8, 2015).

[79] *In re* Childers, 526 B.R. 608, 612, 615 (Bankr. D.S.C. 2015).

[80] *Childers*, 526 B.R. at 611 (citing *In re* Traverse, 753 F. 3d 19 (1st Cir. 2014), *cert. denied sub nom.*, DeGiacomo v. Traverse,--U.S.--, 135 S.Ct. 459 (2014)). *Traverse* is an outlier in holding that while a trustee may hold an interest in an avoided lien, the trustee has no ownership interest in the underlying asset sufficient to permit sale of that asset.

[81] *Traverse*, 753 F. 3d at 27.

[82] *Childers*, 526 B.R. at 612, 615.

[83] No. 11-51327, 2012 WL 1856973 (Bankr. E.D. Ky. May 22, 2012).

[84] *Id.* at *2.

[85] *Cf. id.* (court denied trustee's and IRS's initial motions to disburse exempt proceeds to the IRS where IRS had not yet levied).

[86] *See, e.g.*, Fed. R. Civ. P. 22.

[87] *Quezada*, 368 B.R. at 49.

[88] *But see In re* Elmasri, 369 B.R. 96 (Bankr. E.D.N.Y. 2007*), aff'd* 2009 WL 8758089 (E.D.N.Y. 2009), *aff'd*, 374 F. App'x 75 (2d Cir. 2010) (§ 522(c) does not preempt state law and does not enable creditors holding nondischargeable domestic support obligations to execute against property that would be exempt from execution under state law); *In re* Covington, 368 B.R. 38 (Bankr. E.D. Cal. 2006) (creditor should seek enforcement of domestic support obligation in state court where the state court can "deal with the availability and extent of nonbankruptcy exemptions").

[89] Fed. R. Bankr. P. 7069.

[90] *Quezada*, 368 B.R. at 49.

[91] *See Angelo*, 480 B.R. at 87-88 (bankruptcy court, reviewing family court's postpetition contempt judgment against the debtor, held that the judgment limited collection of ex-spouse and her divorce attorney's domestic support obligations from debtor's exempt retirement funds); *In re* O'Brien, 367 B.R. 240, 242 (Bankr. D. Mass. 2007) (granting relief from stay for non-debtor ex-spouse to seek enforcement of pre-petition award of her attorney's fees that family court ordered to be paid from debtor's exempt retirement accounts). Indeed, these cases illustrate that family courts normally award payment from a delinquent party's exempt assets to satisfy a contempt judgment against him for non-payment of support.
The author represented the ex-spouse and her divorce counsel in the *Angelo* case. The *Angelo* decision provides an extensive analysis of myriad issues, including: whether a claim is a domestic support obligation; is contempt with incarceration "collection" or "enforcement;" is a contempt action subject to the automatic stay; commencing an adversary proceeding under both § 523(a)(5) and (15), and why it is important to distinguish them; the jurisdictional interplay between bankruptcy and family courts regarding determination of whether the stay applies; the *Rooker-Feldman* doctrine; and collection of domestic support obligations from exempt assets.

[92] *See* Ellen Vergos, *Bankruptcy Blues*, 42 TENN. B.J.14, 30 (2006) (hereinafter "Vergos"); Carson, at 3-4.

[93] 11 U.S.C. §§ 1129(a)(14), 1225(a)(7), 1325(a)(8); *see* Uzzi O. Raanan, *The BAPCPA'S Contribution to the Way Domestic Support Obligations Are Handled in Bankruptcy--a Noble but Flawed Effort*, 30 CAL BANKR. J. 183 (2009) (BAPCPA evidences congressional desire to ensure the continued payment of domestic support obligations during and after the pendency of a bankruptcy case).

[94] 11 U.S.C. § 1222(a)(2), § 1322(a)(2).

[95] 11 U.S.C. §1222 (b)(11); §1322 (b)(10).

[96] 11 U.S.C. § 1228(a)(2), § 1328(a)(2). One case held that through § 1326(b)(1), Congress maintained pre-BAPCPA treatment of administrative claims in chapter 13 plans, such that a plan would not violate 11 U.S.C. § 507(a)(1) by providing for the payment of attorney's fees prior to payment in full of a debtor's domestic support obligations. *In re* Reid, No. 06-50147, 2006 WL 2077572 (Bankr. M.D.N.C. July 19, 2006).

[97] 11 U.S.C. § 1141(d)(2), (5).

[98] 11 U.S.C § 1112(b)(4)(P), § 1208(c)(10), § 307(c)(11).

[99] *See* 11.U.S.C. § 1327(a), which provides in relevant part: "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan."

[100] New Hampshire v. McGrahan (*In re* McGrahan), 459 B.R. 869, 875 (B.A.P. 1st Cir. 2011).

[101] *Id*.

[102] *See* United Student Aid Funds Inc. v. Espinosa, 559 U.S. 260, 130 S.Ct. 1367 (2010).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *McGrahan*, 459 B.R. at 875 ("The binding effect of a chapter 13 plan extends, however, only to those issues 'which were actually litigated by the parties and any issue necessarily determined by the confirmation order.'") (internal citation omitted).

[107] *Id.* (citing Enewally v. Washington Mutual Bank (*In re* Enewally), 368 F.3d 1165, 1172-73 (9th Cir. 2004)).

[108] *See Westerfield*, 403 B.R. at 548-49.

[109] 11 U.S.C. § 1222(a)(2), § 1322(a)(2); *see* note 91, *supra*, and accompanying text.

[110] *In re* Burnett, 646 F.3d 575 (8th Cir. 2011); *In re* Hutchins, 480 B.R. 374 (Bankr. M.D. Fla. 374 (2012); *In re* Wright, 461 B.R. 757, 760 (Bankr. N.D. Iowa 2011).

[111] *Burnett*, 646 F.3d at 581.

[112] *In re* Hutchens, 480 B.R. 374, 382-83 (Bankr. M.D. Fla. 2012).

[113] *In re Burnett*, 646 F.3d 575; *In re Hutchens*, 480 B.R. 374; *cf. In re Andrews*, 434 B.R. 541 (attorney for non-debtor ex-spouse

awarded fees pursuant to divorce decree had standing to object to confirmation where fee not depicted as priority support claim); *In re* Soderlund, 197 B.R. 742 (Bankr. D. Mass. 1996) (law firm had standing to seek legal fees).

114 *In re Burnett*, 646 F.3d at 581.

115 *See id*. (ex-spouse who did not object to significantly reduced support arrearage payment bound by plan and forced to wait for case to close to seek collection of remainder of claim); *cf. In re McGrahan*, 459 B.R. 869 (modified plan did not provide sufficient notice that tax intercepts by state agency were prohibited).

116 *See* 11 U.S.C. § 523 (amended 1994).

117 Specifically, Code § 362(b)(2)(A) incorporated BAPCPA's defined term "domestic support obligation," now providing that the filing of a bankruptcy petition does not stay commencement or continuation of a proceeding: (1) to establish paternity; (2) to establish or modify an order for domestic support obligations; (3) that concerns child custody or visitation; (4) to dissolve a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; and (5) that regards domestic violence. 11 U.S.C. § 362(b)(2)(A)(i)-(v).

118 *In re* Gellington, 363 B.R. 497 (Bankr. N.D. Tex. 2007); *see also In re* Taylor, No. 07-31055-KRH, 2007 WL 1234932 (Bankr. E.D. Va. Apr. 26, 2007) (noting new exceptions to automatic stay related to enforcement of domestic support obligations).

119 *See* Janet Leach 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, 247 (Summer 2007).

120 11 U.S.C. § 362 (b)(2).

121 11 U.S.C. § 362(b)(2)(B), (C).

122 H.R. REP. 109-31(I), 61, 2005 U.S.C.C.A.N. 88, 130.

123 11 U.S.C. § 362(b)(2)(D)-(G).

124 *See* Peterson v. Peterson (*In re* Peterson), 410 B.R. 133, 135 (Bankr. D. Conn. 2009); *see also In re* Dagen, 386 B.R. 777, 783 (Bankr. D. Colo. 2008) (no stay violation for recovery of postpetition support from wages).

125 *See In re* Penaran, 424 B.R. 868, 882 (Bankr. D. Kan. 2010); *see also In re* Worland, No. 08-2148-AJM-13, 2009 WL 1707512, at *2 (Bankr. S.D. Ind. June 16, 2009) (interception of tax refund for payment of child support exempted from stay).

126 *O'Brien*, 367 B.R. at 242.

127 *In re* Johnston, 308 B.R. 469 (Bankr. D. Ariz. 2003), *aff'd in part, rev'd in part*, 321 B.R. 262 (D. Ariz. 2005), *aff'd in part, rev'd in part*, 595 F.3d 937 (9th Cir. 2010).

128 Caffey v. Russell (*In re* Caffey), 384 B.R. 297, *aff'd*, 384 F. App'x 882 (11th Cir. 2010); *In re* Bailey, 428 B.R. 694 (Bankr. N.D.

W. Va. 2010). *But see In re* Rogers, 164 B.R. 382 (Bankr. N.D. Ga. 1994) (failure of support creditor to affirmatively act not stay violation because court acted on its own).

[129] *In re* Gazzo, 505 B.R. 28 (Bankr. D. Colo. 2014).

[130] *In re* Pearce, 400 B.R. 126, 133 (Bankr. N.D. Iowa 2009).

[131] *See* Fort v. State of Florida Dep't of Rev. (*In re* Fort), 412 B.R. 840, 849-50 (Bankr. W.D. Va. 2009); *cf. In re Espinosa*, 559 U.S. 260 (confirmation order preclusive as to student loan nondischargeability).

[132] 11 U.S.C. § 1222(a)(2), § 1322(a)(2); *see* note 91 and note 106 *supra*, and accompanying text.

[133] *See In re* Diaz, 647 F.3d 1073 (11th Cir. 2011).

[134] Frederick F. Rudzik, *Collecting Domestic Support Obligations in a Chapter 13 World*, ABI JOURNAL, April 16, 2012, fn. 7 (hereinafter "Rudzik").

[135] 11 U.S.C. § 1327.

[136] *In re Fort*, 412 B.R. 840; *In re* Gellingham, 363 B.R. 497 (Bankr. N.D. Tex. 2007).

[137] *See, e.g.*, Massachusetts Local Bankruptcy Rules, Official Local Form 4, Order Confirming Chapter 13 Plan, *available at* http://www.mab.uscourts.gov/pdfdocuments/localrules/OLR_9-2015.pdf.

[138] *McGrahan*, 459 B.R. at 875.

[139] *See id.* (injunctive language in confirmed plan can bar domestic support creditor from pursuing collection actions specifically excepted from the stay); *In re Fort*, 412 B.R. 840 (state's post-confirmation collection of portion of domestic support obligation in excess of amount provided for in confirmed plan violated confirmation order); *In re Gellingham*, 363 B.R. 497 (state's postpetition garnishment did not violate stay, but was improper because it contravened confirmed plan's *res judicata* effect); *In re* Rodriguez, 367 F. App'x 25 (11th Cir. 2010) (state held in contempt and sanctioned for sending debt-collection letters in violation of confirmed plan) (not published).

[140] *McGrahan*, 459 B.R. at 875.

[141] *In re Burnett*, 646 F.3d 575.

[142] *Id.*; *see generally* Rudzik, *supra*.

[143] *See* 11 U.S.C. § 362 (b)(2)(A)(iv); (d)(1); *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004); *In re* Katzburg, 326 B.R. 606 (Bankr. D.S.C. 2004); *In re* Nelson, 335 B.R. 740 (Bankr. D. Kan. 2004).

[144] *See* White, Culhane & Martin, *supra*, at 17.

145 *See Dryja*, 425 B.R. at 611-612; *see also In re* Perry, 131 B.R. 763, 768 (Bankr. D. Mass. 1991) (stay relief granted to allow probate court to adjudicate property rights and support obligations because of holistic nature of task and probate court's expertise).

146 *Dryja*, 425 B.R. at 611 (citation omitted).

147 *See In re* Katzburg, 326 B.R. 606 (Bankr. D.S.C. 2004) (stay lifted so debtor's ex-wife could pursue litigation in state court to effect award of fifty percent interest in certain accounts which state court granted her prepetition).

148 *See Dryja*, 425 B.R. at 611 (evaluating twelve factors bankruptcy courts consider in deciding whether to permit pending litigation in another forum to proceed).

149 *Id.*

150 *Id*.

151 *See* Trout v. Trout (*In re* Trout), 414 B.R. 916, 920 (Bankr. S.D. Ga. 2009) (cause existed to grant ex-wife relief from stay when court considered debtor's nondivorce reasons for filing bankruptcy to be "laughable").

152 Fraser v. Arnal (*In re* Arnal), No. 03-40429, 2003 WL 21911212, at *2 (Bankr. S.D. Ga. June 10, 2003).

153 *In re* Taub, 413 B.R. 55, 66 (Bankr. E.D.N.Y. 2009).

154 *See In re* Skorich, 332 B.R. 77, 80 (Bankr. D.N.H. 2005) (bankruptcy court resolved effect of final divorce decree issued by family court on the rights and interests of the debtor's ex-wife and the chapter 7 trustee in various pieces of property); *In re Nelson*, 335 B.R. at 754-55 (bankruptcy court lifted stay so debtor's ex-wife could finalize division of property between herself and debtor and obtain entry of judgment in divorce case).

155 Secrest v. Secrest (*In re* Secrest), 453 B.R. 623 (Bankr. E.D. Va. 2011).

156 *In re* Goss, 413 B.R. 843 (Bankr. D. Or. 2009).

157 See *In re* Dzielak, 435 B.R. 538 (Bankr. N.D. Ill. 2010); Davis v. Davis (*In re* Davis), 133 B.R. 593 (Bankr. E.D. Va. 1991).

158 The author, a chapter 7 trustee, intervened and hired special family law counsel in a case where several million dollars in assets were at stake and non-debtor spouse was claiming entitlement to full interests in almost all marital assets. In another case, the bankruptcy court granted limited relief to adjudicate the division of marital assets, retaining jurisdiction to review the judgment and determine enforcement. The debtor and estranged spouse entered an agreement providing that full title to valuable vacation property on Martha's Vineyard would be transferred to the non-debtor spouse. The bankruptcy court declined to enforce the probate court's order. In both of these cases, the parties eventually settled with the trustee in an equitable manner that was approved by the bankruptcy court.

159 *See Dryja*, 425 B.R. at 612, (citing *In re* Fordu, 201 F.3d 693, 704-06 (6th Cir.1999) (trustee representing interests of creditors not

in privity with debtor in state court divorce proceeding)).

160 *See Dryja*, 425 B.R. at 612.

161 28 U.S.C. § 1334(c)(1); *see In re* Waddell, 314 B.R. 328 (Bankr. S.D. Miss. 2004) (bankruptcy court abstained from case commenced by debtor's ex-wife involving the parties' division of marital property and Louisiana community property rights).

162 28 U.S.C. § 1334(c)(1); *see* Cosgrove, *supra*, at 244-46. These factors include: (1) the effect, or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the presence of a related proceeding commenced in state or other nonbankruptcy court; (4) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; and (5) the presence in the proceeding of non-debtor parties. *See* Cosgrove, *supra*, at 245.
In contrast, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention for certain non-core matters. Pursuant to the mandatory abstention doctrine, a bankruptcy court must abstain from hearing a proceeding which could not have been brought in federal court without the pending bankruptcy due to lack of federal jurisdiction. In practice, mandatory abstention is rarely invoked.

163 *See* Vergos, *supra*, at 20; *see also* Carson, *supra*, at 2-3 ("By amending § 523(a)(15), Congress has eliminated any reason for litigating in a chapter 7 case whether a debt is truly in the nature of alimony, maintenance or support regardless of its designation ... In light of the apparent breadth of the definition of domestic support obligation and of the language in it would be hard to imagine a situation in which such a complaint would ever be filed in a Chapter 7 case"). *But see* note 187 and accompanying text.

164 11 U.S.C. § 523(a)(5).

165 *See* 11 U.S.C. § 34(a)(7) (1978).

166 42 U.S.C. § 656(b).

167 11 U.S.C. § 523(a)(18) (added to the Code by Pub. L. No. 104-193 (1996)).

168 11 U.S.C. § 1328 (a) (previously referred to as the chapter 13 "superdischarge" provision); *see* Leibowitz v. County of Orange (*In re* Leibowitz), 217 F.3d 799 (9th Cir. 2000) (reimbursement debt to county, whether or not judgment assigned to municipality, is nondischargeable since basis of debt benefited debtor's children and therefore held to be "in the nature of support" under § 523(a)(18) and 42 U.S.C. § 656(b)).

169 *See In re Anthony*, 453 B.R. 782; *In re* Boller, 393 B.R. 569, 574 (Bankr. E.D. Tenn. 2008); *In re Poole*, 383 B.R. 308, 314 (Bankr. D.S.C. 2007); *O'Brien*, 339 B.R. at 531 n.2 ("Caselaw construing alimony, maintenance and support has largely developed in respect of former Section 523(a)(5) whose text is comparable to and largely mirrors Section 101(14A)."); *see also* Hoskins and Welner, *supra*, at 36.

170 Werthen v. Werthen *(In re* Werthen*)*, 282 B.R. 556 (B.A.P. 1st Cir. 2002) (court must look beyond label given in settlement agreement and examine true nature of obligation); *see also In re Petrosky*, 325 B.R. 475 (§ 523(a)(5) determination made by examining relevant part of the record in the divorce case, supplemented by testimony of the parties).

171 *See Werthen*, 329 F.3d at 271; *Maes*, 342 B.R. at 265; *In re* Swartz, 339 B.R. 497, 501 (Bankr. W.D. Mo. 2006) *amended on other grounds*, Adv. Proc. No. 05-4126, 2006 WL 4451482 (Bankr. W.D. Mo. Mar. 14, 2006).

172 *See Chaney v. Chaney (In re Chaney)*, 229 B.R. 266 (Bankr. D.N.H. 1999).

173 *See In re Smith*, 398 B.R. at 721-22; *In re Hayden*, 456 B.R. 378 (Bankr. S.D. Ind. 2011).

174 Baldwin v. Phillips (*In re* Phillips), 520 B.R. 853 (Bankr. D.N.M. 2014).

175 *Phegley*, 443 B.R. at 157 (citations omitted).

176 *See* Benson v. Benson (*In re* Benson), 441 F. App'x 650 (11th Cir. 2011) (mortgage payments in nature of support despite waiver of support in divorce agreement); *In re* Thomas, 511 B.R. 89 (B.A.P. 6th Cir. 2014) (debtor's obligation to pay one-half of mortgage debt intended as support); *In re* Reinhardt, 478 B.R. 455 (Bankr. M.D. Fla. 2012) (mortgage payments were support); *In re Krueger*, 457 B.R. 465 (same); *In re Petrosky*, 325 B.R. 475 (loans obtained by debtor and ex-wife for college education of children were support debts); *see also* 9 NORTON BANKR. L. & PRAC. 3d § 175:68-175:71 (updated October 2015), and cases cited therein.

177 *See* Farelli v. Farelli (*In re* Farelli), 312 F. App'x 445 (3rd Cir. 2008) ($94,000 lump sum was domestic support obligation based on disparity in parties' resources); Steele v. Wyly (*In re* Wyly), 525 B.R. 644 (Bankr. N.D. Tex. 2015) (chapter 11 debtor's $41,666 per month payment to ex-wife for guaranteed minimum return on $5 million investment held to be nondischargeable domestic support obligation); *In re* Throgmartin, 462 B.R. 836 (Bankr. M.D. Fla. 2012) ($31,000 per month payment to satisfy marital property lien of approximately $7.5 million was domestic support obligation); Plyant v. Plyant (*In re* Plyant), 467 B.R. 246 (Bankr. M.D. Ga. 2012) (debtor's agreement to purchase home for $415,000 was domestic support obligation even though divorce agreement included as property settlement and substantial support payments already provided); *In re* Dudding, No. 10-10557, 2011 WL 1167206 (Bankr. D. Vt. 2011) (assumption of debt for line of credit tantamount to support since it provided necessary financial relief to ex-spouse); *cf. In re* Ashby, 485 B.R. 567 (Bankr. W.D. Ky. 2013) (debtor's agreement to employ ex-spouse intended as nondischargeable support).

178 Levin v. Greco, 415 B.R. 663, 667 (N.D. Ill. 2009) (fees owed to child representative were nondischargeable domestic support obligation); Hutton v. Ferguson (*In re* Hutton), 463 B.R. 819 (Bankr. W.D. Tex. 2011) (debtor's obligation to pay ex-spouse's attorney's fees was nondischargeable domestic support obligation); Morris v. Allen (*In re* Morris), 454 B.R. 660 (Bankr. N.D. Tex. 2011) (same); In re Andrews, 434 B.R. 541 (same); *In re Papi*, 427 B.R. 457 (same); County of LaCrosse v. Stevens (In re Stevens), 436 B.R. 107 (Bankr. W.D. Wis. 2010) (payments owed to custody assessment team were nondischargeable domestic support obligation). *See also* 9 NORTON BANKR. L. & PRAC. 3d § 175:78-175:86 (updated October 2015), and cases cited therein.

179 *See In re* Uzaldin, 418 B.R. 166 (Bankr. E.D. Va. 2009); *see also* notes 46-50 and accompanying text, *supra*.

180 11 U.S.C. § 523(a)(15).

181 *See* Finkelstein, *supra*, at note 2 (citing legislative history of the 1994 Code amendments).

182 *See* Hastings v. Konick (*In re* Konick), 236 B.R. 524 (B.A.P. 1st Cir. 1999); Means v. Grant (*In re* Grant), 335 B.R. 767 (Bankr. D. Wy. 2005).

183 *See In re Wilson*, 342 B.R. 268 (debtor found not to have ability to pay $8,000 property settlement to ex-wife); *In re Swartz*, 339 B.R. 497 (debtor discharged both property settlement obligation and hold-harmless obligation to ex-wife due to inability to pay); *In re Grant*, 335 B.R. 767 (debtor did not have ability to satisfy obligation to ex-wife to hold her harmless on joint marital debts). *But see In re Konick*, 236 B.R. 524 (both elements of balancing test satisfied).

184 *See* James L. Musselman, *Once Upon a Time in Bankruptcy Court; Sorting Out Liability of Marital Property for Marital Debt is No Fairy Tale*, 41 FAM. L.Q. 249, 270 (Summer 2007) (hereinafter "Musselman"); *see also* Blackburn v. Blackburn (*In re* Blackburn), 412 B.R. 710, 712 (Bankr. W.D. Pa. 2009) (noting that BAPCPA's changes in § 523(a)(15) have eliminated the discretion of the court in finding nondischargeability).

185 Prior to BAPCPA, it was already clear that the § 523(a)(5) exception to discharge need not be litigated to be preserved. *See* White, Culhane & Martin, *supra*, at 24, 27. The effect of amended § 523(c) is that complaints under § 523(a)(15) can be filed at any time, and such debts are not discharged even if a complaint is not filed. *See* Carson, *supra*, at 3.

186 *See* Adam v. Dobin (*In re* Adam), BAP No. CC 14-1416-PaKiTa, 2015 WL 1530086, *5-7 (B.A.P. 9th Cir. Apr. 6, 2015) (discussing legislative history and observing trend in caselaw to hold that non-debtor spouse's attorney's fee award was non-support marital claim incurred in connection with divorce proceeding and nondischargeable). *Contra* Martelloni v Martelloni (*In re* Martelloni), Adv. Pro. No. 12-8437-ast, 2013 WL 5873264 (Bankr. E.D.N.Y. October 31, 2013) (acknowledging standing under § 523(a)(15) for matrimonial attorneys fee awards in connection with divorce or separation, but declining to extend standing to in-laws as third-party creditors even though debtor agreed to hold non-debtor ex-husband harmless for in-laws judgment against them).

187 Taylor v. Taylor (*In re* Taylor), 478 B.R. 419 (B.A.P. 10th Cir. 2012) (judgment debt from overpayment of spousal support was non-support divorce debt); Fisher v. Santry (*In re* Santry), 481 B.R. 824 (Bankr. N.D. Ga. 2012) (debtor's obligation to sell or refinance real property and pay $200,000 from such proceeds, was divorce-related martial debt); *In re Poole*, 383 B.R. at 314 (obligation to execute $70,000 note in favor of non-debtor ex-spouse was divorce-related property settlement).

188 *In re* Rabideau, No. 09-72721, 2011 WL 165179 (Bankr. C.D. Ill. Jan. 19, 2011) (assumed mortgage debt was property settlement); *In re Krueger*, 457 B.R. 465 (obligation to make car payments was not support); McCollum v. McCollum (*In re* McCollum), 415 B.R. 625 (Bankr. M.D. Ga. 2009) (mortgage and car payments to be made under divorce agreement not intended as support); *In re* Davis, No. 06-10581-DHW, 2007 WL 865683 (Bankr. M.D. Ala. Mar. 15, 2007) (agreement to pay second mortgage on marital residence in nature of property settlement) (un-reported opinion).

189 *In re* LaGrange, No. BK08-82468-TLS, 2009 WL 1484623 (Bankr. D. Neb. May 27, 2009) (judgment in amount of premarital expenditures was for purpose of fair and reasonable property division).

190 *In re Martelloni,* 2013 WL 5873264, *2 (hold harmless obligation to ex-spouse for joint liability under in-laws judgment against them conceded as nondischargeable under 523(a)(15); *In re* Siegel, 414 B.R. 79 (Bankr. E.D.N.C. 2009) (indemnity for home-equity line of credit was nondischargeable property settlement); *Higgins v. Harn (In re Harn)*, Adv. Pro. No. 07-8099, 2008 WL 130914,*3 (Bankr. C.D. Ill., Jan. 10, 2008) ("it is now beyond peradventure" that hold-harmless obligation to ex-spouse is covered by § 523(a)(15)). *Cf.* Woodward v. Ehrler-Nugent (*In re* Nugent), 484 B.R. 671 (Bankr. S.D. Tex. 2012) (hold-harmless obligation not excepted from discharge under § 523(a)(15) because ex-spouse failed to plead nondischargeability under § 523(a)(15) in complaint brought under § 523(a)(5) only).

191 *See* 11 U.S.C. § 34(a)(7) (1978).

192 *See* Brown, *supra*, at 439-440.

193 Adjudication of the priority and resulting dischargeability of domestic claims should be through an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). Nonetheless, as long as due process is satisfied in the objection to claim, objection to plan confirmation, or other contested matter, it is harmless error and the ruling is valid and has preclusive impact. *See* McNeil v. Drazin, 499 B.R. 484 (citing *Espinosa*, 599 U.S. at 263, 130 S.Ct. 1367).

194 *See* Douglas v. Douglas (*In re* Douglas), 369 B.R. 462 (Bankr. E.D. Ark. 2007).

195 *See* note 186 *supra; see also* Carson, *supra*, at 4 (debating the advantages and disadvantages of filing a complaint versus a plan objection). *Cf.* White, Culhane & Martin, *supra*, at 28 (whether a domestic relations debt is entitled to priority and is nondischargeable in a chapter 13 plan depends on whether the debt is in the nature of support under federal law.

196 *See* Bezanson and Rudolph, *supra*, at 22.

197 *See* 11 U.S.C. § 522(c)(1); Bankr. R. Fed. P. 4007(b).

198 *See* White, Culhane & Martin, *supra*, at 15.

199 *See Davis v. Cox*, 356 F.3d at 84; *Skorich*, 332 B.R. at 82; *Maes,* 342 B.R. at 265; *In re* Ivani, 308 B.R. 132 (Bankr. E.D.N.Y. 2004).

200 *See Skorich*, 332 B.R. at 79.

201 *Id.*

202 *See* MacDonald v. MacDonald (*In re* MacDonald), 755 F.2d 715, 717 (9th Cir. 1985) ("It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.'") (internal citation omitted).

203 *See* Diaz v. State of Texas *(In re* Gandy*)*, 327 B.R. 796, 800 (Bankr. S.D. Tex. 2005) (noting the duty of reciprocal comity state and federal courts owe each other). *See also* Anthony Michael Sabino, *Violence of Action: The Bankruptcy Code, Domestic Relations Law, and the New War with State Probate Law*, 19 QUINNIPIAC PROB. L.J. 264, 275-76 (2006) (examining *In re* Ivani, 308 B.R. 132 (Bankr. E.D.N.Y. 2004), in which court decided that *Rooker-Feldman* doctrine prevented court from exercising jurisdiction to decide whether contempt orders for nonpayment of support entered in state court violated automatic stay); Susan Powers Johnson, *Application of the Rooker-Feldman Doctrine in Bankruptcy Cases,* 15 J. BANKR. L. & PRAC. 341 (No. 4, Aug. 2006).
In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 291-93 (2005), the Supreme Court restricted the scope of the *Rooker-Feldman* doctrine as it had been applied by lower courts, stressing that it is confined to cases brought by the losers in state court proceedings who complain of injuries caused by state court judgments rendered prior to commencement of the federal court proceeding, and who invite a district court to review and reject those state-court judgments. *Id.* The *Rooker-Feldman* doctrine embodies the principle that federal district courts are empowered to exercise original, not appellate jurisdiction; it does not override or replace issue or claim preclusion doctrine, or other doctrines that allow federal courts to stay or dismiss proceedings before them in deference to state court actions. *Id.*

204 *See In re* Newman, 196 B.R. 700 (Bankr. S.D.N.Y. 1996) ("bankruptcy courts will generally defer to state courts in the interest of judicial economy and restraint and out of respect for the state courts' expertise in domestic relations issues.").

205 28 U.S.C. § 1334(e); *see* Tennessee Student Assistance Corp. v. Hood., 541 U.S. 440, 447 (2004) (citing 28 U.S.C. § 1334(e): "Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate."); Richard Lieb, *State Sovereign Immunity: Bankruptcy is Special*, NORTON ANN. SURV. BANKR. L. at 249 (2006) (discussing Supreme Court's analysis in *Hood* that exclusive bankruptcy jurisdictional grant pursuant to § 1334(e) over issues relating to debtor's property was

exercise of *in rem* jurisdiction against all claims held by everyone). *See also* Central Virginia Comm. College v. Katz, 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006) (reviews framers' intent for uniform system of bankruptcy laws, and corresponding paramount jurisdiction of bankruptcy courts).

206 *See* 11 U.S.C. § 541(c)(1); 11 U.S.C. § 362(d)(1).

207 *See* 28 U.S.C. § 157(b)(1); (2)(G); Gruntz v. County of Los Angeles (*In re* Gruntz), 202 F.3d 1074, 1087 (9th Cir. 2000); *Angelo*, 480 B.R. at 82-83.

208 11 U.S.C. § 362(b)(2).

209 *See* 28 U.S.C. § 1334; *see also In re* Steward, 338 B.R. 654 (Bankr. D.N.J. 2006), *aff'd sub. nom.* Alfred Vail Mutual Ass'n v. Steward, C.A. No. 06-1572 (FLW), 2006 WL 3796609 (D.N.J. Dec. 21, 2006) (state court had jurisdiction to determine whether stay applied to proceedings to remove debtor as executor of estate); *In re Gandy*, 327 B.R. 796 (state court could determine that pending matter came within police and regulatory exception to stay); Oakwood Acceptance Corp. v. Tsinigini (*In re* Oakwood Acceptance Corp.), 308 B.R. 81 (Bankr. D.N.M. 2004) (Native American tribal court could determine whether automatic stay applied to pending appeal); *In re Ivani*, 308 B.R. 132 (state court could determine that stay did not apply to contempt proceedings in divorce dispute).

210 *See Steward*, 338 B.R. at 658 (bankruptcy court did not consider state court's entry of order to show cause as implicit ruling on issue of stay).

211 *See* Contractors' State License. Bd. of Cal. v. Dunbar *(In re* Dunbar*)*, 245 F.3d 1058, 1060 (9th Cir. 2001) (federal courts are not bound by state court modifications of the stay); *In re Gruntz*, 202 F.3d at 1087 (same); *Angelo*, 480 B.R. at 82-83 n.12 (following and discussing *Gruntz* and other cases ruling that *Rooker-Feldman* does not preclude bankruptcy court's review of state's court's determination regarding whether stay applied); *In re* Benalcazar, 283 B.R. 514, 528 (Bankr. N.D. Ill. 2002) (citing *Gruntz* for point that erroneous determination by state court that stay did not apply had effect of modifying stay, which is "uniformly understood to be beyond the state court's power"). *But see* Siskin v. Complete Aircraft Servs., Inc. (*In re* Siskin), 258 B.R. 554, 566-67 (Bankr. E.D.N.Y. 2001) (specifically rejects *Gruntz* in holding that state court has concurrent jurisdiction with bankruptcy court to determine whether stay applied to proceeding before it, and bankruptcy court was precluded from revisiting prior state court judgment finding that debtor's imprisonment did not violate stay); *Ivani*, 308 B.R. at 135-136.

212 *See Ivani*, 308 B.R. at 136-37. *See also Steward*, 338 B.R. at 658 (bankruptcy court cannot entertain appellate review over state court judgment). *Cf.* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005) (significantly restricting scope of *Rooker-Feldman* doctrine as it had traditionally been applied by lower courts); *see* note 195 *supra*.

213 *See* Batlan v. Bledsoe (*In re* Bledsoe), 350 B.R. 513 (Bankr. D. Or. 2006) (trustee not barred from bringing strong-arm action against debtor's ex-wife to set aside transfers made pursuant to divorce decree; but trustee's constructively fraudulent transfer action was impermissible where divorce state court conclusively established that debtor received reasonably equivalent value for assets transferred to ex-wife and there was no evidence of fraud or collusion).

214 *See* notes 157-158, *supra*, and accompanying text. For further discussion of mandatory and discretionary abstention, *see* Paul P. Daley and George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COMM. L.J. 383, 428-30 (2006).

215 *See, e.g.*, Eden v. Chapski, Ltd., 405 F.3d 582, 586 (7th Cir. 2005); Siragusa v. Siragusa (*In re* Siragusa), 27 F.3d 406, 408 (9th Cir. 1994); *In re* Petrosky, 325 B.R. 475; Pidgeon v. Pidgeon (*In re* Pidgeon), 155 B.R. 24 (Bankr. N.H. 1993) (citing *In re* Littlefield, 17 B.R. 549 (Bankr. Me. 1982)) (stating that the bankruptcy court has only concurrent jurisdiction with all other competent courts to decide dischargeability under § 523(a)(5)). *See also* Stewart H. Cupps, *Recent Developments: Section 523*--

Exception to Discharge, NORTON ANN. SURV. BANKR. L. 13 (2006) (citing *Eden* for proposition that state court had concurrent jurisdiction to determine whether debtor's discharge included debt for attorney's fees in § 523(a)(5) proceeding).

216 11 U.S.C. § 523(c), as amended by BAPCPA; *see* Brown, *supra*, at 439-40.

217 11 U.S.C. § 524(a)(2) (enjoins commencement or continuation of action against the debtor, or property of the debtor, to collect, recover or offset any discharged debt). *See* Fleming v. Fleming, 32 Va. App. 822, 531 S.E. 2d 38 (2000) (divorce court cannot enter post-discharge order increasing spousal support in amount of discharged credit card and other debts debtor is liable for under separation agreement).

218 *See* Cox v. Cox (*In re* Cox), 247 B.R. 556 (Bankr. D. Mass. 2000) (neither support payment made pursuant to nullified probate court order nor appeal's court order itself were voidable preferences).

219 *See* Prunty v. Terry (*In re* Paschall), 408 B.R. 79 (E.D. Va. 2009) (affirming bankruptcy court's preference avoidances against ex-spouse as insider subject to one-year lookback); West v. Christensen (*In re* Christensen), Adv. Proc. No. 13-2248, 2014 WL 1873401 (Bankr. D. Utah, May 8, 2014) (examining legislative history, citing cases (including *Paschall*) and providing extensive analysis of whether defendant ex-spouse was insider for preference purposes; holding that because defendant was spouse at time of transfer, she was "relative" under § 101(45) definition of insider and subject to preference liability as insider). *Contra,* Barnhill v. Vaudreuil (*In re* Busconi), 177 B.R. 153 (Bankr. D. Mass.1995) (ex-spouse not an insider even though spouse at time of challenged preferential transfer).

220 11 U.S.C. § 548; *See* Grochocinski v. Knippen (*In re* Knippen), 355 B.R. 710 (Bankr. N.D. Ill. 2006) (analyzing prepetition property settlement incorporated into divorce judgment and finding insufficient badges of fraud to avoid agreement as being made with "actual intent to hinder, delay, or defraud" creditors under § 548(a)(1)(A)). The *Knippen* court did determine, however, that the debtor did not receive reasonably equivalent value for the transfer of his interest in real property pursuant to the settlement agreement and avoided the transfer to the extent of the difference between the value of property transferred and the value received for such transfer under 11 U.S.C. § 548(a)(1)(B). The court also found that the ex-wife's relatives were liable as immediate or mediate transferees of the property under 11 U.S.C. §550(d). *Contra, In re* Bledsoe, 350 B.R. 513 (applying *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994) to hold that property transfers pursuant to properly conducted divorce proceedings where there is no fraud or collusion deemed to provide reasonably equivalent value); Pryor v. Zerbo (*In re* Zerbo), 397 B.R. 642 (Bankr. E.D.N.Y. 2008) (divorce court's approval of parties' marital settlement agreement which divided martial assets as part of regularly conducted divorce proceedings where no there was no evidence of fraud or collusion, conclusively established reasonably equivalent value).

221 11 U.S.C. § 544. *See, e.g.,* Massachusetts' adoption of the UFTA at Massachusetts General Laws, c. 109A.

222 Ingalls v. Erlewine (*In re* Erlewine), 349 F.3d 205 (5th Cir. 2003); *In re Bledsoe*, 350 B.R. 513.

223 *See* Wolkowitz v. Beverly *(In re* Beverly*)*, 374 B.R. 221 (B.A.P. 9th Cir. 2007), *aff'd* 551 F.3d 1092 (9th Cir. 2008); *In re Fordu,* 201 F.3d 693; Howison v. Hanley, 141 F.3d 384 (1st Cir. 1998); Campana v. Pilavis (*In re* Pilavis), 233 B.R. 1 (Bankr. D. Mass. 1999) (property division executed in out of country divorce subject to avoidance under M.G.L. c. 109A).

224 *In re* Erlewine, 349 F.3d 204.

225 *In re* Zerbo, 397 B.R. 642; *In re* Bledsoe, 350 B.R. 513 (citing BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S.Ct. 1757 (1994) ("BFP is as applicable in the context of a marital dissolution as it is to foreclosures ...")).

226 *See* 11 U.S.C. § 524(a)(1).

227 *See* Hamilton v. Herr (*In re* Hamilton), 540 F.3d 367 (6th Cir. 2008) (state court order to indemnify ex-spouse regarding discharged joint debt was void); Heilman v. Heilman (*In re* Heilman), 430 B.R. 213 (B.A.P. 9th Cir. 2010) (cannot bring action in state court for sole purpose of forcing debtor to pay dischargeable debt); *In re* Tostige, 283 B.R. 462 (Bankr. E.D. Mich. 2002) (same).

228 *See* 11 U.S.C. § 524(a)(2).

229 *See* Fleming v. Fleming, 32 Va. App. 822 (divorce court cannot enter postdischarge order increasing spousal support in amount of discharged credit card and other debts debtor liable for under separation agreement).

230 *See* Vergos, *supra*, at 31.

231 *See* United States Census Bureau, Custodial Mothers and Fathers and Their Child Support: 2011, Issued October 2013, Table 1, Comparison of Custodial Parent Population and those With Child Support Awarded, Due, and Received: 1993-2011; *see also* Child Support: An Overview of Census Bureau Data on Recipients, December 16, 2013 ("Child Support Overview").
The Child Support Overview reported in its Summary:
The national Census Bureau data show that in 2011, 14.4 million parents had custody of children under age 21 while the other parent lived elsewhere, and the aggregate amount of child support received was $23.6 billion. In 2011, 82% of custodial parents were mothers. Of all custodial parents, 50% were white, 25% were black, 21% were Hispanic, 18% were married, 33% were divorced, 35% were never married, 15% did not have a high school diploma, 17% had at least a bachelor's degree, 50% worked full-time year-round, 29% had family income below poverty, and 39% received some type of public assistance. In 2011, only 2.7 million (38%) of the nearly 7.1 million custodial parents with child support orders actually received the full amount of child support that was owed to them. The average yearly child support payment received by custodial parents with payments was $5,160 for mothers and $4,433 for fathers. These full or partial payments represented 17% of the custodial mothers' total yearly income and 11% of the custodial fathers'. Compared to 1993 Census data, less child support was received by custodial parents in 2011 ($23.9 billion in 1993 versus $23.6 billion in 2011; in 2011 dollars). However, a higher percentage of those owed child support actually received all that they were due (36.9% in 1993 versus 43.4% in 2011).

232 151 CONG. REC. S2464-S2465.

233 11 U.S.C. §§ 704(a)(10), 1106(c), 1202(c), 1302(d)(1).

234 11 U.S.C. § 704(c)(1)(A).

235 11 U.S.C. § 704(c)(1)(B).

236 11 U.S.C. § 704(c)(1)(C).

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