"It's What?" Priority and Nondischargeable Claims in Consumer Cases

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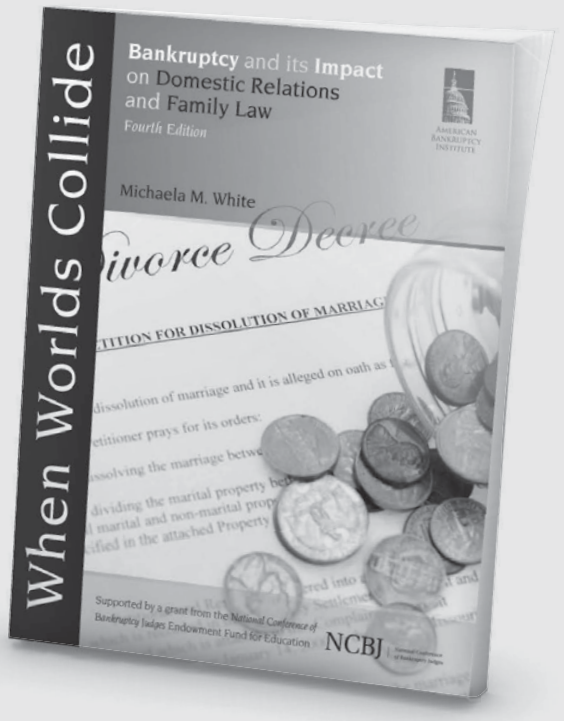
When Worlds Collide

Bankruptcy and Its Impact on Domestic Relations and Family Law, Fourth Edition

Divorce and bankruptcy are similar in that each attempts to provide a "fresh start." However, the objectives of divorce are not necessarily consistent with the goals of bankruptcy. The Bankruptcy Code makes it harder to discharge certain obligations that arise in divorce. This desk book provides a brief, readable primer on the bankruptcy law that impacts their subject-matter jurisdictions. These materials provide a satisfactory starting point for any domestic-relations lawyer who needs a basic understanding of how bankruptcy intersects with family law. Appendices feature relevant sections of the Code, as well as a list of cases and articles on the issues discussed within the text.



By: Michaela M. White

Member Price: $35

Product #: 10_013

MISCELLANEOUS ISSUES CONCERNING THE TREATMENT OF CERTAIN CLAIMS IN CHAPTER 13 CASES

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Objecting to Proofs of Claim

1. Residential Mortgages:

    a. *In re Bateman*, 331 F.3d 821 (11th Cir. 2003)(residential mortgage lien, including any unpaid arrearage claim, survives both confirmation of a debtor's plan and the debtor's discharge where the plan provided for payment of an amount different than the mortgagee's proof of claim)

2. Child Support:

    a. *In re Diaz*, 647 F.3d 1073 (11th Cir. 2011)(bankruptcy court's order granting objection to child support claim only determined the amount of the claim that was to be paid through the chapter 13 plan, it did not discharge the disallowed portion and the creditor was authorized to seek payment post-discharge); *In re Smith*, 2011 WL 3679435 (Bkrtcy.N.D.Ala.)

3. Cosigned Debts:

    a. *In re Cain,* 2007 WL 2852345 (N.D.Fla.)(co-debtor stay lifted where proof of claim allowed by the bankruptcy court did not constitute the entire amount of the co-signed indebtedness)

4. Student Loans:

    a. *In re Haan*, 2013 WL 1277132 (C.A.1)(distinguishes between determining the amount a non-dischargeable student loan claim is to be paid versus whether the debt is actually owed; discusses *Diaz*)

Res Judicata Effect of Confirmed Plan

1. Discharge by Plan Provision

    a. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S.Ct. 1367 (2010)(student loan creditor bound by order confirming chapter 13 plan that provided for the discharge of interest on its student loan claims where the creditor had notice of the plan, did not object to the plan, and did not appeal the order)

2. Deadlines in Plan

    a. *In re Shiver* 484 B.R. 468 (Bankr. N.D.Fla. 2012)(debtor is bound by deadline to file deficiency claim contained in confirmed plan)

3. Treatment of Claims

    a. *In re Berrouet*, 469 B.R. 393 (Bankr. N.D.Ga. 2012)(treatment of claim in confirmed plan prevents subsequent strip-off of mortgagee's lien)

    b. *In re Lewis*, 2009 WL 2777005 (E.D.Mich.)(treatment of mortgage in confirmed plan precludes debtor from seeking recission, etc., of mortgage)

    c. *In re George*, 426 B.R. 895 (Bankr. M.D.Fla. 2010)(mortgage creditor can't amend fully-secured claim to unsecured deficiency claim post-bar date and post-confirmation)

    d. *In re: Scott,* 295 B.R. 686 (Bankr. M.D.Ga. 2003)(mortgagee retains its rights under the mortgage until the claim is satisfied in full in spite of provision in confirmed chapter 13 plan otherwise)(citing *Bateman*, above)

    e. *In re Adkins,* 425 F.3d 296 (6th Cir. 2005)(debtor's obligation for remaining portion of creditor's secured claim following relief from stay and sale of the vehicle had to be paid as a secured calim); *In re Nolan* 232 F.3d 528 (6th Cir. 2000)(debtor cannot surrender collateral post-confirmation and then modify the plan to treat the secured claim as an unsecured deficiency claim)

        i. *In re Enders*, 2010 WL 148415 (Bkrtcy.M.D.Tenn.)(debtor can modify treatment of secured claim post-confirmation if creditor has notice and does not object to its treatment)

        ii. *In re Cox,* 2012 WL 506576 (Bkrtcy.M.D.Tenn)(creditor's silence cannot be construed as consent to post-confirmation change in treatment)

        iii. *In re Zieder,* 263 B.R. 114 (Bankr. D.Ari. 2001)(debtor's post-confirmation surrender of colateral constitutes cause to re-consider creditor's allowed, secured claim)

        iv. *In re Clay* 2011 WL 6117850 (Bkrtcy.D.Kan.)(court approved the trustee's post-confirmation motion to modify treatment of claim from secured to unsecured deficiency over credit union's objection)

        v. *In re Marino*, 349 B.R. 922 (Bankr. S.D.Fla. 2006)(debtor has statutory right to modify plan to surrender vehicle and treat previously-allowed secured claim as an unsecured, deficiency claim)

Interest on Non-Dischargeable Claims:

1. Child Support:

a. *Diaz, supra, at f. 14* (post-petition interest is an integral part of the non-dischargeable child support obligation, it also is nondischargeable and may be collected personally against the debtor after the discharge)

2. Co-Signed Debts:

a. *In re Rivera*, --- B.R. ---, 2013 WL 1406209 (1st Cir.BAP (P.R.))(the practical realities of codebtor claims support separate classification of cosigned, consumer claims which were undertaken for the debtor's benefit)

b. *In re Renteria*, 470 B.R. 838 (9th Cir. B.A.P. 2012)(a court may not deny confirmation of a plan solely because it prefers a codebtor consumer claim over all other unsecured claims)

c. *In re Jackson*, 2012 WL 6623497 (Bkrtcy.M.D.Ga.)(creditor will retain its lien on co-signed vehicle until its underlying debt is paid in full, including contract interest)

d. *In re Leonard*, 307 B.R. 611 (Bankr. E.D.Tenn. 2004)(debtor's chapter 13 discharge does not require creditor to release title lien against co-debtor's interest)

3. Student Loans:

a. *In re Beige*, 417 B.R. 697 (Bankr. M.D.Pa. 2009)(creditor can accrue post-petition interest on student loan, and collect it post-discharge, even though debtors paid the balance of the obligation in full during their chapter 13 plan)

b. *In re Boscaccy*, 442 B.R. 501 (Bankr. N.D.Miss. 2010)(plan provision to cure and maintain long-term student loan debt is subject to the unfair discrimination test under § 1322(b)(1)); *In re Birts*, 2012 WL 3150384 (E.D.Va.)

c. *In re Jackson*, Case No. 05-85212 (Bankr. N.D.Ga. 2006)(plan providing for the direct payent of a student loan does not unfairly discriminate against other unsecured creditors; however, unfair discrimination may take place if the plan proposes to accelerate payment of the student loan within the term of the plan)

d. *In re Freeman*, 2006 WL 6589023 (Bkrtcy. N.D.Ga.)(§ 1322(b)(5) trumps § 1322(b)(10))

e. *In re Uber*, 443 B.R. 500 (Bankr. S.D.Ohio 2011)(bankruptcy court lacks jurisdiction in post-discharge declaratory judgment action to determine the amount of post-petition interest and collection costs owed on student loan debt)

Post-Petition Debts

1. *In re White* 482 B.R. 905 (Bankr. W.D.Ark. 2012)(debtor cannot (a) file a proof of claim on behalf of taxing authority for postpetition taxes and (b) cannot modify plan to provide for payment in full of post-petition taxes, not pay the taxes because no proof of claim has been filed, and then seek to have them discharged)

2. *In re Whall,* 391 B.R. 1 (Bankr. D. Mass. 2008)(a chapter 13 estate is not a taxable entity and, therefore, debtors' post-petition income taxes are not administrative expense claims in chapter 13 cases)

3. *In re Perkins*, 304 B.R. 477 (Bankr. N.D.Ala. 2004)(mere amendment to add post-petition creditors to schedules will not discharge the corresponding debt where the plan does not "provide for" these post-petition creditors)

4. *In re Rattler*, 2013 WL 828286 (Bkrtcy. S.D.Ala.)(compares post-petition administrative expense claims under §503(b)(1) to post-petition claims under § 1305(a)(2))

Nondischargeable Debts and Post-Discharge Disputes

1. *In re Perry,* 388 B.R. 330 (Bankr. E.D.Tenn. 2008)(bankruptcy court does not have jurisdiction to adjudicate dispute over post-discharge default on long-term mortgage)

Domestic Relations Issues in Chapter 13

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I. Domestic Relations Issues in Chapter 13

A. § 523(a)(5) vs. (a)(15)

There are two sections under federal law that deal with whether or not alimony is a dischargeable debt. § 523(a)(5) controls when a debt is in the nature of alimony, maintenance or support. § 523(a)(15) controls when the debt is in the nature of a property settlement resulting from a divorce or separation. Ultimately, however, while federal law governs the exceptability of debts, an examination of state law facilitates determination of whether a debt is in the nature of alimony, maintenance, or support versus a property settlement. Strickland v. Shannon (In re Strickland), 90 F.3d 444, 446 (11th Cir. 1996); Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906 (11th Cir. 1985).

When determining dischargeability, exceptions to discharge are construed liberally in favor of the debtor and against the creditor to provide an honest, but unfortunate debtor a fresh start. Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir.1994); TranSouth Fin. Corp. v. Johnson, 931 F.2d 1505, 1508 (11th Cir.1991).

In most states, the most common types of alimony are periodic alimony and alimony in gross. Periodic alimony, which is usually modifiable, provides for the maintenance and support of a former spouse. Townsend, 155 B.R. at 238; Delaine, 56 B.R. at 466. Alimony in gross is a different sort of alimony that is treated more like a property settlement than traditional alimony payments. Townsend, 155 B.R. at 238.

Periodic alimony for support and maintenance has never been dischargeable under § 523(a)(5). However, prior to the Bankruptcy Reform Act of 1994, alimony in gross was dischargeable. Townsend v. Townsend (In re Townsend), 155 B.R. 235 (Bankr.S.D.Ala. 1992);

Delaine v. Delaine (In re Delaine), 56 B.R. 460, 464 (Bankr.N.D.Al. 1985). Troubled by the wholesale discharge of such debts, Congress enacted 11 U.S.C. § 523(a)(15). H.R.Rep. No. 835, 103d Cong., 2nd Sess. 54 (1994). Its decision was based in part on a determination that during divorce negotiations, a divorcing/separating spouse may agree to pay marital debts and hold the other spouse harmless for such debts or increase the amount of the property settlement in exchange for a reduction in alimony. H.R.Rep. No. 835, 103d Cong., 2nd Sess. 54 (1994). It is important to note that the legislative history does not mention a similar tradeoff with respect to maintenance or support payments. H.R.Rep. No. 835, 103d Cong., 2nd Sess. 54 (1994).

Section 523(a)(15) provides that an individual seeking a discharge does not receive one from any debt:

> to a spouse, former spouse, or child of the debtor and not of the kind described in [§ 523(a)(5)] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

11 U.S.C. § 523(a)(15).

In order for § 523(a)(15) to apply, a former spouse/spouse must timely file an adversary proceeding seeking to except such obligations from discharge. 11 U.S.C. § 523(c)(1). In most cases, this proceeding is required to be commenced no later than sixty days from the original date set for the § 341 meeting of creditors. Fed.R.Bankr.P. 4007(c); In re Smither, 194 B.R. 102, 106 (Bankr.W.D.Ky.1996); Collins v. Hesson (In re Hesson), 190 B.R. 229, 236 (Bankr.D.Md. 1995); Kessler v. Butler (In re Butler), 186 B.R. 371, 375 (Bankr.D.Vt.1995). However, if an

adversary proceeding is not timely filed by the creditor spouse, then these types of marital debts are discharged to the debtor spouse. 11 U.S.C. § 523(c)(1); Butler, 186 B.R. at 375.

B. Objecting to Child Support Claims

Child support cannot be discharged in bankruptcy. 11 U.S.C. § 523(a)(5). In fact, in order to receive a discharge, a debtor must be caught up on any outstanding missed payments accrued prior to filing the bankruptcy. Additionally, to receive a discharge, a debtor must certify he/she is current on all domestic support obligations (which includes child support). 11 U.S.C. § 1328(a); 11 U.S.C. § 523(a)(5); 11 U.S.C. § 1228; *See also,* Jones v. Jones (In re Jones), 9 F.3d 878, 880 (10th Cir.1993).

When it comes to what constitutes "child support" under § 523(a)(5) and § 101(14A), the majority of courts agree that

> the best interests of the child is an inseparable element of the child's "support" — put another way, 11 U.S.C. 523(a)(5) should be read as using the term "support" in a realistic manner; the term should not be read so narrowly as to exclude everything bearing on the welfare of the child but the bare paying of bills on the child's behalf.

Jones v. Jones (In re Jones), 9 F.3d 878 (10th Cir. 1993) (quoting *Holtz v. Poe (In re Poe),* 118 B.R. 809, 812 (Bankr. N.D. Okla. 1990)).

This includes things like guardian ad litem fees. *See, e.g., Beaupied v. Chang (In re Chang),* 163 F.3d 1138 (9th Cir. 1998) (affirming the bankruptcy court's ruling that California law permitted the appointment and provided for compensation of guardians ad litem and that in consideration of the child's best interests, such fees were nondischargeable under § 523(a)(5) and entitled to priority treatment under § 507(a)); *Miller v. Gentry (In re Miller),* 55 F.3d 1487 (10th Cir. 1995) ("[D]ebts to a guardian ad litem, who is specifically charged with

representing the child's best interests, and a psychologist hired to evaluate the family in child custody proceedings, can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a custody proceeding."); *Dvorak v. Carlson (In re Dvorak),* 986 F.2d 940, 941 (5th Cir. 1993) (holding that since the guardian ad litem's fees were incurred during a court proceeding for the child's benefit and support, they were nondischargeable under § 523(a)(5)); *Baskin & Baskin, P.C. v. Carlucci (In re Carlucci),* 2007 Bankr. LEXIS 1567, at *5 (Bankr. N.D. Ga. Mar. 13, 2007) (holding that since the role of the guardian ad litem, under Georgia law, was to protect the interests of the child and investigate and present evidence on the child's behalf, her role related directly to the welfare and support of the child); *Green County Corp. Counsel v. Kline,* 2006 Bankr. LEXIS 2848, at *10-11 (Bankr. W.D. Wis. Apr. 12, 2006) (holding that although court proceedings concerning statutory actions, including termination of parental rights, placement, and paternity, "are not all related to the financial support of the child, they are related to the child's welfare and the guardian ad litem's responsibility is to be an advocate for the best interests of the child[,]" such that fees are in the nature of support for the purposes of § 523(a)(5)); *Walter v. Neville (In re Neville),* 1997 Bankr. LEXIS 1106, at *4 (Bankr. W.D. Tenn. July 22, 1997) ("The Court has no difficulty in finding that Mr. Walter's work was of benefit to the minor child and that the role of a guardian ad litem was necessary for the protection of the child's best interests."); *Lawson v. Lever (In re Lever),* 174 B.R. 936, 942 (Bankr. N.D. Ohio 1991) ("The statutory purposes and duties of a [guardian ad litem] are premised to provide support for the minor child.").

A debtor may only object to a child support claim based on evidence there has been a clerical or mathematical error resulting in a state's claim being higher than the amount a debtor believed he/she owed in child support arrears. *In re Fort*, 412 B.R. 840, 849 (Bankr. W.D. Va.,

2009). Bankruptcy courts do not have jurisdiction to modify an amount owed for child support based any reasons other than factual evidence the amount owed to the state for child support arrears differs from what the state claims. Id.

C. Plan treatment 1322(a)(4)

Section 1322(a)(4) states that notwithstanding any other provision of this section, [the plan] may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

With respect to 1322(a)(4)'s effect on domestic support obligations, the majority of courts agree that

> Section 507(a)(1) gives unsecured domestic support obligations (DSOs) a first priority. This first priority for DSOs is further differentiated in subparts (A) and (B). If the DSO falls within § 507(a)(1)(A), it must be paid in full during the plan pursuant to § 1322(a)(2). If the DSO falls within § 507(a)(1)(B), it may be paid less than in full during the plan under § 1322(a)(4).[1] A debt that is a DSO must then be identified as either one that is payable to or recoverable by the custodial parent, whether or not the claim is filed for her by a governmental unit, falling under § 507(a)(1)(A), or one that has been assigned to, or owed directly to or recoverable by, the governmental unit coming under § 507(a)(1)(B).[2] The key, according to Collier, "is the party to whom the claim is

[1] Payment in full of § 507(a)(1)(B) DSOs is effectively deferred or delayed. To be sure, even a § 507(a)(1)(B) priority DSO remains due and owing after completion of the plan because it is non-dischargeable. See Lundin, § 441.1, p. 441-6 (cautioning against use of § 1322(a)(4) treatment because of the continuing accrual of interest on the DSO).

[2] The language of § 507(a)(1)(B) which excludes DSOs voluntarily assigned by the spouse or parent for the purpose of collecting the debt suggests that a DSO voluntarily assigned to a governmental unit for the purpose of collecting child support is a § 507(a)(1)(A) priority DSO claim. See Collier, ¶ 507.02A[1], p. 507-27. DSOs involuntarily assigned to a governmental until would be a § 507(a)(1)(B) priority DSO claim.

owed," the individual or the governmental unit.[3] If it is the latter, the claim is subordinated in priority to the former by virtue of § 507(a)(1)(B) which assigns a lesser priority within § 507(a)(1) to such claims.[4] And, if the claim is subject only to second support priority, it may be paid less than in full under the plan pursuant to § 1322(a)(4).[5] DSO claims bearing a first support priority (payable to the custodial parent) must be paid in full during the plan term under § 1322(a)(2). DSO debts having either § 507(a)(1) priority are non-dischargeable under § 523(a)(5).

In re Penaran, 424 B.R. 868, 876-77 (Bankr. Kan., 2010).

[3] Collier, ¶ 507.02A[1], p. 507-26.

[4] See Lundin, § 440. 1, p. 440-3.

[5] See Lundin, § 440. 1, p. 440-6.