

# **Domestic-Support Obligations; Applications to Retain Professionals and for Reimbursement of Fees**

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**What!? Is that a DSO?**  
**The Varied Faces of a Domestic Support Obligation Claim**  
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**A CAUTIONARY TALE**

- *Let's be blunt: If you hire a divorce lawyer today, there is a good chance you will hire a bankruptcy lawyer within two or three years.*<sup>3</sup>
- *Revenge is not a stated purpose for the bankruptcy process in the United States.*<sup>4</sup>

**A. DEFINITION**

**BEFORE**

Prior to April 20, 2005 the subject matter of support was dealt by the bankruptcy code in a non-comprehensive manner. We had, for example, a definition for "debt for child support" -a debt of a kind specified in section 523(a)(a)- and a seventh priority for allowed claims of debts to a spouse, former spouse, or child of the debtor.<sup>5</sup> In 2005 with the passage of the bankruptcy reform legislation an expansive concept was introduced to deal with this area.<sup>6</sup> In spite of this, in the Winter of 2005 one author laid down this judgment: "The Bankruptcy Code is particularly harmful to women and children."<sup>7</sup>

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<sup>3</sup> Gene Meyer. <http://m.psychologytoday.com/blog/evolution-the-self/201211/the-wittiest-quotes-divorce>

<sup>4</sup> Breaking up is hard to do...Especially when Bankruptcy is Involved... Andrew Cosgrove, ABI Law Review Volume 14 Number 1, Spring 2006 p. 271.

<sup>5</sup> 11 U.S.C. § 101(12A) and 507(a)(7).

<sup>6</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq.

<sup>7</sup> "HERSTORY" REPEATS: The Bankruptcy Code Harms Women and Children. By Peter C. Alexander. ABI Law Review Volume 13 Number 2. P. 573 evaluating the 2005 amendments to the Code. The gist being that the higher costs associated with filing bankruptcy and the very real possibility that bankruptcy lawyers

This is countered by the assessment that: *"Bankruptcy courts are also usually quite sensitive to the current support needs of a debtor's children and the debtor's spouse or former spouse...the bankruptcy courts will not allow a bankruptcy filing to be used by the debtor to evade the legitimate support needs of his her dependents."* Alan N. Resnick & Henry J. Sommer, 7 Collier Family Law and the Bankruptcy Code ¶ 5.06[4] (ed.2013).

**TODAY**

**BEFORE, ON, OR AFTER...**

Today, the definition starts with a term coined as *"domestic support obligation"* (hereinafter DSO) and, it means a *debt that accrues before, on, or after the date of the order for relief.* Generally, bankruptcy deals with pre-petition debts. With respect to a DSO it can be prior to the filing of the bankruptcy, accruing on the date of the filing and also after such filing. The treatment of the debt will vary depending on the timing of its accrual. At this point note §507(a)(1)(A): *Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by...* (our underline).

**DEBT AND CLAIM**

Before continuing with the review of the definition we look at the term *"debt"* which is defined as, *liability on a claim and*  

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*will become scarce would leave people without hope. In our local experience, this rationale has not proven true.*

"claim" which means, in part, a right to payment.<sup>8</sup> This is the first face of the DSO.

**INTEREST**

Pursuant the code, the debt that is classified as DSO includes interest that accrues on it as provided under applicable non-bankruptcy law notwithstanding any other provision of this title. So, interest is the second face of the DSO. Our applicable non-bankruptcy law on interest is found in the Puerto Rico Civil Code, Articles 1061 and 1062.<sup>9</sup> When the obligation consists in the payment of a sum of money and the payer is late, the indemnification for damages shall consist in the contracted interest and in the absence of contract, the legal interest. Furthermore, interest on the interest due shall accrue when judicially claimed.

In the case of In re Resendiz, 2013 WL 6152921 (U.S.B.C. S.D. Texas 2013) the bankruptcy court confirmed a Chapter 13 plan that provided for the payment of post-petition interest on a DSO claim notwithstanding the fact that pursuant to 11 U.S.C. §1322(b)(10), in order to pay interest on a non-dischargeable unsecured claim the Debtor must propose a 100% repayment plan, which in this case, the plan did not. The issue was identified by the court as "*whether the Court can confirm a Chapter 13 Plan*

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<sup>8</sup> 11 U.S.C. § 101 (12) and (5).

<sup>9</sup> 31 L.P.R.A. §3025 and 3026.

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*which proposes to pay 6% interest on a DSO claim without proposing a 100% dividend to the general unsecured class."* The court concludes that *"Should the interest portion of the claim not be paid in the plan or directly by the debtor, the debtor could be subject to post-discharge enforcement actions by the custodial parent."* And it also viewed "A "domestic support obligation," as the Bankruptcy Code now defines the term, includes not only a child support arrearage, but also interest accruing on the arrearage under applicable nonbankruptcy law." The applicable non-bankruptcy law in the Resendiz case was section 157.265 of the Texas Family Code, which provides that interest accrues on delinquent child support at the rate of six percent per year from the date the support is delinquent until the support is paid.

Locally, seldom do we see a DSO claim that seeks payment of interest, much less ongoing interest after the filing of the bankruptcy. This post-petition interest could be the third face of the DSO. Arguments are made against post-petition interest mainly in that it is not included in the definition of DSO.<sup>10</sup>

On the theme of penalties we have the case of Smith v. Pritchett (In re Smith), 586 F.3d 69 United States Court of Appeals, First Circuit 2009. The bankruptcy court of New Hampshire found that the late payment penalty of support was a

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<sup>10</sup> A Trustee's Role in Determining Domestic-Support Obligations. Robert C. Fur and Alan R. Crane. ABI Journal September 2013 Vol. XXXII, No. 8 p. 96.

DSO. Debtor appealed to the Bankruptcy Appellate Panel and, Judge Lamoutte reversed. Ex-wife appealed. The First Circuit affirmed. The provision in question was that which provided that *"...All alimony payments shall be due in funds available to the wife on or before the first of each month, and shall be subject to a late payment penalty in the amount of \$50.00 for each day after the first of each month upon which they are received by or become available to the wife."* Mr. Smith was late in making payments and his former wife sued and obtained judgment of \$75,010, which represented the accumulated late payment penalties. She then sought to enforce the judgment by obtaining an attachment over Mr. Smith's homestead and a lien was recorded.

Mr. Smith filed a Chapter 13 petition and advised of the intent to avoid the lien. She filed her claim alleging it was a DSO entitled to priority and Mr. Smith objected. The bankruptcy court denied Mr. Smith's motions, concluding that the obligation was in the nature of support and thus entitled to priority. The BAP reversed. The Circuit Court, in view of the definition of DSO states that *"...pursuant to the statute, for an obligation to a former spouse to be considered a DSO, it must actually be in the nature of support. This issue is one of federal bankruptcy law, and not state law."* In reviewing the matter the Circuit Court phrases the controversy in the following

fashion: *"The question then is whether, given the language of the agreement, the \$50 per day late payment fee provision was intended as support to Pritchett, or, alternatively was intended as a punitive measure to deter Smith from paying late."* The court was: *"...persuaded that the late fee was intended to encourage payment of alimony and was not itself alimony."* Thus Pritchett's claim is considered a general unsecured claim not entitled to priority status and subject to discharge.

Attorney's fees awarded to the non-debtor spouse may be the fourth face of a DSO. *"In a family law case, attorney's fees can be awarded either as a support or non-support obligation. However, federal law determines whether a debt is a domestic support obligation under the bankruptcy code. Therefore, a debt that was not considered a domestic support obligation by the family court, can still be considered a domestic support obligation by the bankruptcy court. Conversely, an award of attorney's fees by the family court, even when the state court determines them to be domestic support obligation under state law, can be treated as a nondomestic-support obligation in a bankruptcy case."*<sup>11</sup>

Lastly, *"Whether an attorney's fee award maintains its domestic-support obligation status when it is awarded directly*

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<sup>11</sup> A Trustee's Role in Determining Domestic-Support Obligations. Robert C. Fur and Alan R. Crane. ABI Journal September 2013 Vol. XXXII, No. 8 p. 96.

*to the law firm representing the creditor spouse is the subject of disagreement among bankruptcy courts.” Id.*

**OWED TO...**

The debt is owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or a governmental unit;

**IN THE NATURE OF...**

The debt then must be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) without regard to whether such debt is expressly so designated.

This qualifier *-in the nature of,* - as you may imagine, can give rise to much debate. In the case of In re Melendez Perez, 2013 WL 959842 (USDC D. Puerto Rico, 2013) a motion to dismiss was denied in part regarding the obligations to pay \$2,000 per month (monthly payment in concept of the liquidation in installments of the rights and/or assets of the ex-spouse in the conjugal partnership) and the mortgage payments. On the other hand the court ordered an evidentiary hearing to determine whether or not the agreement to maintain a life insurance policy naming the Creditor as a beneficiary is a support obligation. In his bankruptcy, the debtor interestingly, listed his former spouse as a party to an executory contract in the nature of a liquidation of conjugal partnership and his intention to reject

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the same. The former spouse filed a claim asserting DSO status, which claim included the pay-off balance of a mortgage.

The Melendez Court relies on Smith v. Pritchett when it states: *"The critical issue in determining whether a claim is in the nature of support is, "whether the state court which entered the divorce decree and the parties who entered into a divorce agreement intended the award to serve as support or as 'something else,' such as a division of jointly owned property."* The court then *"...concludes that the \$2,000 monthly payment obligation constitutes part of a property settlement as expressly provided in the stipulations which formed part of the divorce judgment. Consequently, the \$2,000 monthly payment is not a support obligation of the Debtor."*

Contrast the Melendez Perez case with that of In re Efron, 495 B.R. 166 (USBC D. Puerto Rico, 2013). Here the Court ruled that \$50,000.00 monthly payment was a *"Domestic Support Obligation"* as defined in § 101(14A) of the Bankruptcy Code. As an opener the court reports *"...facts surrounding domestic relations cases can be distracting in nature because of sensitive facts and contentious nature."* The divorce judgment mandated Debtor to pay his former spouse \$50,000.00 a month until all the marital assets were divided. The local court determined that debtor had arrearage \$3,314,936.40 plus corresponding interest (seems like the higher the stakes,

interest will show itself) and the Chapter 11 ensued. The parties disagreed on the nature of the payments due. The former spouse argued that the award of \$50,000.00 per month is later to be reduced from the community estate when such community assets are divided. Debtor claimed there was no domestic support obligations pending, but instead, these amounts are for advances to undetermined future conjugal property division.

The court makes an analysis under the rubric of the totality of the circumstances test. *"This Court must note that in exercising its independent discretion under the totality of circumstances test, in deciding whether a support payment carries non-priority status, this Court participates in a weighing between the goal of providing the Debtor a 'fresh start', which mandates that exceptions to discharge be confined to those plainly expressed, and an overriding public policy favoring the enforcement of familial obligations."* The final pronouncement by the court was: *"Incorporating the above Puerto Rico Civil Code findings into our analysis that ex-spouses are entitled to support from the time of dissolution of such conjugal property until the performance of settlement is perfected, this Court finds such amount to be leaning towards those resembling domestic support payments as defined by the Bankruptcy Code. This finding is based on the parties' mutually agreed facts that the Division Case is still pending as of this*

*day in the Puerto Rico state court, years after the resolution of the Divorce Case. This Court reiterates the fact that although state law may characterize a particular obligation as support or property settlement, this determination is not binding on the bankruptcy court."*

**SET BY...**

Established or subject to establishment before, on, or after the date of the order for relief by reason of applicable provisions of— a separation agreement, divorce decree, or property settlement agreement; an order of a court of record; or a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and 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.

In light of the above, we can have a prepetition DSO claim that may have been established by the child support agency (ASUME for its Spanish acronym) as well as a claim regarding the private agreement of the parties; an agreement reached without court or state agency intervention.

**B. EXCEPTIONS TO THE AUTOMATIC STAY**

Here we must take for granted that the reader knows the effect of the automatic stay when a bankruptcy petition is

filed.<sup>12</sup> There are exceptions to the application of the automatic stay. These are particular circumstances, that if present, the automatic stay does not apply.<sup>13</sup> Under the 1978 Code we had seventeen (17) exceptions. Under the 2005 reform to the Code the exceptions have increased to twenty seven (27)<sup>14</sup> and some of the original seventeen (17) have suffered amendments.

In the "old days" we had a short provision in the exceptions to the automatic stay relative to establishment of paternity, establishment or modification of an order for alimony, maintenance and support (AMS) and the collection of AMS from property that is not property of the estate.<sup>15</sup>

The 2005 overhaul of the code kept the above described exceptions (AMS now being labeled DSO) and added a number of activities that are far reaching in their scope. Proceedings concerning child custody or visitation are not stayed. A welcome clarification relates to the dissolution of marriage (not stayed) except to the extent that such proceeding seeks to determine the division of property that is property of the estate.<sup>16</sup> It is now clear that the automatic stay in the case of a Debtor/Spouse does not stay the commencement or continuation

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<sup>12</sup> 11 U.S.C. §362(a).

<sup>13</sup> 11 U.S.C. §362(b)

<sup>14</sup> The numbered paragraphs in subsection (b) under the 1978 Code were eighteen (18) and now under the reform they are twenty eight (28). However, exception five was repealed back in 1998.

<sup>15</sup> 11 U.S.C. §362(b)(2).

<sup>16</sup> 11 U.S.C. §362(b)(2)(A)(iii) and (iv).

of a divorce proceeding by the non-filing spouse. Likewise, a divorce proceeding under the aegis of mutual consent where the couple does not have conjugal property to divide among them would not be stayed.

However, if a couple, were to prosecute their divorce under mutual consent and they have conjugal property and, that property in turn is **property of the estate**, it would be stayed as to the division of property aspect. Likewise, if the debtor spouse owns property privately and intends to convey some to the non filing spouse, it too would be stayed.

Generally, under the Puerto Rico Civil Code's "traditional" causes for divorce and the proceedings thereunder, we do not see a division of property. However, more frequently we see requests for provisional remedies under Puerto Rico Rule of Civil Procedure 56 that have the effect of dividing property albeit, on a temporary basis. It is the opinion of the authors that those provisional remedies would fall under the *exception to the exception* "to the extent that such proceeding seeks to determine the division of property that is **property of the estate**".

We recognize that in certain divorce cases, when dealing with property issues, time is of the essence. Nevertheless, we favor the cautionary road of seeking bankruptcy court approval by way of a motion to modify the stay to allow for the filing of

a provisional remedies motion in the Puerto Rico Court. The foremost reason for such caution is to shield the client (and even the attorney) from a motion for violation of the stay and the financial consequences it may have if it is granted.<sup>17</sup> Secondly, ex parte relief may be available. The Code certainly allows for it. Under subsection 362(f) we have:

*"Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section."*

Continuing with our review of this second exception to the automatic stay, we must bear in mind the fine distinctions among interrelated sections, identify them and avoid the pitfalls they may pose. For example, section 362(a)(6) tells us that the automatic stay applies to *any act to collect, assess, or recover a claim against the **debtor** that arose before the commencement of the case under this title.* On the other hand, section 362(b)(2)(C) excepts from the automatic stay *the withholding of income that is property of the estate or **property of the debtor** for payment of a domestic support obligation under a judicial or administrative order or a statute.*

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<sup>17</sup> Section 362(k)(1) states: Except as provided in paragraph (2) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. Subsection (k)(2) appears to give a partial safe harbor, by limiting the damages to "actual" damages suffered by Debtor.

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In practical terms we have couples who are divorcing and they may report to the Family Court that one or both are in bankruptcy. Often times they tell us that the judge has ordered them to obtain the trustee's permission or consent to the divorce and they come to us for said consent. The Chapter 13 trustee has no ability or power to grant the so called consent. It is the bankruptcy court, when the divorce proceeding entails a division of estate property, who has the authority to pass judgment thereon. What a bankruptcy trustee may be called upon, by the bankruptcy court, is to review the matter and state a position. We proceed to do so. Sometimes we state having no objections and sometimes we do. An example of the latter is when in the divorce pleadings we see assets not disclosed in the bankruptcy petition.

In a recent case the debtor filed an informative motion regarding her divorce and we filed a position where the prayer was: GRANT Debtor's informative motion, recognizing the applicability of the domestic relations exception to Debtor's divorce proceeding and modifying the stay so that the property division contemplated therein may be ruled on by the local Court.

The following exception to the automatic stay may pose a problem in Chapters 11, 12 and 13.

- *with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute*

"This exception draws no distinction between prepetition arrears on the obligation and current payments on the obligation." Collier Family Law at ¶ 5.03[5]. To the extent the withholding includes a portion for arrears and, those are contemplated to be paid thru a plan, the ongoing withholding could jeopardize the feasibility of the plan and purpose of the case. They would appear to be in conflict. If a plan containing a provision to cure those arrears is confirmed, then it could be argued that the plan controls and the withholding should cease.

- *of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;*
- *of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law;*

As with the wage garnishment, discussed above, these two exceptions pose the same issues and probable solutions when a plan comes into play either in Chapter 11, 12 or 13.

**C. EFFECT OF BANKRUPTCY OVER PRE-PETITION  
AND POST-PETITION ARREARS**

**TREATMENT**

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In Chapter 12 and 13, the plan shall provide for the full payment, in deferred cash payments of the priority non-government-assigned DSO claim.<sup>18</sup> In order to obtain confirmation of the chapter 12 and 13 plan, the debtor must show payment of all amounts due under a DSO that become payable after the filing of the petition.<sup>19</sup>

In chapter 11 there is similar, but not identical language in terms of the DSO treatment under the plan. *"In a chapter 11 case, a debtor cannot confirm a plan unless the pre-petition domestic-support obligations are paid in full. The plan can provide for deferred payments only if the class accepts; otherwise, the plan must provide for payment in full as of the plan's effective date."*<sup>20</sup>

What about current support, i.e. those that become due after the filing of the petition? *"When relief from the stay is sought to pursue current support, which would not be paid from the debtor's bankruptcy estate or through a bankruptcy plan, such relief is normally granted."* *Collier on Family Law* at ¶ 5.06[4].

At times we come across a case where the local court has established a support order, yet the parties extra-judicially change it, by way of reduction or elimination. Since for

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<sup>18</sup> 11 U.S.C. §1222(a)(2).

<sup>19</sup> 11 U.S.C. §1225(a)(7).

<sup>20</sup> A Trustee's Role in Determining Domestic-Support Obligations. Robert C. Fur and Alan R. Crane. ABI Journal September 2013 Vol. XXXII, No. 8 p. 32.

confirmation of a plan debtor must show evidence of being current with the payments that become due after the filing, we take the position that debtor is in non-compliance. In those circumstances deference is due to the local court and the parties should therefore obtain the appropriate order from the local court. Likewise, evidence of compliance with the DSO post-petition is a matter of evidence to be filed with the bankruptcy court, not merely tendered to the trustee.

In the case of In re DeSouza, 493 B.R. 669 United States Bankruptcy Appellate Panel of the First Circuit (2013), after filing under Chapter 13, the debtor's spouse filed for divorce and obtained the fixing of alimony which debtor failed to pay. She then initiated contempt proceedings and, in one of those days where the trial was to continue, Debtor failed to appear and an apprehension order ensued. Debtor amended Schedule J to reflect the alimony payment but his chapter 13 plan did not mention the alimony obligation, nor did it address how much was owed or how it was to be paid. Plan was confirmed. Close to six months later debtor was arrested.

DeSouza filed an emergency motion seeking a determination regarding "the validity of entry and enforcement of a domestic relations order post petition." He argued that the spouse had to come first to the bankruptcy court to request an order authorizing the collection and enforcement of domestic support

payments from property of the estate. He also asserted that the withholding exception to the automatic stay was not applicable because *"there was never any pre or post-petition withholding order."* The bankruptcy court ruled against De Souza. The Panel decided that *"...it appears that the payments ordered by the probate court were to come from property of the estate in this chapter 13 case. Consequently, the § 362(b)(2)(B) exception allowing for the collection of a domestic support obligation from property that is not property of the estate does not apply. Likewise, because there was no withholding under a judicial or administrative order or a statute, the exception under § 362(b)(2)(C) does not apply."* On the exception, the Panel states: "We prefer the approach followed in Lawida v. Seyffer (In re Lawida), BAP No. AZ-10-1443-DkiMy, 2011 WL 4502060, 2011 Bankr.LEXIS 4299 (9th Cir. BAP Aug. 1, 2011), where the court declined to apply the withholding exception in the absence of a wage garnishment order. Such an interpretation gives meaning to the language in the statute and the distinctions between the exceptions created by such language." The Panel concludes that the spouse in seeking the establishment of alimony did not violate the stay order but the contempt proceedings did.

**D. DISCHARGE**

*"In a Chapter 7 case, there is no requirement that a debtor pay pre or post-petition domestic-support obligations to stay in*

*bankruptcy and receive a general discharge.”<sup>21</sup> On the other hand, “...a chapter 13 debtor must certify that all pre- and post-petition domestic-support obligations have been paid in full in order to obtain a discharge.” Id*

**E. CAUSE FOR DISMISSAL**

We have sustained here that with the definition of DSO, this type of obligation has broadened its scope within the bankruptcy code. As part of this reach there is an additional tool enacted in the 2005 Reform to enforce compliance with family obligations by a bankruptcy debtor. This new tool is the cause for conversion or dismissal in the reorganization chapters 11, 12 and 13<sup>22</sup> related to the payments of post-petition DSO. In each reorganization chapter, the Code directs the bankruptcy court, after notice and a hearing, to convert or dismiss a case, whichever is in the best interests of creditors and the estate, if the movant establishes cause and there are no unusual circumstances.

It might be simple to determine whether a debtor is current or not when the issue is related to child support. A different scenario arises when we are dealing with property settlements or spousal/ex-spousal obligations. In the latter, the bankruptcy court has to determine first, whether there is a DSO. As

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<sup>21</sup> A Trustee’s Role in Determining Domestic-Support Obligations. Robert C. Fur and Alan R. Crane. ABI Journal September 2013 Vol. XXXII, No. 8 p. 32.

<sup>22</sup> 11 U.S.C. § 1112(b)(4)(P), 1208(c)(10) and 1307(c)(11)

discussed above in In re Perez and In re Efron, supra, this equation is complex and the 1<sup>st</sup> circuit courts have to evaluate the totality of the circumstances in order to make such determination.

The initial burden is on the movant to argue and, by a preponderance of the evidence standard, prove its position that there is cause for either conversion or dismissal of the chapter 11 case, whichever is in the best interests of creditors and the estate. See Alan N. Resnick & Henry J. Sommer, 7 Collier on Bankruptcy ¶ 1112.04[4] (16th ed.2012). "*Thus, until the movant carries the burden, the statutory direction that the court 'shall convert the case to a case under chapter 7 or dismiss the case' is not operative.*" *Id.* So, keep in mind that if you are representing a DSO holder and you request the conversion or dismissal of a case you have to be prepared to present evidence to sustain the allegations and classification of the claim.

Cause to dismiss might involve a contested matter in the bankruptcy court as to what is the extent of the DSO in a particular case. Absent such controversy, cause for dismissal is rather simple: debtor has to demonstrate that he or she is current with the DSO.

Hence, in order to eliminate the cause for dismissal, the debtor needs to make sure that he or she has complied with all post-petition DSO payments. It is our position that to include

post-petition arrears in a plan is not an option available to debtors, as legislative's intent to protect family matters would otherwise be defeated. Also, section 502(b)(5) of the Bankruptcy Code provides that only a DSO pre-petition debt can be an allowed claim.

If cause is found, the court has broad discretion to determine whether conversion or dismissal is in the best interest of creditors and the estate. See, Gilroy v. Ameriquest Mortg. Co. (In re Gilroy), 2008 Bankr.Lexis 3968 (B.A.P. 1st Cir.2008). In re Perez, Id.

**F. RELATIONSHIP BETWEEN BANKRUPTCY  
AND DOMESTIC RELATIONS LAW**

At times the parties tend to be confused by the difference between the family exception and the independent discretion of the bankruptcy court in determining whether a support claim enjoys a priority or non-priority classification. Parties request the abstention of the bankruptcy court for the simple fact of the matter being related to family law. This topic was also discussed by Judge Lamotte in the case of In re Perez, supra. Although state law controls the determination of the duty to support, federal courts nonetheless controls whether the duty or agreement is nondischargeable. William L. Norton Jr., 3 Norton Bankr.L. & Prac.3d § 57.30(2013). The issue of whether certain types of obligations qualify as support or as part of a

property settlement within the meaning of the Bankruptcy Code is one within the province of federal bankruptcy law, not of state law. In re Smith at 73; 1-6 Collier Family Law and the Bankruptcy Code ¶ 6.03[1] and [2]. (“... *the legislative history of the Bankruptcy Code definitively resolved the issue of whether federal law or state family law determines whether a particular obligation is in the nature of alimony, maintenance or support, and therefore a nondischargeable domestic support obligation. The resolution of that question must be based upon principles of federal law*”). Since the First Circuit adopted the totality of circumstances test to determine if the obligation was established in the nature of support, parties must be prepared for an evidentiary hearing to sustain the classification of the claim with testimony and/or documentation. Do not forget, that if the obligation was established by the State Courts of the Commonwealth of Puerto Rico, the documents have to be translated to the English language to comply with Local Rule 5(g) of the United States District Court for the District of Puerto Rico. If you fail to do so, you may lose the opportunity to present evidence in your favor and thus, may have a claim against you, the nature of which you well know and we need not repeat here.

Now we will discuss whether bankruptcy courts are bound by state court when an issue of classification of a DSO claim is

raised. Federal courts are not bound by the state court's determination of a spouse's qualifications for receiving support. In re Gionis, 170 B.R. 675 (B.A.P. 9th Cir. 1994). See also In re Goin, 808 F. 2d 1391, 1392 (10<sup>th</sup> Cir. 1987). Instead, a bankruptcy court "must look beyond the language of the decree to the intent of the parties and to the substance of the obligation." *Id.* See also In re Carrigg, 14 B.R. 658, 660 (D.S.C. 1981).

Also, the First Circuit expressed in 2003 that the labels used for obligations by the state court or the parties are not necessarily controlling for Bankruptcy Code purposes. See In re Werthen, 329 F.3d 269, 273 (1st Cir.2003); 1-6 Collier Family Law and the Bankruptcy Code ¶ 6.03[2] ("Thus, the fact that state law characterizes a particular obligation as support or property settlement is not binding on the bankruptcy court").

Even though state law is not controlling, a bankruptcy court should look to state law for guidance in determining whether a particular obligation is in the nature of support or a property settlement, "since virtually the whole subject matter of familial support is within the domain of state law, and 'there is no federal law of domestic relations,' a federal court must look to many of the same considerations that are found in state law." 1-6 Collier Family Law and the Bankruptcy Code ¶ 6.03[2]. Determining whether a particular obligation is in the nature of support or a property settlement is often a difficult

*decision for various reasons; namely; (i) parties entering into separation agreements generally do not consider how their obligations will be characterized in a bankruptcy case; (ii) if the obligations are mandated by a state court order the same is based on state family law statutes and doctrines; (iii) the state law to which the bankruptcy court turns for guidance, usually recognizes that the issues of support and property division are inextricably intertwined; and (iv) the laws governing support and division of property consider many of the same factors which focus on the financial resources and needs of the parties. Id. at ¶ 6.04[1].*

As presented herein, the crafting, structure and content of a resolution, agreement or judgment is very important for the parties involved in a bankruptcy case. Because of the overall weak economic development in our beautiful Island, it is probable that in years to come, bankruptcy courts will have more contact with family law matters and those family law related will further develop the interplay of domestic support obligation in our bankruptcy practice.

On the other hand, in Puerto Rico we have another development that may impact our practice. The Puerto Rico Family Court judges are taking seminars at the Judicial Academy regarding DSO and other bankruptcy matters in order to consider how their judgments or resolutions may be impacted by a future

bankruptcy filing. So don't be surprised if you receive a state court judgment which specifies that a given monthly obligation is to be considered in a bankruptcy case as a DSO.

**G. EPILOGUE**

Divorce and bankruptcy seek the same goal: the reorganization of the individuals.