



# THE ENFORCER

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## Protecting Your Client When Her Spouse Files Chapter 13

Many family law attorneys have acquired a basic knowledge of the interplay between family law and bankruptcy. As a result of the changes to the Bankruptcy Code in 2005<sup>1</sup> (BAPCPA), determining what is dischargeable in a Chapter 7 is fairly easy. Those obligations in the "nature of support"<sup>2</sup> are non-dischargeable under §523(a)(5) as "domestic support obligations" ("DSOs"). Further, those obligations which are **not** DSOs are separately non-dischargeable under §523(a)(15). As a result, effectively all obligations under a separate maintenance or divorce judgment are non-dischargeable in a Chapter 7. Why the italics? Because the answer changes when the Debtor/Spouse files a Chapter 13.

A Chapter 13 is a different animal. It is often called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three (3) to five (5) years. As a result of this effort by Debtors' to repay all or a portion of their debts, Congress has provided different dischargeability rules with respect to a Chapter 13 discharge. Unlike a Chapter 7, a non-domestic support obligation under §523(a)(15) is *dischargeable* in a Chapter 13.

§1328(a) provides in part:

"...as soon as practicable after completion by the debtor of all payments under the plan,...the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, **except any debt—**

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(2) of the kind specified in section 507 (a)(8)(C) or in **paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523 (a) ;**

Notably, though Congress excluded DSO (§523(a)(5)) in the Chapter 13 discharge, claims which are not DSOs<sup>3</sup> were omitted.

Dealing with a post-divorce Chapter 13 is not for the faint of heart or the unsophisticated family practitioner. When the Debtor files his Chapter 13 plan, you must first analyze it to determine how the obligation to your client is treated. If it

is scheduled as a general unsecured claim, your client will be paid that percentage which the Debtor's other unsecured creditor's are paid. The determination of whether your client's claim is a DSO can be accomplished by an adversary proceeding in the bankruptcy court or in the State Court under its concurrent jurisdiction.

A real world example will be helpful. H and W are divorced and their Judgment of Divorce provides that H will pay a joint Visa credit card with a balance of \$10,000 and indemnify W. After the Judgment is entered, he files a Chapter 13 and lists the Visa card and his obligation to indemnify W as general unsecured obligations. Based on his income and expenses, his Chapter 13 plan offers to pay general unsecured creditors, ten percent (10%) of their claims. This means that Visa will receive \$1,000 on its \$10,000 claim (\$10,000 x 10%). As for W, the indemnification is the difference between what Visa is paid and the amount for which she remains liable (\$10,000-\$1,000=\$9,000). Therefore, W's claim is for \$9,000 and would be paid \$900 (\$9,000x10%).

Unfortunately, there is a kicker. If W doesn't file a proof of claim, she gets paid zero (\$0). This is because she is *required* to file a proof of claim to be paid anything (this is without regard to separately objecting to the plan because it characterizes her claim as a non-DSO). Bankruptcy Rule 3002(a) provides:

(a) Necessity for filing.

An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed...

How to object to the Chapter 13 plan and how to obtain a determination of W's claim as a DSO is beyond the scope of this article. Most importantly, it is critical that your client immediately consult with a bankruptcy attorney if her spouse has an obligation to her in the Judgment and he has filed a Chapter 13. The time to act is short and the consequences are severe.

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)
2. 11 USC §101(14A)
3. 11 USC §523(a)(15).