



# THE ENFORCER

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## Protecting Your Client When Her Spouse Files Chapter 13 (Part II)

In the December, 2010 Enforcer column I wrote of the differences between the dischargeability provisions of the Bankruptcy Code. Under the Code, different dischargeability outcomes may occur when a Debtor files a Chapter 13 rather than a 7. This article discusses a different strategy to be considered when confronted with a spouse's Chapter 13 filing.

The realities of Michigan's economy dictate that many divorces will end in one or both parties filing for bankruptcy. A Chapter 13 bankruptcy 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 pay installments to creditors over three (3) to a maximum of five (5) years. The plan is filed with the bankruptcy court and creditors and the bankruptcy trustee have an opportunity to object to it. If no objections are received, the Court will likely approve the plan.

Plans are broken down into classes. Different types of obligations are placed in different classes. For example, a domestic support obligation ("DSO") would appear as a Class 6 priority claim under the model plan. Arrearages for DSO claimants must be paid in full during the term of the plan. However, should an obligation under a Judgment of Divorce be placed in Class 8, General Unsecured Obligations, it would only be paid a percentage of the amount due.

Chapter 13 debtors often misrepresent or mischaracterize the amount and/or nature of the debts they owe to their former spouse. This is done to preserve the financial viability of their plan or to delay repayment of their support obligations. If your client is owed money for property settlement or support, you should carefully review the plan or refer them to bankruptcy counsel. It is imperative that you verify that the plan properly states the amount and character of the obligation. In addition to the objections discussed in part I of this series, you may

have grounds to object to confirmation on grounds of bad faith.

### A. Bad Faith

11 U.S.C. §1325(a)(3) provides that "the court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law." When the purpose of the plan is to evade support or property settlement obligations, it is evidence of bad faith and confirmation should be denied.<sup>1</sup> Further when the debtor repeatedly violates state court orders and uses the bankruptcy court to do so, the court will determine that the plan is not filed in good faith.<sup>2</sup> Especially when the domestic support creditor is the only significant creditor in a Chapter 13, this will also be grounds for objecting to a plan on the basis of bad faith.<sup>3</sup> Likewise, the filing of bankruptcy for the sole purpose of avoiding payment of a settlement agreement is a filing with a lack of good faith.<sup>4</sup>

Note that the good faith standard applies regardless of the type of debt listed in the plan; it does not hinge on whether the claim is for a DSO or for a property settlement.

### B. Failure to Pay Past DSO Obligations

The requirements for a Chapter 13 plan include a requirement that all priority claims be paid in full over the life of the plan, unless the holder of the claim agrees otherwise.<sup>5</sup> Under the Bankruptcy Code, claims for domestic support obligations are given priority status.<sup>6</sup>

This means that you should review the Chapter 13 plan carefully to ensure that any domestic support obligation is being paid in full over the life of the plan. As previously stated debtors often will misrepresent the amount of the DSO in the hope that this will allow them to obtain confirmation of the plan. However, if you can show that the debtor has misrepresented the amount of the DSO and failed to provide for their payment in full over the life of the plan, you have grounds to object to its confirmation.



### C. Failure to Pay Ongoing DSO Obligations

In addition, a party in interest may seek dismissal of the Chapter 13 bankruptcy case, upon the failure of the debtor to pay any DSO on which first becomes payable after the date of the filing of the petition.<sup>7</sup> This means that the Debtor must remain current in their DSO post petition filing. Bear in mind that any motion for dismissal should be filed promptly after the filing of the Chapter 13 case. The longer the case is administered, the greater the risk that the Court could find that dismissal may prejudice other creditors who would benefit from the Chapter 13 payment plan.

1. *In re Fleury*, 294 B.R. 1 (Bankr. D. Mass 2003).
2. *In re Chadwick*, 296 B.R. 876 (S.D. GA 2003).
3. *In re Griffith*, 203 B.R. 422 (Bankr. N.D. Ohio 1996);
4. *Id.*
5. *In re Garrison* 5 B.R. 256, ( E.D. Mich. 1980), 11 U.S.C. §1322 (a)(2)
6. 11 U.S.C. §507(a)(1)
7. 11 U.S.C. §1307(c)(11)

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