

DOMESTIC SUPPORT OBLIGATION

101(14A) *(14A) 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 or record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by 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.

523(a)(5) A discharge under §727, 1141, 1228(a), 1228(b), or 1348(b) of this title does not discharge an individual debtor from any debt –

(5) for a domestic support obligation

(a) The following expenses and claims have priority in the following order:

(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 a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of a child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

I GENERAL

(A) Past 26 years we have become conversant with phrase "alimony, maintenance and support" to distinguish that portion of matrimonial award attributable to support of former spouse or child, versus a property settlement designed to divide martial assets.

II

2) The phrase has now been supplanted by the phrase DOMESTIC SUPPORT OBLIGATION. Defined 101(141A)

The definition of Domestic Support Obligation appears broader in certain respects:

2. Includes both pre-petition and post-petition obligations.
3. Includes interest that accrues on debt under applicable nonbankruptcy law, "notwithstanding any other provision of this title."
4. Includes obligations owed to or recoverable by
 1. spouse, former spouse or child of debtor, or child's parent legal guardian or responsible relative;
 2. A governmental unit
5. Includes obligations established or subject to establishment before, on, or after the date of the order for relief.
6. Includes obligations assigned to nongovernmental entity if voluntarily assigned for purposes of collection.

3. New 507(a)(1) elevates the priority of Domestic Support Obligations.

Previously 507(a)(7), thus after

- (a)(1) administrative expenses
 - (2) involuntary gap claims
 - (3) up to 4925 for wages, salaries and commissions claims to wage claimant
 - (4) up to 4925 contributions to employee benefit plans - to each individual claim
 - (5) 2225 consumer deposit claimants
4. Still subject to carve out for Trustee's commissions and fees - that is Chapter 7, 11, 12 or 13 Trustee.
 - a) Query: No carve out for DIP's professionals
5. Likewise, clearly no carve our for other administrative expenses - now covered by 507(a)(2).
6. Interesting interplay between the precise language of:
 - i) 101(14)(A)
 - ii) 507(a)(1)
 - a) while (101)(14A) makes clear that DSO's include debts that accrue "before on or after," 507(a)(1) gives first priority only to DSO's.

"owed or recoverable" "as of the date of the filing of the petition"

Thus, facially under new law post-petition DSO's are not covered by 1st priority and that would be case in 11 and 13 as well.

III 507(a)(1) Sub-Priorities

Priority of Pre-Petition Domestic Support Obligations

1. All domestic obligations are "first" priority under § 507(a)(1):
2. However, within category of domestic support obligations, those owed to spouse, former spouse, child of debtor, or child's parent, legal guardian or responsible relative, or recoverable by a governmental unit on their behalf amount the first priority debts.
3. Second among the first priority debts are those domestic support obligations assigned to a governmental unit (other than for purposes of collection) or owed directly to a governmental unit under applicable nonbankruptcy law.
4. And given higher priority than each of these categories are the administrative expenses of a trustee to administer the assets for such claims.
5. The biggest change is the support obligations assigned to governmental units are now priority debts.

(1) Example:

If a debtor is obligated to a spouse for \$2,000/month for child support until the child reaches emancipation, and while 2 months in arrears, files five (5) years before that prospective date? (i.e. 60 payments of \$2,000/mo left on obligation), what is the allowed priority claim?

c) Standard is "owed" or "recoverable" int the disjunctive. Thus, if either element is met the debt has priority.

(1) Principal of statutory construction if two distinct terms are used, each has a difference meaning.

a) Alternative "1" – the 120,000 is owed, but is not yet recoverable – therefore – entire 120,000 is a priority claim.

1. Such interpretation could lead to a DSO receiving all or the greater portion of a bankruptcy estate.

b) "owed or recoverable" might refer to a debt then due and owing versus one not yet liquidated by court order or stipulation.

c) However, under such latter interpretation, no post-petition administrative debt would be treated as an (a)(1) claim.

d) 503(b) – Section dealing with administrative expenses. While BRA has amended it – no amendment for treatment of post-petition DSO's.

e) Arguably such an obligation has no benefit to estate, therefore it would not be an administrative claim, and would be entitled to no special priority.

So then - how do post-petition DSO's get treated in a Chapter 13 or Chapter 11 Plan?

IV Application to Various Chapters

507(a)(1)

A. Effect of Characterizing a DSO as Priority

1. Chapter 7 first money in case - Since post-petition wages not property of the estate 362(b)(2)(B) allows collection of DSO's from property not property of the estate

2. Not paid first because - Chapter 13 must be paid in full over life of Plan - 507(a)(1)

1322(a)(2)

a) Exception under 1322(a)(4) – need not pay 507(a)(1)(B) payments – DSO's owed to governmental unit – IN FULL but then must pay all projected disposable income over 5 years.

3. a) Chapter 11 – 1129(a)(9)(B) –

507(a)(1)

A) "If class has accepted the Plan, deferred cash payments of a value, as of the effective date of the Plan equal to the allowed amount of such claim."

B) If such class has not accepted the Plan, cash on the effective date of the Plan, equal to the allowed amount of such claim.

**2 Alternatives
Depending Upon
Consent or Lack
Thereof**

What About Post-Petition DSO's?

V **BAPCPA** **Auto Stay Changes - Also Impact Treatment of Post-Petition DSO's**

- created major change in definition of Property of Estate as it affects Chapter 11 cases.

1. Under prior statute – Post-petition earnings were not property of the estate – now 1115(a)(2), Post-petition earnings are Property of the Estate.

Thus, BAPCPA creates a uniformity in the treatment of post-petition earnings as property of the estate under Chapters 11 and 13.

BAPCPA continues the prior law in Chapter 13, under 1306(a)(2), that post petition pre-confirmation earnings are property of estate.

VI **Automatic Stay**

Under prior law the automatic stay did not operate as a stay [362(b)(2)] of the commencement of continuation of a proceeding for –

Establishment or Modification of an
Order For Alimony, Maintenance or
Support

Under Prior Law - In 13 precluded
 In 11 could collect but issue as to allocation of earning
 between proceeds of property and earnings

However, none of these could be collected from property of the estate.

Now 362(b)(2)(c) creates, the right to withhold income that is property of the estate for payment of a DSO awarded under a judicial or administrative order or statute.

Thus, while at first blush the expanded definition of property of the estate would limit DSO's creditor's rights –

The addition of 362(b)(2)(C) actually further erodes rights of Debtor and Estate generally.

This erosion is consistent with the very many new sections which subordinate the rights of the Debtor, other creditors and estate to DSO creditors.

NEW

1112(b)(4)(P)

1325(a)(5)(B)(8)

1307(c)(11) - Grounds to convert or dismiss - "failure of Debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

1129(a)(14) - New provision - applicable to individual Chapter 11 - unless Debtor has paid all DSO's that first became payable after the date of the filing of the petition.

NON-DISCHARGEABILITY

While Sub (B) and (C) pertain to filed returns - expanded (2 Ways) to apply to returns or equivalent reports or notices - **FILED OR GIVEN**

I. Changes to Section 523 – Exceptions to Discharge

A. 523(a)(1), setting forth the taxes that are non-dischargeable in bankruptcy has been amended. Section 523(a)(1)(B) previously pertained to "returns" that were either not filed or were filed "after two (2) years before the date of the filing of the petition." This Section has been amended to include not only returns but "equivalent report[s] or notice[s]". Moreover, the standard is no longer whether said "return or equivalent report or notice" was filed, but rather whether it was "filed or given."

1. Under prior law, if a debtor did not file a return, but instead the taxing authority prepared a "substitute for return" said substitute for return was not deemed a return for dischargeability purposes, thus limiting the discharge of such tax obligations. By expanding the definition of the documents needed to be filed, the effect is to expand the type of documents that may be utilized preconditions to a determination of dischargeability as well.

2. The recent case of In re Ridgeway, 322 B.R. 19 (Bankr. D.Conn. March 14, 2005), modified by In re Ridgeway, 325 B.R. 65 (Bankr. D.Conn. May 5, 2005), held that even substitute for returns, prepared by the IRS would constitute returns for dischargeability purposes. The decision relied upon a plain language reading of Section 6020(b) of the Internal Revenue Code which states:

"Any return [prepared by the Treasury Secretary] shall be prima facie good and sufficient for all legal purposes."

Legal History - only dischargeable returns prepared under 6020(a)

BAPCPA - strikes midpoint.

B. Section 523(a)(2).

1. Section 523(a)(2) excepts from discharge debts incurred through fraud. Subsection 523(a)(2)(C) have created presumptions of fraud for "luxury debt for goods and services" and for "cash advances." The dollar amounts and time periods applicable to said presumptions have been changed. Currently, consumer debts owed to a single creditor and aggregating more than \$1,225.00, (used to be \$500.00) for luxury goods and services incurred by an individual debtor on or within 60 days (will be 90) for the order for relief, and cash advances aggregating more than \$750.00 (used to be \$1,225.00) that are extensions of consumer credit under an open end credit plan, on or within 60 days (will be 70 days) before the order for relief, are presumed non-dischargeable.

2. The term luxury goods and services is clarified so as not to include "goods or services reasonably necessary for the support or maintenance of the debtor or dependant of the debtor."

Question:
Does BAPCPA
codify Ridgeway?

- C. Section 523(a)(5) dispenses with the phrase "alimony, maintenance and support" and references instead the phrase "domestic support obligation." This phrase is defined in 11 U.S.C. § 101(14)(A). As we will discuss this definition is analogous to the prior definition of alimony, maintenance and support, but appears to be broader in various respects.

**CONTINUES - LIMITED WINDOW TO DISCHARGE STUDENT LOANS
BASED ON UNDUE HARDSHIP**

- D. Section **523(a)(8)** which excepts from discharge certain debts arising from education loans, expands the prior law made non-dischargeable:

**BROADENS
CATEGORIES OF
EDUCATIONAL
LOANS**

"For an educational benefit, overpayment or loan made or insured or guaranteed by governmental unit, or made under any program funded in whole or in part by a governmental unit or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend".

The new law adds the following category of non-dischargeable educational loans "or . . . (B) any other educational loan that is a qualified education loan, as defined in Section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."

- E. Section 523(a)(9) which previously excepted from discharge a debt arising from death or personal injury caused by the debtor's operation of a motor vehicle while under the influence of alcohol, drug or other substance is amended or clarified to add within the exception the operation of vessels and aircraft as well.

[523(a)(14) debts incurred to pay a tax to United States]

- F. Section 523(a)(14) is supplemented by new Section "(14)(A)", which now provides that if a debt is incurred to pay a tax assessed by a governmental unit, other than the United States, a tax debt non-dischargeable under 523(a)(1), such debt would similarly be non-dischargeable.
- G. Section 523(a)(14)(B) now makes non-dischargeable debts "incurred to pay fines or penalties imposed under Federal Election Law."
- H. Section 523(a)(15) has been amended to provide that any debt to a spouse, former spouse or child of the debtor, not otherwise subsumed under 523(a)(5) is similarly non-dischargeable. So-called property settlements are non-dischargeable unless, (a) whether the debtor has the ability to pay such debt, or (b) discharge would result in weighing the benefit to the debtor outweighing the detriment to the matrimonial creditor.

SO THEN, if both a) amounts now called Domestic Support Obligations and b) Property Settlements are both non-dischargeable - WHY DOES DISTINCTION SUBSIST? - As we'll see Priority Auto Stay Confirmation Issues.

- I. Section 523(a)(16) – the amendment expands the 523(a)(16) to make non-dischargeable not only post-petition fees or assessments due to a condominium or cooperative corporation, but as well such fees applicable to a homeowner's association.
- J. Section 523(a)(17) makes non-dischargeable prisoner's filing fees for civil actions and appeals and for costs imposed in connection with a civil action or appeal.
- K. Section 523(a)(18) – this new section makes non-dischargeable: (a) debts owed to a pension, profit sharing, stock bonus, or other plan established under Section 401, 403, 408, 408(a), 414, 457 or 501(c) of the Internal Revenue Code, (b) permitted under Section 408(b)(1) of ARISA or subject to Section 72(p) of the Internal Revenue Code, or a loan from a thrift savings plan permitted under Subchapter 3 of Chapter 84 of Title.

HOWEVER, the fact that nondischargeable does not mean loan is basis to assert debt or claim

- L. Section 523(c) previously required that a creditor initiate a non-dischargeability proceeding under 523(a)(15) within the 60 day period commencing with the first date set for the first meeting of creditors. Now this time period had been deleted.

II. Chapter 11 Discharge

IN CHAPTER 11 TIMING OF DISCHARGE IS NEW §1141(d)(B) APPLIES - in the case of an individual Chapter 11 Debtor. Previously discharge on confirmation - NOW no discharge IN INDIVIDUAL CASE - until all plan payments. 1141(d)(5)(B) - can apply for discharge before payment in ful if PRESENT VALUE OF PAYMENTS MADE EXCEEDS AMOUNTS WOULD HAVE RECEIVED IN HYPO 1 Q.

**** BAPCPA continues existing law so that all debts excepted from discharge under 523(a) in Chapter 7 are similarly NONDISCHARGEABLE IN 11**

III. Chapter 13 Discharge

- A. The super discharge previously available under Chapter 13 is largely eroded so that in addition to the exceptions to discharge previously set forth at Section 1328, to wit matrimonial Now DSO's 523(a)(5), 523(a)(8)- student loans, and 523(a)(9)-death or PI for operation of a motor vehicle, under statute following additional categories of debt are similarly excepted from discharge:

523(a)(1)(B) (unfiled or late filed tax returns)

523(a)(1)(C) (fraudulent returns or taxes which the debtor wilfully attempted to evade or defeat)

523(a)(2) (fraud)

523(a)(3) (unscheduled debt)

523(a)(4) (fraud defalcation or acting in a fiduciary capacity, embezzlement or larceny)

507(a)(8)(c) (incorporated by reference into 523(a)(1)(A)) (fiduciary taxes).

- B. With respect to the exception to discharge contained at 523(a)(6) for wilful and malicious injury, new Section 1328(a)(4) makes non-dischargeable restitution or damages as a result of wilful or malicious injury that caused personal injury or death. Thus, malicious injury to the property of another entity continues to be dischargeable in Chapter 13.
- C. Section 1328(a)(3) Amalgam (a)(7) fines, (a)(13) restrictions also makes this non-dischargeable ALSO MAKES Non-Dischargeable exception in Chapter 13 uses defendant language is different using language instead deeming dischargeable instead "restitution or a criminal fine (Sections still available (a)(7)), included in a sentence on the debtor's conviction of a crime." - - (Federal-State Fines)

IV. Section 727(a)

- A. New Section 727(a)(11) allows the Court to deny a discharge to a debtor who fails to complete an instructional course concerning personal financial management described in new Section 111 of the Bankruptcy Code.

However Certain Debtors Not Required to Meet This

1. The Debtors who are not required to meet this requirement are those who are unable to because of incapacity, disability or active military duty in a combat zone, additionally, debtors who reside in districts where is has been determined that approved instructional services are not adequate are similarly excepted from this requirement. Finally, compliance may be excused upon the submission of a certification: (1) describing exigent circumstances, (2) stating that the debtor requested credit counseling services but was unable to obtain same during the 5 day period beginning on the date of the request, and (3) that is satisfactory to the court. See generally 109(h).

New Section 727(a)(12) also denies to a debtor a discharge upon the finding by the court of "reasonable cause to believe that Section 522(q)(1) may be applicable to the debtor and that there is pending a proceeding in which the debtor may be found guilty of a felony described in Section 522(q)(1)(A) or liable for a debt of the kind described in Section 522(q)(1)(B)."

522(q)(1) limits State exemption to \$125,000.00 if certain predicate criminal or civil liability has been found

- 1. 522(q)(1)(A) refers to constructed felonies which demonstrate that filing of the case was an abuse of Title 11.
- 2. 522(q)(1)(B) refers to debts arising in violation of (1) federal or state securities law, (2) fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of registered securities, (3) any civil remedy of 18 U.S.C. § 1964, or (4) any criminal act, intentional tort or wilful or reckless misconduct causing serious physical injury or death to another individual in the proceeding 5 years.
- 3. 727(a)(8) - Discharge Under 7 DISCHARGE UNAVAILABLE

No discharge if 1141 or 727 discharge granted in case filed within 8 years before date of filing petition.

1328(f)(1) - No 13 discharge if (5)(1) discharge granted in 7, 11 or 12 in case filed within 4 years of order for relief

1328(f)(2) - No 13 discharge Debtor received 13 discharge in case filed within 2 years of the date of the order for relief

BAPCPA (In the context of retirement plans and other tax qualified plans) makes significant changes to what is excluded from the bankruptcy estate by various amendments to 541(b) and what may be exempt from the estate under 522. In addition there are changes in the scope of the auto stay as to certain retirement assets.

V. Tax Qualified Retirement Plans

A. Amendments to Section 522 Exemptions. The Act amends Section 522 to permit a debtor to exempt certain retirement funds to the extent funds in accounts are exempt from taxation under series of Sections:

IRC Section 401 - a qualified pension, profit sharing, and stock bonus plan created under a trust established by an employer for the exclusive benefit of employees or beneficiaries.

IRC Section 403 - qualified annuity plans that are established by an employer for an employee under IRC Section 404(a)(2) or Section 501(c)(3).

IRC Section 408 - individual retirement accounts (IRA) meaning "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries", provided that the trust meets the requirements of that statute.

IRC Section 408A - a "Roth" IRA.

IRC Section 414 - other retirement plans for controlled groups of employees, including predecessor employers, partnerships or proprietorships, governments and churches.

IRC Section 457 - eligible deferred compensation plans established and maintained by State and Local Governments.

IRC Section 501(a) - retirement plans established and maintained by defined tax exempt organizations and have received a favorable determination pursuant to Internal Revenue Code Section 7805 that is in effect as of the date of the commencement of the case. If the retirement monies are in a retirement fund that has not received a favorable determination, those monies are exempt if the debtor demonstrates that no prior, unfavorable determination has been made by a court or the IRS, and the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code. If the retirement fund fails to be in substantial compliance with applicable requirements of the Internal

Revenue Code, the debtor may claim the retirement funds as exempt if he or she is not materially responsible for such failure. This Section also applies to certain direct transfers and rollover distributions. In addition, this provision insures that 522(b)(3)(c) supplements all state opt out statutes to provide the specified retirement funds are exempt under state as well as federal law. Counterpart 522(d)(12) if Debtor taking federal exemptions gets all the retirement funds under Federal Law. Interesting lists under State and Federal not completely consistent

<u>Fed</u>	<u>NY</u>
414	402
501(a)	

- Difference will be fleshed out in cases.

- B. Section 362(b)(19) is amended to accept from the automatic stay withholding of income from a debtor's wages pursuant to an agreement authorizing such withholding for the benefit of any of the foregoing plans to the extent that the amounts withheld are used solely to repay a loan from such plan. Moreover the foregoing does not form a basis to construe the loan to be considered a claim or a debt within the meaning of the Bankruptcy Code.

However,

- C. Section 522(n) has been added for the purpose of establishing a cap of \$1,000,000.00 on assets contained in individual retirement accounts described in Sections 408 and 408A of the Internal Revenue Code, other than a simplified employee pension under Section 408(k).
- D. Section 541 of the Bankruptcy Code defines what is and what is not property of the bankruptcy estate. There have been several changes to Section 541(b) which sets forth which property is excluded from the bankruptcy estate.
- E. Section 541(b)(5) excludes from the estate funds placed in an educational individual retirement account under Section 530(b)(1) of the Internal Revenue Code. They are exempt to the extent that: (a) said funds were placed in the account not later than 365 days before the date of the filing of the petition, (b) the designated beneficiary of such account was a child, stepchild, grandchild or step grandchild, (c) the funds have not been pledged or promised in connection with any extension of credit, and (d) are not excess contributions as described in Section 4973 of the Internal Revenue Code. However, if placed in the account not earlier than 720 days, nor later than 365 days before the filing of the petition, they must not exceed \$5,000.00.
- F. Section 541(b)(6) excludes from the estate funds used to purchase a tuition credit or certificate or contributed to an account in accordance with Section 529(b)(1)(A) of the Internal Revenue Code under a qualified state tuition program. Each of the same criteria set forth with respect to 541(b)(5) must be met with respect to this tuition credit certificate or account.

- G. Section 541(b)(7) excludes from the bankruptcy estate amounts withheld by an employer from the debtor's wages which are then contributed to (a) an ARISA qualified employee benefit plan under Section 414(d) of the Internal Revenue Code, (b) a deferred compensation plan under Section 457 of the Internal Revenue Code, or (c) a tax deferred annuity under Section 403(b) of the Internal Revenue Code.

Also exempt under this Section are amounts paid by employees to their employer as contributions to (a) an employee benefit plan under Section 414(d), (b) a deferred compensation plan under Section 457, or (c) a tax deferred annuity under Section 403(b).