

**The Amended Bankruptcy Code and its Impact
on Family Law Practice in North Carolina**

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The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," Public Law 109-8, hereinafter "the 2005 Act," became effective on Oct. 17, 2005. The legislation, representing the largest overhaul of the Bankruptcy Code since its enactment in 1978, contains numerous amendments significant to family lawyers. The 2005 Act makes its primary purpose very clear. In response to increased bankruptcy filings and substantial creditor losses, the 2005 Act is designed to eliminate perceived loopholes in the former Bankruptcy Code which allowed "bankruptcy abuse." Many of the provisions of the 2005 Act, including means testing (which compares the debtor's income to the state's median income to determine if the debtor may file Chapter 7), are intended to encourage the repayment of debts by making it more difficult for debtors to discharge debts through Chapter 7 bankruptcy and encouraging Chapter 13 bankruptcy filings. However, some of the most positive changes effected by the 2005 Act are those dealing with Domestic Support Obligations [hereinafter "DSO," a new term of art in the Bankruptcy Code, defined in 11 U.S.C. §101(14A)]. This article addresses issues impacting family lawyers namely the automatic stay in bankruptcy, Chapter 7 bankruptcy and Chapter 13 bankruptcy.

The Automatic Stay in Bankruptcy

When Does the Automatic Stay Begin, and When Does it End?

Section 362 is the automatic stay provision of the Bankruptcy Code. The automatic stay is effective immediately upon the debtor's bankruptcy filing, without any additional action required by the debtor. When the creditor spouse receives notice of a bankruptcy filing (irrespective of the chapter), such notice is also notice to the creditor spouse that the automatic stay is in effect. Generally, the automatic stay is effective until the debtor achieves his discharge, an order is entered by the bankruptcy court "lifting" the automatic stay, or the bankruptcy case is dismissed. Upon discharge, the automatic stay is replaced by a permanent injunction that prohibits any collection of discharged debts. (Note: Solely for convenience, this article uses the masculine pronoun. Bankruptcy issues are gender neutral.)

What Actions of the Creditor Spouse are Prohibited by the Automatic Stay?

With specific exceptions which are discussed below, the automatic stay prohibits the creditor spouse from either beginning or continuing any judicial action (lawsuit, hearing, or execution) either against the debtor spouse [§§362(a)(1) and (2)] or against property of the debtor spouse's bankruptcy estate [§§362(a)(2) and (3)].

Therefore, if your client receives notice that his spouse has filed bankruptcy, your initial advice to your client is that his domestic case must be discontinued until your client obtains stay relief from the Bankruptcy Court. Obtaining stay relief to allow your domestic case to proceed in state court is very possible and is generally not expensive. Often it may be accomplished by entry of a Consent Order with the debtor, particularly if you are clear with debtor's counsel that you want relief from the automatic stay only to liquidate your client's claim for purposes of determining the amount and nature of the claim. The process requires filing a Motion (not a complaint, known as an adversary proceeding in bankruptcy) for Relief from the Automatic Stay. In the Eastern and Western Districts of North Carolina, a motion is not required if a consent order is being tendered; in the Middle District, the motion must be submitted to the Clerk with the consent order. There is no filing fee required if a consent order is tendered with the motion, otherwise a \$150.00 filing fee is required. The new Act, in fact, provides for special rights for child support creditors. Further, as discussed below, some actions can proceed without bankruptcy court involvement.

What is the Automatic Stay's Impact on Equitable Distribution Claims?

Some acts, set forth in Section 362(b) are not stayed by Section 362(a), but there is no exemption within Section 362(b) for equitable distribution proceedings. The 2005 Act explicitly excludes division of property proceedings from its new exceptions to the automatic stay, at least to the extent that the marital/divisible property is property of the bankruptcy estate [§362(b)(2)(A)(iv)] (which it will be). Therefore, the creditor spouse must seek relief from the automatic stay in the debtor spouse's case prior to:

1. Filing any lawsuit for equitable distribution; or
2. Proceeding with a filed suit for equitable distribution; or
3. Attempting to enforce any equitable distribution judgment and/or distributive award with respect to property of the bankruptcy estate.

What Actions by the Creditor Spouse are Allowed in Spite of the Automatic Stay?

The "non-stayed" proceedings, as contained within Section 362(b), are:

- (1) the commencement or continuation of a criminal action or proceeding against the debtor [be *very* careful here -- using a criminal action, such as "worthless check" charges, as a vehicle to collect a debt, is a stay violation];
- (2)
 - (A) the commencement or continuation of a civil action or proceeding:
 - (i) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for DSOs [Note: For our purposes, DSOs are post-separation support, alimony, and child support];
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage [absolute divorce], except to the extent that such proceeding seeks to determine the division of property that is property of the estate [Note: Equitable distribution proceedings are stayed]; or
 - (v) actions regarding domestic violence;
 - (B) the collection of a DSO from property that is not property of the estate;
 - (C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a DSO under a judicial or administrative order or a statute;
 - (D) for 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;
 - (E) for reporting of overdue support owed by a parent to any consumer reporting agency as specified in Section 466(a)(7) of the Social Security Act;

- (F) for 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; or
- (G) for enforcement of a medical obligation, as specified under Title IV of the Social Security Act.

Easily Understood Non-Stayed Domestic Claims

Claims for absolute divorce, paternity, custody, visitation, domestic violence, license termination and restriction, and tax refund interception can proceed in State Domestic Court without bankruptcy court involvement.

Actions to Establish or Modify Support Obligations – Are They Stayed or Not?

Section 362(b)(2)(A)(ii) provides that the automatic stay does not prevent proceedings to establish or modify domestic support obligations. Be careful, however, because there is much ambiguity in the 2005 Act, and this is one of many unanswered questions about how various portions of the Act will be construed and applied. Until a court in your jurisdiction rules on grey areas in the law, the filing of a motion for relief from the automatic stay (or a motion for entry of an order determining the automatic stay inapplicable) is the safest and smartest option. The best and most inexpensive option for your client is to contact debtor's counsel and the bankruptcy trustee in an effort to agree to the terms of a consent order, setting forth exactly what actions you may take without the need of further Bankruptcy Court order.

Contempt Motions – Are They Stayed or Not?

- Debtor's Earnings.

Section 362(b)(2)(C) provides that income that is "property of the bankruptcy estate or property of the debtor" may be withheld for payment of a court ordered DSO. Therefore, as I read the new Act, if the debtor spouse is in arrears (for example, on his post-separation support obligation) and files bankruptcy, the automatic stay does not prohibit a civil contempt proceeding for so long as the civil contempt purge is *limited* to "withholding [the debtor's] income for payment of a domestic support obligation under a judicial or administrative order

or a statute.” I have no case law to support this opinion, only my reading of the statute. In preparing this article, I spoke with Professor John L. Saxon at the Institute of Government concerning this issue. Professor Saxon is more cautious concerning contempt proceedings following bankruptcy filing. In his article, written in June 2005 and published by the Institute of Government, his view is that if the debtor has filed bankruptcy the automatic stay prohibits contempt proceedings. Please refer to his paper, which is an additional resource on this issue. I also spoke with John F. Logan, Esq., Standing Chapter 13 Bankruptcy Trustee for the Eastern District of North Carolina, Raleigh Division. Mr. Logan’s reading of the statute is that such action is not stayed so long as it is clear that the withholding of income sought fits clearly within the plain meaning of the statute and no other relief is sought that is prohibited by the automatic stay.

- Debtor's Assets.

Section 362(b)(2)(B) provides that DSOs may also be collected from property "that is not property of the estate." Without seeking relief from the stay, property of the bankruptcy estate, in a broad sense, includes everything in which the debtor has an ownership interest when he files bankruptcy. Sections 541 (applicable in Chapters 7, 11, 12, and 13), 1115 (in Chapter 11 cases) (added by the 2005 Act), and 1306 (in Chapter 13 cases) define property of the estate. If in doubt, it is safest to presume that property is property of the estate. Under Section 522(c)(1) of the Bankruptcy Code, “unless the case is dismissed, property exempt [by the debtor] is not liable during or after the case for any debt of the debtor that arose...before commencement of the case, except...a debt for...a domestic support obligation.” (*See*, N.C.G.S. §1(C)-1601, et seq., for North Carolina's statute designating exempt property). In my opinion, if within the debtor's bankruptcy petition the debtor has claimed an equity interest in an asset as "exempt property," then the exempt equity interest is not property of the estate and is available to purge the debtor's contempt for failure to comply with a court ordered support obligation without bankruptcy court involvement. For example, if a debtor claims a \$1,500 equity exemption in his automobile, then that exempt equity is available to purge a debtor's contempt for non-payment of his post-separation support obligation. (Note well: Exempt property is generally not available to satisfy pre-bankruptcy filing obligations. However, it is available to satisfy DSOs pursuant to N.C.G.S. Section 1C-1601(e)(9)). Mr. Logan believes that although a holder of a DSO may be entitled to pursue

exempt property for satisfaction of DSOs, such property (or the indivisible non-exempt equity in such property) may still be property of the estate, and it is risky to proceed against such property without relief from the automatic stay unless it's crystal clear that it is not property of the estate and the automatic stay does not apply. The consequences of violating the automatic stay can be serious and can include actual damages (including costs and attorneys' fees), and, in appropriate circumstances, punitive damages, under Section 362(k)(1). Until you have case law guidance in your district on this issue, before proceeding with a contempt motion, seek stay relief or consider filing a motion under Section 362(j) requesting entry of an order under Section 362(c) confirming that the automatic stay has been terminated. The filing of such a motion does not require payment of a filing fee.

The Impact of the 2005 Act in Chapter 7

Discharge (no substantial change)

The reason the debtor has filed Chapter 7 bankruptcy is to obtain a bankruptcy discharge. A discharge, granted by the Bankruptcy Court's entry of an order at the conclusion of a case, relieves the debtor from personal liability to repay his dischargeable debts (important concept, read on). Under Chapter 7, a debtor will receive a discharge when his non-exempt property (if any) has been liquidated and the proceeds of that non-exempt property have been used, to the extent available, to satisfy his debts. Therefore, following the first meeting of creditors (the 341 meeting), discharge of Chapter 7 debtors generally occurs within months. Your job, as the family lawyer representing the creditor spouse, is to use your best efforts to assure that your client's entitlement to payment from the debtor spouse (alimony, child support, or equitable distribution) is not one of the debts discharged upon the debtor's bankruptcy discharge.

New Filing Requirements in Chapter 7 (Dramatic Changes)

The debtor must now file additional documents regarding his financial condition at the same time he files his bankruptcy petition. Revised Section 521 requires a debtor to file (1) a certificate of an attorney indicating that the debtor has received a notice from the clerk explaining the sections of the Bankruptcy Code under which he may file, (2) evidence of any payments he has received from his employer within 60 days before the filing of the petition (under Local Rule which became effective in the Eastern District of North Carolina on

October 17, 2005, the debtor is not required to file this evidence but must provide it to the trustee at the Section 341 meeting of creditors), (3) a statement of his monthly net income, and (4) a statement disclosing any reasonably anticipated increase in income or expenses over the 12-month period following the filing date. Additionally, the debtor must provide to the trustee, and any creditor (including your client) making a timely request, a copy of his most recent tax returns. If the debtor fails to produce all of the required documents within 45 days of filing his petition, the 2005 Act requires the automatic dismissal of the case [§521(i)(1)]. There are, however, time frames within which requests for such information must be made, as set forth in Rule 4002 of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure, also known as the Interim Bankruptcy Rules, adopted (and to some extent modified) in all judicial districts in North Carolina. For example, in Interim Local Rule 4002(b)(4), a creditor must request a copy of the tax return required to be provided to the trustee at least 15 days before the *first date set* for the meeting of creditors (this may be different than the actual meeting date if the initial meeting is continued to a later date). Copies of the Interim Local Rules are available (or should soon be available) at each of the North Carolina Bankruptcy Clerk's Web sites: www.nceb.uscourts.gov; www.ncmb.uscourts.gov; and www.ncwb.uscourts.gov. You may also request, under Section 521(f), that the debtor file and provide you with copies of each Federal tax return (and any amendment thereof) which the debtor must file for each tax year ending during the time the debtor's case is pending. It is important to note as well that the debtor's obligation to provide tax returns under Interim Local Rule 4002(b)(4) is subject to "procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts."

Why are we, as family lawyers, concerned about these new filing requirements? Because these additional documents create a "treasure trove" of discoverable information useful in any future modification and/or contempt hearings. Also remember, when using information contained in a debtor's Petition, Schedules, or Statement of Financial Affairs in domestic litigation, the debtor's representations in these documents are made "under penalty of perjury." Likewise, a debtor's testimony at his Section 341 meeting before the trustee (or at any court hearing) is recorded and given under oath. A bankruptcy discharge can be a substantial change in circumstances justifying a modification of prior orders, of support, etc. *See, Sloan v. Sloan*, 151 N.C. App. 399; 566 S.E.2d 97 (2002).

Priority of Claims (some changes) and Exempt Property

Section 507 relating to the priority of distributions (made by the Chapter 7 trustee from the proceeds of a debtor's non-exempt, liquidated assets) was amended by the 2005 Act. Amended Section 507 elevates domestic support obligations to first priority among unsecured claims. The 2005 Act requires that support obligations be paid in full before other creditors, except administrative expenses incurred by the trustee in administering assets of the bankruptcy estate. The reprioritization of DSOs in Chapter 7 cases will likely be of minimal help to creditor spouses because there will seldom be non-exempt assets for the Chapter 7 trustee to liquidate and distribute to creditors.

As discussed above, North Carolina has "opted out" of the federal exemptions otherwise allowed by Section 522(a). Our exempt property statute is contained within N.C.G.S. Chapter 1C (Section 1C-1601, et seq.). If you have not read this statute recently, do so. It has been amended, and the amendments take effect January 1, 2006. The creditor spouse will generally have more knowledge of assets and their values than any other creditor. His knowledge may result in the discovery of additional value or assets. In the majority of Chapter 7 bankruptcies, most or all of the debtor's assets are claimed by the debtor as "exempt" in the debtor's Petition and Schedules, which results in few assets for the trustee to liquidate and little or no proceeds available for distribution to creditors, including spousal creditors irrespective of the priority of the claim, after a trustee's administrative expenses are paid. For this reason, if you are aware of improperly claimed exemptions, any objection to exemptions claimed must be filed and served within 30 days of conclusion of the debtor's Section 341 meeting. Additionally, if your client is aware that the debtor has materially under-valued assets (this includes over-statement of lien amounts) in his Schedules, it is important to bring this to the trustee's attention as soon as possible, preferably before the debtor's Section 341 meeting. Be aware, however, that the time periods for establishing the debtor's domicile for purposes of claiming exemptions have changed, so the debtor may now be able to claim the exemptions available in States other than North Carolina (often more generous), even if the debtor would have been required to claim North Carolina exemptions prior to the effective date of the Act. Under Section 522(b)(3)(A) of the Code, if the debtor has not lived in a single State for 730 days pre-petition, exemptions must now be claimed in the place where the debtor's domicile for 180 days prior to the 730 day period (or the greater of such 180 days than any other place), rather than just the 180 days pre-petition.

Claims for Alimony, Child Support, Post-separation Support (DSOs) – Non-Dischargeable

DSOs are non-dischargeable. Section 101(14A) of the 2005 Act defines a DSO as a debt owed to a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, responsible relative, or governmental unit, which obligations are in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) and not assigned to a nongovernmental entity, unless assigned voluntarily for the purpose of collecting the debt. The 2005 Act removes all qualifications on who is owed the spousal and child support.

The creditor spouse is not required to file a complaint (adversary proceeding) objecting to the debtor's discharge to preserve the validity of his alimony, post-separation, and child support claims. Therefore, even if the debtor spouse has received his Chapter 7 discharge before you are engaged by the creditor spouse, as the creditor spouse's attorney you can still help your client collect child support, post-separation support, or alimony from the debtor spouse.

Attorneys' Fees – Non-Dischargeable

Attorneys' fees awarded for representing the debtor spouse in child support, alimony, and post-separation support cases are non-dischargeable. The Fourth Circuit Court of Appeals has classified an award of attorneys' fees obtained in prosecuting these claims as a non-dischargeable debt in the nature of alimony, maintenance, and support under Section 523(a)(5). **In re Silansky**, 897 Fed.2d 743, 744 (4th Cir. 1990); *and see*, **In re Bristow**, 2005 Lexus 1117, Middle District of North Carolina (decided April 22, 2005).

Equitable Distribution Claims – Non-Dischargeable

Under pre-amendment law, Section 523(a)(15) allowed the debtor spouse to discharge equitable distribution obligations including distributive awards, whether by court judgment or agreement, by demonstrating either that he did not have the ability to pay the debt or that discharging the debt would result in a benefit to him which outweighed the detrimental consequences to the creditor spouse. Under pre-amendment law, the creditor spouse was required to file a timely adversary proceeding in the debtor's case objecting to discharge in order to prevent discharge of his equitable distribution claim.

The 2005 Act amends Section 523(a)(15) so that all debts incurred by the debtor "in the course of divorce or separation" or in connection with a separation agreement which are

not domestic support obligations are also non-dischargeable under Section 523(a)(5). A debtor may no longer obtain a discharge of an equitable distribution judgment/award by showing that he is unable to pay the debt. Nor may discharge be obtained upon a showing that benefits of discharge to the debtor outweigh the detrimental effects to the debtor's spouse or former spouse. By eliminating these affirmative defenses, the 2005 Act effectively renders all equitable distribution awards pursuant to court judgments and/or separation and property settlement agreements non-dischargeable in Chapter 7. [Note well: The creditor spouse is no longer required to file a complaint (adversary proceeding) objecting to the dischargeability of equitable distribution awards. However, be careful. If the bankruptcy case was filed before Oct. 17, 2005, an objection to discharge must be timely filed to protect your client's claims, because such a case, even if initially filed as a Chapter 13 case and converted to a case under Chapter 7, will be governed by pre-2005 Act law.]

Strategies for Protecting Spousal Creditors in Chapter 7

If you are confronted with a Chapter 7 bankruptcy representing the creditor spouse, the first step is to obtain the debtor spouse's bankruptcy Petition, Schedules, and Statement of Financial Affairs. All petitions and most pleadings are available electronically through the appropriate bankruptcy Court Clerk's office (Eastern, Middle, Western Districts). Each Clerk's office has an easily accessible website, though access requires registration through the Web site and payment for certain information provided. Most petitions and pleadings may also be retrieved by accessing www.uscourts.gov (United States Courts - The Federal Judiciary).

Step 1 – File and Serve a Notice of Appearance.

Unless you, as counsel for the creditor spouse are already properly listed in the debtors schedules as a party to whom notices should be sent, you should file and serve upon the debtor, debtor's counsel, the trustee, and the Bankruptcy Administrator a notice of appearance giving notice that you are entering an appearance in the case on behalf of your named client and providing the address where all notices should be sent. This will ensure that you receive a copy of all notices in the case (such as a notice that the case has been dismissed or a discharge has been granted or denied).

Step 2 -- Review the Petition, Schedules and Statement of Financial Affairs.

Upon obtaining the Petition, Schedules, and Statement of Financial Affairs, review them to be certain your client is listed as a creditor and that his claims are appropriately denominated either as DSOs or property distribution claims. Also review the assets listed; values and exempt property. If you are aware of any false statements or omissions, these should be brought to the trustee's attention in writing as soon as possible and preferably prior to the 341 meeting. Any documentation supporting your allegations should also be provided. This will assist the trustee in determining whether any omissions or false oaths are material and actionable.

Step 3 -- Determine the status of the debtor's case.

Has the case been completed (discharge order entered) or is the case pending? If the creditor spouse reaches your office before a discharge is entered, you should first obtain the domestic court orders/agreements establishing the debtor spouse's obligation to your client and determine the type of obligation (i.e., child support, equitable distribution, alimony). Determine if the first meeting of creditors (the Section 341 meeting) has been held. If the meeting has not been held, you should communicate with the Chapter 7 trustee (in writing) advising him of your client's domestic support and/or equitable distribution claims. Generally, proofs of claim are not filed in Chapter 7 bankruptcies absent a notice from the court or the trustee that the case has been classified as an asset case, meaning there will be assets available to pay creditors' claims (as opposed to a no-asset case).

Step 4 -- The Section 341 Meeting.

This meeting is presided over by the Chapter 7 trustee. Questioning is generally brief; however, it is an opportunity for you to advise the Chapter 7 trustee of the existence of your claims and the fact that they are, in fact, non-dischargeable DSOs, as well as to inquire concerning "exempt property" claims made by the debtor spouse. Obviously, attendance at the 341 meeting will depend on whether or not you are engaged before the 341 meeting; the amount involved, and the location of the 341 meeting. If you wish to question the debtor at greater length than is permitted at the 341 meeting, you may file a motion for entry of an order allowing an examination of the debtor under Bankruptcy Rule 2004.

The Lis Pendens Question

Pursuant to N.C.G.S. Section 50-20(h), if either party claims that any real property is marital or divisible property, that party may cause a Notice of Lis Pendens to be recorded, pursuant to Article 11 of Chapter 1 of the General Statutes. N.C.G.S. Section 50-20(k) provides that "the rights of the parties to an equitable distribution of marital and divisible property are species of common ownership...vesting at the time of the parties' separation."

It is important to advise your client that his equitable distribution claim is just that – a claim. Your client's claim to equitable distribution is not a property right, nor does the equitable distribution statute (as interpreted by both state and federal courts) provide your client with a right to receive any particular item of marital/divisible property. *See, In Re Halperson*, 151 BR 358 (M.D.N.C. 1993); *see also, Justice v. Justice*, 123 N.C.App. 733, 475 S.E.2d 225 (1996), affirmed, 346 N.C. 176, 484 S.E.2d 551 (1997).

In the Eastern District of North Carolina, the filing of a Notice of Lis Pendens will not create a security interest in specific property for the creditor spouse. In the case of **Watts v. Slough (In Re Slough)**, E.D.N.C., March 2005, Chief Judge Leonard concluded that "the filing of Notices of Lis Pendens did not create security interests in the underlying properties but served as constructive notice of pending litigation. (Citations omitted)." [See, Eastern Bankruptcy Institute manuscript, June 3 and 4, 2005, page 66, for a complete case summary of this case.]

The Impact of the 2005 Act on Chapter 13

Introduction

Chapter 13 is commonly referred to as a "wage-earner bankruptcy." Historically, in North Carolina, more Chapter 13 bankruptcies are filed than Chapter 7 bankruptcies. As with Chapter 7, when the debtor files a Chapter 13 bankruptcy, he must file a petition, schedules listing all of his assets, debts, income, and expenses, claiming certain assets as exempt and listing all creditors, and a Statement of Financial Affairs, answering questions concerning the debtor's financial affairs prior to the petition filing.

In addition to his schedules and petition, the Chapter 13 debtor must file a proposed repayment plan. To be confirmed, the plan must pay priority claims (which include pre-petition alimony, post-separation support, and child support claims) in full. The debtor must pay all post filing DSOs in full and, if the trustee or an unsecured creditor (such as your

client) objects to confirmation the debtor must use 100% of his "disposable income" to be received during the plan period to pay unsecured claims (including equitable distribution judgments) (§1322 and §1325). If the debtor's plan provides for all disposable income to be committed to the plan, such an objection would not be needed to ensure that disposable income is paid for the applicable commitment period. The debtor makes monthly payments to the Chapter 13 trustee, and the trustee distributes payments on allowed claims to creditors over a period of 36 to 60 months. After all payments are made under the debtor's confirmed plan, the debtor receives his discharge. The 2005 Act requires payment plans to be made over the "applicable commitment period" [as defined in § 1325(b)(4)], either 36 or 60 months, unless all unsecured claims are paid in full over a shorter period.

What is Disposable Income and Why is it Important?

"Disposable income" is all of the debtor's income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor or for a DSO that first becomes payable after the date the bankruptcy is filed. [§1325(b)(2)]. Therefore, income necessary for prospective DSOs is deducted by the debtor from his income prior to a determination of "disposable income."

Our primary interest in disposable income relates to equitable distribution. Equitable distribution claims and judgments are unsecured claims and the debtor's obligation to pay these claims will be discharged upon completion of the plan. Therefore, if the debtor's confirmed plan pays unsecured creditors only twenty percent (20%) of their claims, your creditor spouses' equitable distribution judgment will only be paid twenty percent (20%). Making sure that all of the debtor's disposable income is discovered and paid into the plan is your client's best protection for these claims.

Protecting the Creditor Spouse in Chapter 13

In order to protect the creditor spouse's claims in Chapter 13, the following steps should be taken:

- § **File and Serve a Notice of Appearance.** As in a chapter 7 case, and for the same reasons, you should file and serve a notice of appearance giving notice that you are entering an appearance on behalf of your client.

§ **Review the Petition, Schedules and Statement of Financial Affairs.** As in a Chapter 7 case, obtain and review copies of the Petition, Schedules, and Statement of Financial Affairs for completeness and accuracy. If your client is not listed as a creditor, or his claims are not appropriately denominated either as DSOs or property distribution claims, immediately file a claim making this clear (see below), or if the claims' bar date has passed, write to the trustee making him aware of the amount, nature, and payment status (both pre-petition and post-petition) of any DSO within the meaning of Section 101(14A). Additionally, you should make the trustee aware, if not accurately stated in the schedules, what State has jurisdiction over enforcement of the debtor's DSOs. If you are aware of any material false oaths or omissions, bring these to the trustee's attention in writing with any available supporting documentation.

§ **File the proof of claim.** The first important action item for the creditor spouse is to complete and file a "Proof of Claim" form. Supporting documentation, such as a judgment or order, should be attached. Only claims filed with Chapter 13 trustee (in the Eastern District) or the Clerk of the Bankruptcy Court (in the Middle and Western Districts) are recognized as "allowed" or valid claims to be paid through the Chapter 13 plan.

A proof of claim form will be provided with the notice of the bankruptcy filing. The notice of bankruptcy filing will identify the Chapter 13 trustee in the notice and will provide both the address where claims should be filed and the bar date by which any claim must be filed. The bar date for filing claims is 90 days from the *first date set* for the meeting of creditors (note that the first date set for the meeting may be different than the date the meeting is actually held). All claims must be *received* by the trustee or Clerk, as appropriate, by the bar date. Any claims filed after the bar date will not be allowed and, therefore, will not be paid any distribution. Be sure to note on the face of the proof of claim form if the claim is for alimony, post-separation support, or child support (a domestic support obligation), and note on the proof of claim that the claim is a priority claim. If the claim is an equitable distribution claim, a general unsecured proof of claim must be filed. You will

always want to receive a filed copy of your proof of claim. Send an extra copy of the claim with a self-addressed, postage-paid, return envelope.

§ **Section 341 Meeting.** Review the debtor's Petition, Schedules, Statement of Affairs, and proposed plan, and attend the Section 341 meeting. The Section 341 meeting in Chapter 13 is presided over by the Chapter 13 trustee; the debtor is placed under oath. No judge is present. The trustee will ask questions, and creditors are allowed to ask questions of the debtor concerning his proposed plan, obligations, and repayment of debts. You will also be able to ask questions of the trustee. As in a Chapter 7 case, the time available for questioning may be limited during the meeting. If extensive questioning is necessary, a Rule 2004 examination (deposition) (requiring a motion and order) may be required.

The creditor spouse (or his attorney) should attend the Section 341 meeting to confirm that all established support claims will be paid directly to the creditor spouse as priority claims, and to confirm whether the debtor is current in the payment of all post-petition DSOs. If such payments are not current, the debtor's plan may not be confirmed, and the case may be dismissed. Further, the creditor spouse should advise the trustee if there are support issues which are pending and not yet finalized and whether, and to what extent, determination of such issues may impact a determination of the debtor's disposable income.

Plan Confirmation, the Debtors Certification Concerning DSOs, and Discharge.

The Chapter 13 debtor receives a discharge (of dischargeable debts) when he completes all payments required to be made under his confirmed Chapter 13 plan. One of the advantages of a debtor seeking relief under Chapter 13 in the past was that the debtor could obtain what was commonly referred to as a "super-discharge." After the 2005 Act, a debtor's discharge, while broader than that available in Chapter 7, is no longer as "super" as it once was. There is a limited hardship discharge exception, and alimony, post-separation support, and child support debts are non-dischargeable in Chapter 13. [§1328(a)(2)]. Therefore, when the debtor completes his plan and receives his discharge, these support obligations remain. [Note well: Equitable distribution judgments/obligations pursuant to court order or property settlement/separation agreements are general unsecured claims that can be discharged and

"crammed down" in Chapter 13. Equitable distribution claims will be paid along with other unsecured claims only to the extent of the debtor's disposable income.]

Just as a Chapter 13 plan may not be confirmed unless the debtor has paid all DSOs that are due and payable pursuant to judicial or administrative order or statute that first became payable after the filing of the petition [§1325(a)(8)], Section 1328(a) requires a debtor to certify that all DSOs due both pre-petition and post-petition have been paid. If the debtor's support obligations are set by contract, it is unclear if the provisions of Sections 1325(a)(8) and 1328(a) apply. Therefore, from a bankruptcy perspective, at least until this question is determined in your jurisdiction, the use of court orders for DSOs provides the most protection.

Should you become aware within 180 days post plan confirmation that the debtor made a false statement that all post-petition, pre-confirmation domestic support obligations were paid, and if such false statement constitutes fraud, you may seek revocation of confirmation under Section 1330(a) in addition to dismissal (or conversion to a case under Chapter 7, with the debtor's consent) under Section 1307(c)(11) (failure to pay a DSO which first becomes due after the petition date). The addition of Sections 362(c)(3) and (4) by the 2005 Act, limiting the availability or extent of protection of the automatic stay in second and subsequent serially filed cases, makes dismissal of a case filed (under any chapter of the Bankruptcy Code) after Oct. 17, 2005, a much more consequential event than in the past. Accordingly, if you become aware that the debtor is two months' or more delinquent in the payment of a DSO during the pendency of a case, you will have significant bargaining leverage with debtor's counsel to ensure that arrearages are promptly cured and maintained as current. Also consider providing the trustee with an affidavit concerning the delinquency with a request that a motion to dismiss be filed. Most Chapter 13 trustees will be willing to file such a motion, particularly since payment of all domestic support obligations is now a pre-condition of discharge.

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