

PRESENTED AT
15th Annual Consumer Bankruptcy Practice

July 25 – 26, 2019
Houston, Texas

Prosecuting and Defending Exceptions to Discharge

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When an individual debtor receives a discharge in a chapter 7 or chapter 13 case, certain debts are not eliminated by that discharge. These exceptions to the discharge remain due and owing, to whatever extent they were due and owing prior to the bankruptcy case, as personal liabilities of the debtor. The general rule is that a prepetition debt is discharged unless a specific exception to the discharge provides otherwise. 1 Collier Consumer Bankruptcy Practice Guide P 26.01 (2018). This paper provides a brief overview of the Fifth Circuit standard regarding exceptions to discharge, including recent Supreme Court cases.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) eliminated many, though not all, of the differences between a chapter 7 discharge and a chapter 13 discharge. In addition to those debts described in section 523(a)(5) [*domestic support obligations*], (8) [*student loans*] and (9) [*intoxication debts*], debts that meet the requirements of section 507(a)(8)(C) [*taxes*] or section 523(a)(1)(B) [*unfiled tax return*], (1)(C) [*fraudulent return*], (2) [*fraud/misrepresentation*], (3) [*unscheduled*], or (4) [*fiduciary*] are no longer dischargeable in chapter 13 cases.

One of the often litigated dischargeability actions results from divorce decrees, which can create dischargeable obligations in Chapter 13. Pursuant to 11 U.S.C. § 523(a)(5), a “domestic support obligation” cannot be discharged. Pursuant to 11 U.S.C. § 101(14A)(B), a domestic support obligation includes a debt that is “in the nature of alimony, maintenance, or support” of a former spouse. However, any obligation created by the divorce decree that is not in the nature of alimony, maintenance, or support would be dischargeable pursuant to 11 U.S.C. § 1328(a). These debts are *dischargeable* at the completion of payments under a Chapter 13 plan. This vestige of

the pre-BAPCPA¹ “super” discharge is why some debtors choose Chapter 13 to discharge a “nonsupport” domestic obligation that would otherwise be non-dischargeable under 11 U.S.C. 523(a)(15).

The exception to discharge in § 1328(a) for debts of the kind specified in § 523(a)(5) was not changed by BAPCPA; however, the new definition of domestic support obligation in §101(14A) enlarged the universe of debts that are non-dischargeable under § 523(a)(5). The non-dischargeable domestic support obligation in this case is defined in § 101(14A) as follows:

(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**; (*court’s emphasis*)

(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 of record; or

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

There are exceptions to discharge that must be raised during the bankruptcy case, within 60 days of the day first set for the 341 meeting. Fed. R. Bankr. P. 4007(c).² These debts are

¹ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub.L. 109–8, 119 Stat. 23, enacted April 20, 2005), is a legislative act that made several significant changes to the United States Bankruptcy Code.

² In chapter 13 cases in which the debtor seeks a hardship discharge, a different deadline is set by the court pursuant to Fed. R. Bankr. P. 4007(d).

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First appeared as part of the conference materials for the
15th Annual Consumer Bankruptcy Practice session

"Prosecuting and Defending Exceptions to Discharge "