Lou Jones Breakfast Club: June 11, 2013

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DOMESTIC SUPPORT OBLIGATIONS

The Bankruptcy Abuse Prevention and Consumer Protection At of 2005 added the term "domestic support obligation", and defined that term in 11 U.S.C. Sec. 101 (14A) as:

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 non-bankruptcy law notwithstanding any other provision of this title,

- 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 of record; or
 - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- D) not assigned to a governmental 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.

11 U.S.C. Sec 362

Does NOT operate as a stay under 11 U.S.C. Sec 362(a);

- A) of the commencement or a civil proceeding or action
 - (i) for the establishment of paternity;
 - (ii) for the establishment or modification of an order for domestic support obligations;
 - (iii) concerning child custody or visitation;
 - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
 - (v) regarding domestic violence;
- B) of the collection of a domestic support obligation 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 domestic support obligation under a judicial or administrative order or statute.
- D) of the withholding, suspension or restriction of a driver's license, a professional of occupational license, or a recreational license, under State law, as specified in 466(a)(16) of the Social Security Act;
- E) the reporting of overdue support owed by a parent to any consumer reporting agency as specified in sections 466 and 466(a)(3) of the Social Security Act;
- F) the interception of a tax refund, as specified in sections 466 and 466(a)(3) of the Social Security Act or under analogous State law; or
- G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act.

PRIORITIES UNDER 11 U.S.C Sec. 507(a)(1)

- (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 under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable non-bankruptcy 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 the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable non-bankruptcy law, on the condition tat the 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 non-bankruptcy law.
- (C) If a trustee is elected or appointed under section 701, 702, 703, 1104, 1202or 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 payment of such claims.

EXEMPTIONS - 11 U.S.C. Sec 522

- (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except —
- (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding and provision of applicable non-bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5);
- (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtors in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in 523(a)(5);

DISCHARGEABILITY - 11 U.S.C. Sec. 523

- 523(a): A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt –
- (5) for a domestic support obligation;
- (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

PREFERENCES – 11 U.S.C. 547

- (c): The trustee may not avoid under this section a transfer –
- (7) to the extent such payment was a bona fide payment of a debt for a domestic support obligation;

TRUSTEE DUTIES

CHAPTER 7 TRUSTEE: 11 U.S.C. 704(a)(10): provide applicable notices as specified in (c)

11 U.S.C. 704(c)(1): notices to;

- (A) the holder of the claim, including;
 - (i) claim holder's claim and right to use services of the State child support enforcement agency, for assistance in collecting child support;
 - (ii) provide the address and phone number of the State child support enforcement agency;
 - (iii) explain the rights of such claim holder
- (B)(i) provide written notice to such State child support enforcement agency of such claim and
 - (ii) including the name, address and phone number of such claim holder;

- (C) at such time as the debtor is granted a discharge under 727, notice to the claim holder and the State child support enforcement agency of
 - (i) the granting of the discharge;
 - (ii) the last recent known address of the debtor;
 - (iii) the last known name and address of the debtor's employer; and
 - (iv) the name of each creditor that holds a claim that is (I) not discharged under paragraph (2), (4) or (14A) of section 523(a); or (II) was reaffirmed by the debtor under Sec. 524(c).

CHAPTER 13 TRUSTEE:

- 11 U.S.C. 1302(b)(5) ensure the debtor commences making timely payments under 1326
- 11 U.S.C. 1302(b)(6) if with respect to the debtor there is a domestic support obligation, provide the applicable notices specified in subsection (d) to
- 11 U.S.C. 1302(d):
- (A) the holder of the claim, including;
 - (i) claim holder's claim under (b)(6) and right to use services of the State child support enforcement agency, for assistance in collecting child support;
 - (ii) provide the address and phone number of the State child support enforcement agency;
 - (iii) explain the rights of such claim holder
- (B)(i) to such State child support enforcement agency of such claim and
 - (ii) including the name, address and phone number of such claim holder;
- (C) at such time as the debtor is granted a discharge under 1328, notice to the claim holder and the State child support enforcement agency of -
 - (i) the granting of the discharge;
 - (ii) the last recent known address of the debtor;
 - (iii) the last known name and address of the debtor's employer; and
 - (iv) the name of each creditor that holds a claim that is (I) not discharged under paragraph (2), (4) or (14A) of section 523(a); or (II) was reaffirmed by the debtor under Sec. 524(c).

CHAPTER 13 PLAN REQUIREMENTS

11 U.S.C. 1322 (a): The Plan shall -

- (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under sec 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;
- (4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.
- As such, a 60-month Chapter 13 Plan may classify allowed claims under 11 U.S.C. 507(a)(1)(B) to receive all funds (including tax refunds paid to the Plan), after payment of secured debt, if any, attorneys fees, Trustee fees and adequate protection payments, and, thereby, eliminate any dividend to allowed unsecured non-priority claims (unless all priority claims were previously paid in full.

Suggested Plan Language for Treatment of DSO priority (a)(1)(A) and (a)(1)(B) claims:

1.

2.

- 3. All available funds received by the Trustee, including tax refunds that are shared with the Plan, shall first be used to pay secured debt, (if any), attorney fees, and then priority debt (including DSO debt (under §507(a)(1)(A) or (B)) as prioritized in paragraph 4 below. Until all such debt (including additional allowed claims in these categories during the duration of the Plan), is paid in full, there shall be no dividend to general unsecured non priority creditors.
- **4.** Following confirmation of the Plan, distribution of payments shall be as follows:

a.

b. The DSO priority	claim of WI SCTF §507(a)(1)(A), payable to
(and) shall be paid in full;

c. The DSO priority claim of WI SCTF under §507(a)(1)(B) shall be paid with any remaining funds. Pursuant to §1322(a)(4), any §507(a)(1)(B) claim might not be paid in full but the Plan is required to last 60 months unless those claims are paid in full.

11 U.S.C. 1328 (a): "...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

- (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 523(a);
- 11 U.S.C. 1328 (c): A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the Plan or disallowed under section 502 of this title, except any debt—
- (1) provided for under section 1322(b)(5) of this title; or
- (2) of a kind specified in section 523(a) of this title
- I) DEBTS OWED TO OR RECOVERABLE BY THE SPOUSE, FORMER SPOUSE, CHILD OF THE DEBTOR, SUCH CHILD'S PARENT, GUARDIAN OR LEGAL REPRESENTATIVE.

A) Support Over payment:

1. Langford v Drinkard, 254 B.R. 91 (Bankr. N.D. Tex. 2000)

Claim for reimbursement of support overpayment

Held: NOT DSO

- does not benefit the child of obligee
- does not result from a Judgment for alimony, maintenance or support (of child or spouse)
- no evidence that payments were necessary for other support
- no disparity of income

B) Wrongful payment:

In Re: Vanhook, 426 B. R. 296 (Bankr. N.D. III. 2010)

Claim for wrongful payments ("the child is not my son")

Held: NOT DSO

- Support wrongfully ordered and paid does not transform the claim for a refund into a Priority Debt

C) Child support continued past termination date

In Re: Baker, 294 B. R. 281 (Bankr. N.D. Ohio 2002) Court Ordered support payments continued past termination date Held: **PRIORITY DSO**

- Debtor did not have "clean hands" since she knew the Support Order terminated and wrongfully kept the money.

D) Marital settlement agreement provided for establishment of Trust fund for children

In Re Tadisch, 220 B.R. 371 (Bankr. E.D. Wis. 1998) (JES)

- debtor asserts the provision to create a Trust for the children is property division.

Held: Non-Dischargeable [under 523(a)(5)]

- conveyance to the Trust was not a property division between themselves, but instead intended to provide a source of support.

II) OTHER DEBTS "IN THE NATURE OF" SUPPORT

- A) To determine debts "in the nature of" Support, look to federal law In re: Reines, 142 F. 3d 970, 972 (7th Cir. 1998)
- B) Consider whether the obligation was **intended** to be for support (look beyond labels) **Sylverster v Sylverster**, 865 F.2d 1164, 1166 (10th Cir. 1989)

Intent is a threshold that must be crossed before any other concerns become relevant.

<u>Tilley v. Jessee</u>, 789 F. 2d at 1078 (4th Cir. 1986):

C) The party seeking to hold the debt non-dischargeable has the burden of proof by a preponderance of the evidence **Grogan v Garner**, 48 U.S. 279, 11 S.Ct. 654 (1991)

D. Intent: unofficial factors:

In Re Poole, 383 B. R. 308 (2007);

- 1. substance and language of the document in question
- 2. the financial conditions of the parties at the time of the decree or agreement
- 3. the function served by the obligations and the intent of the parties at the time of the agreement and
- 4. whether there is evidence to question the intent of a spouse or overbearing by either party

"As the language of the former exception and the new definition are similar, the pre-BAPCPA case law applicable to 11 U.S.C. 523(a)(5) is helpful in determining if a debt fits within the definition of a 'domestic support obligation.' "(Id., at 313)

E. If intent is not clear, then examine factors

In Re Deberry, 429 B.R.532 (M.D. N.C. 2010)

- Separation Agreement provided for x-Husband to pay Mortgages until marital home sold, then proceeds of sale would be used to pay [specified] marital debts, with each equally responsible for the balances on the remaining marital debts. The Separation Agreement also provided "in lieu of periodic spousal support payments" x-Husband shall pay to x-Wife "an amount equal to one-half of the minimum monthly payments for the [specified] marital debts..."
- the parties entered into an option to sell, the buyer paid \$18,000 earnest money on the option, which was retained by x-Husband when the option expired.
- X-husband did not pay the mortgages, did not pay his half of the [specified] marital debts and the house was foreclosed. Meanwhile, x-wife paid off the [specified] marital debts (\$30,500)

Held:

- **SOME DSO**: x-husband's obligation to pay one-half of the debts that were to be settled from the sale of the marital home are "in the nature of" support
- which follows from the terms of the Separation Agreement "in lieu of periodic spousal support payments"; \$9,000 (1/2 the earnest money) and \$15,250 (1/2 the amount paid by x-wife to settle the [specified] marital debts)
- the fact that x-wife paid money toward debts which otherwise would have been owed as a DSO is unfortunate but does not change the result
- **SOME NOT DSO**: since the remainder of the marital debt was not included as "in lieu of periodic spousal support payments", the remaining marital debts are only property division.

F. Intent AND effect

In Re Norbut, 387 B.R. 199 (Bankr. S.D. Ohio 2008)

- x-wife to collect alimony until former husband's retirement, then she get half his pension. Former husband retired early, started to pay half his retirement fund and continued to pay alimony

Held: DSO

- former husband's payment of half his pension along with alimony **reduced his living ability**, so the overpayments were originally intended as support and had the effect of support.

See also: In Re Sampson, 997 F.2d 717 (10th Cir. 1993)

G. "Hold Harmless" agreements

"A provision in a divorce decree to hold harmless or indemnify a spouse for joint obligations incurred during a marriage creates a 'new debt', running solely between the former spouses."

In Re Schweitzer, 370 B.R. 145, 150 (Bankr. S.D. Ohio 2007)

In Re Johnson, 397 B.R. 289 (Bankr. M.D. N.C. 2008):

- two debts encumbered the marital homestead; x-wife was to remain responsible for the first and x-husband was responsible for the second. X-husband did not pay the second lien and filed a Chapter 13 case. X-wife filed priority claim for the amount of the second lien.

Held: DSO

- At the time of the agreement, both parties knew x-wife would not be able to remain living at the property unless x-husband paid the second lien.
- "An obligation which enables one's family to maintain shelter is in the nature of support, and an agreement to indemnify and hold the former spouse harmless on that debt is non-dischargeable..." (id. At 299).

See also: <u>In Re: Robinson</u>, 921 F. 2d 252 (10th Cir. 1990)

In Re Jaeger-Jacobs, MDM, April 10, 2013, 12-20021, AP 12-2227

- Court considered a Marital Settlement Agreement which included hold-harmless language and a provision classifying the payment of certain debts as a DSO under 523(a)(5); Debtor did not pay.

Held: **non-dischargeable** [facts not clear, but if not DSO under 523(a)(5), then non-dischargeable under 523(a)(15)]

"the obligation that is non-dischargeable in these situations is a debtor's responsibility to hold his non-debtor, ex-spouse harmless." (citing **In Re Clark**, 207 B.R. 651, 65 (Bankr. E.D. Mo 1997)

III) DSO OWED TO THIRD PARTIES

New 101(14A) definition includes the words "owed to or recoverable by" - which opens the door for DSO Claims by third parties

<u>In Re Calhoun</u>, 715 F.2d 1103 (6th Cir. 1983) <u>In Re Spong</u>, 661 F. 2nd 6 (2nd Cir. 1981)

A) GUARDIAN AD LITEM:

In Re: Kassicieh, 425 BR 467 (2010)

- GAL, NOT a payee under 101(14A) is a DSO

<u>In Re Lockwood</u>, 148 B.R. 45 (Bankr. E.D. Wis. 1992) (MDM) Held:

(a) GAL services were not related only to "custody and visitation" and extended to support (distinguished from the type of "support" owed to a former spouse) and (b) facts are distinguished from Attorneys fees owed to one's own Divorce

Attorney (citing **Matter of Rios**, 901 F. 2d 71, 72: not a DSO "unless there is some legal obligation to hire an attorney on behalf of the spouse or child")

B) FOOD STAMP BENFITS OVERPAYMENT BY WIS. DWD

Wisconsin Department of Workforce Development, Creditor-Appellant vs. Rose Ratliff, Debtor-Appellee, 390 B. R. 607 (Dist. Court. E.D. Wis., 2008).

Rose M. Ratliff received food stamp benefits for May, 2002 through December 31, 2006. Due to her failure to report the presence of her ex-husband in her household during that time, the Wisconsin Department of Workforce Development filed a claim for overpayments in the total amount of \$17,075.35 and filed a Priority Claim under 11 U.S.C. 507 (a)(1)(A) or (B). The debtor objected to the Priority Claim.

The Bankruptcy Court found that food stamp benefits were not the traditional type of support that the State advanced on behalf of Ratliff to her x-spouse or child and held the debt dischargeable.

On Appeal, Judge Randa found the only element at issue was whether the debt was "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."

Having found that the new definition of domestic support obligations under 101(14A) is broader than the former definition of 523(a)(5), Judge Randa held food stamps provide a basic form of support (namely, food), found the food stamp benefits are in the nature of support of the children of the debtor, and held the debt to be non-dischargeable DSO.

C. ATTORNEY FEES

<u>In Re Wiesniewski</u>, 109 B.R. 926 (Bankr. E.D. Wis. 1990) (MDM) marital settlement agreement where x-husband agreed to pay \$2,000 of x-wife's Attorneys Fees

Held: DSO

- (a) the parties circumstances at the time of the divorce controls, not their circumstances at the time of the bankruptcy and
- (b) "a spouse has a duty to support the other spouse and the ability to prosecute or defend a matrimonial action is necessary for the support of the dependant spouse."

In Re Georgi, 459 B.R. 716 (Bankr. E.D. Wis. 2011) (MDM)

- both parties to a divorce waived maintenance and allocated debts between them.
- x-wife didn't pay and x-husband was sued.
- x-wife says the debt is not DSO since there's no allegation in the Marital Settlement agreement or provision to hold the other party harmless nor is there an indemnification provision

Held: DSO

- A court order to pay a third party is the equivalent of a hold harmless provision.

In Re Hying, 477 B.R. 731, (Bankr. E.D. Wis. 2012) (JES)

- Attorneys fees awarded to x-wife by Family Court

Held: DSO

- legal services related to x-wife's general welfare DSO
- see also **In Re: Uzaldin**, 418 B. R. 166 (Bankr. E.D. Virginia 2009): Attorneys fees follow the nature of the award; if the principal award is a DS), then Attorneys fees incidental to obtaining the DSO are a DSO.