



THE NEW BANKRUPTCY LAW: ASSESSING THE LAW'S IMPACT ON WOMEN

by Justin H. Dion

It is well understood that consumer bankruptcy is designed to assist someone to obtain a “fresh start,” which in most cases entails discharging some, if not all, debts and obligations. Although the bankruptcy code is gender neutral, the implications of the new



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code may in fact have a disproportionate and unintentional effect on women. Ironically, although one aspect of the recent bankruptcy law changes purports to further empower the recipients of support obligation payments and debts (who are overwhelmingly women), other provisions of the law also make it more difficult for people to seek bankruptcy protection. A majority of bankruptcy filers are now also women. Thus, on one hand, the new bankruptcy law seems to be beneficial to women because of some added protections that are afforded if the support obligation provider files bankruptcy while, on the other hand, other provisions of the law potentially will harm those who will find it more difficult and costly to file bankruptcy themselves, even if they are desperately in need of a fresh start.

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Pursuant to House Report 109-031, the purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors. Although the crux of BAPCPA relates to the new implementation of a “means test” to determine if a debtor qualifies for a Chapter 7 bankruptcy, other sweeping changes were made, including some pertaining to domestic support obligations. These support obligation changes will have a disproportionately beneficial effect on women because, by far, women represent the overwhelming majority of domestic support recipients in the United States. According to 2002 Census Bureau statistics, women are recipients of 84 percent of all child support payments in the United States.¹ As such, changes to the bankruptcy law that enhance the domestic support recipients’ rights and improve their ability to collect support will

likely improve the standard of living for women and children.

To start, BAPCPA set forth a broad and expansive definition of “support obligations” to include debts owed or recoverable by the child’s parent, legal guardian or responsible relative; as well as debts voluntarily assigned to governmental units.² Prior to BAPCPA, 11 USC § 523 (A)(5) listed as non-dischargeable an obligation:

to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that — (A) such debt is assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State; or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Under BAPCPA, for the purposes of determining a debtor’s ability to discharge certain obligations, the amendment eliminates the distinction between orders providing for division of property and orders providing for support of a spouse or child. The result is that nearly all obligations to a spouse, former spouse or child of a debtor which are incurred in connection with a divorce or separation agreement or other family law-related order are not discharged in a case under any chapter



of the bankruptcy code. The one exception to this rule occurs in a case under Chapter 13 where there has been complete consummation of a confirmed Chapter 13 plan (i.e., where the debtor has made all payments required under the plan).

Under prior law, an obligation other than one found to be for support would not be discharged unless the debtor could sustain the substantive burden of proof contained in 11 U.S.C. § 523 (a)(15)(A) and (B). The law no longer distinguishes between debts for alimony or support, and debts arising from property settlements, as both kinds of debt are now not dischargeable.

Another important modification with respect to 11 U.S.C. § 523(a)(15) is that the support obligation recipient is no longer required to bring an adversary proceeding to achieve a finding as to the dischargeability of debts related to family law. Section 523(c) was amended to delete the reference to 11 U.S.C. § 523(a)(15), which previously burdened a support obligation recipient to seek a ruling that the debt owed to them was not dischargeable. As such, the burden is now on the debtor to prove a potential support obligation is dischargeable.

BAPCPA elevates unsecured claims for domestic support obligations to first priority status. This elevation requires that the trustee pay domestic support obligations ahead of almost all other unsecured claimants. Specifically, § 507(a) states that the following claims have priority in the following order:

(1) First:

- (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 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 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 non-bankruptcy law.
- (C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expense 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.

If assets are available in a Chapter 7 bankruptcy case, a woman who is owed past due support obligations from the debtor will receive payment ahead of most other creditors.

Another important provision of BAPCPA requires a debtor seeking reorganization pursuant to Chapter 11, 12 or 13 first to complete a certification that all post-petition court ordered domestic support obligations are current before the court will confirm a plan. A case may be dismissed or converted if a debtor is not making timely post-petition domestic support payments. Pre-petition domestic sup-

port obligations owed to an individual must be paid in full as a priority claim in a Chapter 13 plan. However, if the obligations are to be paid to a governmental unit, the plan can provide for less than 100 percent payment where the debtor proposes to pay all of his or her projected disposable income into a five year plan. If obligor debtors want the protection and benefits afforded by the bankruptcy court, the debtors are now required to pay domestic support obligations. Again, this is a major benefit for women who are owed support payments from a bankruptcy debtor, as the likelihood of getting paid has now increased. Prior to BAPCPA, women who were owed support were for all intents and purposes ignored.

Other provisions of the revised law specifically exempt from the automatic stay actions pertaining to domestic support obligations proceedings, including: (1) child custody or visitation; (2) dissolution of marriage; (3) domestic violence; (4) withholding of income that is property of the bankrupt estate for payment of domestic support obligations; (5) suspension of driver's licenses and professional licenses; (6) reporting of overdue support owed by a parent to certain consumer reporting agencies; (7) interception of specified tax refunds; and (8) enforcement of medical obligations under title IV, part D (Child Support and Establishment of Paternity) of the Social Security Act. Women are free to pursue a bankruptcy debtor to obtain an order of support and/or enforcement of a support order without first needing to seek permission from the bankruptcy court for relief from stay. This is also of assistance to women, as pursuit of debtor does not now require the additional time and expense associated with first stopping in bankruptcy court.

Other changes to the law: (a) modify the guidelines governing the non-dischargeability of certain debts for alimony, maintenance and support to repeal prior exceptions granted the debtor under specified conditions; (b) change the guidelines governing property exempt from the bankruptcy estate to declare such property liable for a debt arising from domestic support obligations; (c) prohibit the bankruptcy trustee from avoiding a transfer that is a payment of a debt for a domestic support obligation; (d) exclude income payments for post-petition domestic support obligations from "disposable



income” for purposes of a Chapter 12 confirmation plan; and (e) set forth the duties of the bankruptcy trustee to notify the claim holder and the appropriate state child support agency of the debtor’s last known address.³

Cumulatively, these changes do empower the recipients of support obligations and enhance collectability. However, the other side of BAPCPA must also be recognized. BAPCPA creates obstacles for all persons seeking to file bankruptcy. Although women will have some assistance receiving payment of support obligations, if their debts become overwhelming for whatever reason, their ability to file bankruptcy and obtain a fresh start has been hindered. As noted earlier, women now comprise the majority of both domestic support recipients and bankruptcy filers. According to professors Teresa Sullivan and Elizabeth Warren, authors of “Women in Bankruptcy”:

The proportion of women filing alone in bankruptcy has increased dramatically since 1981. In 1981, single filing women were the smallest group, comprising 17 percent of all filers in our sample. By 1991, single filing women had overtaken single filing men and were 30 percent of all filers in the sample. By 1999, our initial analysis suggests that single filing women have increased even more and now constitute almost 40 percent of all filers. This makes single filing women the fastest growing group in bankruptcy by a large margin and means that women filing alone now outnumber either men filing alone or married couples.⁴

Sullivan and Warren also disclosed projected filings from the Administrative Office of the U.S. Courts as follows:

	1981	1991	1999
Joint	178,000	357,000	455,000
Men	81,000	211,000	386,000
Women	53,000	243,000	538,000
Total	312,000	811,000	1,379,000

Although the precise cause of the rise in female bankruptcy rates remains unknown, it

is widely believed that the relatively high divorce rates (which hover around 50 percent), failure to receive any or adequate child support and/or alimony, disproportionately paying job opportunities and issues relating to lack of health insurance are likely causes for this trend. In addition, women who do work part time or at low pay jobs oftentimes fall into the unfortunate group of people who are too poor to afford the cost of living while still earning too much to qualify for government assistance. This group of women becomes more reliant on unsecured debts, which fall further behind due to the often exorbitant interest rates, and leave few alternatives other than bankruptcy.

The provisions of BAPCPA that propose to make obtaining bankruptcy relief more difficult will ultimately impose more of a burden on women (and in all likelihood, their children).

First, BAPCPA now requires debtors to complete both a pre- and a post-filing financial counseling program as approved by the United States Trustee. Although the time involved in completing these two programs has not proven overly burdensome for debtors, these programs pose an additional financial burden on already cash-strapped individuals, with each program usually costing from \$40 to \$60.

Prior to BAPCPA, persons filing bankruptcy were presumed to be acting in good faith, and were generally automatically recognized to be eligible for Chapter 7 protection. A fundamental change inaugurated by BAPCPA alters this landscape. After the enactment of BAPCPA, the burden has shifted so that debtors are no longer presumed eligible for Chapter 7 protection. Rather, the burden to prove eligibility now rests on the debtor by way of a “means test.” To apply the means test, a court looks at the debtor’s average income for the six months prior to filing, and compares the debtor’s six-month median income to the income for that state. For example, the median annual income for a single wage-earner in Massachusetts is \$48,775. If the debtor’s income is below the median, then Chapter 7 remains an option. If the debtor’s income exceeds this median, the remaining aspect of the means test becomes applicable. That calculation takes monthly income less living expenses and multiplies the

result times 60. The result is intended to represent the amount of income available over a five-year period for repayment of the debt obligations. If the income available for debt repayment over that five-year period is \$10,000 or more, Chapter 7 is not an option and a Chapter 13 will be required. In other words, anyone earning above the state median, and with at least \$166.67 per month of available income, will be denied Chapter 7 benefits.

Simply put, the means test was Congress’ attempt to stop the increasing rate of bankruptcy filing and force debtors to repay their obligations. In addition to the legal barrier imposed by the means test, a secondary barrier has also resulted — additional cost to the debtor. Specifically, the cost a debtor must pay to hire an attorney to assist them to file bankruptcy has generally increased. Due to the additional work, time, liability and labor involved in preparing and filing a bankruptcy, many attorneys have been forced to raise their fees anywhere from 20 to 50 percent. This substantial rise in bankruptcy filing costs, in conjunction with the means test, has now put women facing financial crisis in an extremely difficult position. They can either avoid bankruptcy and continue to struggle with crushing debt for the indefinite future, or sacrifice current household expenses in an attempt to pay the increased costs to hire an attorney to file a bankruptcy, for which they may now in fact be ineligible due to the means test.

At first glance, the BAPCPA appears to have provided women a great benefit by increasing the collectability of their support payment rights. After a more careful examination of the totality of the act, it appears the means test and increased complexity/costs of filing may in fact cause a greater hardship than any purported benefit. In the end, only time will tell if BAPCPA has a disproportionate effect on women. At present, it is important for attorneys to recognize these potential issues and remain sensitive to these potential problems.

End notes

1. See U.S. Census Bureau News (February 24, 2005). According to this report, national domestic support increased by 18 percent between 1997 and 2002, which, after adjusting for inflation, amounts to an increase from \$34 billion to \$40



billion in total support payments made in the United States. In addition, the number of payors increased by 8 percent, from 7.2 million to 7.8 million. Finally, the national average annual amount of financial support was \$5,200, about 10 percent higher than the inflation-adjusted level of support in 1997 (\$4,700).

- 2 Specifically, 11 USC § 101(14A) reads as follows: 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, 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 government 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 non-bankruptcy 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.

3. These modifications regarding support obligations also act to remind lawyers representing debtors to make certain that all creditors holding domestic support obligations have either filed the appropriate support obligation claim, or that the debtor files the claim on the creditor’s behalf pursuant to Fed. Rule of Bankruptcy Proc. 3004. If it is an asset case, it is generally in the debtor’s best interest to have the support obligation claim filed to allow the trustee to make payment. If a claim is not filed, the claimant will not share in any distribution from the bankruptcy estate, and 100 percent of the debt will survive debtor’s discharge.
4. See “Women in Bankruptcy,” Teresa Sullivan and Elizabeth Warren, American Bankruptcy Institute, Web posting (July 13, 1999) at http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Women_in_Bankruptcy.htm. Source: Administrative Office of the U.S. Courts, Consumer Bankruptcy Project I (1981), Consumer Bankruptcy Project II (1991), and Consumer Bankruptcy Project III (1999).