

See also the following reference material at the end of this article: Title 11 U. S. C. sections; Costanza Decision (Judge Stewart Rose); and Aguilar Decision (Judge James Starzynski)

WHEN WORLDS COLLIDE¹
BANKRUPTCY AND DOMESTIC RELATIONS:
When to go to (Bankruptcy) Court and When Not to.²

By James S. Starzynski³ and Gerald R. Velarde⁴

The purpose of this article is to provide a summary of the provisions of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005⁵ (“Code”), which are most likely to come into play in a domestic relations context. These materials consist of an outline of the issues coupled with an

¹ The phrase “When Worlds Collide” was shamelessly stolen from a publication of the American Bankruptcy Institute (“ABI”) covering this same topic. The authors apologize to the ABI, but also strongly commend readers of this paper to the ABI as the premier source of materials and expertise on everything having to do with bankruptcy and insolvency generally. The website is www.abiworld.org.

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² **These materials have been revised and corrected three times since they were presented on July 11, 2009 at the New Mexico Annual Bar Convention at the stylish Buffalo Thunder Casino and Resort, at the Family Law Institute on October 16, 2009, and at a “Two Buck Chuck” CLE (with apologies to Trader Joe’s) hosted by the Honorable Elizabeth Whitefield, D.J., at the Second Judicial District Court on February 1, 2010. The authors are indebted to the Honorable Robert H. Jacobvitz, B.J., for his comments/corrections to these materials. While these materials are continuing to improve, their approach to perfection is surely asymptotic at best.**

³ Judge Starzynski is currently the Chief Judge of the United States Bankruptcy Court for the District of New Mexico. Judge Starzynski has helped prepare these materials and is participating in the presentation at which these materials are being used. Anyone is free to quote or refer to any of the content of these materials to Judge Starzynski in the course of any proceedings he may conduct. Judge Starzynski considers that he is equally free, upon presentation of any such argument, to completely disagree with any of the contents herein. State court judges are welcome to contact Judge Starzynski or his law clerk James Burke (505.348.2420); starzynski@nmcourt.fed.us to confer about these issues, or any other bankruptcy issues, arising in their courts. The United States Bankruptcy Court maintains a user friendly web site that readers are encouraged to visit at www.nmcourt.fed.us. At that website is the chambers web page for Judge Starzynski’s court, which includes a word-searchable compilation of all of his written decisions (including citations to any appellate decisions reversing his decisions) and most of his oral rulings (in the form of almost verbatim notes).

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⁵ Pub. L. 109-8, 119 Stat. 216 (2005).

appendix of the Code sections⁶ applicable to the issue. The materials and the presentation will focus on the Code sections and discuss what happens when one or both spouses or ex-spouses file for bankruptcy relief. As with any statute, statements interpreting the Code must be viewed in the light of a careful reading of the statute.

The general topics addressed are the automatic stay, discharge, priority of payments, and miscellaneous issues, in that order. These are the areas in which bankruptcy law will most likely intrude in domestic relations practice. Virtually all the discussion assumes that the bankruptcy filing will be a chapter 7 case or a chapter 13 case, since by far those are the majority of cases filed.

AUTOMATIC STAY

As time has passed, Congressional policy as reflected in the Code has increasingly permitted more domestic relations matters to proceed in state courts without interference from the bankruptcy court or bankruptcy proceedings. This is the current status of the automatic stay with respect to a pending domestic relations matter:

- Critical to understanding the current Code provisions about domestic relations is the concept of the domestic support obligation (“DSO”). A DSO is a debt owed by the debtor for spousal or child support (whether or not explicitly designated as such) that arises before or after the commencement of the bankruptcy case from a separation agreement, divorce decree, or property settlement agreement, or by an order of a court or a government agency. A DSO is to be distinguished from an obligation which is essentially a division or allocation of property or debt between the separating spouses. There are a considerable number of cases, including several decisions from the Tenth Circuit Court of Appeals⁷, that address this distinction. Whether a debt is to be treated as a DSO or a property/debt allocation is a matter of federal law, although depending on the circumstances the decision could be made by a state court (applying federal law) as well as a federal court.
- Note that in chapter 7 cases, post petition earnings from services performed by the debtor are not estate property. 11 U.S.C. sec 541(a). In chapter 11 and chapter 13 cases, the debtor’s post petition income is property of the estate. 11 U.S.C. secs, 1115(a)(2) and 1306(a)(2). Post petition earnings of the non-filing spouse are not property of the estate in

⁶ All “section” references are to Title 11 of the United States Code – the Bankruptcy Code – unless otherwise indicated.

⁷ For example, *In re Jones*, 9 F.3d 878 (10th Cir. 1993); *In re Turner*, 266B.R. 491 (10th Cir. BAP 2001) (holding that attorney fees incurred in establishing nondischargeability of support obligations are themselves part of support and therefore nondischargeable); *Miller v. Gentry*, 55 F.3d 1487 (10th Cir. 1995) (same for guardian ad litem fees).

any event, although they need to be taken into account in connection with the means test.

- Practically speaking, state courts and litigants can continue with and conclude most of the components of a domestic relations matter without seeking stay relief from the bankruptcy court.⁸ These components include

⁸ State courts and bankruptcy courts have concurrent jurisdiction to determine whether the stay applies to a matter pending in that court, although only the bankruptcy court has the jurisdiction to modify a stay. The *Rooker-Feldman* doctrine [*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-416 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482(1983)] ordinarily prevents a federal court from acting as an appellate court to review a state court decision. Thus an appeal from a state-court decision about the applicability of the stay would presumably have to be taken to the state appellate court. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990); *Singleton v. Fifth Third Bank of Western Ohio (In re Singleton)*, 230 B.R. 533, 538-39 (6th Cir. BAP 1999); *Siskin v. Complete Aircraft Services, Inc. (In re Siskin)*, 258 B.R. 554, 560-63 (Bankr.E.D.N.Y. 2001). See also *In re United-Baldwin Corp. Litigation*, 765 F.2d 343, 347 (2nd Cir. 1985) (United States district court had jurisdiction to decide applicability of stay but its issuance of injunction enforcing that decision, including forbidding the debtor from seeking a contrary decision from the bankruptcy court, was a misuse of the district court's equitable power). (But note that the *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district [bankruptcy] court proceedings commenced and inviting district [bankruptcy] court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 282-84 (2005). Thus, *Rooker-Feldman* is not applicable to prevent the application of substantive bankruptcy law rights.)

On the other hand, there is also substantial (indeed, more) authority that the bankruptcy court has the final decision on the issue. See, e.g., *In re Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001) (the federal courts have the final authority to determine the scope and applicability of the automatic stay); *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 384 (6th Cir. 2001) ("If the non-bankruptcy court's initial jurisdictional determination is erroneous, the parties run the risk that the entire action later will be declared void *ab initio*. (Citation omitted.) If a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum's resolution has been held determinative, presumably pursuant to the Supremacy Clause"); *In re Mid-City Parking, Inc.*, 332 B.R. 798, 805-06 (Bankr. N.D.Ill. 2005) ("The state or federal forum handling the nonbankruptcy litigation has concurrent jurisdiction to initially determine whether § 362(a)-(b) stays the proceeding, but the federal bankruptcy forum may entertain a collateral attack on that ruling"); *In re Edwin A. Epstein, Jr. Operating Co., Inc.* 314 B.R. 591, 599 (Bankr. S.D.Tex.2004)"Thus, while EEOC is correct that state courts have jurisdiction to rule on the applicability of the automatic stay to non-debtors, they do not have authority to do so when the automatic stay precludes the continuation of the proceeding against the debtor"; *In re Cavanaugh*, 271 B.R. 414, 423-24 (Bankr. D. Mass 2001)("by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay"). See also *Raymark Industries, Inc. v. Lai*, 973 F. 2d 1125, 1132 (3rd Cir. 1992) ("the bankruptcy court has the power to vacate the decision of the California Court of Appeal dismissing Raymark's appeal because actions taken in violation of the automatic stay are void *ab initio*;" *Rooker Feldman* does not apply to state court proceedings that are void *ab initio*). The Tenth Circuit has not decided the issue. (This latter position, that bankruptcy courts have the last word, is understandable from at least the psychological perspective of bankruptcy courts; it would be difficult for a bankruptcy judge to watch the bankruptcy estate being dismembered by decisions rendered outside the control of the bankruptcy court. Or it may simply be another application of Justice Oliver Wendell Holmes' apothegm : "The life of the law has not been logic; it has been experience." *The Common Law* (1881) 1.)

In consequence, a state court may want to direct parties to get an order from the bankruptcy court regarding whether the stay applies. Otherwise, the bankruptcy court might rule that the federal courts are the ultimate arbiter of the issue, and therefore possibly conclude that the state court ruled incorrectly and its proceedings are void or, to put it another way, the state court might be ruled to be attempting to modify the

determinations of paternity, child and spousal support, child custody and visitation, establishing or modifying a DSO, dissolving a marriage, and of course orders dealing with domestic violence. More specifically, the authors believe that it may well be the case that interim orders issued by the state court pursuant to NMRA 1-122 (and its accompanying form) apportioning income and assets between the spouses pending a final allocation of income, expenses, assets and debts through a state court judgment or a marital settlement agreement are stayed by a bankruptcy filing when at least one of the spouses is in a chapter 13 or a chapter 11 case (but not in a chapter 7 case). That is, the “establishment or modification” of a DSO by the state court and/or the parties is not stayed, 11 U.S.C. sec. 362(b)(2)(A)(ii), and the withholding of the debtor’s income, regardless of whether the income is property of the estate or property of the debtor, in order to pay the DSO, is also not stayed. 11 U.S.C. sec 362(b)(2)(C). However, it might be argued that an interim order that allocates the income of the filing spouse in a chapter 13 or chapter 11 proceeding is stayed under 11 U.S.C. sec. 362(b)(2)(A)(iv) which permits “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;...” And the language of 11 U.S.C. sec. 362(b)(2)(B) – “the collection of a [DSO] from property that is not property of the estate [is not stayed]” – implies that collection of a DSO from property of the estate is stayed. (Note that 11 U.S.C. sections 1115(a)(2) and 1306(a)(2) include in “property of the estate” “earnings from services performed by the debtor after the commencement of the case...”) That in turn would imply that 11 U.S.C. sec. 362(b)(2)(C) may refer to a collection device that is in place before the petition is filed, although the statute itself does not make that distinction, at least explicitly. This statutory scheme in which the parties in the domestic relations action can do just about everything without stay relief except for the allocation of income may well constitute a major inconvenience for all the parties involved in the domestic relations action (including the domestic relations judge, hearing officer or alternative dispute resolution personnel), but it is worth noting that almost always the income of the debtor in a chapter 13 case, and in some instances for an individual in a chapter 11 case, is the

stay if the state court had ruled incorrectly that some action was not subject to the stay.

Note: “It is well established that any action taken in violation of the stay is void and without effect.” *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990), citing *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (“the action of the ... court was not merely erroneous but was beyond its power, void, and subject to collateral attack.”). Unless, of course, it does not seem fair (read: “would not be equitable”) to hold the action in question void. *Job v. Calder (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990) (citing cases in which debtor was “stealthily silent” and thereby contributed to the “creditor’s plight”). See also *Picco v. Global Marine Drilling Co.*, 900 F.2d at 850 (action taken in violation of the stay voidable rather than void because it could be retroactively legitimated by an annulment of the stay). The large majority of circuit courts that have ruled on this issue, including the Tenth Circuit, hold that as a rule, actions taken in violation of the stay are void.

lifeblood of the chapter 13 or chapter 11 plan. And the plan is what enables the debtor to repay creditors, retain assets such as the home, etc. Thus the safer path for a practitioner may be to file for stay relief in that limited circumstance.

- Stay relief is not required for collection of a DSO from the debtor's property (as opposed to the property of the estate).⁹ 11 U.S.C. sec. 362(b)(2)(B). Prepetition (at least) wage withholding or garnishment orders for DSOs are not stayed even if the income is considered estate property; the same applies to tax refunds intercepted to pay support obligations. A debtor's license to drive, practice a profession, etc. can be suspended without stay relief for failure to meet support obligations.
- In general, stay relief is required for collection of a DSO from estate property. 11 U.S.C. sec. 362(b)(2)(B). However, stay relief is not required with respect to the withholding of income that is property of the estate for payment of a DSO "under a judicial or administrative order or a statute." 11 U.S.C. sec 362(b)(2)(C).
- Stay relief is also required for a final allocation of property *of the estate* between the two spouses. 11 U.S.C. sec. 362(b)(2)(A)(iv). Most chapter 7 debtors in New Mexico have so few assets that there is nothing that is not exempt. In consequence the spouses or the state court will be able to make a final allocation of assets without the need for stay relief after the request period for objecting to debtor's exemption claim has expired (usually 30 days after the section 341 meeting of creditors).
- Keep in mind that the vast majority of bankruptcy cases are consumer cases, and that of those roughly 90% are chapter 7 rather than chapter 13 cases. And the vast majority of chapter 7 cases are no asset cases (that is, cases in which there is no distribution to unsecured creditors) which conclude with the debtor getting a discharge and the case being closed

⁹ Note the difference between property of the estate and property of the debtor. When a bankruptcy case is filed, all property of the debtor (including of course the debtor's separate property), and the community property of the non-filing spouse, becomes estate property. (The concept of a bankruptcy estate is analogous to that of a probate estate: just as the probate estate is a different entity than the deceased person, the bankruptcy estate is a different entity than the debtor.) The debtor then claims out of that property the exemptions to which the debtor is entitled. Additionally the trustee may abandon property which the debtor has not claimed as exempt but which is not valuable enough to be worth administering. And in chapter 7 cases, the debtor's post petition wages are not part of the estate. The exempt and abandoned property, and chapter 7 post petition wages, become the debtor's property. In chapter 7 cases the stay as to estate property terminates automatically when the property "leaves the estate", such as by exemption or abandonment or the closing of the case. The stay terminates automatically in chapter 7 cases for the debtor's property when the debtor receives or is denied a discharge. In chapter 13 cases, the debtor has the option of vesting property of the estate in the debtor at the time of confirmation or at the time debtor receives a discharge after complying with the terms of the Plan. Section 1322(b)(9). If the debtor elects to vest property of the estate at the time of confirmation of the Plan, the property so vested would not be property of the estate and the stay would terminate as to that property. Note, however, that post-petition wages of the debtor remains property of the estate until a Chapter 13 Plan is completed. Section 1306(a)(2). Of course, the stay can also be modified earlier by a court order issued pursuant to a motion to modify the stay.

within 90 to 120 days from the filing of the petition. So concerns about the automatic stay will often resolve themselves simply by the passage of time.

- Keep in mind also Rule 1-084 of the Rules of Civil Procedure for New Mexico state district courts: anyone who learns that the automatic stay may be applicable to an ongoing proceeding in state district court has an obligation to file a notice of same in the district court action. The same applies for the opposite result: anyone who learns of a stay relief order, the closing of a case or the issuance of a discharge which may affect the state court proceedings has the obligation to notify the state court. The rule is a salutary one, since proceedings in violation of the stay are at least voidable if not simply void, even if the parties and the court are operating in complete good faith or without any knowledge of the existence of a stay.

DISCHARGE

Usually the goal of a debtor filing a bankruptcy petition is to obtain a bankruptcy discharge (as opposed to the discharge that arises from payment) of debts. The injunction against collecting discharged debts ordinarily follows immediately after expiration of the automatic stay, but is more permanent. Now, as with the changes in the law concerning the automatic stay, Congress has increasingly made much of the debt arising out of domestic relations matters nondischargeable.¹⁰

- Originally the Code held spousal and child support obligations nondischargeable but allowed the discharge of debts arising out of property/debt allocations (whether by agreement or court order). A substantial amount of case law arose determining what was a non-dischargeable spousal or child support obligation and what was a dischargeable property/debt allocation including a number of cases holding that certain property settlements were in reality support obligations and therefore nondischargeable. Congress then amended the Code to provide that in certain circumstances property /debt allocations could be held nondischargeable. More specifically, Congress provided that a debtor who took on or received in a divorce case the responsibility

¹⁰ Note the difference between discharge and dischargeability. An individual debt can be precluded from being discharged for a variety of reasons, set out in section 523(a). These include DSOs and marital debt allocations, as well as debts such as recent taxes, debts incurred by fraud, larceny, violations of fiduciary obligations, certain intentional torts, education loans, etc. On the other hand, a debtor can be denied a discharge of any of his or her debts generally for misbehavior that goes to the heart of the bankruptcy process, such as (but certainly not limited to) hiding assets from the trustee, lying to the trustee or creditors, disobeying court orders, etc. Section 727(a) lists the behaviors that can lead to a denial of discharge, including filing another bankruptcy case too soon after the last one. The denial of a discharge usually leads to the worst of all possible worlds for the debtor: the debtor's non-exempt property is distributed to creditors and the creditors get to continue to pursue the debtor to collect their unpaid claims.

of paying off certain debts (as between the debtor and the ex-spouse – such allocations are of course not binding on creditors) could not, vis a vis the ex-spouse, discharge those debts unless, by virtue of a balancing test, the debtor established, roughly speaking, that discharging those debts as to the ex-spouse would provide a greater benefit to the debtor than it would damage the ex-spouse. (The debt to the third-party creditor was discharged; what was ordinarily left was a claim that the ex-spouse had against the debtor for whatever claims the ex-spouse was forced to pay to the creditor.) BAPCPA eliminated the balancing test, so that the statute now, in addition to making DSO's (support obligations arising out of a divorce, paternity action, etc.) nondischargeable, pursuant to section 523(a)(5), also makes property/debt allocations nondischargeable, *in chapter 7 cases*, pursuant to section 523(a)(15). Congress has eliminated that specific nondischargeability provision from chapter 13 cases pursuant to section 1328(a)(2). What this means in effect is that at the time of negotiating or litigating debt allocations in the divorce action, an allocation of a debt to the spouse who subsequently files a bankruptcy petition might or might not end up being "permanent". An attorney representing the spouse allotted the debt needs to advise the client that he or she will not be able to discharge that debt vis-a-vis the other spouse in a chapter 7 case; the attorney representing the other spouse needs to advise that client that if the spouse taking on the debt files (and completes – no easy task; only about 1/3 of chapter 13 cases are completed) a chapter 13 case, the debtor/(ex)spouse will be able to discharge that debt, although the underlying debt to the third-party creditors may be reduced or even eliminated by the chapter 13 plan payments.

- Interestingly, the non-filing spouse (but *not* a non-filing ex-spouse) can in effect obtain the equivalent of a discharge even though only the other spouse has filed. This is the so-called "community discharge" or "community property discharge". This result follows from the provisions of sections 541(a)(2) and 524(a), which have the effect (with a minor exception) of bringing into the estate the community property of the debtors (who must be married at the time the debtor's petition is filed), using non-exempt community property to pay off community debts¹¹, and enjoining any further claims by creditors against subsequently acquired community property for any remaining prepetition community debts. To the extent state law so allows, the separate property of the non-filing spouse may be liable for payment of those prepetition community debts, but if the non-filing spouse has no non-exempt separate property, the non-filing spouse is effectively immune from further collection efforts. Note: there is a split of authority in the District of New Mexico as to whether, if a debt is declared nondischargeable against the filing spouse, the

¹¹ If there is no or not enough non-exempt community property to pay the community debts in full or at all, the community debts are nevertheless discharged.

“community property discharge” described in this paragraph is lost. Judge Rose has ruled that it is not lost as to the non-filing spouse; Judge Starzynski has ruled otherwise. What is clear, from section 524(b), is that if the filing spouse is denied a discharge altogether, the “community property discharge” does not take place.

- As with the determination of whether an automatic stay does or does not apply to a certain situation, the state court and the bankruptcy court have concurrent jurisdiction to make the decision about whether a debt has been discharged or not.¹² In effect, therefore, state courts may be called upon to decide whether a debt has been discharged; for example, if a student loan lender sues in state court to collect on a debt or a taxing authority’s levy is challenged in state court. Presumably *Rooker-Feldman*¹³ would apply in these instances as well. And such state court determinations may occur long after the sixty-day deadline (and timely extensions thereof) has passed.
- In a chapter 13 case, the debtor may not confirm a plan unless he or she is current on all DSOs, and may not receive a discharge at the conclusion of the performing the plan unless he or she is current on all DSOs. Sections 1325(a)(8) and 1328(a). And note that the definition of a DSO includes obligations that may arise for the first time after the bankruptcy case started.

PRIORITY OF PAYMENTS

In any bankruptcy proceeding, cash flow for the debtor is critical. This applies especially in chapter 13 cases, in which cash flow to support the repayment plan determines whether the plan will be implemented or not. It also applies in chapter 7 cases, in the sense that even after the filing of the petition and the subsequent issuance of the discharge, the debtor must pay DSOs because they are not discharged.

- BAPCPA not only created the concept of the DSO; it also provided special treatment for DSOs. Several of those have already been discussed above. Another aspect of that is that payment of DSOs have a priority over virtually every other payment in a bankruptcy case, including for

¹² On the other hand, only the bankruptcy court can grant a discharge. And with respect to certain obligations such as fraud, violations of fiduciary obligations, and certain intentional torts (but not DSOs or property/debt allocations), as specified in section 523(a)(2),(4) and (6), only the bankruptcy court can render an adjudication of nondischargeability. Such nondischargeability actions concerning such claims of fraud, violations of fiduciary obligations and certain intentional torts must usually be brought no later than 60 days after the first date set for the section 341 first meeting of creditors, or such additional time as the Court allows if the request for the extension is made within the allowed time.

¹³ See footnote 8 above.

example most trustee and professional fees. (Prioritizing payment of DSOs over the almost sacred fees of the professionals in bankruptcy cases shows just how serious Congress was on this issue.)

- The payment priority for DSOs does not apply to property/debt allocations; the underlying obligation to the third-party creditor of an allocated debt is paid no differently than any other debt in the class to which that debt belongs. Whatever part of the debt remains unpaid at the end of the bankruptcy case (whether chapter 7 or 13) is presumably discharged as to the third-party creditor but not as to the ex-spouse to the extent that the ex-spouse ends up paying the debt.

MISCELLANEOUS

There are any number of additional bankruptcy considerations that could arise in the context of a domestic relations case. The following are some that may be relevant and in any event are the ones that occurred to these authors while preparing these materials:

- Bankruptcy is as much about procedure as substance; indeed, much of the statute literally is procedure. And the Federal Rules of Bankruptcy Procedure are almost as important as the Code itself, and in any event play a far more important role in bankruptcy cases than, say, the Federal Rules of Civil Procedure do with respect to substantive issues in a civil case in federal courts. In consequence, even in an area such as domestic relations where Congress is showing increasing deference to state domestic relations courts and their subject matter, a comfortable working knowledge of bankruptcy practice, or consulting with someone who has such knowledge, is important.
- Married debtors filing a joint petition in New Mexico are entitled to select either the federal exemptions set out in large part (but not entirely) in section 522(d) or the state exemptions set out in NMSA 42-10-1 et seq. Each debtor is entitled to the exemptions so that, for example, the current state homestead exemption of \$60,000 would total \$120,000 for both debtors. Joint debtors are required to select the same set of exemptions; that is, it is not permitted that one joint debtor selects the federal exemptions and the other joint debtor the state exemptions. (If they cannot agree, the default selection is the federal exemptions.) On the other hand, if the married debtors file separate cases which are not subsequently jointly administered, each debtor may select whichever exemptions the debtor wishes.
- If a debtor fails to claim exemptions, a dependent of the debtor may claim the exemptions so they are not lost.
- The Code does not address the issue of a non-filing spouse claiming exemptions. It would seem reasonably clear that the federal bankruptcy exemptions are not available to a non-filing spouse (except in the instance

of a dependent claiming in the place of a non-claiming debtor), leaving the non-filing spouse only the state exemptions. The bigger question is when and how to claim such exemptions when the other spouse has filed bankruptcy. Rule 65.1 of the New Mexico Rules of Civil Procedure sets out the required notice that must be given when a creditor attempts to seize property of a judgment debtor through a New Mexico district court; that rule no longer requires a judgment debtor to assert exemptions at the first opportunity to do so in a legal proceeding at the risk of being deemed to have waived the right to claim exemptions. One author has seen at least one instance in which a non-filing spouse simply filed a list of claimed exemptions in the bankruptcy case, and no one disputed the non-filing spouse's claims of exemptions. Certainly if a secured creditor is seeking to foreclose or repossess property in which the non-filing spouse has an interest, permitting the non-filing spouse to claim equity in the property as exempt would be appropriate.

- Generally the debtor's exempt property is not subject to repayment of prepetition claims, pursuant to section 522(c), with certain major exceptions such as DSOs and taxes.
- If a professional such as an attorney is representing a person in a domestic relations matter and the client files a chapter 11 case, a chapter 12 case or a chapter 13 case, the professional needs to make sure that an application to employ him or her is immediately filed and prosecuted in the chapter 11 case, the chapter 12 case or the chapter 13 case. Otherwise the professional will almost certainly not be compensated from the estate and very likely not from the debtor either. Employment orders from the bankruptcy order are almost always retroactive to the date of the filing of the employment application and never earlier.
- Beware of being required to list yourself as a "debt relief agency" (or something similar) unless that is what you want. The applicable Code sections are §§ 101(3),(4A),(12A), and (41); 526; 527 and 528. The problem arises with the definition of an "assisted person" – that is, someone who gets the advice – whom section 101(3) defines as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." Congress clearly intended the term "assisted person" to include debtors, but reading the language literally or "plainly" (as a long line of Supreme Court cases such as *Lamie v. United States Trustee*, 540 U.S. 526 (2004) would seem to require), **the definition of "assisted person" also describes certain creditors.** So if an attorney, for compensation, provides advice to a creditor who is an individual with mostly consumer debts and not too much property, that attorney becomes a "debt relief agency". An example would be an attorney that provides advice to a recently divorced person about the ex-spouse's threat to file bankruptcy (a likely creditor that would qualify as an 'assisted person'), and accepts a \$100 fee for the advice.

- The timing of the filing of a bankruptcy petition and of a divorce petition is something to think about if the opportunity arises. Married couples can file a joint petition, pay a single filing fee and presumably each receive a discharge at the same time. But if following the filing of the bankruptcy petition, one spouse incurs additional community debt before the filing of a divorce petition and the entry of status quo orders by the domestic relations court, the other debtor may well be stuck with post petition debt that is nondischargeable in both a chapter 7 case and a chapter 13 case. Alternatively, filing the divorce petition and having a divorce decree entered (but perhaps not a division of the property) prior to filing a bankruptcy petition would require the filing of two petitions and paying two filing fees, but the cases can be administered together if need be (though this is seldom necessary) and in any event it avoids putting spouses at risk of nondischargeable postpetition debt at the hands of the other spouse. The extra filing fee would seem to be a small price to pay for eliminating the risk of the additional liability. Additional considerations would come into play as well for the filing spouse, such as whether to select a chapter 7 or chapter 13 case depending on whether there were allocated debts to deal with.¹⁴

¹⁴ The decision to file joint or separate petitions could also significantly affect the outcome of the means test. An examination of the means test, a device enacted by BAPCPA designed to force more debtors into chapter 13 repayment plans, is complicated enough to be beyond the scope of this article (or the inclination of these authors to talk about it).

Code sections for BRDR paper

11 USC Section 101:

In this title the following definitions shall apply:

(1) The term “accountant” means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized. ...

(3) The term “assisted person” means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$164,250 [\[FN1\]](#).

(4) The term “attorney” means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term “bankruptcy assistance” means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term “claim” means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. ...

(7) The term “community claim” means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in [section 541\(a\)\(2\)](#) of this title is liable, whether or not there is any such property at the time of the commencement of the case. ...

(8) The term “consumer debt” means debt incurred by an individual primarily for a personal, family, or household purpose. ...

(10) The term “creditor” means--

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in [section 348\(d\)](#), [502\(f\)](#), [502\(g\)](#), [502\(h\)](#) or [502\(i\)](#) of this title; or

(C) entity that has a community claim. ...

(12) The term “debt” means liability on a claim.

(12A) The term “debt relief agency” means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under [section 110](#), but does not include--

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under [section 501\(c\)\(3\) of the Internal Revenue Code](#) of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(13) The term “debtor” means person or municipality concerning which a case under this title has been commenced. ... **(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 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.

(15) The term “entity” includes person, estate, trust, governmental unit, and United States trustee.
...

(27) The term “governmental unit” means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government. ...

(42) The term “petition” means petition filed under [section 301](#), [302](#), [303](#), or [304](#) of this title, as the case may be, commencing a case under this title. ...

(54) The term “transfer” means--

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with--

(i) property; or

(ii) an interest in property.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under [section 721](#), [1202](#), or [1108](#) of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

- (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.
- (f) The trustee may not employ a person that has served as an examiner in the case.

11 USC Section 362:

(a) Except as provided in subsection (b) of this section, a petition filed under [section 301](#), [302](#), or [303](#) of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under [section 301](#), [302](#), or [303](#) of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of 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 domestic support obligations;

11 USC Section 327:

(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 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 domestic support obligation under a judicial or administrative order or a statute;

(D) of the 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) of the 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) of the 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) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under [section 546\(b\)](#) of this title or to the extent that such act is accomplished within the period provided under [section 547\(e\)\(2\)\(A\)](#) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in [section 555](#) or [556](#)) under any security agreement or

arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in [section 555](#) or [556](#)) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in [section 559](#)) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in [section 559](#)) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under [section 31325 of title 46](#) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of

Transportation under [chapter 537 of title 46 or section 109\(h\) of title 49](#), or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under [section 31325 of title 46](#) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in [section 560](#)) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in [section 560](#)) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under [section 401, 403, 408, 408A, 414, 457, or 501\(c\) of the Internal Revenue Code of 1986](#), that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to [section 72\(p\) of the Internal Revenue Code](#) of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under [section 414\(d\)](#), or a contract or account under [section 403\(b\), of the](#)

[Internal Revenue Code of 1986](#) constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under [section 109\(g\)](#) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under [section 544](#) and that is not avoidable under [section 549](#);

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date

of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of [section 361](#)) for the secured claim of such authority in the setoff under [section 506\(a\)](#);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in [section 555](#), [556](#), [559](#), or [560](#)) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in [section 555](#), [556](#), [559](#), or [560](#)) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act). The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under [section 707\(b\)](#)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed

before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the

(B) if, within 30 days after the filing of the later case debtor were pending within the previous year but were dismissed, other than a case refiled under [section 707\(b\)](#), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect; , a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding [section 363\(c\)\(2\)](#), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30 day period is extended with the consent of the parties in interest or for a specific time which the court finds is

required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by [section 521\(a\)\(2\)](#)--

(A) to file timely any statement of intention required under [section 521\(a\)\(2\)](#) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to [section 722](#), enter into an agreement of the kind specified in [section 524\(c\)](#) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to [section 365\(p\)](#) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by [section 521\(a\)\(2\)](#), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate

adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. ...

11 USC Section 503.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -

(1)(A) the actual, necessary costs and expenses of preserving the estate including -

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax -

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by -

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred -

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid -

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that -

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either -

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless -

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 USC Section 507

(a) The following expenses and 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 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 the 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.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of \$10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for -

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75

percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan -

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of -

(i) the number of employees covered by each such plan multiplied by \$10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons -

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility -

but only to the extent of \$4,000 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of \$1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for -

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition -

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of -

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on -

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise -

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisalment or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 USC Section 522:

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case. ... 11 USC Section 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--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in [section 507\(a\)\(3\)](#) or [507\(a\)\(8\)](#) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)--

(I) consumer debts owed to a single creditor and aggregating more than \$550 [\[FN1\]](#) for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than \$825 [\[FN1\]](#) that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph--

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

(3) neither listed nor scheduled under [section 521\(1\)](#) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; 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;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under [section 727\(a\)\(2\)](#), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(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; ... 11 USC Section 524:

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under [section 727](#), [944](#), [1141](#), [1228](#), or [1328](#) of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in [section 541\(a\)\(2\)](#) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under [section 523](#), [1228\(a\)\(1\)](#), or [1328\(a\)\(1\)](#), or that would be so excepted, determined in accordance with the provisions of [sections 523\(c\)](#) and [523\(d\)](#) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such

community claim is waived.

(b) Subsection (a)(3) of this section does not apply if--

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under [section 727](#) of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under [section 727](#), [1141](#), [1228](#), or [1328](#) of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under [section 727](#), [1141](#), [1228](#), or [1328](#) of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor--

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt. ...

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

11 USC Section 541

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is -

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include -

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that -

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but -

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds -

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(6) 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 of 1986 under a qualified

State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but -

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(7) any amount -

(A) withheld by an employer from the wages of employees for payment as contributions -

(i) to -

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 14(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions -

(i) to -

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where -

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made -

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law -

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

11 USC Section 554.

- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
- (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

11 USC Section 1325.

(a) Except as provided in subsection (b), the court shall confirm a plan if -

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan -

(A) the holder of such claim has accepted the plan;

B)(i) the plan provides that -

(I) the holder of such claim retain the lien securing such claim until the earlier of -

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if -

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308. For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended -

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than -

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" -

(A) subject to subparagraph (B), shall be -

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than -

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

11 USC Section 1328.

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, 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 -

(1) provided for under section 1322(b)(5); (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 section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if -

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(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.

(d) Notwithstanding any other provision of this section, a discharge granted under this section

does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if -

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge -

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.

(h) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that -

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
at _____ O'clock & _____ min. M

MAR 08 1993

OFFICE OF THE CLERK
United States Bankruptcy Court
Albuquerque, New Mexico

In re:

EDWARD HOLMES COSTANZA,
Debtor.

No. 7-91-13903

MICHAEL and RINA GONZALES,
FRANCIS H. and MARGIE EDWARDS
Plaintiffs,

v.

Adv. No. 92-1044 R

EDWARD HOLMES COSTANZA,
Defendant.

MEMORANDUM OPINION

Does the "community discharge", 11 U.S.C. § 524(a)(3), bar plaintiffs' complaint and entitle the defendant to relief for violation of its injunctive provisions?¹

The matter came on for hearing on cross motions for summary judgment. The court determines that (a) the complaint is not barred, (b) there has been no violation of the injunction, and (c) the claims are enforceable only from the defendant's separate property.

In 1984 and early 1985, the defendant defrauded the plaintiffs. Defendant plead guilty to the frauds perpetrated upon plaintiffs and has been ordered to pay restitution. There is no claim that the restitution obligations are discharged or dischargeable. They are conceded to be enforceable against defendant's separate property, if any, and all community property.

On December 18, 1985, Carolyn Costanza filed a Chapter 7 petition; she received a discharge. Carolyn Costanza was and is

the defendant's wife. None of the plaintiffs filed a complaint pursuant to 11 U.S.C. § 523 in her case alleging that the debts were excepted from discharge as to her, or hypothetically as to him. *See*, 11 U.S.C. § 524(a)(3).² Plaintiffs were either scheduled creditors or had actual knowledge of her bankruptcy in time to have filed such a complaint. 11 U.S.C. § 523(a)(3).³

Defendant and plaintiffs do not dispute that at all material times defendant and his wife have no property other than community property. Further, as long as they remain married, it is unlikely that they will acquire any separate property. In New Mexico, all community property is subject to the equal or joint management and control of both spouses and liable for the community debts of both spouses. N.M. Stat. Ann. § 40-3-9 and 40-3-14 (Michie 1989) *Compare*, 11 U.S.C. §§ 101(7) and 541(a)(2)(A).

In this case defendant contends that the discharge received by his wife, which discharged the community and its after acquired property, likewise discharges him. This is wrong. Defendant's liability remains, but the sources against which it may be enforced have been reduced.⁴

Plaintiffs complaint seeks a determination that their claims are not discharged in defendant's bankruptcy. In view of his guilty plea and conviction, his personal liability can hardly be disputed. Plaintiffs do not seek to enforce the claims against any particular property. Only if plaintiffs sought to enforce a judgment against the community property of defendant and his wife would there be a violation of 11 U.S.C. § 524.

The discharge received by defendant's wife provides her a

1. Section 524(a)(3) provides:

§ 524 Effect of Discharge

(a) A discharge in a case under this title ...

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived. 11 U.S.C. § 524(a)(3) (1979).

2. When a creditor seeks to object hypothetically to the dischargeability of a particular debt of the debtor's spouse it is proceeding under §524(a)(3). When a creditor seeks to have the entire discharge denied in a hypothetical case against the debtor's spouse it is proceeding under §524(b). *Collier*, 3 *Collier on Bankruptcy* ¶ 524.01[2], 524-13 to 16 (15th ed. 1992). *But see, Midi Music Center v. Smith, (In re Smith)* 140 B.R. 904 (Bankr. D.N.M. 1992) (creditor filed complaint objecting to dischargeability of a debt based on fraud but proceeded under §524(b)).

3. This Court expresses no opinion concerning whether the sixty-day time limit to object to the dischargeability of a debt, specified in Fed. Bankr. R. 4007(c) applies to hypothetical cases against the nondebtor spouse. One opinion has suggested that a creditor must file a hypothetical discharge against a nondebtor spouse within the sixty days. *In re Karber*, 25 B.R. 9, 12 (Bankr. N.D. Tex. 1982).

4. Section 524 of the Bankruptcy Code is titled "Effect of discharge." Section 524(a)(3) does not grant a discharge; it creates an injunction for the marital community. The community does not receive a discharge under §524, because discharge is determined by §§ 523 and 727. Section 524 prevents collection from community property if a discharge is granted.

5. Section 524(a)(3) is only available to the marital community. Upon dissolution of the marriage its protection no longer exists. *Collier*, 3 *Collier on Bankruptcy*, ¶ 524.01[2] at n. 16 (15th ed. 1992); *Pedlar, Community Property and Bankruptcy Reform Act of 1978*, 11 *St. Mary's L.J.* 349 (1979) at n. 134.

fresh start. It shields all her after acquired property from the claim of her creditors, including community claims based upon her husband's wrongdoing. It provides the marital community, of which she is an equal member, a fresh start.⁵ Such is the clearly stated policy of Congress.

This opinion is intended to be concise for the sake of clarity. The questions which could have been raised, but were not, will be left for another day. For those who wish to pursue the matter, there may be no better source than the article written by Alan Pedlar, Community Property and the Bankruptcy Act of 1978, 11 St. Mary's L.J. 349 (1979). The article suggests the possibility that "the Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White." Id. at 382. To this I would add: if he does not treat her better than his creditors, she will, by divorcing him, deny his discharge.

Partial summary judgment shall be entered in accordance with this opinion. An appropriate order shall enter. F.Bankr.R. 7052.



STEWART ROSE
UNITED STATES BANKRUPTCY JUDGE

I HEREBY CERTIFY that I received
a true copy of the above to

Barry Williams & Janice Baker

on MAR - 8 1993

GAE TORRES
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

ESTEBAN ANGEL AGUILAR
and DENA DENISE ROBINSON,
Debtors.

Case No. 7-08-13642 SA

RUBEN SANDLER
and AARON COHEN,
Plaintiffs,

v.

ESTEBAN ANGEL AGUILAR
and DENA DENISE ROBINSON,
Defendants.

Adversary No. 08-1144 S

**MEMORANDUM OPINION ON DEFENDANT DENA ROBINSON'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter is before the Court on Defendant Dena Robinson's Motion for Judgment on the Pleadings (Doc. 5) ("Motion") filed December 9, 2008. Plaintiffs did not respond. The Court has reviewed the Motion and the applicable law and finds that the Motion is well taken and should be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

For the purposes of this Motion only, the Court took as true all allegations in the complaint and deemed admissible all exhibits on file. The complaint contains the following allegations:

...

3. Defendant, Esteban (Steve) Angel Aguilar, Sr. is an attorney licensed to practice law in the state of New Mexico who resides in Albuquerque, Bernalillo County, State of New Mexico. Steve Aguilar is the principal and owner of a professional corporation, Aguilar law Offices, P.C., through which he conducts his law practice. Defendant Dena Denise Robinson is the spouse of Steven Aguilar. At all material times relevant to this proceeding Defendant Steve Aguilar

was acting on behalf of the marital community. The debt alleged herein is a community debt.

...

14. Defendant Steve Aguilar unlawfully converted to himself or his corporation, and to his clients money belonging to Plaintiffs and delivered to Defendant solely for investment in Fuel Reduction Associates.

...

24. Defendant Steve Aguilar had a fiduciary duty to safeguard money it [sic] received on behalf of a client or from a client.

...

28. Defendant Steve Aguilar willfully intended to convert and misappropriate Plaintiff's funds to his own use or the use of his clients.

and prays for the following relief:

WHEREFORE Plaintiffs request the Order of this Court determining that defendant Steve Aguilar is indebted to plaintiffs in the amount of \$75,000, that such debt is a community debt, and that such debt is not dischargeable in this bankruptcy proceeding by reason of Defendant's larceny, embezzlement, defalcation while action as a fiduciary, and/or willful and malicious injury to the property of the Plaintiffs.

There are no allegations that defendant Dena Robinson committed any of the bad acts alleged in the complaint. Plaintiffs' only theory of her liability is that the debt is a community debt. A review of the cases shows that marriage alone is not a basis to declare a debt dischargeable as to an innocent spouse¹. For example, Judge McFeeley granted summary judgment to an innocent spouse in Markey v. Sanchez (In re Sanchez), Memorandum Opinion, Adv. No. 03-1222 M (Bankr. D. N.M. August 3,

¹The term "innocent spouse" in this opinion will mean a spouse that did not personally participate in the creation of the community debt in question.

2004). "Plaintiff's cause of action is necessarily based on a theory of imputed liability based on the alleged wrongdoing of [Debtor's non-filing spouse]." Id. at 4. "Courts have uniformly held that fraud cannot be imputed to a spouse based solely on the marital relationship." Id. at 4-6 (collecting cases.)

Similarly, in Wilson v. Bursh (In re Bursh) the Court granted the defendant's motion for summary judgment, stating:

Plaintiff's assertion that the marital community benefitted from defendant's husband's acts and therefore that the defendant should be barred from discharging the resulting debt amounts to fraud implied by law and it is the opinion of the court that such a result is not within the purview or contemplation of section 523(a). This court will not impute the fraud of the husband to the bankrupt wife on the sole argument that the state's community property law permits the assessment of punitive damages against the community property if the tort of the husband is committed in the interest of the community.

14 B.R. 702, 706 (Bankr. D. Ariz. 1981).

Plaintiffs did not allege that Dena Robinson committed any actions prohibited by 11 U.S.C. § 523(a). Therefore, the Court finds that the Motion should be granted.

But, unless Plaintiffs are seeking to collect from Dena Robinson's separate after-acquired property, the Court is not sure that it matters whether Plaintiffs obtain a judgment against her. If Plaintiffs' claim is a community claim, it would appear that under § 524(a)(3) the after-acquired community property will remain liable for Angel Aguilar's non-dischargeable debt as long as there is a community generating community property. See

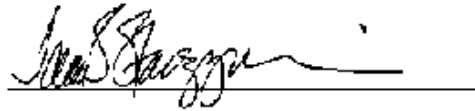
Federal Deposit Ins. Corp. v. Soderling (In re Soderling), 998 F.2d 730, 734 (9th Cir. 1993)(Under California law, husband's crime was community claim and all community property will be potentially liable for the debt.); Midi Music Center, Inc. v. Smith (In re Smith), 140 B.R. 904, 909 (Bankr. D. N.M. 1992) ("Once the Court has determined that only one spouse has committed acts which make the debts nondischargeable, the community property is liable. Only the separate property of the innocent spouse will not be available to satisfy creditors."); Arcadia Farms Ltd. v. Rollinson (In re Rollinson), 332 B.R. 879, 883 (Bankr. D. Ariz. 2005):

Normally, the discharge causes community property acquired post-petition to be free from pre-petition community claims. Code § 524(a)(3). But, if either the community debt is excepted from discharge under § 523, or if the other spouse was denied or would be denied a discharge, the discharge does not immunize such post-petition community property from the community debt. This happens automatically by operation of Code §§ 524(a)(3) and (b), without the necessity for any determination as to the knowledge or participation of the "innocent" spouse, so long as the debt is community debt.

See also Joann Henderson, For Better or Worse: Liability of Community Property after Bankruptcy, 29 Idaho L. Rev. 893, 898 (1992)(Both spouses must be innocent in order to gain a community discharge.) If the parties were to divorce, however, there would be no more new community property to pay the debt. Dena Robinson's after acquired property would then all be separate property and not liable for the debt. Angel Aguilar's after-

acquired separate property would be liable for the debt.

The Court will enter an Order granting Dena Robinson's Motion for Judgment on the Pleadings.

A handwritten signature in black ink, appearing to read "James S. Starzynski", is written over a horizontal line.

Honorable James S. Starzynski
United States Bankruptcy Judge

date filed on docket: January 20, 2009

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