

**DEBTS, DIVORCE,
AND DISARRAY IN BANKRUPTCY**

Margaret M. Mahoney

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DEBTS, DIVORCE, AND DISARRAY IN BANKRUPTCY

A HYPOTHETICAL CASE

Several years ago, Mary and John MacDonald divorced after ten years of marriage.¹ They had no children. With the help of their lawyers, Mary and John negotiated a separation agreement, which was intended to settle all of the financial issues between them. The agreement was ultimately incorporated into the judicial decree of divorce ending their marriage.

Under the settlement agreement, Mary received the marital home and one-half of the combined value of the parties' pensions. John received the assets associated with his solely-owned business, and the other half of the pension benefits. John also assumed full responsibility for repayment of the couple's debts, which had been incurred jointly by John and Mary during their marriage. The debts consisted of a mortgage on the family home, a loan used to finance the acquisition of John's business assets, and the balance owed on John's and Mary's joint credit card account. In exchange for this relatively favorable property settlement, Mary, whose earning capacity was less than John's, waived all claims to future support.

One year after the divorce, John closed his business. In the process, he made a charitable donation of the business assets which had been allocated to him in the divorce proceeding. Then

*Professor of Law, University of Pittsburgh. I would like to thank Judith K. Fitzgerald, Chief Judge of the Bankruptcy Court for the Western District of Pennsylvania, Peter C. Alexander, Dean of Southern Illinois University School of Law, and my University of Pittsburgh colleagues Harry M. Flechtner and Rhonda S. Wasserman, for carefully reviewing and commenting on an earlier draft of this article. I would also like to thank law students Allisha Chapman, Rachel Kotys, David Lefevre, Rushen Rahimian and Kimberly Thomas, who served as research assistants during the preparation of this article. And finally, I am grateful to the members of the Law School Document Technology Center for their assistance in preparing the manuscript.

¹The hypothetical case in the text is loosely based on the facts of *MacDonald v. MacDonald (In re MacDonald)*, 69 B.R. 259 (Bankr. D.N.J. 1986), discussed *infra* at text accompanying notes 68-71.

he stopped making payments on the mortgage, business and credit card debts which had been allocated to him for repayment, and filed for bankruptcy. While John's bankruptcy proceeding was pending, all three creditors approached Mary for payment of these debts. Mary quickly became the target of unpleasant collection efforts, including a threat by the mortgage lender to foreclose on her home.

Mary, who had planned her financial future in reliance on John's agreement to assume full responsibility for all of the liabilities of their marriage, found herself in immediate financial jeopardy. First, the marital creditors were clearly entitled under state law to collect their loans from Mary, based on her joint contractual liability under the original loan agreements. Notably, the earlier divorce proceeding had no impact on the rights of the creditors, who were not parties in that case.

As to Mary's legal rights against John in these circumstances, various federal bankruptcy and state family law doctrines offered potential theories of relief for Mary. However, when Mary sought judicial relief from the effects of her former husband's bankruptcy, not all of the available theories of relief were identified by her lawyer or addressed by the courts. Due in large part to these omissions, Mary ultimately found no adequate protection for her financial interests and expectations.

This Article examines the state and federal laws that govern the rights of former spouses and third-party creditors in cases, like the hypothetical case of Mary and John MacDonald, where debts incurred during marriage are allocated at the time of divorce to a spouse who subsequently declares bankruptcy. The legal relationships established among the parties in these circumstances, under all of the relevant federal and state doctrines, are complex. This Article examines and attempts to solve the recurring analytical problems that have arisen in cases where

the spouse to whom marital debts were allocated at the time of divorce subsequently declares bankruptcy.

INTRODUCTION

As illustrated in the preceding hypothetical case of Mary and John MacDonald, the settlement of a divorcing couple's financial affairs typically involves the allocation of responsibility for the debts they incurred during marriage. A provision in the couple's separation agreement or divorce decree allocating the responsibility for repayment to one spouse creates new and enforceable obligations to the other. The obligated former spouse who subsequently declares bankruptcy, like John in the hypothetical case above, may intend thereby to discharge all liability arising under both the original loan agreements and the divorce decree. In response, the bankruptcy debtor's former partner may claim that the debtor's various obligations relating to the allocated marital debts are nondischargeable in bankruptcy. Finally, if the debtor prevails on this issue, the former spouse may return to state family court seeking the adjustment of other financial orders in their divorce decree. A thorough analysis of the rights of each former spouse and the third-party creditors in all of these circumstances is a complex matter.

Section I of this Article describes the state laws governing the allocation of marital debts between divorcing spouses. Next, this Section delineates the legal relationship established between former spouses when one of them assumes the sole responsibility for repaying debts incurred during marriage, as well as the ongoing relationships of the third-party marital creditors with each former spouse. Notably, the allocation of debts typically results in multiple, discrete liabilities for the obligated spouse. He or she remains contractually liable to the third-party creditors, and assumes new obligations to the other spouse as well.

Section II discusses the two statutory exceptions to the discharge of debts established under the Bankruptcy Code for certain divorce-related obligations of the bankruptcy debtor. The statutory exceptions extend to the debtor's family support debts and to certain property settlement obligations. Section II explores the applicability of these exceptions from discharge in the situation where debts incurred during marriage were allocated by the divorce court to the bankruptcy debtor for repayment. Next, Section III describes the significance of a ruling of nondischargeability in bankruptcy for each interested party—the third-party marital creditor, the bankruptcy debtor and the debtor's former spouse—as to each aspect of the debtor's liability under the original loan agreements and under the divorce decree. Section III also examines the relevant case law, which has often failed to identify and separately evaluate the several obligations of the bankruptcy debtor in these circumstances.

Section IV first explores certain complications that arise under bankruptcy laws governing the timing of nondischargeability claims by the debtor's former spouse, and the forums in which such claims may be raised. Specifically, certain claims relating to the debts incurred during marriage and allocated to the debtor at the time of divorce may be raised during the debtor's bankruptcy proceeding *or* after the bankruptcy case is closed. Furthermore, the claims may be made either in bankruptcy court or in state court. Here, the delayed timing of claims creates problems about finality in litigation, and the rule of concurrent jurisdiction raises questions about the relationship between the federal and state courts.

An additional set of complications explored in Section IV follows from the ongoing jurisdiction of the state family courts over the financial affairs of divorced couples, under state laws governing family support and property settlement obligations. These state law doctrines must be reconciled with the provisions of the Bankruptcy Code, whenever a bankruptcy debtor's

former spouse seeks post-bankruptcy relief in the family court. The task of reconciling state and federal doctrines and policies is especially challenging in the situation discussed in this Article, where the bankruptcy debtor was assigned the responsibility for repaying joint marital debts at the time of divorce.

This Article provides a road map for understanding and analyzing the doctrinal and policy issues that arise when the former spouse to whom marital debts were allocated in a divorce proceeding subsequently declares bankruptcy.

I. THE ALLOCATION BY THE DIVORCE COURT OF DEBTS INCURRED DURING MARRIAGE

The family courts in every state wield great power over the financial interests of divorcing couples. In addition to support orders for dependent family members, divorce courts have the authority to make orders affecting the ownership of property.² The property orders in a divorce decree may require one spouse to transfer certain assets to the other in order to achieve a fair distribution of property at the end of their marriage. In many states, this judicial power was first established in legislation enacted during the 1970s and 80s as part of the new, no-fault divorce codes.³

Modern equitable distribution laws define the assets that are subject to distribution, and set out factors for the divorce court to consider in allocating these assets between the spouses.⁴ For many divorcing couples, however, no fair economic settlement is possible unless the court

²See JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW chs. 9-10 (2d ed. 1995) (discussing the authority of divorce courts over family support and property issues).

³See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 46-47 (1985) (describing the enactment of modern equitable distribution statutes in the United States).

⁴GREGORY ET AL., *supra* note 2, §§ 10.03, 10.12.

also addresses the liabilities of the marriage. Surprisingly, then, most of the state statutes refer only to assets.⁵ Currently, the divorce codes in just a handful of states include a provision regarding the allocation of responsibility between divorcing spouses for the repayment of debts.⁶ In the remaining states, the courts have generally understood the importance of debts in settling the financial affairs of the parties, and have exercised their equitable powers to allocate debts as

⁵See J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 13.03[4] (2002). Most equitable distribution statutes refer to the debts of the parties in the list of factors that the court must consider in making a fair distribution of assets. See GREGORY ET AL., *supra* note 2, § 9.12, at 250. For example, the Pennsylvania equitable distribution statute provides:

In an action for divorce . . . [t]he court shall . . . equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties . . . [i]n such proportions and in such manner as the court deems just after considering all relevant factors, including: . . . [t]he age, health, station, amount and sources of income, vocational skills, employability, estate, *liabilities* and needs of each of the parties.

PA. CONS. STAT. ANN. § 3502(a)(3) (West 2001) (emphasis added). This type of reference to liabilities in the equitable distribution statute does not, however, confer any authority on the court to allocate responsibility between the spouses for their debts.

⁶See DEL. CODE ANN. tit. 13, § 507(a) (1999) (“The Family Court . . . shall have exclusive jurisdiction over . . . the division and distribution of marital property and marital debts . . . incident to . . . a separation or divorce.”); FLA. STAT. ANN. § 61.075 (West 1997 & Supp. 2004) (“[I]n distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal”); HAW. REV. STAT. § 580-47(a) (1999) (“Upon granting a divorce . . . the court may make any further orders . . . allocating, as between the parties, the responsibility for the payment of the debts of the parties”); MO. ANN. STAT. § 452.330 (West 2003) (“[I]n a proceeding for dissolution of the marriage . . . the court shall . . . divide the marital property and marital debts”); UTAH CODE ANN. § 30-3-5(1)(c)(i) (1998 & Supp. 2003) (“The court shall include the following in every decree of divorce: . . . an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities”); VA. CODE ANN. § 20-107.3(C) (Michie 2000) (“The court shall also have the authority to apportion and order the payment of the debts of the parties, or either of them”).

well as assets in divorce proceedings.⁷ As discussed at length below, the allocation of debts in this manner in a divorce proceeding has no impact on the rights of the third-party marital creditors.⁸

Whereas most equitable distribution statutes define the types of assets that are subject to distribution in a divorce proceeding, the definition of “marital debts” for this purpose has been left to the courts, even in jurisdictions where the divorce code expressly confers judicial authority to distribute debts as well as assets.⁹ There is no uniform definition. The limitations most commonly imposed involve the exclusion of debts incurred prior to marriage and debts incurred for other than a marital purpose.¹⁰

The debts of the spouses that become subject to equitable allocation at the time of divorce may have been owed to the third-party creditors by one or both spouses during the marriage.

The rules governing the liability of spouses for their debts in an ongoing marriage differ under

⁷See 3 FAMILY LAW AND PRACTICE § 37.14, at 224-25 (Arnold H. Rutkin ed., 1998) (collecting cases); Brett R. Turner, *The Hidden Part of the Marital Estate: Classifying, Valuing, and Dividing Marital Debts*, 3 DIVORCE LITIG. 29-32 (1991).

⁸See *infra* text accompanying notes ___-___.

⁹See Turner, *supra* note 7, at ___. *But see* FLA. STAT. ANN. § 61.075(5)(a)(1) (West 1997 & Supp. 2004) (“‘Marital assets and liabilities’ include: [a]ssets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them . . .”).

¹⁰See Turner, *supra* note 7, at 23 (“In most states, a marital debt is any debt incurred during the marriage for the joint benefit of the parties.”). The limitation of marital debts to those used “for a marital purpose” or “for the joint benefit of the parties” requires further inquiry into the scope of the shared purposes and shared benefits in marriage. As a general rule, expenditures for the legitimate goals of either spouse can be, and often are, viewed as accomplishing a shared purpose in the context of marriage. The American Law Institute has avoided this issue in formulating its definition of marital debt in the recently published *Principles of the Law of Family Dissolution*. Section 4.09 creates a presumption that all debts incurred during marriage, with a few specific exceptions such as educational loans, are marital debts subject to allocation by the divorce court. *See* ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 cmt. g (2002).

the two systems of marital property law in the United States. In the nine community property states, both the ownership of assets and the responsibility for debts are generally shared by the spouses.¹¹ By way of contrast, in the common law or separate property states, both the ownership of property and the responsibility for debts are largely unaffected by the existence of the marriage relationship. The legal regime is one of separate property during marriage, and the principle of marriage as an economic partnership is implemented only upon the death of one spouse or termination of the marriage by divorce.¹²

As a general rule in the common law property states, the respective liability of each spouse for debts during marriage is established according to the principles of contract law: whoever promises the creditor that payment will be made is legally responsible for the debt.¹³ Thus, for example, a joint credit card account is the responsibility of both spouses, but an education loan is the student spouse's sole responsibility unless the creditor also obtained the promise of the other spouse to repay the loan.

The rights of a third-party creditor, established by the contract executed with a married couple during marriage, are not affected by the debtors' subsequent divorce. If the divorcing

¹¹See W.S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 10.6 (1983); ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL 269-303 (2d ed. 1988); JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 386-87 (Aspen 2001). There are many variations among community property states as to the manner in which responsibility for debts is allocated between the spouses during marriage. See MENNELL & BOYKOFF at 269-303.

¹²See SINGER, *supra* note 11, at 380-82.

¹³See 1 JOSEPH W. MCKNIGHT, VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 13.05, at 13-97 (2002). The common law doctrine of necessities and state family expense statutes constitute exceptions to the general rule that liability for debts in the common law property states is governed by contract principles. Under these doctrines, a spouse may become liable for goods or services provided to other family members, even though he or she was not involved in purchasing them. *Id.* § 13.06[1][b].

spouses agree that one of them will become solely responsible for a joint debt, the agreement does not change the rights of the third-party creditor to pursue both of them for payment.¹⁴ Even if the divorce court incorporates the spouses' agreement into the divorce decree, the rights of the creditor are unaffected. This result follows from the general rule in civil litigation that a court order can affect only individuals who are parties to the lawsuit.¹⁵ Unless a creditor is somehow joined as a party in the divorce proceeding,¹⁶ the divorce court is without power to affect the creditor's rights. Thus, the creditor's right to collect a joint marital debt from either spouse remains intact, even if the divorce court allocates sole responsibility, as between the spouses, to just one of them. Similarly, if the divorce court happens to order one spouse to assume responsibility for a debt for which the other partner was solely liable during the marriage, the creditor's recourse in the event of nonpayment remains exclusively against the partner who incurred the debt.¹⁷

¹⁴Basic contract law principles would require the participation of the creditor in such an agreement in order to affect the creditor's interests. *See generally* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS ch. 71 (Interim ed. 2002) (discussing doctrine of contract novation).

¹⁵*See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.13, at 699 (3d ed. 2002) ("Our notions of due process require this result because individuals who are tied to a judgment in a suit in which they had no opportunity to be heard rightly could claim that there had been a denial of due process.").

¹⁶The involvement of a marital creditor in divorce litigation is unlikely, and appears to be foreclosed by the jurisdictional rules in some states. *See Eberley v. Eberley*, 489 A.2d 433, 446 (Del. 1985) (reversing divorce court's order allowing intervention by a third-party creditor as beyond the scope of the divorce court's jurisdiction). *See generally* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY §§ 3.03, 3.04, 3.44 (2d ed. 1994 & Supp. 1995) (discussing participation of third parties in divorce litigation).

¹⁷The general rule described in the text, that divorce has no impact on the rights of creditors, is set out in the Utah Code, as follows: "On the entering of a decree of divorce . . . of joint debtors in contract, the claim of a creditor remains unchanged . . ." UTAH CODE ANN. § 15-4-6.5(1) (2001). *See also* *Moline v. Experian Information Solutions, Inc.*, 289 F. Supp. 2d 956 (N.D. Ill. 2003) (holding that credit reporting agency did not violate federal reporting law by

The powerlessness of the divorce court over third-party creditors leads to a disconnect in many cases, between the responsibilities described in the divorce decree and the real, ongoing liability of the spouses. When the divorce court allocates responsibility for marital debts to one spouse, the other may make future plans which do not include setting aside funds to repay the creditors. The resulting personal financial plans can be upset, however, if the creditors subsequently exercise their continuing rights to pursue the second spouse for payment of the debts incurred during marriage.

A recent (year 2000) amendment to the marriage dissolution statute in Arizona, a community property state, requires the dissolution courts to advise spouses about their respective responsibilities for marital debts following the termination of their marriage, as follows:

In all actions for the dissolution of marriage or legal separation the court shall require the following statement in the materials provided to the petitioner and to be served on the respondent: Notice. In your property settlement agreement or decree of dissolution or legal separation, the court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a court order that does this is binding on the spouses only and does not necessarily relieve either of you from your responsibility for these community debts. These debts are matters of contract between both of you and your creditors Since your

listing past-due account on former husband's credit report, even though divorce court had assigned sole responsibility for the account to former wife); *Pinson v. Cole*, 131 Cal. Rptr. 2d 113 (Cal. App. Ct. 2003) (ruling that creditor of former wife had no right to enforce a divorce court order requiring the former husband to repay her debt).

creditors are not parties to this court case, they are not bound by court orders or any agreements you and your spouse reach in this case.¹⁸

Whereas this Arizona statute is designed to provide information to the former spouses, a related provision in the Utah equitable distribution statute recognizes that the third-party creditors may also be interested in the results of their debtors' divorce proceedings. The Utah statute governing the judicial allocation of marital debts provides that the divorce court must enter "an order requiring the parties to notify respective creditors or obligees regarding the court's division of debt, obligations, or liabilities and regarding the parties' separate, current addresses"¹⁹ The provisions of both the Arizona and Utah statutes are premised on the rule that judicial decrees allocating marital debts do not limit the rights of the divorcing couple's creditors.

When the divorce court orders one spouse to repay a joint marital debt, a new obligation is created. Specifically, the spouse to whom the debt is allocated (the obligor) becomes obligated to the other spouse (the obligee) to satisfy their joint debt to the third-party creditor. In the event that the obligor fails to comply with the court order, several judicial remedies may be available to the obligee, including contempt and the attachment of assets and future earnings of the obligor,²⁰ to enforce the court's repayment order. This type of enforcement becomes available, for example, when the divorce court orders one former spouse to assume responsibility for a joint marital credit card debt, the obligor thereafter fails to keep the payments current, and the obligee learns of this when he or she is contacted by the credit card company for payment. In

¹⁸ARIZ. REV. STAT. § 25-318(F) (2002).

¹⁹UTAH CODE ANN. § 30-3-5(1)(c)(ii) (1998 & Supp. 2003).

²⁰See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.6, at 671-76 (2d ed. 1988).

these circumstances, the obligee has no right to insist that the credit card company collect payments from the obligor. Rather, the available remedy is an action in the divorce court, seeking enforcement of the repayment provision of the divorce decree.²¹

Frequently, the parties in their settlement agreements and the courts in divorce decrees include an additional provision requiring the obligor spouse to hold the other harmless as to marital debts. This type of provision creates a second, distinct obligation between the former spouses, in addition to the repayment obligation described above. The hold harmless provision imposes an obligation of indemnification on the obligor, requiring reimbursement to the other former spouse in the event that the creditor actually collects the debt from him or her.²² Thus, in the example of the joint credit card debt assigned by the divorce court to the obligor spouse, if the obligor fails to make payments, and the obligee assumes this responsibility when contacted by the lender, the obligee can turn around and recover the amounts paid. Like the repayment obligation between the former spouses, the hold harmless obligation created by the divorce decree is generally enforceable in subsequent judicial proceedings.

Clearly, the court order allocating sole responsibility for joint marital debts to one former spouse does not guarantee financial security for the other, because the divorce court cannot relieve either spouse of pre-existing liability to marital creditors. In the event of noncompliance by the obligated former spouse to whom the divorce court allocated marital debts, the third-party creditor is entitled to pursue the other former spouse for payment. In order to protect his or her financial rights, the obligee must then initiate a post-divorce enforcement proceeding against the

²¹See *infra* text accompanying notes 133-35 for additional discussion of the enforcement of the financial provisions in divorce decrees.

²²See BLACK'S LAW DICTIONARY 737 (7th ed. 1999) (defining hold harmless agreement).

noncompliant former partner. The obligee may face even greater financial jeopardy, in the event that the obligated former spouse subsequently declares bankruptcy.²³

The federal Bankruptcy Code provide generally for the discharge by an individual debtor of personal liability for pre-bankruptcy debts.²⁴ The debts dischargeable in this manner may include the liabilities imposed on a debtor under the provisions of a pre-bankruptcy divorce decree.²⁵ Often, the bankruptcy debtor's divorce-related debts involve direct payments to the former spouse, in the nature of either support for dependent family members or property distributions. The debtor's dischargeable divorce-related debts may also include liabilities arising from the debts to third-party creditors incurred during marriage. The release of the bankruptcy debtor from responsibility as to these obligations would leave the other former spouse solely responsible for repayment to the third-party marital creditors under the terms of their original loan agreements.²⁶ This result would follow, even if the divorce court had allocated the debts incurred during marriage to the debtor for repayment.

The Bankruptcy Code establishes important exceptions from discharge for two types of divorce-related debts—family support debts and certain property settlement obligations.²⁷ The next Section discusses the applicability of these exceptions from discharge to the bankruptcy

²³See Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFF. L. REV. 369, 429 (1997) (describing the disappointed expectations of a bankruptcy debtor's former spouse in these circumstances).

²⁴HENRY J. SOMMER ET AL., *COLLIER FAMILY LAW AND THE BANKRUPTCY CODE* ¶ 1.06, at 1-62 (1997).

²⁵*See id.* ¶ 6.01.

²⁶*Id.* ¶ 6.05[5].

²⁷*Id.* ¶ 1.06.

debtor's obligations arising from the earlier allocation of debts incurred during marriage to the debtor for repayment. The designation of these obligations as potentially nondischargeable family support or property settlement obligations has important consequences for both former spouses and for the third-party marital creditors.

II. THE APPLICATION OF BANKRUPTCY CODE §§ 523(a)(5) AND 523(a)(15) TO THIRD-PARTY DEBTS INCURRED DURING MARRIAGE AND ALLOCATED TO THE DEBTOR AT THE TIME OF DIVORCE

There is a correlation between divorce and bankruptcy in the lives of many individuals.²⁸ On the one hand, financial problems during marriage are one major factor associated with divorce.²⁹ Conversely, divorce can create or exacerbate financial problems because of the added costs generally associated with maintaining two households.³⁰ Finally, one or both former spouses may use the bankruptcy process following divorce as a planned means to escape responsibility for certain divorce-related obligations along with other types of debt.

As a general rule, the individual debtor who successfully petitions for bankruptcy under Chapter 7 of the Bankruptcy Code is entitled to a discharge from personal liability for pre-existing debts, following the distribution of available assets to creditors.³¹ The Code establishes

²⁸See Vance, *supra* note 23, at 394 (collecting cases involving dischargeability of divorce-related debts in bankruptcy, and noting that time between divorce and bankruptcy in most cases was under one year).

²⁹Yvonne M. Lada, Comment, *Something Every Divorce Attorney Should Know About Bankruptcy*, 23 S. ILL. U. L.J. 735, 735 (1999).

³⁰See 1 MCKNIGHT, *supra* note 13, § 13-1, at 13-5; SOMMER ET AL., *supra* note 24, ¶ 6.05(5), at xiii (“In some parts of the country as many as half of all marriages end in divorce, often due, at least in part, to financial difficulties. Even when the divorce was not caused by money problems, the financial consequences to the former spouses now living as two households are often dire.”).

³¹COLLIER ON BANKRUPTCY ¶ 103[2][d] (Lawrence P. King ed., 15th ed. rev. 2001). Individual debtors are eligible to file for bankruptcy reorganization under Chapters 11 and 13, as

exceptions from discharge for several categories of debts, including two types of divorce-related obligations. First, Bankruptcy Code § 523(a)(5)³² provides for the nondischargeability of all debts owed by the bankruptcy debtor to other family members, which arose under a separation agreement, divorce decree, or other court order, and which are in the nature of alimony, maintenance or support. Section 523(a)(15)³³ additionally provides for the nondischargeability of some, but not all, divorce-related debts which are *not* in the nature of support. Typically, § 523(a)(15) debts involve the reallocation of marital wealth intended to achieve a fair economic settlement between divorcing spouses. In the bankruptcy context, the term “property settlement obligations” is used to identify nonsupport debts arising under the parties’ separation agreement or divorce decree whose dischargeability is governed by § 523(a)(15).

The obligations contemplated by the two divorce-related exceptions to discharge in bankruptcy may take several forms. Most often, the exceptions to discharge apply to a debtor’s obligations to make payments or transfer assets directly to the former spouse or to agencies that collect support payments on behalf of minor children. A second category of divorce-related obligations includes debts payable directly to third-party creditors for post-divorce family expenses, such as the post-divorce education expenses of children. Finally, the debtor’s divorce-

well as bankruptcy liquidation under Chapter 7, of the Bankruptcy Code. *See* SHAYNA M. STEINFELD & BRUCE R. STEINFELD, *THE FAMILY LAWYER’S GUIDE TO BANKRUPTCY* 2 (2002). Generally speaking, there are many important differences between bankruptcy reorganization and bankruptcy liquidation for the debtor and his or her creditors, but few of the differences are relevant to the issues discussed in this Article.

³²11 U.S.C. § 523(a)(5) (2001).

³³11 U.S.C. § 523(a)(15). Notably, § 523(a)(15) does not apply to bankruptcy cases arising under Chapter 13 of the Bankruptcy Code. An exception to this rule, however, applies in cases involving a “hardship discharge” under Chapter 13. *See* 11 U.S.C. § 1328(a), (b), *discussed in* 2 ROBERT E. GINSBERG & ROBERT D. MARTIN, *GINSBERG & MARTIN ON BANKRUPTCY* § 15.06 (4th ed. Supp. 1999).

related obligations may involve debts that first arose during the marriage, such as the obligation to repay the mortgage on the family home or credit card debts. As to such pre-divorce debts owed to third-party creditors, the bankruptcy debtor may have been ordered by the divorce court to assume sole responsibility for repayment and to hold the former spouse harmless. The resulting obligations between the former spouses, like the other forms of debt arising under a separation agreement or divorce decree, may be nondischargeable in bankruptcy under § 523(a)(5) or § 523(a)(15).

A. *The Dischargeability of Support Obligations Under § 523(a)(5)*

Bankruptcy Code § 523(a)(5)(B) creates an exception from discharge for “any debt . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree . . . or property settlement agreement”³⁴ This exception from discharge in bankruptcy embodies the priority assigned by Congress to the fulfillment of family support responsibilities. The determination that this family-related policy outweighs the competing financial interests of the debtor in bankruptcy has a long history. “The exception from discharge for family support debts originally was formulated by the United States Supreme Court in a trilogy of cases at the beginning of [the twentieth] century. Congress codified the exception in 1903.”³⁵

The exception to discharge for family support debts under § 523(a)(5) focuses on the purpose of the debtor’s obligations, rather than the form they take.³⁶ Notably, the obligations imposed on the debtor under a separation agreement or divorce decree requiring the debtor to

³⁴11 U.S.C. § 523(a)(5)(B).

³⁵GREGORY ET AL., *supra* note 2, § 9.08[A], at 359-60.

³⁶*See* SOMMER ET AL., *supra* note 24, ¶ 6.03[4].

repay debts incurred during marriage can survive the debtor's bankruptcy, if they meet the family support standard of § 523(a)(5).³⁷ The bankruptcy judge in a recent case explained why the debtor's repayment and hold harmless obligations to a former spouse are included in this manner within the purview of § 523(a)(5), as follows:

Debt assumption and hold harmless agreements are common features of divorce-related property settlements and court decrees. Unlike lump sum or installment payment covenants, they do not put money into the pocket of their beneficiary. Rather they operate to *protect* (to the extent possible) one spouse from liability or . . . from potential liability. The protection they afford may provide essential maintenance or support.³⁸

This broad construction is supported by the legislative history of § 523(a)(5). Although the nearly identical House and Senate Reports first stated that “[Section 523(a)(5)] will apply to make nondischargeable only alimony, maintenance or support owed directly to a spouse or dependent,” they proceeded to expressly include hold harmless obligations, as follows:

This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to

³⁷See *Calhoun v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1106-07 (6th Cir. 1983); SOMMER ET AL., *supra* note 24, ¶ 6.03[4], at 6-23 to -24.

³⁸*Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 297 (Bankr. D.R.I. 1996) (footnotes omitted).

considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.³⁹

This extension of the support exception to include harmless debts is premised on the same underlying policy as the exception itself. Here, “Congress has recognized the legitimate needs of the dependents of a bankruptcy debtor and has overridden the general bankruptcy policy [relating to the interests of the bankruptcy debtor] in which exceptions to discharge are construed narrowly.”⁴⁰

In the bankruptcy law context, § 523(a)(5) support debts are automatically nondischargeable. All other divorce-related obligations, which are characterized as “property settlement obligations,” do not share the characteristic of automatic nondischargeability. Not surprisingly, then, the key legal issue in many cases arising under § 523(a)(5) is whether a particular divorce-related debt, set out in the debtor’s separation agreement or divorce decree, is a support debt or a property settlement obligation.

The legal standard for identifying nondischargeable family support debts is a federal law standard, which frequently requires judicial application in individual bankruptcy cases.⁴¹ The bankruptcy judge in a recent case described how often the courts must make this distinction between support debts, on the one hand, and the property settlement obligations not included under § 523(a)(5), on the other hand, as follows: “Applying § 523(a)(5) has become a common

³⁹S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

⁴⁰4 COLLIER, *supra* note 31, ¶ 523.11(2), at 523-78.

⁴¹*See id.* ¶ 523.11[1]. As described at length in a later Section of this Article, these frequent determinations of dischargeability of debts under § 503(a)(5) are made in both the federal bankruptcy courts and state family courts. *See infra* text accompanying notes 107-10.

exercise for the bankruptcy courts. To assess its applicability in this case involves a trek over well-trod ground.”⁴²

The same general standard for identifying nondischargeable support debts is applied, whether the form of the debt involves the allocation of responsibility to the bankruptcy debtor for pre-divorce marital obligations or the more common direct payment obligation to the former spouse. The following formulation of the support standard is tailored to the context of obligations to repay marital debts and to hold the former spouse harmless as to those debts, arising under the bankruptcy debtor’s separation agreement:

In making the determination of whether [the] agreement is dischargeable under section 523(a)(5), courts look to . . . [various] factors . . . in an attempt to determine both the intent of the agreement and the actual function it served. Generally, when the agreement appears to be a result of the parties’ imbalance in income, expenses and earning capacity, and when the failure of the debtor to pay would impair the nondebtor spouse’s ability to maintain his or her expected standard of living or support the couple’s children, the obligation to pay debts or hold the nondebtor spouse harmless is found [to be] in the nature of support.⁴³

⁴²Dressler v. Dressler (*In re Dressler*), 194 B.R. 290, 295 (Bankr. D.R.I. 1996). *See also* GREGORY ET AL., *supra* note 2, § 8.08, at 297 (describing the “enormous volume of litigation” involving the distinction in bankruptcy cases between support debts and property settlements).

⁴³SOMMER ET AL., *supra* note 24, ¶ 6.05(5), at 6-14 (footnotes omitted). *See generally* GREGORY ET AL., *supra* note 2, § 9.08[A], at 361 (discussing the judicial application of these same factors to determine whether divorce-related obligations in the form of direct payments to the bankruptcy debtor’s former spouse are dischargeable support debts); Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women As Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351, 380-87 (1994) (describing lack of consistency in formulation and application of the support standard). Most courts have ruled that the determination of dependency under § 523(a)(5) must focus on the circumstances of the parties at the time of

If the bankruptcy debtor's dependent former spouse can satisfy this standard, he or she may be protected against the financial burden of sole responsibility for the repayment of debts incurred during marriage, in spite of the debtor's bankruptcy.

B. The Dischargeability of Property Settlement Obligations Under § 523(a)(15)

The courts ruling on claims of nondischargeability under § 523(a)(5) typically use the term “property settlements” to label divorce-related obligations that do not satisfy the federal standard, described above, for nondischargeable family support debts. Until 1994, all such nonsupport, divorce-related obligations were dischargeable in bankruptcy. Then Congress enacted the Bankruptcy Reform Act of 1994, which added an exception from discharge for some, but not all, property settlement obligations. This additional exception from discharge for certain divorce-related, non-support obligations, codified in § 523(a)(15) of the Bankruptcy Code,⁴⁴ was intended to further protect the financial interests of the divorced bankruptcy debtor's family. Thus, “Congress enacted § 523(a)(15) in an attempt to lessen the chance that a divorce obligee's claims might slip through § 523(a)(5)'s cracks and be discharged unjustly.”⁴⁵

Section 523(a)(15) sets forth standards to determine whether the property settlement obligations in a particular case are dischargeable debts, if the former spouse raises the issue in a timely fashion during the debtor's bankruptcy proceeding. In these circumstances, property settlement obligations are *nondischargeable* unless the court determines that either:

divorce, not at the time of the debtor's bankruptcy. There is, however, a minority position on this issue. *See infra* note 171 and accompanying text.

⁴⁴11 U.S.C. § 523(a)(15) (2001).

⁴⁵*Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 300 (Bankr. D.R.I. 1996).

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.⁴⁶

These standards require the courts to consider the present financial circumstances of the bankruptcy debtor and the former spouse, in determining whether to discharge the debtor's property settlement obligations.⁴⁷

Like the legislative history of § 523(a)(5), the 1994 Congressional Report regarding § 523(a)(15) specifically addresses the hold harmless obligations of the bankruptcy debtor associated with the allocation of marital debts by a divorce court. The Congressional Report states that these obligations are encompassed within the exception to discharge in bankruptcy

⁴⁶11 U.S.C. § 523(a)(15).

⁴⁷Following the enactment of § 523(a)(15), scholars criticized the failure of Congress to address several important matters affecting the respective rights of the bankruptcy debtor and the former spouse. The questions left unresolved by Congress included: which party has the burden of proof in § 523(a)(15) cases, how the bankruptcy debtor's "inability to pay" should be measured under § 523(a)(15)(A), what factors are relevant in the balancing test established under § 523(a)(15)(B), and whether property settlements can be *partially* discharged. See JUDITH K. FITZGERALD & RAMONA M. ARENA BAKER, *BANKRUPTCY AND DIVORCE* 30-36 (2d ed. Supp. 1997); Peter C. Alexander, *Building "A Doll's House": A Feminist Analysis of Marital Debt Dischargeability in Bankruptcy*, 48 VILL. L. REV. 381, 404-11 (2003); Veryl Victoria Miles, *The Nondischargeability of Divorce-Based Debts in Bankruptcy: A Legislative Response to the Hardened Heart*, 60 ALB. L. REV. 1171, 1183-1216 (1997); Vance, *supra* note 23, at 369 (emphasizing the negative effect for women, who are typically the creditor spouses in § 523(a)(15) proceedings, flowing from the lack of clarity in the statute); Meredith Johnson, Note, *At the Intersection of Bankruptcy and Divorce: Property Division Debts Under the Bankruptcy Reform Act of 1994*, 97 COLUM. L. REV. 91, 122-32 (1997).

established by § 523(a)(15) for certain property settlement obligations.⁴⁸ Early scholarly commentary about § 523(a)(15) anticipated that the new discharge exception might supplant § 523(a)(5), and become the sole basis for preserving the debtor's hold harmless obligations to a former spouse.⁴⁹ Such a shift in the analysis of hold harmless obligations would predictably have been costly for the dependent family members of bankruptcy debtors. Scholars anticipated that claims of nondischargeability would be more difficult to establish under the debtor-focused standards of § 523(a)(15) than under the § 523(a)(5) support standard.⁵⁰

However, this predicted shift in the analysis of cases involving the debtor's divorce-related obligations to repay marital debts and hold the former spouse harmless has not, in fact, occurred. In cases where the former spouse's pleadings include claims under both § 523(a)(5) and § 523(a)(15), the courts routinely first consider the possibility of preserving the divorce-

⁴⁸See H.R. REP. NO. 103-835, at 55, reprinted in 1994 U.S.C.C.A.N. 3340 , 3364.

⁴⁹See Brian B. Rothenberg, Note, *The Dischargeability of Marital Obligations: Three Justifications for the Repeal of § 523(a)(15)*, 13 BANKR. DEV. J. 135, 158 (1996); Miles, *supra* note 47, at 1179; Vance, *supra* note 23, at 390-392, 416, 434 n.173.

⁵⁰This concern regarding the relationship between § 523(a)(5) and § 523(a)(15) was summarized by one scholar, as follows:

According to the House Report, § 523(a)(15) was drafted with hold harmless agreements partially in mind. Prior to the [enactment of § 523(a)(15)], courts usually characterized these types of obligations as support debts, thereby excepting them from discharge. With this language in the legislative history, though, most courts will probably now analyze hold harmless agreements under § 523(a)(15). Because the debtor, who by definition is in poor financial condition, can easily prove his inability to pay such debt, most of the hold harmless obligations will undoubtedly be discharged.

Rothenberg, *supra* note 49, at 158 (footnotes omitted).

related debts as nondischargeable support obligations, and proceed to consider the § 523(a)(15) claim only if the § 523(a)(5) claim has failed.⁵¹

III. THE LEGAL EFFECT FOR EACH PARTY WHEN THE DEBTOR'S OBLIGATIONS ARISING FROM THE ALLOCATION OF PRE-DIVORCE DEBTS ARE DETERMINED TO BE NONDISCHARGEABLE IN BANKRUPTCY

The allocation of debts incurred during a couple's marriage by the divorce court results in a complex set of financial relationships. First, as discussed above, the divorce decree cannot affect the interests of the third-party creditor, and the direct liability of each spouse to the creditor continues to be governed by the terms of their original loan agreement.⁵² For example, if both spouses were jointly liable under the loan agreement, the creditor retains the right to collect the debt from either or both, in spite of the divorce decree allocating responsibility for repayment to just one spouse. Second, a provision in the divorce decree ordering the debtor spouse to repay marital debts creates a new, enforceable obligation to the other former spouse.

⁵¹See, e.g., *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998); *Dressler v. Dressler (In re Dressler)*, 194 B.R. 290 (Bankr. D.R.I. 1996); *Kennard v. Kennard (In re Kennard)*, 259 B.R. 146 (Bankr. W.D. Mo. 1995). Cf. *Winegarden v. Winegarden (In re Winegarden)*, 719 A.2d 678 (N.J. Super. Ct. App. Div. 1998) (affirming jurisdiction in a post-bankruptcy state court proceeding to consider the nondischargeability of debtor's hold harmless obligation under § 523(a)(5), even though the court lacked jurisdiction to consider the former spouse's § 523(a)(15) claim).

The proposed Bankruptcy Abuse Prevention and Consumer Protection Act, discussed in Trisha L. Baggs, Comment, *Bankruptcy Reform of 2001: A Hollow Victory for Creditor-Spouses*, 34 ARIZ. ST. L.J. 967, 986-88 (2002), includes changes to both § 523(a)(5) and § 523(a)(15) of the Bankruptcy Code. See H.R. 975, 108th Congress (2003), available at <http://thomas.loc.gov>. Notably, the Act would extend the exception to discharge to all property settlement obligations of the bankruptcy debtor in Chapter 7 cases. See *id.* The proposed changes would not affect the analysis of the special issues involving debts incurred during marriage and allocated to the bankruptcy debtor at the time of divorce, which are the focus of this Article.

⁵²See *supra* text accompanying notes 15-19 (discussing the effect of marital debt allocation on creditors' rights).

Finally, an additional provision in the divorce decree ordering the debtor to hold his or her former spouse harmless as to the marital debts creates another direct and enforceable obligation between the parties. Specifically, the debtor is obligated to indemnify the former spouse for any future payments made by the former spouse to the creditors of the marriage.

If a dispute subsequently arises regarding the dischargeability in bankruptcy of the debtor's divorce-related debts under § 523(a)(5) and § 523(a)(15), a thorough analysis would require the separate consideration of each of the debtor's three discrete obligations in this situation. If a judicial determination of nondischargeability is made, the question arises as to which of the debtor's obligations—the debt to the creditor incurred during marriage, the obligation to the former spouse to repay that debt, or the obligation to hold the former spouse harmless—are preserved. Important legal consequences follow for each of the former spouses and the third-party creditor if only one or two of the component debts are preserved while the other(s) is (are) discharged.

A. Nondischargeability of the Debtor's Direct Liability to the Third Party Creditor

The first component obligation of the bankruptcy debtor in these circumstances is the underlying contractual liability to the third-party marital creditor. The 1994 legislative history of § 523(a)(15) states clearly that the former spouse may *not* claim this obligation as a nondischargeable property settlement debt.⁵³ By way of contrast, the legislative history and

⁵³See H.R. REP. NO. 103-835, at 55, reprinted in 1994 U.S.C.C.A.N. 3340, 3364, *relied on in* Barstow v. Finaly (*In re Finaly*), 190 B.R. 312, 315-16 (Bankr. S.D. Ohio 1995) (“[Section] 523(a)(15) applies only to debts owed to the former spouse. The plaintiff cannot assert § 523(a)(15) to render nondischargeable a debt owed to a third party.”). An early draft of § 523(a)(15) raised the prospect of preserving the bankruptcy debtor's underlying debt to the third-party marital creditor, by providing that a debt “assumed or incurred” in connection with the debtor's divorce would be eligible for nondischarge. See SOMMER ET AL., *supra* note 24, ¶ 6.07A[1], at 6-97 to -99 (discussing House of Representatives Report that accompanied the early draft). The word “assumed” was deleted from the language of the statute as enacted, and

statutory language of § 523(a)(5) are silent on this issue.⁵⁴ Only a handful of judicial opinions have discussed the potential survivability of the debtor's underlying contractual liability to the third-party creditor as a nondischargeable family support debt. As illustrated by the discussion below of two bankruptcy court cases, *In re MacDonald*⁵⁵ and *In re Maune*,⁵⁶ the courts addressing this issue have not reached any uniform result.

Two threshold concerns must be addressed before the bankruptcy debtor's direct obligation to the third-party marital creditor, incurred during the debtor's marriage, can be considered as a potentially nondischargeable support debt under § 523(a)(5). First, a concern arises that preserving the debtor's direct contractual liability may provide an unacceptable windfall to the third-party creditor, who is not an object of special protection under the family-related provisions of the Bankruptcy Code. Actually, this same concern also arises in considering the potential nondischargeability of the other aspects of the debtor's liability relating to allocated marital debts—the repayment and hold harmless obligations owed to the former spouse, discussed below. For example, preserving the bankruptcy debtor's repayment obligation to the former spouse probably enhances the likelihood of payment to the third-party creditor by the debtor, because the debtor's former spouse remains entitled to coerce such payment. Thus, preservation of each aspect of the debtor's liability regarding debts incurred during marriage

the express statement in the House Report excluding the underlying marital debt from such treatment was added. *Id.*

⁵⁴See S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

⁵⁵*MacDonald v. MacDonald (In re MacDonald)*, 69 B.R. 259 (Bankr. D.N.J. 1986).

⁵⁶*Maune v. Maune (In re Maune)*, 133 B.R. 1010 (Bankr. E.D. Mo. 1991), *overruled in part by* *McKinnis v. McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002).

enhances the likelihood of the third-party creditor receiving payment in spite of the debtor's bankruptcy.

However, any benefit flowing to the third-party marital creditor from the determination that a debt is nondischargeable under § 523(a)(5) or (a)(15) must be regarded as a collateral consequence of implementing the important goal of protecting post-divorce families in bankruptcy proceedings. The crucial inquiry is whether the debtor's obligations arising from the earlier allocation of debts incurred during marriage satisfy the standards for nondischargeability of family support or property settlement obligations. In determining which aspects of the debtor's liability should be preserved in these circumstances, the focus must be on the debtor's dependent family members, and not on the third-party marital creditor.⁵⁷

In considering whether the underlying contractual obligation to the third-party creditor can itself be considered a potentially nondischargeable family support obligation, a more difficult threshold concern arises from the language of § 523(a)(5). The statute requires that a nondischargeable support debt must be a "debt . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, *in connection with a separation agreement, divorce decree or other order of a court of record . . .*"⁵⁸ If this statutory language is construed to mean that nondischargeable support debts must be incurred by the debtor at the time of divorce, then the contractual obligations to third-party creditors incurred during the debtor's marriage would be excluded from consideration. On the other hand, the joint

⁵⁷Notably, courts have recognized other types of debts payable to third-party creditors as nondischargeable family support debts under § 523(a)(5). For example, as discussed *infra* at text accompanying notes 95-97, courts have held that the obligation of the bankruptcy debtor to pay the divorce attorney's fee of the former spouse is nondischargeable if the debt is in the nature of support.

⁵⁸11 U.S.C. § 523(a)(5) (2001) (emphasis added).

marital debts may arguably be regarded as debts “for support . . . in connection with a . . . divorce decree,” because the decree allocates them to the debtor for repayment.⁵⁹ Thus, there is no clear answer in the statutory language to the question posed here: whether the bankruptcy debtor’s contractual liabilities to marital creditors may be regarded as “divorce-related” debts under § 523(a)(5).⁶⁰ As with the concern described above about potential windfalls to third-party creditors, a primary focus on the protection of the family interests supports the broad construction of statutory language here.

The bankruptcy court in *In re Maune*⁶¹ engaged in this type of broad statutory construction, and ruled that the bankruptcy debtor’s underlying obligations to third-party marital creditors constituted nondischargeable support debts. In *Maune*, the 1989 divorce decree of the Missouri state court required the husband to “assume responsibility for certain debts of the

⁵⁹The language of § 523(a)(15) regarding nondischargeable property settlement obligations avoids the type of ambiguity arising under the language of § 523(a)(5) and discussed in the text. Section 523(a)(15) requires that a nondischargeable debt must be “*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” 11 U.S.C. § 523(a)(15) (emphasis added). The phrase “incurred by the debtor” has been construed to limit § 523(a)(15) to those debts arising at the time of the debtor’s divorce or separation. *See infra* text accompanying notes 73-81.

⁶⁰The same question has arisen in other situations involving certain types of unilateral (not joint) obligations of the bankruptcy debtor that pre-dated the debtor’s divorce. For example, the question has arisen whether obligations incurred by the debtor during marriage for family support purposes, such as medical bills, can be characterized as “divorce-related” obligations under § 523(a)(5) in the debtor’s post-divorce bankruptcy. SOMMER ET AL., *supra* note 24, ¶ 6.03[3], [4]. The various courts considering the eligibility of such pre-divorce debts for nondischarge have not reached consistent results. *See id.* (collecting cases).

⁶¹*Maune v. Maune (In re Maune)*, 133 B.R. 1010 (Bankr. E.D. Mo. 1991), *overruled in part by* *McKinnis v. McKinnis*, 287 B.R. 245, 252 (Bankr. E.D. Mo. 2002) (ruling that debtor’s obligation to third-party creditor fails to satisfy the requirement under § 503(a)(5) that nondischargeable debt must be owed to the debtor’s former spouse “when the debtor is also obligated to hold his former spouse harmless as to those debts”).

marriage on which both [spouses] were liable . . . and . . . to indemnify and hold harmless the [wife].”⁶² One year later, the former husband filed a bankruptcy petition, listing on the schedule of debts “the debts he had assumed in the Dissolution Decree and Settlement Agreement, including obligations to [the marital creditors].”⁶³ A few months later, with the bankruptcy case pending, one of the joint marital creditors sued the former wife for payment. This creditor action apparently motivated the former wife to file a complaint in the debtor’s bankruptcy case, seeking a declaration of nondischargeability of the debtor’s divorce-related debts under § 523(a)(5).

The *Maune* court first applied the federal standard for distinguishing nondischargeable support debts from dischargeable property settlement obligations, and concluded that the husband’s obligations fell into the former category. Next, the court ruled, as a matter of law, that the debtor’s underlying debts to the third-party creditors, as well as the obligation to hold his former spouse harmless as to these debts, could be preserved under § 523(a)(5).⁶⁴ In doing so, the court assessed this issue in light of the interests of each party.

First, as to the interests of the bankruptcy debtor, the *Maune* court stated that “the discharge of the debts underlying the indemnity agreements [would do] little to further the

⁶²*Id.* at 1012.

⁶³*Id.*

⁶⁴The *Maune* opinion expressly overruled the following cases, as to the issue of dischargeability of the debtor’s contractual liability to the marital creditor: *Lord v. Lord* (*In re Lord*), 93 B.R. 678, 681 (Bankr. E.D. Mo. 1988); *Smith v. Smith* (*In re Smith*), 42 B.R. 628, 631 (Bankr. E.D. Mo. 1984) (“[S]ection (a)(5) . . . does not render non-dischargeable a debt to a third party itself but only the debtor’s obligation to hold his or her ex-spouse harmless from payment of this debt . . .”). The rule of the *Maune* case was followed in *Burns v. Burns* (*In re Burns*), 194 B.R. 578, 582 (Bankr. E.D. Mo. 1993). The Bankruptcy Court for the Eastern District of Missouri reversed itself again on this issue in *McKinnis v. McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002), as to cases where a hold harmless obligation exists between the former spouses.

Debtor's fresh start."⁶⁵ Here, the court apparently meant that the debtor would remain ultimately responsible for payment under the hold harmless obligation, even if the underlying obligations to third-party creditors were discharged. The court failed to acknowledge, however, that the debtor's liability under the hold harmless obligation was contingent on his former wife's payment of the underlying obligation followed by her affirmative effort to collect reimbursement from him. By way of contrast, the debtor's liability under the original loan contract was immediate and enforceable by the third-party creditor. Thus, the court's decision to preserve both the hold harmless debt and the debtor's original contractual liability had a likely negative impact on the economic position of the debtor.

The *Maune* court also justified its decision by focusing on the interests of the bankruptcy debtor's former wife. Here, the court emphasized both the unfairness and inconvenience that would result if only the debtor's hold harmless obligation to her was preserved. On the subject of fairness, the court observed that "discharging the Debtor of the [joint marital] obligations he agreed to satisfy seems unfair to the Debtor's former spouse who, in essence, negotiated for secondary liability on those debts." As to the convenience of the former spouse, the court stated that "the proposed disposition needlessly inconveniences the Debtor's former spouse who serves as a conduit between the Debtor and the third-party creditor."⁶⁶ That is if only the debtor's hold harmless liability was preserved, the former wife could assert her rights only by paying off the joint marital itemizations to the third-party creditors, and then suing her former husband for reimbursement.

⁶⁵*Maune*, 133 B.R. at 1012.

⁶⁶*Id.* at 1014.

Finally, the *Maune* court assessed the impact of its ruling on the debt collection process. The court opined that “the contemplated result [of discharging the underlying debts] detracts from the efficiency of the collection process by directing the creditor to collect from the Debtor’s former spouse who must then collect from the Debtor.”⁶⁷ Thus, the court concluded that many important interests were best served by granting the former spouse’s request for relief. The bankruptcy court in *Maune* ruled that the bankruptcy debtor’s joint liability for the debts incurred during his marriage was nondischargeable under § 523(a)(5).

By way of contrast to the decision in the *Maune* case, the bankruptcy court in the 1986 case of *In re MacDonald*⁶⁸ ruled that the bankruptcy debtor’s underlying contractual liability to third-party marital creditors was not itself a potentially nondischargeable debt. Notably, the court gave no rationale for its conclusion on this important legal issue.

The MacDonalds’ 1983 property settlement agreement, which had been incorporated by the divorce court into their divorce decree, provided that the husband must hold his wife harmless as to two debts incurred by them jointly during marriage. (The divorce decree did not expressly order the husband to repay the debts.)⁶⁹ The first marital debt in the *MacDonald* case was a loan in the amount of \$81,000 used to purchase x-ray equipment when the husband first set up his medical practice in 1980; the lending bank had also obtained a security interest in the equipment at that time. The second loan, made to the MacDonalds by a credit union in the amount of approximately \$20,000, was used for ordinary living expenses during the time when the husband set up his practice.

⁶⁷*Id.*

⁶⁸*MacDonald v. MacDonald (In re MacDonald)*, 69 B.R. 259 (Bankr. D.N.J. 1986).

⁶⁹*See id.* at 262.

In spite of the intention of the divorce decree to impose sole responsibility on the former husband for repayment of these two loans, both were in arrears at the time of his bankruptcy proceeding. In the bankruptcy court, the former wife “testified that she ha[d] been sued by [the first lender] for outstanding payments, and that demands ha[d] been made of her by the [second lender] for overdue payments.”⁷⁰ Furthermore, sometime after the divorce the former husband had donated the x-ray equipment, which was the security for the larger loan, and took a charitable deduction for the donation on his income tax return.

In his bankruptcy proceeding, the debtor listed the hold harmless obligation to his former wife along with the underlying debts to the third-party creditors, on his schedule of debts. The former wife filed a complaint in the bankruptcy case, asserting that the debtor’s underlying obligations to the marital creditors were nondischargeable support obligations. In analyzing her claim, the *MacDonald* court first applied § 523(a)(5) to the facts of the case, and concluded that the arrangement made between the former spouses at the time of the divorce regarding their marital debts satisfied the federal standard for nondischargeable support obligations. However, the court refused to grant the former wife’s request for relief by preserving the debtor’s joint liability to the two third-party creditors. The court ruled as a matter of law that only the hold harmless debt to the former spouse could be preserved under § 523(a)(5), as follows:

The court notes that there are two distinct obligations involved in an agreement to assume former joint marital debts: (1) the underlying debt owed to the mutual creditor, and (2) the obligation owed directly to the former spouse to hold the spouse harmless on that underlying debt. . . . It is the dischargeability of the latter obligation that is at issue in this case. The debtor’s obligation to pay his various

⁷⁰*Id.* at 265.

other creditors, those creditors in respect of whose debts he promised to pay and to indemnify and hold the plaintiff harmless, are discharged by his discharge in bankruptcy. The debtor's obligation to the plaintiff and their children has not been discharged. Thus the debtor is required to reimburse or to indemnify and hold plaintiff harmless only to the extent that the plaintiff is actually required to make payment to [the two named creditors].⁷¹

Clearly, the support-related interests of the former wife in *MacDonald* would have been better protected by the remedy she requested. Specifically, the nondischarge of the bankruptcy debtor's underlying contractual obligations would have preserved the rights of the third-party creditors to seek repayment from either former spouse. In *MacDonald*, the former husband continued in his profession as an orthopedic surgeon, while the former wife had no significant employment history, and was unemployed and without significant assets at the time of the bankruptcy case. Following the former husband's discharge of the underlying debts in bankruptcy, however, the lenders could pursue only the former wife for collection of the delinquent marital debts. The only protection extended to her under the *MacDonald* ruling was the right to sue her husband for reimbursement, in the event that she paid off the creditors.

The bankruptcy court opinions in the *MacDonald* and *Maune* cases reached inconsistent results on the legal question of the potential survivability of the bankruptcy debtor's personal liability to pre-divorce marital creditors under § 523(a)(5). No appellate court has addressed this

⁷¹*Id.* at 278 (citations omitted). *Accord* *Krein v. Hanagan (In re Krein)*, 230 B.R. 379 (Bankr. N.D. Iowa 1999); *Reeder v. Ziegler (In re Ziegler)*, No. 94-61854, 1995 WL 512197 (Bankr. N.D. Ohio, Aug. 9, 1995). Congress cited the *MacDonald* case in the legislative history of § 523(a)(15) to support the proposition that the underlying debt to the marital creditor cannot be the subject of a determination of nondischargeability in cases involving property settlements. *See* H.R. REP. NO. 103-835, at 55, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3364.

issue. And in most reported cases involving allocated marital debts, the issue has not been raised by the parties or addressed by the court.

The likely explanation for this lack of attention to the bankruptcy debtor's underlying contractual liability to third-party creditors for the debts incurred during marriage involves the complexity of the debtor's financial situation in cases where such marital debts were allocated to the debtor by the divorce court. As described at length in this Article, the debtor in this situation owes more than one debt relating to the same subject matter. The parties, their lawyers and the courts may not appreciate that the former spouse's claim of nondischargeability could potentially be extended to several discrete debts. The hold harmless provision or repayment clause included in the parties' separation agreement or divorce decree may be the most obvious aspect of the debtor's divorce-related liability, and the analysis of the debtor's continuing liability under § 523(a)(5) may begin and end with the consideration of it. However, the failure to identify the debtor's underlying contractual liability to third parties as potentially nondischargeable debts forecloses the type of inquiry made in the *Maune* case as to whether preservation of the third-party claims would serve the family support purpose of § 523(a)(5). Failure to address the status of this additional aspect of the debtor's liability, as in the *MacDonald* case, unnecessarily limits the forms of relief available to the bankruptcy debtor's dependent family members under the Bankruptcy Code.

B. Nondischargeability of the Debtor's Obligation to the Former Spouse to Repay the Third-Party Debts Incurred During Marriage

Just like the debtor's personal liability to third-party marital creditors, discussed in the last Subsection, the obligation arising under a divorce court order requiring the debtor to repay the debts incurred during marriage is frequently ignored in post-divorce bankruptcy litigation. The *Maune* case, discussed in the last Subsection, illustrates the tendency to ignore this

additional obligation as a potentially nondischargeable debt of the bankruptcy debtor. According to the bankruptcy court in *Maune*, the debtor's divorce decree expressly ordered him to repay certain joint marital debts, and to hold his former wife harmless as to these obligations.⁷² The dual requirement here created two distinct obligations between the former spouses. In the former husband's bankruptcy proceeding, however, the parties and the court ignored the repayment obligation, focusing instead on the court-ordered duty to hold the nondebtor spouse harmless, along with the underlying joint obligation to the marital creditors.

The failure to consider the bankruptcy debtor's repayment obligation as a potentially nondischargeable debt has ramifications for both the debtor's former spouse and the third-party creditors. From the perspective of the former spouse, preservation of this obligation continues his or her right to directly enforce the provision of the divorce decree shifting full responsibility for marital debts to the debtor. In the event that the debtor defaults on repaying the creditors, the former spouse can ask the divorce court to hold the debtor in contempt of court until payment is made, or pursue other state court enforcement remedies. This option involves more direct control on the part of the former spouse to protect his or her own financial interests than a court order preserving only the debtor's hold harmless obligation. From the creditors' perspective, preservation of the repayment obligation between the former spouses involves no direct enforcement rights for the third-party creditors. Nevertheless, the creditors' chances of being repaid by the bankruptcy debtor are enhanced by the former spouse's continuing right to coerce payment from the debtor.

⁷²*Maune v. Maune (In re Maune)*, 133 B.R. 1010, 1012 (Bankr. E.D. Mo. 1991), *overruled in part by* *McKinnis v. McKinnis*, 287 B.R. 245, 252 (Bankr. E.D. Mo. 2002) (ruling that debtor's obligation to third party creditor fails to satisfy the requirement under § 503(a)(5) that nondischargeable debt must be owed to the debtor's former spouse "when the debtor is also obligated to hold his former spouse harmless as to those debts").

Many of the reported cases involving repayment obligations established by the bankruptcy debtor's divorce decree have arisen under § 523(a)(15). Here, the availability of the former spouse's claim of nondischargeability depends upon the judicial construction of specific statutory language. Bankruptcy Code § 523(a)(15) sets out a threshold requirement that nondischargeable property settlement obligations must have been "incurred by the debtor *in the course of* a divorce or separation or in *connection with* a separation agreement [or] divorce decree."⁷³ There is no consensus among the judicial opinions that have considered whether, as a matter of law, the repayment order in a debtor's separation agreement or divorce decree satisfies this statutory requirement. The bankruptcy court opinion in *Burton v. Burton*⁷⁴ and the opinion of the bankruptcy appeals panel in *Gibson v. Gibson*⁷⁵ illustrate the conflict.

In *Burton*, the Missouri divorce court ordered the former husband to repay a mortgage loan on which the former spouses were jointly liable, but the divorce decree did not include a hold harmless provision. In the former husband's subsequent bankruptcy proceeding, his former wife asserted that the repayment obligation constituted a nondischargeable property settlement debt under Bankruptcy Code § 523(a)(15). She did not make a claim under § 523(a)(5).⁷⁶

The bankruptcy court in *Burton* expressed the opinion that the repayment order in the debtor's divorce decree provided no basis for a claim of nondischargeability under § 523(a)(15), because it was not a debt "incurred . . . in the course of [the debtor's] divorce," as required by the statutory language quoted above. According to the *Burton* court,

⁷³11 U.S.C. § 523(a)(15) (2001) (emphasis added).

⁷⁴*Burton v. Burton (In re Burton)*, 242 B.R. 674 (Bankr. W.D. Mo. 1999).

⁷⁵*Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998).

⁷⁶*See Burton*, 242 B.R. at 677.

[Section (a)(15)] require[s] the creation of a debt in the course of a divorce or separation that was not in existence before the divorce. . . . A hold harmless or indemnification agreement in the divorce decree will usually meet this requirement. Conversely, in the absence of a hold harmless agreement, § 523(a)(15) is inapplicable to joint debts that were incurred by the Debtor prior to the divorce proceeding.⁷⁷

The *Burton* court believed that no new debt was created, because the former husband had been obligated to pay the mortgage lender under the original loan agreement, and was also required to pay the same lender under the divorce court's repayment order. Here, the court failed to consider that the debtor's obligation under the repayment order was owed to, and enforceable by, the former spouse rather than the third-party creditor. As a result, the court did not recognize the new and substantial obligation established under the divorce decree.

The *Burton* court failed to identify and assign significance to the discrete, component obligations of the bankruptcy debtor to whom debts incurred during marriage were allocated in a pre-bankruptcy divorce proceeding. As in the *MacDonald* case,⁷⁸ discussed in the last

⁷⁷*Id.* at 678 (citations omitted). *Accord* *Stegall v. Stegall (In re Stegall)*, 188 B.R. 597 (Bankr. W.D. Mo. 1995). The underlying debt in the *Burton* case was a mortgage on the family home for which the former spouses were jointly liable. The divorce decree had awarded the house to the former husband "subject to" the outstanding mortgage, and the *Burton* court observed that "the [divorce decree did] not even contain a specific statement that the Debtor was to assume . . . the debt." *Id.* It is quite clear under the court's holding, however, that the result would have been the same if the divorce decree had included such an explicit statement about the former husband's responsibility to repay the joint marital debt.

⁷⁸*MacDonald v. MacDonald (In re MacDonald)*, 69 B.R. 259 (Bankr. D.N.J. 1986), *discussed supra* at text accompanying notes 68-71. The debts in *MacDonald* were the bankruptcy debtor's underlying obligations to marital creditors, and the responsibility to hold his former wife harmless as to these marital debts. In the adversary proceeding initiated by the debtor's former spouse under § 523(a)(5), the *MacDonald* court refused to consider the underlying obligations as potentially nondischargeable debts.

Subsection, the failure to separately consider each aspect of the debtor's liability relating to allocated marital debts automatically closed off the corresponding avenues of relief for the debtor's family members under § 523 of the Bankruptcy Code. The *Burton* court's denial that the debtor's repayment obligation to the former spouse was a debt separate from his underlying obligation to the third-party marital creditor had dramatic consequences for the former spouse. In the words of the bankruptcy court, "[t]he unfortunate but unavoidable result of this determination is that, in the event there is a deficiency (which there will likely be) when [the creditor] forecloses on the property securing the debt (scheduled to occur [on a date certain]), [the former spouse] will be solely liable for the deficiency."⁷⁹

In *Gibson v. Gibson*,⁸⁰ the Bankruptcy Appeals Panel of the Sixth Circuit Court of Appeals provided a different answer to the same legal question, whether the repayment order in a divorce decree created a new debt, as required for nondischargeability under § 523(a)(15). By recognizing the multiple aspects of the bankruptcy debtor's liability, the *Gibson* court preserved the possibility of relief for the former spouse in the event that the other elements of nondischargeability under § 523(a)(15) could be established as to the debtor's repayment obligation.

In *Gibson*, the Ohio divorce court ordered the former husband to repay a debt to his stepfather, which the divorcing couple had incurred jointly during their marriage. As in *Burton*, there was no hold harmless clause. During the former husband's subsequent bankruptcy proceeding, the former wife claimed that the debtor's obligation to repay his stepfather was

⁷⁹*Burton*, 242 B.R. at 678.

⁸⁰*Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998).

nondischargeable under § 523(a)(5) or § 523(a)(15). At that time, the stepfather had already initiated a lawsuit to collect the debt from her.

The bankruptcy court in *Gibson* entered a summary judgment order in favor of the debtor, ruling that his repayment obligation under the divorce decree was dischargeable. First, as to the former wife's claim under § 523(a)(5), the court ruled that there was no evidence in the pleadings that the husband's repayment obligation was "in the nature of support." On appeal, the Bankruptcy Panel of the Sixth Circuit Court of Appeals affirmed this portion of the summary judgment. As to the former wife's second claim, that the debt was a nondischargeable property settlement under § 523(a)(15), the lower court held that the debt created by the repayment clause of the divorce decree was not a debt "incurred by the debtor in the course of a divorce" as required by § 523(a)(15). Here, the bankruptcy court emphasized that the debtor and his wife were both obligated to his stepfather under the original loan note prior to the time of divorce, and concluded therefore that the debtor incurred no new debt under the repayment clause of the divorce decree. This is the same analysis employed by the bankruptcy court in the *Burton* case, described above. On this issue, the appellate court in *Gibson* reversed the summary judgment order and remanded the case for trial.

The Sixth Circuit appellate panel in *Gibson* ruled that a new debt had been created by the repayment order in the bankruptcy debtor's divorce decree, which was distinct from his preexisting joint liability to his stepfather. Namely, the repayment order had created an obligation to the debtor's former wife, which was enforceable by her in state court in the event of the debtor's default.⁸¹ This obligation would be nondischargeable if, on remand, the bankruptcy

⁸¹*Id.* at 204. *Accord Crawford v. Osborne (In re Osborne)*, 262 B.R. 435 (Bankr. E.D. Tenn. 2001) (overruling *LaRue v. McCracken (In re LaRue)*, 204 B.R. 531 (Bankr. E.D. Tenn.

court balanced the factors under the § 523(a)(15) standard in favor of the former wife. In that event, the bankruptcy debtor would continue to owe the duty to his former wife to repay the debt, even though his underlying contractual liability to his stepfather was discharged in bankruptcy.

The divorce decrees in *Burton* and *Gibson* included repayment orders, but no hold harmless provisions. In other cases, the dischargeability of a repayment order has been assessed along side the hold harmless clause included in the same divorce decree. The 1995 South Dakota state court case of *Hogie v. Hogie*,⁸² which involved the support exception to discharge in bankruptcy, illustrates this category of cases.

The divorce decree in the *Hogie* case required the former husband to “assume and pay for all indebtedness concerning the accounts with the Firstline Account, the Visa charge card, and the Discover charge card, and . . . hold [the former wife] harmless from collection of any amounts due on said accounts.”⁸³ When the former husband subsequently stopped making payments on these debts and filed for bankruptcy, the creditors approached the former wife for payment. In response to these events, the former wife sued in state court to enforce the provisions of the divorce decree. The trial court in South Dakota ruled that both the repayment obligation and the hold harmless obligation established in the bankruptcy debtor’s divorce decree

1997)); *Johnston v. Henson (In re Henson)*, 197 B.R. 299 (Bankr. E.D. Ark. 1996). *See also Hazelton v. Hazelton, (In re Hazelton)* 2003 Bankr. LEXIS 1831 (Bankr. M.D. Pa., Aug. 1, 2003) (ruling that hold harmless debt was a new obligation under § 523(a)(15) incurred in the debtor’s divorce proceeding).

⁸²*Hogie v. Hogie*, 527 N.W.2d 915 (S.D. 1995).

⁸³*Id.* at 918.

were nondischargeable family support debts under Bankruptcy Code § 523(a)(5).⁸⁴ This ruling, which allowed the former wife to enforce the debtor's obligations to her, in spite of his bankruptcy, was affirmed by the Supreme Court of South Dakota in *Hogie*.

The South Dakota high court in *Hogie* recognized the bankruptcy debtor's repayment obligation and the hold harmless obligation as two distinct debts, even though both had been created in the same instrument and related to the same subject matter. At the time of the state court enforcement proceeding, initiated by the former wife in *Hogie*, the hold harmless obligation was not immediately enforceable, because the former wife had not made any payments to the credit care companies. In these circumstances, the court's recognition of the former husband's repayment obligation as a separate, nondischargeable support debt under § 523(a)(5) entitled the former wife to enforce his obligation to make current payments to the credit care lenders.

C. *Limitation of Nondischargeability to the Debtor's Hold Harmless Obligation to the Former Spouse*

The analysis in many cases involving marital debts allocated to the divorced bankruptcy debtor has focused on the debtor's hold harmless obligation to the former spouse.⁸⁵ Often, there

⁸⁴The *Hogie* court acted pursuant to provisions in the Bankruptcy Code, *discussed infra* at text accompanying notes 107-10, which confer concurrent jurisdiction on the state courts to make determinations about the dischargeability of divorce-related debts under § 523(a)(5).

⁸⁵The legislative histories of §§ 523(a)(5) and 523(a)(15) also emphasized the bankruptcy debtor's hold harmless debts in cases where pre-divorce marital obligations have been allocated by the divorce court to the bankruptcy debtor. Thus, the 1994 House of Representatives Report regarding the exception from discharge for certain property settlement obligations under § 523(a)(15) expressly referred to the potential nondischargeability of hold harmless obligations. *See* H.R. REP. NO. 103-835, at 55, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3364, *discussed in* Miles, *supra* note 45, at 1180-82. Furthermore, the House Report stated that any judicial ruling of nondischargeability under § 523(a)(15) may *not* be extended to the debtor's contractual liability to the third-party creditor. H.R. REP. NO. 103-835, at 55. There was no express reference to the third obligation that may arise in these circumstances, the debtor's obligation to

is no consideration of either the debtor's pre-divorce, direct liability to the third-party creditors or the debtor's obligation to the former spouse under the divorce decree to assume sole responsibility for repayment of the marital debts. Silence as to these related obligations has led to the (unspoken) conclusion that they are automatically discharged in bankruptcy. Often, it appears that the parties in their pleadings have ignored these additional obligations of the bankruptcy debtor relating to allocated marital debts. And, generally speaking, the courts have not expanded their analysis beyond the limited formulation of the dischargeability issue in the parties' pleadings, focusing exclusively on the debtor's hold harmless obligation to the former spouse.

For example, in *In re Edwards*,⁸⁶ the bankruptcy debtor's divorce decree ordered him to repay several marital debts and to hold his former wife harmless, as follows:

[The debtor] shall be responsible for the payment of [the marital debts] [He] shall indemnify and hold harmless the [former wife] from any liability for these obligations. This order is made for the purpose of freeing the [former wife] of her liability as to these past obligations so that she may properly care for herself.⁸⁷

the former spouse under their divorce decree to be solely responsible for repayment to the third-party marital creditors.

As to family support debts, the legislative history of § 523(a)(5) stated that Congress intended to include hold harmless obligations between former spouses within the scope of the exception from discharge. *See* S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320. But no reference appears in either the statute or the legislative history of § 523(a)(5) to the two additional obligations involved in the allocation of responsibility for marital debts to the bankruptcy debtor at the time of divorce.

⁸⁶*Tavella v. Edwards (In re Edwards)*, 172 B.R. 505 (Bankr. D. Conn. 1994).

⁸⁷*Id.* at 509.

In the debtor's post-divorce bankruptcy proceeding, his former wife sought "a determination that the defendant's obligation . . . to hold the [former wife] harmless from certain liabilities (the Obligation) was not dischargeable because it was actually in the nature of alimony, maintenance, or support within the meaning of § 523(a)(5)(B)."⁸⁸ The bankruptcy court ruled in favor of the debtor's former wife on this issue, holding that "the Obligation is not dischargeable under § 523(a)(5)."⁸⁹ Notably, neither the former wife in her pleadings nor the bankruptcy court in its opinion in *Edwards* raised the possibility of preserving the debtor's obligation to the former wife to repay the marital debts or the debtor's underlying contractual liability to the marital creditors.

As illustrated by the *Edwards* case, an exclusive focus on the debtor's hold harmless obligation forecloses any consideration of the debtor's other obligations as potentially nondischargeable support debts. The practical effect of the limitation is best illustrated in cases where the debtor's former spouse is denied any remedy until he or she actually pays off the marital debts and thereby becomes entitled to reimbursement under the hold harmless provision. The financial impact of this limitation for the former spouse was described by the dissenting judge in the Kentucky Court of Appeals case of *McDonald v. McDonald*, as follows:

While it is true that [the debtor's former wife] is not yet the subject of collection procedures, it is equally apparent that she is obligated to [the third-party creditor] and recognizes that obligation. When one considers this sizeable debt and commensurate interest charges coupled with the probable costs of collection, the

⁸⁸*Id.*

⁸⁹*Id.* at 525.

majority has placed [her], a person with limited financial resources, in a legal limbo.⁹⁰

In both the *Edwards* and *McDonald* cases, a threshold judicial determination was made that the debtor's former spouse had satisfied the Bankruptcy Code standard for identifying nondischargeable family support obligations under § 523(a)(5). Clearly, then, the debtor's former spouse was a person intended by Congress to receive economic protection under the Bankruptcy Code. The failure to recognize the several component obligations of the debtor relating to allocated marital debts in these cases unnecessarily limited the protection available for the bankruptcy debtor's former spouse. Consideration of the debtor's repayment obligation to the former spouse, along with the hold harmless obligation, would afford greater protection to the debtor's dependent family members in these circumstances.

D. Standing of the Third-Party Creditor

The issues raised above in the *Maune*,⁹¹ *Gibson*⁹² and *Hogie*⁹³ cases, regarding debtors to whom marital debts were allocated for repayment in pre-bankruptcy divorce proceedings, lead to a related question. Namely, do the third-party creditors of the marriage have standing to assert

⁹⁰*McDonald v. McDonald*, 882 S.W.2d 134, 136 (Ky. Ct. App. 1994) (Gardner, J., dissenting).

⁹¹*Maune v. Maune (In re Maune)*, 133 B.R. 1010 (Bankr. E.D. Mo. 1991), *overruled in part by* *McKinnis v. McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002), *discussed supra* at text accompanying notes 61-67, 72.

⁹²*Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998), *discussed supra* at text accompanying notes 80-81.

⁹³*Hogie v. Hogie*, 527 N.W.2d 915 (S.D. 1995), *discussed supra* at text accompanying notes 82-84.

the nondischargeability of the debtor's obligations under §§ 523(a)(5) or (a)(15)?⁹⁴ In *Maune*, the bankruptcy court refused to discharge the direct contractual liability of the bankruptcy debtor to third-party marital creditors. In *Gibson* and *Hogie*, the courts preserved the bankruptcy debtors' divorce court-imposed obligations to their former spouses to repay the debts incurred jointly during marriage. In *Maune*, *Gibson* and *Hogie*, the question of nondischargeability was raised by the bankruptcy debtors' former spouses. The related issue posed here is whether the third-party marital creditor would also have standing to assert the nondischargeability of these divorce-related obligations of the bankruptcy debtor under § 523(a)(5) or (a)(15). The question would arise if, for some reason, the debtor's former spouse did not act to raise the issue of nondischargeability in the debtor's bankruptcy case. To date, there are no reported cases addressing this precise question.

If raised, the question of third-party creditor standing would likely be answered differently in cases arising under the two Bankruptcy Code provisions creating exceptions from discharge for divorce-related obligations. The creditor is unlikely to be granted standing under § 523(a)(15), which governs the dischargeability of divorce-related property settlement obligations, because the legislative history expressly states that third-party marital creditors have no standing to assert such claims. The 1994 House of Representatives Report regarding § 523(a)(15) states that "the exception [to discharge for certain property settlement obligations] . . . can be asserted only by the other party to the divorce or separation. If the debtor agrees to

⁹⁴For a general discussion of the standing doctrine in civil litigation, see FRIEDENTHAL ET AL., *supra* note 15, § 6.3.

pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception”⁹⁵

While the legislative history is not binding on the courts in the same manner as the statutory language itself,⁹⁶ the courts have generally been deferential to the clear intent expressed in this Report in cases involving other types of third-party creditors. For example, in cases involving divorce-related attorney fees payable by the bankruptcy debtor for legal services provided to the debtor’s former spouse, most courts have held that the attorney creditor does not have standing to raise the issue of nondischargeability under § 523(a)(15).⁹⁷ According to the judicial opinions in these cases, which frequently rely upon the legislative history quoted above, the claim that the attorney fee obligation is a nondischargeable property settlement debt can be asserted only by the former spouse. Predictably, the courts would be similarly deferential to the limitation on third-party standing expressed in the House of Representatives Report in cases involving a pre-divorce obligation allocated to the bankruptcy debtor for repayment at the time of divorce. This, of course, is the situation expressly anticipated by the drafters of the House Report in the language quoted above.

⁹⁵H.R. REP. NO. 103-835, at 55, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3364.

⁹⁶*See generally* CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 33 (3d ed. 1998) (observing that legislative history provides “the primary source of extrinsic evidence of legislative intent”).

⁹⁷*See* Ashton v. Dollaga (*In re Dollaga*), 260 B.R. 493 (B.A.P. 9th Cir. 2001); Abate v. Beach (*In re Beach*), 203 B.R. 676 (Bankr. N.D. Ill. 1997); Woloshin v. Harris (*In re Harris*), 203 B.R. 558 (Bankr. D. Del. 1996); STEINFELD & STEINFELD, *supra* note 31, at 8, 41 n.127 (collecting cases). *But see* Zimmerman v. Soderlund (*In re Soderlund*), 197 B.R. 742 (Bankr. D. Mass. 1996) (allowing attorney to raise claim of nondischargeability of attorney fees under § 523(a)(15)).

As to claims of nondischargeability for family support obligations under § 523(a)(5), neither the language of the Bankruptcy Code nor the legislative history addresses the question of third-party creditor standing. To date, no reported cases have addressed the question in the context of pre-existing marital obligations that were allocated by the divorce court to the bankruptcy debtor.⁹⁸ The question of third-party creditor standing under § 523(a)(5) *has* arisen, like the counterpart issue under § 523(a)(15), in attorney fee cases. Contrary to the results in the property settlement cases, described above, many courts have granted the attorney creditor standing to assert support claims under § 523(a)(5). The attorney, along with the former spouse, is thereby entitled to raise the question whether the bankruptcy debtor's obligation to pay attorney fees for representation of the former spouse in the parties' divorce proceeding constitutes a nondischargeable family support debt under § 523(a)(5).⁹⁹

For example, in *Will v. Saxton*,¹⁰⁰ the bankruptcy court affirmed an attorney's standing to assert such a claim under § 523(a)(5), stating: "We view [the bankruptcy debtor's] undertaking to pay his wife's legal fees as a paradigmatic third party beneficiary contract In a third party beneficiary contract, benefits flow to both the promisee and the third party, and either may sue to enforce the contract."¹⁰¹ Thus, absent the type of constraint imposed by the legislative history of § 523(a)(15), the third-party creditor was permitted to raise the question whether the

⁹⁸*But see* Stranathan v. Stowell (*In re Stranathan*), 15 B.R. 223, 229 (Bankr. D. Neb. 1981) (accepting without discussion the standing of a marital creditor who claimed that the bankruptcy debtor's divorce-related obligation to repay marital debts constituted a nondischargeable support debt under § 523(a)(5)).

⁹⁹*See* SOMMER ET AL., *supra* note 24, ¶ 6.05(5) (summarizing case law).

¹⁰⁰*Will v. Saxton (In re Will)*, 116 B.R. 254 (Bankr. D. Colo. 1990).

¹⁰¹*Id.* at 255 (quoting *Pauley v. Spong (In re Spong)*, 661 F.2d 6, 10-11 (2d Cir. 1981)).

family-related purposes of § 523(a)(5) would be served by a judicial determination of nondischargeability.

Predictably, the same analysis would yield an affirmative answer to the question of third-party creditor standing under § 523(a)(5), in the situation where the creditor was a pre-divorce marital creditor whose claim was the subject of a repayment order in the debtor's divorce decree. Under this analysis, if the debtor's divorce decree ordered the debtor to assume exclusive responsibility for repaying a pre-divorce marital debt, the marital creditor would have standing to assert the nondischargeability of the resulting repayment obligation owed by the debtor to the former spouse. Furthermore, in a jurisdiction that has adopted the rule of the *Maune* case,¹⁰² discussed above, the question of third-party creditor standing could arise as well as to the debtor's direct, contractual obligation to the creditor.¹⁰³ The issue of third-party creditor standing would arise if a creditor, aware of the debtor's bankruptcy proceeding, believed that its interests were not well represented by the former spouse, perhaps because the former spouse failed to raise the issue of dischargeability under § 523(a)(5).

Allowing the third-party creditor to act to protect its interests in this manner would confer a privilege on the marital creditor not generally available to other creditors of the bankruptcy debtor. As in the related cases involving divorce attorneys, however, the resulting benefit to the

¹⁰²See *Maune v. Maune (In re Maune)*, 133 B.R. 1010 (Bankr. E.D. Mo. 1991), *overruled in part* by *McKinnis v. McKinnis*, 287 B.R. 245 (Bankr. E.D. Mo. 2002), *discussed supra* at text accompanying notes 61-67.

¹⁰³The analysis in the text, regarding the potential standing of third-party creditors to assert claims of nondischargeability under § 523(a)(5) as to marital debts allocated in divorce proceedings to the bankruptcy debtor, would not extend to the debtor's obligation to hold the former spouse harmless. Here, the benefit derived by the third-party creditor from a ruling of nondischargeability is de minimis, and would not justify the allowance of standing. See *generally* SOMMER ET AL., *supra* note 24, § 6.07[3], at 6-95 (making a similar observation in the context of a more general discussion of third-party standing under § 523(a)(5)).

third-party creditor would be a secondary effect flowing from the protection of family-related interests under § 523(a)(5) of the Bankruptcy Code.

IV. ADDITIONAL COMPLICATIONS ARISING UNDER § 523(a)(5) DUE TO CONCURRENT JURISDICTION OF THE STATE COURTS AND THE TIMING OF CLAIMS

Under the Bankruptcy Code, divorce-related family support debts do not, as a theoretical matter, require a judicial pronouncement to make them nondischargeable.¹⁰⁴ As a practical matter, however, if dischargeability as to a particular debt is contested, a judicial determination is required to resolve the dispute. Under the Bankruptcy Code, “[t]he issue of discharge of a section 523(a)(5) debt is never finalized unless some party litigates the issue in a court of competent jurisdiction.”¹⁰⁵ Thus, if the issue is not resolved during the debtor’s bankruptcy proceeding, a general order of discharge at the close of the case does not affect the debtor’s divorce-related support obligations. In these circumstances, both the bankruptcy debtor and the former spouse retain the right to raise the issue of dischargeability under § 523(a)(5) even after the close of the bankruptcy case.¹⁰⁶ Furthermore, claims relating to family support debts under § 523(a)(5) can be raised either in bankruptcy court or in the state court with jurisdiction over family matters.¹⁰⁷

¹⁰⁴STEINFELD & STEINFELD, *supra* note 31, at 4.

¹⁰⁵*In re Crawford*, 183 B.R. 103, 106 (Bankr. W.D. Va. 1995) (citing Fed. R. Bankr. P. 4007 (1990) (advisory committee note)).

¹⁰⁶*See* Fed. R. Bankr. P. 4007. The same allowance for delayed determinations of nondischargeability is extended to other types of debts listed in Bankruptcy Code § 523, including certain tax obligations. *Id.*

¹⁰⁷*See* Fed. R. Bankr. P. 4007. *See also* 4 COLLIER, *supra* note 31, ¶ 523.03 at 523-17 (discussing concurrent jurisdiction of state courts and federal bankruptcy courts).

These issues of timing and jurisdiction are governed by Rule 4007 of the Federal Rules of Bankruptcy Procedure, which is entitled “Determination of Dischargeability of a Debt.” Rule 4007 provides:

(a) Persons Entitled To File Complaint. A debtor or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt.

(b) Time for Commencing Proceeding [for certain claims, including those arising under § 523(a)(5)]. A complaint . . . may be filed at any time.¹⁰⁸

The Advisory Committee Note to Rule 4007 explains that “[s]ubdivision (b) does not contain a time limit for filing a complaint to determine the dischargeability of a type of debt listed as nondischargeable under § 523(a) . . . (5) Jurisdiction over this issue on these debts is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum.”¹⁰⁹ The Rhode Island Supreme Court summarized the provisions of Rule 4007 and the accompanying Note, as they apply to family support debts, as follows: “[C]ontests to dischargeability [can] be brought in either an appropriate state court or in the bankruptcy court, and [can] be brought before or after a discharge has been granted to the debtor.”¹¹⁰

By way of contrast, the bankruptcy rules governing claims that property settlement debts are nondischargeable under § 523(a)(15) are less lenient. Such claims must be raised in the

¹⁰⁸Fed. R. Bankr. P. 4007.

¹⁰⁹*Id.* advisory committee note.

¹¹⁰*Hopkins v. Hopkins*, 487 A.2d 500, 503 (R.I. 1985) (citing *Aldrich v. Imbrogno (In re Aldrich)*, 34 B.R. 776, 780 (B.A.P. 9th Cir. 1983)).

bankruptcy court, in a timely fashion before the close of the debtor's bankruptcy proceeding.¹¹¹

These stricter procedural rules follow from the basic theoretical premise that property settlement obligations, unlike family support debts, are not characterized as nondischargeable absent a contrary judicial ruling.

Not surprisingly, the analysis of support claims relating to marital obligations allocated in the bankruptcy debtor's pre-bankruptcy divorce proceeding becomes more complicated, if the claims are made *after* the close of the debtor's bankruptcy case. Special issues relating to the timing of claims of nondischargeability in these circumstances are discussed below in Subsection A. Furthermore, additional complications may arise when the delayed determination of dischargeability is made in a state court forum, where additional financial remedies between the former spouses may be available under state law. The interaction of the relevant state and federal law doctrines in these circumstances is discussed below in Subsection B.

A. *The Timing Factor*

The lenient rule governing the timing of § 523(a)(5) claims, embodied in Bankruptcy Rule 4007 and set out above, is based on the provisions of Bankruptcy Code § 523(c)(1). Section 523(c)(1) lists certain types of dischargeability claims that are waived by the creditor if they are not raised in a timely fashion before the debtor's bankruptcy case is closed.¹¹² Claims involving the dischargeability of family support obligations under § 523(a)(5) are not included

¹¹¹Fed. R. Bankr. P. 4007 advisory committee note. *See also* Carey v. Carey, 733 N.E.2d 14 (Ind. Ct. App. 2000) (reversing trial court determination of nondischargeability of debtor's property settlement obligation, on the ground that state court lacked jurisdiction under § 523(a)(15)); Margaret Howard, *A Bankruptcy Primer for the Family Lawyer*, 31 FAM. L.Q. 377, 392 (1997) (discussing exclusive bankruptcy court jurisdiction under § 523(a)(15)); Vance, *supra* note 23, at 369 (same).

¹¹²*See* 11 U.S.C. § 523(c)(1) (2000) (excluding § 523(a)(5) support debts from statutory list of debts automatically discharged in bankruptcy).

on the list. Therefore, a general order of the bankruptcy court discharging the debtor's obligations does not affect the debtor's divorce-related support obligations, if no judicial determination was made about their dischargeability.

In these circumstances, either the bankruptcy debtor or the former spouse is entitled to a post-bankruptcy ruling regarding the status of divorce-related debts under § 523(a)(5). The issue may arise in various procedural contexts following the close of the debtor's bankruptcy case. For example, the debtor may assert dischargeability in bankruptcy as a defense to enforcement of the debtor's divorce-related obligations by the former spouse in state court.¹¹³ In the alternative, the debtor may bring an action in bankruptcy court, alleging that the former spouse's efforts to enforce divorce-related debts in state court violate the bankruptcy court's earlier discharge order, and the former spouse may respond by claiming that the debts are nondischargeable support obligations.¹¹⁴

The rights of the bankruptcy debtor and the former spouse to raise issues relating to the dischargeability of divorce-related support debts in this manner may appear to be inconsistent with general principles governing the timing of claims in civil litigation. Absent the special bankruptcy rule permitting delayed claims, general rules of civil procedure could likely bar the former spouse from seeking a post-bankruptcy declaration of nondischargeability. Generally speaking, an interested party with notice of a court proceeding and the opportunity to be heard

¹¹³See, e.g., *McCarthy v. McCarthy*, No. FA 93-0343580, 1995 WL 684831 (Conn. Super. Ct. Nov. 8, 1995), *discussed infra* at text accompanying notes 126-27; *Bauer v. Bauer (In re Marriage of Bauer)*, 605 P.2d 750 (Or. Ct. App. 1980).

¹¹⁴See, e.g., *Brabham v. Brabham (In re Brabham)*, 184 B.R. 476 (Bankr. D.S.C. 1995), *discussed infra* at text accompanying notes 158-63.

therein is foreclosed from raising any issue following the close of the case which could have been raised during its pendency.¹¹⁵

In the normal course of a bankruptcy proceeding, the debtor submits a schedule of debts listing creditors and the debts to be discharged in bankruptcy.¹¹⁶ The bankruptcy court then notifies each listed creditor about the bankruptcy proceeding. Thereafter, the creditor may seek a judicial determination about the dischargeability of debts, by initiating a so-called adversary proceeding in bankruptcy court.¹¹⁷ Thus, if the bankruptcy debtor lists the former spouse as a creditor on the schedule of debts, the former spouse will receive notice of the bankruptcy proceeding and will have the opportunity to assert claims. In these circumstances, the special rule permitting the former spouse to assert the nondischargeability of support debts under § 523(a)(5) *after* the close of the bankruptcy case effectively creates an exception to the general rule of finality in litigation.

Unfortunately, the courts have sometimes failed to recognize and apply this exception to the principle of finality, established under the Bankruptcy Code for determinations about the dischargeability of family support debts. For example, in *White v. White*,¹¹⁸ the divorced bankruptcy debtor listed a divorce-related hold harmless obligation to his former wife on his schedule of debts in bankruptcy. The former wife, who received formal notice of the bankruptcy

¹¹⁵18 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE chs. 130-132 (3d ed. 1997).

¹¹⁶*See* 1 COLLIER, *supra* note 31, § 103[2][6] (discussing Bankruptcy Code § 521 and Bankruptcy Rule 1007, which set out the substantive and procedural requirements for filing the schedule of debts).

¹¹⁷*See* 1 GINSBERG & MARTIN, *supra* note 33, § 11.07[c] (discussing adversary proceedings initiated by creditors to assert the nondischargeability of debts).

¹¹⁸*White v. White*, 666 N.E.2d 459 (Ind. Ct. App. 1996).

proceeding, did not make any claim about the dischargeability of the hold harmless debt in the debtor's bankruptcy case. Following the debtor's discharge in bankruptcy and the close of his bankruptcy case, the former wife paid the third-party marital debts which were the subject of the divorce court's hold harmless order. She then asked the state family court to hold her former husband in contempt of the hold harmless order, which required him to reimburse her in these circumstances. In *White*, the Indiana Court of Appeals ruled that the former wife had waived this claim by not raising it in the debtor's bankruptcy proceeding. In the words of the court, "the husband here scheduled his potential hold harmless liability to the wife [in his bankruptcy proceeding] and thereby secured a discharge of his personal liability to her."¹¹⁹ In this manner, the court improperly denied the former wife's right, established under the Bankruptcy Code, to seek a delayed ruling about the survivability of the debtor's hold harmless obligation as a family support debt.¹²⁰

In *White v. White*, the bankruptcy debtor's inclusion of his divorce-related hold harmless obligation on the schedule of debts in bankruptcy led the Indiana Court of Appeals to mistakenly deny his former spouse's right to a subsequent determination as to nondischargeability of the debt. Conversely, the bankruptcy debtor's *failure* to list divorce related debts may also lead to analytical confusion, in light of the rule permitting post-bankruptcy judicial determinations about the dischargeability of divorce-related support obligations. The general principle of litigation

¹¹⁹*Id.* at 460.

¹²⁰Notably, after ruling that the debtor's obligation to reimburse his former wife for payment of their marital debts had been discharged in bankruptcy, the *White* court fashioned a different financial remedy for her. The court ruled that the former wife would no longer be required to transfer her interest in certain jointly owned real estate, as required by their divorce decree. According to the court, the wife's obligation to transfer title to the husband had been contingent on his payment of the marital debts. *White*, 666 N.E.2d at 461.

which must be considered here provides that a person without notice of a judicial proceeding cannot be adversely affected by it.¹²¹ This general principle is reflected in § 523(a)(3) of the Bankruptcy Code,¹²² which establishes an exception from discharge for certain debts not listed on the schedule of debts if the creditor had no actual notice of the bankruptcy proceeding. Section 523(a)(3) does *not* apply to the bankruptcy debtor's divorce-related support obligations to a former spouse, however, because the close of the debtor's bankruptcy case is not "final" in terms of the former spouse's potential support claim. As a result, a former spouse may in some cases be barred from enforcing divorce-related obligations of the bankruptcy debtor, even though the former spouse had no notice of the bankruptcy case.

Like the general principle of civil litigation upon which it is based, § 523(a)(3) is designed to avoid prejudice to innocent parties resulting from their failure to receive notice and an opportunity to participate in judicial proceedings that might affect their interests. Thus, § 523(a)(3) preserves debts for which claims of nondischargeability can only be made during the pendency of the bankruptcy case, such as claims that property settlement obligations are nondischargeable under § 523(a)(15), "unless such creditor had notice or actual knowledge of the case in time [to request a determination of nondischargeability during the bankruptcy proceeding]."¹²³

¹²¹See generally FRIEDENTHAL ET AL., *supra* note 15, § 14.13 (discussing constitutional requirements regarding notice and opportunity to be heard).

¹²²See 11 U.S.C. § 523(a)(3) (2001).

¹²³*Id.* In *Merritt v. Merritt*, 693 N.E.2d 1320 (Ind. Ct. App. 1998), the court ruled that the notice requirement of § 523(a)(3) was met, because the bankruptcy debtor's former wife had *actual* notice of his bankruptcy. As a result, the debtor's hold harmless obligation, which was characterized by the court as a dischargeable property settlement debt under § 523(a)(15), could not be enforced following the close of the bankruptcy case.

Section 523(a)(3) need not operate in this same manner in order to protect the corresponding interests of creditors without notice who are permitted to assert the nondischargeability of their claims *even after* the close of the debtor's bankruptcy case.¹²⁴ As to these claims, which include support claims arising under § 523(a)(5), the absence of notice to the creditor during the debtor's bankruptcy case does not have the same prejudicial impact. As a result, the debtor's failure to list the former spouse as a creditor on the schedule of debts in bankruptcy does not absolutely preserve the former spouse's support claim. Rather, the debtor remains entitled to assert the dischargeability of alleged support debts in post-bankruptcy litigation.¹²⁵

For example, in *McCarthy v. McCarthy*¹²⁶ the Connecticut Superior Court permitted the bankruptcy debtor to litigate the dischargeability of the hold harmless obligation to his former wife established in their divorce decree, in a post-bankruptcy family court proceeding.¹²⁷ The court allowed the debtor to establish that the obligation did not meet the standard of § 523(a)(5) for nondischargeable support debts. The fact that the former wife had received no notice of the

¹²⁴There are additional exceptions to the rule that § 523(a)(3) automatically preserves the claims of creditors without notice. See 4 COLLIER, *supra* note 31, ¶ 523.09[5] (discussing absence of prejudice to certain creditors resulting from lack of notice in no asset cases).

¹²⁵See SOMMER ET AL., *supra* note 24, ¶ 6.08[4], at 6-117 and n.37a.

¹²⁶*McCarthy v. McCarthy*, No. FA 93-0343580, 1995 WL 684831 (Conn. Super. Ct. Nov. 8, 1995).

¹²⁷The former wife's pleadings in *McCarthy* requested a determination under § 523(a)(5) as to the nondischargeability of her former husband's direct, contractual liability the mortgage lender. *McCarthy* at *1. The court reformulated her request to address the hold harmless debt alone. *Id.* at *2.

earlier bankruptcy proceeding¹²⁸ did not prevent the state court from discharging the hold harmless obligation.¹²⁹

As described in this Subsection, numerous complications arise in analyzing the dischargeability of family support debts under § 523(a)(5), because the Bankruptcy Code provides that the issue can be raised either during the debtor’s bankruptcy proceeding or in subsequent litigation. Subsection B highlights the additional complications that may arise when the delayed judicial determination is made in a state family court proceeding.

B. The Federalism Issues

The laws of every state authorize family courts to enforce the financial provisions of an earlier divorce decree, to modify those terms, and to make new orders in certain circumstances.¹³⁰ At the same time, these state courts have concurrent jurisdiction with the federal bankruptcy court to determine the dischargeability of support debts under § 523(a)(5).¹³¹ Thus, the financial relationship of former spouses, following their divorce and the close of the debtor’s bankruptcy case, may be modified by either a judicial determination about the survivability of divorce-related support debts under § 523(a)(5), or new financial orders of the family court. Both the state courts and the federal bankruptcy courts have sometimes

¹²⁸*Id.* at *1.

¹²⁹*But see In re Marriage of Bauer*, 605 P.2d 750, 751 (Or. Ct. App. 1980) (“[N]othing in the record before us indicates that the wife had either legal or actual notice of the bankruptcy proceedings. Therefore, husband’s obligation to her was not discharged.”).

¹³⁰*See CLARK, supra* note 20, §§ 16.5 to .7, 17.1 to .4 (discussing powers of the state divorce courts over financial matters in the post-divorce family).

¹³¹*See Fed. R. Bankr. P.* 4007 (1990).

experienced difficulty in reconciling the two sets of legal rules—federal bankruptcy laws and state family laws—governing these matters.

The financial orders in a typical divorce decree distribute the assets and liabilities of the marriage and require the payment of child support and spousal support or maintenance by one former spouse to the other.¹³² In the event of subsequent noncompliance by the obligor, the divorce court may, in certain cases, enforce its orders by holding the noncompliant obligor in civil contempt of court.¹³³ Under the contempt power, the court may impose sanctions, including fines and imprisonment, to coerce compliance with its initial order.¹³⁴ Besides the remedy of contempt, the family courts have other enforcement remedies at their disposal, including the garnishment of wages, intercept of tax refunds, and imposition of liens on the obligor's property.¹³⁵

In addition to these powers of enforcement, the family courts have the authority, under certain circumstances, to modify the financial provisions of a divorce decree. As to support awards for children and the former spouse, the general standard for modification is changed financial circumstances of the parties affecting the continuing appropriateness or fairness of the

¹³²See GREGORY ET AL., *supra* note 2, chs. 9-10 (discussing family support and property laws in the context of divorce).

¹³³See CLARK, *supra* note 20, § 16.6, at 673-76. There are, however, significant limitations on the authority of the courts regarding the exercise of their contempt powers. In many states, equitable distribution orders requiring the transfer of assets cannot be enforced by holding the obligor in contempt of court. *Id.* at 673-74. Furthermore, since civil contempt is used as a coercive measure, it is not invoked when the obligor is financially unable to comply with the initial court order. *Id.* at 675-76.

¹³⁴See GREGORY ET AL., *supra* note 2, § 9.06(2)(a), at 334-35.

¹³⁵See TURNER, *supra* note 16, § 9.05, at 644-51; GREGORY ET AL., *supra* note 2, § 9.06(2)(b).

initial order.¹³⁶ Judicial authority to address the issue of spousal support in post-divorce proceedings is generally premised on the entry of a support order in the original divorce decree.¹³⁷ By way of contrast, initial child support orders can be formulated at any time.¹³⁸

As to the provisions of a divorce decree addressing the equitable distribution of assets and liabilities, the powers of the family court in post-divorce proceedings are more restricted. Unlike support obligations, property orders are regarded as final orders of the court. Thus, as a general rule, these orders are not subject to modification.¹³⁹ In exceptional cases, however, the divorce court can modify the terms of an equitable distribution order, if one party satisfies the general standard under state law for reopening final orders in civil litigation.¹⁴⁰

The purpose of these state domestic relations laws governing the post-divorce family differ from the goals of the federal bankruptcy laws regulating the dischargeability of divorce-related debts. As a matter of policy, the Bankruptcy Code is designed to permit the bankruptcy debtor to enjoy an economic fresh start,¹⁴¹ subject to limited exceptions for continuing family responsibility. On the other hand, state laws governing the enforcement and modification of

¹³⁶See CLARK, *supra* note 20, § 16.5, at 658-71 (alimony), § 17.2, at 724-33 (child support).

¹³⁷D. KELLY WEISBERG & SUSAN F. APPLETON, MODERN FAMILY LAW 698 (2d ed. 2002).

¹³⁸See CLARK, *supra* note 20, § 17.2, at 724.

¹³⁹TURNER, *supra* note 16, § 9.06, at 651-53.

¹⁴⁰See *id.* at 656-63. See generally FRIEDENTHAL ET AL., *supra* note 15, § 12.6 at 572-73 (describing exceptional circumstances, such as fraud on the court, which justify reopening a final judgment). Cases in which former spouses sought to reopen property settlement orders are discussed *infra* at text accompanying notes 156-66.

¹⁴¹1 GINSBERG & MARTIN, *supra* note 33, § 1.01[H], at 1-7 (discussing the goal in bankruptcy law of “afford[ing] the honest debtor a fresh economic start”).

divorce decrees are concerned exclusively with the ongoing financial equities among family members. The resulting tension between the state and federal laws governing the financial affairs of the post-divorce family is reflected in many cases where the courts have trouble reconciling the two sets of laws and conflicting policy goals. This tension is well-illustrated in numerous cases involving the allocation of responsibility between former spouses for obligations incurred jointly during marriage.

1. The Nonenforceability of Discharged Property Settlement Obligations

The most straightforward interaction between federal bankruptcy law and state family law occurs when the bankruptcy court makes a clear determination that a debtor's divorce-related obligations are dischargeable under § 523(a)(5) or § 523(a)(15). Here, the so-called discharge injunction of Bankruptcy Code § 524(a)(2) bars any subsequent attempt by the debtor's former spouse to enforce the provisions of the parties' divorce decree in state court. Section 524 provides that the debtor's discharge of a debt in bankruptcy "operates as an injunction against the commencement or continuation of an action . . . to collect . . . any such debt as a personal liability of the debtor . . ." ¹⁴² The discharge injunction applies to the debts arising from a divorce court order requiring the debtor to repay obligations incurred during marriage and to hold the former spouse harmless, if the bankruptcy court subsequently determines these debts to be dischargeable. Thereafter, the state court has no authority to enforce its earlier orders establishing the debtor's obligations to the former spouse.

¹⁴²11 U.S.C. § 524(a)(2) (2001), *discussed in* 4 COLLIER, *supra* note 31, § 524.02.

The general principle of federal preemption of state law requires this result.¹⁴³ The Washington state court in *In re Marriage of Myers*¹⁴⁴ relied on this principle in refusing to grant the request of a bankruptcy debtor's former wife to hold him in contempt of court for failing to comply with certain divorce decree provisions. Specifically, the debtor had not repaid the third-party debts incurred during marriage and allocated to him for repayment at the time of divorce.¹⁴⁵ The *Myers* court described the controlling effect of the former husband's discharge of his divorce-related obligations in bankruptcy on the power of the state court, as follows:

Mr. Myers cannot be recharged with debts which became his sole obligation as part of a property settlement but which were later discharged in bankruptcy. Nor could Mrs. Myers, who was named as a creditor in the bankruptcy proceeding, enforce the provision in the dissolution decree holding her harmless from those debts. This court is bound by the bankruptcy laws¹⁴⁶

2. The Reformation of Discharged Property Settlement Obligations

As illustrated by the *Myers* case, the doctrine of federal preemption bars the enforcement in state court of a debt arising under the debtor's settlement agreement or divorce decree, if the

¹⁴³See generally JOHN W. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 319 (6th ed. 2000) ("The Supremacy Clause mandates that federal law overrides, *i.e.*, preempts, any state regulation where there is an actual conflict between the two sets of legislation.").

¹⁴⁴*In re Marriage of Myers*, 773 P.2d 118 (Wash. Ct. App. 1989).

¹⁴⁵Following the negative ruling on her enforcement petition described in the text, Mrs. Myers returned to the state court and obtained an upward adjustment of alimony based on the parties' changed financial circumstances. See *infra* note 169.

¹⁴⁶*Myers*, 773 P.2d at 121. See also *Haines v. Haines*, 501 N.W.2d 470 (Wis. Ct. App. 1993) (denying post-bankruptcy enforcement of a contempt order obtained by debtor's former wife *prior to* his bankruptcy, because the primary purpose of the contempt proceeding was debt collection, and the debtor's obligations to pay marital debts and to hold his former wife harmless had been discharged in bankruptcy).

debt was clearly discharged in bankruptcy. Furthermore, the former spouse of the bankruptcy debtor is generally precluded, as a matter of state law, from seeking relief in state court in the form of a new or revised equitable distribution of property order. Unlike child support and spousal maintenance orders,¹⁴⁷ equitable distribution orders are regarded as final decrees of the family court at the time of divorce. As a general rule, such orders cannot be reopened or modified in a post-divorce modification proceeding.¹⁴⁸ Exceptions can be made, however, under state laws of general application providing for post-judgment relief from final orders in certain, limited circumstances.¹⁴⁹

For example, in *In re Marriage of Beardslee*¹⁵⁰ the bankruptcy debtor's former wife obtained a court order reforming the property distribution provision of her divorce decree, under the Kansas statute conferring discretion on civil trial courts to grant relief from final judgments for "any . . . reason justifying relief from the operation of the judgment."¹⁵¹ In *Beardslee*, the

¹⁴⁷The post-bankruptcy modification of alimony is discussed *infra* at text accompanying notes 170-77.

¹⁴⁸In *Faster v. Childers*, 416 N.W.2d 781 (Minn. Ct. App. 1987), the state appellate court reversed a trial court decision to reopen and modify the equitable distribution order in a bankruptcy debtor's divorce decree, following the debtor's discharge of divorce-related debts in bankruptcy. The appellate court relied upon the rule that property distribution orders were not modifiable under state law. The discharged debts in the *Childers* case were the debtor's obligations relating to third-party debts incurred during the debtor's marriage and allocated by the divorce court to the debtor for repayment. After reversing the trial court's decision to reopen the property distribution order, the Minnesota Court of Appeals remanded the case to the trial court to consider the possible modification of the alimony provision in the debtor's divorce decree.

¹⁴⁹See TURNER, *supra* note 16, at 651-53. See generally FRIEDENTHAL ET AL., *supra* note 15, § 12.6 (discussing general rules governing relief from final judgments in civil litigation).

¹⁵⁰*In re Marriage of Beardslee*, 922 P.2d 1128 (Kan. Ct. App. 1996).

¹⁵¹KAN. STAT. ANN. § 60-260(b)(6) (currently codified at KAN. CIV. PROC. CODE ANN. § 60-260(b)(6) (West 1964 & Supp. 2003)), *cited in Beardslee*, 922 P.2d at 1132. Although this

initial divorce decree had awarded the family home to the former husband, and also required him to assume the responsibility for two mortgages on the home. Specifically, the divorce decree had ordered the former husband to refinance the first and second mortgages within three months, in a manner that would relieve the former wife of all liability. A final provision in the divorce decree had ordered the former husband to repay other marital debts and hold his former wife harmless as to these liabilities. One year later the former husband, who had not refinanced the home or repaid the other marital debts as required by the divorce decree, filed for bankruptcy. While the bankruptcy case was pending, the former wife returned to the divorce court and obtained a revised property distribution order.

The revised property settlement order in *Beardslee* required the immediate sale of the marital home, distribution of the sale proceeds to satisfy the two mortgage loans and other marital debts, and delivery of any balance to the former husband. According to the trial court, this relief from the original provisions of the divorce decree was justified, in light of the former husband's noncompliance with the decree and his decision to file for bankruptcy. On appeal, the Kansas Court of Appeals ruled that the trial court had properly applied the statute governing relief from final judgments, quoted above, to reopen and revise the equitable distribution provision in the bankruptcy debtor's divorce decree. The appellate court affirmed the revised equitable distribution of property order.

state statute confers discretion on the trial judge to reopen a final judgment "for any reason," Professor Friedenthal observes that such broad statutory language has generally been construed by the courts in a narrow manner. *See* FRIEDENTHAL ET AL., *supra* note 15, at 579-81 (discussing judicial imposition of "extraordinary circumstances" limitation on this type of broad statutory standard). Narrow judicial construction of the statutory language reflects the strong interest of the legal system in finality, especially as to property titles.

The timing of the two lawsuits in *Beardslee* highlights an additional procedural complexity, which arises when the parties ask the state court and the federal bankruptcy court to act simultaneously. The Bankruptcy Code provides the rule, observed by the state court in *Beardslee*, which governs the federal-state jurisdictional conflict in this situation. Specifically, Bankruptcy Code § 362¹⁵² requires the automatic stay of creditor litigation and other activity involving the debtor's property, upon the filing of the bankruptcy case.¹⁵³ The opinion in *Beardslee* stated that the bankruptcy court had granted Mrs. Beardslee's request for a waiver of this automatic stay, thereby enabling her to initiate an action in state court while her former husband's bankruptcy case was pending. Notably, the analysis of the issues in state court would predictably have been the same if the former wife sought the revised equitable distribution order in state court only after the close of the debtor's bankruptcy case.

The *Beardslee* opinion does not provide any additional facts about the relative progress of the two simultaneous proceedings. It appears, however, that the former husband's discharge of debts at the close of his bankruptcy case occurred during the pendency of the family court proceeding. Thus, the Kansas family court in *Beardslee* cited the changed circumstances of the parties resulting from the discharge of the former husband's divorce-related debts, along with his noncompliance with the earlier divorce court order, in granting relief to the former wife.

Even if the former spouse is able to overcome the threshold hurdle of satisfying the state law standard for reopening a final judgment, as in *Beardslee*, another legal doctrine may prevent

¹⁵²11 U.S.C. § 362 (2001), *discussed in* 3 COLLIER, *supra* note 31, ¶ 362.01(1)-(3).

¹⁵³Section 362 of the Bankruptcy Code establishes certain exceptions to the general rule that a bankruptcy proceeding automatically stays creditor activity involving the debtor's property, including an exception for certain actions involving the debtor's family support obligations. *See* 11 U.S.C. § 362(b)(2), *discussed in* 3 COLLIER, *supra* note 31, § 362.05[2].

the request for a revised property distribution from being heard by the court. Namely, the former spouse's effort to obtain a revised equitable distribution order may be defeated by the federal preemption doctrine¹⁵⁴ discussed above in the context of the *Myers* case.¹⁵⁵ In *Beardslee*, for example, the bankruptcy debtor argued (unsuccessfully) that the trial court's revised property settlement order, which required payment of the two mortgages and other marital debts out of the property assigned to him at the time of divorce (the family home), was barred by the bankruptcy court's order discharging him of liability for those debts. The federal preemption claim here is less compelling than the corresponding issue presented in the *Myers* case, where the former spouse attempted to directly enforce the debtor's obligations under the divorce decree after they had been expressly discharged in bankruptcy. Nevertheless, the reformed property settlement order in a case like *Beardslee* would be unlawful under the preemption principle if it simply reinstated discharged obligations of the debtor.¹⁵⁶

In *Beardslee*, the Kansas Court of Appeals rejected the former husband's preemption claim. The court's opinion does not clearly explain why the court's revised property settlement did not violate the bankruptcy court's discharge injunction by simply reinstating the debtor's

¹⁵⁴*See, e.g.,* Hogg v. Hogg, 816 A.2d 314 (Pa. Super. 2003) (reversing trial court decision to "credit" former wife for amount of bankruptcy debtor's discharged marital debts, when distributing proceeds of house sale).

¹⁵⁵*In re* Marriage of Myers, 773 P.2d 118 (Wash. Ct. App. 1989), *discussed supra* at text accompanying notes 144-46.

¹⁵⁶Although the *Beardslee* court drew no distinction between the mortgage loans and the unsecured marital debts, the trial court order to sell the family home to satisfy the mortgage loans raises fewer concerns under the doctrine of federal preemption than the order involving repayment of the unsecured marital debts. A discharge in bankruptcy extends only to the debtor's personal liability for debts, and does not affect security interests like the mortgages in *Beardslee*. *See* 1 GINSBERG & MARTIN, *supra* note 33, ¶ 11.01[B], at 11-9 to -10. In *Beardslee*, the debtor's discharge in bankruptcy did not destroy the right of the mortgage lenders to foreclose on the family home in the event of a default in repayment of the mortgage loans.

discharged obligations. According to the *Beardslee* court, the debts involved in the revised divorce court order were not the same debts allocated to the former husband in the initial divorce decree, because following his bankruptcy only the former wife was liable to the third-party creditors. In the words of the court, “the district court recognized that [the former husband’s] portion of the joint debts had been discharged, and . . . ordered [him] to pay them, recognizing them as [the former wife’s] debts.”¹⁵⁷ Based on this distinction, the *Beardslee* court concluded that the revised order requiring payment of the mortgage loans from the sale of the husband’s property did not reinstate the discharged obligations.

An alternative theory existed for rejecting the former husband’s federal preemption claim in *Beardslee*. Namely, the former husband’s obligations under the revised state court property settlement order were *not* the same as his obligations under the initial divorce decree, because the initial decree required him to pay the marital debts out of his general assets, while the revised decree ordered him to satisfy the debts out of the sale proceeds of the family home. The distinction would be significant if the proceeds from the sale of the home were insufficient to pay off the marital creditors, because under the revised order the former husband would not be liable for the difference. This limitation of the former husband’s liability to the value of the house supports the conclusion of the *Beardslee* court that the revised state court order did not violate the discharge injunction of the bankruptcy court.

Unlike the Kansas state court in the *Beardslee* case, the bankruptcy court in *In re Brabham*¹⁵⁸ found a violation of the bankruptcy court’s earlier discharge injunction in a state court’s modification of the bankruptcy debtor’s divorce decree. In *Brabham*, the initial divorce

¹⁵⁷*In re Marriage of Beardslee*, 922 P.2d 1128, 1133 (Kan. Ct. App. 1996).

¹⁵⁸*Brabham v. Brabham (In re Brabham)*, 184 B.R. 476 (Bankr. D.S.C. 1995).

decree of the South Carolina family court included a provision dividing the debts incurred during marriage between the divorcing spouses. The former wife was assigned the responsibility to repay and hold her former husband harmless as to thirty-five percent of the marital debts, and the remainder were allocated to the former husband. An additional provision of the property distribution order required the former husband to transfer twenty percent of his military pension to his former wife. Shortly after their divorce, the former wife filed for bankruptcy, and obtained a general discharge of her debts. Following the close of her bankruptcy case, the debtor's former husband filed a motion in state court seeking to set aside the earlier financial orders of the divorce court, and to obtain a new equitable distribution order.

The South Carolina rule of civil procedure applied in the *Brabham* case¹⁵⁹ allowed for relief from any final judgment in the discretion of the trial judge, based on equitable considerations. Pursuant to this standard, the South Carolina family court granted the former husband's motion to set aside the financial provisions of the divorce decree, and scheduled a hearing to reconsider the matters addressed therein. In the scheduled hearing, the former husband planned to request an order permitting him to keep his entire pension, in light of the fact that he was now solely liable for all of the marital debts. The South Carolina court had already indicated its receptivity to this position when the court granted the former husband's motion to reopen the divorce decree.

Shortly after the South Carolina family court agreed to revise its equitable distribution order, the former wife returned to the bankruptcy court, claiming that her former husband's action in state court violated the discharge injunction issued at the close of her bankruptcy case.

¹⁵⁹The rule applied in the *Brabham* case was S.C.R. Civ. P. 60(b)(5), cited in *Brabham*, 184 B.R. at 477, which was subsequently repealed.

As a threshold matter, the bankruptcy court in *Brabham* addressed the status of the debtor's divorce-related obligations. First, the bankruptcy court observed that the former wife's joint contractual liability to the third-party marital creditors had clearly been discharged in her earlier bankruptcy proceeding. Next, the court made an initial determination under § 523(a)(5) regarding dischargeability of the debtor's obligation to hold her former husband harmless as to thirty-five percent of their marital debts. After applying the federal standard for nondischargeable family support debts to the facts of the case, the court ruled that the hold harmless obligation failed to meet this standard and was also discharged.

On the key issue of preemption, the *Brabham* court ruled that the former husband's attempt to modify the property settlement in state court, by eliminating the bankruptcy debtor's claim to his pension benefits, constituted an unlawful effort to collect the debts that had been discharged in bankruptcy. The court enjoined the former husband from proceeding on his property claim in state court. Notably, the court "view[ed] the [former husband's] efforts as de facto collection actions, regardless of whether [he was] formally seeking a 'dollar for dollar' exchange."¹⁶⁰

The bankruptcy court in the *Brabham* case addressed the difficult issue of respect for the authority of the state court, in the situation where the federal court's order effectively denied recognition to a ruling of the state family court as follows:

In making this ruling, this Court in no way seek [sic] to imply that it has authority over the Family Courts of this State or that this Court does not acutely recognize

¹⁶⁰*Brabham*, 184 B.R. at 488. See also *Fitzgerald v. Fitzgerald*, 481 A.2d 1044, 1046 (Vt. 1984) (denying former spouse's motion for relief from equitable distribution order on grounds of fraud, because "to reopen proceedings in state court on this issue would be . . . in violation of [the bankruptcy court's discharge injunction under] § 524 . . .").

the Family Court's expertise on domestic issues. . . . However, it is one of this Court's responsibilities to enforce the bankruptcy laws.¹⁶¹

The *Brabham* court expressly limited the scope of its ruling to the particular subject matter of the case, namely, the former husband's effort to reopen and modify a property settlement order in state court. The bankruptcy court emphasized that its ruling did not extend to the post-bankruptcy modification of alimony or child support orders in state court. According to the opinion in *Brabham*, "whether the family court seeks to subsequently modify support, maintenance or alimony, as opposed to a property settlement, is the paramount factor in the determination of whether such action violates a prior bankruptcy discharge."¹⁶² Indeed, the modification of spousal maintenance and child support orders in the family court is the most readily available avenue of relief for the former spouse in many cases, following the discharge of a debtor's responsibilities regarding pre-divorce marital debts. Unfortunately for the former husband in *Brabham*, his waiver of any claim to alimony at the time of divorce¹⁶³ precluded this form of relief.

3. The Post-Bankruptcy Modification of Child Support and Spousal Maintenance Orders Following the Discharge of Divorce-Related Debts

The crucial distinction between the modification of an alimony or support order, on the one hand, and the reopening of a property settlement order, on the other hand, emphasized in the *Brabham* opinion above, is illustrated by the result in another bankruptcy court case, *In re*

¹⁶¹*Brabham*, 184 B.R. at 488.

¹⁶²*Id.* at 487.

¹⁶³*See id.* at 477.

Danley.¹⁶⁴ There, the New Mexico divorce court had initially ordered the former husband to assume the responsibility for repaying certain debts incurred jointly with his wife during marriage. The former husband's subsequent discharge in bankruptcy resulted in the former wife's sole responsibility for these marital debts. Next, the family court granted the former wife's request for relief, by adjusting her alimony award upward from the amount of one dollar to the amount of the debts discharged by the debtor in bankruptcy. Finally, the former husband returned to bankruptcy court seeking relief from the revised state court judgment, based on the theory of the *Brabham* case. The *Danley* court, however, denied his application, ruling that the former wife had not violated the bankruptcy court's earlier discharge injunction.

According to the bankruptcy court in *Danley*, the state court's decision to increase the alimony award was based on the general state law standard of changed financial circumstances, which encompassed the economic changes for both former spouses resulting from the debtor's bankruptcy. The *Danley* court acknowledged that "[t]he state court's compulsion of the debtor to pay otherwise discharged obligations (as support measured by the amount and payment schedule of the discharged obligation) can . . . frustrate the federal policy of a fresh start."¹⁶⁵ Nevertheless, the court did not view this result as a reinstatement of the former husband's discharged debts, or a violation of the bankruptcy court's discharge injunction.

Unlike the bankruptcy court in the *Brabham* case, the *Danley* court deferred to the post-bankruptcy decisions of the state court, which protected family interests at the expense of the debtor's fresh start. The crucial difference between the two cases, giving rise to such different results in the final bankruptcy court forum, rested on the nature of the state court actions: the

¹⁶⁴*In re Danley*, 14 B.R. 493 (Bankr. D.N.M. 1981).

¹⁶⁵*Id.* at 495.

modification of an alimony award in *Danley*, and the proposed reformation of a property distribution order in *Brabham*. Indeed, there are substantive differences between the relationship of the former spouses under the law of alimony and under the equitable distribution doctrine, which support the conclusion that the substitution of an alimony order for discharged property settlement obligations is not a disguised effort to collect the discharged debts. Specifically, under the laws of many states, alimony orders can be terminated upon the recipient's death or remarriage, while court orders allocating property and debts between former spouses are unaffected by such changed circumstances.¹⁶⁶ Furthermore, as described earlier, alimony orders are generally modifiable based on future changes in the financial circumstances of the parties, while equitable distribution obligations are not.¹⁶⁷ Thus, the bankruptcy debtor's obligation to a former spouse under the revised alimony order in a case like *Danley* is different in nature from the debtor's discharged property settlement obligation, even when the dollar amounts of the two obligations are the same.

A number of state courts have reached the same result on this issue as the bankruptcy court in *Danley*. For example, the Connecticut state court in *Lesniewski v. Walsh*¹⁶⁸ rejected the bankruptcy debtor's claim that an upward adjustment of alimony violated the discharge injunction issued at the close of his post-divorce bankruptcy case.¹⁶⁹ In *Lesniewski*, the parties'

¹⁶⁶See WEISBERG & APPLETON, *supra* note 137, at 696-97.

¹⁶⁷The modifiability of alimony orders under state law is discussed *supra* at text accompanying notes 140-41.

¹⁶⁸*Lesniewski v. Walsh*, No. 98-76988S, 2001 Conn. Super. LEXIS 713 (Conn. Super. Ct. Mar. 7, 2001).

¹⁶⁹See also *In re Marriage of Myers*, 773 P.2d 118, 122 (Wash. Ct. App. 1989), *discussed supra* at text accompanying notes 144-46 (allowing increased alimony award for bankruptcy debtor's former spouse, after ruling that hold harmless debts explicitly discharged in bankruptcy

divorce decree required the former husband to pay alimony in the amount of one dollar per week, and to hold his former wife harmless as to the joint marital debt owed to a credit union. During the debtor's subsequent bankruptcy proceeding, his former wife claimed that this hold harmless obligation was in the nature of support and nondischargeable under § 523(a)(5). The bankruptcy court rejected this claim, and discharged the former husband's contractual liability to the third-party creditors as well as the hold harmless obligation to his former wife. Following the close of the debtor's bankruptcy case, the state family court in *Lesniewski* granted the former wife's request for increased alimony, based on the parties' changed financial circumstances. Specifically, the court relied on the fact that the former wife had been making payments of fifty dollars per month to the credit union since the date of her husband's discharge in bankruptcy. Of course, the divorce court had anticipated at the time of divorce that the former husband would be making these payments. The *Lesniewski* court ordered an increase in weekly alimony payments from one dollar to seven dollars per week until the debtor had transferred the full amount of the credit union debt to his former wife.

According to the Connecticut court in *Lesniewski*, revision of the alimony order in this manner was not precluded by the bankruptcy court's earlier ruling that the debtor's hold harmless obligation was a dischargeable nonsupport debt. Indeed, the court pointed out that the bankruptcy court opinion rejecting the former wife's claim under § 523(a)(5) had referred to the possibility of increased alimony in a post-bankruptcy state court proceeding. The bankruptcy court had stated: "In view of the [information contained in the divorce proceeding] transcript,

could not be subsequently enforced by the state court); *In re Marriage of Eckert*, 424 N.W.2d 759, 763 (Wis. Ct. App. 1988) ("We conclude that a state family court may modify a payor spouse's support obligation . . . following the payor's discharge of [divorce-related debts, including a hold harmless obligation,] in bankruptcy without doing major damage to the clear and substantial federal interests of the bankruptcy code.").

the [former wife] apparently may request an alimony modification upon nonpayment by the debtor of the credit union debt. The [family court] may or may not grant such a request taking into account present circumstances.”¹⁷⁰

The bankruptcy court’s reference to “present circumstances” highlights an important difference between the state law standard for modification of family support orders and the federal law standard for identifying nondischargeable support obligations under § 523(a)(5) of the Bankruptcy Code. The federal law standard for identifying nondischargeable support obligations focuses primarily on the intent and circumstances of the parties at the time of the divorce, but not their circumstances at the time of the debtor’s bankruptcy.¹⁷¹ By way of contrast, as illustrated in the *Lesniewski* case, the state court modification proceeding requires an additional inquiry into the condition of the parties at the time of the lawsuit. This difference reinforces the widely-held view, expressed by the *Lesniewski* court, that the state court is not foreclosed, under principles of federal preemption, from revisiting the support issue following

¹⁷⁰*Lesniewski v. Walsh (In re Walsh)*, 247 B.R. 30, 35 (Bankr. D. Conn. 2000), *quoted in Lesniewski*, 2001 Conn. Super. LEXIS 713, at *5.

¹⁷¹SOMMER ET AL., *supra* note 24, ¶ 6.04(11). The authors observed, however, that “(a) small minority of courts, led by the Court of Appeals for the Sixth Circuit, has considered one other factor in deciding whether a marital obligation is nondischargeable as support or alimony. That factor is the circumstances of the parties at the time of the dischargeability proceeding.” *Id.* at 6-48. The authors expressed the following concern about issue preclusion in cases where the Sixth Circuit standard is applied:

[W]hen the bankruptcy court has refused to take current needs into account in its dischargeability determination and those needs have changed since the original marital agreement, . . . a state court should not be precluded from assessing the current circumstances of the parties However, it is far more difficult to justify a modification action when the bankruptcy court has already ruled upon the amount necessary to satisfy the obligee spouse’s current needs under the [Sixth Circuit] test

Id. ¶ 6.10, at 6-128 to -129.

the debtor's discharge of divorce-related debts in bankruptcy. According to this view, the bankruptcy law governing the discharge of divorce-related debts and the law of family support are concerned with two distinct factual and legal matters.

In *Lesniewski*, the bankruptcy debtor's former wife asserted a claim during the debtor's bankruptcy proceeding that the debtor's obligation to hold her harmless as to the joint debt of their marriage was not a nondischargeable support obligation under Bankruptcy Code § 523(a)(5). After the bankruptcy court rejected this claim and discharged the debtor's obligation to her, the former wife proceeded to state court where she received an increased alimony award. In another category of cases, former spouses have sought state court relief following bankruptcy proceedings in which the dischargeability of the debtor's divorce-related obligations was *not* addressed by the court. As discussed earlier, the Bankruptcy Code confers jurisdiction on the state court in these circumstances to determine whether divorce-related obligations of the bankruptcy debtor are nondischargeable support debts under § 523(a)(5).¹⁷² Thus, the state court in a post-bankruptcy proceeding may be required to simultaneously consider the dischargeability of debts under the Bankruptcy Code and the availability of financial relief for the former spouse under state family law doctrines, including the modification of alimony awards.

The Connecticut state court in *Peabody v. Peabody*¹⁷³ failed to successfully navigate this point of intersection between federal bankruptcy law and state family law, in responding to the request for increased alimony by the former wife of a bankruptcy debtor. In *Peabody*, the

¹⁷²The concurrent jurisdiction of state courts under § 523(a)(5)) is discussed *supra* at text accompanying notes 107-10.

¹⁷³*Peabody v. Peabody*, 1995 WL 415823 (Conn. Super. Ct.).

debtor's divorce decree required him to repay and hold his former wife harmless as to two joint marital obligations, including a second mortgage on the marital home. The divorce decree also provided for periodic alimony in the amount of one dollar per year, "subject to modification only in the event that the [husband] does not fulfill his obligation to indemnify the [wife] with respect to said mortgage."¹⁷⁴ Several years later, the former husband defaulted on repayment of the two loans, and filed for bankruptcy. The bankruptcy court's order of discharge clearly included his joint contractual liability to the third-party creditors on the two marital debts. The bankruptcy court did not, however, address the debtor's repayment and hold harmless obligations to his former wife arising under the divorce decree. Thereafter, the mortgage lender "made demand on [the former wife], advising her of the [former husband's] default and threatening foreclosure."¹⁷⁵ The second creditor had not initiated collection procedures, but the *Peabody* court observed that such action in the near future was likely.¹⁷⁶ In response to the creditor initiative, the former wife returned to state court, requesting an upward adjustment of alimony in the amount needed to make the monthly payments on the mortgage. Her former husband responded that all of his responsibility arising from the joint marital debts had been discharged in bankruptcy.

The *Peabody* court's analysis involved two steps. First, the court applied the federal standard under Bankruptcy Code § 523(a)(5) to the former husband's obligations to repay the marital debts and to hold his former wife harmless, and determined that they were nondischargeable support debts. Next, the court proceeded to analyze the former wife's alimony modification request under the relevant Connecticut statutes and caselaw. Here, the court

¹⁷⁴*Id.* at *1.

¹⁷⁵*Id.* at *4.

¹⁷⁶*See id.* at *6.

concluded that the state law standard of changed financial circumstances had been met, and ordered weekly alimony payments to the former wife, to “terminate upon the death of either party or the wife’s remarriage, and [to be] reduced to \$1 per year upon the repayment by the [former husband] of a sum equal to the present balance of the [mortgage] obligation.”¹⁷⁷

The upward adjustment of alimony was not the best available remedy in the *Peabody* case. Having determined that the former husband’s obligations to repay the marital debts and to indemnify his former wife had survived his bankruptcy, the *Peabody* court could have simply enforced these terms in the divorce decree. The property and support provisions of the initial divorce decree reflected the view of the court that the assignment of marital debts to the husband was preferable to an alimony order, as a means of providing family support. Notably, this remedy was of greater benefit to the former wife because the husband’s repayment obligation, unlike the alimony award, was not subject to early termination in the event of death or remarriage. In *Peabody*, the court failed to take advantage of the opportunity to enforce the former husband’s repayment and hold harmless obligations under the divorce decree, based on its own determination that these obligations were nondischargeable support debts under § 523(a)(5).¹⁷⁸

¹⁷⁷*Id.* at *7.

¹⁷⁸In the *Peabody* case, discussed in the text, the state court failed to consider the possibility of enforcing the divorce court order assigning pre-divorce marital obligations to the bankruptcy debtor. A similar analytical shortcoming has been observed in state court cases where the bankruptcy debtor’s divorce-related obligations took other forms, as follows:

State courts faced with motions to modify support obligations after a bankruptcy case have, unfortunately, not always seemed to understand the principles involved. In many case, they appear to have assumed that a debt designated a property settlement [in the divorce decree] was discharged even though it had been intended to serve a support function. Proceeding on this mistaken assumption, these courts have then modified a support obligation in light of the

At the same time, the *Peabody* court's analysis of the alimony remedy was flawed. The court appeared to assume, mistakenly, that its ruling of nondischargeability as to the former husband's divorce-related debts was a necessary prerequisite to the upward adjustment of alimony. In fact, as illustrated by the cases discussed earlier,¹⁷⁹ an upward adjustment of alimony is available under state law based on changed circumstances, even if the debtor's divorce-related obligations have been discharged in bankruptcy.

The court's analysis in *Peabody* appears to have been shaped by the parties' pleadings. Initially, the former wife requested an upward adjustment of alimony. When the debtor raised the issue of the dischargeability of his repayment and hold harmless obligations, the *Peabody* court accepted the debtor's formulation of how these two issues were related to each other. Namely, the debtor erroneously alleged that a finding of dischargeability would be a defense to his former wife's alimony claim. The *Peabody* court failed to understand that its ruling of nondischargeability of the divorce-related debts was not a prerequisite to adjusting the alimony award, and that the ruling provided an alternative theory for addressing the financial claims of the former wife.¹⁸⁰ As illustrated by the *Peabody* case, the role of the state court in addressing

assumed discharge when they should instead have determined that the "property settlement" had really been in the nature of support and had not been discharged at all.

SOMMER ET AL., *supra* note 24, ¶ 6.10, at 6-129.

¹⁷⁹*See supra* text accompanying notes 170-77 (discussing cases where alimony award was increased following discharge of bankruptcy debtor's divorce-related debts).

¹⁸⁰In a case factually similar to the *Peabody* case, the New York court in *Mina v. Mina*, 652 N.Y.S.2d 492 (N.Y. App. Div. 1996), avoided the analytical confusion of the *Peabody* opinion. In the post-bankruptcy proceeding in *Mina*, the New York court first observed that the question of dischargeability of the debtor's hold harmless obligation to his former wife had not been addressed in the bankruptcy proceeding. Therefore, the state court made its own determination that the obligation was a nondischargeable support debt under § 523(a)(5). Since

the request of the bankruptcy debtor's former spouse for post-bankruptcy relief under state law becomes complicated, when the issue of dischargeability of divorce-related debts in bankruptcy arises for the first time in the same state court action.

A final issue arising under the doctrine of post-bankruptcy alimony modification, in cases involving allocated marital debts, involves the nature of the hold harmless obligation imposed on the debtor at the time of divorce. As a general rule, family court judges have wide discretion to determine whether the circumstances of the parties have changed in a manner that would justify the modification of alimony and, if so, the appropriate adjusted amount. The simple fact that the obligor spouse has declared bankruptcy does not justify the modification of alimony, absent evidence that the bankruptcy has affected either the needs of the obligee or the obligor's ability to pay. Not surprisingly, the nexus between the discharge of divorce-related debts in bankruptcy and the relevant changed financial circumstances of the former spouses is easily established in many cases. For example, the changed circumstances justifying an increased alimony award in *Lesniewski v. Walsh*,¹⁸¹ discussed above, included the former wife's assumption of the marital debts allocated to her former husband in their divorce, after he discharged those debts in bankruptcy.

The impact of the debtor's bankruptcy on the former spouse would be more speculative, however, if the discharged debt to the former spouse was a hold harmless obligation, and the former spouse had not made any payments to the third-party creditor. In *In re Marriage of*

the obligation had survived the debtor's bankruptcy, the court ordered him to reimburse his former wife for the amount she had paid to the third-party marital creditor.

¹⁸¹*Lesniewski v. Walsh*, No. 98-76988S, 2001 Conn. Super. LEXIS 713 (Conn. Super. Ct. Mar. 7, 2001), *discussed supra* at text accompanying notes 168-72.

Ganyo,¹⁸² the bankruptcy debtor argued that no upward adjustment of the alimony award to his former wife was appropriate in this situation until the third-party creditor actually approached her for payment of the debts they had incurred jointly during marriage. The Minnesota court rejected this argument, and granted the former wife's request for increased alimony.¹⁸³ In addition to the former wife's loss of protection under the discharged hold harmless guarantee, the court relied upon other changed financial circumstances of the parties, including the debtor's enhanced ability to pay spousal support resulting from the discharge of his liability to the marital creditors.¹⁸⁴ As in the other cases discussed above, the court in *Ganyo* determined that the entry of an increased alimony award in light of changed financial circumstances was not barred by the federal ban on collection of the debtor's discharged obligations relating to allocated marital debts.

4. The Problems Created in State Court by the Existence of Multiple Obligations Relating to Allocated Marital Debts

The allocation of marital debts to one former spouse at the time of divorce creates a complex set of rights and duties involving the marital creditors and both former spouses. As discussed earlier in Section III, the existence of multiple, related obligations in these circumstances has complicated the analysis of claims arising under § 523(a)(5) and § 523(a)(15), when the debtor seeks to discharge the divorce-related obligations in bankruptcy court.¹⁸⁵ As an

¹⁸²*Ganyo v. Engen (In re Marriage of Ganyo)*, 446 N.W.2d 683 (Minn. Ct. App. 1989).

¹⁸³*But see McDonald v. McDonald*, 882 S.W.2d 134 (Ct. App. Ky. 1994) (reversing increased alimony award because former spouse of the bankruptcy debtor had not been approached for repayment of the joint debts discharged by the debtor).

¹⁸⁴*Ganyo*, 446 N.W.2d at 686.

¹⁸⁵Bankruptcy court cases involving the multiple obligations of bankruptcy debtors relating to allocated marital debts are examined *supra* in Section III of this article.

example, the bankruptcy court may fail to separately consider whether a ruling of nondischargeability extends to each aspect of the debtor's liability relating to the allocated debts. The same type of analytical complexity, flowing from the existence of multiple obligations, also arises when the debtor's former spouse pursues financial remedies in state court following the debtor's bankruptcy.

In *Marden v. Marden*,¹⁸⁶ for example, the former husband assumed exclusive responsibility for certain joint marital debts at the time of his divorce, and agreed to hold his former wife harmless as to those debts. Following his post-divorce bankruptcy, the marital creditors turned to the former wife for repayment, and she negotiated a repayment schedule in the amount of \$500 per month. Her subsequent lawsuit in state family court requested an upward adjustment of child support in this same amount, which involved a substantial upward deviation from the applicable state child support guideline amount.¹⁸⁷ In granting her request, the Minnesota court in *Marden* engaged in a rather strained interpretation of the state child support law. Notably, the court gave no consideration to the alternative and less controversial theory, that relief for the bankruptcy debtor's former spouse in the same dollar amount might be available under the repayment and hold harmless provisions of their divorce decree. The *Marden* court failed to consider the availability of this alternative remedy, apparently because the court failed to identify the multiple, component obligations arising from the allocation of marital debts to the former husband at the time of divorce.

¹⁸⁶*Marden v. Marden*, 546 N.W.2d 25 (Minn. Ct. App. 1996).

¹⁸⁷*See generally* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 4.01 (2001) (discussing child support guidelines and the state law standards for deviation from guideline amounts).

The Minnesota Court of Appeals in *Marden* observed that the debtor's contractual liability to the marital creditors had been discharged in his bankruptcy case, but made no reference whatsoever to the separate obligations owed by the debtor to his former wife. The court apparently and mistakenly believed that the discharge of liability to the third-party creditors automatically extended to the repayment and hold harmless obligations imposed on the former husband in the divorce decree. Neither the parties in their pleadings nor the opinion of the court raised the possibility that these divorce-related obligations might have survived his bankruptcy, as nondischargeable family support debts under Bankruptcy Code § 523(a)(5).¹⁸⁸ The failure to identify the component obligations of the former husband, arising from the assignment of marital debts in the divorce decree, precluded any consideration of the most appropriate remedy for the bankruptcy debtor's dependent family members.

Similarly, the Rhode Island Supreme Court in *Hopkins v. Hopkins*¹⁸⁹ failed to identify the component debts involved in the repayment and hold harmless provisions of a bankruptcy debtor's divorce decree, and analytical confusion followed. In *Hopkins*, the former husband was ordered by the divorce court to repay and hold his former wife harmless from the joint debts of their marriage. Regarding alimony, the divorce decree provided that the wife waived alimony, and that the husband's assumption of the marital debts owed to third-party creditors was "a condition of the waiver of alimony."¹⁹⁰ Following the divorce, the former husband declared bankruptcy. According to the *Hopkins* court, the bankruptcy court held a hearing under

¹⁸⁸In the circumstances of the *Marden* case, the state court had the authority to make an initial determination about the dischargeability of debts under § 523(a)(5). *See supra* text accompanying notes 107-10.

¹⁸⁹*Hopkins v. Hopkins*, 487 A.2d 500 (R.I. 1985).

¹⁹⁰*Id.* at 502.

§ 523(a)(5), and determined that “*the debts described in the divorce decree* were the result of a property settlement rather than an award of alimony and, therefore, ordered the debts discharged.”¹⁹¹ Thereafter, in response to a lawsuit against the former wife by one of the marital creditors, she attempted to enforce the hold harmless provision in her divorce decree.¹⁹²

In the state court enforcement proceeding, a question remained as to which debts were included in “the debts described in the divorce decree,” noted above, which had been expressly discharged by the bankruptcy court. The Rhode Island trial court did not raise this question, but apparently assumed that the discharge in bankruptcy extended beyond the debtor’s contractual liability to the third-party marital creditors and included his obligations to the former wife under the divorce decree to repay those debts and to hold her harmless. Having failed to address the potential survivability (and enforceability) of the divorce-related debts in this manner under § 523, the trial court in *Hopkins* entered a new order requiring the former husband to hold his former wife harmless as to the marital debts. The new order, which duplicated the prior hold harmless order, was characterized as a modified alimony order. The Supreme Court of Rhode Island affirmed this result.

As illustrated by the *Marden* and *Hopkins* cases, the complex financial status of the debtor who assumed responsibility at the time of divorce for debts incurred during marriage has generated confusion, when the debtor’s former spouse seeks post-bankruptcy relief in state court. Here, the parties and the court may mistakenly assume that a discharge in bankruptcy of the

¹⁹¹*Id.* (emphasis added).

¹⁹²The state court proceeding in *Hopkins* was filed by the former wife sometime before the close of the debtor’s bankruptcy case, and stayed pending the outcome of the bankruptcy case. See *supra* text accompanying notes 158-59 (discussing automatic stay under Bankruptcy Code § 362).

debtor's contractual obligations to the third-party marital creditors automatically extends to the debtor's obligations to repay and hold the former spouse harmless as to these discharged debts. Such an assumption unnecessarily limits the financial remedies available for dependent family members in state court.¹⁹³

The analytical difficulties encountered by the state courts in *Marden* and *Hopkins* are a final illustration of the theme repeated throughout this Article. Namely, the allocation of joint marital debts to one spouse at the time of divorce is frequently the first step in what proves to be a complex financial dance involving both former spouses and their creditors over an extended period of time. Subsequent steps may take the parties through several rounds of litigation in bankruptcy court and in state family court. The legal issues to be resolved may include the dischargeability of each strand of the obligated spouse's indebtedness relating to the joint marital debts, and the impact of these determinations on subsequent property and support claims under state law. The rules governing the rights of parties at each step are complex and interrelated, and they require careful application in each case.

CONCLUSION

Post-divorce bankruptcy is a common phenomenon in the experience of lawyers who represent clients in a family law or bankruptcy law practice. The legal issues that typically arise in the divorced debtor's bankruptcy proceeding include questions about the dischargeability of

¹⁹³The same false assumption has sometimes been made in post-bankruptcy state court cases, when the debtor's bankruptcy *preceded* the debtor's divorce. *See Hudson v. Hudson*, 634 So. 2d 579 (Ala. Civ. App. 1994) (ruling that a hold harmless obligation imposed by the bankruptcy debtor's divorce decree had been automatically discharged in the debtor's pre-divorce bankruptcy, along with his underlying contractual liability to the third-party marital creditor). *But see Ray v. Ray*, 905 P.2d 692 (Ky. Ct. App. 1995) (identifying the hold harmless provision in debtor's post-bankruptcy divorce decree as an enforceable obligation distinct from the discharged underlying obligation to the third-party marital creditor).

divorce-related debts. The answers to these questions are found at the intersection of federal bankruptcy law and the state laws governing financial claims between family members. This area of law and legal practice is challenging and complex. Within this general context, the existence of third-party marital debts allocated for repayment to the bankruptcy debtor at the time of divorce introduces additional layers of complexity.

Most divorcing couples leave their marriages with debts as well as assets, and many separation agreements and divorce decrees allocate these pre-divorce marital debts to one former spouse for repayment. When this occurs, the former spouse to whom joint marital debts are allocated leaves the divorce court with one or more new obligations to the other former spouse relating to the allocated debts, along with continuing contractual liability to the third-party creditors. If the obligated spouse subsequently files for bankruptcy, a thorough analysis of the debtor's family-related obligations would involve the separate consideration of each of the debtor's several obligations here, as a potentially nondischargeable debt. The analysis is further complicated by various rules governing the timing of nondischargeability claims and the forums where these claims can be heard, and the simultaneous applicability of state laws governing financial interests in the post-divorce family.

The topic of allocated marital debts presents unique analytical challenges for lawyers, judges, and students of the law who seek to understand the federal and state laws governing the financial interests of family members following divorce. Numerous legal issues may arise in state court and in federal bankruptcy court when the divorce court allocates the debts incurred during marriage to one former spouse, who subsequently declares bankruptcy. This Article has provided a road map for understanding and analyzing these issues.