At the Intersection of Family Law and Bankruptcy

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1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Provides Some Protection for a Non-Debtor Spouse. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Act) became effective October 17th, 2005. The legislation represents the largest overhaul of the Bankruptcy Code since its enactment in 1978. The Act contains several amendments of significance to family law lawyers. For instance, the Act creates a new term of art, the Domestic Support Obligation, or "DSO". DSOs cannot be discharged in either a Chapter 7 or Chapter 13 filing. The Act makes clear that equitable distribution judgments and marital property settlements cannot be discharged in a Chapter 7, but a debtor spouse can still discharge equitable distribution obligations and property settlements to the detriment of the non-filing spouse.

2. Domestic Support Obligations Defined. For purposes of bankruptcy law a "domestic support obligation" is any debt incurred before or after a bankruptcy filing that is owed to or recoverable by a spouse, former spouse, child or governmental unit; in the nature of alimony, maintenance or support; and established pursuant to the terms of a divorce decree, separation agreement, property settlement agreement, court order or administrative determination without regard to whether such debt is expressly so designated. 11 U.S.C. § 101(14A). This means that a DSO DOES NOT have to be labeled as post-separation support, alimony, maintenance, or child support for purposes of the bankruptcy code. Conversely, labeling a term of property settlement a DSO may not be sufficient to prevent the discharge of the obligation.

Domestic support obligations are excepted from discharge in all individual bankruptcy proceedings pursuant to 11 U.S.C. 523(a)(5).

Whether an obligation is a domestic support obligation is a fact specific analysis and is determined by federal law, not state law. In re Johnson, 397 B.R. 289, 297 (Bankr. M.D.N.C. 2008).

The factors considered by the bankruptcy court are (i) the debt must be owed to or recoverable by the non-filing spouse; (ii) is in the nature of alimony, maintenance, or support; (iii) was established before the debtor filed for bankruptcy relief by a separation agreement or divorce decree; and (iv) has not been assigned other than for collection purposes.

The first factor can be satisfied by proof of a direct obligation to the spouse or indemnification. There is also no requirement that the debt be payable directly to the spouse or ex-spouse. In re Calhoun, 715 F.2d 1103, 1107 (6th Cir.1983). This opens the door for the bankruptcy court to consider whether assumed debt payment obligations pursuant to settlement agreements and equitable distribution judgments are in the "nature of support."

The second factor is where the real debate begins. Even if an obligation is not labeled as support the bankruptcy court may "look beyond the labels" to determine whether the debt was intended to be in the nature of support.

"Courts in the Fourth Circuit have articulated an "unofficial" test for the intent inquiry, which provides for the court to look at: (i) the actual substance and language of the agreement, (ii) the financial situation of the parties at the time of the agreement, (iii) the function served by the obligation at the time of the agreement (i.e. daily necessities), and (iv) whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse." Johnson, 397 B.R. at 292.

As one court has noted "every assumption of a joint loan obligation in a divorce settlement at least indirectly contributes to support. The former spouse is relieved of payments on that debt and thus has funds for other purposes including necessary support." Calhoun, 715 F.2d 1103, (1983). Bankruptcy courts have held that an "obligation that is essential to enable a party to maintain basic necessities or to protect a residence constitutes a non-dischargeable support obligation." Johnson, at 293.

Scenarios that have fallen into this category include agreements to pay mortgages and equity lines that are necessary to provide shelter to the non-filing spouse and especially the dependents and that the non-filing spouse could not pay on their own and still meet his or her basic living expenses.

However, it could also be argued that even non-payment of unsecured debts can result in a spouse not being able to meet his or her living expenses. Parties don't generally enter into settlement agreements that require them to pay debts they cannot afford and still meet their basic living expenses. In the absence of clear language of a support obligation, the burden of proof would be on the spouse claiming the exception to discharge to show that other support provisions – or the lack of them – were predicated upon the debtor spouse paying certain debts. In short, you have to convince the court that your client's ability to meet their basic living expenses was a consideration in the property settlement or equitable distribution judgment.

The third factor simply requires that the right to the claim must arise before the bankruptcy is filed. If the debtor files bankruptcy before separation, this factor fails but that wouldn't matter anyway because it would be a post-petition debt that isn't subject to discharge. Because an equitable distribution claim arises on the date of separation, the bankruptcy court considers any debts and obligations that are ultimately the product of an Equitable Distribution Judgment to also arise on the date of separation. So long as the date of separation occurs before the bankruptcy is filed, any subsequent obligation resulting from an equitable distribution judgment of separation agreement will satisfy this prong. See In re Linville, No. 04- 52886C7W, 2005 WL 1289373 (Bankr. M.D.N.C. 2005).

The fourth factor simply means that the debts have not been assigned to a third party. However, remember that debts owed to a governmental unit for support are also dischargeable. Therefore, if the non-filing spouse receives governmental assistance for dependent children the debtor's obligations to the governmental would survive a bankruptcy.

3. The Difference between a Chapter 7 and 13 filing with Respect to Marital Debt, Equitable Distribution Judgments and Property Settlements. Excepted from discharge in a Chapter 7 filing are debts that can be construed as "domestic support obligations" *and* debt:

> to a spouse, former spouse, or child of the debtor [in addition to domestic support obligations] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit. 11 U.S.C. 523(a)(15).

The same is not true for Chapter 13 bankruptcy filings. Discharges in a Chapter 13 bankruptcy are governed by 11 U.S.C. 1328. That statute refers back to domestic support obligations referenced at 11 U.S.C. 523(a)(5) but not to other debts incurred in the course of separation and divorce as defined at 11 U.S.C. 523(a)(15) . 11 U.S.C. 1328(a)(2). Therefore, property settlements are dischargeable under Chapter 13.

One key to keep in mind for Chapter 13 and Chapter 7(a)(15) type debts is that they must be to the spouse, former spouse or child of the debtor. Therefore, when there is a debt or obligation to repay a credit card, for example, as part of an equitable distribution agreement, the debt to Capital One would be discharged, even in a Chapter 7 case. The debtor would only continue to be liable if there is an enforceable indemnification agreement.

4. The Automatic Stay. Upon the filing of a bankruptcy, there is an automatic stay that prohibits the commencement or continuation of litigation or any action involving the property of the debtor. 11 U.S.C. § 362. Because equitable distribution actions (E.D. Actions) involve a determination of what property belongs to the debtor, an equitable distribution proceeding is stayed. No action for equitable distribution can be commenced or continued while the automatic stay is in place. This is also true for executing a property settlement. A property settlement executed while the stay is in place is invalid.

A) Under § 362, the automatic stay does not affect commencement or continuation of the following claims:

1. Child custody and support;
2. Post separation support and alimony; establishment or modification of support;
3. Dissolution of marriage;
4. Establishment of paternity.

B) The stay applies to all property of the bankruptcy estate which includes a Debtor's interest in the marital estate. In a Chapter 7 case, property of the bankruptcy estate includes all interest the Debtor has in property at the time of filing the bankruptcy and all property acquired by the Debtor in the 180 days after the filing from equitable distribution. In a Chapter 13 case, property of the estate includes anything acquired during the course of the case, which includes incomes earned post-petition. The bankruptcy court has exclusive jurisdiction over the bankruptcy estate until a relief from stay is granted. Unless the stay is lifted, it continues until property is no longer property of the estate, until case is closed or dismissed, or debtor is discharged. 11 U.S.C. § 362(c).

5. When One Needs to Seek a Relief from Stay. To proceed with an equitable distribution suit, or to pursue a property settlement, the non-debtor spouse needs to pursue a relief from stay. A pending case DOES NOT have to be dismissed. In the motion for relief from stay, request that the matter proceed in state court. The bankruptcy court has concurrent jurisdiction to decide ED claims, but will nearly always defer to state courts. In re Sokoloff, 200 B.R. 300 (Bankr. E.D. Pa. 1996).

In the case of negotiating a property settlement out of Court, the motion to lift the stay should reference what the intentions of the parties are, e.g., to continue or commence settlement negotiations.

There is a filing fee to file a motion to lift stay UNLESS the parties consent to lifting the stay. As a matter of procedure, it is best to submit a consent order signed by both parties at the time the motion to lift stay is filed. If there is no consent, then the bankruptcy court will schedule the motion for a hearing and the parties will have to argue their respective positions. Courts will routinely rule in favor of the Movant unless there is a good reason not to when the stay is related to the division of property.

Once the stay has been lifted, the Movant should file the order lifting the stay with the state court if the equitable distribution is being litigated so the state court judge knows that the matter can proceed.

A debtor must also file a motion to lift the stay if the debtor wishes to pursue an equitable distribution against a non-debtor.

The state court cannot actually distribute the property because the ultimate authority is held by the bankruptcy court even if it has abstained to allow the state court to determine the rights of the spouses to a property division. In re Sparks, 181 B.R. 341 (Bankr. N.D. Ill. 1995). This causes confusion over the role of the state court and what it can and cannot do. The best answer is that the state court can proceed with a regular E.D. But should add language in the judgment that the judgment is subject to approval by the bankruptcy court. The judgment should then be submitted to the bankruptcy court for approval. The role of the bankruptcy court is to prevent fraud (collusion between the spouses to avoid liquidation of property). If the judgment is approved, then only the property of the debtor spouse is subject to liquidation.

This is also true for property settlements negotiated outside of Court. Before the agreement is executed it should be submitted by way of motion to the bankruptcy court for approval.

Keep in mind that the §362(b)(2) exceptions to the automatic stay only apply to the commencement or continuation of an action to establish or modify a DSO. The enforcement of those provisions might be subject to the stay in a Chapter 13 case, the post-petition income of the Debtor is property of the estate. Thus, to enforce a DSO in a Chapter 13 case, the non-filing spouse must seek relief from stay.

If, at the time of filing, the parties are separated, but no action has been filed yet, the non-filing spouse must seek relief from stay to even bring a claim for equitable distribution, divorce might be excepted from discharge, but the attached equitable distribution is not.

The Debtor might need to bring Relief from Stay Motion if he or she wants an equitable distribution because it will affect property of the estate.

6. When to File a Proof of Claim. A non-debtor spouse should file a proof of claim with the bankruptcy court when notified by the Trustee that there may be a distribution of assets. The amount of the claim should be based on the anticipated equitable distribution or if a distributive award is already owed. Also, the non-filing spouse may have a priority claim for unpaid pre-petition DSO. This puts the Trustee on notice that the non-debtor spouse has a claim that may affect the property of the estate and might be entitled to a portion of any assets.

Ordinarily, no proof of claim is filed in a Chapter 7 unless a creditor is notified to do so by the Chapter 7 trustee. In a Chapter 13, a proof of claim should be filed as soon as the non-debtor spouse is aware that the bankruptcy has been filed. As with a Chapter 7, the amount of the claim should be based on the anticipated equitable distribution or if a distributive award is already owed. There is a proof of claim forms available on the bankruptcy court website and are filed electronically.

The family law lawyer should also file a proof of claim whenever attorney fees that have been previously awarded in a family law case are subject to discharge. Since attorney fees are typically awarded in a family law case only when a financial need is demonstrated, attorney fees are akin to a domestic support obligation.

For example, attorney fees in child custody and support actions are awarded when a court finds that:

> i. A party acting in good faith has insufficient means to defray the expense of suit; and,
>
> ii. The party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. N.C.G.S. 50-13.6

Under 50-13.6, a payment of attorney fees is intended to provide for the maintenance and support of a party with insufficient means and therefore should be found to be a DSO.

Attorney fees in spousal support and alimony cases may be awarded at any time spousal support or alimony are awarded, and such fees are "to be paid and secured by the supporting spouse in the same manner as alimony". N.C.G.S. 50-16.4. That last phrase, "to be paid in the same manner as alimony", strongly suggests that attorney fees so awarded are akin to alimony, and therefore a DSO.

Attorney fees awarded for representing the non-debtor spouse in child support, alimony and post separation support cases are non-dischargeable according to the Fourth Circuit in In re. Silansky, 897 Fed.2d 743, 744 (4th Cir. 1990); and see, In re. Bristow, 2005 Lexus 1117, Middle District of North Carolina (decided April 22nd, 2005).

Remember that a DSO is limited to debts owed to the spouse, former spouse or parent/guardian of a child. If the award for attorney fees is payable or collectable only by the attorney for the non-filing spouse, then it is not a DSO and is discharged in a bankruptcy case.

7. How to Protect a Non-Debtor Spouse from Discharge by the Debtor Spouse of Distributions and Awards made in the Context of their Family Law Case. Because DSO's are non-dischargeable, a family law lawyer need to draft orders, judgments and contracts with an understanding of what a DSO is, and how a bankruptcy court is likely to construe a DSO. Drafting orders, judgments and settlements, with an eye toward preventing a debtor spouse from discharge in bankruptcy invites a family law lawyer to be creative, but not without some risk that a family law lawyer must consider. Finally, while you may not be able to protect your client in a family law case from third party creditors by defining third party debt as a DSO, you can make such debt less likely to be discharged by a debtor spouse.

The obvious temptation for a family law lawyer is to cloak a distributive award (money paid to equalize a property settlement in the context of equitable distribution) in alimony terms. While alimony is clearly a DSO in a bankruptcy court, it is subject to modification in a state court. You must remember the statutory factors (death, cohabitation, remarriage) for modification/termination at N.C.G.S. 50-16.9, and you must rule them out, if you can. Otherwise, the property settlement you have traded for an alimony commitment could go up in a puff of smoke if alimony is modified.

The safest way to provide for non-modifiable alimony is by contract that is not subject to incorporation in a subsequent judgment for divorce. That contract should indicate that the termination events set out at 50- 16.9 will not apply. Be aware that if alimony does not terminate upon death, it is not taxable to the payee according to I.R.C. 71, a fact that will prejudice the payor but benefit the payee.

When a non-integrated contract is not an option, and a court order or judgment is necessary, a family law lawyer should consider carefully the concept of "integration" and "reciprocal consideration". A property settlement and an alimony commitment may serve as reciprocal consideration for each other, making them perhaps inseparable in the eyes of a bankruptcy court, and therefore a DSO. In Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1985) the Supreme Court held that:

> Support provisions, although denominated as "alimony," do not constitute true alimony within the meaning of N.C.G.S. § 50-16.9(a) if they actually are part of an integrated property settlement. The test for determining if an agreement is an integrated property settlement is whether the support provisions for the dependent spouse "and other provisions for a property division between the parties constitute reciprocal consideration for each other." White v. White, 296 N.C. 661, 666, 252 S.E. 2d 698, 701. See also Bunn

v. Bunn, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 ("if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties"). Marks v. Marks, 342 S.E.2d 859, 864, 316 N.C. 447, 454-455, 1986 N.C. LEXIS 2160, 15-16 (N.C. 1986)

In other words, it should be possible to integrate your property settlement terms and your alimony terms such that alimony cannot be modified despite being court ordered.

Be aware, however, that while affirming Marks, in the case of Underwood v. Underwood, 365 N.C. 235; 717 S.E.2nd 361 (2011), the North Carolina Supreme Court held that "the mere incantation of the phrase 'reciprocal consideration' does not render alimony non modifiable". Id. at 242. Where a court order unambiguously demonstrates that the parties intend that one is to support the other with alimony payments, those payments though a non-dischargeable DSO, are nevertheless subject to modification by a state court. See attached for model integration language.

As to a joint marital debt to a third party, here are some options you may consider to ensure that your client isn't left holding the bag:

a. Establish payment of a marital debt to a third party as a DSO in kind (either as PSS or alimony) which the state court may also later assign as a property division when the E.D. is completed. This would keep the payment current until the case is sorted out. In re Hamblen, 233 B.R. 430 (Bankr. W.D. Mo. 1999) (payment of marital debt to third party may be support). Also, you are better off with debt payment as a DSO, especially in a Chapter 13 rather than a property settlement, but of course you also have to consider the tax consequences. But remember that what the bankruptcy court considers in the nature of a DSO is not always the same as state law or IRS regulations.

b. Include indemnification language in separation agreements and court orders. Even though a debt to a creditor may be discharged, an obligation to the non-debtor spouse to pay the creditor is not. A debtor spouse could have their personal liability to a creditor discharged in bankruptcy only to have a state court judge or property settlement re-impose the obligation on the spouse in the form of a marital debt obligation owed to or on behalf of the non-debtor spouse.

c. For court orders, ask the state court judge to make a specific finding if possible that the debt distribution provisions of the order were intended to provide for an equitable distribution of property that also allows each party to meet their basic living expenses. If you are asking for an unequal distribution N.C.G.S. § 50-20(c)(1) requires consideration of "income, property, and liabilities of each party at the time the division or property is to become effective" This is certainly a viable argument considering that the court may reconsider support obligations after a subsequent equitable distribution order is entered so the relationship between the two is not a stretch at all. See N.C.G.S. 50-16.3A(a). If the parties' incomes at the time of the equitable distribution are such that

your client could not pay the debt assigned to the other party, the bankruptcy court could consider that in determining that the debt was in the nature of support.

d. If possible, consider seeking an interim distribution where the Court orders the liquidation of marital assets to pay unsecured, joint marital debts. This may be good advice in any E.D. case, but may not always be possible if there are insufficient assets. The Court has the authority to distribute marital assets and marital debts, but it is unclear if they can order payment of marital debts with marital assets. Regardless, you can certainly ask the Court for an interim distribution of property with the stated purpose of paying off a joint marital debt. Such a distribution would not alter the ultimate value to be distributed by the court. If your client then fails to pay the debt, it will show up as a strike against him/her in the final balance sheet and also defeat the purpose of filing the action. Short version: Eliminate marital debt as soon as possible.

e. Other remedies

i. Discharge of a joint debt may justify modification of support obligation in state court because it renders non-debtor spouse solely liable for a debt that might increase his/her expenses. In re Henderson, 324 B.R. 302 (Bankr. W.D. Ky. 2005). Also, a non-debtor payor spouse may wish to modify a support obligation to the extent that the debtor spouses expenses decreased. However, in both cases a motion to lift stay must be filed to undertake such action before (but not after) discharge. In Re Harris, 310 B.R. 395 (Bankr. E.D. Wis. 2004).

ii. Non-debtor spouse can file a claim on behalf of a creditor where debtor was ordered to pay a debt as part of a divorce decree, etc. This is of limited value, and only useful if the creditor fails to file a proof of claim.

iii. Non-debtor spouse can file a subrogation claim for payment of debts assigned to debtor spouse pursuant to a divorce decree. 509(a) provides that if a co-debtor and debtor are liable on the same claim of a creditor, and the co-debtor pays the claim, the co-debtor is subrogated to the rights of the creditor to the extent of the payment. However, because such a debt is non-dischargeable anyway (in Chapter 7), the debtor would be fully liable to the non-debtor spouse regardless of filing the subrogation claim in a Chapter 7.

8. How to Protect a Debtor Spouse Faced with an Equitable Distribution Order or Judgment Providing for a Distributive Award that Can't be Paid. Suppose you represent a spouse who has just been hit with a distributive award that he/she cannot pay. In other words, the district court judge heard your evidence regarding the lack of liquidity to pay any such award and also your client's insufficient income to pay any such award over time, but still imposed a judgment that the client cannot pay. You can always file an appeal, but that costs thousands of dollars and the appellate courts haven't seemed too receptive to such challenges. A much less expensive option is to get a second opinion on your client's ability to pay with the assistance of the Chapter 13 bankruptcy trustee and bankruptcy judge. Filing a Chapter 13 allows a second review of what your client can truly pay that takes precedence over the state court. To the extent

that your client cannot pay the distributive award, it will be fully discharged at the end of a successfully completed Chapter 13 plan.

9. When to Allege that a Debtor-Spouse's Bankruptcy Petition was Filed in "Bad Faith". Before raising the issue of a bad faith filing, every lawyer (whether you practice family law, bankruptcy or otherwise) should take care and be mindful of the following words-of-wisdom by Judge Posner of the Seventh Circuit Court of Appeals: "It is not bad faith to seek to gain an advantage from declaring bankruptcy—why else would one declare it?" In re James Wilson Assocs., 965 F.2d 160, 170 (7th Cir. 1992).

With that maxim in mind, one of the best examples of a bad faith filing by a debtor-spouse can be found in Judge Aron's recent opinion, In re Page, 519 B.R. 908 (Bankr. M.D.N.C. 2014)[1]. Mrs. Page, along with her husband Mr. Page, filed for Chapter 13 in October of 2013. Mr. Diaz was Mrs. Page's ex-husband. Their separation agreement became enforceable through an order of the Forsyth County District Court entered on January 26, 2009 ("Separation Order"). 519 B.R. at 910. On May 11, 2010, the Forsyth County District Court found Mrs. Page in Contempt of the Separation Order, and ordered her to pay Mr. Diaz's legal fees ("First Contempt Order"). The First Contempt Order also changed physical custody of the couple's three children. 519 B.R. at 914. Mrs. Page appealed that First Contempt Order to the North Carolina Court of Appeals. 519 B.R. at 910. It is important to note that Mr. Diaz's attorney sent "repeated notices" to Mrs. Page[2] that her appeal was interlocutory. 519 B.R. at 914. On June 7, 2011, the North Carolina Court of Appeals dismissed the appeal as "clearly interlocutory" 519 B.R. at 910[3]. Nearly two years later, on June 27, 2013, the Forsyth County District Court ordered Mrs. Page to pay Mr. Diaz's legal fees, in the amount of $17,000.00, which he incurred in defending her appeal of the First Contempt Order. 519 B.R. at 910-911. On October 2, 2013, Mrs. Page was found in contempt for the second time ("Second Contempt Order"). 519 B.R. at 911. Two days later, she and her husband filed for bankruptcy. Id. At the time the Pages filed for bankruptcy, their income consisted entirely of food stamps and contributions from family and charitable organizations. 519 B.R. at 915. Ultimately, the bankruptcy court concluded that the debtors' conduct was "clearly atypical of the debtors that seek relief from this Court and rises to the level of bad faith." 519 B.R. at 915.

In order to determine whether the debtors filed their petition in bad faith, pursuant to 11 U.S.C. §§ 1325(a)(7) and 1307(c), the bankruptcy court looked to Fourth Circuit precedent, as well as opinions from other circuits, and then delineated a non-exhaustive list of factors to be considered. 519 B.R. at 913 (citing Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982), Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986), Matter of Love, 957 F.2d 1350, 1357 (7th Cir. 1992), and In re Chinichian, 784 F.2d 1440, 1445 (9th Cir. 1986)).

[1] A copy of the slip opinion is included as part of the appendix to this manuscript.

[2] The bankruptcy court's opinion does not indicate whether these notices were sent to Mrs. Page directly, or to her appellate attorney (or if she had one).

[3] See also Diaz v. Diaz, 212 N.C. App. 419, 713 S.E.2d 791 (Table), 2011 N.C. App. LEXIS 1325, 2011 WL 2235463 (N.C. Ct. App. June 7, 2011) (Unpublished)

Judge Aron also identified one additional factor for the purposes of that particular case. 519 B.R. at 913. Altogether, a total of fifteen separate factors were identified by the court in Page[4]. Each factor, and how it was weighed by bankruptcy court's analysis, are outlined in the table below.

No.	Factors Considered by the Court	Weight Given
1	The percentage of repayment proposed to unsecured creditors	**N/A**
2	The debtor's financial situation.	**N/A**
3	The period of time payment will be made.	**N/A**
4	The debtor's employment history and future prospects.	**N/A**
5	The nature and amount of unsecured debt.	**N/A**
6	The debtor's prior bankruptcy filings (if any).	**In favor of the Debtor** ("The only factors in the Debtor's favor are that they are not repeat filers . . . .")
7	The debtor's honesty in representing the facts.	**Against the Debtor** ("Debtors failed to report Mrs. Page's unsecured attorney fee debt from the First Fee Order in the amount of $17,000. The Debtors had ample opportunity to amend their petition to reflect their omission and yet failed to do so.") In favor of the Debtor ("The only factors in the Debtors' favor are . . . they have been candid with the court by admitting they filed Chapter 13 to wipe out the debt owed to Mr. Diaz.")
8	Any unusual or exceptional problems facing a particular debtor.	**N/A**
9	The debtor's prepetition conduct.	**Against the Debtor** ("Mrs. Page incurred this debt by pursuing a frivolous appeal and attempted to mollify any repercussions by filing for bankruptcy.")
10	The timing of the petition.	**Against the Debtor** ("The proximity in time between the Second Contempt Order and Mrs. Page's filing, a mere two days, is not coincidental but instead demonstrates an impermissible attempt to use the protections of the Bankruptcy Code to vitiate the litigation costs imposed on her by the state court.")
11	How the debt arose.	**N/A**

[4] Other factors which were not included by the bankruptcy court in Page, have also been identified. See Love, 957 F.2d at 1357 (". . . how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.")

12	The debtor's motive for filing.	**Against the Debtor** ("In contrast to a typical Chapter 13 case, the Debtors' home was not in foreclosure, and their car was not repossessed. Instead, the Debtors filed for Chapter 13 to secure Mrs. Page from complying with a state court order.
13	Whether the debtor intended to defeat state court litigation.	**N/A** (but probably weighed against the Debtor)
14	Whether the debt could be discharged in Chapter 7.	**In favor of the Debtor** ("They also stated it was their understanding that such debt would not be discharged in a Chapter 7 proceeding."
15	The Debtor's eligibility to file for Chapter 13.	**Against the Debtor** ("At the time the Debtors filed their Chapter 13 case, they did not have the requisite "regular income" under § 109(e) and they did not provide reasonable assurances of future regular income that were sufficiently stable and regular.")

10. HEARTBALM TORTS & SECTION 523(a)(6). Once upon a time, Husband and Wife were happily married and raising a family in the Land of Gastonia. Then one day, an evil Debtor came to town and stole Husband away from Wife. Wife sued Debtor in both state court and bankruptcy court. A trial was held in state court, and a jury found that Debtor committed both criminal conversation and alienation of affections, and awarded Wife $50,000 in actual damages, plus $75,000 in punitive damages. Wife then moved for summary judgment in bankruptcy court, arguing that the jury's award was a non-dischargeable debt under 11 U.S.C. § 523(a)(6) ("for willful and malicious injury by the debtor to another entity or to the property of another entity. . . ." (emphasis added)). Judge Whitley initially ruled that the debt was non-dischargeable based on collateral estoppel, but the District Court reversed since it was "unable to conclude that the issue of "willful and malicious injury" was "actually litigated" in and "necessary and essential to" the judgment entered in the State Court Action." Keever v. Gallagher (In re Gallagher), No. 3:06-cv-00108-W, 2007 U.S. Dist. LEXIS 18884 at *10, 2007 WL 782183 at *3 (W.D.N.C., Mar. 13, 2007).

> Thus, both the substantive claim and punitive damages issues presented in the State Court Action considered the willfulness and maliciousness of the wrongdoer's conduct, and not whether there was a "willful and malicious injury." . . . . The Pattern Jury Instructions for alienation of affections define malicious conduct as conduct that is "intended to or is recklessly indifferent to the likelihood that it will destroy or diminish the genuine marital relationship." N.C.P.I. Civil 800.20, Alienation of Affections (emphasis added). These instructions provide an alternative basis for which a jury could find malicious conduct based on "reckless indifference." . . . . A finding of "reckless indifference" is a "lower bar" than that for a finding of "willful and malicious injury" under § 523(a)(6).

Id., 2007 U.S. Dist. LEXIS 18884 at *9-10, 2007 WL 782183 at *3 (emphasis in original). On remand, the bankruptcy court (once again) ruled in Wife's favor. And (once again), Debtor

appealed. This time, the District Court only reversed in part—finding that the Wife's cause of action for alienation of affections was non-dischargeable under Section 523(a)(6), whereas the Debtor's criminal conversation was nonetheless dischargeable. See Keever v. Gallagher (In re Gallagher), 388 B.R. 694 (W.D.N.C. 2008). The District Court then remanded again for the bankruptcy court to determine which portion of the jury's award was attributed to alienation of affections (i.e., not dischargeable), and which portion of the jury's award was attributed to criminal conversation (i.e., dischargeable). Id. After the parties returned to bankruptcy court for the third time, Judge Whitley found that the entire $125,000.00 debt was attributed to Debtor's "willful alienation of affections." This time, the District Court affirmed and so did the Fourth Circuit. See "MEMORANDUM ORDER," Keever v. Gallagher (In re Gallagher), Case No. 02-33036, Adv.Pro. 02-03243 [Doc. 60] (Bankr. W.D.N.C., May 11, 2010); Keever v. Gallagher (In re Gallagher), No. 3:10-cv-00237-W, 2011 U.S. Dist. LEXIS 36820, 2011 WL 1130878 (W.D.N.C., Mar. 25, 2011); Keever v. Gallagher, 464 Fed. Appx. 163 (4th Cir. 2012).

11. Family Law: The Bankruptcy Trustee's Perspective. Whether you know it or not, expect a Chapter 7 Trustee to be paying close attention to your client's divorce and separation proceedings. Under Section 541, any property acquired by the debtor within six months after the petition date, by way of life insurance, divorce or inheritance, becomes property of the bankruptcy estate. This means that, if the debtor owns property as tenants by the entirety when he or she files for bankruptcy and obtains a divorce less than six months later, that property is treated just the same as if it had been owned as tenancy in common on the date of the petition. In other words, your client (the debtor's non-filing spouse) now co-owns that property with the Trustee (and not the debtor).

Sometimes, the Trustee may opt to buy the Debtor's interest from the Debtor for substantially less than what your client may believe the home is worth. For example, let's say your client is awarded possession of the marital home pursuant to an equitable distribution (or property settlement). For purposes of the equitable distribution, the state court values the marital residence as being worth $200,000.00. Both the Debtor and your client own a one-half interest in the home. Needless to say, the Debtor could not care less about what happens to your client in the future. In that spirit, the Debtor decides to sell his or her 50% ownership-interest for substantially less than $100,000. The Trustee can now sale the house on the open market in order to create income for the Estate.

Other times, one spouse may be so eager to split away from their ex, that he or she will agree to take a proverbial "dive" (i.e., a debtor agrees to settlement terms that awards most of the marital property to the former spouse in exchange for less than fair value). Less than two years later, the debtor files for bankruptcy. Under such circumstances, the debtor may have "transferred" his or her interest over to your client in what amounts to a fraudulent transfer under 11 U.S.C. § 548(a)(1)(B)—regardless of whether the Settlement Agreement was incorporated into a judicial decree.

12. Information and Effect in Bankruptcy.

a. The petitions and schedules and equitable distribution schedules require a large amount of information. This is important for both the Debtor's attorney and the Non-Debtor's attorney. A Debtor's attorney must remember that the Trustee's new best friend is the mad ex-spouse. He or she will be going over the schedules, comparing them to the domestic documents and affidavits and contacting the Trustee about discrepancies. If the bankruptcy is filed first a Debtor might have issues claiming an interest or a value in property in the domestic case that they didn't list or listed differently in the bankruptcy case.

b. Under §521(e)(2), a creditor, including a non-filing spouse who has a claim or potential claim may timely request a copy of the Debtor's last filed Federal tax return to be sent to him or her. The Debtor much send it to the creditor within not later than 7 days before the first meeting of creditors (341 meeting), at the same time as the Debtor provides it to the Trustee. If, in the domestic case, the non-filing spouse is finding resistance to providing the tax return, this might be a method to obtain it. If the Debtor fails to send the tax return "the court shall dismiss the case unless the Debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the Debtor." 11 USC § 52(e)(2)(B).

c. Another source of information for the non-filing spouse can be a Rule 2004 examination of the Debtor. The Debtor can be examined as to "the acts, conduct, or property or to the liabilities and financial condition of the Debtor, or to any matter which may affect the administration of the Debtor's estate, or to the Debtor's right to discharge." Fed. R. Bankr. Pro. 2004. A 2004 Exam can be both for the direct questioning of the Debtor and for the production of documents. A 2004 examination is not a substitute for, and cannot be used as a substitute for, discovery in civil litigation. In re: Southeastern Materials, Inc. Case No. 09-57606 (MDNC Bankr. Waldrep) (Dec. 10, 2010). However, where the primary purpose is to benefit the bankruptcy estate, a Rule 2004 examination may be used. Id.