I. INHERENT CONFLICT BETWEEN BANKRUPTCY AND DIVORCE LAW

“The historic purpose of bankruptcy is for honest, but insolvent, debtors to get a fresh start in their financial lives.” Once upon a time, “[b]ankruptcy [was] . . . an effective weapon to thwart or impede a divorce or undo the result obtained after a settled or contested divorce. . . . Typically, the spouse who files bankruptcy is the one obligated to pay alimony, child support and make the hold harmless payments.” As of October 17, 2005, Congress dramatically changed the ability of a bankruptcy case to “thwart or impede a divorce or undo the result obtained after a settled or contested divorce.” These are the most significant changes to bankruptcy law since 1978. Congress has taken stories of abusive filers (essentially those going on shopping sprees and then keeping everything in bankruptcy—legalized shoplifting if you will) and amended the Bankruptcy Code to make it significantly more difficult for a debtor to discharge debt in a bankruptcy case.

Ex-spouses, generally the former wives and mothers, are a great beneficiary of this legislation as Congress made it substantially more difficult for a debtor to escape divorce-related obligations. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), a misnomer, because it does not protect consumers, debtors may now thwart or impede divorce-related obligations only if the obligation is considered to be a property settlement and, then, only if the debtor is able to successfully navigate his or her way to a Chapter 13 discharge via three to five years’ worth of plan payments to a Chapter 13 trustee. There may be other creative uses of BAPCPA for family law obligations, such as in complex Chapter 11 scenarios with significant, complicated debt and situations, but these are for creative lawyers with clients able to fund and navigate such creative arguments. Generally, under BAPCPA,
bankruptcy does not provide much help to a debtor addressing divorce-related debts—although there is still a possibility that the debtor can discharge other debt in order to free up money to pay the divorce-related debt.

As previously noted, the Bankruptcy Code was not intended “to provide a method whereby yuppies and other affluent persons may serenely and luxuriously cruise down the river of life without modification or disturbance of their far above average lifestyle and, with barely a ripple, wash themselves clear of debt by the filing of a bankruptcy petition.” Although there have historically been many provisions that enable the bankruptcy court to weigh the equities between the discharge of divorce-related debts, allowing the debtor a clean fresh start, as contemplated by 11 U.S.C. §§ 727, 1141, 1228, and 1328 and public policy favoring their remaining non-dischargeable, under BAPCPA, this discretion appears to have been eliminated. It is important for a family lawyer to understand how a bankruptcy filing can assist his or her client in cleaning up financial situations and how it may be utilized as a “move” in the chess match constantly being played between divorcing spouses in contested matters, even if under BAPCPA the debtor’s leverage for chess playing in a bankruptcy case is minimized (perhaps the debtor is even playing without his queen).

Although BAPCPA makes a bankruptcy filing substantially more difficult and onerous and eliminates some of the benefits that used to be available after such a filing, the root causes for the filing of bankruptcy remain. About a quarter of all bankruptcy cases are caused by divorce. Often, the divorce is caused by financial problems, and supporting two households on the same income is often substantially more difficult than supporting one household was. Other causes of bankruptcy filings are also sometimes part of a divorce, such as uncovered medical expenses, failing businesses, and job loss. Therefore, there are still situations in which a bankruptcy case may be beneficial for both spouses.

Sometimes, a bankruptcy case should be contemplated before the divorce—for example, when there is significant debt, little disposable income, a moderate lifestyle, and relatively few, if any, nonexempt assets subject to liquidation by a trustee. In these instances, a couple can clean up the debt of the marriage before the divorce and facilitate a “clean” or “fresh” start to their new lives apart from each other. Under BAPCPA, there are nuances to be considered that may make it worthwhile for the parties to file separately (this is also wise for the bankruptcy lawyer when considering potential conflicts although some bankruptcy lawyers will file a joint bankruptcy case prior to the divorce). A divorce lawyer is wise to consider and review the impact of bankruptcy laws before advising a client in order to avoid malpractice actions and to best represent his or her client on these financial issues.

It is important to note, however, that (1) under BAPCPA any lawyer encouraging a client to obtain a bankruptcy lawyer for a consultation or for a filing may become
a “debt relief agency” subject to various restrictions and disclosures and (2) BAPCPA makes it illegal to recommend that someone incur debt in anticipation of a bankruptcy case. This may apply when the client is either the debtor or creditor, as the Act is written. See 11 U.S.C. §§ 101(12A), 526, 527, and 528 to get a feel for just how onerous these provisions could be.\(^8\) In summary, if an attorney represents an “assisted person”—a person whose debts are primarily consumer debts and the value of whose nonexempt property is less than $192,450,825 ($384,900 if married)\(^9\)—and gives that assisted person “bankruptcy assistance,”\(^10\) which is not limited to the role of the debtor’s attorney, that attorney becomes a “debt relief agency”—maybe into perpetuity and not just in a particular case. According to § 101(12A), the term debt relief agency means “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110.”\(^11\) “Bankruptcy assistance” is defined as goods or services provided with the “purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation” with respect to any bankruptcy case.\(^12\) This language is very broad, however BAPCPA expressly excludes nonprofits and employees so that the credit counselor advertising on TV is not a debt relief agency—but the attorney is.

Once the attorney is a debt relief agency, various disclosures must be given, documents must be provided to the client, and various restrictions apply to all advertising. Many of these requirements are logical (e.g., for the provision of a fee agreement), but other requirements are not. These requirements include (1) that the attorney note that a bankruptcy may be filed without the assistance of counsel (very bad advice and potentially malpractice) and (2) that the following disclosure (or one very similar to it) be made: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”\(^13\) (Such a disclosure is reminiscent of the credit card disclosures in micro-type one receives regularly in the mail, but now the attorney must develop and use it.) Violations of these provisions may be sanctioned. At times, the statute requires the disclosure of bad legal advice. The family lawyer must balance what may be appropriate legal advice, perhaps without charge to skirt the debt relief agency definition, with the “hammer” and restrictions set forth in the debt relief agency provisions.

II. BANKRUPTCY 101

BAPCPA was an amendment; it did not change the bare basics of bankruptcy or the Bankruptcy Code, although it did redefine eligibility for relief under Chapter 7 of the Bankruptcy Code. There are many types of bankruptcy cases, each falling into different
sections of the Bankruptcy Code, codified at Title 11 U.S.C. Chapters 1, 3, and 5 provide substantive provisions that may apply to any bankruptcy case, and Chapters 7, 9, 11, 12, 13, and now Chapter 15 provide for different types of bankruptcy cases: Chapter 7 for a straight liquidation for individuals and corporations, Chapter 9 for bankruptcies by municipalities, Chapter 11 for a reorganization by corporations and individuals, Chapter 12 for a reorganization for the family farmer and family fisherman, Chapter 13 for a reorganization by individuals, and Chapter 15 for international situations. Parties to a divorce will file primarily a Chapter 7 liquidation or a Chapter 13 reorganization. There may also be instances when a Chapter 11 or Chapter 12 case is more appropriate. There should never be a reason for such individuals to file Chapter 9 or 15. A specific discussion of various provisions of bankruptcy law and how they apply to different chapters, including a description of each chapter and its players that are relevant to divorce cases as well as what divorce lawyers ought to be concerned about, is found in the second half of this book.

One of the essential provisions of the Bankruptcy Code is the automatic stay of § 362, which places a “Chinese Wall” around the debtor (the one who files the bankruptcy case) and gives him or her a reprieve from collection activities, including lawsuits, contempt actions, and garnishments, immediately upon filing. The stay gives the debtor time to get his or her financial affairs in order and gives the trustee, in a Chapter 7 case, an opportunity to collect and evaluate assets and the debtor’s financial affairs. There have always been exceptions to the automatic stay, some of which applied to divorce-related situations. BAPCPA created even more exceptions to the automatic stay. As a result, the only divorce-related matters to which the automatic stay seems to apply are actions to collect from “property of the estate” and to establish a property settlement if the divorce has not been concluded pre-petition.

Ultimately, the “end game” of a bankruptcy case, from the debtor’s perspective, is to receive a discharge. A discharge releases the debtor from personal liability on a debt. It does not automatically void liens; a lien could survive the case and still be executable (e.g., a car with a lien on it retains that lien unless it has been avoided or paid off, even if the underlying in personam debt has been discharged). The discharge injunction provided by § 524 replaces the automatic stay and prohibits creditors, including ex-spouses, from taking actions to collect debts that have been discharged.

The Bankruptcy Code also provides exceptions to the discharge: the debtor receives a discharge but specific types of debt survive—some automatically and some after litigating a complaint—and also provides for the denial of a discharge altogether in certain situations. A denial of a discharge results in all the creditors being able to collect their debts from the debtor, whereas when a debt is excepted from discharge, or excluded, from discharge, it is the only obligation remaining after the case (along
with every other nondischarged debt). There are also situations in which the case may be dismissed and BAPCPA expanded these provisions.

The primary focus of the first half of this book is on the discharge exception provisions that are applicable in the divorce arena. The emphasis is on the two most common exceptions: § 523(a)(5), which provides for the automatic exception of “support” debts from all bankruptcy cases, and § 523(a)(15), which provides an additional, automatic, exception to discharge for nonsupport, divorce-related debts from Chapter 7, 11, and 12 cases. Nonsupport obligations remain dischargeable from Chapter 13 cases.

### III. Domestic Support Obligations

BAPCPA created a provision to specifically define a support-related obligation and then incorporated that provision into other parts of the Bankruptcy Code. The provision, called a Domestic Support Obligation or DSO, is defined under § 101(14A):

The term *domestic support obligation* means a debt that accrues before, on, or after the date of the order for relief in a case under this title [11 U.S.C.], including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative or (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

To be given treatment under the Bankruptcy Code as a DSO, an obligation must meet all four requirements under this definition. This definition encompasses what
was historically referred to as “support,” “alimony,” “child support,” and “maintenance.” This definition is also quite broad. Historically, a bankruptcy filing drew a line in time at the point the case was filed—events occurring before the filing were “pre-petition” and were included in the filing, whereas events occurring after the filing were “post-petition” and were subject to a different set of rules. This DSO definition defines “support obligation” as any obligation that exists at the time of filing, comes into being after filing, or could come into existence. Such a broad definition could create problems in situations where the divorce occurs after the bankruptcy filing. The definition also includes debts due to “nontraditional” parents, as the language expressly applies to debts due to anyone responsible for a child. It also includes debts due to governmental agencies that are in the nature of alimony, maintenance, or support, including debts assigned for collection. This definition rendered debts prior to § 523(a)(18) for government-related support debts enforceable under Title IV-D of the Social Security Act unnecessary.

The term DSO is utilized throughout the Bankruptcy Code, as modified by BAPCPA, including §§ 362 (automatic stay), 507 (priorities), 523 (exceptions to discharge), 1112 (dismissal or conversion of a Chapter 11 case), 1129 (confirmation requirements for a Chapter 11 plan), 1207 (dismissal or conversion of a Chapter 12 case), 1225 (confirmation of a Chapter 12 plan), 1228 (Chapter 12 discharge), 1307 (dismissal or conversion of a Chapter 13 case), 1322 (Chapter 13 plan requirements), 1325 (Chapter 13 plan confirmation), and 1328 (Chapter 13 discharge). These provisions give the creditor who is owed a DSO more rights and remedies and the debtor who owes a DSO much less of an ability to obtain relief from such obligations.

IV. DISCHARGE

Upon the completion of a bankruptcy case, the individual debtor receives a discharge from any and all personal liability on all dischargeable debts. In general, the discharge only affects claims that existed at the time of the filing of the case and does not affect post-petition claims. This is no longer the case with regard to DSOs, which are now defined to include post-petition debts as well as pre-petition debts. Further, in certain limited circumstances, it may not affect claims that were not disclosed by the debtor in the bankruptcy.

The effect of a discharge is to render certain debts unenforceable against the debtor personally—it does not eliminate an unavowed lien against property and does not affect in rem liability or a cosigner’s obligation to pay the debt (e.g., one spouse’s discharge will not affect the other’s liability on the debt; this may be different, however, in community property states). Further, the discharge does not necessarily affect all
the debtor’s debts. For instance, a discharge voids a judgment on discharged debts to the extent it is a determination of personal liability of the debtor and enjoins any legal action to collect such debt from the debtor or property of the debtor not previously encumbered by the judgment. If the judgment is legally attached to property before the bankruptcy filing, however, the judgment lien would still be an encumbrance against the property unless the lien itself was avoided in the bankruptcy case. Once the lien expires by operation of state law (e.g., after a certain period of time), reinstating the lien on a discharged debt then violates the discharge injunction. A discharge does not cancel or extinguish debts. Certain exceptions to discharge are delineated in § 523, applying only to individuals in Chapter 7, 11, and 12 cases (and in Chapter 13 “hardship” discharge cases). Some, but not all, apply to Chapter 13 cases. BAPCPA greatly expanded the exceptions to discharge that are applicable in Chapter 13 cases. Noticeably missing from the exceptions to discharge applicable in Chapter 13 cases is the exception for non-DSO debts found in § 523(a)(15). Therefore, property settlement debts may be non-dischargeable in a Chapter 7 case but remain dischargeable in a Chapter 13 case.

The purpose of the exceptions is to protect creditors whom Congress has determined should not be impacted by the discharge.

The exceptions to discharge . . . are essentially the product of countervailing policy considerations in which the scales of justice tip in favor of certain creditors by allowing select categories of obligations to remain virtually unscathed by the bankruptcy discharge. The exceptions from discharge are, however, construed liberally in favor of the debtor.

Congressional policy favors the debtor’s “fresh start”; thus, discharge exceptions are construed in favor of the debtor: strictly and narrowly. Congressional policy, however, also favors enforcement of obligations for spousal and child support. Notably, the policy that alimony is not dischargeable has been in place since at least the turn of the last century and the exception from discharge of alimony and support has a long legislative history. Support obligations are prospective at the time of the divorce, because they create an obligation to make payments in the future based upon the future need of the recipient. Property settlements, on the other hand, divide the marital assets and liabilities of the parties as of the time of the divorce.

These exceptions to discharge under § 523 include, but are not limited to, certain debts related to support and property settlement debts and debts incurred by fraudulent, willful, and malicious conduct; defalcation and breaches of fiduciary duties; and taxes. To have a debt excepted from discharge pursuant to § 523(a)(2) (false pretenses, false representation, actual fraud, and false financial statements), (a)(4)
(fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny), or (a)(6) (for willful and malicious injury), it is necessary that a complaint, called an adversary proceeding, be initiated by the creditor within 60 days of the first set meeting of creditors. 

Additionally, a Chapter 7 debtor’s discharge may be denied altogether for reasons delineated in § 727 for “committing bad acts.” These bad acts include, but are not limited to, perjury relating to any testimony given or documents filed in the bankruptcy case, failure to disclose assets, and failure to keep adequate financial records. This has also been utilized when a divorce decree entered close to the bankruptcy filing appears to be collusive and divested the debtor of all his or her assets. Historically, has been a good target area for ex-spouse “tattletaling” because of the inside knowledge the ex-spouse may have regarding the filing spouse’s financial affairs. This provision is also often used when the debtor is seeking to circumvent payment to a former spouse through transfers of property. A creditor-spouse should carefully consider filing an adversary complaint under this section because it limits the spouse’s ability to settle the action with the debtor (although it may put added pressure on the debtor to be reasonable) and, if successful, will saddle the debtor with all his debts (oftentimes there is a benefit to be realized from the debtor’s release from some of the debt). The court must approve a settlement of a § 727 complaint; all creditors receive notice of any proposed settlement and are given an opportunity to challenge it and to take over the prosecution of the cause of action. Under § 523, however, the debtor and creditor may enter into a consent order setting forth a settlement of the dispute, without noticing all the creditors. Such an order only impacts the debt to the specific creditor and does not benefit all creditors.

A timely complaint must be filed by an objecting creditor to prevent the debtor’s discharge under § 727 or the dischargeability of the debts under certain provisions of § 523. Some types of debt are automatically excepted from discharge under § 523 and do not require a creditor complaint, including those debts that are for domestic support obligations under § 523(a)(5) (which was the case pre-BAPCPA) and nondomestic support obligations due to a former spouse or child arising under a divorce decree or settlement agreement pursuant to § 523(a)(15) (which is new under BAPCPA). Some exceptions allow or require the debtor to file the complaint. A complete discussion of the non-divorce-related discharge provisions is outside the scope of this book. If these issues arise in your practice, you should immediately consult a bankruptcy practitioner, as the time for filing these complaints is very limited.

The discharge issues at different points in time depending on the chapter under which the bankruptcy case has been filed. Upon the entry of the debtor’s discharge, regardless of whether the case remains open, the automatic stay of § 362 dissolves
by operation of law, and the discharge injunction under § 524 takes its place. The discharge injunction essentially prohibits the collection of any discharged debts from the debtor personally. It is at this time that a creditor with a valid, un avoided lien may proceed against its collateral, or a creditor with a debt that was excepted from discharge may proceed to collect the debt without stay relief. Sanctions may be imposed by the bankruptcy court for a creditor’s failure to adhere to the discharge injunction, including efforts to collect a discharged debt. Issues may arise, however, when a discharge injunction overlaps with the nondischarged debt. These issues are addressed below in Section VIII.

V. NON-DISCHARGEABILITY OF DIVORCE OBLIGATIONS

A. Debts for Domestic Support Obligations

As previously discussed, debts that qualify as domestic support obligations pursuant to the definition found in § 101(14A) are automatically excepted from discharge in Chapter 7, 11, 12, and 13 cases. A domestic support obligation is one that is:

(A) owed to or recoverable by
   (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative or
   (ii) a governmental unit;
(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;
(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of
   (i) a separation agreement, divorce decree, or property settlement agreement;
   (ii) an order of a court of record; or
   (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Either the debtor or the ex-spouse, however, can file a complaint to confirm that a debt is or is not “in the nature of support.” This will generally only be necessary in Chapter 13 cases as under the other chapters, nondomestic support obligations that arise under
a divorce decree or separation agreement are also automatically non-dischargeable. In certain situations, a complaint may be wise in order to have an affirmative order from the bankruptcy court to take to the state court clarifying exactly what happened as a result of the bankruptcy filing.

The bankruptcy court does not determine the reasonableness of the debtor’s support obligations under the state court judgment, but only determines the nature of the obligation, construed under federal, not state, law, before determining whether the obligation is one for support.49 Some courts have held that only the parties to a divorce or separation have standing to pursue a § 523(a)(5) complaint.50 Other courts have allowed the non-debtor’s attorney standing to pursue the complaint.51

Historically, courts have wrestled with issues regarding what constitutes “support,” qualified for non-dischargeability under § 523(a)(5). Under BAPCPA, as previously stated, this distinction is important for discharge in Chapter 13 and will be important for other issues, such as the payment of domestic support obligation claims as a first priority debt when there are funds being distributed by a trustee, but will not matter for purposes of discharge from Chapter 7, 11, or 12 cases. Because the definition of a domestic support obligation expressly includes the “in the nature of alimony or support” language used prior to BAPCPA, case law developed under pre-BAPCPA cases to determine which obligations were in the nature of support are still useful to determine if debts under BAPCPA are domestic support obligations. It is important, however, to check the filing dates of cases relied upon in briefing and arguing cases, as pre-BAPCPA opinions do reflect the earlier version of the Code.

It has been clear that obligations denoted in divorce-related documents as “child support” are non-dischargeable from the bankruptcy case.52 Courts have determined that the following obligations are considered “in the nature of support” for the spouse or child:

- Debts for palimony,53
- Debts under an antenuptial agreement, separation agreements, and divorce decrees,
- Child-support arrearages or college and private-school expenses, even for grown children,55
- Guardian ad litem fees for children,56
- Life insurance,57
- Medical expenses (including out-of-pocket expenses),58
- Debts incurred for the birth expenses and necessaries for an out-of-wedlock child,59
- Dental bills,60
- Mortgage payments (particularly when the obligation is for the person filing bankruptcy to pay the ex-spouse’s mortgage payments on the home they are living in;
not as often when the person filing bankruptcy is the one living in the home with the primary obligation to make the mortgage payments),
• Mobile home payments including taxes and insurance,
• Insurance,
• Day-care expenses,
• Payments for a former spouse’s car,
• Fees for a former spouse’s college expenses or even actual employment, and
• Attorney’s fees,
• Repayment of support situations generally result in cases whereby the courts usually, but not exclusively, hold that a debtor’s obligation to repay an ex-spouse for the overpayment of support is still support (e.g., the payments retain their support characterization),
• Awards based on alleged paternity of the child when paternity turned out to be false have also been ruled as non-dischargeable support.

In some other interesting situations, one court determined that a debt ordered to be paid in a divorce decree on a consolidated, merged student loan owed for both parties’ education would be non-dischargeable on grounds other than § 523(a)(5) or (a)(15). In another interesting case, the Court held that a Chapter 11 debtor’s obligations to provide services as an investment advisor to his ex-wife with a guaranteed return of 10% per year and $41,666.00 per month, while assuring her that he would cover any shortfall from his own pocket was providing her with support.

Historically, bankruptcy courts have wrestled with the dischargeability of support payments assigned to enforcement units. Prior to BAPCPA, § 523(a)(18) was enacted by Congress to address this problem. BAPCPA further addresses this issue by incorporating debts due to and assigned to enforcement units under the definition of a “domestic support obligation,” thereby eliminating this distinction.

Although the domestic support obligation determination is a matter of federal law, significant authority exists to grant concurrent jurisdiction to the state and federal courts to determine if a debt was discharged as one that is in the nature of support. Under BAPCPA, an argument is available that the state court will have concurrent jurisdiction over any dispute involving the dischargeability of a divorce-related obligation because the changes made render all divorce-related debts automatically non-dischargeable from Chapter 7, 11, 12, and hardship 13 cases and domestic support obligations automatically non-dischargeable from Chapter 13 cases. As a practical matter, the debtor is better off in bankruptcy court, where the focus is on the debtor being granted a “fresh start,” and the non-debtor spouse is better off in state court where the focus is on debt collection. Additionally, the bankruptcy courts have tried to stay out of divorce proceedings and leave these matters to the state courts by readily granting stay relief and abstaining.
B. Debts for Property Settlements

Congress has spent the past few decades struggling with what to do with nonsupport, divorce-related debts. From 1978 through 1994, a debtor could discharge any nonsupport debt. Then for bankruptcy cases filed between October 22, 1994, and October 16, 2005, under the Bankruptcy Reform Act of 1994, certain property settlements were not dischargeable from a Chapter 7, 11, or 12 bankruptcy case, but they remained dischargeable from Chapter 13 cases. For these cases, an adversary proceeding (complaint) had to be filed within 60 days of the first scheduled § 341 meeting of creditors in order to have an obligation qualify for this exception from discharge. From October 22, 1994, through October 16, 2005, § 523(a)(15) provided that the following debts will not be discharged:

[any debt] not of the kind described in paragraph (5) [support, alimony, or maintenance] 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, a determination made in accordance with State or territorial law by a governmental unit unless—

(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 [the “Disposable Income Test”]; 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 [“the “Balancing Test”].

This exception required the bankruptcy court to perform a balancing test between the benefit to the debtor of the discharge and the detriment to the ex-spouse if the debt is discharged. The effect of this provision is to prevent the use of bankruptcy to evade marital property settlements when the debtor does not have bona fide financial problems.

During the 11 years prior to BAPCPA, “Sections 523(a)(5) and (a)(15) [were] ‘merely alternate theories for an objecting ex-spouse to establish a [divorce-related] debt as nondischargeable.’” If the debt is in the nature of support, § 523(a)(5) applies, and if it is a property settlement, then a complaint under § 523(a)(15) may lie.

“The cumbersome wording of this section [523(a)(15)] has prompted some judges to describe it as legislative sausage.” “Others have described it as a paving stone