TAMING THE PERNICIOUS CREATURE THAT IS § 523(a)(15) OF THE UNITED STATES BANKRUPTCY CODE

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The number of consumer bankruptcy[1] filings in the United States increased from 313,000 in 1980 to approximately 1,200,000 in 2000.[2] There was an additional twenty percent increase in bankruptcy filings between January 1, 2001 and March 3, 2001, when compared to the same period in 2000.[3] What explains the enormous increase in bankruptcy petitions when the United States is undergoing an age of unprecedented wealth and prosperity? Bankruptcy scholars pinpoint unemployment or underemployment, overwhelming credit card debts, increased housing costs, debilitating sickness or injury, and divorce as the primary impetuses for bankruptcy.[4] It is estimated that two-thirds of those who filed bankruptcy petitions in 1999 cited unemployment as precipitating their filing, while forty percent cited a serious medical problem, and twenty percent cited the economic fallout of divorce.[5] While each of these socio-economic phenomena explain bankruptcy, divorce is the only rationale that is explicitly considered by the statutes of the United States Bankruptcy Code (the "Code").[6]

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1 An individual debtor typically files a bankruptcy petition under Chapter 7 or Chapter 13 of the United States Bankruptcy Code. Chapter 7 provides for the liquidation of the debtor's assets to satisfy the claims of his or her creditors. 11 U.S.C. §§ 701-766 (2001). Chapter 13 requires a plan whereby a portion of the debtor's future income is distributed to satisfy the claims of his or her creditors for a period of up to five years. 11 U.S.C. §§ 1301-1330 (2001). This Note will only focus on the ramifications a Chapter 7 filing has on a separation or divorce decree.

2 Rivas D. Atlas, *Bankruptcy Bill May Lead to Surge of Filings*, N.Y. TIMES, Mar. 9, 2001, at C1; *New Bankruptcy Limit Nears Passage*, NEWSDAY (New York, NY), Mar. 2, 2001, at A51.

3 Peter T. Kilborn, *Mired in Debt and Seeking a Path Out*, N.Y. TIMES, Apr. 1, 2001, at A1.

4 *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS (2000) [hereinafter SULLIVAN ET AL.].

5 David Cay Johnston, *Bankruptcy Borne of Misfortune, Not Excess*, N.Y. TIMES, Sept. 3, 2000, § 3, at 7.

6 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as 11 U.S.C. § 101-1330); Bankruptcy Judge, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (1986) (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.). Both acts provide the general provisions governing a bankruptcy filing. The following sections provide protections to nondebtor

This is significant because a recent study found twenty three percent of bankruptcy petitioners to be divorced compared to the national average divorce rate of ten percent.[7]

Traditionally, federal courts have been wary of becoming embroiled in domestic relations law matters.[8] Over a century ago, the Supreme Court concluded that the subject of domestic relations belonged to state, not federal law.[9] Today, federal courts generally abstain from adjudicating diversity cases involving divorce, alimony, child custody, visitation rights, establishment of paternity, child support, and/or enforcement of separation or divorce decrees still subject to state court modification.[10] Federal abstention occurs because no codified federal statutes govern the area of domestic relations,[11] because states' interest in domestic relations matters override any federal interest in the matters, and because state courts are more competent to settle these disputes.[12]

However, federal bankruptcy courts[13] have the authority to alter the debtor's post-divorce alimony, child support, or property settlement agreement obligations.[14] Bankruptcy's primary goal, i.e. that the debtor obtains a fresh start free of debt,[15] is statutorily limited in the case of the divorced debtor.[16] Granting a fresh start

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spouses and children of divorce: 11 U.S.C. § 304(b)-(g), 302(g), 523(a)(5), 523(a)(15) (2001).

7 SULLIVAN ET AL., *supra* note 4, at 183. Another eight percent of sampled debtors were legally separated. *Id.*

8 Ingram v. Hayes, 866 F.2d 368, 369 (11th Cir. 1988).

9 Simms v. Simms, 175 U.S. 162, 167 (1899); SULLIVAN ET AL., *supra* note 4, at 175.

10 *Ingram*, 866 F.2d at 369.

11 DeSylva v. Ballentine, 351 U.S. 570, 580 (1956).

12 Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978).

13 Bankruptcy courts have jurisdiction over this subject matter pursuant to 28 U.S.C. § 157 (2001) and 28 U.S.C. § 1334 (2001). Section 1334 states in part:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
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> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on courts or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334 (2001).

14 SULLIVAN ET AL., *supra* note 4, at 175.

15 Grogan v. Garner, 498 U.S. 279, 286 (1991) (noting that the Bankruptcy Code's goal of a fresh start consists of allowing debtors to "reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and clear field for future effort, unhampered by the presence and discouragement of preexisting debt").

16 11 U.S.C. § 523(a)(5) (2001) exempts from discharge 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 other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that:-
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the

to a debtor through bankruptcy conflicts with states' domestic relations laws' goal of a fair start[17] and with the public policy argument that a husband's[18] obligation to support his former wife and children is an imperative societal responsibility.[19] Until 1994, bankruptcy courts only protected an ex-spouse and children from the loss of alimony, support, and maintenance owed by the ex-spouse debtor.[20] Support obligations protect the creditor-spouse, who may lack job skills or be incapable of working, and minor children of the creditor-spouse, who may be neglected if the creditor spouse is forced to work.[21] In contrast, property division debts were considered dischargeable[22] because, unlike alimony and child support which provide for the ongoing needs of the ex-spouse and the chil-

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Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support[.]

11 U.S.C. § 523(a)(15) (2001) does not exempt from discharge debts:

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, 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 payment of expenditures necessary for 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[.]

17 Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFF. L. REV. 369, 370 (1997) (noting that the aim of divorce is to allow the husband and wife to separate through an equitable decree).

18 Unless stated otherwise, this Note will refer to the wife as the "creditor-spouse" and the husband as the "debtor-spouse."

19 Wetmore v. Markoe, 196 U.S. 68, 74 (1904); Brian P. Rothenberg, Comment, *The Dischargeability of Marital Obligations: Three Justifications for the Repeal of § 523((a)(15))*, 13 BANKR. DEV. J. 135, 140 (1996).

20 Act of Feb. 5, 1903, § 5, 32 Stat. 797, 798 (repealed 1978) (The nondischargeability of alimony and child support were first codified in this 1903 amendment to the Bankruptcy Act of 1898.); Macy v. Macy, 114 F.3d 1, 3 (1st Cir. 1997); *see also* Jessica B. Altman, *What the Bankruptcy Code Giveth, Congress Taketh Away: The Dischargeability of Domestic Obligations After the Bankruptcy Reform Act of 1994*, 34 J. FAM. L. 521, 543 (1994) (Federal bankruptcy law has consistently held that alimony, maintenance, and support obligations are nondischargeable.).

21 Rothenberg, *supra* note 19, at 140 n.21 (citing Shaver v. Shaver, 736 F.2d 1314, 1316 n.3 (9th Cir. 1984); Madison Grose, Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96, 96-97 n.7 (1977)).

22 11 U.S.C. § 727(b) (2001) states: "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . ."

dren, property settlements merely divide the parties' assets or liabilities acquired during the marriage.[23]

The discharge of property settlements has harsh, far-reaching consequences for the spouse (in most cases the wife) who is owed property. Divorce proceedings containing property settlements tend to result in lower alimony, maintenance, or child support payments.[24] Property settlements generally take two forms.[25] In some cases, the husband assumes the marital debt, relieving the wife of the obligation of debt payments,[26] in exchange for a reduction in alimony payments. Bankruptcy courts define a contractual agreement releasing only one spouse's liability from a debt the couple incurred during the marriage as a "hold harmless" agreement.[27] The wife, however, might still be held responsible for the liability incurred during the marriage if the husband fails to eliminate the debt.[28] For example, if a husband agrees, as part of property settlement, to assume all credit card debts incurred by the family and if he then files a bankruptcy petition, the credit card company will likely hold the wife responsible for the fees incurred.[29] In other cases, spouses agree to lower alimony payments in exchange for one spouse receiving a larger percentage of the marital assets.[30] For example, a settlement may award the wife an interest in the husband's business in exchange for lower support payments.[31] The creditor-spouse depends on income derived from the property settlement, but the debtor-spouse may deplete the income in an effort to avoid bankruptcy.[32]

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23 Rothenberg, *supra* note 19, at 140; Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J ON. LEGIS. 43, 68-69 (1993).

24 Elisa A. Smith, Note & Comment, *Partial Dischargeability of Property in a Divorce Settlement: A Call for an Equitable Remedy Under Section 523(A)(15) of the Bankruptcy Code*, 15 BANKR. DEV. J. 87, 89 (1998).

25 Rothenberg, *supra* note 19, at 136-37 n.8.

26 *See id.* (citing David M. Susswein, Note, *Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Context: A Distinction Without a Difference?*, 22 HOFSTRA L. REV. 679, 682 n.22 (1994)).

27 *See* Susswein, *supra* note 26, at 682; *see also* Belanger v. Fortier (*In re* Fortier) No. 00-1036-MWV, 2001 Bankr. LEXIS 594, at *2 (Bankr. D. N.H. Apr. 17, 2001) (citing permanent divorce stipulation between husband and wife whereby any and all debts of marriage shall be sole responsibility of husband, including but not limited to all credit card debt, mortgage, business debt, and car leases, and husband will indemnify and hold harmless wife from same); Garrity v. Hadley (*In re* Hadley), 239 B.R. 433, 434 (Bankr. D. N.H. 1999) (citing state court order whereby debtor-husband responsible for and shall indemnify and hold harmless wife from Providian joint credit card debt in amount of $2,418.44).

28 Susswein, *supra* note 26, at 682.

29 *Hadley*, 239 B.R. at 435 n.2.

30 Vance, *supra* note 17, at 375.

31 *Id.*

32 Susswein, *supra* note 26, at 691.

The Bankruptcy Reform Act of 1994,[33] and in particular 11 U.S.C. § 523(a)(15), renders debts incurred through a court divorce, separation decree, or agreement nondischargeable, unless the debtor does not have the ability to pay the debt, or unless discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse, or child of the debtor.[34] However, unlike many sections of the Code read in the conjunctive,[35] under 11 U.S.C. § 523(a)(15), a finding that the debtor satisfies either criteria generates a finding of a dischargeable debt.

Section 523(a)(15) neither states whether the debtor or creditor has the burden of proof under the ability to pay test, nor whether the debtor or creditor has the burden under the equity test. Congress did not provide the courts guidance in applying the statute. By analyzing decisions issued from the First and Seventh Circuits since 1998, this Note explores whether early interpretations of the statute have produced a standard interpretation and application of the statute. This Note concludes that the evidentiary burden and judicial interpretation of the statute vary among and within the federal circuits. Most courts place the burden of proof on the debtor, while other courts place the burden on the creditor.[36] In a third approach, some courts apply a "bifurcated" methodology whereby the debtor has the burden of proving his inability to pay the debt, and the creditor must demonstrate that the detriment to her outweighs the benefit to the debtor.[37]

This Note also outlines how courts in the First and Seventh Circuits have applied different burdens of proof and varying methodologies in 11 U.S.C. § 523(a)(15) adversary proceedings[38] since 1998. To reconcile these differing approaches, this Note offers the rationale for a general burden of proof and an analytical guide under the statute which would be applicable to all proceedings. This Note's suggestive approach adheres to the Seventh Circuit's interpretation of the statute.

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33 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.).

34 11 U.S.C. § 523(a)(15)(A) will be referred to as the "ability to pay test," and 11 U.S.C. § 523(a)(15)(B) will be referred to as the "equity test" or the "balancing of equities."

35 *E.g.*, 11 U.S.C. § 547(b) (2001).

36 Jodoin v. Samayoa (*In re* Jodoin), 209 B.R. 132, 139-40 (B.A.P. 9th Cir. 1997).

37 *Id.*

38 FED. R. BANKR. P. 7001; Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351, 357 (1994) (defining an adversary proceeding as proceeding creditor must file in attempt to prevent debtor from discharging known debt).

I. BACKGROUND ON BANKRUPTCY, DIVORCE AND THE FAMILY

Overwhelming credit card debts and/or financial obligations arising from divorce decrees are likely causes for bankruptcy filing.[39] Ex-spouses, children with financial agreements resulting from divorce decrees, and credit card companies owed payment on charges are unsecured creditors in bankruptcy proceedings.[40] However, bankruptcy law has traditionally afforded special statutory protection to the debts owed to children and ex-spouses.[41] Obligations stemming from familial relationships are unlike debts produced from business or consumer dealings.[42] While credit card companies cover or pass along their losses through the institution of higher interests rates for all consumer accounts,[43] the ex-spouse or child's only recourse is the bankruptcy court.[44]

Although the Constitution gave Congress the authority to establish uniform laws for bankruptcy, the Bankruptcy Act of 1898 was the first meaningful statute to govern debtor-creditor relations.[45] The 1903 Amendment to the Bankruptcy Act of 1898 codified a common law trend to deny debtors the right to discharge alimony debts.[46] Under the common law, courts defined alimony as a duty, not a contractual obligation, and they defined unpaid arrears on alimony as a nonprovable debt.[47] These definitions led courts to hold alimony nondischargeable in bankruptcy proceedings.[48] In administering the Bankruptcy Act of 1898[49] and the Bankruptcy Reform Act of 1978, bankruptcy courts' general goal of providing the debtor a fresh start did not override their equitable

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39 *See supra* text accompanying note 4.

40 *See* 11 U.S.C. § 506(a) (2001) (determining that claims of creditor secured by lien on property, in which bankruptcy estate has interest or that is subject to setoff under § 553, constitute secured claims; all other claims are unsecured).

41 SULLIVAN ET AL., *supra* note 4, at 177.

42 *Id.*

43 *Id.*; *New Bankruptcy Limit Nears Passage*, NEWSDAY (New York, NY), Mar. 2, 2001, at A51 (citing study that estimates that bankruptcy creates "hidden tax" of approximately $400 per year on every American family through higher interest rates passed on by consumer credit businesses and other charges).

44 SULLIVAN ET AL., *supra* note 4, at 177.

45 David Wessel, *The Muddled Course of Bankruptcy Law*, WALL ST. J., Feb. 22, 2001, at A1.

46 *See* Alexander, *supra* note 38, at 356-57.

47 Dunbar v. Dunbar, 190 U.S. 340, 352-53 (1903); Alexander, *supra* note 38, at 356 (Courts defined alimony as a nonprovable debt because these payments are subject to revision if the beneficiary's situation changes, i.e. the ex-wife remarries.).

48 Alexander, *supra* note 38, at 356.

49 The Bankruptcy Act of 1898 § 17(a)(2) was declared a violation of the Equal Protection Clause because it only prevented male debtors from discharging alimony debts in bankruptcy. *See id.* at 357 (citing Schiffman v. Wasserman, 13 Collier Bankr. Cas. 611 (MB) (D.R.I. 1977)). Female debtors were allowed to discharge alimony debts owed their former husbands. *See id.*

concern for debtors' familial obligations.[50] Congress intended the bankruptcy courts to act as equity courts,[51] providing only "honest debtors," i.e. those not using the bankruptcy proceedings to avoid their responsibilities to their ex-spouses and/or children, a fresh start.[52]

The nondischargeability of alimony and child support payments does not mean that the creditor spouse will continue to receive payments throughout the bankruptcy proceeding. It is likely that the debtor is in arrears to the former spouse or children.[53] The creditor-spouse may not seize the ex-husband's property, garnish his wages, or seize money in his checking account.[54] Instead, upon confirmation of a bankruptcy plan or liquidation of the debtor's assets, the creditor-spouse will receive a priority payment from the bankruptcy trustee.[55] However, this disposition can have deleterious effects on the creditor-spouse and the children.[56] The creditor-spouse will have to find alternative sources of income while awaiting payment from the bankruptcy trustee.[57] Further, the spouse might have to retain an attorney specializing in bankruptcy law to ensure that her and/or her children's interests are fully protected in the bankruptcy proceeding.[58]

While parties may agree to a separation agreement or divorce settlement, some argue that the property owner may not have considered the ramifications of a bankruptcy filing on the enforceability of the agreement or settlement.[59] Courts have cited a reduction in tax liabilities, not bankruptcy consequences, as the general reason a husband offers a large property settlement instead of support

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50 Stephen Joseph, *How Courts Have Interpreted the Phrases "Ability To Pay" and "Outweighs the Detrimental Consequences" Under 11 U.S.C. § 523(a)(15)(A) and (B) of the Bankruptcy Code in Cases Involving Non-Dischargeable Divorce Obligations–Part I,* 103 COM. L.J. 67, 68 (1998) (quoting Stelly v. Breanx, 8 B.R. 218, 220 (Bankr. W.D. La. 1981)).

51 Alexander, *supra* note 38, at 355.

52 Greenwalt v. Greenwalt (*In re* Greenwalt), 200 B.R. 909, 914 (Bankr. W.D. Wash. 1996) (finding that the debtor cannot utilize bankruptcy to avoid marital obligations); Joseph, *supra* note 50, at 68.

53 *See generally* Roslyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County Maryland,* 22 FAM. L.Q. 225, 306 (1988) (citing a 1985 Maryland study which estimated that only about twenty nine percent of separated or divorced women with children receive all of their court-ordered support).

54 SULLIVAN ET AL., *supra* note 4, at 177 (Under 11 U.S.C. § 362(b)(2), a bankruptcy filing creates an automatic stay prohibiting any creditor from initiating any legal proceeding in state court to recover a debt.).

55 *Id.*

56 Alexander, *supra* note 38, at 364 (citing TERRY ARDELL, MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS 150 (1986)).

57 *Id.*

58 *Id.*

59 *See, e.g.,* Mercer v. Mercer (*In re* Mercer), 50 B.R. 80, 83 (Bankr. E.D. Ark. 1985); Benz v. Nelson (*In re* Nelson), 16 B.R. 658 (Bankr. M.D. Tenn. 1981).

payments to his ex-spouse.[60] In contrast, when revising the Code in 1994, Congress viewed a discharge of property debts through bankruptcy as the primary rationale for the husband favoring a property settlement over alimony or support payments.[61] Typically, the beneficiary, the wife, is indifferent as to whether the attorneys have structured the agreement as a property settlement, as alimony, or as support payments.[62] After all, "money is money."[63] For the purposes of this Note, it is irrelevant whether parties consider the bankruptcy ramifications of their property settlement when they agree to their divorce settlement. Regardless of the parties' intent, alimony will not be discharged under 11 U.S.C. § 523(a)(5), and property settlements will not be discharged subject to the exceptions under 11 U.S.C. § 523(a)(15).[64]

Although bankruptcy might not have been considered a contingency when formulating divorce settlements before 1994, debtor husbands with large property settlement liabilities and other mounting debts utilized the Code's property settlement loophole to discharge property settlement agreements.[65] The wives who consented to these agreements were powerless to oppose the discharge.[66] For example, before 1994, a debtor husband might have agreed to give his ex-wife profits from his business until his children reached the age of maturity in exchange for him assuming little or no alimony or child support. If the husband later filed for bankruptcy, then the Code required the court to discharge the profit-sharing agreement.[67] The termination of this obligation extended even where the debtor reopened the same business and resumed reaping profits from the business.[68]

For decades, advocates of women's and children's rights unsuccessfully lobbied Congress to eliminate the loophole that allowed the debtor to reduce or eliminate his obligations to the family through the discharge of property debts.[69] In 1973, a com-

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60 *See, e.g., Mercer*, 50 B.R. at 83; *Nelson*, 16 B.R. at 658-59.

61 Smith, *supra* note 24, at 93.

62 Vance, *supra* note 17, at 379.

63 *Id.*

64 *See id.* at 380-81.

65 *See* Smith, *supra* note 24, at 89.

66 *See id.*

67 *See id.*

68 11 U.S.C. § 727 (2001). Upon discharge of the debtor's obligations, the debtor is no longer obligated to pay his or her debts. *Id.* Even when the debtor wins the lottery a day after his or her discharge, the creditors cannot satisfy their claims through this windfall. *Id.*

69 *See* Smith, *supra* note 24, at 93. Note that the Bankruptcy Reform Act of 1994 was passed in October, one month before the Congressional Midterm Elections, when the Democratic Party lost control of both the House of Representatives and the Senate. Bank-

mission appointed by Congress proposed to exclude from discharge any debt arising from divorce.[70] However, the National Conference of Bankruptcy Judges opposed the commission's proposal, arguing that property settlements should not be discharged through bankruptcy.[71] The judges deemed property settlements as falling outside the policy goals of family law.[72] The judges' opposition led to the enactment only of 11 U.S.C. § 523(a)(5) as part of the Bankruptcy Reform Act of 1978.[73]

In the late 1980's, a renewed effort to render property settlements nondischargeable in bankruptcy proceedings gathered momentum in Congress. In 1990, the Property Settlement Integrity Act was introduced on the House floor by Representative Henry Hyde; it sought "to make nondischargeable debts for liabilities under the terms of a property settlement entered into in connection with a separation agreement or divorce decree."[74] However, the bill was never enacted.[75] Finally in 1994, Congress responded with 11 U.S.C. § 523(a)(15), an addition to the Code, intended "to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of the debtor in bankruptcy."[76] In analyzing the issue, the House of Representatives 1994 Report concluded that the distinction between support debts and property debts, including the subsequent discharge of the latter, often led to the nondebtor spouse receiving little or no alimony or support.[77] Without these payments, the nondebtor spouse incurred more liabilities potentially forcing her into a bankruptcy filing.[78] The dischargeability of property settlements perpetuate a cycle of bankruptcy in the family unit. "Congress enacted § 523(a)(15) to reduce the possibility that a divorce obli-

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ruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.). One could argue that the timing of the act's passage indicates that political motives spurred Congress to correct an inequity present in the Code since its enactment in 1978.

70 REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., H.R. DOC. No. 93-137, pt. II, at 136 (1973).

71 Susswein, *supra* note 26, at 682 (citing *Hearing on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the Comm'n. on the Judiciary*, 94th Cong., 1st Sess. 1, at 304 (1975) (statement of Hon. Daniel R. Cowans, fmr. Bankr. J.)).

72 *See* Susswein, *supra* note 26, at 682.

73 *See id.*

74 H.R. 5203, 101st Cong., 2d Sess. (1990).

75 Susswein, *supra* note 26, at 691.

76 H.R. REP. No. 103-835, at 54 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3363.

77 Rothenberg, *supra* note 19, at 159 (citing H.R. REP. No. 103-835, at 54-55 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3363).

78 *See id.* at 159.

gation might slip through the cracks of § 523(a)(5) and be discharged unjustly."[79]

II. FEDERAL COURTS' APPLICATION OF 11 U.S.C. § 523(A)(15)

> Section 523(a)(15) is a pernicious creature. Using it is equivalent to applying acupuncture without a license because it does not heal the emotional wounds from a divorce. Indeed, section 523(a)(15) is an intrusive invasion into the private lives of a former couple . . . an impediment to the emotional fresh start in life that divorce may bring. It also can impede the fresh start of bankruptcy.[80]

The creditor-wife must have standing to object to the dischargeability of the property settlement.[81] To obtain standing before the bankruptcy court, the wife must have a pre-bankruptcy petition claim[82] and be a creditor within the meaning of the Code.[83] Congress intended a claim to include all legal obligations of the debtor, no matter how remote or contingent.[84] However, most courts hold that a strong likelihood that a state court will grant alimony or division of marital assets to the wife does not provide the wife standing as a creditor.[85] A final divorce decree or property settlement must be entered by the probate or family court in order for the wife to have a claim for alimony or property in the bankruptcy estate.[86]

A party who is not a spouse, former spouse, or dependent of the debtor lacks standing to sue for nondischargeability of a claim

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

80 Kessler v. Butler (*In re* Butler), 186 B.R. 371, 372 (Bankr. D. Vt. 1995).

81 Compagnone v. Compagnone (*In re* Compagnone), 239 B.R. 841, 842 (Bankr. D. Mass. 1999).

82 11 U.S.C. § 101(5) (2001) defines a claim as:

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

83 *Compagnone*, 239 B.R. at 843. FED R. BANKR. P. 4007(a) states that a "debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt."

84 *See Compagnone*, 239 B.R. at 843 (quoting H.R. REP. NO. 595, at 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; S. REP. NO. 989, at 21-22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-5808).

85 *See* Arleaux v. Arleaux (*In re* Arleaux), 229 B.R. 182, 185 (B.A.P. 8th Cir. 1999); *Compagnone*, 239 B.R. at 845; Scholl v. Scholl (*In re* Scholl), 234 B.R. 636, 642-43 (Bankr. E.D. Pa. 1999).

86 *See id.*

under § 523(a)(15).[87] Section 523(a)(15)(B)'s equity test effectively limits standing to a debtor's spouse, former spouse, or child.[88] If a debt is owed to someone other than one of these parties, discharge of the debt will always result in a "benefit to a debtor that is greater than the detriment to his or her spouse, former spouse, or child. In this circumstance, the benefit of a discharge to a debtor is necessarily a positive while the detriment to the spouse, former spouse, or child is necessarily zero."[89] Section 523(a)(15)'s legislative history supports these holdings.[90] "The exception [to discharge in §] 523(a)(15) applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation."[91]

Generally, the creditor-wife who has standing will argue that the debt in dispute constitutes alimony, nondischargeable under § 523(a)(5) or, in the alternative, that the debt results from a property settlement nondischargeable under § 523(a)(15).[92] The debtor spouse typically responds that the debt is dischargeable under either or both of § 523(a)(15)'s exceptions; the debt falls within subsection (A) the "ability to pay test," and/or under subsection (B) the "equity test."[93] There are also cases where the debtor seeks a discharge of the marital obligation under § 523(a)(15) and the creditor counterclaims under § 523(a)(5).[94]

Before applying § 523(a)(15), the bankruptcy court must determine whether the claim, arising under the divorce decree, is based on a support or property settlement agreement. Courts typically interpret the provisions of § 523(a) against the objecting cred-

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87 Ashton v. Dollaga (*In re* Dollaga), 260 B.R. 493, 496 (9th B.A.P. 2001); Abate v. Beach (*In re* Beach), 203 B.R. 676, 680 (Bankr. N.D. Ill. 1997) (holding that professional who represented debtor in pre-petition marital dissolution proceeding lacked standing under § 523(a)(15)); Woodruff v. Smith (*In re* Smith), 205 B.R. 612, 616 (Bankr. E.D. Cal. 1997). *But see* Zimmerman v. Soderlund (*In re* Soderlund), 197 B.R. 742, 747 (Bankr. D. Mass. 1996) (rejecting view that only parties to divorce have standing under § 523(a)(15)).

88 *Dollaga*, 260 B.R. at 496.

89 *Id.* (citing *Smith*, 205 B.R. at 616).

90 *Id.*

91 *Id.* (quoting H.R. REP. No. 103-835, at 55 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3364).

92 Adler v. Adler (*In re* Adler), 243 B.R. 596 (Bankr. D.R.I. 2000); Ghelfi v. Abati (*In re* Ghelfi), No. 98-1135, 1999 WL 9940 (Bankr. D. Mass. Jan. 6, 1999); Rossi v. Rossi (*In re* Rossi), No. 98 A 01559, 1999 WL 253124 (Bankr. N.D. Ill. Apr. 27, 1999).

93 Section 523(a)(15) is typically not a debtor remedy. *See* Brown v. Pitzer (*In re* Brown), 249 B.R. 303, 306 (S.D. Ind. 2000) (citing *In re* Gomez, 206 B.R. 663, 666 (Bankr. E.D.N.Y. 1997)). The provision is typically a debtor counterclaim to a creditor's claim of nondischargeability. *See id.*

94 Sobel, Inc. v. Weinstein (*In re* Weinstein), 237 B.R. 567, 571 n.6 (Bankr. E.D.N.Y. 1999).

itor to give the debtor a better opportunity to obtain a fresh start.[95] The party claiming an exception to discharge generally bears the burden of proving by a preponderance of the evidence that the debt falls into one of the exceptions enumerated in § 523(a).[96] All circuits agree that the creditor-spouse has the initial burden of proving that the debt falls within the nondischargeability provisions of either § 523(a)(5) or § 523(a)(15).[97]

The courts are bound by federal bankruptcy law in determining the nature of the debt.[98] State law is not applicable, and a state probate court's characterization of the debt is not determinative.[99] Bankruptcy courts are likely relieved that the state court's definition of the debt in the divorce decree is not binding because many state courts tend to not clearly distinguish between whether the divorce decree constitutes a support agreement or a property settlement.[100]

Congress has recognized the difficulty of distinguishing between income derived from a support order and income derived from a property settlement agreement.[101] Congress has eliminated the distinction for income tax purposes via the Domestic Relations Tax Reform Act of 1984.[102] However, the distinction remains in bankruptcy proceedings. Further, no standard rule exists among or within the circuits for determining whether an agreement is for support or property under the Code.[103] Most courts look to the substance of the obligation: did the parties intend for one spouse to provide the other with support at the time the agreement was

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95 *In re* Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998) (citing Kolodziej v. Reines (*In re* Reines), 142 F.3d 970, 972-73 (7th Cir. 1998)).

96 *Crosswhite*, 148 F.3d at 881 (citing Grogan v. Garner, 498 U.S. 279, 291 (1991); Barclays/American Business Credit, Inc. v. Adams (*In re* Adams), 31 F.3d 389, 393-94 (6th Cir. 1994)).

97 *Id.*

98 *See Reines*, 142 F.3d at 972; Goin v. Rives (*In re* Goin), 808 F.2d 1391, 1392 (10th Cir. 1987); Harr v. Harr (*In re* Harr), No. 98 A 169, 2000 WL 1341402, at *5 (Bankr. N.D. Ill. Sept. 18, 2000). *But see* Forsdick v. Turgeon, 812 F.2d 801, 803 (2d Cir. 1987); Long v. West (*In re* Long), 794 F.2d 928, 931 (4th Cir. 1986) (commenting that where an award has been determined by trier of fact in state court, award's characterization should be given some deference).

99 *See Harr*, 2000 WL 1341402, at *5; Ghelfi v. Abati (*In re* Ghelfi), No. 98-1135, 1999 WL 9940, at *1 (Bankr. D. Mass. Jan. 6, 1999).

100 Bernice B. Donald & Jennie D. Latta, *The Dischargeability of Property Settlements and Hold Harmless Agreements in Bankruptcy: An Overview of § 523(a)(15)*, 31 FAM. L.Q. 409, 412 (1997); Ellen B. Vergos, *Bankruptcy Issues Arising in Divorce Practice*, 24 MEM. ST. U. L. REV. 697, 699 (1994).

101 Susswein, *supra* note 26, at 691.

102 Domestic Relations Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 793 (1986).

103 Susswein, *supra* note 26, at 691-92; Vance, *supra* note 17, at 383.

executed?[104] This substance over form analysis[105] yields to the application of multiple factor tests. Four courts sitting in the First Circuit apply four different tests to determine whether an agreement constitutes a support obligation or a property settlement.[106] The Seventh Circuit Court of Appeals has expressed reservations about the effectiveness of "factorcounting."[107] The Seventh Circuit views laundry lists that do not assign weights or consequences to the considered factors as a failure of the test of utility.[108] Yet, a recent decision within the circuit utilized a nine factor test to determine whether a debtor's agreement to pay for his children's private school education was child support.[109] An earlier decision within the Seventh Circuit articulated a twenty factor test.[110] The uncertainty surrounding the courts' discretion has produced criticism from academics.[111] One bankruptcy scholar noted that "it is difficult for litigants to predict with any degree of certainty how a bankruptcy court will resolve their particular dispute."[112]

Courts, however, continually rely on several factors in determining how to characterize the agreement.[113] For example, in both the First Circuit and the Seventh Circuit, most courts characterize the agreements based on whether the obligation payable is due in a lump sum or in installments, whether the obligation terminates upon certain events such as death or remarriage, whether the payments attempt to balance the parties' income, and on the earning potential of the parties.[114] When the debt incurred is due in installments, courts typically classify the debt as alimony or support.[115] Courts generally also consider the debt to be support when payments end upon the death or the remarriage of either

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104 *In re* Brody, 3 F.3d 35, 38 (2d Cir. 1993); Yeates v. Yeates (*In re* Yeates), 807 F.2d 874, 878 (10th Cir. 1986); Maitlen v. Maitlen (*In re* Maitlen), 658 F.2d 466, 468 (7th Cir. 1981); *Harr*, 2000 WL 1341402, at *6.

105 *See generally Harr*, 2000 WL 1341402, at *6 (holding that label of the obligation is not dispositive; obligation found in section of the divorce agreement labeled "Property Settlement," and not in section designated "Periodic Maintenance," still constituted support).

106 Ghelfi v. Abati (*In re* Ghelfi), No. 98-1135, 1999 WL 9940, at *1 (Bankr. D. Mass. Jan. 6, 1999).

107 *Harr*, 2000 WL 1341402, at *6 (citing Kolodziej v. Reines (*In re* Reines), 142 F.3d 970, 973 (7th Cir. 1998).

108 *In re* Plunkett, 82 F.3d 738, 741 (7th Cir. 1996).

109 Gatliff v. Gatliff (*In re* Gatliff), No. 99 A 01198, 2000 WL 1836726, at *4 (Bankr. N.D. Ill. Dec. 13, 2000).

110 Alexander, *supra* note 38, at 361.

111 *See id.*

112 *Id.*

113 *See* Vance, *supra* note 17, at 385.

114 *See Gatliff*, 2000 WL 1836726, at *4; Ghelfi v. Abati (*In re* Ghelfi), No. 98-1135, 1999 WL 9940, at *2 (Bankr. D. Mass. Jan. 6, 1999).

115 *Gatliff*, 2000 WL 1836726, at *4; *see also* Altavilla v. Altavilla (*In re* Altavilla), 40 B.R. 938, 942 (Bankr. D. Mass. 1984); Vance, *supra* note 17, at 385.

spouse and when the payments reduce the income gap between the parties.[116]

Courts may also look beyond the four corners of a divorce decree or property settlement agreement to make the determination.[117] Many courts hold that the most important factor in deciding the debt's character is the financial situation of the parties at the time the obligation is agreed upon or determined by the court.[118] "If the agreement failed to provide explicitly for spousal support, the court may presume that the property settlement was intended for support if it appears under the circumstances that the creditor-spouse needed support."[119] Where the debtor-husband had a substantially higher income than the creditor-wife at the time of the divorce, the court is likely to classify that debt as a support obligation.[120]

If the court views the agreement as a support claim, the debt is nondischargeable, and the court's work is complete.[121] The court does not have to tackle the "ability to pay" or "balancing of the equities" tests of § 523(a)(15).[122] No intrusive inquiries into the financial affairs of the debtor and creditor are necessary.[123] The modern trend in divorce, however, is to end the marriage as completely as possible and to allow the financially dependent spouse to attain financial self-sufficiency in an efficient manner.[124] To attain these goals, a growing number of divorce decrees provide for a division of marital assets or debts, not long-term monthly support payments.[125] This trend forces bankruptcy courts to analyze § 523(a)(15).

Congress has afforded federal bankruptcy judges wide discretion in interpreting or taming the "pernicious creature – provision" of the Code. The United States Supreme Court offers few interpretative weapons in capturing the essence of the statute. The Supreme Court has held that when analyzing the Code, the statute

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116 *Gatliff*, 2000 WL 1836726, at *4.

117 Richter v. Pelikant (*In re* Pelikant), 5 B.R. 404, 406-07 (Bankr. N.D. Ill. 1980).

118 *Harr*, 2000 WL 1341402, at *8 (Bankr. N.D. Ill. Sept. 18, 2000); Kerzner v. Kerzner (*In re* Kerzner), 250 B.R. 487, 495 (Bankr. S.D.N.Y. 2000) (citing Bonheur v. Bonheur (*In re* Bonheur), 148 B.R. 379, 382 (Bankr. E.D.N.Y. 1992)).

119 Neveu v. Martin (*In re* Martin), No. 99-1175-MWV, 2000 Bankr. LEXIS 1823, at *5 (Bankr. D. N.H. May 26, 2000) (quoting Goin v. Rives (*In Re* Goin) 808 F.2d 1391, 1392-93 (10th Cir. 1987)).

120 *Harr*, 2000 WL 1341402, at *8; Ghelfi v. Abati (*In re* Ghelfi), No. 98-1135, 1999 WL 9940, at *3 (Bankr. D. Mass. Jan. 6, 1999).

121 *See* Vance, *supra* note 17, at 387.

122 *See id.* at 390.

123 Harrell v. Sharp (*In re* Harrell), 754 F.2d 902, 906 (11th Cir. 1985).

124 Singer, *supra* note 23, at 79-80; Vance, *supra* note 17, at 385.

125 Vance, *supra* note 17, at 385.

itself is the binding authority because a statute says what it means.[126] Section 523(a)(15) omits the phrases "hold harmless" and "payable to a third party."[127] The term "incurred" is not defined within the Code.[128] These three terms define the obligations contained in most property settlement agreements.[129] Where language is not defined within the Code, the Supreme Court generally utilizes Black's Law Dictionary for a definition.[130] "Incur" means "to have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively."[131] Under § 523(a)(15), the debtor may incur an obligation in accordance with applicable nonbankruptcy, matrimonial law. Bankruptcy judges must analyze matrimonial law for which they rarely have any substantive training.[132] Further, the issue of exclusive versus concurrent jurisdiction is hopelessly entangled within the state courts[133] A full or partial discharge of a marital debt is a modification of the state divorce decree.[134] However, unlike a state court proceeding, the creditor-spouse cannot later petition for a reinstatement of or increase in payments.[135]

Once bankruptcy courts untangle the issues of standing and jurisdiction and once they determine that the debt meets the qualifying language of § 523(a)(15), the courts must then determine who has the burden of proving the nondischargability of the debt and finally apply the statute.

III. SEVENTH CIRCUIT'S CLEAR ALLOCATION OF THE BURDEN OF PROOF

In *Matter of Crosswhite*,[136] the Seventh Circuit provided clear guidelines for determining which party in an adversary proceeding has the burden of proof under § 523(a)(15).[137] The Crosswhites did not have overwhelming debts before the dissolution of their

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126 Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

127 Gibson v. Gibson (*In re* Gibson), 219 B.R. 195, 202 (B.A.P. 6th Cir. 1995).

128 *Id.*

129 Susswein, *supra* note 26, at 682 n.22.

130 *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 538 (1994); Dewsnup v. Timm, 502 U.S. 410, 428 (1992); Farrey v. Sanderfoot, 500 U.S. 291, 296 (1991).

131 BLACK'S LAW DICTIONARY 768 (6th ed. 1990).

132 Sobel, Inc. v. Weinstein (*In re* Weinstein), 237 B.R. 567, 571 n.6 (Bankr. E.D.N.Y. 1999).

133 *Id.*

134 Rothenberg, *supra* note 19, at 153.

135 *See id.* at 153 n.116.

136 148 F.3d 879 (7th Cir. 1998).

137 United States Courts of Appeals have jurisdiction over bankruptcy proceedings pursuant to 28 U.S.C. § 158(d) (2001).

marriage in September 1993.[138] The divorce decree, entered by the Whitley, Indiana Circuit Court, contained a property settlement whereby the husband kept possession of the family home and agreed to pay his ex-wife $8,000 as a property equalization payment.[139] In addition, the husband agreed to assume, pay, and hold the ex-wife harmless on two joint debts totaling approximately $5,200.[140] Four months later, the husband still had failed to pay these debts, and he had filed for bankruptcy under Chapter 7 of the Code.[141] The husband's bankruptcy filing prevented the two creditors from collecting the debts owed to them.[142] Without a remedy against the debtor-husband, each creditor sought payment from the ex-wife.[143] The ex-wife paid one debt in full and restructured the other debt whereby she made monthly payments to retire it.[144] The ex-wife then initiated an adversary proceeding in the husband's bankruptcy case.[145] She sought a determination from the court that her husband's property settlement obligations were nondischargeable debts under § 523(a)(15).[146] Through this adversary proceeding, the creditor-wife hoped to enforce the property settlement agreement and thus receive restitution for the debts she had retired.[147] In response, the husband argued that he did not have the ability to pay his debts and/or that the benefit of discharging his debts outweighed the detrimental consequences a discharge of the debts would have on his ex-wife.[148]

The United States Bankruptcy Court, sitting in the Northern District of Indiana, held that the debtor had the burden of proving that he did not have the ability to pay the debts to his wife under § 523(a)(15)(A).[149] The debtor was the party in the best position

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138 *Crosswhite*, 148 F.3d at 881.

139 *Id.* One half of this amount was to be paid within thirty days, with the remaining balance due within one year. *Id.*

140 *Id.*; Wessel, *supra* note 45, at 1 (discussing how society tends to pigeonhole bankruptcy petitioners based on media reports of outrageous debts such as couple with $3,200 per month income who ran up $237,000 in debt on thirty credit cards before filing for bankruptcy; in reality, *Crosswhite* is more indicative of amount of debt individuals seek discharged through bankruptcy).

141 *Crosswhite*, 148 F.3d at 881.

142 Under 11 U.S.C. 362(a) (2001), upon filing a bankruptcy petition, creditors are automatically stayed from proceeding in any litigation or debt collection against the petitioning debtor.

143 *Crosswhite*, 148 F.3d at 881 (citing one creditor who brought suit against his wife, and the other who threatened his wife with litigation).

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *In re* Crosswhite, No. 95-1021, 1996 WL 756745, at *2 (Bankr. N.D. Ind. July 3, 1996), *rev'd*, 148 F.3d 879 (1998).

149 *Id.* at *4-5.

to provide evidence of his financial circumstances to the court.[150] In determining the debtor's ability to pay, the bankruptcy court subtracted the reasonable costs incurred by the debtor to feed, house, and clothe himself from the debtor's income.[151] The court held that the debtor, a self-employed mechanic with an unprofitable business, currently did not have the ability to pay his debts to his ex-wife from his income.[152] However, the court looked beyond the debtor's current financial situation.[153] The court held that if the debtor worked for another mechanic, then he would have the ability to provide for himself and pay his debts.[154] Thus, the debtor failed to prove that he did not have the ability to pay his debts to his ex-wife.[155]

The bankruptcy court then analyzed the debtor's alternative theory for discharge under § 523(a)(15)(B).[156] Noting a lack of guidance from Congress on how to balance the debtor's benefit against the creditor's detriment in applying the statute, the court applied a "totality of the circumstances" analysis.[157] This interpretative approach required both parties to proffer evidence.[158] The debtor had to present evidence illustrating the benefits he would receive from a discharge of the debts.[159] However, the court held that the debtor did not have an evidentiary burden.[160] The court viewed the benefit of a discharge to the debtor as obvious: he was no longer responsible for his liabilities.[161] In contrast, the court required the ex-wife creditor to produce evidence demonstrating the deleterious consequences discharging the debt would have on

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150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at *5. Generally, courts consider whether the debtor has the ability to pay the claim in installments over time from future income. Rossi v. Rossi (*In re* Rossi), No. 98 A 01559, 1999 WL 253124 at *6 (Bankr. N.D. Ill. Apr. 27, 1999); Taylor v. Taylor (*In re* Taylor), 191 B.R. 760, 764 (Bankr. N.D. Ill. 1996), *aff'd*, 199 B.R. 37 (N.D. Ill. 1996). Here, the court did not make this a determination. *Crosswhite*, 1996 WL 756745, at *5.

154 *Id.* at *2 (holding that based on debtor's experience, training, and earning history and based on current job market for mechanics in Whitley County, Indiana, debtor could earn approximately $13.00 per hour despite fact that he incurred losses through his self-employment).

155 *Id.*

156 *Id.* at *8.

157 *Id.* Bankruptcy courts have utilized the "totality of the circumstances" as a general method for weighing the benefit of the discharge to a debtor against the harm the discharge creates for the creditor. Within this general method, courts use a number of different factor-based approaches. *Id.* at *6. Here, the court applied a finances-based test. *See id.* at *7.

158 *Id.* at *8 (citing *In re* Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996)).

159 *Crosswhite*, 1996 WL 756745, at *8.

160 *Id.*

161 *Id.*

her.[162] The court argued that the creditor was in the best position to produce evidence concerning her economic circumstances and her ability to economically survive the discharge of the debts.[163] The court believed that creditor had "weathered the storm" produced by the debtor's breach of the property agreement, citing the creditor's remarriage, both her and her second husband's full time employment, and their relatively low monthly expenses.[164] The court then held that the debtor's obligations to his ex-wife were dischargeable under § 523(a)(15)(B), since the benefit of discharging the debt outweighed the detriment caused to the ex-wife.[165]

The United States District Court for the Northern District of Indiana affirmed the bankruptcy court's ruling without issuing an opinion.[166] The creditor–ex-wife then appealed to the Seventh Circuit Court of Appeals, arguing that the bankruptcy and district courts incorrectly placed the burden of proof on the creditor when analyzing the debtor's claim for discharge under § 523(a)(15)(B).[167] The creditor contended that the bankruptcy court would have found the debt nondischargeable if the burden of proof had been placed on the debtor.[168] He could not show that the benefit to him outweighed the harm to her.[169]

In analyzing cases like *Crosswhite*, the Seventh Circuit conducts a de novo review of the bankruptcy and district courts' legal interpretations[170] and reverses a bankruptcy court's findings of fact only when the findings are clearly erroneous.[171] Here, the court affirmed the bankruptcy and district court's holdings that the debtor had the burden of proof under § 523(a)(15)(A).[172] The debtor is in the best position to show that he cannot satisfy the debt under § 523(a)(15)(A).[173] However, the court reversed the lower court's rulings and remanded the case based on the bankruptcy court's

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162 *Id.*

163 *Id.* at *9 (citing Collins v. Hesson (*In re* Hesson), 190 B.R. 229, 239 (Bankr. D. Md. 1996)).

164 *Crosswhite*, 1996 WL 7567745, at *9. *But cf.* Willey v. Willey (*In re* Willey), 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996) (holding that courts should not take into consideration spouse's or companion's income).

165 *Id.*

166 *In re Crosswhite*, 148 F.3d 879, 884 (7th Cir. 1998).

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* at 881 (citing *In re* Birkenstock, 87 F.3d 947, 951 (7th Cir. 1996)).

171 FED. R. BANKR. P. 8013.

172 *Crosswhite*, 148 F.3d at 884-85.

173 *Id.*

incorrect allocation of the burden of proof under § 523(a)(15)(B).[174]

The Seventh Circuit stated two rationales for reversing the bankruptcy court's decision. First, the court stated that it is "logical and reasonable that the debtor bear the burden of proving either exception to nondischargeability."[175] The debtor is in the best position to demonstrate that the benefit he receives from a discharge of the property settlement agreement is greater than the detrimental effects to the creditor who must pay the debt.[176] Analyzing § 523(a)(15)(B), the court concluded that Congress intended that the evidentiary burden be placed on the debtor.[177] If Congress had intended that the creditor bear the burden of proof, then the statute would have required a showing that the detrimental consequences of a discharge to the creditor outweigh the benefit to the debtor.[178]

Second, the Seventh Circuit focused on the structural similarity between § 523(a)(15) and 11 U.S.C. § 523(a)(8).[179] Both statutes contain an exception to the discharge exception denoted by the term "unless."[180] Under § 523(a)(8),[181] the debtor has the burden of proving that circumstances warrant a discharge of the debt.[182] The debtor must demonstrate undue hardship; if he does not, his or her student loans will not be discharged despite the bankruptcy petition.[183] The *Crosswhite* court equated proving undue hardship under § 523(a)(8) with the burden of proving that the benefit of the discharge outweighs the detriment under

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174 In his dissenting opinion, Judge Manion agreed with the majority that the debtor has the burden of proof. He dissented on the ground that the bankruptcy court's decision, regarding how to balance the equities between the benefit and the detriment of the discharge to the respective parties, should be reviewed only for an abuse of discretion. He held that the bankruptcy court did not abuse its discretion in discharging the debtor's property settlement agreement. Judge Manion further held that the court should not have used this case to set a standard for the circuit because the debtor did not file a response to the creditor's appeal. *Id.* at 889.

175 *Id.* at 885.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 11 U.S.C. § 523(a)(8)(2001) does not exempt from discharge:

> [a]n educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a government unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

182 *Crosswhite*, 148 F.3d at 886 (citing *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993)).

183 *Id.* at 886 n.9.

§ 523(a)(15)(B). Thus, the court held that the debtor had the burden of proof under § 523(a)(15).[184]

Crosswhite is not interpreted to hold that the creditor has no evidentiary burden under § 523(a)(15). The court clearly delineates that each party must present information necessary to make a decision.[185] The debtor, alone, can demonstrate the benefit of a discharge; the creditor, alone, can show how a discharge would perpetuate a wrong on her and/or her children.[186] However, the court places the ultimate burden of proof on the debtor.[187] His claim for discharge is analogous to an affirmative defense.[188] The debtor must win the balancing of the equities, otherwise the presumption is that the debt will not be discharged.

The *Crosswhite* decision followed holdings of the Bankruptcy Appellate Panel of the Sixth,[189] Eighth,[190] and Ninth[191] Circuits and has since been applied in several bankruptcy courts in circuits where the court of appeals has not enunciated a clear standard for the burden of proof under § 523(a)(15).[192] A minority of courts, particularly the First Circuit Bankruptcy Appellate Panel, however, hold that the creditor-wife has the burden of proof to render the debt nondischargeable under § 523(a)(15).[193]

IV. First Circuit's Murky Allocation of the Burden of Proof

Since the Sixth, Seventh, Eighth, and Ninth Circuits' rulings, the Bankruptcy Appellate Panel of the First Circuit has ruled on only one case involving a § 523(a)(15) adversary proceeding.[194] In *Hastings v. Konick*, pursuant to the couple's separation agreement, Hastings (the wife) transferred her interest in real property held by her and Konick (her husband) as tenants by the entirety to Konick in exchange for a promissory note for $15,000 to be paid by Konick within fifteen years in annual installments of not less than

184 *Id.*
185 *Id.* at 885.
186 *Id.*
187 *Id.*
188 *Id.*
189 Hart v. Molino (*In re* Molino), 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998).
190 Moeder v. Moeder (*In re* Moeder), 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998).
191 Jodoin v. Samayoa (*In re* Jodoin), 209 B.R. 132, at 140 (B.A.P. 9th Cir. 1997).
192 Prisco v. Buxbaum (*In re* Buxbaum), No. 899-8189-288, at 6 (Bankr. E.D.N.Y. Sept. 22, 2000); Foto v. Foto (*In re* Foto), 258 B.R. 572, 569 (Bankr. S.D.N.Y. 2000). The Second Circuit Court of Appeals has never ruled on this question. However, bankruptcy courts in both the eastern and southern districts of New York regularly apply the *Crosswhite* standard. *Id.*
193 Hastings v. Konick (*In re* Konick), 236 B.R. 524 (B.A.P. 1st Cir. 1999).
194 *Id.*

$1,000.[195] Konick failed to meet these obligations, and the Commonwealth of Massachusetts Family and Probate Court Department ordered Konick to pay $40 per week toward the property settlement debt in compliance with a mutually agreed to stipulation.[196] Konick soon filed a bankruptcy petition under Chapter 7 of the Code.[197] Hastings proceeded to initiate an adversary proceeding, objecting to the discharge of the property settlement agreement.[198] The bankruptcy court held that Konick's property settlement obligations were nondischargeable under § 523(a)(15).[199]

The Bankruptcy Appellate Panel of the First Circuit affirmed the bankruptcy court's decision in all aspects.[200] The Court also held that the debtor's ex-spouse bore the ultimate burden of proof with respect to each element of the dischargeability exception.[201] The creditor-wife must show that the debt arises from a separation agreement.[202] She then has the burden of proving that the debtor has the ability to pay the debt, and that the detrimental consequences to her outweigh the benefits resulting to the debtor from discharge of the debt.[203] In placing the burden on the creditor, the court enunciated an allocation of the evidentiary burden which was now applicable to all in § 523(a)(15) adversary proceedings in all bankruptcy courts in the First Circuit. However, the Court did not analyze the statute or the reasoning outlined in *Crosswhite.* Instead, the court's primary support for its holding resided in *Brasslet v. Brasslet* (*In re* Brasslet),[204] a lengthy District of Maine Bankruptcy Court ruling.[205]

In *Brasslet,* the bulk of the couple's personal property was associated with the husband's business and was set aside to him.[206] Following Maine's property division statute,[207] the state court held that a "just" division of marital assets was achieved by ordering the husband to pay his ex-wife $90,000.[208] The husband then proceeded to file a bankruptcy petition under Chapter 7, which

195 *Id.* at 525-26.
196 *Id.* at 526.
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.* at 530.
201 *Id.* at 527.
202 *Id.*
203 *Id.*
204 233 B.R. 177 (Bankr. D. Me. 1999).
205 *Konick,* 236 B.R. at 527.
206 *Brasslet,* 233 B.R. at 180.
207 ME. REV. STAT. ANN. tit. 19-A, § 953 (West 1998).
208 *Brasslet,* 233 B.R. at 180.

prompted the wife to file a complaint to determine the dischargeability of the property division award.[209] The court held that there was ample evidence to demonstrate that the husband's current circumstances and future prospects provided him with the ability to pay the obligation under § 523(a)(15)(A).[210] Further, the Court held that the detriment to the wife in discharging the obligation clearly exceeded the benefit the debtor would receive from a discharge.[211]

An analysis of *Brasslet* reveals that the court placed the burden of proof on the creditor, with respect to each element, because the court viewed this allocation of the burden as a straightforward and practical interpretation consistent with the statute.[212] The court noted that many creditors had successfully pleaded and proven § 523(a)(15) claims.[213] Again, the *Brasslet* court did not analyze the statute, and it gave only a cursory consideration to the arguments that the debtor should have the burden of proof under the statute. Essentially, the *Brasslet* court relied on a judicial economy argument when it placed the burden of proof in § 523(a)(15) proceedings on the creditor.

A bankruptcy court sitting in New Hampshire has, however, refined the reasoning behind placing the burden of proof in § 523(a)(15) proceedings on the creditor, while simultaneously adhering to the *Brasslet* and *Konick* holdings.[214] The *Hadley* court[215] held that the "focus on the burden of proof should be more precise."[216] The court viewed the "burden of proof" to include both a burden of production and a burden of persuasion.[217] According to this view, a claimant meets the burden of production when he or she presents enough evidence to establish a prima facie case.[218] The burden of persuasion requires enough evidence to persuade the court that the alleged fact is true by a "relevant evidentiary margin."[219] In *Hadley*, in a § 523(a)(15) proceeding, the court held that the debtor has the burden of production under § 523(a)(15)(A).[220] *Hadley* agreed with *Crosswhite*[221] that the

209 *Id.*
210 *Id.* at 183-84.
211 *Id.* at 185-87.
212 *Id.* at 183.
213 *Id.*
214 Garrity v. Hadley (*In re* Hadley), 239 B.R. 433, at 433 (Bankr. D. N.H. 1999).
215 For details regarding the dispute between the parties, see *supra* note 27.
216 *Hadley*, 239 B.R. at 437.
217 *Id.* (citing Stone v. Stone (*In re* Stone), 199 B.R. 753, 759 (Bankr. N.D. Ala. 1996)).
218 *Hadley*, 239 B.R. at 437 (citing BLACK'S LAW DICTIONARY 178 (5th ed. 1979)).
219 *Id.*
220 *Id.*

debtor is in the best position to show that he cannot pay the property settlement obligation.[222] Yet, the *Hadley* court concluded that the creditor bears the burdens of production and persuasion on all of the other elements of § 523(a)(15) and has the ultimate burden of persuasion under § 523(a)(15)(A).[223]

One could argue from the cases cited from the First Circuit that the creditor-wife is not harmed when the ultimate burden of proof is placed on her in a § 523(a)(15) proceeding. The courts in *Hadley*,[224] *Konick*,[225] and *Brasslet*[226] each held for the creditor-wife: the debts incurred through the property settlement agreements were nondischargeable under § 523(a)(15). According to these holdings, placing the burden on the wife to prove that her husband has the ability to pay the debt, and that the benefit of the discharge does not outweigh the detriment to the creditor, is not an untenable or overly burdensome burden.

However, this Note argues that there are harmful economic and legal consequences to women when courts place the burden of proof on the wife. In the First Circuit cases cited, each of the creditor-wives were in dire financial straits when they initiated the adversary proceedings. The creditor-wife in *Brasslet* was an unemployed, fifty-five-year-old single woman with a high school education.[227] The creditor-wife in *Konick* lived with her parents and earned less than $7,000 a year.[228] While the creditors in these cases satisfied the burden of proof, in many instances the wife will not have the means to pay disbursements so that counsel may fully investigate the finances of the debtor.[229] In contrast, the debtor-husband has no need for experts, and in many cases represents himself pro se.[230] The debtor has the presumption that the debt will be discharged, and it is the creditor who must utilize lawyers and accountants to rebut this presumption.

The *Hadley* evidentiary standard which is needed to rebut the debtor-husband's evidence of an inability to pay the obligation is a high bar for the creditor-wife to overcome. Two recent First Cir-

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221 *Crosswhite*, 148 F.3d at 885.
222 *Hadley*, 239 B.R. at 437.
223 *Id.*
224 *Id.* at 440.
225 Hastings v. Konick (*In re* Konick), 236 B.R. 524, 530 (B.A.P. 1st Cir. 1999).
226 *Brasslet*, 233 B.R. 177, 187 (Bankr. D. Me. 1999).
227 *Id.* at 181.
228 *Konick*, 236 B.R. at 526.
229 Adler v. Adler (*In re* Adler), 243 B.R. 596, 601 (Bankr. D.R.I. 2000) (stating that the creditor-wife had to employ a forensic accountant to prove the debtor-husband's income).
230 Smith v. Anderson (*In re* Anderson), No. 98-1165-JMD, 1999 Bankr. LEXIS 1895, at *1 (Bankr. D. N.H. Sept. 23, 1999); *Hadley*, 239 B.R. at 433.

cuit cases illustrate this argument. In both *Smith v. Anderson* (*In re* Anderson)[231] and *Denton v. Girard* (*In re* Girard),[232] Judge Michael Deasy, the author of the *Hadley* burden of proof allocation, held that the creditor-wives lacked sufficient evidence to overcome the debtor-husbands' evidence that they had the current ability to pay their obligations to their ex-spouses. In *Anderson*, the court exhaustively analyzed the debtor's ability to pay under § 523(a)(15)(A) in accordance with the disposable income test.[233] The court noted that the ex-wife merely rebutted this evidence by arguing "that the parties' daughter is no longer in college and therefore the Debtor's expenses relating to the children's education have decreased."[234] The court held that this argument failed to meet the burden of persuasion, thereby rendering a promissory note to the ex-wife in the amount of $23,062.02 and the debtor's obligation to indemnify his ex-wife from a loan in the amount of $8,423.13 dischargeable under § 523(a)(15).[235] A similar lack of sufficient evidence presented was the reasoning behind the court's holding in *Girard*, i.e. that an indemnification obligation of $3,385.57 was dischargeable under § 523(a)(15).[236] These holdings will likely dissuade future creditor-wives from filing adversary proceedings and from attempting to render property settlement agreements nondischargeable in New Hampshire and in other First Circuit jurisdictions. Judge Deasy's attempt to clarify the burden of proof under the statute has taken much of the thunder away from it. An exception to the discharge of property settlement debt has become a mere formality on the road to the debtor's discharge of the obligation.

V. CONCLUSION

Typically, the creditor has to prove the nondischargeability of a debt. Yet, a wife or child is not a typical creditor. Given the deleterious effect a discharge could have on the remaining or reconstituted family unit, Congress enacted a statute that presumes that debts arising from property settlement agreements are nondischargeable. The Seventh Circuit has followed Congress's intent whereby the circuit has placed on the debtor the burden of rebut-

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231 1999 Bankr. LEXIS 1895, at *1.
232 Denton v. Girard (*In re* Denton), No. 00-1095-JMD, 2001 Bankr. LEXIS 585, at *1 (Bankr. D. N.H. Mar. 23, 2001).
233 *Anderson*, 1999 Bankr. LEXIS 1895, at *20-21.
234 *Id.* at *22-23.
235 *Id.* at *23.
236 *Girard*, 2001 Bankr. LEXIS 585, at *15-16.

ting the presumption. With bankruptcy courts sitting in equity, this is the only fair and equitable allocation of the burden. United States Courts of Appeals that apply a different burden or which have not commented on the issue should follow the Seventh Circuit's interpretation. But, more importantly, Congress must revise § 523(a)(15) to clearly state that the debtor has the burden of proving that the discharge should be under one of the statute's exceptions.

The current bankruptcy legislation, which was passed by both the House[237] and the Senate[238] and is presently before a joint conference committee, seeks to make it more difficult for individuals to file for Chapter 7 bankruptcy.[239] Further, both the House and Senate bills seek to revise § 523(a)(5) to read that all domestic support obligations are nondischargeable.[240] The proposed elimination of exceptions to § 523(a)(5) and the potential clarity to the statute will only benefit creditor-spouses. These changes will be an iron-clad exception to the debtor's discharge.[241] However, the proposed legislation does not attempt to significantly clarify § 523(a)(15). The 2001 legislation merely alters this section minutely.[242] Given the time and expense incurred in litigating this exception to discharge, congressional silence on the exceptions to discharge within this section of the Code is deafening. Significant revision in the Code occurs about only every seven or eight years. Before this revision to the Code becomes law or dies in the joint committee, this Note advocates that Congress should analyze how § 523(a)(15) is operating in the bankruptcy courts, and Congress should move to eliminate the burdensome and inequitable results the statute has on women, children, and what remains of the family unit after divorce and bankruptcy.

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237 Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001).

238 Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001).

239 *See* Rhonda McMillon, *Debtors' Fast Track*, A.B.A. J., May 2001, at 83.

240 H.R. 333, 107th Cong. § 215(1)(A) (2001); S. 420, 107th Cong. § 215(1)(A) (2001).

241 H.R. 333; S. 420.

242 H.R. 333, 107th Cong. §215(1)(B) (2001); S. 420, 107th Cong. § 215(1)(B) (2001). This legislation proposes that § 523(a)(15) be amended as follows: in the paragraph stating "to a spouse, former spouse, or child of the debtor and" prior to the language "not of the kind;" insert an "or" after "court of record;" and strike "unless" and all that follows after it. Then, add a semicolon at the end of the paragraph. Congress does not propose any changes to § 523(a)(15)(A) or § 523(a)(15)(B). *Id.*