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THE NONDISCHARGEABILITY OF DIVORCE-BASED DEBTS IN BANKRUPTCY: A LEGISLATIVE RESPONSE TO THE HARDENED HEART

Veryl Victoria Miles*

I. INTRODUCTION

[M]arriage should be regarded as indissoluble in itself; for the end of marriage is the ethical end, which is so exalted that everything else appears powerless against it and subject to its authority. ... But it is indissoluble only in itself, for as Christ says, divorce is permitted only ‘because of the hardness of their hearts.’ Since marriage contains the moment of feeling ..., it is not absolute but unstable, and it has within it the possibility of dissolution. ... [L]egislat[ors] must make such dissolution as difficult as possible and uphold the right of ethics against caprice.¹

The preceding quotation is a striking expression of the primacy and importance of marriage and family to the wholeness of a society. Given the import of marriage and family to society, its dissolution through divorce must be regulated with the greatest care. Although those sentiments were expressed more than 175 years ago by German philosopher G.W.F. Hegel, they provide a powerful and sobering reminder of the commonplace occurrence of divorce today, its contribution to the rapid demise of the family, and the critical need for society to fight for its preservation.² Today, as in the past,

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² The long-term effect of divorce decisions is overwhelming. See Michael J. Albano, Children—The Innocent Victims of Family Breakups: How the Family Law Attorney, the Courts, and Society Can Protect Our Children, 26 U. TOL. L. REV. 787, 787 (1995). Both the parties divorcing and the court system are stressed by the break up of a family. See id. The emotional, physical and economic consequences of divorce require that the family law attorney
the family remains an essential base upon which a stable society is built and finds a secure foundation. It is within the family that an individual should experience the beginnings of moral, ethical and educational life. In turn, parents must possess adequate financial resources to meet this responsibility to their children.

While our laws governing divorce have become quite liberal, such that obtaining a divorce is relatively easy and not at all limited to grave or irreconcilable estrangement between spouses, recent reformation in many of our laws—both criminal and civil in nature—seek to preserve and enforce an individual's financial responsibility to children and former spouses after a divorce. In fact, this movement found a receptive ally in 1994 when Congress...
passed the Bankruptcy Reform Act of 1994 (Reform Act). The Reform Act is a comprehensive set of amendments to the Bankruptcy Code (Code) that includes several provisions designed to prevent bankruptcy relief from being used as a means of escaping alimony, child support, and other divorce-based financial obligations assessed against an individual under a divorce or separation decree. Its goal is to provide adequate support for children and a former spouse, or to provide a fair financial settlement of the marital assets between the divorced parties.

It has been, and continues to be, a long standing rule of bankruptcy law that an individual cannot escape personal liability for alimony or child support by filing a petition in bankruptcy. In describing the policy issues regarding the nondischargeability of alimony and child support obligations at bankruptcy, one commentator succinctly noted that while the "rehabilitation of helpless debtors is an important objective [of bankruptcy relief] ... there is no compelling reason why this should be at the expense of the economically helpless members of his, or her family." Thus, under section 523(a)(5) of the Code, alimony and child support obligations are deemed nondischargeable at bankruptcy.

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8 The amendments to the Bankruptcy Code [hereinafter Code] providing greater support and enforcement of familial obligations were listed under section 304 of the Reform Act, entitled "Protection of Child Support and Alimony." See id. In the House Report accompanying the legislation this group of amendments was explained as follows:

This section is intended to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy. The Committee believes that a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.


Some of the amendments designed to preserve and protect alimony and child support payments included an exception of paternity actions or legal proceedings to obtain or modify alimony or child support payment from the protection of the automatic stay under section 362(b); the inclusion of alimony and child support as priority claims under section 507(a); a prohibition for avoidance of pre-bankruptcy judicial liens that secure alimony or child support obligations of a debtor for the benefit of a former spouse or child under section 522(f); and protection of alimony and child support payments from avoidance as preferential transfers under section 547 of the Code. See 11 U.S.C. §§ 362(b)(2)(A), 507(a)(7), 522(f)(1)(A), 547(c)(7).

8 Section 523(a)(5) of the Code provides that debts owed "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" are nondischargeable. 11 U.S.C. § 523(a)(5).

However, prior to the enactment of the Reform Act, an individual could avoid liability for nonsupport property settlement obligations incurred under a divorce decree by seeking relief in bankruptcy. If the bankruptcy court determined that a debt did not constitute alimony or support under section 523(a)(5) but was instead a property settlement, the debtor would be discharged from personal liability for the debt. The dischargeability of property settlements encouraged many to view bankruptcy as an opportunity to find relief from this obligation.

In many cases, divorce or separation agreements were drafted in a manner that described the obligation assumed by the financially stronger party as a property settlement instead of alimony or support. It soon became clear that section 523(a)(5), alone, was not sufficient to make support and maintenance obligations nondischargeable where the divorce decrees had labeled such obligations as settlements. As noted by one court:

[T]he reality of modern divorce judgments and property settlement agreements is that the characterization of obligations they create is, as often as not, the product of factors not always taken into account in §523(a)(5) dischargeability determinations. For example, how much child support or

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11 "The legislative history of the Code makes it clear that what constitutes alimony, maintenance, and support will be determined by the purpose of the Bankruptcy Code rather than by the labels or characterization given by state statutes or state courts." 2 COWANS, supra note 9, § 6.49 (citing H.R. REP. NO. 95-595, at 363 (1977)). See also 2 DAVID G. EPSTEIN, ET AL., BANKRUPTCY § 7-29, at 371 & n.1 (1992). Likewise, several federal circuits recognize that bankruptcy law rather than state law determines whether a particular obligation constitutes alimony, maintenance, or support under section 523(a)(5). See Swate v. Hartwell, 99 F.3d 1282, 1286 (5th Cir. 1996); Brody v. Brody, 3 F.3d 35, 39 (2d Cir. 1993); Harrell v. Harrell, 754 F.2d 902, 904 (11th Cir. 1985). In Harrell, the court held that the language of section 523(a)(5) does not allow state courts to determine dischargeability. See id. "Congress chose instead to describe as not dischargeable those obligations in the 'nature' of support. We believe that in using this general and abstract word, Congress did not intend bankruptcy courts to be bound by particular state law rules." Id.


Despite the rulings of the family courts or their pre-bankruptcy agreements, parties were in a position to effectively re-litigate a substantial number of the issues surrounding the divorce as part of the dischargeability determination to be made pursuant to [section] 523(a)(5).

"Many scholars urged reform in the Bankruptcy Code because of the injustice caused by the support/property division and to spare bankruptcy judges from the sophistry of reconciling the irreconcilable."

Id. (quoting Collins v. Hesson (In re Hesson), 190 B.R. 229, 234 (Bankr. D. Md. 1995)). See also Dressler v. Dressler (In re Dressler), 194 B.R. 290, 299-300 (Bankr. D.R.I. 1996) (discussing the inadequacy of section 523(a)(5) in striking "a fair balance between a divorced debtor's discharge and the needs of that debtor's former spouse or family?")
alimony one party receives may be a function of the extent and timing of property division payments. One party may bargain to have an obligation (or payment) labeled one way or the other for tax purposes in return for some offsetting concession. Or the parties might sign off on a form agreement without a second thought to the way it characterizes reciprocal rights and obligations. Divorcing couples are generally concerned with the economic consequences of divorce, rather than the labels that attach to the arrangement's components. For another, Congress perceived that divorce "obligors were able to craftily draft settlement agreements to be in property, rather than in alimony terms and then discharge their marital obligations in bankruptcy."\(^{13}\)

In response to a growing concern that too many divorce-based property settlements and hold harmless agreements were being discharged in bankruptcy to the detriment of needy nondebtor ex-spouses and their dependents, the Reform Act added section 523(a)(15) to the list of nondischargeable debts enumerated under the Code.\(^{14}\) Section 523(a)(15) makes divorce-based debts that are

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\(^{12}\) *Dressler*, 194 B.R. at 299-300 (citations omitted).

\(^{14}\) Several commentators called for an amendment of the Code to prevent property settlements from being discharged. Professor Jana Singer reasoned that the "Code's distinction between nondischargeable support awards and dischargeable property distributions [had] become untenable. . . . because property division . . . replaced support as the preferred means of adjusting the spouses' financial relationship." Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43, 45 (1993). According to Professor Singer, the discharge of divorce-based property obligations "compromises the certainty and finality of divorce settlements and undermines the partnership notions that lie at the heart of equitable distribution schemes"; and since the majority of debtors seeking discharge of divorce-based debts are ex-husbands, the discharge of property settlements contributes "to the already disparate economic effect of divorce on women." *Id.* at 46. Similarly, it was this disparate treatment of women under section 523(a)(5), "an ostensibly gender-neutral statute," that prompted Professor Peter Alexander to assess the problem with the alimony/property settlement distinction required under section 523(a)(5) from a feminist legal theory perspective. *See* Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351, 352 (1994). It is his opinion that the bankruptcy court should not be required to determine whether a debt is in the nature of support or a property settlement, but simply address the matter of the dischargeability of the obligation. That is, "[a] more appropriate version of section 523(a)(5) would require the bankruptcy court to refuse to discharge any debt to a spouse, ex-spouse, or child of the debtor, which was reduced to judgment by a court of competent jurisdiction and which arose out of a separation or divorce or out of an action for alimony or support." *Id.* at 393. *See also* Sheryl L. Scheile, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577, 637-38 (1991) (advocating that federal courts "adopt a broader view of the exception from discharge" than stated in the plain language of section...
not in the nature of alimony and support, as defined under section 523(a)(5), and that are incurred by the debtor under a divorce or separation decree or other court order of record nondischargeable 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; 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.\(^{16}\)

The goal of this provision is to eliminate a "devastating" loophole often used by noncustodial parents seeking bankruptcy relief to avoid personal liability for property settlements and hold harmless obligations incurred under a divorce or separation agreement.\(^{16}\)

In an impassioned appeal to Congress in support of this provision, Congresswoman Slaughter stated:

During a divorce agreement, it is not uncommon for the custodial parent to accept a lower level of child support in exchange for the other parent assuming the couple's marital debts. If the non-custodial parent declares bankruptcy, however, the marital debts than [sic] fall to the single parent. Think of what the custodial parent then faces: little or no child support payments, the heavy responsibilities of all the marital debts, and the expenses that come with rearing children alone.

\(^{523(a)(5)}\) because modern divorce laws recognize forms of alimony that resemble property division in form and, thus, are misappropriately discharged). The author suggests that "[b]ecause of the inextricable interrelationship between support and property division, the ideal solution is for Congress to eliminate the distinction from the Bankruptcy Code entirely." \(^{Id.}\); Ottilie Bello, Comment, Bankruptcy and Divorce: The Courts Send a Message to Congress, 13 PACE L. REV. 643, 716-19 (1993) (stating that section 523(a)(5) "no longer ameliorates the problem it was designed to address").


The Bankruptcy Reform Act would obligate the non-custodial spouse, who agreed to pay the couple's martial debts, to continue responsibility for these debts. I think it is outrageous that wives and dependent children must answer to creditors for debts the husband first agreed to pay. This relatively small—but vital—change in the Bankruptcy Code would prevent this situation, and ensure a more equitable treatment of all parties in the event of bankruptcy.

Mr. Speaker, I have heard heartbreaking stories from single parents who want nothing but the best for their children, but find themselves forced to fight for their rightful level of child support. With no other recourse, these families often turn to welfare to provide the child support the absent parent ought to be responsible for.\(^{17}\)

Since section 523(a)(15) became law, numerous courts have interpreted this provision. The response of the bankruptcy judiciary has been noteworthy in two respects. First, having to revisit the nature of marital obligations long-settled by state courts has been an unremovable thorn for bankruptcy courts and uniformly regarded with skepticism as to the efficacy with which bankruptcy courts can fairly resolve such matters. As one court lamented:

While the problem which 523(a)(15) was designed to address, i.e. high to moderate income debtors discharging property settlements which their former spouses are entitled to and in most cases desperately need, will be solved by this provision, the ability of former spouses to continue to wage legal war against each other in every bankruptcy proceeding will be a significant burden on all those involved. Too often this Court has seen impoverished parties in domestic/relation bankruptcy cases fight over the dischargeability of debts neither party can afford to pay as an outgrowth of the bitterness of their state court litigation.

Unfortunately, § 523(a)(15) will give many such couples an additional avenue to continue their destructive fighting. This new domestic relations battlefield has the potential to make the already painful road of bankruptcy and divorce even more destructive than it is at the present time. Only time and caselaw will show whether the cost of this additional bitter litigation will be worth the benefit of preventing easy 

discharges of property based marital obligations under the Bankruptcy Code.\textsuperscript{18}

While one can easily sympathize with the bankruptcy judiciary’s distaste for having to re-enter the “domestic relations battleground,” it will remain an inevitable task as long as divorce and bankruptcy exist.

The second concern expressed by the courts involves the draftsmanship of the provision. It is, however, a more solvable issue. While most courts acknowledge Congress’ good intentions in adding this provision to the Code, the language of section 523(a)(15) has not earned any praise and has caused great frustration when applying and interpreting the provision. The courts have criticized section 523(a)(15) for being ambiguous, imprecise and cumbersome, prompting several courts to call for legislative revision and clarification.\textsuperscript{19} However, given the fact that section 523(a)(15) is law, albeit one that the bankruptcy courts would prefer not to address, it is a very important addition to the reform movement which strengthens and creates new and more effective ways of preserving and enforcing “legitimate marital and child support obligations.”\textsuperscript{20} Accordingly, the focus of this Article is how this statute can be best understood, applied, and clarified in order to achieve its legislative purpose.

\textsuperscript{18} In re Smither, 194 B.R. 102, 112 (Bankr. W.D. Ky. 1996) (citation omitted); see also Silvers v. Silvers (In re Silvers), 187 B.R. 648, 648 (Bankr. W.D. Mo. 1995) (“The problem with that section is that it requires bankruptcy courts to revisit, in excruciating detail, the anger, the bitterness, and the pain which the Debtor and the Debtor’s former spouse have felt and now feel. . . . [O]ne could almost see the old wounds being reopened and new and more expensive scars being inflicted upon both parties.”).

It has been said that one should never watch laws or sausage being made, and section 523(a)(15) of the Bankruptcy Code is no exception to that caution. Section (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 (a)(15) is an intrusive invasion into the private lives of a former couple who had agreed in their divorce to separate forever. Section (a)(15) can be described as an impediment to the emotional fresh start in life that divorce may bring. It also can impede the fresh start of bankruptcy.


Nondischargeability of Divorce-Based Debts

II. GOOD INTENTIONS AND AN INTERPRETIVE QUAGMIRE: THE STORY OF SECTION 523(A)(15)

As previously noted, section 523(a)(15) was added to the list of nondischargeable debts to prevent individuals from using bankruptcy as a means of escaping liability for all divorce-based debts that are not alimony or for support and maintenance. Although most would agree with the purpose behind this legislation, few believe the provision is clear. Considerable consternation arises when the provision is interpreted and applied.

A. Congressional Intent and the Legislative History

Although the legislative history of section 523(a)(15) is very limited, it clearly describes the kinds of debts it intends to cover: hold harmless agreements that a divorcing spouse may assume under the divorce or separation agreement for obligations the parties incurred during the marriage; or large property settlement agreements offered in exchange for lower alimony/support payments. As noted in the legislative history, when these types of agreements are assumed in a divorce or separation, often "[t]he nondebtor spouse may be saddled with substantial debt and little or no alimony or support." Accordingly, in such instances where the divorce-based obligation is framed in the nature of a property settlement or hold harmless agreement and is critical to a former spouse's ability to support himself and his dependents, the preservation of this obligation under the Code is very important.

Under section 523(a)(15), the debtor's general need for relief from prepetition indebtedness is balanced against the needs of the nondebtor ex-spouse and their dependents to have this obligation satisfied. This objective reflects two of the fundamental tenants of bankruptcy law and is addressed through the directive that the determination of nondischargeability is rebuttable under this provision through a balancing test. That is, conditions for

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21 See id.; Butler, 186 B.R. at 372-73 (noting that the statute was designed to stop parties from "discharg[ing] their marital obligations in bankruptcy").
23 Id.
24 See id.
25 The ability to rebut the nondischargeability of divorce-based property settlements under section 523(a)(15) is not similarly possible with respect to alimony and child support obligations under section 523(a)(5)—these debts are absolutely nondischargeable. See 4
nondischargeability are limited to "cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts."\(^2\)

Accordingly, if the qualifying debt is one that the debtor will not be able to pay and still have sufficient income for the reasonable support of the debtor, his or her dependents and business, the debt may be discharged. In cases where the debtor is able to pay the debt, the debt may be deemed dischargeable on the grounds that the benefits of a discharge to the debtor outweigh any detriment the nondebtor spouse and his or her dependents would suffer from nonpayment of the debt. The legislative history explains that these two alternative conditions for permitting a discharge of a divorce-based debt reflect Congressional concern "that payment of support needs must take precedence over property settlement debts" and that in cases where the debtor has the ability to pay the debt, "[t]he benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start."\(^2\)

As further explained in the legislative history, a qualifying debt must be one "incurred in a divorce or separation that [is] owed to a spouse or former spouse" and its nondischargeability can be raised "only by the other party to the divorce or separation."\(^2\) This requirement is critical in cases where the debt in question is a hold harmless agreement arising from a marital debt the debtor and spouse, or former spouse, had jointly owed to a third party. With this type of debt, the spouse or former spouse to whom the debt is owed is the only party with standing to seek a determination of nondischargeability under section 523(a)(15).\(^2\) It is the debtor's hold harmless agreement to the spouse, or former spouse, that is the subject of nondischargeability under section 523(a)(15).\(^3\)

\(^2\) See id. at 54, reprinted in 1994 U.S.C.C.A.N. 3340, 3363. In In re Finailey, the nondebtor spouse filed a motion for a hearing on the nondischargeability of a debt that the debtor owed to a third party and had agreed to hold the nondebtor spouse harmless. See Barstow v. Finailey (In re Finailey), 190 B.R. 312, 313-14 (Bankr. S.D. Ohio 1995). The court held that the exception to discharge under section 523(a)(15) was not applicable to obligations a debtor owed to a third party and applies only to the debt the debtor owed to the former spouse arising from the

COLLIER ON BANKRUPTCY ¶ 523.11 (Lawrence P. King ed., 15th ed. 1996) (discussing exemption from discharge under section 523(a)(5)).

\(^27\) Id.
\(^28\) Id. at 55, reprinted in 1994 U.S.C.C.A.N. 3340, 3364.
\(^29\) See id.
party to whom the marital debt is owed does not have standing under this provision and the debt owed to the third party is not the subject of nondischargeability under section 523(a)(15).  

See id. at 315. Additionally, in In re Stegall, an ex-wife petitioned the bankruptcy court to find the debtor's obligation to assume a pre-marital debt owed to a bank nondischargeable under section 523(a)(15). See Stegall v. Stegall (In re Stegall) 188 B.R. 597, 597 (Bankr. W.D. Mo. 1995). The court interpreted section 523(a)(15) to be in reference to debts one "incurred' in the course of a divorce or separation." Id. at 598. The debtor's obligation to assume payments for a debt he was already liable for, as one incurred in the divorce, the property settlement did not change the debtor's liability for the debt. See id. Although, "[i]f . . . the [divorce] agreement had provided that debtor would indemnify and hold plaintiff harmless to the extent she made payments to [the bank], a new obligation might have been incurred." Id. Thus, "to the extent plaintiff actually made such payments, section 523(a)(15) might have come into play." Id. But see Schmitt v. Eubanks (In re Schmitt), 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996); Johnston v. Henson (In re Henson), 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996) (disagreeing with the requirement announced in Stegall that the divorce decree include hold harmless language in order for the debt to fall within the scope of section 523(a)(15)). These courts held that under state law a decree with language importing an obligation on the part of the debtor to pay a marital debt and giving the nondebtor a right to indemnification is sufficient to qualify as a divorce-based debt for purposes of section 523(a)(15) in the absence of "hold harmless" language. See Schmitt, 197 B.R. at 316; Henson, 197 B.R. at 303. See also McCracken v. LaRue (In re LaRue), 204 B.R. 531, 535-36 (Bankr. E.D. Tenn. 1997) (stating that because the final divorce decree between the debtor and plaintiff did not contain a "hold harmless" agreement obligating the debtor to reimburse the plaintiff for debts in question, the court held that the debts were not incurred by the debtor in connection with the divorce decree and did not fall within the scope of a nondischargeable debt under section 523(a)(15)).

See H.R. REP. NO. 103-835, at 55, reprinted in 1994 U.S.C.C.A.N. 3340, 3364. See also Abate v. Beach (In re Beach), 203 B.R. 676, 679 (Bankr. N.D. Ill. 1997) (holding that the debtor's attorney did not have standing to seek a determination of nondischargeability under section 523(a)(15), and finding that Congress only intended this provision to make debts incurred by a debtor under a divorce decree owed to a spouse and former spouse nondischargeable). The court offered an illustration in support of its position on the debtor's attorney's standing in the following observation: 

Interestingly, the language of Section 523(a)(15)(B) requires the debtor to prove that the benefit of the discharge outweighs the detriment to the former spouse. Nowhere does it mention a third party. A third party, if permitted to bring a Section 523(a)(15) action, always would be faced with the insurmountable obstacle of Section 523(a)(15)(B). If a third party brought a complaint under Section 523(a)(15) seeking to discharge a debt in which the former spouse has no liability, the debtor would always raise the affirmative defense set forth in Section 523(a)(15)(B). The debtor would succeed because the former spouse suffers no detrimental consequences when the debt is discharged. Under this plain reading of Section 523(a)(15) as a whole it is clear that third parties are not contemplated to fall within its protective bounds despite the absence of explicit language limiting it to former spouses. Id. at 680; see also Woloshin, Tenenbaum and Natalie v. Harris (In re Harris), 203 B.R. 558, 559-61 (Bankr. D. Del. 1996) (dismissing a complaint filed by the debtor's attorney for a determination of nondischargeability under section 523(a)(15) for attorney's fees incurred in the debtor's divorce proceeding). While acknowledging "the literal application" of the provision would permit any debt arising from the divorce to be subject to a nondischargeability determination under section 523(a)(15), the court held that the legislative history of this provision reflected an intent to limit the scope of the provision "to the debts owed to the
Finally, the qualifying divorce-based debts are not automatically nondischargeable. Section 523(c) of the Code requires that the nondebtor spouse to whom the debt is owed file a complaint with the bankruptcy court for an adversary hearing to determine the nondischargeability of the debt.\textsuperscript{32} The complaint must be filed within sixty days after the first date set for the meeting of the creditors in accordance with Federal Bankruptcy Rule of Procedure 4007(c).\textsuperscript{33}

debtor's spouse or former spouse." \textit{Id.}; \textit{Finaly}, 190 B.R. at 315 (noting that section 523(a)(15) does not apply to obligations to third parties).

\textsuperscript{32} See H.R. REP. No. 103-385, at 54-55, reprinted in 1994 U.S.C.C.A.N. 3340, 3363-64; 4 \textsc{Collier on Bankruptcy}, supra note 25, ¶ 523.26, at 112 (stating that the creditor must request a ruling on dischargeability). A spouse or ex-spouse with a claim against a debtor that arose from a divorce or separation decree should be advised to file an adversary complaint with the bankruptcy court for a determination of nondischargeability under both sections 523(a)(5) and (a)(15). A determination of nondischargeability of alimony and support under section 523(a)(15) must be filed within 60 days of the date of the section 341 creditors meeting, pursuant to section 523(c) and Federal Bankruptcy Rule 4007(a) and (b). However, failure to file a timely complaint will preclude such a determination, thus, any property settlement portion of the divorce-based obligation will be discharged. Because of the exclusive jurisdiction and time limitation prescribed for determinations of nondischargeability under section 523(a)(15), nondebtor spouses must be proactive in filing a complaint for a determination of nondischargeability. See 4 \textsc{Collier on Bankruptcy}, supra note 25, ¶ 523.21 n.3, at 106. But see Farmer \textit{v. Osburn} (\textit{In re Osburn}), 203 B.R. 811, 812 (Bankr. S.D. Ga. 1996) (overruling the debtor's objection to a plaintiffs amendment of her original complaint for a determination of nondischargeability under section 523(a)(5) by adding a request for a determination of nondischargeability under section 523(a)(15) subsequent to the 60-day bar date under Federal Bankruptcy Rule 4007(c)). Because the amended complaint for a determination under section 523(a)(15) arose from the same conduct as the original complaint which was filed within the 60-day bar date, the court held that it had jurisdiction to hear the matter. See \textit{id}.

\textsuperscript{33} See H.R. REP. No. 103-385, at 54-55, reprinted in 1994 U.S.C.C.A.N. 3340, 3363-64; 4 \textsc{Collier on Bankruptcy}, supra note 25, ¶ 523.26, at 112. The court in \textit{In re Minnick} offered a different interpretation of this procedural question under section 523(a)(15). \textit{See In re Minnick}, 198 B.R. 187 (Bankr. W.D. Va. 1996). In this case the non-debtor spouse had received notice of the debtor's petition, but on the advice of her attorney, she understood the notice to relate to the debtor's obligation to make child support payments and was advised that such obligations were nondischargeable in bankruptcy. \textit{See id.} at 187. Accordingly, she believed the debtor would also remain liable for a divorce-related obligation to pay a motor vehicle loan which he agreed to assume in lieu of support, and thus, did not file a complaint for a determination of dischargeability within the 60 days required under Bankruptcy Rule 4007(c). \textit{See id.} The court held that the burden of bringing an adversary proceeding for such a determination rested with the debtor and not the creditor. \textit{See id.} at 190.

This court noted that the addition of subsection (15) to section 523(a) did nothing but bring confusion to the dischargeability of divorced-based obligations. \textit{See id.} at 188. That is, the addition of section (a)(15) did "nothing more than what (a)(5) was already doing, with one exception. In effect, it essentially adds a potential defense for the debtor to discharge certain awards in property settlement agreements when he or she 'does not have ability to pay' or when it causes an undue hardship." \textit{Id.} Accordingly, the court read section (a)(15) as an affirmative defense for the debtor against the nondischargeability of the property settlement and thus should mean that the debtor should bear the burden of raising the defense by an
Thus, certain requirements of section 523(a)(15) are clearly delineated and generally accepted when applying the provision. The legislative history makes it clear that the kinds of debts falling within its scope are those which arise from a divorce or separation decree and are not in the nature of alimony or support. There is no question that nondischargeability is rebuttable where the debtor does not have the ability to pay the debt or when payment of the debt is possible but the detriment of nondischargeability to the nondebtor spouse is outweighed by the benefits of discharge for the debtor. It is generally accepted that only the party to the divorce has standing to object to discharge under this provision, not third parties who would benefit from nondischarge of the obligation.

However, the complexity of the provision raises several interpretive and procedural questions that are not clearly resolved by the language of the provision or addressed in the legislative history. These questions can be described as follows:

1. Who bears the burden of proof under the provision—the debtor or the nondebtor spouse?
2. What is the standard of measurement to be applied in assessing the debtor’s ability to pay the debt?
3. What time period(s) should the courts look to when assessing the debtor’s ability to pay?
4. Is a partial discharge of the debt permissible, or does it require an “all or nothing” discharge of the debt if the debtor has some income to pay a portion of the debt but not enough to pay the entire debt?
5. What factors should be considered in balancing the benefits of the debtor’s discharge against the detriments of discharge to the nondebtor spouse?
Through a review and analysis of these issues as they have developed in the rather significant body of case law that has evolved since the enactment of section 523(a)(15), one can find some interpretive and potential legislative solutions to improve the provision's clarity and to achieve greater efficacy of its goals.

B. Case Law Analysis of Section 523(a)(15): Resolving Interpretive and Procedural Issues

There is a general consensus among the courts that section 523(a)(15) first requires the bankruptcy court to determine whether the debt in question is one that the debtor incurred under a divorce- or separation agreement, that it is a debt owed to the nondebtor spouse, and that the debt does not fall within the scope of section 523(a)(5) as alimony or support. Additionally, the nondebtor spouse must seek this determination by filing a complaint for an adversary hearing within sixty days of the first date set for the meeting of creditors. When seeking this nondischargeability determination under section 523(a)(15), the nondebtor spouse bears the burden of establishing that the debt does not fall within the scope of section 523(a)(5) as alimony, maintenance or support and that it is one incurred by the debtor pursuant to the divorce or separation agreement. However, the courts are divided as to who

917, 920-21 (Bankr. N.D. Ala. 1996) (holding that a bankruptcy court should examine the debtor's current and future circumstances when inquiring into whether the debtor has sufficient disposable income to pay the debt incurred in a divorce); Humiston v. Huddleston (In re Huddleston), 194 B.R. 681, 689 (Bankr. N.D. Ga. 1996) (finding that in balancing the benefit of discharge to the debtor against the detriment to the party to whom the obligation is owed, the court should consider "the income and expenses of each party, the nature of the debt in question, and the former spouse's ability to pay"); Bodily v. Morris (In re Morris), 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996) (finding that "once the creditor demonstrates that the debtor incurred the debt in connection with divorce, the burden shifts to the debtor to prove subsections (A) and (B) of section 523(a)(15)"); Gantz v. Gantz (In re Gantz), 192 B.R. 932, 937 (Bankr. N.D. Ill. 1996) (holding that a debtor's new spouse's income is properly considered in determining nondischargeability of debt); In re Smither, 194 B.R. 102, 107-08 (Bankr. W.D. Ky. 1996) (holding that the debtor's ability to pay should be determined as of the date of trial of the action to have the debt declared nondischargeable); Taylor v. Taylor (In re Taylor), 191 B.R. 760, 763 (Bankr. N.D. Ill.), aff'd, 199 B.R. 37 (N.D. Ill. 1996) (holding that "[t]he party seeking to establish an exception to the discharge of a debt bears the burden of proof").

See cases cited infra note 43.

38 See H.R. REP. No. 103-835, at 54-55, reprinted in 1994 U.S.C.C.A.N. at 3363-64. Section 523(c) was amended by the Reform Act to add section 523(a)(15) to the list of nondischargeable debts that creditors must affirmatively request a determination of nondischargeability from the bankruptcy court within sixty days of the first date set for the meeting of creditors. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4133.

bears the burden of proof between the debtor and the nondebtor spouse under subsections (A) and (B) of section 523(a)(15).

1. Who Bears the Burden of Proof Under Section 523(a)(15)(A) and (B): The Debtor or the Nondebtor Spouse?

Although the courts are divided about who has the burden of proof under subsections (A) and (B), a clear majority view has evolved. As noted in virtually every case addressing this provision, the burden of proof on questions of discharge usually falls on the objecting creditor in favor of the debtor receiving the benefits of a “fresh start” through discharge. The standard of proof is by a preponderance of evidence as established under Grogan v. Garner. Nevertheless, a majority of the courts have interpreted the burden of proof under section 523(a)(15) to require that the nondebtor spouse first prove that the debt qualifies as the type of nonsupport divorce-based debt covered by section 523(a)(15). The courts then require that the

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41 See cases cited infra note 43.
43 See Wynn v. Wynn (In re Wynn), 205 B.R. 91, 101 (Bankr. N.D. Ohio 1997) (following the majority on the debtor’s burden of proof under subsections (A) and (B); Ginter v. Crosswhite (In re Crosswhite), 1996 WL 756745, at *1 (Bankr. N.D. Ind. July 3, 1996) (same); Wolfe v. McCartin (In re McCartin), 204 B.R. 647, 654-55 (Bankr. D. Mass. 1996) (same); Jenkins v. Jenkins (In re Jenkins), 202 B.R. 102, 104 (Bankr. C.D. Ill. 1996) (following the majority view requiring the nondebtor spouse to establish the applicability of section 523(a)(15) and then shifting the burden to the debtor to prove either defenses under subsections (A) or (B); Henderson v. Henderson (In re Henderson), 200 B.R. 322, 324 (Bankr. N.D. Ohio 1996) (same); Cleveland v. Cleveland (In re Cleveland), 198 B.R. 394, 397-98 (Bankr. N.D. Ga. 1996) (holding that the “creditor bears the initial burden of establishing that the debt owed to it actually arose in connection with a divorce or separation agreement. . . [from and after that point, however, the burden . . . shifts to the debtor”); Johnston v. Henson (In re Henson), 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996) (opining that “[u]pon the non-debtor’s proof that the debt was incurred in the course of the divorce or later order, the burden shifts to the debtor to demonstrate either that the debtor does not have the ability to pay the debt or that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse”); Schmitt v. Eubanks (In re Schmitt), 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996) (same); Samaya v. Jodoin (In re Jodoin), 196 B.R. 845, 853 (Bankr. E.D. Cal. 1996) (adopting the majority view believing it provided “the best fit to the statutory language and apparent policies among three plausible analyses”); Sterna v. Paneras (In re Paneras), 196 B.R. 395, 403 (Bankr. N.D. Ill. 1996) (holding that once the nondebtor spouse establishes that the debt falls within the category of the divorce-based debt described under 523(a)(15) “the burden of going forward shifts to [the debtor]” to prove the elements of (A) or (B), that the debtor does not have the ability to pay the debt from monies needed to support the debtor and his dependents or that the benefits of discharge outweigh detriments of nondischarge to the nondebtor spouse, respectively); Campbell v. Campbell (In re Campbell), 198 B.R. 467, 472-73 (Bankr. D.S.C. 1996) (following the majority view on the placement of the burden of proof, that is, once the non-debtor spouse proves the debt is divorce-based the burden shifts to the debtor to prove inability to pay or “undue hardship”); McGinnis v. McGinnis (In re McGinnis), 194 B.R. 917,
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920 (Bankr. N.D. Ala. 1996) (opining that “the nondebtor spouse bears the initial burden . . . (and) thereafter, the burden of coming forth shifts to the debtor”); Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 685-86 (Bankr. N.D. Ga. 1996) (finding that once the nondebtor spouse has met her initial burden, the burden shifts to the debtor to demonstrate that he falls within the statute); Craig v. Craig (In re Craig), 196 B.R. 305, 308 (Bankr. E.D. Va. 1996) (adopting the “bifurcated approach; once the nondebtor spouse establishes that the debt arose from a property settlement and that § 523(a)(15) applies, the burden of proof shifts to the debtor to prove that the debtor does not have the ability to pay the debt or that the benefit of discharging the debt outweighs any detriment to the nondebtor spouse”); Christison v. Christison (In re Christison), 201 B.R. 298, 308 (Bankr. M.D. Fla. 1996) (following “the majority of courts which split the burden [of proof] between the parties”); Gantz v. Gantz (In re Gantz), 192 B.R. 932, 935 (Bankr. N.D. Ill. 1996) (finding that “the burden shifts to the debtor to establish that the debt should be discharged under either subparagraph (A) or (B) of [s]ection 523(a)(15)”; Simons v. Simons (In re Simons), 193 B.R. 48, 50 (Bankr. W.D. Okla. 1996) (indicating that “there is a ‘rebuttable presumption that any property settlement obligation arising from a divorce is nondischargeable unless the debtor can prove’ the applicability of § 523(a)(15)(A) or (B)” (quoting Slover v. Slover (In re Slover), 191 B.R. 886, 891 (Bankr. E.D. Okla. 1996))); In re Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996) (finding that “[i]f the objecting creditor meets this burden of proof, then the burden shifts to the debtor who must either prove an inability to pay the debt . . . or that a discharge of the debt would result in a benefit to the debtor that outweighs the detrimental consequences of a discharge to the spouse”); Straub v. Straub (In re Straub), 192 B.R. 522, 527-28 (Bankr. D.N.D. 1996) (holding that “[t]he non-debtor spouse’s threshold burden is to merely show that she held a divorce-related claim not covered by § 523(a)(5). Once meeting this rather minimal burden, it becomes for the debtor to prove either that he has an inability to pay the obligation in the face of his support and essential business obligations or alternatively, to show that discharging the debt would give him a benefit which outweighs the detriment to the former spouse.”); Taylor v. Taylor (In re Taylor), 191 B.R. 760, 764 (Bankr. N.D. Ill.), aff’d, 199 B.R. 37 (N.D. Ill. 1996) (holding that once the nondebtor spouse establishes that he or she holds a claim against the debtor other than alimony, maintenance, or support, the burden shifts to the debtor “to show either . . . that he [or she] lacks the ability to pay the debt from income or property not needed to support the debtor and any dependents, or . . . that the discharge would be more beneficial to [the debtor] than detrimental” to the party seeking the exception); Collins v. Florez (In re Florez), 191 B.R. 112, 115 (Bankr. N.D. Ill. 1995) (agreeing with the majority view and finding a shifting burden); Scott v. Scott (In re Scott), 194 B.R. 375, 381 (Bankr. D.S.C. 1995) (finding that once the nondebtor spouse meets “her burden, the burden then shifts to the [debtor] to show that he falls under one of the exceptions set forth in § 523(a)(15)”); Phillips v. Phillips (In re Phillips), 187 B.R. 363, 367 (Bankr. S.D. Fla. 1995) (holding that “[t]he plaintiff bears the burden of proving that the debt is in the nature of support”); Florio v. Florio (In re Florio), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995) (finding that section 523 “creates a shifting burden between the plaintiff and the defendant debtor”); Anthony v. Anthony (In re Anthony), 190 B.R. 433, 436 (Bankr. N.D. Ala. 1995) (finding that “[t]he burden is on the debtor to prove the exceptions in subsection (15)”); Silvers v. Silvers (In re Silvers), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995) (finding that the language of the statute “suggests that at least the burden of going forward is somewhat of a shifting one”); Carroll v. Carroll (In re Carroll), 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995) (finding that after the creditor carries his or her burden, it necessarily shifts to the debtor spouse); Hill v. Hill (In re Hill), 184 B.R. 750, 753 (Bankr. N.D. Ill. 1995) (stating that generally “a creditor seeking judgment of nondischargeability bears the burden of proof,” however, under section 523(a)(15), the burden falls on the debtor who must plead the defenses as affirmative defenses); Becker v. Becker (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995) (finding that “section 523(a)(15) sets up a rebuttable presumption that any property settlement obligation arising from a divorce is
debtor bear the burden of proving that the debt should be discharged under subsections (A) or (B) of section 523(a)(15).\textsuperscript{44}

Within this majority, some courts have expressed interpretive differences. Several courts have identified a similarity between section 523(a)(15) and section 523(a)(8), which makes guaranteed student loans nondischargeable unless the debtor can prove that there is "undue hardship" if the debt is not discharged.\textsuperscript{45} The shifting of the burden of proof onto the debtor is clearly stated under section 523(a)(8) but is not addressed in the language of section 523(a)(15). Courts have found that section 523(a)(15), as it is written, would not make sense if it required the plaintiff to bear the burden of proof because the plaintiff would have no incentive to prove that the debtor could not pay the debt, or that the benefits of a discharge to the debtor outweigh the detriment of discharge to the claimant.\textsuperscript{46}

The court in \textit{In re Hill}\textsuperscript{47} recalled in its comparative analysis of sections 523(a)(8) and (a)(15), that in some of the first bills and proposals providing for the nondischargeability of property settlements, the provision was drafted with language very similar to that found in section 523(a)(8).\textsuperscript{48} It essentially provided that "property divisions would be nondischargeable altogether, or that they would be nondischargeable [under section 523(a)(15)] except in the case of 'undue hardship.'\textsuperscript{49} However, the "undue hardship" standard was abandoned in the final provision because critics found

\textsuperscript{44} See cases cited supra note 43.

\textsuperscript{45} See \textit{Hill}, 184 B.R. at 754 (inquiring "as to whether an analysis similar to the one invoked for 'undue hardship' in student loans should be utilized in dischargeability determinations"). \textit{Cf. Christison}, 201 B.R. at 307 (holding that college expenses and health insurance "are in the nature of support and are nondischargeable"); \textit{Paneras}, 196 B.R. at 403-04 (noting "the exception to the placement of the burden of proof on the creditor under section 523(a)(8)"); \textit{Florez}, 191 B.R. at 116 n.6 (analogizing the "ability to pay" standard with the "undue hardship" standard in section 523(a)(8) proceedings (citing Comisky v. Comisky (\textit{In re Comisky}), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995)); \textit{Phillips}, 187 B.R. at 368 (citing section 523(a)(8) as an example of burden-shifting in the context of discharge proceedings).

\textsuperscript{46} See, e.g., \textit{Hill}, 184 B.R. at 753 (asserting that "[i]f the burden is placed on the Plaintiff to show the Debtor does not have the ability to pay, the Plaintiff would want to fail to meet the burden").

\textsuperscript{47} \textit{Hill v. Hill (In re Hill)}, 184 B.R. 750 (Bankr. N.D. Ill. 1995).

\textsuperscript{48} See id. at 754 (stating that "undue hardship" does not apply to 523(a)(15) because the section does not expressly provide for it).

it too harsh and believed that it would be more equitable to weigh
the consequences of a discharge between the parties.50

Other courts in the majority have based their interpretation of the
burden of proof on the "plain language" of the provision. These courts
read section 523(a)(15) as creating a "rebuttable presumption" that
nonsupport obligations arising out of a divorce or settlement
agreement are nondischargeable unless the debtor proves an
inability to pay, or in the case of a debtor who is able to pay, that the
benefits of discharge outweigh the detriments of nonpayment to the
nondebtor spouse.51

There are two different minority interpretations of how the burden
of proof is to be placed. One interpretation is that under section
523(a)(15) the debtor does not bear any burden of proof on the
question of ability to pay, or the balancing of detrimental conse-
quences between the debtor and the nondebtor spouse, thus placing the

50 As the court in Woloshin, Tenenbaum and Natalie v. Harris (In re Harris), 203 B.R. 558,
560 (Bankr. D. Del. 1996) noted, "[a]section 523(a)(15) has its genesis in House Bill 4711 [and]
version of section 523(a)(15)(A) in House Bill 4711 specifically described the first exception to
nondischargeability as excepting a debt from discharge where it "would impose an undue
hardship for the debtor." Once this provision reappeared in House Bill 5116, the final version
of section 523(a)(15), several changes had been made including the substitution of the "ability
to pay" test with the "undue hardship" test. As explained in Collier Family Law and the
Bankruptcy Code, this change was made because the "undue hardship" [test] was too difficult
a test to meet." Id. It was noted that a finding of undue hardship "could leave a debtor bound
to pay a property settlement debt the debtor could not afford, even if enforcement of that debt
would make it impossible for the debtor to support current dependents, thereby undermining
the bill's principal goal of ensuring support for women and children." Id. Accordingly, the
assessment of the debtor's financial ability "was modified, through the adoption of the 'ability
to pay' language of section 1325(b) of the Code." Id.

that "[b]y its language, section 523(a)(15) sets up a rebuttable presumption that any property
settlement obligation arising from a divorce is nondischargeable unless the debtor can prove
one of two things"). See also, e.g., McGinnis v. McGinnis (In re McGinnis), 194 B.R. at 920
(stating that the debtor must show lack of ability to pay or that the benefit of discharge
exceeds the consequent harm to the creditor); Humiston v. Huddleston (In re Huddleston), 194
Okla. 1996) (same); In re Smither, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996) (same); Straub
re Taylor), 191 B.R. 760, 765 (Bankr. N.D. Ill. 1996) (same); Scott v. Scott (In re Scott), 194
entire burden of proof on the creditor. The court in *In re Butler* based its interpretation on the *dissimilarity* between sections 523(a)(15) and (a)(8). The court noted that under section 523(a)(8) the educational loan is nondischargeable and the burden is on the debtor to seek a determination for discharge; whereas, under section 523(a)(15), the debtor’s discharge is presumed unless the ex-spouse objects to it by filing an adversary complaint for a determination of nondischargeability pursuant to section 523(c). Moreover, the court noted that the language of section 523(a)(8) demands proof by the debtor that nondischargeability will impose “undue hardship” and that under section 523(a)(15)(B) there must be a showing that the benefits of discharge outweigh the detriment to the nondebtor spouse. The court stated that it makes sense for the debtor to bear the burden of showing “undue hardship” under section 523(a)(8); whereas, under section 523(a)(15)(B) the nondebtor spouse is in the best position to show how the discharge would be detrimental to him or her. With respect to subsection (A) and its requirement that there be a showing of the debtor’s inability to pay, the court said that this too should be a burden of proof requirement for the nondebtor spouse and not one for the debtor because this should be shown on the face of the debtor’s petition.

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62 See Dressler v. Dressler (*In re Dressler*), 194 B.R. 290, 304 (Bankr. D.R.I. 1996) (holding that the party seeking to establish an exception from discharge of the debt under section 523(a)(15) “bears the burden of production and proof on all elements of dischargeability”); Kessler v. Butler (*In re Butler*), 186 B.R. 371, 374 (Bankr. D. Vt. 1995) (ruling that “the burden of proof in § 523 hearings should be upon the objecting creditor”). See also Woodworth v. Woodworth (*In re Woodworth*), 187 B.R. 174, 177 (Bankr. N.D. Ohio 1995) (stating initially that the nondebtor spouse “bears the burden of proof in this adversary proceeding,” however, later holding that the debt was dischargeable because the debtor had met the requirements of subsection (A)). 63 *Kessler v. Butler* (*In re Butler*), 186 B.R. 371 (Bankr. D. Vt. 1995).
64 See *id.* at 373-75. The court stated that the inclusion of section 523(a)(15) in section 523(c) supported its interpretation that the creditor bears the burden of proof because of the requirement under subsection (c) that the creditor take affirmative action to pursue a determination of nondischargeability. See *id.* at 374-75. Moreover, the court held that the placement of the burden of proof on the creditor for a determination of nondischargeability is consistent with the basic bankruptcy principle that the question of nondischargeability be “narrowly construed” against the creditor. See *id.* at 375.
65 See *id.* at 374.
66 See *id.*
67 See *id.*
68 See *id.*
The other minority interpretation is that the debtor bears the burden of proving dischargeability on the grounds of inability to pay under subsection (A), and the nondebtor spouse bears the burden of proving that a discharge of the debt does not outweigh the detrimental consequence to them under subsection (B). The court in *In re Hesson* describes this “bifurcation” of the burden of proof under subsection (B) as appropriate because in cases where the debtor has the ability to pay the debt, the creditor has the greatest ability and motivation to show that the detrimental consequences of a discharge outweigh its benefits to the debtor while the creditor has no motivation to establish the debtor’s inability to pay the debt under subsection (A).

2. What Standard of Measurement is to be Applied in Assessing the Debtor’s Ability to Pay the Debt Under Section 523(a)(15)(A)?

Another interpretive question addressed by the courts in applying section 523(a)(15) is how to measure the debtor’s ability to pay the debt. A majority of bankruptcy courts have looked at the similarity between the language used by Congress in section 523(a)(15)(A) and section 1325(b)(2), which provides for the “disposable income test” to be used in determining a debtor’s ability to pay prepetition debts under a chapter 13 plan. These courts, following the lead of the court in *Hill*, have argued that the similarity in the language between the two provisions serves as a directive to the courts to apply the “disposable income test” of section 1325(b)(2) when assessing the debtor’s ability to pay under section 523(a)(15)(A).

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60 See id. at 239 (explaining the bifurcation of the burden of proof). *Cf. Morris v. Morris (*In re Morris*), 197 B.R. 236, 243 (Bankr. N.D. W. Va. 1996) (explaining that it is more convenient for the court to have the debtor “present evidence as to his ability to pay”).

61 See 11 U.S.C. § 1325(b)(2) (1994). Section 1325(b)(2) defines disposable income as:

[I]ncome which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

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

Id.

62 See *Hill v. Hill* (*In re Hill*), 184 B.R. 750, 755 (noting that section 523(a)(15)(A)’s language mirrors that of section 1325(b)(2)).

63 See *id.* at 755 (“The use of the phrase ‘ability to pay’ in Section 523(a)(15)(A) directs the Court to Section 1325(b)(2)’s ‘disposable income’ test. The language of Section 523(a)(15)(A) essentially mirrors the language of Section 1325(b)(2).”). *See also, e.g., Soforenko v. Soforenko*
The “disposable income test” requires the court to consider whether the debtor’s listed expenses are “reasonably necessary” for the support and maintenance of the debtor and the debtor’s dependents or business. The court in In re Taylor found the standard for the ability to pay makes both practical and logical sense:

It is practical because most Chapter 7 debtors do not have the available cash on hand to presently satisfy such claims in one lump sum and at the same time meet their current living expenses—lack of cash to pay all claims now or in the near future is why so many debtors file for relief under Chapter 7. It is also logical because the relevant statutory language of § 523(a)(15)(A) is identical to that contained in § 1325(b)(2)(A) and (B).

Other courts have found the application of the “disposable income test” to be insufficient for making a determination of the debtor’s ability to pay under section 523(a)(15) because of the dissimilarities between the two provisions. These courts note that section


See Taylor, 191 B.R. at 765.


Id. at 765-66.

1325(b)(2) limits the measurement of a debtor's ability to pay to the effective date of the chapter 13 plan confirmation and does not address the dischargeability of debts, but focuses on the debtor's ability to make payments of prepetition debts under the plan.68 One court observed that the limited focus of the debtor's financial abilities under section 1325(b)(2) is not consistent with the broader focus intended under section 523(a)(15).69 The court in In re Hud-delston70 expressed this point very clearly:71

Unlike any analysis under section 1325(b)(2), which actually turns on the ability to make payments in bankruptcy, section 523(a)(15) looks beyond to the debtor's ability to pay after the bankruptcy event. Given this ultimate focus of inquiry, courts must afford at least some consideration to the impact of the debtor's bankruptcy and discharge upon his financial abilities. Indeed, any standard which focuses on the debtor's current financial burden without taking into account the effect of his impending discharge may not be said to properly measure the debtor's ability to pay a divorce-related debt upon its relegation to nondischargeability. If nothing else, simple equity, as well as the text and policy of section 523(a)(15), demands a broader inquiry than that based upon a "snap-shot" which fails to take into account impending changes in the scope of the debtor's financial obligations.72

Accordingly, these courts have argued that an inquiry like that used under section 523(a)(8) is more appropriate in making a determination of the debtor's ability to pay under section

68 See Huddelston, 194 B.R. at 687; Straub, 192 B.R. at 528.
69 See Huddelston, 194 B.R. at 687-88. See also Florio, 187 B.R. at 657 (stating that the determination of a debtor's ability to pay under section 523(a)(15) "must be made on a case by case basis" rather than turning to section 1325(b)(2)'s disposable income test).
71 See id. at 688 (discussing the "broader net of inquiry" required under section 523(a)(15) to determine the financial abilities of the debtor).
72 Id. at 687 (citations omitted); see also Ginter v. Crosswhite (In re Crosswhite), 1996 WL 756745, at *5 (Bankr. N.D. Ind. July 3, 1996) (stating that in considering the debtor's ability to pay, the court "may look beyond a debtor's current financial circumstances and may consider the income a debtor is reasonably capable of earning" (citing Huddelston, 194 B.R. at 688; Straub, 192 B.R. at 528-29); Straub, 192 B.R. at 528 (noting that "[s]ection 523(a)(15)(A) does not restrict the court's inquiry to a 'present' ability to pay the debt nor should it").
The inquiry under the “undue hardship” test of section 523(a)(8) demands a broader inquiry into a debtor’s financial ability at and after bankruptcy. The court in Huddelston identified the scope of the inquiry to include: the debtor’s disposable income at the time of the trial; the future employment opportunities of the debtor; the extent that the debtor’s financial burdens will be reduced in bankruptcy; and the extent the debtor has made a good faith attempt to be fully employed. In assessing a debtor’s ability to pay under section 523(a)(15)(A), several courts have found it appropriate to consider any contribution of income from a new spouse or live-in companion of the debtor.

The court in In re Jodoin took a different view of the applicability of the these two tests in arriving at determinations of nondischargeability under section 523(a)(15)(A). The court agreed that the “disposable income test” of section 1325(b) would be a good test to begin the inquiry regarding the debtor’s ability to pay, but cautioned that inquiry should not be limited to this test. It reasoned that because the “disposable income test” inquiry is limited to a debtor’s ability to pay a debt under a three year plan in chapter 13 cases, it would have to be modified to accommodate the circumstances of repayment of a nondischargeable debt in a chapter 7 liquidation which has an “indefinite horizon in mind.” Moreover, the court noted that the disposable income test was best used in cases where the issues to be considered were “purely financial,” noting that in divorce cases many “nonfinancial factors that are

73 See, e.g., Huddelston, 194 B.R. at 688 (noting that the exception under section 523(a)(15) resembles the exception of section 523(a)(8)); Straub, 192 B.R. at 528 (same); Florio, 187 B.R. at 657 (same); Anthony, 190 B.R. at 439 n.5 (noting that familiar policy bases exist in other subsections of 523). But cf. Bodily v. Morris (In re Morris), 193 B.R. 949, 953 (Bankr. S.D. Cal. 1996) (disagreeing with the view that the disposable income test is not broad and that it does permit courts to “consider reasonably projectable future events known at the time of trial”). The court stated that to inject the “undue hardship” test of section 523(a)(8) simply causes confusion in applying section 523(a)(15)(A). See id.

74 See Huddelston, 194 B.R. at 688-89.

75 See id. at 688; see also Cleveland v. Cleveland (In re Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996) (citing the same factors as Huddelston).


78 See id. at 854 (noting that the “disposal income test” was a good starting place but that it “should not be the exclusive test”).

79 Id. at 854.
fundamentally subjective” have to be considered in assessing a debtor’s ability to pay a divorce-based obligation. Accordingly, a modified test permitting the use of both the disposable income test and the more flexible “undue hardship” test of section 523(a)(8) would allow a more realistic look at a debtor’s ability to pay the divorce-based debts. As the court stated:

The sad reality of domestic relations cases is that subjective nonfinancial factors become important when spouses respond to the intense personal pain attendant to a failed marriage by refusing to work or by intentionally impairing their ability to earn income. . . . The “undue hardship” concept developed under § 523(a)(8) affords more latitude to entertain subjective factors than the “disposable income” test and functions better in situations where the debtor is engaging in sub-rational or self-destructive economic behavior.

The court concluded that this modified test compensates for the absence of an “explicit” good faith requirement under chapter 7 as is found in chapter 13, and it compliments the balancing test under section 523(a)(15)(B) which the court notes “functions as a limiting principle whenever the court concludes, for subjective nonfinancial reasons, that the debtor does not lack the ability to pay.”

3. What Time Period(s) Should the Courts Look at When Assessing the Debtor’s Ability to Pay Under Section 523(a)(15)(A)?

Another issue related to the interpretation and application of section 523(a)(15)(A) is the “point of inquiry” the court must consider when determining whether the debtor has the ability to pay. That is, does the court look at the debtor’s financial ability at the time the bankruptcy petition was filed, at the time the complaint for a determination of nondischargeability was filed, or at the time of the trial? The provision gives no direction on this question and the courts have been very divided as to which point of inquiry is appropriate.

In some of the early cases interpreting and applying section 523(a)(15)(A), the courts provided little explanation for their decisions as to the point of inquiry used in assessing the debtor’s ability to pay. For example, in Hill the court simply identified the

80 See id.
81 Id.
82 Id. at 855.
time for measuring the ability to pay as the date of the complaint,\(^{83}\) the court in *In re Carroll*\(^{84}\) appeared to have based its assessment on the schedules filed at the time of the bankruptcy petition,\(^{85}\) and in *In re Anthony*\(^{86}\) and *In re Becker*,\(^{87}\) the courts looked at the schedules filed at the time of the bankruptcy petition with some additional consideration of post-petition changes to the debtor's circumstances.\(^{88}\)

In later decisions, a majority of the courts rejected the view that the date of the bankruptcy petition is the appropriate point of inquiry.\(^{89}\) These courts either identified the date of the trial as the appropriate time to begin making the inquiry, or were of the opinion that no specific time limit for the inquiry should be identified.\(^{90}\)

\(^{83}\) See Hill v. Hill (*In re Hill*), 184 B.R. 750, 754 (Bankr. N.D. Ill. 1995) (finding that the appropriate measuring point is the date of the filing of the complaint for purposes of both affirmative defenses).


\(^{85}\) See id. at 200 (finding that "[s]ection 523(a)(15) concerns the relative positions of the parties as of the date of the filing of the bankruptcy").


\(^{88}\) See Anthony, 190 B.R. at 38 & n.4 (noting that the court's concern was with the facts as they existed at the time of the bankruptcy filing, but it also considered the debtor's financial position at the time of hearing); *Becker*, 185 B.R. at 569-70 (discussing the debtor's bankruptcy schedules, noting that her income had decreased since the filing of the bankruptcy petition).


\(^{90}\) See Wolfe v. McCartin (*In re McCartin*), 204 B.R. 647, 654 (Bankr. D. Mass. 1996) (considering the debtor's disposable income at three time periods: the time the bankruptcy petition was filed; the time of the adversary complaint was filed; and the time of the trial); *Henson*, 197 B.R. at 303 (holding that the time of trial governs the inquiry); *Schmitt*, 197 B.R. at 316 (same); *Jodoin*, 196 B.R. at 854 (same); *Paneras*, 195 B.R. at 405 (holding that a court should take into account the debtor's financial circumstances at the time of filing, the time of trial and "reasonably foreseeable short-term future prospects"); *McGinnis*, 194 B.R. at 920 (inquiry begins with debtor's circumstances at time of trial, but also assesses debtor's prospects for the foreseeable future); *Morris*, 193 B.R. at 953 (time of trial); *Dressler*, 194 B.R. at 300 (same); *Christison*, 201 B.R. at 309 (same); *Gantz*, 192 B.R. at 935 (concluding that the date of trial is appropriate starting point, but not a limitation); *Smither*, 194 B.R. at 107 (holding that inquiry into debtor's financial strength is not controlled by a mere "snapshot" of the debtor's circumstances at the time of trial); *Straub*, 192 B.R. at 528 (concluding that inquiry
Several courts have expressed the view that limiting the date of inquiry to the time the bankruptcy petition was filed would preclude consideration of changes which might be relevant in the debtor’s circumstances that may have occurred between the time the petition was filed and the date of the trial.\(^9\) Other courts expressed similar concerns holding that in order to permit a consideration of the debtor’s current and future financial circumstances, including the debtor’s future ability to earn income to pay the obligation, the inquiry should not be restricted to a specific date.\(^2\)

begins with debtor’s circumstances at time of trial, but also assesses debtor’s prospects for the foreseeable future); Owens, 191 B.R. at 674 (holding that the time of trial governs the inquiry); Hesson, 190 B.R. at 238 (same); Taylor, 191 B.R. at 766-67 (considering debtor’s present and future income).

\(^9\) See Henderson v. Henderson (In re Henderson), 200 B.R. 322, 326 (Bankr. N.D. Ohio 1996) (holding that the inquiry into the debtor’s financial condition should not be a “snapshot” inquiry but one that allows “a court to consider the debtor’s prospective earning ability” (quoting Smither, 194 B.R. at 107)); Campbell v. Campbell (In re Campbell), 198 B.R. 467, 473 (Bankr. D.S.C. 1996) (noting that the benefits of basing the determination of nondischargeability on circumstances existing at the time of the trial is that one can consider the debtor’s present financial condition, including “the benefits that a debtor may have received from a discharge of other debts in a Chapter 7”); Morris v. Morris (In re Morris), 197 B.R. 236, 244 (Bankr. N.D. W. Va. 1996) (rejecting the view that the time of inquiry should be the date of the petition and finding that the “appropriate time at which to begin its inquiry is with the date of trial”); Morris, 193 B.R. at 953 (“Measuring the parties’ financial positions at the time of trial enables the court to consider these changed events, and determine in its experience which events are bona fide.”); Craig v. Craig (In re Craig), 196 B.R. 305, 310 (Bankr. E.D. Va. 1996) (expressing the view that the “correct approach” to determine whether a debtor’s expenses are reasonably necessary “is not to determine whether the debtor has the ability to pay the debt at any certain time, but to examine whether the debtor can pay the debt over time”); Dressler, 194 B.R. at 300-01 (agreeing with the view that the appropriate time to analyze the question of the debtor’s ability to pay was the trial date); Gantz, 192 B.R. at 935 (“[T]he Court finds that, at a minimum, the date of trial is an appropriate starting point in examining the relative positions of the parties. This finding should, in no way, limit courts from considering extenuating facts that may have a direct bearing on a debtor’s financial circumstances.”); Hesson, 190 B.R. at 238 (rejecting the view that the date of the petition is the relevant time to measure the defenses against nondischargeability and maintaining that the more appropriate measuring point should be the time of trial).

\(^2\) See Henson, 197 B.R. at 303 (“[T]he Court views the parties’ circumstances as of the time of trial, rather than at some earlier date, in order to fully examine the benefits of the ‘fresh start’ to the debtor, any change in circumstances in employment, and other good or bad fortune which may have befallen the parties. In considering changed events, and particularly the benefits of discharge, the current and future financial circumstances of the parties are better analyzed.”); Schmitt, 197 B.R. at 316 (same); Paneras, 196 B.R. at 405 (“Absent a specific time referenced in the statute, and lacking a rule for guidance, the Court will consider the parties’ relative positions not only at the time of the petition, but also throughout the time of trial, in light of any reasonably foreseeable short-term future prospects for the parties as indicated by the evidence adduced.”); McGinnis, 194 B.R. at 920 (“[T]his Court will not restrict its review of the Debtor’s financial condition as of some historical point in time, but instead will examine the Debtor’s current and future circumstances.”); Smither, 194 B.R. at 108 (“[A] Court may consider facts and circumstances concerning a debtor’s future earning potential, as well as his
4. Is a Partial Discharge of a Debt Permissible Under Section 523(a)(15), or Does it Require an "All or Nothing" Determination?

While the majority of courts interpreting section 523(a)(15) have issued orders for either full discharge or nondischarge of the debt, only a few have addressed the question of whether, under this provision, a partial discharge of an obligation is permissible in cases where there is a finding that the debtor can pay only a portion of the debt. This question was decided first in In re Comisky. The court looked to bankruptcy court decisions under section 523(a)(8) allowing partial discharge of student loans, to support its ruling for providing a partial discharge and a partial nondischarge of divorce-based obligations. As the court noted, section 523(a)(8) "provides for a nondischargeable debt with two exceptions." Bankruptcy courts have permitted partial discharge and nondischarge orders of guaranteed student loans under section 523(a)(8) where a debtor

or her income as of the date of the trial . . . in determining his ability to pay."; Straub, 192 B.R. at 528-29 ("[T]he inquiry begins with an analysis of the debtor's current financial circumstances, but ends with an inquiry whether that situation is fixed or is likely to change in the foreseeable future. Section 523(a)(15)(A) does not restrict the court's inquiry to a 'present' ability to pay the debt nor should it, since to impose or imply such a restriction would in many, if not most cases, render the provision's objective a nullity."); Taylor, 191 B.R. at 767 ("[A]ppropriate construction of § 523(a)(15)(A) requires the Court to consider [the debtor's] future ability to pay the claim over time, as well as his ability at the time he filed the bankruptcy petition.").

See Campbell, 198 B.R. at 474 (holding that a partial discharge may be appropriate in some circumstances under section 523(a)(15) (citing Comisky v. Comisky (In re Comisky), 183 B.R. 883 (Bankr. N.D. Cal. 1995)); McGinnis, 194 B.R. at 921 (adopting the view that a section 523(a)(15) debt may be discharged in part were the debtor has the ability to pay a "material part of the property settlement within a reasonable amount of time") (citing Smither, 194 B.R. at 107); Smither, 194 B.R. at 110 (holding that the court may "equitably modify the obligation"); Comisky v. Comisky (In re Comisky), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995) (finding section 523(a)(15) to be analogous to section 523(a)(8) justifying partial discharge of debts where the debtor has the ability to pay part but not all of the divorce-based obligation). But cf. Taylor v. Taylor, 199 B.R. 37, 42 n.5 (N.D. Ill. 1996) (rejecting the "equitable middle ground," noting that section 523(a)(15)(A) makes no provision for partial discharge); Collins v. Florez (In re Florez), 191 B.R. 112, 115 (Bankr. N.D. Ill. 1995) (adopting the "all or nothing" approach to discharge taken in In re Silvers); Silvers v. Silvers (In re Silvers), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995) (interpreting nondischargeability under section 523(a)(15) to be an "all or nothing situation"); Hill v. Hill (In re Hill), 184 B.R. 750, 755 n.15 (Bankr. N.D. Ill. 1995) (noting that the language of section 523(a)(15) seemed to suggest that Congress intended to limit the question of discharge or nondischarge to an "all or nothing" result.")


See id. at 884.

Id.
would suffer "undue hardship" if required to pay all of the loan.\textsuperscript{97} The court reasoned that because section 523(a)(15) similarly provides for a nondischargeable debt with two exceptions, the allowance of a partial discharge and nondischarge of property settlement obligations under section 523(a)(15), in cases where the debtor had the ability to pay a portion of the debt, was both "fair and sound."\textsuperscript{98}

As the court noted in \textit{In re Smither},\textsuperscript{99} the issue concerning the permissibility of partial discharge of a debt will often require some "equitable modification" of the debt by the court where the property settlement obligation is to be paid in a lump sum.\textsuperscript{100} In such cases the debtor would have little difficulty proving his or her inability to pay the lump sum amount according to the original terms of the divorce or separation agreement.\textsuperscript{101} However, with an equitable modification of the debt amount and/or payment schedule, a debtor may be found to have the ability to pay some of the debt.\textsuperscript{102} The


A statute must be read in context; and § 523(a)(8)(B) has an extensive context. The Bankruptcy Code is embedded in equity and must be read accordingly.\ldots Certain provisions of the Code are not merely "embedded in" but grow directly from equity and equitable remedies. In particular, the bankruptcy discharge is an injunction, 11 U.S.C. § 524(a)(2); and provisions relevant thereto, in particular §§ 523, 727 which effectively shape the injunction, should be read as an expression of the equitable nature, function, and (it necessarily follows) behavior of the injunctive remedy. It is therefore entirely proper to read the exceptions to discharge in § 523(a), including (8)(B) thereof, in light of equity. \textit{Id.} at 194. \textit{See also} Cheesman v. Tennessee Student Assistance Corp. (\textit{In re Cheesman}), 25 F.3d 356, 360-61 (6th Cir. 1994) (holding that under section 105 the bankruptcy court has the equitable power to provide any remedy that will further the goals of bankruptcy relief, including a decision to stay a final determination of dischargeability under section 523(a)(8) in order to see if a debtor's financial condition improves).

\textsuperscript{98} See Comisky, 183 B.R. at 884.


\textsuperscript{100} See id. at 109 (noting that if the court applied the "all or nothing" approach, the debt would be discharged since the debtor could not pay the judgment, due immediately, in full).

\textsuperscript{101} See id. at 109-10.

\textsuperscript{102} See id.
Smither court held that the partial discharge approach was appropriate and agreed with the Comisky court’s adoption of this approach from the section 523(a)(8) cases. While the Smither court rejected the view that section 523(a)(15) was intended to be an “all or nothing” discharge provision, it cautioned for balance in equitable modifications. The court favored rejecting modifications in which a debtor would be paying small amounts of the debt over many years simply because of “the existence of a small amount of excess income in relation to the (a)(15) debt in question.”

Conversely, the “all or nothing” approach to discharge under section 523(a)(15) was adopted by the court in In re Florez. This court was not persuaded by the “undue hardship” analysis used in Comisky to permit a partial discharge of divorce-based debts by analogizing with the partial discharge provision of section 523(a)(8). While the court noted that the result of an “all or nothing” approach might “nickel and dime” a debtor to make such payments, such a result is an unfortunate consequence of section 523(a)(15)(A) when the debtor with a small salary has failed to meet the burden of proving his or her inability to pay the debt. Similarly, the court in Taylor rejected the Comisky court’s approach in allowing for a partial discharge. It stated that “[t]he statute makes no provision for determining that a part of a debt may be found dischargeable, but the remainder nondischargeable . . . [t]he morass of § 523(a)(15) is difficult enough to judicially navigate, and Congress needs to provide much needed legislative remediation.”

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103 See id.
104 See id. at 109.
105 Id. See also McGinnis v. McGinnis (In re McGinnis), 194 B.R. 917, 921 (Bankr. N.D. Ala. 1996) (holding that “a Debtor has the ability to pay an obligation . . . if the Debtor has sufficient disposable income to pay all or a material part of the property settlement within a reasonable amount of time” (citing Smither, 194 B.R. at 107)).
106 Collins v. Florez (In re Florez), 191 B.R. 112, 115-16 (Bankr. N.D. Ill. 1995) (holding that the debtor must discharge the entire amount of the obligation, paying what amounted to little more than interest payments, for an indefinite period of time).
107 See id. at 116 n.6.
108 See id. at 116.
110 Id. For other cases expressing the view that an “all or nothing” discharge or nondischarge was intended under section 523(a)(15), see Florez, 191 B.R. at 115-16; Silvers v. Silvers (In re Silvers), 187 B.R. 648, 649 (Bankr. W.D. Mo. 1995); Hill v. Hill (In re Hill), 184 B.R. 750, 755 n.15 (Bankr. N.D. Ill. 1995).
5. What Factors Should Be Considered in Applying the Balancing Test of Section 523(a)(15)(B) and How Should It Be Interpreted?

Section 523(a)(15) provides the debtor who has failed to prove an inability to pay the debt with an additional way to justify the dischargeability of the obligation. Under subsection (B), the debtor will be granted a discharge of the obligation if he or she is able to prove that “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 courts that have interpreted and applied subsection (B) have uniformly adopted the view that a court must consider the “totality of the circumstances” when balancing the effect that a discharge might have on the parties. The most common factors the courts consider in making determinations under subsection (B) include: the income and expenses of the parties; the debts for which the parties are jointly liable; the number of dependents of the parties; the nature of the debt in question, such as terms and amounts; the debtor’s reaffirmation of the debts; the claimant’s ability to pay the debt; the contributions and expenses a new spouse adds to the financial circumstances of the debtor; the nondebtor spouse’s prospects for


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bankruptcy eligibility; and whether the parties have acted in good faith.  

Nevertheless, the courts differ in their approaches to interpreting and applying subsection (B), and thus, illustrate that this provision requires courts to make value judgments about which party suffers the most. In interpreting and applying subsection (B), the court in Hill heeded the legislative history which provided that "[t]he benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start." The Hill court found the financial circumstances of both the debtor and nondebtor spouse to be equally dire, and held that its discharge of the debt, while constituting a detrimental consequence to the nondebtor spouse, was in fact a "sensible solution to the combined problems of the Plaintiff and the Debtor" since the plaintiff may subsequently file chapter 7, if needed, and receive a discharge of the debt as well. The solution, according to the court, was for the nondebtor spouse to also file a petition in bankruptcy to seek relief from the debt she would ultimately be responsible for after the debtor's discharge.

One court was very critical of decisions which gave weight to the possibility of the nondebtor spouse filing a petition in bankruptcy when balancing the detrimental consequences of discharge under section 523(a)(15). The court in In re Christison issued a strong condemnation of this consideration:


114 See Phillips v. Phillips (In re Phillips), 187 B.R. 363, 369 (Bankr. M.D. Fla. 1995). But see Crosswhite, 1996 WL 756745, at *6 (disagreeing with Congress on its expectation that the bankruptcy courts have to "make a value judgment" under 523(a)(15)(B) and it was critical of subsection (B) due to the failure of Congress to give guidance on how to balance the "debtor's benefit against the creditor's detriment").


116 Id.

117 See id.; see also Jenkins v. Jenkins (In re Jenkins), 202 B.R. 102, 106 (Bankr. C.D. Ill. 1996) (stating that this is a case in "which [a] discharge of debts by both parties . . . [is] the most sensible solution" (quoting Hill, 184 B.R. at 756)); Bodily v. Morris (In re Morris), 193 B.R. 949, 954 (Bankr. S.D. Cal. 1996) (granting a discharge where the debtor and nondebtor spouse were both in financial difficulty and the equities were balanced, suggesting that the best solution would be for both parties to file bankruptcy (citing Hill, 184 B.R. at 756)).


Such analyses cavalierly ignore questions of whether the creditor spouse is eligible to file a bankruptcy case or is entitled to receive a discharge under Section 727 or discharge debts under Section 523 of the Bankruptcy Code. In addition, many individuals today continue to consider bankruptcy an antithetical solution to oppressive debt, and courts should not be in the business of forcing innocent parties into bankruptcy because they regard that as the lesser evil under Section 523(a)(15) [of the Bankruptcy Code]....

Rather, the balancing test set forth in Section 523(a)(15)(B) requires a court to examine the harm and benefits caused to the parties in their existing situations. The fact that the non-filing creditor spouse may later file bankruptcy is not a relevant factor in weighing the relative impact to the respective parties. If a debtor spouse has disposable excess income, the non-filing creditor spouse has no excess income and no ability to pay joint liabilities which the debtor agreed to pay, the harm to the creditor spouse generally will outweigh the harm to the debtor.120

The court in In re Owens121 has interpreted the opportunity for discharge under subsection (B) to mean that the nondischarge of the obligation should be avoided "where the non-debtor spouse has independent means, wealth, or a lack of need of the particular payment involved or, arguably, where the non-debtor spouse has no assets that can be reached by creditors."122 The parties in Owens and Hill had similar financial circumstances. In Owens, however, neither the debtor nor the nondebtor spouse were experiencing extreme financial difficulty. The Owens court observed that if the debtor is required to pay the debt he would live under a "very tight budget," while noting that if the nondebtor spouse had to assume the debt she too would experience similar financial demands.123 Accordingly, the court found the debt to be nondischargeable; the benefit of discharge for the debtor did not outweigh the detriments

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120 Id. at 311. See also Wolfe v. McCartin (In re McCartin), 204 B.R. 647, 655 (Bankr. D. Mass. 1996) (rejecting the suggestion of the nondebtor spouse that filing for bankruptcy was a means of improving her financial circumstances).
122 Id. at 675. See also Taylor v. Taylor, 199 B.R. 37, 41-42 (N.D. Ill. 1996) (holding that the creditor's spouse, earning $750,000 a year, failed to show that she would suffer a significant detriment if the $60,000 debt was discharged—substantially outweighing the benefit to the debtor's spouse who was earning only $37,000 a year).
123 See Owens, 191 B.R. at 675.
to the nondebtor spouse and their financial circumstances were equal.\textsuperscript{124}

The courts in \textit{In re Florio},\textsuperscript{125} \textit{Anthony} and \textit{Carroll} have applied subsection (B) in a manner such that the equities in balancing the consequences of discharge are weighed against discharge when the debtor has additional disposable income.\textsuperscript{126} The \textit{Carroll} court stated that its decision against discharge was facilitated by a "totality of the circumstances."	extsuperscript{127} The factors it noted in reaching its conclusion included: the nondebtor spouse's proof that she could not meet her monthly expenses without receiving the debtor's support; the nondebtor spouse's need for some financial contribution from the debtor toward their child's college tuition; and the debtor's past record of contempt orders from domestic relations courts for nonsupport payments.\textsuperscript{128} The court held that benefits of a discharge of the debt to the debtor would be minimal in comparison to the detriment the nondebtor spouse would suffer and that a discharge in this case "would simply provide [the] Debtor with additional disposable income to 'use at his discretion.'"\textsuperscript{129} The court did not believe this qualified as a benefit identified under section 523(a)(15).\textsuperscript{130}

The court in \textit{Florio} denied the debtor a discharge of a property settlement where it found that the debtor had the ability to pay but had voluntarily been underemployed and was able to earn sufficient income to pay the debt.\textsuperscript{131} Moreover, the debtor failed to show how

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item \textit{Carroll}, 187 B.R. at 201.
\item See id.
\item Id.
\item See id.
\item See \textit{Florio}, 187 B.R. at 658. \textit{Cf.} Jenkins v. Jenkins (\textit{In re Jenkins}), 202 B.R. 102, 106 (Bankr. C.D. Ill. 1996) (holding that the nondebtor spouse's underemployment was a factor to be considered under the balancing test of section 523(a)(15)(B) (citing \textit{In re Smither}, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996))); Johnston v. Henson (\textit{In re Henson}), 197 B.R. 299, 304 (Bankr. E.D. Ark. 1996) (finding that since the debtor had "chosen to limit his income and employment" because he had the ability to earn more and thus pay the debt, he had failed in meeting the burden of proving an inability to pay the debt); Humiston v. Huddelston (\textit{In re Huddelston}), 194 B.R. 681, 690 (Bankr. N.D. Ga. 1996) (holding that "[i]n light of the voluntary nature of [the debtor's] underemployment and his failure to pursue more lucrative opportunities" he could not claim an entitlement to a discharge on the grounds that he was not able to pay the divorce-based obligations); \textit{In re Smither}, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) (holding "that voluntarily [sic] reduction should still be considered by the Court in making the 523(a)(15)(B) balancing test").
\end{enumerate}
\end{footnotesize}
she would benefit from the discharge and how it would outweigh any
detriment to the nondebtor spouse. In Anthony the debt was not
discharged based on the fact that the debtor was financially able to
pay the debt and the nondebtor spouse's earnings would not allow
her to pay the debts. The Anthony court did not include the
nondebtor spouse's substantial inheritance in balancing the conse-
quences of a discharge of the debt.

The court in Smither, disagreed with the application of subsection
(B) in Carroll, Florio and Anthony. It held that such an approach
"ignores the value of the Debtor's discharge and simply blends 11
§ 523(a)(15)(A) by making the existence of 'excess income' the
determinative test of 523(a)(15)(B)." This court held that the
appropriate application of subsection (B) is
to review the financial status of the debtor and the creditor
and compare their relative standards of living to determine
the true benefit of the debtor's possible discharge against any
hardship the spouse, former spouse and/or children would
suffer as a result of the debtor's discharge. If, after making
this analysis, the debtor's standard of living will be greater
than or approximately equal to the creditor's if the debt is not
discharged, then the debt should be nondischargeable under
the 523(a)(15)(B) test. However, if the debtor's standard of
living will fall materially below the creditor's standard of
living if the debt is not discharged, then the debt should be

In this case the court held that the debt should not be discharged
because the financial circumstances of the parties would be equal
regardless of whether the debt was discharged.

III. REDEEMING SECTION 523(A)(15) THROUGH LEGISLATIVE
REVISION

In spite of the flawed draftsmanship of section 523(a)(15) and the
many interpretive challenges it presents for both the bankruptcy

132 See Florio, 187 B.R. at 668.
134 See id.
135 Smither, 194 B.R. at 110.
136 Id. at 111 (citing Belcher v. Owens (In re Owens), 191 B.R. 669, 674-75 (Bankr. E.D. Ky.
1996)).
137 See id. at 111-12.
judiciary and the bar, it remains an important addition to the list of nondischargeable debts in bankruptcy. Its goal to provide greater protection for divorce-based debts that are not in the form of alimony, support or maintenance—but are nevertheless critical to a nondebtor spouse's and dependents' support and maintenance—is appropriate. Society and its legislators must gain a greater awareness of the devastating impact that divorce has on the financial security of families, and they must come to appreciate that the preservation and enforcement of this security is essential. Only then will society require the fulfillment of financial obligations to families for the general welfare of the citizenry, regardless of the new form the family assumes as a result of divorce.

As Hegel noted in his views on marriage and divorce, the sad truth of marriage is that it is dissoluble through divorce while in principle it should not be dissoluble.\textsuperscript{138} We as a society have accepted divorce and its prevalence, and we now are having to address its many consequences in all aspects of the law. Although the first federal bankruptcy law enacted in 1800 did not specifically except alimony and child support obligations from discharge, some courts at that time did exclude alimony and child support from a debtor's discharge.\textsuperscript{139} Alimony and child support obligations were specifically excepted from discharge under the bankruptcy laws through a 1903 amendment to the Bankruptcy Act of 1898,\textsuperscript{140} the predecessor to the Bankruptcy Code.\textsuperscript{141} The recent addition of section 523(a)(15) to the Code to except other types of divorce-based obligations from discharge completes our responsiveness to the financial effects of divorce under bankruptcy law.

While the task of reviewing and determining the nature of obligations arising out of a divorce is one of the most dreaded duties for the bankruptcy judge, it is not likely to disappear. The frustration the courts have encountered in applying section 523(a)(15) is well documented by case law, and calls for revision and clarification of the provision are firmly justified. The following discussion offers a legislative solution to the interpretive problems revealed by the growing complex of case law addressing section

\textsuperscript{138} See supra text accompanying note 1.

\textsuperscript{139} See J. Joseph Cohen, Note, Congressional Intent in Excepting Alimony, Maintenance, and Support From Discharge in Bankruptcy, 21 J. Fam. L. 525, 526-29 (1982-83) (exploring the establishment of the exception through case law analysis).


\textsuperscript{141} See Cohen, supra note 139, at 528-29.
523(a)(15), while achieving the goals of bankruptcy relief with greater efficacy.

Before addressing the problems with section 523(a)(15), it is important to restate which issues of interpretation and application are clearly and generally accepted by the courts, and they are:

1. The qualifying debt must not be alimony or support;
2. The qualifying debt must be a debt actually incurred by the debtor under a divorce or separation agreement;
3. The status of the debt as nondischargeable is rebuttable where it is established that the debtor does not have the ability to pay the debt, or where the benefits of discharge to the debtor outweigh the detriments of nondischarge to the nondebtor spouse; and
4. Persons with standing to bring an objection to discharge is limited to the nondebtor spouse to whom the debt is owed and not third-party beneficiaries.142

The interpretive issues that are less clear and require resolution when applying section 523(a)(15) are the following:

1. Who bears the burden of proof under the provision?
2. What standard of measurement is to be applied when determining the debtor's ability to pay the debt?
3. What time period(s) should the court look at when assessing the debtor's ability to pay (i.e., the time the bankruptcy petition was filed or the time of the trial)?
4. Is a partial discharge of the debt permissible or is an “all or nothing” discharge of the debt intended?; and
5. What factors should be considered in balancing the benefits of the debtor's discharge against the detriments of discharge to the nondebtor spouse?

The legislative intent of section 523(a)(15) is to prevent prepetition obligations assumed under a divorce or separation decree that are not in the nature of alimony or support—but are either hold harmless agreements or other property settlements—from being discharged at bankruptcy where the debtor has the ability to pay the debt and the benefits of discharge do not outweigh the detriment of discharge to the nondebtor spouse.143

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142 See supra notes 34-36 and accompanying text (establishing that certain criteria must be met for section 523(a)(15) to apply).
143 See supra notes 22-31 and accompanying text (analyzing the legislative history and intent of section 523(a)(15) and determining the types of debt the statute was intended to address).
nondischargeable, Congress intended to hold debtors responsible to their families, to assure financial support to needy ex-spouses and their dependents in the satisfaction of marital debts, and to guarantee the fair and equitable division of marital property.\textsuperscript{144} Section 523(a)(15) was enacted in response to the common practice of divorced obligors to have the majority, if not all, of the divorce or separation decree obligations drafted as property settlement obligations and to have them discharged if the bankruptcy court concluded that the debt was a property settlement and not a nondischargeable alimony or a support obligation covered under section 523(a)(5).\textsuperscript{145}

Section 523(a)(15) fits basic bankruptcy principles governing the nondischargeability of the protected debts of section 523(a). It conforms with the policy and equity concerns grounded in nondischargeable debts. It is generally understood that the basic objective of bankruptcy relief is to provide the deserving debtor a discharge of all prepetition indebtedness and to allow prepetition creditors to share equitably in the proceeds from the bankruptcy estate.\textsuperscript{146} However, in the interest of equity and the general welfare of society as a whole, the debtor’s discharge from certain prepetition indebtedness is subject to exception where equity and justice make the general principle of discharge inappropriate for the debtor and the affected creditor.\textsuperscript{147} The prepetition obligations a debtor has to his or her family weighs heavily against discharge because of the important role the “family” unit plays in society and the support system a family unit is expected to provide to its members. A critical part of this support is the financial support of dependent children and former spouses who emerge from a divorce financially dependent on the financially stronger spouse. Accordingly, alimony and child support obligations have been excepted from bankruptcy discharge for almost two centuries.\textsuperscript{148}

\textsuperscript{144} See supra note 16 and accompanying text (discussing the provision’s goal of eliminating the opportunity from noncustodial parents to avoid payment of support through bankruptcy).


\textsuperscript{146} See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 144 (1935).

\textsuperscript{147} See id. (explaining that “[t]here is now . . . a rather general acceptance of the principle that a bankruptcy law is required in the public interest of the Nation at large and for its welfare, apart from the effect of the law upon the particular individuals on whom it is to operate”).

\textsuperscript{148} See Smither, 194 B.R. at 105 (stating that since the early part of the nineteenth century alimony and child support payments have been nondischargeable through bankruptcy).
Given the importance of property settlements and hold harmless agreements, which are increasingly common in divorce and separation decrees, the inclusion of these familial-based obligations fits well within the public policy concerns that society has in preserving the financial support expected and required for families. It is also important to enforce marital property divisions based on the contributions divorcing couples made as a family and which ultimately must be divided between them in fairness to both parties. Moreover, under section 523(a)(15) the debtor's need for discharge and a fresh start is taken into consideration in the determination of nondischargeability by permitting a balancing of the debtor's need for discharge against the nondebtor spouse's need to have the debt excepted from discharge. This is a balancing of interests between the debtor's ultimate need of a discharge and fresh start and the financial vulnerability of an individual creditor to the debtor's discharge.

A. The Burden of Proof

Given the fact that the goals of section 523(a)(15) conform with and reflect the principles and concerns that dominate bankruptcy relief, it is now necessary to determine how it can be made more effective. On the question of how the burden of proof should be borne between the debtor and nondebtor spouse, the majority view taken by the courts applying section 523(a)(15) seems most appropriate based on the overall goals of the provision, how well it fits within the overall goals of bankruptcy discharge, and the structure of the provision.

In fact, the court in Jodoin eloquently raised these points in its support of the majority view, stating that this view should prevail because it "provid[es] the best fit to the statutory language and apparent policies" of the provision.

[Section 523(a)(15)] is best viewed as an effort to harmonize two competing policies. The rehabilitative policy of bankruptcy clashes with the more general federal policy of not upsetting domestic relations decisions of state courts. Intra-family obligations that have been established in marital dissolutions often involve delicate noneconomic issues that can be exacerbated by incautious application of bankruptcy relief.

149 See Anthony, 190 B.R. at 436.
Under this view, Congress accommodated the clash regarding debts arising out of marital dissolutions with the following regime. Alimony and support obligations are nondischargeable. Other marital dissolution debts are rebuttably presumed to be nondischargeable. If the debtor cannot afford to pay, the presumption of nondischargeability is rebutted and the debt discharged. If the debtor can afford to pay, the debt is discharged only if the debtor demonstrates that the harm to the nondebtor resulting from dishonoring the debt is less than the benefit the debtor reaps from not having to pay. This is a rational accommodation of the two policies.\(^{151}\)

The court further noted that the way in which section 523(a)(15) was drafted, subsections (A) and (B) are presented as defenses to the presumption of nondischargeability "rather than as substantive elements of nondischargeability."\(^{152}\)

The *Jodoin* court's focus on the language of section 523(a)(15)—the way it fits within the basic structure of bankruptcy relief and the competing interests that have to be considered and weighed in determining the extent of relief that will be granted in bankruptcy—provides the clearest interpretation of the burden of proof offered thus far. It should be recalled that while there is a clear majority view that the burden of proving the applicability of the provision to the debt in question first rests with the nondebtor spouse, and the burden of proving the elements of subsections (A) and (B) requiring discharge rest with the debtor, there is a split between the courts on the reasoning for this view.\(^{153}\) One group concluded that the burden of proof should be split between the nondebtor spouse and the debtor based on a comparative analysis of the language of section 523(a)(15) with that of the student loan nondischarge provision of section 523(a)(8).\(^{154}\) The other group based its interpretation on the "plain language" of the provision.\(^{155}\)

Of the two minority interpretations regarding the burden of proof under section 523(a)(15), one was very critical of the majority

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\(^{151}\) *Id.* at 853-54 (citations omitted).

\(^{152}\) *Id.* at 853.

\(^{153}\) See *supra* notes 41-60 and accompanying text (explaining that some courts have made a comparative analysis between sections 523(a)(15) and 523(a)(8) while others rely on a plain language interpretation of the statute).

\(^{154}\) See *supra* notes 45-50 and accompanying text (discussing the comparative analysis of the provisions).

\(^{155}\) See *supra* note 51 and accompanying text (discussing the "plain language" interpretation of the provision).
interpretation that based its interpretation on perceived similarities between the language of section 523(a)(15) and section 523(a)(8). The Butler court held that the entire burden of proof should fall on the nondebtor spouse because of the dissimilarities between the two provisions, noting that, under the language of section 523(a)(8), the student loan is nondischargeable unless the debtor proves "undue hardship." In contrast, the language of section 523(a)(15) presumes nondischarge only if the creditor meets the affirmative requirement to file a complaint with the bankruptcy court for an adversary hearing on nondischargeability. Accordingly, it was argued that the language of section 523(a)(15) and the requirement that the creditor seek a court determination of nondischargeability distinguishes the two provisions and suggests the burden of proof rests solely on the nondebtor spouse. Finally, the other minority view bifurcates the burden of proving the elements under subsections (A) and (B) governing discharge. Apparently, this view does not regard subsections (A) and (B) as defenses for the debtor in favor of discharge. It suggests that where the debtor has the ability to pay, it is the creditor who has the greatest ability and motivation to establish if the benefits of discharge outweigh the detrimental consequences to the creditor.

Based on the variations between the courts in their interpretations of the burden of proof, it is clear that neither the "plain language" of the provision, nor comparison of section 523(a)(15) with section 523(a)(8) will render a completely acceptable interpretation of the burden of proof. Thus, the better approach of analysis requires a review of the language of the provision, the objectives of the provision and how it fits into the overall goals of bankruptcy discharge as adopted by the court in Jodoin.

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156 See supra notes 52-58 and accompanying text (describing courts which emphasize the dissimilarity between the two sections).
158 See id. (pointing out the different presumptions created by each provision).
159 See id. ("It is clear to us that the burden of proof in § 523 hearings should be upon the objecting creditor.").
160 See id. (holding that "[t]he creditor is in the best logical position to plead the detrimental effects of a discharge"); see also supra note 60 and accompanying text (explaining the reasoning followed by the court in Hesson).
B. The Standard of Measuring the Ability to Pay

The courts are once again divided on the question of the standard of measurement, or test to be applied, in assessing the debtor's ability to pay the debt under section 523(a)(15)(A). In this instance, however, they have engaged in review of the tests used to determine a debtor's ability to pay under section 1325(b)(2), which applies a "disposable income test" standard in chapter 13 cases, and the "undue hardship" test used under section 523(a)(8) to determine whether a debtor deserves a discharge from a student loan debt.

Again, the courts look at the language of section 523(a)(15) to find similarities in the language of these provisions to justify which standard to use under subsection (A) of 523(a)(15). It is the requirement under section 523(a)(15)(A) that the debtor not have the "ability to pay" the debt for a determination of nondischargeability that recalls the "disposable income test" used under section 1325(b)(2). In a chapter 13 case, this test is defined as requiring an analysis of the debtor's listed expenses as reasonably necessary for support and maintenance during the term of the chapter 13 plan. As noted by the courts that disagree with the application of the disposable income test, this test is designed to address circumstances under chapter 13, which do not take into account a discharge of other prepetition debts, as would occur in a chapter 7 liquidation, and is limited to the debtor's ability to pay for a three-year period. Accordingly, these courts rejected the use of the disposable income test under section 523(a)(15)(A). They argued that the more appropriate test is the "undue hardship" test required under section 523(a)(8), because it requires con-

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161 *See supra* notes 61-82 and accompanying text.
162 *See supra* notes 61-82 and accompanying text (discussing the two tests in detail).
163 *Compare* Hill v. Hill (*In re* Hill), 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995) (applying the disposable income test) *with* Butler, 186 B.R. at 374-75 (discussing undue burden under section 523(a)(8)).
164 *See*, e.g., Hill, 184 B.R. at 755 (stating that "[t]he use of the phrase 'ability to pay' in Section 523(a)(15)(A) directs the Court to Section 1325(b)(2)'s 'disposable income' test").
165 *See*, e.g., Greenwalt v. Greenwalt (*In re* Greenwalt), 200 B.R. 909, 913 (Bankr. W.D. Wash. 1996) ("[T]he Court must critically assess the debtor's budgeted expenses to determine the minimum the debtor could afford to pay over a three-year period."); *In re* Cornelius, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995) (applying section 1325(b)(2) analysis to conclude that Social Security income is among the debtor's listed expenses).
166 *See* Straub v. Straub (*In re* Straub), 192 B.R. 522, 528 (Bankr. D.N.D. 1996) (noting the difference between chapter 12 and 13 which address "confirmation of a plan" and section 523 which addresses "dischargeability").
sideration of the effects of discharge from other prepetition debts and is not at all restricted by the repayment period.\textsuperscript{167}

The recent decision in \textit{Jodoin} synthesizes these interpretations on the applicability of the disposable income test and the "undue hardship" test, and suggests a standard of measurement that borrows from both tests and identifies how that standard would best serve the overall objectives of section 523(a)(15).\textsuperscript{168} By having a test that encompasses both standards, factors that are "purely financial" and relevant to a debtor's reasonable expenses for support and maintenance can be considered, along with the more "fundamentally subjective" factors that often accompany a divorce and provide critical insight into the debtor's ability to pay the debt beyond what is listed in bankruptcy schedules.\textsuperscript{169} Moreover, a modified test of the two standards would not be limited by time, as is the case with the disposable income test and its application in chapter 13 cases.\textsuperscript{170}

\textbf{C. Time of Inquiry as to Ability to Pay}

Related to this interpretive question regarding section 523(a)(15)(A) and the determination of the debtor's ability to pay the debt is what time periods are relevant to this inquiry. A very small minority of decisions suggested that the court should look at the time the complaint for a determination of nondischargeability is filed, or the date the bankruptcy petition was filed.\textsuperscript{171} The majority of the courts suggest that the time period of review should at least begin with the ability of the debtor to pay at the time of the trial for the determination of nondischargeability, rejecting specific periods prior to the trial or a limited "snapshot" inquiry.\textsuperscript{172} This takes into account any changes in the debtor's circumstances that would have

\textsuperscript{167} See id. (stating that under section 523(a)(8), "[c]ourts look to a debtor's long-term financial prospects and seek to determine whether a debtor's present financial inability to pay a student loan will exist on into the foreseeable future").

\textsuperscript{168} See Samaya v. Jodoin (In re Jodoin), 196 B.R. 845, 855 (Bankr. E.D. Cal. 1996) (concluding that the test "gives the court the flexibility to do justice").

\textsuperscript{169} See id. at 854-55.

\textsuperscript{170} See id. at 854 (stating that the modified test considers disposable income "with an indefinite horizon in mind").

\textsuperscript{171} See Hill v. Hill (In re Hill), 184 B.R. 750, 754 (Bankr N.D. Ill. 1995) (holding that the date of filing is the appropriate point of inquiry).


\textsuperscript{173} See, e.g., Jodoin, 196 B.R. at 854 (measuring the ability to pay from time of trial).
an effect on the debtor's current and future ability to pay the debt. This view seems to make the most sense, given the fact that the provision is concerned about payment of the obligation after bankruptcy, which is the consequence of nondischargeability.

D. Partial Discharge

Another question that has arisen in the application of section 523(a)(15) is whether a partial discharge is permitted where there is evidence of an ability to pay some of the debt. Few courts have addressed this issue, however, among the courts that have, there is no clear majority on whether the determination under section 523(a)(15) allows for a partial discharge or demands an “all or nothing” determination. The arguments in favor of partial discharge are centered on comparisons between section 523(a)(15) and section 523(a)(8), where many courts have permitted partial discharges of student loans. It is viewed as being “fair and equitable” to hold the debtor responsible for the debt to the extent it can be paid, while at the same time acknowledging the need to have equitable modifications of the terms of these obligations to make determinations of partial discharge. Other courts reject using comparisons between section 523(a)(15) and section 523(a)(8). They note that there is nothing in the language of section 523(a)(15) to suggest partial discharge. Moreover, the challenge of determining the ability to pay an entire debt, let alone a portion of the debt, raises caution against determinations that will “nickel and dime” the debtor. It should be noted, however, that a “nickel and dime” effect of nondischarge can occur in partial discharge cases.

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174 See supra notes 83-92 and accompanying text (addressing the different time periods utilized by the courts in determining the debtor's ability to pay).
175 See Comisky v. Comisky (In re Comisky), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995) (calling the “all or nothing” result “harsh” and not mandated by the Code).
176 See id. (“[T]he court finds analogous cases regarding student loan issues to be helpful in deciding this case.”).
177 See supra notes 93-105 and accompanying text (discussing the reasoning behind equitable modifications).
178 See supra notes 106-10 and accompanying text (discussing cases that applied the “all or nothing” test).
179 See Taylor v. Taylor (In re Taylor), 191 B.R. 760, 766 (Bankr. N.D. Ill. 1996), aff’d, 199 B.R. 37 (N.D. Ill. 1996) (“The statute makes no provisions for determining that a part of a debt may be found dischargeable.”).
180 See Collins v. Florez (In re Florez), 191 B.R. 112, 116 (Bankr. N.D. Ill. 1995) (stating that “the Court is forced to apply Section 523(a)(15)(A) in a way which nickels and dimes the Debtor”).
as well as in cases where the court has found some ability to pay but adopts the "all or nothing" approach to discharge. This possible result should remind the courts that one of the principle objectives of bankruptcy relief is to provide a deserving debtor a "fresh start."\(^{151}\)

Accordingly, the partial discharge of the debt under section 523(a)(15) should not be prohibited where the court finds it fair and equitable. The survival of the debt after bankruptcy will not impair the debtor's ability to achieve a fresh start and the nondebtor spouse's need for some payment overrides the debtor's need for a discharge. Such a result clearly would be in accord with the objectives of section 523(a)(15) and the overall goals of bankruptcy relief. The question and determination of partial discharge seems appropriate under the equitable umbrella of bankruptcy and should be left to the courts' discretion.

**E. Balancing the Benefit and Detriment of Discharge**

The final question the courts have wrestled with in interpreting and applying section 523(a)(15)(B) is what factors to consider in balancing the consequences of discharge or nondischarge between the debtor and nondebtor spouse. This question is not the subject of great division, but more of a call for guidance. This guidance has been well fashioned by the courts through case law that has amassed on this question.\(^{182}\) It has been uniformly accepted by the courts that the "totality of the circumstances" that will affect the financial lives of the debtor and nondebtor spouse must be considered when determining if, and the extent to which, the benefits of discharge to the debtor outweigh the detrimental consequences of discharge to the nondebtor spouse.\(^{183}\) What factors the courts will deem relevant to this exercise and how they will balance them will inevitably vary from court to court simply because the factors will vary from case to case.

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\(^{151}\) See id. ("The concept of a fresh start is amply challenged by application of Section 523(a)(15)(A).")

\(^{182}\) See supra note 112 and accompanying text (listing cases deciding on totality of circumstances test).

\(^{183}\) See supra note 112 and accompanying text.
This task will undoubtedly reflect the value judgments of each court.

F. The Legislative Solution

In view of the foregoing analysis, it appears that the legislative redemption of section 523(a)(15) can accommodate a statutory clarification of three of the issues discussed above. The first of which is to adopt the majority view of how to apply the burden of proof. This is, that it is the nondebtor spouse's burden to prove that the debt in question qualifies as a nonsupport divorce-based obligation, and is thus presumptively nondischargeable. It is the debtor's burden to rebut this presumption by proving the debtor's inability to pay the debt, or in the alternative, that the benefit of discharge outweighs the detrimental consequences of discharge to the nondebtor spouse. The second issue for legislative clarification is whether the time of inquiry into the debtor's financial stability must be broad, thereby permitting an assessment of the debtor's present and future ability to pay the debt. Lastly, it should be clarified that the standard of measuring the debtor's ability to pay similarly must be broad and permit both a quantitative assessment of the ability to pay as well as a subjective assessment of the ability to pay. This may be accomplished through an "explicit good faith" test as suggested by the court in Jodoin. The issues governing partial discharge and the factors to be considered in balancing the consequences of discharge between the debtor and the nondebtor spouse should be left to the discretion of the courts as they apply this provision to the unique factors of each case in accordance with basic bankruptcy principles.

Accordingly, an amended section 523(a)(15) reflecting these clarifications would prohibit a debtor from discharge of any debt that is:

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

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accordance with State or territorial law by a governmental unit unless the debtor proves in good faith that he or she—
(A) the debtor does not have the present and future ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.\textsuperscript{186}

There are undoubtedly many ways that section 523(a)(15) can be analyzed, criticized and improved. However, it is unsettling to realize this provision's significance in our society. Sadly, it is a necessary piece of legislation due to divorce's devastating consequences and its consistent frequency.