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Domestic Support Obligation Not Necessarily a First Priority Claim

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Introduction

During distribution of the proceeds of a debtor's estate, creditor claims and expenses are paid in a specific order of priority pursuant to title 11 of the United States Code (the "Bankruptcy Code").¹ Domestic support obligations, which include monies owed to or recoverable by a spouse, former spouse, child of the debtor, or such child's parents, are entitled to be paid first.² Typically, these types of claims are first priority regardless of whether they are filed by the persons to whom they are owed or by a governmental unit on behalf of such persons.³ However, this top tier priority is not always guaranteed as it can be affected by things such as an untimely filing of a proof of claim or even state-specific laws that are triggered during bankruptcy.⁴

Generally, a creditor may file a proof of claim during a bankruptcy case, effectively saving their spot in the line to be paid. Section 101(10) of the Bankruptcy Code generally defines a creditor as an "entity that has a claim against the debtor."⁵ Courts can and have expanded the

¹ See generally 11 U.S.C. § 507 (2018) (listing the order of priority of claims and expenses during bankruptcy distribution).

² See 11 U.S.C. § 507(a)(1)(A) (declaring domestic support as having the highest priority during a bankruptcy distribution).

³ See *id.* (noting how unsecured claims for domestic support obligations are given first priority "without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person.").

⁴ See *In re Clark*, 921 F.3d 566 (holding that because state laws gave the government agency the right to enforce the obligation, it was the creditor rather than the person to whom the money was actually owed); see also *Fezler v. Davis (In re Davis)*, 194 F.3d 570, 576–77 (5th Cir. 1999) (holding a creditor can also be "an entity with authority to prosecute and collect a claim against a debtor").

⁵ 11 U.S.C. § 101(10).

statutory definition of a creditor. By doing so, courts confer in the person or entity not only title of creditor, but also the statutory rights and privileges that go with it. For example, some states offer collection agencies for creditors to enroll in as an effort to help collect debts quicker and more effectively. However, state services of this type come with the “catch” of signing over particular rights to the agency. In some cases, this division of rights can be the deciding factor in who is the creditor in a bankruptcy proceeding, especially when it involves a domestic support obligation.

This memorandum examines when a domestic support obligation is afforded first priority distribution during a bankruptcy case and certain events that could possibly alter this determination. Section I explains how the Bankruptcy Code defines a “creditor” and the courts’ analysis of that definition. Section II specifically examines domestic support obligations and where they fall on the priority spectrum after taking state law into consideration. Additionally, this Section will explore proofs of claim under section 726 of the Bankruptcy Code and discuss who can file them, their statutorily imposed time restrictions, and how these restrictions could potentially affect domestic support obligations. Section II will further discuss how the courts’ narrow definition of a creditor and statutory time restrictions interact to potentially result in a lower priority for persons owed domestic support obligations.

Discussion

I. Definition of a Creditor

It is well established that a “creditor” is an “entity that has a claim against a debtor that arose at the time of or before the order for relief concerning the debtor.”⁶ The Bankruptcy Code

⁶ See 11 U.S.C. § 101(10); see also 11 U.S.C. § 301(b) (stating the definition of an order for relief). An order for relief refers to an actual court order determining that, moving forward, a debtor is subject to the control of the bankruptcy courts. See 11 U.S.C. § 301(b). Essentially, the debtor’s obtaining an order for relief from the court marks the beginning of a bankruptcy proceeding. *Id.*

defines “claim” as the “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”⁷ Therefore, the co-parent of a debtor’s child who received a court order compelling the debtor to pay child support prior to the debtor’s filing an order of relief in a bankruptcy court would be a creditor and entitled to a recovery from a debtor’s estate.

The United States Supreme Court has held that “‘the right to payment’ [means] nothing more or less than an enforceable obligation.”⁸ Determining where an enforceable obligation lies “requires an analysis of interests created by *non-bankruptcy* substantive law.”⁹ In *In re Davis*, the Fifth Circuit expands on this notion as well as the definition of a creditor by stating that a creditor can also be “an entity with [authority] to prosecute and collect a claim against the debtor, even if other persons are entitled to ultimate payment on the claim . . .”¹⁰ Therefore, one’s right to be paid is no longer entirely determinative of creditor status.¹¹

In determining an entity’s status as a creditor, a court will analyze the entity’s ability to *enforce* the obligation.¹² For example, the court in *Davis* specifically references government agencies and explains that “administrative agencies by virtue of their authority to enforce the administrative law are creditors regardless of the fact that they are not the debt-payment recipient.”¹³ The Court of Appeals for the Fifth Circuit held that the administratrix of an estate was eligible to bring adversary proceedings as a creditor because of her “statutory authority to

⁷ See 11 U.S.C. § 101(5)(A).

⁸ See *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (alteration in original) (quoting *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)).

⁹ See *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1274 (5th Cir. 1994) (quoting *In re Nat’l Gypsum Co.*, 139 B.R. 397, 405 (N.D. Tex. 1992) (emphasis added)).

¹⁰ See *In re Davis*, 194 F.3d at 576–77 (holding that an administratrix of a probate estate qualified as a “creditor” with standing to bring adversary proceedings).

¹¹ See *In re Clark*, 921 F.3d 566 (“But the ultimate right to receive the fund is not dispositive to our analysis; instead, we must consider whether [the parties] could enforce [the] child support obligation against [the debtor].”).

¹² See *In re Davis*, 194 F.3d at 576–77 (holding that an administratrix of a probate estate qualified as a “creditor” with standing to bring adversary proceedings because of her ability to enforce the decedent’s claim); see also *In re Egea*, 236 B.R. 734, 744–45 (Bankr.D.Kan.1999)(holding Secretary of Labor is creditor with standing to object to the discharge of claim against employer-debtor for breach of fiduciary duties under ERISA).

¹³ See *In re Davis*, 194 F.3d at 575.

prosecute and collect a claim against the debtor.”¹⁴ Therefore, where there is dispute as to who has creditor status or whether an entity is a creditor under the definition at all, the courts will likely consider several factors, with who has the right to enforce payment being the most significant.

II. Untimely Filed Proofs of Claim

Being a creditor comes with rights and obligations, namely, the obligation to file a proof of claim to obtain a recovery from a debtor’s estate.¹⁵ A proof of claim is an “indica of a claim’s validity and amount.” Filing a proof of claim registers a claim (i.e., money owed or a right to be paid) with the court against the assets of the bankrupt debtor’s estate.¹⁶ When a creditor files a proof of claim for the money she is owed, she is essentially securing her place in line during the distribution stage of the bankruptcy proceeding. According to section 501 of the Bankruptcy Code, the right to file a proof of claim lies solely with the creditor or an indenture trustee.¹⁷ Therefore, one must be a creditor under the narrow definition used by courts in order to be able to file a proof of claim and assert their right to a portion of a debtor’s estate during bankruptcy distribution. Additionally, one must have the right to enforce the claim in order to be able to effectively register it with the court.¹⁸

Additionally, the Bankruptcy Code imposes deadlines as well as a distribution schedule for the property of a debtor’s estate that considers whether proofs of claim were timely or untimely; if a creditor does not file their proof of claim within the appropriate time frame, they risk losing their “spot in line” to be paid and being bump down a priority level. This is particularly important in cases of domestic support obligations.

¹⁴ *Id.* at 579.

¹⁵ *See* 11 U.S.C. § 501.

¹⁶ *In re Umstead*, 460 B.R. 186 (Bankr. E.D.Penn. 2013).

¹⁷ *See* 11 U.S.C. § 501(a).

¹⁸ *See supra* Section I.

Initially, the parent or child who obtains the court-ordered domestic support obligation (i.e. the person to whom the money is owed and paid to) has a claim against the debtor for those monies. Under this situation, the parent or child would be the creditor under the statute as well as under the narrow definition of the courts because they have both a right to be paid as well as the ability to collect and enforce the obligation. Assuming such a creditor timely filed her proof of claim, she would be given first priority under section 507(a)(1)(A). However, if someone owed money enrolls in a government offered service to aid in collection of the domestic support obligation, the outcome may differ.

When a person owed domestic support enrolls in their state's collection agency, she permits the agency to directly collect the obligation from the debtor on her behalf. In doing so, she relinquishes her personal right and ability to enforce the obligation. In that instance, the government collection agency would have the power to enforce the debtor's obligation. Therefore, the state agency becomes the creditor of the domestic support obligation even though they are not the ultimate payee. Under section 507(a)(1)(A), the government agency is still afforded top tier priority during distribution contingent on it timely filing the proof of claim, contingent on its timely filing proof of *the parent or child's* claim.

Thus, when a domestic support payee enrolls in a state's collection agency, she is doing more than simply introducing an intermediary into the situation that makes getting herself paid easier and quicker. She is abandoning her priority status and putting it entirely in the hands of the government agency to maintain. Should the government agency fail to timely file a proof of the domestic support claim, not only does the claim lose top tier priority distribution status, but the ultimate payee (the parent or child) suffers.

Conclusion

Domestic support obligations are afforded the highest priority during distribution of a bankrupt debtor's estate under section 507(a)(1)(A) of the Code. In order to maintain this priority, the creditor must timely file a proof of claim. Identifying the creditor of a domestic support obligation can be ambiguous; it is not instinctively the debtor's child or co-parent. Section 101(10) of the Bankruptcy Code provides a broad definition of a "creditor" – someone with a right to be paid. However, courts have narrowed this definition and identified one determinative factor – ability to *enforce* payment. Therefore, if a child or parent owed domestic support opts into a government collection agency and assigns to it their ability to enforce payment, it is likely that the agency will be deemed the creditor over the child or parent. Furthermore, it will be the agency's responsibility to maintain first priority distribution by timely filing a proof a claim during a debtor's bankruptcy proceeding.