

2012

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### Recommended Citation

Becker M. Wyckoff, *They're Just Letting Anyone In These Days: The Expansion of § 523(a)(5)'s "Domestic Support Obligation" Exception to Discharge*, 28 EMORY BANKR. DEV. J. 637 (2012).

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# THEY'RE JUST LETTING ANYONE IN THESE DAYS: THE EXPANSION OF § 523(A)(5)'S "DOMESTIC SUPPORT OBLIGATION" EXCEPTION TO DISCHARGE

## INTRODUCTION

In the Western District of Oklahoma in 2010, a woman named Stephanie Tucker, a single widowed mother, suddenly became responsible for \$15,405 in attorney's fees incurred during litigation in which she had previously prevailed.<sup>1</sup> Her deceased husband's parents had sued her for custody of their grandchild, and when Ms. Tucker successfully defended the suit, the court ordered the grandparents to pay her attorney's fees.<sup>2</sup> However, when the grandparents filed for bankruptcy, the court decided that these fees were dischargeable in part because they were owed to Ms. Tucker.<sup>3</sup> Although Ms. Tucker had prevailed and retained custody in the earlier action, she was suddenly and inequitably burdened with over \$15,000 in fees.

Meanwhile, in 2010, another award of almost \$10,000 in attorney's and other litigation-related fees were at issue in the Bankruptcy Court for the Middle District of Florida.<sup>4</sup> Prior to the debtor's bankruptcy, a Florida state court had ordered him to pay the fees and court costs incurred in their divorce proceedings directly to his ex-wife's attorney.<sup>5</sup> As opposed to the single widowed mother above, the debtor's former wife in this instance was not suddenly confronted with overwhelming fees she needed to pay.<sup>6</sup> Instead, the court ordered the ex-husband to pay the attorney all of these debts and did not allow them to be discharged.<sup>7</sup>

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<sup>1</sup> Tucker v. Oliver, 423 B.R. 378, 379 (W.D. Okla. 2010); Brief of Appellant at 8–9, Tucker v. Oliver, 423 B.R. 378 (W.D. Okla. 2010) (No. CIV-09-1137-HE), 2009 U.S. Dist. Ct. Briefs LEXIS 794 at \*4–5.

<sup>2</sup> Tucker, 423 B.R. at 379.

<sup>3</sup> *Id.* at 379–81 (“To qualify [as a domestic support obligation], the debt must be owed to or recoverable by ‘a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative.’ The undisputed facts make it clear that Ms. Tucker, as the former daughter-in-law of the debtors, is none of these.” (citation omitted) (quoting 11 U.S.C. § 101(14A)(A) (2006)).

<sup>4</sup> Coleman v. Blackwell (*In re Blackwell*), 432 B.R. 856, 857 (Bankr. M.D. Fla. 2010).

<sup>5</sup> *Id.* at 859–60. The debtor owed the fees in question directly to the plaintiff as the attorney to the debtor's ex-wife. *Id.* Additionally, the divorce court had previously ordered the debtor to pay the ex-wife's attorney's fees for the divorce, mortgage payments, and various late fees and interest accrued by her due to the debtor's contempt of court, none of which were at issue in this opinion. *Id.*

<sup>6</sup> *Id.* at 862–63.

<sup>7</sup> *Id.*

In comparing these cases, the most startling observation is that both holdings rest on the same statutory provision—§ 523(a)(5)—and the exact same statutory language.<sup>8</sup> This Bankruptcy Code (Code) section allows courts to declare debts deemed “domestic support obligations” nondischargeable in bankruptcy.<sup>9</sup> How, though, could courts rely on the exact same language and reach opposite outcomes? This analysis is necessary as courts’ presently disparate applications of § 523(a)(5) must be remedied if the Code is to meet its goal of equitable enforcement. This Comment addresses and answers this question.

Abiding by its general intent to respect and protect support for family members (especially those made vulnerable through divorce and bankruptcy proceedings), § 523(a)(5) excepts “domestic support obligations” from discharge in bankruptcy. Section 101(14A) provides the Code’s only definition of “domestic support obligation,” specifying four requirements a debt must satisfy to be nondischargeable as a domestic support obligation.<sup>10</sup> One requirement is that the debt must be owed to, or recoverable by, the “spouse, former spouse, or child of the debtor.”<sup>11</sup> And while its language may seem obvious and understandable, courts have struggled to clearly and consistently interpret this element since Congress codified the original familial support exception from discharge in 1978.<sup>12</sup> The confusion even survived the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or 2005 Amendments).<sup>13</sup> Many would find attempting to define family to be a complicated and multifaceted task. Likewise, courts have found it particularly difficult to demarcate the practical scope of “spouse, former spouse, or child of the debtor.”<sup>14</sup> As a result, courts’ enforcement of the exception for domestic support obligations is varied and inconsistent and, as

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<sup>8</sup> See *Tucker*, 423 B.R. at 381; *In re Blackwell*, 432 B.R. at 862–63. All “§” in this Comment refer to sections of title 11 unless otherwise indicated.

<sup>9</sup> 11 U.S.C. § 523(a)(5) (2006).

<sup>10</sup> *Id.* § 101(14A).

<sup>11</sup> *Id.* § 101(14A)(A). Courts have referred to this provision as the “payee requirement.” *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 473 (Bankr. S.D. Ohio 2010).

<sup>12</sup> Even long before the 2005 Amendments, many scholars studied the issues courts were having interpreting 11 U.S.C. § 523(a)(5). See, e.g., Patricia A. Cullen, Note, *Does Anybody Know the Rules in Federal Divorce Court?: A Case for Revision of Bankruptcy Code § 523*, 46 RUTGERS L. REV. 427 (1993); Margaret M. Mahoney, *Debts, Divorce, and Disarray in Bankruptcy*, 73 UMKC L. REV. 83 (2004); Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFF. L. REV. 369 (1997).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Parts I.B–II.

demonstrated in the above examples, thwarts the efforts of courts to equitably and accurately apply the Code.

The majority of courts previously read, and continues to read, the § 523(a)(5) payee language out of the statutory requirements.<sup>15</sup> As a result, those courts have consistently held that the payee requirement is broader than the payees explicitly listed in § 101(14A), finding it to include debts to attorneys, banks, and other third parties. More recently, however, several courts have interpreted the payee language and the changes instituted by BAPCPA as plainly as possible, declaring that only debts owed directly to the listed payees could be nondischargeable.<sup>16</sup> This approach, although a valid one, is a more literal application than Congress intended.<sup>17</sup>

To temper the plain meaning analysis of the language so that it fits with the policy, purpose, and equities involved, courts should combine this “plain meaning” interpretation with the judicially created limited exception to it. Courts should embrace this approach as the method by which they analyze these domestic support obligations. The exception involves investigating the underlying responsibility for the debt and identifying which of the parties would ultimately be responsible for paying the obligation if the debt was discharged because it was not owed directly to one of the listed payees. This approach would be in accordance with the legislative history, the policy objectives, and the findings of many other approaches to statutory construction.<sup>18</sup> It would also grant courts greater flexibility when dealing with individual cases involving domestic support obligations.

Bankruptcy and family law intersect in § 523(a)(5) of the Code. Thus, discussions involving the interpretation of § 523(a)(5) must also include a family law perspective. Issues involving domestic support obligations arise most frequently in situations where either a debtor has been ordered to pay attorney’s fees after a divorce, third-party fees are incurred during divorce proceedings (for example, fees to guardians *ad litem* or child psychologists), or paternity is at issue.<sup>19</sup> Because divorce and bankruptcy frequently occur

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<sup>15</sup> See *infra* Parts I.B, II.B.

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> See *infra* Part III.A.2, B.3.a.

<sup>18</sup> See *infra* Part III.A.2–3, B.3.

<sup>19</sup> 4 COLLIER ON BANKRUPTCY ¶ 523.11[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011); see also *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1489–90 (10th Cir. 1995) (finding fees due to guardian *ad litem* and child psychologist nondischargeable under § 523(a)(5)).

concurrently,<sup>20</sup> this is an issue that truly affects many individuals and which necessarily involves multiple courts—bankruptcy and various state courts. In fairness to the parties involved and in the interest of judicial consistency, courts should embrace and apply a uniform method of interpreting § 523(a)(5)'s payee language.

This Comment offers a uniform approach to the interpretation of the domestic support obligation “payee requirement” by analyzing the various interpretive strategies courts have used both pre- and post-2005<sup>21</sup> and carefully considering the policy and the corresponding congressional intent of the amendments related to domestic support. Part I summarizes the history of divorce and separation debts and the Code sections that regulate them. Part I also chronicles bankruptcy court decisions prior to BAPCPA and discusses the courts’ conflicting interpretations of family support obligations. Part II discusses more current, post-BAPCPA decisions, particularly exploring the conflicts among the courts, and many courts’ continued reliance on their pre-BAPCPA interpretations of family support obligations. Part III explores the specific policy objectives behind the treatment of domestic support obligations and considers Congress’s intent in altering the domestic support obligation clause from its previous statutory form. Finally, Part III suggests a way to reconcile competing forces, including: the plain language of the statute, the Code sections’ legislative history, the overarching policy objectives, the family concerns and bankruptcy law equities, and the courts’ currently varied approaches. Ultimately, this Comment suggests a solution that provides courts with a process of deciding domestic support obligation cases more uniformly and comprehensively: the judicially developed exception to the plain meaning rule.

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<sup>20</sup> *Bankruptcy Site: Statistics*, THE PEOPLE’S SITE FOR INFORMATION ON THE NEW BANKRUPTCY LAW, <http://www.bankruptcylawinformation.com/index.cfm?event=dspStats> (last visited Mar. 1, 2011). Statistically, bankruptcy and divorce tend to happen in conjunction with each other. “[Ninety-one percent] of bankruptcy filers have suffered a job loss, medical event[,] or divorce,” and “[forty percent] of bankruptcies result from medical crises, unemployment[,] or divorces.” *Id.* Additionally, “[u]rban areas [are known to] have more personal bankruptcies than rural areas, a trend that can be explained, in part, by higher divorce rates.” *Id.*

<sup>21</sup> In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, overhauling several areas of the law such as the provisions for domestic support obligations. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in various sections of title 11).

## I. SECTION 523(a)(5): ITS PLACE IN THE BANKRUPTCY CODE AND ITS HISTORICAL INTERPRETATION

### A. *Section 523(a)(5) and the Bankruptcy Code*

Debtors who choose to file for bankruptcy under chapters 7, 11, or 13 are able to discharge their outstanding debts after either liquidating their entire estates or completing their reorganization plans.<sup>22</sup> However, the luxury of discharge is not without limitations. Section 523 contains the exceptions to discharge, detailing those debts bankruptcy will not eliminate.<sup>23</sup> In particular, § 523(a)(5) provides that “[a] discharge under [§§] 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . for a domestic support obligation . . . .”<sup>24</sup>

Filing under chapter 7 or 11 means the entire list of obligations in § 523 will be ineligible for discharge.<sup>25</sup> However, debtors who file for bankruptcy under chapter 13 are subject to fewer exceptions—a discrepancy which arose following a combination of changes made in BAPCPA and the 1994 Amendments.<sup>26</sup> Chapter 13 limits the debts that are nondischargeable to those listed under § 523(a)(1B), (1C), and (2)–(9), but it excludes § 523(a)(15).<sup>27</sup> This omission is notable because both § 523(a)(5) and § 523(a)(15) concern divorce- and separation-related debts.<sup>28</sup> Courts dealing with chapter 13 cases involving those types of debts must, therefore, analyze those obligations

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<sup>22</sup> See 11 U.S.C. §§ 727(a)–(b), 1141(d)(1)(A), 1328(a)–(b) (2006).

<sup>23</sup> See *id.* § 523.

<sup>24</sup> *Id.* § 523(a)(5).

<sup>25</sup> See *id.* §§ 727(b), 1141(d)(2). Taken together, these provisions mean that, in all of the chapters listed, debtors remain responsible for domestic support obligations during and after their bankruptcies.

<sup>26</sup> 3 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKRUPTCY LAW AND PRACTICE* 3D § 57:35, at 57-100 (2008) (“Obligations arise between spouses, particularly former spouses, as a result of loans, as a means of adjusting a division of property, and often as a means of discharging the duty of support. Originally, debts traceable to loans and to property divisions were not excepted from the debtor’s discharged debts. After amendments in 1994 and 2005, however, such property settlement obligations were excepted from discharges in all cases other than [c]hapter 13. Debts traceable to support are not dischargeable in any chapter under the Bankruptcy Code.” (footnotes omitted)).

<sup>27</sup> 11 U.S.C. § 1328(a)(2) (discharging debts owed to children, former spouses, and spouses not covered under § 523(a)(5)); see also *id.* § 523(a)(15). Section 1328(a)(2) essentially makes dischargeable all debts owed to a spouse, former spouse, or child, that are not considered to be in the nature of support.

<sup>28</sup> See *id.* § 523(a)(5), (15). Section 523(a)(5) excepts domestic support obligations from discharge. *Id.* § 523(a)(5). Section 523(a)(15) excepts debts to a spouse, former spouse, or child that are incurred during divorce or separation and are not domestic support obligations. *Id.* § 523(a)(15).

differently than courts dealing with chapter 7 or 11 bankruptcies.<sup>29</sup> Although courts analyze domestic support obligations similarly in all types of bankruptcy cases, the chapter 13 cases are the most affected by the inclusion of § 523(a)(5) and the exclusion of § 523(a)(15).

The differences between § 523(a)(5) and § 523(a)(15) are not vital to the discussion of the specific payee language in § 523(a)(5). However, an understanding of the distinction between the two is useful in trying to comprehend the case law involving domestic support obligations. Section 523(a)(5) deals with “domestic support obligations,” which are obligations determined to be “in the nature of alimony, maintenance, or support.”<sup>30</sup> Section 523(a)(15) deals with marital and family-related debts as well, dictating that all other debts resulting from divorce or separation agreements are nondischargeable.<sup>31</sup> This provision is known as the “property settlement” subsection.<sup>32</sup> Essentially, the dividing line separating these two types of debts is the nature of the debt. Section 523(a)(5) covers support obligations, such as child support and alimony, while § 523(a)(15) governs other divorce- or separation-related debts involving the division of family assets.<sup>33</sup>

Courts’ historic problems discerning between domestic support obligations and property settlements continue to be important issues in divorce and bankruptcy jurisprudence today.<sup>34</sup> These difficulties continue to affect the issue this Comment addresses, as courts continue to confuse and merge the factors they use to decide between § 523(a)(5) and § 523(a)(15) obligations, and those elements necessary to decide if debts are even domestic support obligations in the first place.<sup>35</sup> Procedurally, courts consider a number of factors to determine

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<sup>29</sup> James A. Patten & Craig D. Martinson, *Avoiding Traps for the Divorce Lawyer: Changes in Laws Affect Your Briefs on Domestic Obligation*, MONT. LAW., Sept. 2008, at 8, 8–9, 31.

<sup>30</sup> 11 U.S.C. §§ 101(14A)(B), 523(a)(5).

<sup>31</sup> *Id.* § 523(a)(15).

<sup>32</sup> 4 COLLIER, *supra* note 19, ¶ 523.11[1]; *see also* Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 WAYNE L. REV. 1369, 1395 (2005) (noting Third Circuit case law discussing the difference between a support-based obligation and a property settlement (citing *Gianakis v. Gianakis (In re Gianakis)*, 917 F.2d 759, 762 (3d Cir. 1990)); Shayna M. Steinfeld, *The Impact of Changes Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Family Obligations*, 20 J. AM. ACAD. MATRIM. LAW. 251, 255–56 (2007) (discussing, in the context of chapter 13 cases, a nondischargeable domestic support obligation and a “dischargeable property settlement/non-domestic support obligation”).

<sup>33</sup> *See* 4 COLLIER, *supra* note 19, ¶ 523.11[1]; Austin, *supra* note 32, at 1385–87.

<sup>34</sup> *See generally* Austin, *supra* note 32, at 1371–72.

<sup>35</sup> *See id.* at 1384; *see also* *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 861–63 (Bankr. M.D. Fla. 2010); *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*3–4 (Bankr. E.D. Tenn. Sept. 10, 2008).

the difference between obligations in the nature of support and property settlements.<sup>36</sup> If that analysis indicates that the debt is in the nature of support, the court then decides whether the debt is a domestic support obligation. That step in the process is when the payee requirement becomes an issue. This Comment focuses on the payee requirement of § 523(a)(5) and the second step outlined above—specifically, whether the language of the statute actually limits nondischargeability to those debts owed directly to the listed payees or whether the payee language is unimportant to the determination of nondischargeability as a domestic support obligation. This uncertainty must be resolved in order to maintain the integrity of the Code and the judicial system that applies it.

### 1. *The Genesis of § 523(a)(5): Family Support Obligations and the History of Their Codification as Nondischargeable Debts*

Even before their codification in the Bankruptcy Reform Act of 1978 as nondischargeable debts, alimony and child support were, for policy reasons, already considered nondischargeable.<sup>37</sup> Congress codified these policy objectives in § 523(a)(5) and afforded distinctive treatment to debts considered child and spousal support.<sup>38</sup> After multiple amendments to the Code, these debts, presently referred to as domestic support obligations, continue to enjoy a virtually unequaled priority status among other bankruptcy debts<sup>39</sup> and comprise a solidly established exception to the general rule of discharge.<sup>40</sup>

### 2. *Changes Made by the 2005 Amendments*

In 2005, Congress overhauled the Code, attempting to address concerns that had developed since the last major Code revision<sup>41</sup> and discourage debtors from filing for bankruptcy by making the requirements more difficult to

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<sup>36</sup> 4 COLLIER, *supra* note 19, ¶ 523.11[6].

<sup>37</sup> Charles P. Kindregan, Jr., *The Bankruptcy Reform Act and Its Effect on Family Law Proceedings, Judgments and Agreements*, 28 SUFFOLK U. L. REV. 657, 657 n.1 (1994); *see also* Austin, *supra* note 32, at 1384 (“Bankruptcy courts have long recognized marital and child support obligations as a unique type of debt to be treated differently from other forms of secured debt due to the vulnerability of former spouses and dependents.”).

<sup>38</sup> *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(5) (2006)); *see also* S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

<sup>39</sup> 11 U.S.C. § 507(a)(1) (stating domestic support obligations hold first priority, following only trustee’s fees).

<sup>40</sup> *Id.* § 523(a)(5), (15).

<sup>41</sup> H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

meet.<sup>42</sup> BAPCPA was a purported response to increasing consumer filings, overwhelming numbers of serial filings, and abuse of the system.<sup>43</sup> The House Judiciary Committee indicated that the bill's purpose was to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."<sup>44</sup> Essentially, the 2005 Amendments increased creditor protections and attempted to reduce the number of abusive or manipulative filings by debtors.<sup>45</sup>

The 2005 Amendments specifically altered § 523(a)(5) in several ways,<sup>46</sup> with a few notable changes that are essential to any discussion of the payee requirement.<sup>47</sup> Congress removed the pertinent language from § 523(a)(5) and replaced it with "domestic support obligations," necessitating the definition of that term in § 101.<sup>48</sup> The definition in § 101(14A) contains essentially the same language that had been present in the pre-2005 § 523(a)(5) but in a different structure.<sup>49</sup> Instead of using a paragraph-based format, Congress took the four requirements contained in the pre-2005 paragraph form and structured them so that they were listed as four separate elements, each necessary for the classification of a debt as a nondischargeable domestic support obligation.<sup>50</sup> These alterations essentially compromise the bases upon which some courts have deviated from the majority decisions that guided both pre- and post-2005 cases.<sup>51</sup>

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<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 3–5.

<sup>46</sup> *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 211, 215, 119 Stat. 23, 50–51, 54 (codified at 11 U.S.C. §§ 101(14A), 523(a)(5) (2006)).

<sup>47</sup> *See 2 COLLIER, supra note 19, ¶ 101.14A.*

<sup>48</sup> *See 11 U.S.C. §§ 101(14A), 523(a)(5).*

<sup>49</sup> Austin, *supra note 32*, at 1390–91 (discussing the alterations made to 11 U.S.C. §§ 101(14A) and 523(a)(5)). Section 101(14A) makes nondischargeable debts to "a spouse, former spouse, or child of the debtor . . . in the nature of alimony, maintenance, or support . . . of such spouse, former spouse, or child of the debtor." 11 U.S.C. § 101(14A)(A)–(B).

<sup>50</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §§ 211, 215; Austin, *supra note 32*, at 1390–91.

<sup>51</sup> *See, e.g.*, Tucker v. Oliver, 423 B.R. 378, 379–81 (W.D. Okla. 2010); Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (*In re Brooks*), 371 B.R. 761, 763–65, 768 (Bankr. N.D. Tex. 2007).

### 3. *The Current Status of § 523(a)(5)*

Today, § 523(a)(5) simply lists “domestic support obligation[s]” as nondischargeable.<sup>52</sup> The current Code defines a domestic support obligation in § 101(14A) as follows:

The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—(A) owed to or recoverable by—(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or (ii) a governmental unit; (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated; (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—(i) a separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and (D) not assigned to a governmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.<sup>53</sup>

Both the Code section laying out the exceptions to discharge<sup>54</sup> and the Code section outlining priorities for unsecured creditor payment<sup>55</sup> contain this definition.

Courts and scholars are still assessing the repercussions of the 2005 Amendments.<sup>56</sup> For now, although Congress attempted to clarify many

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<sup>52</sup> 11 U.S.C. § 523(a)(5).

<sup>53</sup> *Id.* § 101(14A).

<sup>54</sup> *Id.* § 523(a)(5).

<sup>55</sup> *Id.* § 507(a)(1) (“The following expenses and claims have priority in the following order: (1) First: (A) Allowed unsecured claims for *domestic support obligations* that, as of the date of filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor . . . .” (emphasis added)).

<sup>56</sup> *See generally* Austin, *supra* note 32; Steinfeld, *supra* note 32.

sections of the Code, domestic support obligations continue to lack clarity and evade judicial uniformity.<sup>57</sup>

*B. Judicial Interpretations of § 523(a)(5)'s Payee Requirement Prior to the 2005 Amendments*

Prior to the 2005 Amendments, most courts failed to evaluate fully all of the requirements necessary to declare debts nondischargeable as family support obligations under § 523(a)(5).<sup>58</sup> Most courts primarily focused on whether the debt was in the nature of support when making these determinations.<sup>59</sup> This often meant disregarding some or all of the other requirements listed in § 523(a)(5), either by ignoring the payee requirement completely or by interpreting it extremely broadly.<sup>60</sup>

Some courts, however, followed the language of § 523(a)(5) beyond the initial support determination and considered the payee requirement.<sup>61</sup> Those courts noted that the payee requirement existed and performed a more thorough analysis of the debts.<sup>62</sup> In determining nondischargeability, these courts created an exception to the plain meaning of the payee language and evaluated whether, although the debt was not owed directly to one of the listed parties, a specifically named payee would remain liable for the debt if the court discharged it.<sup>63</sup>

It is important to recognize that, prior to 2005, courts based their decisions on an earlier version of the Code. The pertinent section, § 523(a)(5), excepted from discharge debts

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<sup>57</sup> Compare Tucker v. Oliver, 423 B.R. 378, 379–82 (W.D. Okla. 2010) (holding attorney's fees due to former daughter-in-law not within payee requirement), with Coleman v. Blackwell (*In re Blackwell*), 432 B.R. 856, 861–63 (Bankr. M.D. Fla. 2010) (finding attorney's fees owed directly to ex-wife's attorney within payee requirement).

<sup>58</sup> See, e.g., Dvorak v. Carlson (*In re Dvorak*), 986 F.2d 940, 941 (5th Cir. 1993); Gianakis v. Gianakis (*In re Gianakis*), 917 F.2d 759, 762–64 (3d Cir. 1990); *In re Seibert*, 914 F.2d 102, 105–07 (7th Cir. 1990).

<sup>59</sup> See, e.g., *In re Dvorak*, 986 F.2d at 941; *In re Gianakis*, 917 F.2d at 762–64; *In re Seibert*, 914 F.2d at 105–07.

<sup>60</sup> See, e.g., *In re Dvorak*, 986 F.2d at 941 (failing to discuss payee requirement completely vis-à-vis fees of guardian *ad litem*); *In re Gianakis*, 917 F.2d at 762–64 (ignoring the payee requirement completely by disregarding mortgagee's role as the direct payee of the debtor); *In re Seibert*, 914 F.2d at 105 n.5 (“The statutory requirement that the debt be owed to a child of the debtor is to be read broadly.”).

<sup>61</sup> See Pauley v. Spong (*In re Spong*), 661 F.2d 6, 9–11 (2d Cir. 1981); see also Kasscieh v. Battisti (*In re Kasscieh*), 425 B.R. 467, 477–78 (Bankr. S.D. Ohio 2010).

<sup>62</sup> See *In re Spong*, 661 F.2d at 10–11; see also *In re Kasscieh*, 425 B.R. at 477–78.

<sup>63</sup> See, e.g., *In re Spong*, 661 F.2d at 10–11; see also *In re Kasscieh*, 425 B.R. at 477–78.

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 property settlement agreement, but not to the extent that—(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . . .<sup>64</sup>

These pre-2005 cases are important to understand because they continue to guide much of the jurisprudence in this area today, regardless of the alterations made by BAPCPA.<sup>65</sup>

### 1. Courts that Only Considered the Nature of the Debt Important in Determining § 523(a)(5) Dischargeability

Prior to the 2005 Amendments, an overwhelming number of courts refused to allow the identity of a payee—other than the debtor's child, spouse, or ex-spouse—to interfere with a finding that a debt was nondischargeable under § 523(a)(5).<sup>66</sup> They tended to consider only whether the debt was in the nature

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<sup>64</sup> 11 U.S.C. § 523(a)(5) (1982) (emphasis added) (current version at 11 U.S.C. § 523(a)(5) (2006)).

<sup>65</sup> *In re Kassicheh*, 425 B.R. at 476–78 (discussing various post-BAPCPA cases, all of which invoke pre-BAPCPA case law to analyze the issue); see also *In re Andrews*, 434 B.R. 541, 546–48 (Bankr. W.D. Ark. 2010).

<sup>66</sup> See, e.g., *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1141–42 (9th Cir. 1998) (holding fees due directly to guardian *ad litem* as nondischargeable family support obligation); *Stark v. Bishop (In re Bishop)*, No. 97-2151, 1998 U.S. App. LEXIS 12900, at \*4–9 (4th Cir. June 18, 1998) (finding fees payable directly to attorney *ad litem* nondischargeable); *Strickland v. Shannon (In re Strickland)*, 90 F.3d 444, 445–47 (11th Cir. 1996) (holding that fees payable to debtor's ex-spouse and the ex-spouse's attorney were nondischargeable family support obligations); *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995) (holding attorney fees directly payable to attorney nondischargeable); *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1488–89 (10th Cir. 1995) (fees directly payable to guardian *ad litem* and child psychologist nondischargeable); *In re Dvorak*, 986 F.2d 940, 941 (5th Cir. 1993) (holding guardian *ad litem* fees nondischargeable); *Gianakis v. Gianakis (In re Gianakis)*, 917 F.2d 759, 763–64 (3d Cir. 1990) (holding debtor's assumption of ex-spouse's second mortgage in divorce in nature of support and nondischargeable); *In re Seibert*, 914 F.2d 102, 104–07 (7th Cir. 1990) (holding court order requiring debtor to pay county agency for costs of providing medical care for birth of debtor's child nondischargeable); *Calhoun v. Long (In re Calhoun)*, 715 F.2d 1103, 1107 (6th Cir. 1983) (broadly holding that "payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable" after discussing lower court decisions on hold harmless agreements); *Blackburn-Gardner v. Edwards (In re Edwards)*, 261 B.R. 523, 524–27 (Bankr. M.D. Fla. 2001) (holding claim for attorney's fees brought by ex-spouse's attorney nondischargeable as family support obligation); *Madden v. Staggs (In re Staggs)*, 203 B.R. 712, 717–19, 721 (Bankr. W.D. Mo. 1996) (holding fees to guardian *ad litem* nondischargeable, viewing the "character of the fees" and not the ultimate responsibility for them determinative); *Spear v. Constantine (In re Constantine)*, 183 B.R. 335, 335–37 (Bankr. D. Mass. 1995) (holding guardian *ad litem* fees nondischargeable). *But see DeKalb Cnty. Div. of Fam. & Children Servs. v.*

of support and left the analysis at that, rather than confirming that the debt fulfilled the rest of the requirements in § 523(a)(5).<sup>67</sup>

*In re Kline* and *In re Staggs* characterize the approaches of the Eighth Circuit and the majority of courts on this issue.<sup>68</sup> These cases are examples of the analysis that almost every circuit consistently used in construing the § 523(a)(5) payee language, with various circuit-level decisions in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits adopting similar logic.<sup>69</sup>

In *In re Kline*, the ex-wife's attorney filed a claim against his client's ex-husband, seeking to have his fees declared nondischargeable.<sup>70</sup> The ex-wife incurred the fees during her divorce proceedings with the debtor, and the divorce court ordered the ex-husband to pay them.<sup>71</sup> On appeal, while

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Platter (*In re Platter*), 140 F.3d 676, 681 (7th Cir. 1998) (finding fees to local county agency expended on behalf of debtor's child dischargeable because agency was not listed payee in § 523(a)(5)).

<sup>67</sup> See, e.g., *In re Chang*, 163 F.3d at 1141–42; *In re Bishop*, 1998 U.S. App. LEXIS 12900, at \*4–9; *In re Strickland*, 90 F.3d at 445–47; *In re Kline*, 65 F.3d at 751; *In re Miller*, 55 F.3d at 1488–89; *In re Dvorak*, 986 F.2d at 941; *In re Gianakis*, 917 F.2d at 763–64; *In re Seibert*, 914 F.2d at 104–07; *In re Calhoun*, 715 F.2d at 1107; *In re Edwards*, 261 B.R. at 524–27; *In re Staggs*, 203 B.R. at 717–19, 721; *In re Constantine*, 183 B.R. at 335–37. But see *In re Platter*, 140 F.3d at 681.

<sup>68</sup> See, e.g., *In re Kline*, 65 F.3d at 751; *In re Staggs*, 203 B.R. at 717. Some courts have viewed *In re Kline* as falling into the more limited exception due to its discussion of the possible liability of the debtor's ex-wife to the plaintiff in *quantum meruit* if the debtor was able to discharge the debt. See *Simon, Schindler & Sandberg, LLP v. Gentilini (In re Gentilini)*, 365 B.R. 251, 254–55 (Bankr. S.D. Fla. 2007); see also *In re Kline*, 65 F.3d at 751. Other courts, however, have considered that *In re Kline* also supports focusing primarily on the nature of the debt and not on the specific payee. See, e.g., *In re Kasscieh*, 425 B.R. at 475, 477 (recognizing that statements in *In re Kline* could support either view). This Comment places *In re Kline* in the latter group—that is, the group focusing almost exclusively on the payee—for the reasons detailed below. See *infra* note 162.

<sup>69</sup> Compare *In re Kline*, 65 F.3d at 751, and *In re Staggs*, 203 B.R. at 717, with *In re Chang*, 163 F.3d at 1141–42, *In re Bishop*, 1998 U.S. App. LEXIS 12900, at \*4–9, *In re Strickland*, 90 F.3d at 445–47, *In re Miller*, 55 F.3d at 1488–89, *In re Dvorak*, 986 F.2d at 941, *In re Gianakis*, 917 F.2d at 763–64, *In re Seibert*, 914 F.2d at 104–07, *In re Calhoun*, 715 F.2d at 1107, *In re Edwards*, 261 B.R. at 524–27, and *In re Constantine*, 183 B.R. at 335–37. There does not seem to be a circuit opinion on point in the D.C. Circuit. Additionally, though there does not seem to be a circuit-level case on point in the First Circuit, this did not stop lower courts from adopting this rationale. See, e.g., *In re Constantine*, 183 B.R. at 335–37. There is also some debate as to which perspective was adopted in the Second Circuit. This Comment views *In re Spong* as supporting the limited exception to the plain meaning. See *infra* Part I.B.2. However, other parties have viewed *In re Spong* as favoring the majority tendency to fundamentally ignore the payee requirement. See *In re Chang*, 163 F.3d at 1141–42; *In re Kasscieh*, 425 B.R. at 474–75. The Second Circuit has also elsewhere upheld payment to third parties where there was no showing that the arguable beneficiary would have been liable if the debt was discharged. See *Peters v. Hennenhoefter (In re Peters)*, 133 B.R. 291, 294–96 (S.D.N.Y. 1991), *aff'd*, 964 F.2d 166 (2d Cir. 1992) (per curiam).

<sup>70</sup> *In re Kline*, 65 F.3d at 750.

<sup>71</sup> *Id.*

considering § 523(a)(5), the circuit court believed that “the statute continue[d] to except from discharge attorney fees, even if payable to an attorney rather than to a former spouse, if such fees are in the nature of maintenance or support of the former spouse or of the child of the debtor.”<sup>72</sup> The *Kline* court used policy arguments to support its assertion, noting that § 523(a)(5)’s policy “favors enforcement of familial support obligations over a “fresh start” for the debtor.”<sup>73</sup>

In *In re Staggs*, a guardian *ad litem* who had represented a child in a post-divorce custody proceeding attempted to declare the money owed to her by the child’s father (the debtor) nondischargeable under § 523(a)(5).<sup>74</sup> In considering her claim, the bankruptcy court expounded at length that the debt must be in the nature of support, stating that, when “deciding whether to characterize an award as maintenance or support[,] the crucial issue is the function the award was intended to serve.”<sup>75</sup> The debtor argued that the fees should be dischargeable because they did not meet the payee requirement, but the court rejected that argument,<sup>76</sup> quoting *In re Stacey*: “Although the monies are not paid to the child, they are paid to a third party strictly for the benefit of the child.”<sup>77</sup> The bankruptcy judge noted that “[t]he fact that the minor child would not be responsible for paying the guardian ad litem fees in the event the [c]ourt declared the fees to be dischargeable [did] not change the character of the fees.”<sup>78</sup> Ultimately, the court settled with the popular judicial notion that the debt was nondischargeable because it was in the nature of support for children, even if it did not fall within the literal language of the payee requirement.<sup>79</sup>

These rulings are examples of the typical decisions concerning § 523(a)(5) prior to the 2005 Amendments.<sup>80</sup> They epitomize the tendency of courts to simply disregard or minimize the payee language and decide primarily based on whether the debt is in the nature of support.<sup>81</sup>

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<sup>72</sup> *Id.* at 751.

<sup>73</sup> *Id.* (quoting *In re Miller*, 55 F.3d at 1489).

<sup>74</sup> *In re Staggs*, 203 B.R. at 714.

<sup>75</sup> *Id.* at 719 (quoting *Adams v. Zentz*, 963 F.2d 197, 200 (8th Cir. 1992)) (internal quotation marks omitted).

<sup>76</sup> *In re Staggs*, 203 B.R. at 721.

<sup>77</sup> *Id.* (quoting *Baillargeon v. Stacey (In re Stacey)*, 164 B.R. 210, 212 (Bankr. D.N.H. 1994)) (internal quotations marks omitted).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 717–19.

<sup>80</sup> See *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 474–76 (Bankr. S.D. Ohio 2010).

<sup>81</sup> See *id.*

## 2. Courts that Created an Exception and Considered § 523(a)(5)'s Payee Requirement

A small subset of courts considered the payee's identity in their decisions and created a limited exception to the plain meaning of § 523(a)(5)'s payee requirement.<sup>82</sup> Under these circumstances, the courts considered the identity of the payee by determining who would be liable for the debt if it were to be discharged (i.e., would responsibility for the debt then shift from the debtor to a third party?) and whether that person was one of the statute's designated payees.<sup>83</sup>

For example, in *In re Spong*, the Second Circuit considered the dischargeability of an obligation a debtor-husband owed to his ex-spouse's attorney for the fees incurred during the divorce proceedings.<sup>84</sup> In finding that the debt was a nondischargeable family support obligation, the court distinguished between the "assumption of a debt" and a third-party beneficiary contract, explaining that "appellee's undertaking to pay his wife's legal fees [w]as a paradigmatic third party beneficiary contract, which is not . . . an assignment."<sup>85</sup> It was then necessary for the court to determine whether the contract fit under § 523(a)(5); seeking guidance, the court referred to the statements of the House Judiciary Committee, which explained, "This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse . . . ."<sup>86</sup> Additionally, the court discussed the fact that "[i]f appellee fails to satisfy his obligation to [the appealing attorney], the third party beneficiary, appellee will, at the same time, fail to satisfy his obligation to his wife, the promisee."<sup>87</sup> The court reasoned that, if the debtor failed to pay his ex-wife's attorney's fees, he thus failed to satisfy an obligation to her, and that reasoning justified the finding of nondischargeability even though the attorney—the direct payee—was not an individual listed in the statute.<sup>88</sup>

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<sup>82</sup> See, e.g., *Pauley v. Spong (In re Spong)*, 661 F.2d 6, 10–11 (2d Cir. 1981).

<sup>83</sup> *In re Kassiech*, 425 B.R. at 472, 477–79.

<sup>84</sup> *In re Spong*, 661 F.2d at 7–8.

<sup>85</sup> *Id.* at 10.

<sup>86</sup> *Id.* (quoting H.R. REP. NO. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320).

<sup>87</sup> *Id.* at 10–11.

<sup>88</sup> *Id.*

This Second Circuit decision outlines the alternate approach courts took prior to 2005.<sup>89</sup> While respecting the plain meaning of § 523(a)(5)'s payee language, these courts fashioned an exception that allowed them to circumvent the limited and strict list of payees but remain true to the intent of the statute.

This discussion illustrates the two general approaches courts took when interpreting § 523(a)(5) prior to 2005. The majority basically read the payee requirement out of the statutory language. During the same period, a few select courts fashioned an exception to the plain meaning of the statute, considering the party ultimately responsible for the obligation if discharged.<sup>90</sup>

Courts have generally continued making decisions this way through the 2005 Amendments. However, the judicially created exception to the plain meaning has gained more force, and a new faction of courts has emerged and is adhering to the plain meaning of § 523(a)(5),<sup>91</sup> thus igniting a statutory interpretation debate.

## II. SECTION 523(A)(5) DECISIONS POST-BAPCPA: DO COURTS TODAY CONSIDER THE PAYEE REQUIREMENT IN DETERMINING NONDISCHARGEABILITY UNDER § 523(A)(5)?

Section 523(a)(5)'s payee requirement language has continued to confound courts through the comprehensive 2005 Amendments. In fact, courts currently approach § 523(a)(5) issues from three different angles, rather than the two paths that courts took prior to BAPCPA.<sup>92</sup> The two prior interpretations of the payee language have continued—some courts still read the payee requirement out of the statute, and others continue to focus on the exception to the plain language of § 523(a)(5).<sup>93</sup> A third approach has emerged which uses the BAPCPA alterations as support for remaining true to the plain language of the statute.<sup>94</sup>

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<sup>89</sup> See *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 477–79 (Bankr. S.D. Ohio 2010).

<sup>90</sup> Compare *Kline v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995), and *Madden v. Staggs (In re Staggs)*, 203 B.R. 712, 717–19 (Bankr. W.D. Mo. 1996), with *In re Spong*, 661 F.2d at 10–11.

<sup>91</sup> See *infra* Part II.A.

<sup>92</sup> See *supra* Part I.B.

<sup>93</sup> See *infra* Part II.B, C.

<sup>94</sup> See *infra* Part II.A.

A. *Courts Adopting a Plain Meaning Approach to § 523(a)(5)'s Payee Requirement*

Several courts have begun to oppose the pre-BAPCPA majority approach and have applied the plain meaning of the amended § 523(a)(5) and, consequently, the new § 101(14A) definition of domestic support obligations.<sup>95</sup> These courts interpret the 2005 Amendments, along with the policy and congressional purpose behind the domestic support obligation exception, as an indication that Congress intended greater judicial focus on the payee's identity.<sup>96</sup> Such decisions are rare, but they are becoming more prevalent.

*Tucker v. Oliver* demonstrates an Oklahoma district court's application of the plain meaning of § 523(a)(5).<sup>97</sup> In *Tucker*, the debtor's former daughter-in-law filed an action to have the debt owed her by her former husband's parents declared nondischargeable after the former husband's parents had unsuccessfully sued their former daughter-in-law for custody of their granddaughter.<sup>98</sup> In the prior custody action, the court ordered the grandparents to pay their former daughter-in-law's attorney's fees.<sup>99</sup> Considering the dischargeability of those attorney fees, the district court found that the debt in question did not satisfy the payee requirements of § 523(a)(5) and § 101(14A) and was, thus, dischargeable.<sup>100</sup> In determining that precedent did not apply due to the 2005 Amendments, the court stated:

[T]he statutory language spelling out the pertinent exception to discharge has been modified since *Miller*. . . . In 2005, Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which amended § 523(a)(5) . . . . The new definition is substantially similar in many respects, but it does identify certain specific and additional groups of persons to which it applies. This suggests a conscious decision on Congress'[s] part to focus on which debtors were, or were not, within the scope of the nondischargeability provision.<sup>101</sup>

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<sup>95</sup> See, e.g., *Tucker v. Oliver*, 423 B.R. 378, 379–81 (W.D. Okla. 2010); *Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (In re Brooks)*, 371 B.R. 761, 763–65, 768 (Bankr. N.D. Tex. 2007).

<sup>96</sup> See, e.g., *Tucker*, 423 B.R. at 379–81; *In re Brooks*, 371 B.R. at 763–65, 768.

<sup>97</sup> See *Tucker*, 423 B.R. at 378.

<sup>98</sup> *Id.* at 379.

<sup>99</sup> *Id.* at 382.

<sup>100</sup> *Id.* at 380–81.

<sup>101</sup> *Id.* at 381 (internal citations omitted) (discussing *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir. 1995)).

In essence, the court decided that the 2005 Amendments, by placing the requirement as to whom the debt is owed into a subsection separate from the nature of the obligation, had so substantially altered § 523(a)(5) that previous circuit-level case law was no longer binding.<sup>102</sup> The court held that the debt was therefore dischargeable for two reasons: one, the debt was not owed to any of the listed payees; and two, it was not in the nature of support.<sup>103</sup> The fact that the case was decided on both of those grounds, and not the payee requirement, does not change the importance of the court's analysis regarding the payee requirement.

A bankruptcy court in the Fifth Circuit recently followed the “plain meaning rule” in deciding a case about domestic support obligations.<sup>104</sup> *In re Brooks* concerned a law firm that filed a complaint against its client's debtor-ex-husband to declare his obligation to pay his ex-wife's attorney's fees nondischargeable.<sup>105</sup> The bankruptcy court reasoned that

[e]ven assuming the Final Judgment is a debt “in the nature of alimony, maintenance, or support,” the Firm is not Debtor's spouse, Debtor's former spouse, or Debtor's child; nor Debtor's child's parent, legal guardian, or responsible relative; nor a governmental unit. As none of these, the Firm does not fall within the ambit of [§] 101(14A) and is not an entity to whom a “domestic support obligation” may be owed under [§] 523(a)(5).<sup>106</sup>

The court held that, “applying the plain meaning rule, the [f]irm is not an entity to which may be owed a nondischargeable divorce-related debt.”<sup>107</sup> Discussing the policy behind its decision, the court emphasized that Congress had not intended to allow the debtor's family or former family to serve as a mechanism through which other individuals or entities could seek to be paid.<sup>108</sup> Instead, Congress intended § 523(a)(5) to benefit only the family members themselves.<sup>109</sup> The court emphasized that although Congress had the power to add attorneys to the list of payees while amending the section, it had not done

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 381–82.

<sup>104</sup> *See* Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (*In re Brooks*), 371 B.R. 761, 763–65 (Bankr. N.D. Tex. 2007).

<sup>105</sup> *Id.* at 762–63.

<sup>106</sup> *Id.* at 764 (footnote omitted).

<sup>107</sup> *Id.* at 764–65.

<sup>108</sup> *Id.* at 765.

<sup>109</sup> *Id.*

so.<sup>110</sup> Like the *Tucker* court, the *Brooks* court reasoned that Congress's 2005 reformatting of the statutory language was "not to broaden the category of entities that may assert that debts owed to them are non-dischargeable."<sup>111</sup> Even in the face of prior cases to the contrary,<sup>112</sup> the *Brooks* court unequivocally interpreted § 523(a)(5) plainly and limited the characterization of debts as nondischargeable domestic support obligations to those strictly within the payee requirement.<sup>113</sup>

*B. Courts Continuing To Consider Only the Nature of the Debt in Determining § 523(a)(5) Dischargeability*

Since the 2005 Amendments, a majority of courts continue to rule on domestic support obligation exceptions to discharge without any serious consideration of the payee requirement contained in § 523(a)(5) by reference to § 101(14A).<sup>114</sup> Following pre-2005 precedent, these courts are of the opinion that the changes made to the Code in 2005 were not substantial enough to alter prior interpretations of § 523(a)(5) and support obligations.<sup>115</sup>

*Prensky v. Clair Greifer LLP* is an example of the Third Circuit's approach to domestic support obligations.<sup>116</sup> In this case, the district court found that the debtor's obligation to his ex-wife's attorneys for fees from the divorce proceeding could fairly be classified as a domestic support obligation.<sup>117</sup> The district court considered the debt's dischargeability under both § 523(a)(5) and § 523(a)(15) because the debtor had filed under chapter 7, where both types of obligations would be nondischargeable.<sup>118</sup> Although the bankruptcy court

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<sup>110</sup> *Id.* at 768.

<sup>111</sup> *Id.* at 765.

<sup>112</sup> See *Dvorak v. Carlson (In re Dvorak)*, 986 F.2d 940, 941 (5th Cir. 1993), cited in *In re Brooks*, 371 B.R. at 768; *Hill v. Snider (In re Snider)*, 62 B.R. 382, 385 (Bankr. S.D. Tex. 1986), cited in *In re Brooks*, 371 B.R. at 768.

<sup>113</sup> *In re Brooks*, 371 B.R. at 763–67.

<sup>114</sup> See *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 476–77 (Bankr. S.D. Ohio 2010); see also *Kennedy v. Kennedy (In re Kennedy)*, BAP No. AZ-09-1035-JuPaDu, 2010 Bankr. LEXIS 3169, at \*18–19 (B.A.P. 9th Cir. Mar. 9, 2010); *Prensky v. Clair Greifer LLP*, No. 09-6200 (FLW), 2010 U.S. Dist. LEXIS 66181, at \*25–27 (D.N.J. June 30, 2010); *Levin v. Greco*, 415 B.R. 663, 666–67 (N.D. Ill. 2009); *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 862 (Bankr. M.D. Fla. 2010); *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*3–4 (Bankr. E.D. Tenn. Sept. 10, 2008).

<sup>115</sup> See *In re Kassicieh*, 425 B.R. at 476–77; see also *In re Kennedy*, 2010 Bankr. LEXIS 3169, at \*18–19; *Prensky*, 2010 U.S. Dist. LEXIS 66181, at \*25–27; *Levin*, 415 B.R. at 666–67; *In re Blackwell*, 432 B.R. at 862; *In re Rose*, 2008 WL 4205364, at \*3–4.

<sup>116</sup> *Prensky*, 2010 U.S. Dist. LEXIS 66181.

<sup>117</sup> *Id.* at \*24–27.

<sup>118</sup> *Id.* at \*10–12, 22–27.

below had found the debt nondischargeable pursuant solely to § 523(a)(15), on appeal, the district court explained that the attorney's fees could also be nondischargeable under § 523(a)(5).<sup>119</sup> The district court emphasized the language contained in § 101(14A), specifically "that the debt be in the nature of . . . support . . . of such spouse, former spouse, or child of the debtor or such child's parent, *without regard to whether such debt is expressly so designated.*"<sup>120</sup> This emphasis indicates that the Third Circuit's focus on the designation of the debt as support and the lack of focus on the payee requirement<sup>121</sup> has survived the 2005 Amendments. Indeed, the only place where the court possibly acknowledged the payee requirement was when it noted that "dischargeability must be determined by the substance of the liability rather than its form"<sup>122</sup>—a phrase courts typically employ to bypass the requirement that the nondischargeable debt be paid directly to a statutorily defined payee.<sup>123</sup>

Following Sixth Circuit precedent, the Bankruptcy Court for the Eastern District of Tennessee held that a debt owed to a guardian *ad litem* was a domestic support obligation in *In re Rose*.<sup>124</sup> This case dealt with the priority provision in § 507, which encompasses the § 101(14A) domestic support obligation definition<sup>125</sup> and therefore requires that the court analyze the same underlying issues as when interpreting § 523(a)(5).<sup>126</sup> The court declared the debts nondischargeable child support obligations but failed to consider the payee's identity and focused solely on the nature of the debt.<sup>127</sup> In deciding this

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<sup>119</sup> *Id.* at \*22–27.

<sup>120</sup> *Id.* at \*25 (quoting 11 U.S.C. § 101(14A)(B) (2006)) (internal quotation marks omitted).

<sup>121</sup> See *Gianakis v. Gianakis (In re Gianakis)*, 917 F.2d 759, 762–64 (3d Cir. 1990) (finding an assumption of a second mortgage to be in the "nature of alimony, maintenance, and support").

<sup>122</sup> *Prensky*, 2010 U.S. Dist. LEXIS 66181, at \*25 (quoting *Gilman v. Golio (In re Golio)*, 393 B.R. 56, 63 (Bankr. E.D.N.Y. 2008)) (internal quotation marks omitted).

<sup>123</sup> See, e.g., *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1141–42 (9th Cir. 1998); *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir. 1995).

<sup>124</sup> *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*9 (Bankr. E.D. Tenn. Sept. 10, 2008).

<sup>125</sup> 11 U.S.C. § 507(a)(1)(A) (making "[a]llowed unsecured claims for domestic support obligations" first in priority).

<sup>126</sup> *In re Rose*, 2008 WL 4205364, at \*3–4.

<sup>127</sup> *Id.* at \*9 (holding the guardian *ad litem*'s actions on behalf of the minor child were for support and maintenance of the child during proceedings in juvenile court and therefore constituted a domestic support obligation).

way, the court acknowledged the changes made by BAPCPA, but it nevertheless found case law construing the former § 523(a)(5) persuasive.<sup>128</sup>

In the Seventh Circuit, the District Court for the Northern District of Illinois overturned a bankruptcy court decision applying the plain meaning and held that an obligation for child representative fees was a nondischargeable domestic support obligation in *Levin v. Greco*.<sup>129</sup> Levin had been a child representative—a more active version of a guardian *ad litem* in Illinois—for Greco’s children during his divorce proceedings.<sup>130</sup> The district court considered the issue of fees owed to a child representative as one of first impression in the Seventh Circuit, although it observed that pre-BAPCPA precedent “endorsed the notion that [§] 523(a)(5) can except debts owed to third parties.”<sup>131</sup> The court took note that, as of that point, six circuits had interpreted the domestic support exception as encompassing debts owed to third parties if the debt was in the nature of support.<sup>132</sup> The court explained that within these circuit decisions there were two interpretations: the limited exception to the plain meaning rule (as seen in the pre-2005 case law) and the majority trend of evaluating only whether the debt is in the nature of support while ignoring the payee requirement.<sup>133</sup> The *Levin* court decided to follow both the Tenth Circuit decision in *In re Miller*, which advocated the “substance over form” approach that ignored the payee requirement,<sup>134</sup> and the Second Circuit decision in *In re Spong*, which the *Levin* court considered the origin of this body of case law.<sup>135</sup> However, the opinion made little mention of the potential liability of the ex-spouse for the debt and relied primarily on *In re Miller*, discussing *In re Spong* only incidentally.<sup>136</sup> This suggests that in this case, the district court followed the majority (rather than the limited exception

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<sup>128</sup> *Id.* at \*3 (“[C]ase law construing the former [§] 523(a)(5) is relevant and persuasive.” (second alteration in original) (quoting Wis. Dep’t of Workforce Dev. v. Ratliff, 390 B.R. 607, 612 (E.D. Wis. 2008)) (internal quotation marks omitted)).

<sup>129</sup> *Levin v. Greco*, 415 B.R. 663, 667 (N.D. Ill. 2009).

<sup>130</sup> *Id.* at 664–65.

<sup>131</sup> *Id.* at 666 (citing *In re Rios*, 901 F.2d 71, 72 (7th Cir. 1990) (holding attorney’s fees excepted from discharge under § 523(a)(5) even though attorneys not listed as payees)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 667 (“Some courts have assumed that if the debt is not paid by the debtor, the creditor could collect from the spouse, and thus a payment to the creditor is indirectly a payment to the spouse. Other decisions have stated that ‘the emphasis [should be] placed on the determination of whether a debt is in the nature of support, rather than on the identity of the payee.’” (alteration in original) (citations omitted) (quoting *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir. 1995))).

<sup>134</sup> *In re Miller*, 55 F.3d at 1490 (10th Cir. 1995), cited in *Levin*, 415 B.R. at 667.

<sup>135</sup> *Levin*, 415 B.R. at 667 (citing *Pauley v. Spong (In re Spong)*, 661 F.2d 6 (2d Cir. 1981)).

<sup>136</sup> *Id.* (citing *In re Miller*, 55 F.3d at 1490).

approach) and agreed that the nature of support is the only necessary requirement under § 523(a)(5).<sup>137</sup>

The Bankruptcy Appellate Panel for the Ninth Circuit adds to the considerable list of courts following the idea that, even post-BAPCPA, support is the only element of the statute that matters in determining dischargeability.<sup>138</sup> In *In re Kennedy*, it ruled that debts for child support and attorney's fees incurred in connection with divorce proceedings were nondischargeable as domestic support obligations.<sup>139</sup> After listing the four separate requirements for domestic support obligations under § 101(14A), the court held that "the record sufficiently shows that those debts met the requirements for nondischargeability under § 523(a)(5) without further inquiry."<sup>140</sup> The panel did not discuss whether the attorney's fees met the payee requirement of the statute.<sup>141</sup> The panel simply determined that both the attorney's fees and child support debts were support and, thus, nondischargeable.<sup>142</sup>

*In re Blackwell* involved a debt for attorney's fees awarded by the state to the debtor's wife, in connection with actions taken by the wife to compel her ex-husband to pay his divorce-related, court-ordered fees.<sup>143</sup> The court noted that although the Code defines domestic support obligations, it does not address issues arising specifically from attorney's fees.<sup>144</sup> The court asserted that it did not matter to whom the debt was owed, stating that "there is no change in the legal character of the award just because, under the statute, the award is now made directly to the former wife's attorney and not to the former wife."<sup>145</sup> The court invoked the long-standing idea that dischargeability is dependent on whether the debt is in the nature of support or alimony.<sup>146</sup> It went on to find that "the fact the award is made to an attorney is no longer relevant[,] and it is now well established that there is no impediment to assert a claim of nondischargeability just because the attorney fee award was made

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<sup>137</sup> See *id.* at 666–67.

<sup>138</sup> *Kennedy v. Kennedy (In re Kennedy)*, BAP No. AZ-09-1035-JuPaDu, 2010 Bankr. LEXIS 3169, at \*18–19 (B.A.P. 9th Cir. Mar. 19, 2010).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See *id.*

<sup>142</sup> *Id.* at \*19.

<sup>143</sup> *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 859–60 (Bankr. M.D. Fla. 2010).

<sup>144</sup> *Id.* at 862.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

directly to the attorney and not to the former spouse.”<sup>147</sup> In essence, the debt would be nondischargeable regardless of whether the payee was the former spouse or the attorneys representing her. In support of this conclusion, the court cited *In re Strickland*, a 1996 Eleventh Circuit case in which the court did not discuss the payee requirement.<sup>148</sup>

These cases all provide examples of courts that have continued to decide § 523(a)(5) cases based on the nature of the debt alone. Although their methods of analysis differ slightly, they all remain true to the same mantra: all that matters is that the nature of the debt is support.

### *C. Courts Continuing to Consider § 523(a)(5)'s Payee Requirement Under the Exception to the Plain Meaning Rule*

The judicial exception to § 523(a)(5) prior to 2005 continues to influence decisions.<sup>149</sup> These courts adhere to the plain meaning of the payee requirement, but they carve out an exception for debts that are support obligations initially owed to a party other than any of the listed payees that would ultimately remain a statutory payee's responsibility if discharged by the court.<sup>150</sup>

In *In re Johnson*, the court embraced the limited exception that looks to whether the debtor's spouse or child is potentially liable if the court were to discharge the debt.<sup>151</sup> Mr. Johnson claimed responsibility for a joint, or “hold harmless,”<sup>152</sup> debt to Wachovia Bank in his divorce proceedings with his ex-wife.<sup>153</sup> When he declared bankruptcy, his ex-wife attempted to categorize this Wachovia debt as a nondischargeable domestic support obligation.<sup>154</sup> Finding

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<sup>147</sup> *Id.* (citing *Brown v. Brown (In re Brown)*, 177 B.R. 116, 117 (Bankr. M.D. Fla. 1994); *Aughenbaugh v. Aughenbaugh (In re Aughenbaugh)*, 119 B.R. 861, 863–64 (Bankr. M.D. Fla. 1990)).

<sup>148</sup> *Id.* at 862–63 (citing *Strickland v. Shannon (In re Strickland)*, 90 F.3d 444, 446–47 (11th Cir. 1996)).

<sup>149</sup> See *In re Andrews*, 434 B.R. 541, 546–48 (Bankr. W.D. Ark. 2010); *In re Johnson*, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008).

<sup>150</sup> See, e.g., *In re Andrews*, 434 B.R. at 546–48; *In re Johnson*, 397 B.R. at 296.

<sup>151</sup> See *In re Johnson*, 397 B.R. at 295–96.

<sup>152</sup> “Hold harmless” agreements—otherwise known as indemnity clauses—are essentially agreements in which one party promises to remain responsible for a debt owed to a third party and vows to hold the counterparty harmless for that debt. See BLACK'S LAW DICTIONARY 837–38 (9th ed. 2009). For example, a spouse could agree to pay her ex-spouse's mortgage payments and would assume responsibility for those payments.

<sup>153</sup> *In re Johnson*, 397 B.R. at 293.

<sup>154</sup> *Id.* at 294.

Mr. Johnson responsible for a nondischargeable domestic support obligation, the court reasoned that

[t]he debt would be recoverable from [the ex-wife] or Mr. Johnson if Mr. Johnson did not pay. Due to the language in the Separation Agreement by which Mr. Johnson agreed to hold her harmless, if [the ex-wife] were forced to pay the Wachovia [d]ebt, then Mr. Johnson would be liable to [the ex-wife]. Thus, the Wachovia [d]ebt is owed to or recoverable by [the ex-wife].<sup>155</sup>

Because the debtor's ex-wife would be liable for the debt if it were discharged, the court considered this debt to fall within the limited exception to the payee requirement.<sup>156</sup>

In the Eighth Circuit, the Bankruptcy Court for the Western District of Arkansas decided *In re Andrews* using the limited exception.<sup>157</sup> In that case, the debtor was burdened with his ex-wife's attorney's fees following their divorce.<sup>158</sup> The attorney of the debtor's ex-wife sought to declare the debt a priority claim under § 507.<sup>159</sup> The case revolved around interpreting the same definition of "domestic support obligation" as the one in § 523(a)(5) and necessitated the same support-and-payee analysis.<sup>160</sup> Embracing the pre-2005 Amendment case law regarding the payee requirement,<sup>161</sup> the court explained that those amendments did not alter the statute enough to depart from precedent, even as the court categorized the holding of *In re Kline*, the Eighth Circuit precedent, a bit differently.<sup>162</sup> Finding that the debt was nondischargeable although owed to the attorney and her law firm, the court explained,

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<sup>155</sup> *Id.* at 296.

<sup>156</sup> *See id.*

<sup>157</sup> *See In re Andrews*, 434 B.R. 541, 546–48 (Bankr. W.D. Ark. 2010).

<sup>158</sup> *Id.* at 544.

<sup>159</sup> *Id.* at 543.

<sup>160</sup> *See id.* at 545 (citing 11 U.S.C. § 507(a)(1)(A) (2006) (assigning first priority to "[a]llowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition . . . are owed to or recoverable by a spouse, former spouse, or child of the debtor")).

<sup>161</sup> *Id.* at 546–47.

<sup>162</sup> *In re Andrews*, 434 B.R. at 547–48 (discussing *Holliday v. Kline (In re Kline)*, 65 F.3d 749, 750–51 (8th Cir. 1995)). The *Kline* court mentioned briefly that the debtor's spouse might be liable for the obligation if the court decided to discharge it, but the *Andrews* court placed much more emphasis on the fact that the debtor's ex-wife would be responsible for the attorney's fees, were they to be discharged. *Compare In re Kline*, 65 F.3d at 751, with *In re Andrews*, 434 B.R. at 547–50. For this reason, *Kline* is listed with the pre-BAPCPA cases as one that follows the majority rule, and *Andrews* is grouped with post-BAPCPA cases decided pursuant to the limited exception.

In *Gentilini* [a post-BAPCPA decision analyzing *In re Kline*], the court reasoned that the *Kline* court equated the attorney's right to payment from the debtor with the former spouse's right to payment from the debtor, provided that if the debtor were allowed to discharge the debt, the former spouse would be liable for the debt to the third party. . . . The [*Gentilini*] court concluded that the statute's requirement that the obligation be owed to a named entity can be satisfied, as in *Kline*, "when the obligation is payable directly to a third party, typically a professional who provided services to benefit the wife or child, but only if the former spouse is also obligated for the fees."<sup>163</sup>

Here, the court interpreted the divorce decrees and other court documents to make the ex-spouse liable for payment of the attorney's fees if the bankruptcy court did not hold the debtor liable for them.<sup>164</sup> This decision is therefore representative of the rationale embraced by those courts carving out a limited exception to the plain meaning rule for debts that become the responsibility of the ex-spouse or child if the debtor is able to discharge them.<sup>165</sup>

### III. A SOLUTION TO COURTS' DISUNITY IN APPLYING § 523(A)(5)'S PAYEE REQUIREMENT

#### A. *Section 523(a)(5)'s Legislative History, Policy Background, and 2005 Alterations Support Courts Following the Exception to the Plain Meaning Rule*

The Comment turns now to the changes made by BAPCPA to family support obligations and the legislative history behind § 523(a)(5). This legislative history began with the Bankruptcy Reform Act of 1978, which codified in § 523(a)(5) the exception to discharge for support obligations, and continues through the 2005 Amendments and their rearrangement of the statutory language.<sup>166</sup> The Comment then considers the policies underlying congressional support for, and protection of, domestic support obligations.

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<sup>163</sup> *In re Andrews*, 434 B.R. at 547–48 (discussing *Simon, Schindler & Sandberg, LLP v. Gentilini (In re Gentilini)*, 365 B.R. 251, 255–56 (Bankr. S.D. Fla. 2007)).

<sup>164</sup> *See id.* at 546–48.

<sup>165</sup> *Id.*

<sup>166</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 211, 215, 119 Stat. 23, 50–51, 54 (codified at 11 U.S.C. §§ 101(14A), 523(a)(5) (2006)); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(5)).

1. *Interpreting BAPCPA's Changes to the Language and Structure of § 523(a)(5)*

In 2005, Congress significantly altered the language and configuration of § 523(a)(5).<sup>167</sup> Originally, the 1978 codification of § 523(a)(5) excepted a debt owed:

(5) 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 property settlement agreement, but not to the extent that—(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . . .<sup>168</sup>

In 1981 and 1984, Congress amended this subsection to make it more favorable to government entities.<sup>169</sup> The first change added the phrase “other than debts assigned pursuant to section 402(a)(26) of the Social Security Act” to the end of § 523(a)(5)(A).<sup>170</sup> This addition made certain obligations nondischargeable if specifically assigned and created the first assignment exception in this Code section.<sup>171</sup> Then, Congress added another provision that allowed exception for a much broader category of government entities.<sup>172</sup> The new provision altered § 523(a)(5) by:

(1) amending the first paragraph thereof by inserting the words “or other order of a court of record” after the words “divorce decree,”; and (2) inserting “, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State” after “Social Security Act.”<sup>173</sup>

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<sup>167</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act §§ 211, 215.

<sup>168</sup> Bankruptcy Reform Act § 101.

<sup>169</sup> See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(b), 98 Stat. 333, 376 (codified as amended at 11 U.S.C. § 523(a)(5)); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2334(b), 95 Stat. 357, 863 (codified as amended at 11 U.S.C. § 523(a)(5)).

<sup>170</sup> Omnibus Budget Reconciliation Act § 2334(b).

<sup>171</sup> *Id.*

<sup>172</sup> See Bankruptcy Amendments and Federal Judgeship Act § 454(b).

<sup>173</sup> *Id.*

These are just two examples of the numerous times Congress altered and expanded the requirements and categories of nondischargeable debts under the family support obligation section.<sup>174</sup>

In 2005, Congress made additional alterations.<sup>175</sup> It shifted the § 523(a)(5) language to § 101(14A), moving the definition of domestic support obligation.<sup>176</sup> Section 523(a)(5) was rewritten to except domestic support obligations from discharge.<sup>177</sup> When Congress moved the § 523(a)(5) language to § 101(14A), it also altered its format and changed the structure of the payee requirement.<sup>178</sup>

There are several major differences between the new § 101(14A) definition and the pre-2005 § 523(a)(5) language that inspired it.<sup>179</sup> The new definition is broader than it was previously.<sup>180</sup> Instead of excepting only obligations arising out of a separation agreement, divorce decree, other court order, state law determination, or property settlement established prior to the beginning of the bankruptcy case, § 101(14A) excepts obligations that are established after the order for relief as well.<sup>181</sup> This change expands the time during which these debts can be established—debts that are established both before and after the date of the order of relief can be declared nondischargeable—and, therefore, increases the category of debts excepted from discharge.<sup>182</sup> Additionally, Congress broadened § 101(14A) to include in the payee section debts owed to governmental units and to the legal guardian or the responsible relative of the debtor's child, while a strict reading of pre-2005 § 523(a)(5) might not have included these groups.<sup>183</sup>

Most importantly, Congress altered the structure of the exception from a paragraph with two obvious requirements to a list of four elements that outline

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<sup>174</sup> See also Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 211, 215, 119 Stat. 23, 50–51, 54 (codified at 11 U.S.C. §§ 101(14A), 523(a)(5)); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(5)).

<sup>175</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act §§ 211, 215.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 215.

<sup>178</sup> *Id.* §§ 211, 215.

<sup>179</sup> See 2 COLLIER, *supra* note 19, ¶ 101.14A; 4 *id.* ¶ 523.11[3].

<sup>180</sup> 4 *id.* ¶ 523.11[3].

<sup>181</sup> *Id.* ¶ 523.11 (quoting 11 U.S.C. § 101(14A) (2006)).

<sup>182</sup> *See id.*

<sup>183</sup> Bankruptcy Abuse Prevention and Consumer Protection Act §§ 211, 215; 2 COLLIER, *supra* note 19, ¶ 101.14A.

the separate prerequisites for making the debt nondischargeable.<sup>184</sup> Those four prerequisites are that the debt: be paid to a listed payee; be in the nature of support, maintenance, or alimony; be established in a separation or divorce agreement, court order, or the determination under nonbankruptcy law of a governmental unit; and cannot be assigned to nongovernmental entities except under limited circumstances.<sup>185</sup> This remodeled structure outlines the domestic support obligation requirements more distinctly,<sup>186</sup> while the addition of certain language allows courts to declare additional categories of debts nondischargeable.<sup>187</sup>

While the legislative reports from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 acknowledged the alterations to § 523(a)(5) and the new § 101(14A), the House Report accompanying BAPCPA did not address or explain the significance of Congress's rearrangement of the elements.<sup>188</sup> Courts have interpreted the 2005 Amendments as evidence that the payee requirement is not only a distinct condition, but also a condition weighed equally with the statutory requirement that the debt be in the nature of support.<sup>189</sup> Stated another way, Congress's conscious restructuring and amendment of the section may indicate its disagreement with the courts' prior interpretations of § 523(a)(5).

On the other hand, Congress's failure to amend the essential language of the payee requirement, and the lack of legislative statements surrounding the 2005 Amendments to the domestic support obligation exception, could imply that Congress either ratified the actions of courts prior to the 2005 Amendments<sup>190</sup> or had no knowledge of these judicial decisions.

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<sup>184</sup> See 11 U.S.C. § 101(14A).

<sup>185</sup> *Id.*; see also *Tucker v. Oliver*, 423 B.R. 378, 381 (W.D. Okla. 2010) (noting that the format of the new § 101(14A) is different and “sets out in a separate labeled subsections the requirements as to who[m] the debt is owed”).

<sup>186</sup> See *Tucker*, 423 B.R. at 381.

<sup>187</sup> See 2 COLLIER, *supra* note 19, ¶ 101.14A; 4 *id.* ¶ 523.11[3].

<sup>188</sup> See H.R. REP. NO. 109-31, pt. 1, at 16–17, 42–43, 59, 61 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 102–03, 114, 129, 131.

<sup>189</sup> See *Tucker*, 423 B.R. at 381.

<sup>190</sup> See Matthew Baker, Comment, *The Sound of Congressional Silence: Judicial Distortion of the Legislative–Executive Balance of Power*, 2009 BYU L. REV. 225, 231 (“Broadly speaking, the judicial doctrine of congressional acquiescence states that Congress can impliedly authorize presidential actions or judicial interpretations by failing over time to signal disagreement or opposition.”).

Congress amended § 523 twelve times between 1978 and 2005.<sup>191</sup> Congress had ample opportunity to specify additional parties to which a domestic support obligation could be assigned or paid. However, Congress limited the expansion of the payee requirement to certain family members, the responsible caregivers for the debtor's children, and governmental entities.<sup>192</sup> Significantly, Congress did not alter the list of payees or assignees to include law firms, attorneys, guardians *ad litem*, or any number of third parties who frequently try to claim nondischargeability under § 523(a)(5).<sup>193</sup> Thus, Congress's failure to add language allowing these third-party payees to declare debts owed to them nondischargeable is likely deliberate. The fact that Congress has kept language in § 523(a)(5) fairly consistent through the numerous amendments to the Code indicates that Congress did not find error in courts' interpretation through the years.<sup>194</sup> Because the courts continue to interpret the § 523(a)(5) language in a variety of ways, however, it is difficult to tell which interpretations congressional inaction implicitly approved.<sup>195</sup> Without any clear indication from Congress either way, trying to discern what its actions truly mean is a perilous task.

## 2. Section 523(a)(5)'s Legislative History

The House and Senate Reports accompanying the Bankruptcy Reform Act of 1978 support the idea that Congress intended § 523(a)(5) only to apply to debts owed directly to a spouse, former spouse, or child, subject to one exception.<sup>196</sup> The Senate Report explained that the exception did not apply to debts assigned to another entity.<sup>197</sup> However, the Senate Report noted that if the debtor assumed a spouse or ex-spouse's debt to a third party, that debt was

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<sup>191</sup> See 11 U.S.C. § 523 (2006) amendments.

<sup>192</sup> See 11 U.S.C. § 101(14A)(A) (2006) (listing parties explicitly covered by the payee requirement).

<sup>193</sup> Compare *id.*, with 11 U.S.C. § 523(a)(5) (1982) (current version at 11 U.S.C. § 523(a)(5) (2006)).

<sup>194</sup> See Baker, *supra* note 190, at 231.

<sup>195</sup> Compare *Madden v. Staggs (In re Staggs)*, 203 B.R. 712, 717–19 (Bankr. W.D. Mo. 1996) (disregarding the payee requirement while finding a debt to be a nondischargeable domestic support obligation), with *Pauley v. Spong (In re Spong)*, 661 F.2d 6, 10–11 (2d Cir. 1981) (carving out a very narrow exception and looking to the individual with ultimate responsibility for the debt in determining nondischargeability).

<sup>196</sup> See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2594, 2591 (codified as amended at 11 U.S.C. § 523(a)(5) (2006)); S. REP. NO. 95-989, at 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320.

<sup>197</sup> S. REP. NO. 95-989, at 79.

also nondischargeable as long as it was also categorized as being in the nature of alimony, maintenance, or support.<sup>198</sup>

The House Report also explained that the language “will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent,”<sup>199</sup> yet the report similarly noted that “[t]his provision . . . make[s] nondischargeable any debts resulting from an agreement by the debtor to hold the debtor’s spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse.”<sup>200</sup>

Thus, Congress consistently has asserted that when the debt is payable *only* to a spouse, former spouse, or child, it is excepted from discharge. However, both the House and Senate Reports indicate that hold harmless obligations—those assumed by the debtor and owed to a third party—are also eligible for nondischargeability.<sup>201</sup> Thus, the judicially created exception to the plain meaning rule would best accomplish the ends that Congress envisioned in 1978, even though some of the language within the legislative history might foreclose the possibility that courts could consider anything but the plain meaning of the payee requirement.

In *In re Brooks*, the court inferred from the 1994 Congressional Record that Congress did not intend § 523(a) to provide aid for law firms when it noted: “The [§ 523(a)(15)] exception [to discharge] applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and *can be asserted only by the other party to the divorce or separation . . .*”<sup>202</sup> Although this statement applies to § 523(a)(15), the pertinent language—“to a spouse, former spouse, or child of the debtor”—is the same as that originally in § 523(a)(5) and can illuminate the congressional intent behind § 523(a)(5).<sup>203</sup> This would suggest that the payee language applies literally to only those individuals as they are the only parties who may assert these discharge exceptions. However, the possibility exists that a spouse, former spouse, or

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<sup>198</sup> *Id.*

<sup>199</sup> H.R. REP. NO. 95-595, at 364.

<sup>200</sup> *Id.*

<sup>201</sup> S. REP. NO. 95-989, at 79; H.R. REP. NO. 95-595, at 364; *see also* 124 CONG. REC. 32,399 (1978) (statement of Rep. Edwards).

<sup>202</sup> Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (*In re Brooks*), 371 B.R. 761, 766 (Bankr. N.D. Tex. 2007) (alterations in original) (quoting 140 CONG. REC. H10,770 (daily ed. Oct. 4, 1994) (statement by Rep. Brooks)).

<sup>203</sup> *Compare id.*, with 11 U.S.C. § 523(a)(5) (1982) (current version at 11 U.S.C. § 523(a)(5) (2006)).

child could attempt to declare nondischargeable a hold harmless agreement under which the debtor had agreed to assume responsibility for the obligation. Because such an attempt would still be an adversary action by a listed payee, these types of debts potentially fit within the confines of the statutory language, and the judicially created exception accomplishes what Congress intended.

The 2005 House Judiciary Committee Report provided a comprehensive discussion of the 2005 Amendments,<sup>204</sup> but the Committee neglected to comment extensively on the specific changes to §§ 523(a)(5) and 101(14A).<sup>205</sup> The Report acknowledged that § 101(14A) greatly expanded and made uniform the spectrum of domestic support obligations and briefly discussed the changes intended to enforce families' rights and protections.<sup>206</sup> The Committee discussed the enhancement of states' rights and priorities regarding domestic support obligations and emphasized that the state would be able to collect those obligations more easily.<sup>207</sup> However, the Report neither admonishes the courts nor addresses the trend of court decisions largely ignoring the statute's payee requirement.<sup>208</sup> Perhaps Congress did not wish to contradict the majority of case law, and perhaps lack of attention to the jurisprudence supports that contention.<sup>209</sup> It remains, though, that the legislative history accompanying the 2005 Amendments lends no insight to how courts should interpret the domestic support obligation payee requirement.

### 3. *The Policy Motivations that Separate § 523(a)(5) from the Rest of the Bankruptcy Code*

Generally, a consistent set of fundamental policies guides the Code. Most importantly, Congress designed the Code to give honest and unfortunate debtors a fresh start.<sup>210</sup> Therefore, courts understand that “[e]xceptions to

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<sup>204</sup> Generally, Congress designed the 2005 Amendments to combat bankruptcy fraud, and make it harder for debtors to file, while attempting to protect the creditors' interests. See H.R. REP. NO. 109-31, pt. 1, at 15 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 101-02. Notably, the House Committee Report does not provide any interpretation of the domestic support obligation language or discuss any cases that address the payee requirement. See *id.* at 16-17, 42-43, 52-53, 59-62, 84, 95 (listing all instances where the “domestic support obligation” is discussed).

<sup>205</sup> See *id.* at 16-17.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 17, 42-43.

<sup>208</sup> See *id.* at 16-17, 42-43, 59-62.

<sup>209</sup> See *supra* text accompanying note 190.

<sup>210</sup> Levin v. Greco, 415 B.R. 663, 665 (N.D. Ill. 2009) (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007)).

discharge are generally construed strictly against a creditor and liberally in favor of the debtor.”<sup>211</sup>

Courts have interpreted domestic support obligations and their predecessor, family support obligations, using individualized policy considerations. Courts are cognizant of both these policies and Congress’s desire that “genuine support obligations would not be discharged.”<sup>212</sup> Courts interpret § 523(a)(5) as demonstrating a policy preference for the protection of the debtor’s spouse and children and assurances that they are provided for throughout and after the debtor’s bankruptcy.<sup>213</sup> It is therefore necessary that courts construe § 523(a)(5) more liberally than the other § 523 exceptions.<sup>214</sup> Congress’s intent to protect the often-vulnerable family members—namely, the debtor’s spouse and children—is evident through its deviation from the usual discharge exception policies and rules.<sup>215</sup> Protecting attorneys, banks, and court-appointed professionals, however, would not further this goal; the more liberal policies are limited in their application to family members or other § 523(a)(5) listed payees.<sup>216</sup>

#### *B. Interpreting § 523(a)(5) Using Canons of Construction, Legislative History, and Policy Considerations*

As previously mentioned, § 523(a)(5) excepts domestic support obligations, and § 101(14A) defines domestic support obligations.<sup>217</sup> Although § 523(a)(5) makes domestic support obligation debts nondischargeable based on four separate elements, most courts functionally ignore the requirement that those debts only be owed to or recoverable by a spouse, former spouse, or child of the debtor.<sup>218</sup> Family support obligations have long existed in the Code

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<sup>211</sup> *Id.* (citing *Goldberg Secs., Inc. v. Scarlata* (*In re Scarlata*), 979 F.2d 521, 524 (7th Cir. 1992)).

<sup>212</sup> *Tucker v. Oliver*, 423 B.R. 378, 380 (W.D. Okla. 2010) (quoting *Jones v. Jones* (*In re Jones*), 9 F.3d 878, 880 (10th Cir. 1993)) (internal quotation marks omitted).

<sup>213</sup> *Levin*, 415 B.R. at 665 (citing *In re Crosswhite*, 148 F.3d 879, 881–82 (7th Cir. 1998)).

<sup>214</sup> *Id.* (citing *In re Crosswhite*, 148 F.3d at 881–82).

<sup>215</sup> *Id.* (citing *In re Crosswhite*, 148 F.3d at 881–82).

<sup>216</sup> *See Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks* (*In re Brooks*), 371 B.R. 761, 765 (Bankr. N.D. Tex. 2007) (“Congress intended in [§] 523(a)(5) to ensure the support of a debtor’s family, not to turn a debtor’s family members into debt recovery associates. This is evidenced by the words of the defined term itself: ‘a domestic *support* obligation.’”).

<sup>217</sup> 11 U.S.C. §§ 101(14A), 523(a)(5) (2006).

<sup>218</sup> *See, e.g., Kennedy v. Kennedy* (*In re Kennedy*), BAP No. AZ-09-1035-JuPaDu, 2010 Bankr. LEXIS 3169, at \*18–19 (B.A.P. 9th Cir. Mar. 9, 2010); *Prensky v. Clair Greifer LLP*, No. 09-6200 (FLW), 2010 U.S. Dist. LEXIS 66181, at \*24–27 (D.N.J. June 30, 2010); *Levin*, 415 B.R. at 666–67; *Coleman v. Blackwell* (*In*

and case law, but the reach of the exception must be tailored and limited in order to balance the policies favoring protection of a debtor's dependents and those authorizing a fresh start for the debtor.<sup>219</sup> The solution this Comment recommends in this section considers and promotes the meaning, purpose, and policies of § 523(a)(5).

*1. A Procedural Formula To Determine Whether a Debt Is a Domestic Support Obligation*

The process of determining whether a debt is a domestic support obligation should follow a specific formula. First, the court should determine whether the debt should be characterized as a domestic support obligation or as a § 523(a)(15) property settlement. This determination is especially important for debtors who have filed chapter 13 petitions as the distinction means the difference between dischargeability and nondischargeability.<sup>220</sup> Debts falling under § 523(a)(15) are dischargeable in chapter 13.<sup>221</sup> This area of law has historically been the subject of considerable debate, as there has been great variance in the approaches courts use to distinguish between the two types of debts.<sup>222</sup> Perhaps only a declaration by Congress or the Supreme Court will clear up the confusion regarding the difference between § 523(a)(5) and § 523(a)(15) and the method courts should use to distinguish the two.

Once a court decides that the debt is in the nature of support and is potentially a domestic support obligation under § 523(a)(5), it must still evaluate the three other requirements contained in § 101(14A).<sup>223</sup> It is not enough that the debt is simply one of support; it must also be: (a) owed to or recoverable by a spouse, former spouse, child of the debtor, the child's caretakers, or a governmental entity; (b) established or subject to establishment within a divorce or separation decree, court order, or other governmental

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*re* Blackwell), 432 B.R. 856, 862–63 (Bankr. M.D. Fla. 2010); *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*3–9 (Bankr. E.D. Tenn. Sept. 10, 2008); *see also supra* Part II.B.

<sup>219</sup> *See supra* Part III.A.3.

<sup>220</sup> NORTON, *supra* note 26, § 57:35, at 57-100 (“Obligations arise between spouses, particularly former spouses, as a result of loans, as a means of adjusting a division of property, and often as a means of discharging the duty of support. Originally, debts traceable to loans and to property divisions were not excepted from the debtor’s discharged debts. After amendments in 1994 and 2005, however, such property settlement obligations were excepted from discharge in all cases other than [c]hapter 13. Debts traceable to support are not dischargeable in any chapter under the Bankruptcy Code.”).

<sup>221</sup> 11 U.S.C. § 1328(a)(2).

<sup>222</sup> *See supra* Part I.A.; *see also* Austin, *supra* note 32, at 1393–1416.

<sup>223</sup> *See* 11 U.S.C. §§ 101(14A)(A), (C)–(D), 523(a)(5).

determination before, on, or after the order of relief; and (c) notwithstanding certain exceptions, not assigned to a nongovernmental entity.<sup>224</sup> If the court determines that the debt is indeed owed to one of the listed payees, and it fulfills the remaining two requirements, the court should declare the debt nondischargeable.

If, however, the debt is not payable directly to one of the listed payees, the court should determine then whether the debt fits under the judicially created exception to the payee requirement.<sup>225</sup> Under this exception, if a separation or divorce agreement contains a hold harmless provision, or if the non-debtor spouse or child would be responsible for payment if the obligation were ultimately discharged, the court would find the debt to be a domestic support obligation and, therefore, nondischargeable.<sup>226</sup> Because the debt is not owed directly to a statutorily listed payee, this approach would require that the court analyze the debt and inquire into the parties involved for the purpose of determining who, if anyone, would be responsible for the debt if it were discharged. This formula differs from the current majority practice in that it goes beyond a simple determination of the nature of the debt.<sup>227</sup> It also takes into account the plain language of the statute while remaining true to the congressional intent and policy behind § 523(a)(5).<sup>228</sup>

## 2. *What Result if Courts Followed the Plain Meaning of the Payee Requirement?*

At first glance, restricting nondischargeability specifically to debts payable only to a spouse, former spouse, or child of the debtor seems to comport both with the policy and legislative history of the statute. Hypothetically, courts would adhere strictly to a plain language reading of the domestic support

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<sup>224</sup> See *id.* §§ 101(14A), 523(a)(5).

<sup>225</sup> See *In re Andrews*, 434 B.R. 541, 547–48 (Bankr. W.D. Ark. 2010); *In re Johnson*, 397 B.R. 289, 299 (Bankr. M.D.N.C. 2008).

<sup>226</sup> See *In re Andrews*, 434 B.R. at 547–48 (following the judicially created exception in interpreting § 523(a)(5)'s payee requirement); *In re Johnson*, 397 B.R. at 296, 298–99 (evaluating the dischargeability of the debt in question according to who would be ultimately responsible for the debt if the debt was not declared a domestic support obligation).

<sup>227</sup> *Contra* *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 476–77 (Bankr. S.D. Ohio 2010); see also *Kennedy v. Kennedy (In re Kennedy)*, BAP No. AZ-09-1035-JuPaDu, 2010 Bankr. LEXIS 3169, at \*18–19 (B.A.P. 9th Cir. Mar. 9, 2010); *Prensky v. Clair Greifer LLP*, No. 09-6200 (FLW), 2010 U.S. Dist. LEXIS 66181, at \*24–27 (D.N.J. June 30, 2010); *Levin v. Greco*, 415 B.R. 663, 666–67 (N.D. Ill. 2009); *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 862 (Bankr. M.D. Fla. 2010); *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*3–10 (Bankr. E.D. Tenn. Sept. 10, 2008).

<sup>228</sup> See *supra* Part III.A.

obligation elements, particularly the payee requirement, which means that courts would deem only those debts that are actually payable to or recoverable by the statutorily listed recipients as domestic support obligations. This “plain meaning” approach would necessarily reject both the majority method, in which courts allow the nature of the debt to control, and the limited judicial exception presently followed by only a few courts.<sup>229</sup> *Tucker v. Oliver* and *In re Brooks*, in which attorney’s fees incurred in the course of divorce or custody proceedings were declared dischargeable because the debts did not meet the payee requirement, would be the standard.<sup>230</sup> Those courts asserted not only that they should follow the plain and obvious language of §§ 523(a)(5) and 101(14A), but also that the changes to the Code in the 2005 Amendments altered the statutory section enough that pre-2005 case law was not binding precedent.<sup>231</sup> Admittedly, the requirement that the debt be payable only to the spouse, former spouse, or child of the debtor is not new to §§ 523(a)(5) and 101(14A); it was contained in the pre-2005 version of § 523(a)(5).<sup>232</sup> However, these courts believe that Congress may have deliberately reformatted the statutory section into the new § 101(14A) to stress that there are four separate, distinct, and strict requirements for a nondischargeable domestic support obligation.<sup>233</sup> One of those elements is the payee requirement.

In *Kelly v. Robinson*, the Supreme Court mandated that when construing a statute, the first step is to look to the plain language of the statute, stating, “the ‘starting point in every case involving construction of a statute is the language itself.’ But the text is only the starting point.”<sup>234</sup> The Court therefore calls for a multidimensional approach to statutory construction—analyzing language, purposes, and policies and using certain canons of construction—that begins with the language itself.<sup>235</sup> Courts and scholars have embraced this seemingly holistic method of interpreting and applying BAPCPA by first assessing the plain meaning of the language and, in some cases, continuing with an analysis

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<sup>229</sup> See *Tucker v. Oliver*, 423 B.R. 378, 381–82 (W.D. Okla. 2010); *Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (In re Brooks)*, 371 B.R. 761, 763–65, 768 (Bankr. N.D. Tex. 2007).

<sup>230</sup> See *Tucker*, 423 B.R. at 381–82; *In re Brooks*, 371 B.R. at 763–65, 768.

<sup>231</sup> *Tucker*, 423 B.R. at 381–82; *In re Brooks*, 371 B.R. at 763–65, 768.

<sup>232</sup> 11 U.S.C. § 523(a)(5) (2000).

<sup>233</sup> *Tucker*, 423 B.R. at 381–82; *In re Brooks*, 371 B.R. at 763–65, 768.

<sup>234</sup> *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (citation omitted) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

<sup>235</sup> Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 351 (2008).

of congressional intent and a variety of canons of construction to gain more insight into the likely meaning of the statute.<sup>236</sup>

The Supreme Court has previously considered other sections of the Code under a plain meaning analysis.<sup>237</sup> This doctrine embodies the idea that the written language of the statute alone demonstrates congressional intent.<sup>238</sup> This interpretation demands that an unambiguous statute be “enforce[d] . . . according to its terms.”<sup>239</sup> Determining a statute’s plain meaning is the default rule when engaging in statutory construction.<sup>240</sup> But if the plain meaning of the language remains uncertain, courts are to proceed with other methods of statutory construction.<sup>241</sup>

The relevant text is § 523(a)(5)’s requirement that to be nondischargeable, the debt must be “owed to or recoverable by . . . a spouse, former spouse, or child of the debtor . . . or a governmental unit.”<sup>242</sup> Arguably, within normal usage and meaning, the words “owed to” and “recoverable by” indicate an exclusive list of individuals to whom the debtor must be directly responsible. At the very least, when paired with a discrete list of payees (spouse, former spouse, child, or governmental entity), those terms do not reflect the idea that individuals or entities other than those listed in the statute can be eligible for a determination of nondischargeability as holding a domestic support obligation. According to Webster’s Dictionary, the definition of “owe” is “to have or bear (an emotion or attitude) to someone or something” or “to be indebted to.”<sup>243</sup> The commonality between these definitions is that they require someone or something to whom a debt or obligation is owed. Congress filled that need by

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<sup>236</sup> Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 210–14 (2007) (stating that the principles when assessing congressional intent include the following canons: avoiding surplusage, practice under the prior version of the statute, neologisms, comparison with other sections, unforeseen consequences, *expressio unius est exclusio alterius*, and legislative history).

<sup>237</sup> Alan R. Lepene & Sean A. Gordon, *The Case for Derivative Standing in Chapter 11: “It’s the Plain Meaning, Stupid,”* 11 AM. BANKR. INST. L. REV. 313, 313–14 (2003).

<sup>238</sup> *Id.* at 313.

<sup>239</sup> *Id.* at 313–14 (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989)) (internal quotation marks omitted).

<sup>240</sup> Waldron & Berman, *supra* note 236, at 211–12 (noting that the “default approach” to evaluating congressional intent in statutory interpretation is the plain meaning rule).

<sup>241</sup> *Id.* at 212–13.

<sup>242</sup> 11 U.S.C. §§ 101(14A)(A), 523(a)(5) (2006).

<sup>243</sup> *Owe Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/owe> (last visited Jan. 13, 2012).

listing the payees to whom they felt a domestic support obligation should be owed.

Similarly, the dictionary defines “recover” as “to get back” or “to gain by legal process.”<sup>244</sup> This interpretation also hints that an entity or individual must be eligible to get back or gain through legal process that which it lost or is owed.<sup>245</sup> Again, Congress addressed this need in the language of § 101(14A), outlining the four requirements for a domestic support obligation.<sup>246</sup> Therefore, the plain language of the statute and the reasonably foreseeable repercussions of its literal interpretation would lead to the belief that courts should strictly follow this text. Section 101(14A) is not an ambiguous statement. Rather, § 101(14A) contains common and easily defined words that are placed logically together to form a requirement that may seem intuitive when dealing with obligations that are in the nature of family support: the debt must provide for a family member or former family member. This analysis would be in line with recent cases in which courts have ruled based on the plain meaning of § 523(a)(5)’s payee requirement.<sup>247</sup>

### 3. *Solving the § 523(a)(5) Payee Problem Requires Courts To Follow the Exception to the Plain Meaning Interpretation*

Although the preceding analysis may lead to the conclusion that one should plainly construe § 523(a)(5)’s payee requirement, there are recent developing trends in statutory interpretation which must be considered. The “holistic” approach mentioned above from *Kelly* has evolved further in recent Supreme Court decisions.<sup>248</sup> Eschewing the plain meaning approach in 2007, the Court decided *Marrama v. Citizens Bank of Massachusetts* by forgoing an exclusive focus on the language of the Code and placing a greater emphasis on the purposes and policy to guide interpretation.<sup>249</sup> This and other recent decisions

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<sup>244</sup> *Recover Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/recover> (last visited Jan. 13, 2012).

<sup>245</sup> *But see* Austin, *supra* note 32, at 1392 (“[D]ebts that are ‘owed to’ a spouse or child are debts so designated in an agreement or decree as payable to that person. Debts ‘recoverable by’ a spouse or child are debts that, through state court legal process, the creditor spouse or child could enforce.”).

<sup>246</sup> Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (*In re* Brooks), 371 B.R. 761, 768 (Bankr. N.D. Tex. 2007).

<sup>247</sup> *See* Tucker v. Oliver, 423 B.R. 378, 381–82 (W.D. Okla. 2010); *In re* Brooks, 371 B.R. at 763–65, 768.

<sup>248</sup> *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 371–76 (2007) (focusing on policy and legislative purpose in allowing the lower courts to deny a bad faith debtor the right to convert a chapter 7 case to another chapter).

<sup>249</sup> Braucher, *supra* note 235, at 350.

instruct lower courts that they should de-emphasize their reliance on the plain meaning of the language in the Code and focus instead on “purposes and policy as the primary basis of interpretation.”<sup>250</sup> One can view the Supreme Court’s statements as a mandate to interpret the Code in such a way that reconciles the policy, purpose, and language of the statute.<sup>251</sup>

Because of this Supreme Court decision and the developing trend moving away from “plain meaning,”<sup>252</sup> the “plain meaning” should not be the stopping point in determining how to apply the Code (and § 523(a)(5) specifically). Supporting this idea is the fact that although the plain language of the payee requirement seems easy to interpret, courts struggle when applying it.<sup>253</sup> Therefore, an analysis beyond the “plain meaning” is necessary to develop a comprehensive solution to the confusion.

In an effort to embrace the previously mentioned “holistic” method of statutory interpretation and in combination with this recent Supreme Court instruction, this Comment next considers certain factors and canons of construction in interpreting the payee requirement, with special emphasis on the purpose and policy behind § 523(a)(5).<sup>254</sup>

*a. Analyzing the Factors Outlined in Supreme Court Cases*

The canons of construction discussed in this section lend support to conflicting theories of interpretation. Some of the canons would counsel courts simply to apply the plain meaning, and others would support the idea that the plain meaning is not the correct way to apply § 523(a)(5). While reviewing each interpretive principle, it is important to keep in mind that the Supreme Court recently placed considerable emphasis on evaluating the legislative purpose and the policy behind the statutory section.<sup>255</sup> This Comment will discuss the canon of surplusage, courts’ practice under prior versions of the statute, neologisms, the effect of certain interpretations on other Code sections, unforeseen consequences of certain interpretations, the canon *expressio unius est exclusio alterius*, and the legislative history surrounding the payee requirement.

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<sup>250</sup> See *id.* at 350 & n.10.

<sup>251</sup> See *id.*

<sup>252</sup> See *id.* at 350–51.

<sup>253</sup> See *supra* Parts I–II.

<sup>254</sup> See Braucher, *supra* note 235, at 350; Waldron & Berman, *supra* note 236, at 210–14.

<sup>255</sup> See Braucher, *supra* note 235, at 350; see also *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 371–75 (2007).

First, the canon of surplusage recognizes that courts may decline to acknowledge certain words in the statute if they were “inadvertently inserted or [would be] repugnant to the rest of the statute.”<sup>256</sup> In *Lamie v. United States Trustee*, the Supreme Court used the concept of surplusage to provide support for its decision.<sup>257</sup> In that case, the Court explained that, although attorneys were listed as possible payees under § 330(a), they were also encompassed as “professional persons” in the statute.<sup>258</sup> The approach the Court ultimately took in interpreting § 330(a) meant that listing both “attorneys” and “professional persons” as possible payees was surplusage.<sup>259</sup> The Court noted that, although not the death knell of a court’s interpretation, courts usually seek to avoid interpreting statutes in a way that would produce surplusage.<sup>260</sup>

Reading the plain language of §§ 523(a)(5) and 101(14A) would not result in surplusage. Courts would not have to ignore any words in the statute. The list of payees (“spouse, former spouse, or child of the debtor . . . or governmental entity”) does not overlap with any other statutory list of payees for domestic support obligations, and there are no overlaps within the domestic support obligation definition.<sup>261</sup> The plain language does not render any of the listed payees superfluous. Therefore, courts would not need to worry about surplusage if they plainly interpret the domestic support obligation requirement from §§ 523(a)(5) and 101(14A).

The next factor that the Supreme Court has considered in construing the Code is the practice of courts under prior versions of the statute.<sup>262</sup> As discussed above, the vast majority of circuits essentially ignored the payee requirement,<sup>263</sup> even though it has been in the statute since the enactment of the Code in 1978.<sup>264</sup> Concurrently, a few courts followed a judicially created

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<sup>256</sup> See *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)) (internal quotation marks omitted).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> 11 U.S.C. § 101(14A) (2006) (providing the only definition for “domestic support obligation” in the Code).

<sup>262</sup> Waldron & Berman, *supra* note 236, at 212; see also *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 444–50 (1999) (evaluating terms in the Code in light of their pre-Code usage).

<sup>263</sup> See *supra* Part I.B.1.

<sup>264</sup> See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2594, 2591 (codified as amended at 11 U.S.C. § 523(a)(5)).

exception prior to 2005.<sup>265</sup> Courts using this exception evaluated certain debt payments, such as the attorney's fees in *In re Spong*, as de facto payments to the former spouse.<sup>266</sup> However, even with some courts following this exception, it remains that, prior to 2005, most courts seemed to simply evaluate whether the debt was in the nature of support and disregard the requirement that, for nondischargeability, the debtor had to owe the debt to a payee listed in § 523(a)(5).<sup>267</sup> If modern courts were to continue to disregard the payee requirement in interpreting domestic support obligations, there would at least be continuity with majority decisions prior to the 2005 Amendments.

Neologisms are also used by courts to interpret statutory language.<sup>268</sup> A neologism is a “new word, usage or expression.”<sup>269</sup> The interpretative use of neologisms involves a presumption that Congress acted intentionally when omitting language it included in another section.<sup>270</sup> The presumption is even stronger when the omission involves the replacement of standard terminology with a neologism.<sup>271</sup> Every occurrence of domestic support obligations in the Code invokes the same definition from § 101(14A), so there are no alternate lists of payees for domestic support obligations and, thus, no neologisms to analyze.<sup>272</sup>

When interpreting the Code, the Supreme Court also directs parties to compare the questioned language with that in other sections.<sup>273</sup> Justice Souter noted that “[n]ormal rule[s] of statutory construction require that identical words [*used*] in the same section of the same enactment must be given the same effect” and the rules of construction mandate that a common term which occurs multiple times within a statute must be defined in a single way.<sup>274</sup> Every time the Code mentions domestic support obligations, it incorporates the definition of that phrase found in § 101(14A).<sup>275</sup> However, the specific list of

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<sup>265</sup> See, e.g., *Pauley v. Spong (In re Spong)*, 661 F.2d 6, 9–11 (2d Cir. 1981).

<sup>266</sup> See *supra* Part I.B.2.

<sup>267</sup> See *supra* Part I.B.1.

<sup>268</sup> Waldron & Berman, *supra* note 236, at 212 & n.79.

<sup>269</sup> *Neologism Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/neologism> (last visited Jan. 9, 2012).

<sup>270</sup> Waldron & Berman, *supra* note 236, at 212 n.79.

<sup>271</sup> *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

<sup>272</sup> See, e.g., 11 U.S.C. §§ 507(a)(1), 523(a)(5) (2006); see also *id.* § 101(14A).

<sup>273</sup> Waldron & Berman, *supra* note 236, at 212 & n.80.

<sup>274</sup> *Resolution Trust Corp.*, 511 U.S. at 556–57 (Souter, J., dissenting) (second and third alterations in original) (quoting *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting)) (internal quotation marks omitted).

<sup>275</sup> See *supra* text accompanying note 261.

designated payees occurs in three sections: §§ 101(14A), 507(a)(1), and 523(a)(15).<sup>276</sup> Section 507(a)(1) is the priority section that encompasses the domestic support obligation definition of § 101(14A) and assigns a priority to “[a]llowed unsecured claims for domestic support obligations that, as of the date of filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse or child of the debtor.”<sup>277</sup> Section 523(a)(15) makes nondischargeable non-support debts arising out of support or separation.<sup>278</sup> Courts have interpreted these listed payees in §§ 507(a)(1) and 523(a)(15) the same way that they previously interpreted § 523(a)(5)—that the payee requirement is not an essential element of the statute.<sup>279</sup> For instance, courts use decisions involving §§ 523(a)(5) and 507(a)(1) interchangeably in their decision making when discussing the elements and requirements of domestic support obligations.<sup>280</sup> The rationales offered for declaring attorney’s fees nondischargeable, regardless of the payee requirement, are indistinguishable from those that courts use when considering the priority status of similar fees under § 507(a)(1)(A).<sup>281</sup>

Furthermore, because all references to domestic support obligations in the Code necessarily incorporate the payee language involved in § 101(14A)’s definition of authorized payees, any conclusion regarding its application will necessarily affect all of those sections. Returning to § 507(a)(1), it is therefore appropriate to interpret the language in the nondischargeability section and the language in the priority section in the same way.<sup>282</sup> This is not difficult as the priority section also strives to ensure that family members’ claims are afforded

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<sup>276</sup> 11 U.S.C. §§ 101(14A), 507(a)(1), 523(a)(5).

<sup>277</sup> *Id.* § 507(a)(1)(A).

<sup>278</sup> *Id.* § 523(a)(15).

<sup>279</sup> Compare *In re Andrews*, 434 B.R. 541, 546–50 (Bankr. W.D. Ark. 2010) (allowing a law firm to collect nondischargeable priority payments as a domestic support obligation), *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*2–9 (Bankr. E.D. Tenn. Sept. 10, 2008) (allowing a guardian *ad litem* to recover fees as a nondischargeable domestic support obligation under §§ 101(14A) and 507(a)(1)), and *Clair, Grier LLP v. Prensky (In re Prensky)*, 416 B.R. 406, 409–12 (Bankr. D.N.J. 2009) (stating it was “immaterial that the debt is payable to the [law firm]” and allowing it to recover its fees from a chapter 7 debtor as a nondischargeable divorce-incurred debt under § 523(a)(15)), *aff’d*, 2010 U.S. Dist. LEXIS 66181 (D.N.J. June 30, 2010), with *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1490 (10th Cir. 1995) (allowing a guardian *ad litem* and child psychologist to classify their fees as nondischargeable under § 523(a)(5) because “the emphasis [is] placed on the determination of whether a debt is in the nature of support, rather than on the identity of the payee”).

<sup>280</sup> See, e.g., *In re Andrews*, 434 B.R. at 546–50; *In re Rose*, 2008 WL 4205364, at \*3–9.

<sup>281</sup> See *In re Andrews*, 434 B.R. at 546–50; *In re Rose*, 2008 WL 4205364, at \*3–9.

<sup>282</sup> See *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1142 (9th Cir. 1998) (noting that because the language of the two sections is identical, “application of § 507(a)(7) should be coincidental with application of § 523(a)(5)”).

protection and precedence in bankruptcy, and their claims on the debtor's assets are therefore the most important.<sup>283</sup> However, because the specific payee language in the domestic support obligation definition appears so infrequently in the Code, analyzing how Congress uses the language in question elsewhere in the statute does not offer the most reliable analysis.

Construing § 523(a)(5) a certain way has the potential to lead to unwanted consequences elsewhere in title 11. Numerous sections of the Code directly or indirectly reference domestic support obligations and, through it, § 523(a)(5).<sup>284</sup> Thus, the analysis of the payee requirement language in the context of nondischargeability necessarily affects the other statutory sections that incorporate § 101(14A). Some of the Code sections are simply related to procedure, such as § 502(b)(5), which disallows claims for unmatured domestic support obligations, and § 704(a)(10), which provides guidelines for the notice that trustees must provide if the bankruptcy involves domestic support obligations.<sup>285</sup> Other sections are more substantive, including § 1129(a)(14), which mandates that plan confirmation require the debtor to pay his domestic support obligations.<sup>286</sup> This category also includes § 547(c)(7), which limits the trustee's avoidance powers to transfers that are payments of domestic support obligations.<sup>287</sup> Each statutory section within this "substantive" category shares similar characteristics, in that each protects the interests of the payee, and elevates domestic support obligations to positions of importance.<sup>288</sup>

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<sup>283</sup> See 11 U.S.C. § 507(a)(1)(A) (elevating domestic support obligations to a higher priority than all other debts).

<sup>284</sup> See, e.g., *id.* §§ 101(14A), 362(b)(2)(A)–(C), 502(b)(5), 503(b)(1)(A)(ii), 507(a)(1)(A), 522(c)(1), 524(a)(3), 547(c)(7), 704(a)(10), 707(c)(3), 1106(a)(8), 1112(b)(4)(P), 1129(a)(14), 1141(d)(2), 1202(b)(6), 1208(c)(10), 1225(a)(7), 1228(a)(2), 1302(b)(6), 1307(c)(11), 1325(a)(8), 1328(a)(2).

<sup>285</sup> See *id.* §§ 502(b)(5), 704(a)(10); see also *id.* §§ 503(b)(1)(A)(ii), 1106(c)(1)(C)(iv)(I), 1202(b)(6), 1302(b)(6).

<sup>286</sup> *Id.* § 1129(a)(14).

<sup>287</sup> *Id.* § 547(c)(7).

<sup>288</sup> See *id.* § 362(b)(2)(A)–(C) (excepting from automatic stay the collection, establishment, or modification of domestic support obligations); *id.* § 507(a)(1)(A) (affording domestic support obligations first priority in payment of claims in reorganization); *id.* § 522(c)(1) (stating that property, even if exempt, is subject to debts for domestic support obligations); *id.* § 524(a)(3) (not allowing discharge to enjoin domestic support obligations accrued after commencement of action); *id.* § 707(c)(3) (providing that case cannot be dismissed if it is necessary to satisfy claim for domestic support obligations); *id.* § 1112(b)(4)(P) (labeling failure of debtor to pay domestic support obligations as cause for conversion or dismissal of chapter 11 plan); *id.* § 1129(a)(14) (requiring payment of all past-due domestic support obligations before confirmation of chapter 11 plan); *id.* § 1141(d)(2) (mandating that discharge of debts in an individual chapter 11 debtor does not apply to any debts covered by § 523); *id.* § 1208(c)(1) (labeling failure of debtor to pay domestic support obligations as cause for conversion or dismissal); *id.* § 1225(a)(7) (requiring payment of domestic support

However one construes the domestic support obligation language, the interpretation must be compatible with the intent behind these other sections. In order to ensure uniformity within the Code, courts should embrace the same approach and consistently interpret the domestic support obligation payee language. Arguably, if all courts only followed the plain meaning, uniformity would be achieved. To allow courts to manipulate the domestic support obligation definition for the purposes of § 523(a)(5) would discourage uniform interpretation of domestic support obligations throughout the Code. If courts allowed entities other than spouses, former spouses, or children of the debtor to hold nondischargeable domestic support obligations, it would cause potentially unwanted repercussions in other Code sections.

When interpreting statutory language, courts also evaluate the potential unforeseen external consequences of certain constructions of the language.<sup>289</sup> In enacting § 523(a)(5), Congress surely did not intend for attorneys or individuals other than family members to hold nondischargeable domestic support obligations or occupy the top priority in payment. Under § 523(a)(5) as generally applied, banks, guardians *ad litem*, and attorneys have been able to use this statutory section to elevate their debts above those that are essentially the same but not gained in connection with support issues.<sup>290</sup> Preserving the family and granting support-related debts a special status in bankruptcy are long-respected and honored principles,<sup>291</sup> but it seems to be an unfair mutation for courts to allow those other than spouses, children, or former spouses to take advantage of the § 523(a)(5) language. If Congress had intended to allow third parties and outside entities access to the privileges afforded domestic support obligations, it would have indicated so any of the numerous times it amended

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obligations for confirmation of payment plan for reorganization); *id.* § 1228(a)(2) (decreasing that debts covered by § 523 are nondischargeable through chapter 12 plans); *id.* § 1307(c)(11) (labeling failure of debtor to pay domestic support obligations as cause for conversion or dismissal); *id.* § 1325(a)(8) (requiring payment of domestic support obligations for confirmation of payment plan for reorganization); *id.* § 1328(a)(2) (mandating that certain debts covered by § 523 are nondischargeable through chapter 13 plans).

<sup>289</sup> See Waldron & Berman, *supra* note 236, at 212–13 & n.81.

<sup>290</sup> See, e.g., *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1140–42 (9th Cir. 1998) (holding court-imposed guardian *ad litem* fees nondischargeable family support obligation deserving priority payment); *Gianakis v. Gianakis (In re Gianakis)*, 917 F.2d 759, 762–64 (3d Cir. 1990) (holding second mortgage assumed by debtor to be nondischargeable family support obligation); *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 858–63 (Bankr. M.D. Fla. 2010) (holding attorney’s fees payable directly to attorney for post-divorce enforcement actions nondischargeable domestic support obligation).

<sup>291</sup> See Austin, *supra* note 32, at 1384 (“Bankruptcy courts have long recognized marital and child support obligations as a unique type of debt to be treated differently from other forms of secured debt due to the vulnerability of former spouses and dependents.”).

§ 523(a)(5).<sup>292</sup> Additionally, the Code affords creditors protections elsewhere,<sup>293</sup> and courts should be forbidden from manipulating such a family-centric area of bankruptcy law to suit their needs. The policy motivations behind § 523(a)(5) and domestic support obligations indicate that the purpose of this language is to respect and protect family members and those who require the debtor's support.<sup>294</sup> That list does not include banks, attorneys, guardians *ad litem*, or any other third party that § 101(14A) does not name.<sup>295</sup>

The canon *expressio unius est exclusio alterius* supports the proposition that the courts should strictly and plainly interpret the domestic support obligation language limiting nondischargeability to certain payees. It stands for the proposition that “to express or include one thing implies the exclusion of the other, or the alternative.”<sup>296</sup> Applying this premise, the fact that Congress wrote an exclusive list of payees for domestic support obligations indicates that it intended to exclude all others from that list. Therefore, because Congress outlined specific eligible payees in both §§ 523(a)(5) and 101(14A),<sup>297</sup> those not clearly on the list are not eligible to have their debts declared nondischargeable under § 523(a)(5), even if owed a debt in the nature of support.

The final factor that courts consider when interpreting the statutory language of the Code is the legislative history.<sup>298</sup> Except for a few minor additions, the language of the § 523(a)(5) payee requirement has remained fairly consistent since the original enactment in 1978.<sup>299</sup> Because of this consistency, the legislative history referring back to 1978 is relevant. In the twelve times that Congress has amended § 523 since 1978, it has only

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<sup>292</sup> See *supra* text accompanying notes 191–93.

<sup>293</sup> See, e.g., 11 U.S.C. § 362(d) (allowing a party to seek a modification or termination of the automatic stay for various reasons including a lack of adequate protection or when involving certain types of “scheme[s] to delay, hinder, or defraud” creditors); *id.* § 1322(b)(2) (preventing debtors in chapter 13 from modifying many terms of a mortgage on their home).

<sup>294</sup> See *supra* Part III.A.3.

<sup>295</sup> See 11 U.S.C. §§ 101(14A)(A), 523(a)(5); *supra* Part III.A.3 (discussing the policies accompanying § 523(a)(5)).

<sup>296</sup> BLACK'S LAW DICTIONARY, *supra* note 152, at 661.

<sup>297</sup> See 11 U.S.C. § 101(14A)(A); see also 11 U.S.C. § 523(a)(5) (2000) (current version at 11 U.S.C. § 523(a)(5) (2006)).

<sup>298</sup> See Waldron & Berman, *supra* note 236, at 213.

<sup>299</sup> Compare 11 U.S.C. § 101(14A) (2006), with 11 U.S.C. § 523(a)(5) (1982) (current version at 11 U.S.C. § 523(a)(5) (2006)).

minimally expanded the list of payees in § 523(a)(5).<sup>300</sup> The current list of authorized payees under § 101(14A) includes “a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or . . . a government unit.”<sup>301</sup> Congress has therefore never expanded the list of payees to include any number of the creditors that courts are currently allowing to categorize their debts as domestic support obligations, such as banks and law firms.<sup>302</sup> However, except for the congressional remarks accompanying the 1978 codification of the domestic support obligation exception, Congress has not specifically overruled any case law, and it has not criticized the courts’ decisions involving § 523(a)(5).<sup>303</sup> Congressional silence is often interpreted as an implicit ratification of courts’ decisions construing statutory language.<sup>304</sup> This idea creates a conundrum, as over the years courts have interpreted this section in very different ways.<sup>305</sup> So, if Congress is silently ratifying the courts’ actions, which actions is it ratifying? Not everyone in the legal world approves of interpreting congressional silence as anything other than silence, so is it possible that Congress did not intend to ratify any of these approaches to domestic support obligations?<sup>306</sup> If this is true, potentially because § 523(a)(5) is just a small section of bankruptcy law, it is conceivable that Congress simply has not considered the case law surrounding this section in any detail. Regardless of which possibility is true, reliance on any one of the current judicial approaches alone should not dictate the interpretation of § 523(a)(5)’s language.

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<sup>300</sup> Compare 11 U.S.C. § 101(14A) (2006), with 11 U.S.C. § 523(a)(5) (1982) (current version at 11 U.S.C. § 523(a)(5) (2006)).

<sup>301</sup> 11 U.S.C. § 101(14A)(A) (2006).

<sup>302</sup> Compare *id.* § 101(14A)(A) (failing to list banks, attorneys, guardians *ad litem*, or many other third parties as allowed payees), with *In re Rose*, No. 08-30051, 2008 WL 4205364, at \*9 (Bankr. E.D. Tenn. Sept. 10, 2008) (holding that fees of a guardian *ad litem* are nondischargeable domestic support obligations), and *Coleman v. Blackwell (In re Blackwell)*, 432 B.R. 856, 862–63 (Bankr. M.D. Fla. 2010) (holding attorney’s fees directly payable to attorneys to be a nondischargeable domestic support obligation).

<sup>303</sup> See H.R. REP. NO. 109-31, pt. 1, at 16–17, 42–43, 59, 61 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 102–03, 114, 129, 131; S. REP. NO. 95-989, at 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. NO. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320; 140 CONG. REC. 10,770 (1994) (statement of Rep. Brooks).

<sup>304</sup> Baker, *supra* note 190, at 231 (“Broadly speaking, the judicial doctrine of congressional acquiescence states that Congress can impliedly authorize presidential actions or judicial interpretations by failing over time to signal disagreement or opposition.”).

<sup>305</sup> See *Kassicieh v. Battisti (In re Kassicieh)*, 425 B.R. 467, 472–81 (Bankr. S.D. Ohio 2010).

<sup>306</sup> Baker, *supra* note 190, at 229 (“[P]ast Supreme Court justices have condemned reliance on congressional silence as, in Justice Harlan’s words, ‘a poor beacon to follow.’” (quoting *Zuber v. Allen*, 396 U.S. 168, 185 (1969))).

As discussed previously, the legislative history of the original § 523(a)(5) codification in 1978 could be read in one of two ways. Some of the legislative statements are in line with a plain meaning interpretation.<sup>307</sup> However, others support the judicially created exception that accounts for de facto hold harmless agreements that would leave the spouse, ex-spouse, or child responsible for the debt if the court discharged it.<sup>308</sup> However, the one clear proposition from the legislative history is that Congress did not intend the payee requirement to be ignored,<sup>309</sup> and it should have always been a vital requirement for nondischargeability.

Legislative statements accompanying other amendments to § 523(a)(5), such as the 1994 Congressional Record discussed previously, would support courts uniformly embracing the exception to the plain meaning rule.<sup>310</sup> The House Report outlining the 2005 Amendments does not offer any insight into interpreting § 523(a)(5)'s payee requirement.<sup>311</sup> However, none of the legislative history implies that courts should completely ignore the payee requirement. All of the legislative history affirms that there is indeed a legitimate payee requirement, and the courts need to consider it along with the rest of the requirements when determining the dischargeability of a domestic support obligation.

*b. Analyzing § 523(a)(5)'s Policy Considerations*

The policy behind a provision of the Code, although not a contemplated canon of construction, received added weight as a means of statutory interpretation after the Supreme Court's decision in *Marrama*, and this analysis

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<sup>307</sup> See, e.g., H.R. REP. NO. 95-595, at 364 ("This language . . . will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent.").

<sup>308</sup> See, e.g., S. REP. NO. 95-989, at 79 ("The proviso, however, makes nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse . . .").

<sup>309</sup> See H.R. REP. NO. 109-31, pt. 1, at 16, 59 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 102, 129 (intending to create "a uniform and expanded definition" for domestic support obligations that "includes a debt owed to or recoverable by . . . a spouse, former spouse, or child of the debtor"); S. REP. NO. 95-989, at 79 (making only those family support obligations nondischargeable that are "owed directly to a spouse or dependent"); H.R. REP. NO. 95-595, at 364 (making only those family support obligations nondischargeable that are "owed directly to a spouse or dependent").

<sup>310</sup> See 124 CONG. REC. 32,399 (1978) (statement of Rep. Edwards) ("If such 'hold harmless' and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law.").

<sup>311</sup> Cf. H.R. REP. NO. 109-31, pt. 1, at 16-17, 42-43, 52-53, 59-62, 84, 95 (listing all places where domestic support obligations are mentioned).

must consider it.<sup>312</sup> The bankruptcy policy behind § 523(a)(5) is different from the rest of the § 523 exceptions from discharge.<sup>313</sup> Normally, courts strictly interpret exceptions against the creditor, making it very hard for a creditor to prove that a claim is nondischargeable.<sup>314</sup> Section 523(a)(5), however, represents a different policy completely—one that makes it easier for creditors like former spouses and children to argue that debts owed to them are nondischargeable.<sup>315</sup> By consciously allowing a policy contrary to the norm, Congress intended to guide § 523(a)(5) and to elevate and protect oft-vulnerable family members' claims above other creditors.<sup>316</sup> Congress's desire likely does not reach to the protection of third parties, such as banks and attorneys, who argue that their claims are nondischargeable.<sup>317</sup> Protection of family and those who are most deserving of support through bankruptcy is necessarily limited to those who genuinely fit into the category of "family."

Combined, the canon of construction analysis and the weighted considerations of congressional purpose and policy paint a rough picture of how courts should interpret the payee requirement language. Yet it is easy to forget that this issue does not take place solely in the arena of bankruptcy. The interpretation of these words in § 523(a)(5) also has repercussions in family law. All of these cases involving debtors and their ex-spouses or children exist simultaneously in two areas of law: one involving the debtor's bankruptcy, and the other involving the family law that governed the establishment of the debt at issue in the bankruptcy. The interpretation of the payee requirement can potentially lead to inequities and hardship on the family law aspect of this issue.

*c. Analyzing the Repercussions of § 523(a)(5)'s Payee Requirement on Family Law*

To interpret the language of §§ 523(a)(5) and 101(14A) plainly and strictly would be to limit the availability of a multitude of settlement possibilities during divorce or separation. Instead of being able to assume responsibility for

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<sup>312</sup> Braucher, *supra* note 235, at 350.

<sup>313</sup> See Levin v. Greco, 415 B.R. 663, 665 (N.D. Ill. 2009).

<sup>314</sup> See *id.*

<sup>315</sup> *Id.*

<sup>316</sup> See *id.*

<sup>317</sup> Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (*In re Brooks*), 371 B.R. 761, 765 (Bankr. N.D. Tex. 2007) ("Congress intended in [§] 523(a)(5) to ensure the support of a debtor's family, not to turn a debtor's family members into debt recovery associates. This is evidenced by the words of the defined term itself: 'a domestic support obligation.'").

their former spouse's mortgage payments or attorney's fees, or participate in hold harmless agreements, the non-debtor-spouses would have to negotiate and attempt to require their counterparts to simply pay them large sums of money directly.<sup>318</sup> Courts would only declare debts owed directly to the spouse, former spouse, or child of the debtor nondischargeable, severely restricting the bargaining power of the spouse in divorce proceedings. It would narrow the world of possible divorce- or separation-related financial settlements to only those that could be owed directly to a former spouse or child. This scenario could potentially wreak havoc on divorce and separation settlements, and it eliminates all creativity the courts may have had in fashioning fair resolutions.

Even more unsettling is the idea that divorcing couples who have expended time and effort reaching a final settlement could be surprised in bankruptcy court when, unexpectedly, their negotiated support and alimony claims are discharged. Many couples and families that go through divorces also find themselves, at some later point, in bankruptcy court.<sup>319</sup> If courts were to begin following the strict and plain meaning of § 523(a)(5), a great deal of the settlements that inevitably undergo scrutiny in bankruptcy courtrooms would fall victim to discharge, and the payments they order would no longer function as support for the non-debtor spouse or child.

Furthermore, the recent trend of courts deciding dischargeability according to the plain meaning could lead to forum shopping by debtor-spouses who owe support obligations that are not recoverable directly by their ex-spouses or children. And while attorneys can draft their clients' settlement orders in such a way that they are compatible with the interpretations of the bankruptcy courts in their area, the truth of the matter is that few people truly anticipate being hailed into bankruptcy court<sup>320</sup> and cannot anticipate when or where that litigation will occur. This plain meaning interpretation seems to lead to consequences that may not be disastrous yet would certainly be inequitable. The past, present, and future repercussions caused by the courts' varied interpretations have been and will continue to be troublesome. These disparate judicial decisions have eliminated all predictability and have saddled attorneys and their clients with unacceptable uncertainty.

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<sup>318</sup> This scenario would likely satisfy the payee requirement, as the debts would be owed directly to the spouse, former spouse, or child of the debtor. *See* 11 U.S.C. § 101(14A)(A)(i) (2006).

<sup>319</sup> *Bankruptcy Site: Statistics, supra* note 20.

<sup>320</sup> *See* Austin, *supra* note 32, at 1396.

These important family law considerations are all reasons why, instead of following the plain meaning, courts should uniformly embrace the judicially created exception to § 523(a)(5)'s payee language. The judicially created exception is an elegant catch-all that strikes a fair and equitable balance between interpreting the plain meaning of the language and allowing for consideration of the family law equities involved. If courts embraced this exception, they would remain true to the intent of the statute without simply eliminating the payee requirement. Each court would consider who would be ultimately responsible for the debt and would subsequently find the debt nondischargeable if it were any of the listed payees in § 101(14A). With this exception, those parties with reasonable separation agreements providing that the debtor pay certain obligations on behalf of his ex-spouse or children (such as mortgage payments, attorney's fees, or guardian *ad litem* fees) will be able to argue that those debts should be nondischargeable. The payees who benefit from those obligations will not suddenly face unforeseen financial liability. This position is supported by several cases that declare hold harmless agreements and debts owed to third parties nondischargeable because the spouse or child would end up responsible for the debt.<sup>321</sup> For years, courts that have not favored the majority's habit of ignoring the payee requirement have followed this narrow exception from the plain meaning,<sup>322</sup> and their interpretation is the best option for applying the § 523(a)(5) payee requirement.

*d. Courts Should Embrace the Exception to the Plain Meaning of § 523(a)(5)'s Payee Language*

Nowhere in the application of various canons of construction, the legislative history, or the policy background is there any validation for reading the payee requirement completely out of § 523(a)(5) as some courts have done.<sup>323</sup> To protect the truly deserving domestic support obligation creditors from those creditors who would falsely argue that the obligations owed to them are nondischargeable domestic support obligations, courts should embrace and apply the judicially fashioned exception that has been in practice long before the 2005 Amendments. Courts that have embraced this exception—such as the Second Circuit Court of Appeals in *In re Spong*, the Bankruptcy Court for the Middle District of North Carolina, and the Bankruptcy Court for the Western

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<sup>321</sup> Steinfeld, *supra* note 32, at 280.

<sup>322</sup> See, e.g., Pauley v. Spong (*In re Spong*), 661 F.2d 6, 10–11 (2d Cir. 1981); *In re Andrews*, 434 B.R. 541, 546–48 (Bankr. W.D. Ark. 2010); *In re Johnson*, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008).

<sup>323</sup> See *supra* Part III.B.3.a–b.

District of Arkansas—have successfully walked the line between following Congress's intent, remaining true to the statutory language, and preventing § 523(a)(5) abuse.<sup>324</sup> This judicially created exception that allows consideration beyond the plain meaning of the statute but still respects and follows that language, is the method of interpretation courts should use in analyzing the payee requirement of domestic support obligations.

#### 4. *Practical Advice for Attorneys and Their Family Law Clients*

While courts continue to vary their interpretations of § 523(a)(5), attorneys and their debtor and non-debtor clients need to be prepared for any of the approaches bankruptcy courts might take. To be the most secure in divorce and separation agreements, attorneys need to ensure that if one spouse owes support to another (or to a child) according to a separation or divorce agreement, the agreement needs to provide for direct payments to either the spouse or child. In the areas where courts have recently begun to apply the plain language to domestic support obligation disputes, this designation of payment is absolutely necessary to maintain the nondischargeability of the support obligation.<sup>325</sup>

The next safest approach that attorneys can take for their divorcing clients is to execute hold harmless agreements if the spouse owing support has taken on payments to third parties, such as banks (for mortgages) or attorneys (for attorney's fees incurred in divorce-related litigation). In any of the jurisdictions that apply the judicially created exception or those that simply eliminate the payee language from the analysis, this approach most likely would be sufficient to make the debt nondischargeable. In the jurisdictions that only consider the nature of the debt, there need not be a hold harmless agreement—as long as one could easily categorize the obligation as support for a child, spouse, or former spouse, the payee requirement should not raise any issues. However, because courts are altering the way they analyze domestic support obligations, there is no way to predict whether bankruptcy courts will begin to follow the plain language trend. Attorneys must prepare for all contingencies.

This uncertainty and the multiple contingencies attorneys must plan for with domestic support obligations illustrate the main issue surrounding

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<sup>324</sup> See, e.g., *In re Spong*, 661 F.2d at 10–11; *In re Andrews*, 434 B.R. at 546–48; *In re Johnson*, 397 B.R. at 296.

<sup>325</sup> See, e.g., *Loe, Warren, Rosenfield, Katcher, Hibbs, & Windsor, P.C. v. Brooks (In re Brooks)*, 371 B.R. 761, 764–65 (Bankr. N.D. Tex. 2007).

domestic support obligation exceptions. Attorneys and their clients should not be uncertain about which debts courts will declare nondischargeable and which they will not. In some situations, banks and attorneys will be able to have courts declare their claims nondischargeable, while in other areas, spouses or children who hold claims that the debtors do not pay directly to them will have their obligations discharged in their ex-spouses' or parents' bankruptcy. Interpreting the domestic support obligation without the payee requirement will only permit and encourage fraud by third parties and violate the policy and meaning behind the statute. Courts should not apply the nondischargeability exception in a way that totally overlooks the payee requirement.

This area of the Code desperately needs both a clear method of interpreting the § 523(a)(5) payee requirement and consistency in its application. The judicially created exception to the plain meaning of the payee language is one solution to this difficult issue. It is the most prudent of all the possible methods of resolution because it takes into account and reconciles the competing forces involved in construing statutory language in this area.

#### CONCLUSION

Family support obligations arose from Congress's respect for family and its desire to preserve and elevate the status of potentially vulnerable family members who are going through bankruptcy and divorce. This purpose has been manipulated into an avenue for third parties, such as banks and attorneys, to obtain greater protection and an elevated priority status in bankruptcy. Sparse legislative history and policy motivations contrary to those behind the rest of the Code have created a varying and inconsistent body of case law surrounding § 523(a)(5). Courts' interpretations of the statutory language prior to the 2005 Amendments were inconsistent, with most courts simply ignoring the plain language of the statute and fashioning their own avenues through which to except otherwise dischargeable obligations. Courts thus entirely bypassed the § 523(a)(5) language that required the debt be owed "to a spouse, former spouse, or child of the debtor" and simply ascertained whether the debt was in the nature of support. This muddled jurisprudence continued even after Congress amended § 523(a)(5) in 2005, and since then the confusion has only grown. Now, § 523(a)(5) excepts "domestic support obligations," as defined in § 101(14A). This definition mirrors the requirements of the pre-2005 § 523(a)(5) but is laid out in a format that unmistakably lists the payee as an equal and separate requirement for nondischargeability.

Recent cases such as *Tucker v. Oliver* and *In re Brooks* have begun to interpret the statutory language plainly. Although this is a step towards creating consistency in judicial decisions, it does not comport with the purpose, policy, and equities surrounding this section's place in bankruptcy law and related areas of family law. Similarly, the majority of courts, which still essentially read the payee requirement out of the statute, is deviating from the purpose, policy, and equities involved in the nondischargeability decision. Some courts have devised an exception to the plain meaning rule, which manages to remain true to the language of the statute while accounting for the external factors affecting the method of interpreting the payee language. This judicial exception is a necessary catch-all to address many of the issues that occur when family law and bankruptcy law intersect.

The confusion among courts as to the correct approach towards the payee requirement in domestic support obligations has created unacceptable uncertainty and a lack of uniformity in nondischargeability jurisprudence. The American justice system strives for consistency, stability, and predictability in the application of law, especially in courts operating in the same jurisdiction. Currently, the disparity among those deciding these bankruptcy cases according to the plain letter of the written law and the freedoms that the majority of courts are taking challenges the integrity of the Code. Although this statutory section is rife with confusion, a uniform approach to the payee requirement of § 523(a)(5) will be a significant step in the right direction.

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