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Citation: 16 Cap. U. L. Rev. 369 1986-1987

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Wed Apr 26 16:57:55 2017

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SPOUSAL AND CHILD SUPPORT PAYMENT PROVISIONS IN CHAPTER 13 PLANS

MICHAELA M. WHITE*

I. INTRODUCTION

The purpose of this Article is to examine whether a Chapter 13 plan¹ may properly include provisions for past due spousal and child support. This question must be addressed both in terms of the federal courts' power to decide whether Chapter 13 plans may include such provisions absent explicit congressional authorization, and in terms of the desirability of including such provisions. The Article argues that the federal courts possess the power to decide the proper scope of Chapter 13 plans as a function of their power to formulate federal common law, notwithstanding the principles of *Erie R.R. v. Tompkins*.² Further, the domestic relations "exception" to federal jurisdiction does not warrant any inference that Congress intended to prevent federal courts from exercising their power to decide the issue. Having established the power of federal courts to decide whether a Chapter 13 plan may include family obligations, this Article will then address the merits of competing federal rules of decision. The choice of rule should be guided by the treatment accorded family support obligations in other bankruptcy contexts as well as by congressional intent in creating a bankruptcy proceeding in which an individual may repay part or all of his or her debts. The Article advocates formulation of a rule which allows past due spousal and child support to be included in Chapter 13 plans. Such a rule implements sound consumer bankruptcy policy by allowing persons otherwise eligible for Chapter 13 to repay not only the support creditor but also other secured and unsecured creditors.

As a means of examining the importance of this question in Chapter 13 proceedings, this Article begins by providing an overview of Chapter

* Associate Professor, McGeorge School of Law. The author wishes to thank her colleagues, Professor Julie A. Davies and Professor Kathleen Kelly, for their helpful comments and suggestions regarding this Article. The author gratefully acknowledges the research assistance of Brian Varner, McGeorge School of Law, Class of 1988.

1. The Bankruptcy Code, including Chapter 13, was enacted as part of the Bankruptcy Reform Act of 1978. Pub. L. 95-598, §§ 1301-1328, 92 Stat. 2645-51 (1978). The Bankruptcy Code, including Chapter 13, was significantly amended in 1984. Pub. L. 98-353, §§ 313-319, 524-33, 98 Stat. 355-57, 388-90 (1984). In 1986, Congress again amended the Code. Pub. L. 99-554, ___ Stat. ___ (1986). This Article discusses the current text of the Bankruptcy Code, including the 1984 and 1986 Amendments. Unless otherwise noted, all citations to the Code refer to 11 U.S.C. §§ 101-1330. (1982 & Supp. 1986).

2. 304 U.S. 64 (1938).

13 proceedings and a discussion of the cases in which the issue of the propriety of including payment provisions for support debts in Chapter 13 plans has arisen.

II. AN OVERVIEW OF CHAPTER 13

American consumer bankruptcy law has three fundamental purposes. The first is to give the honest debtor a "fresh start" by freeing him or her from pre-petition financial obligations.³ The second is to provide an equitable basis for the division of the debtor's assets among his or her creditors.⁴ The third purpose is to rehabilitate the financially troubled individual who is able to repay at least some portion of his or her debts.⁵

Chapter 7 consumer bankruptcy cases effectuate only the fresh start policy and the policy of equitable distribution of assets to creditors. In Chapter 13 cases, however, each purpose can be realized. Significant benefits inure to both the debtor and creditors through the financial rehabilitation of the debtor. As a result, it is not surprising that Congress viewed the "use of the bankruptcy law [to] be a last resort; [and] that if it is used, debtors should attempt repayment under Chapter 13."⁶ Congress created a number of incentives to encourage consumers in need of protection from creditors to file for relief under Chapter 13 rather than Chapter 7. Before examining these statutory inducements, a brief summary of Chapter 13 is in order.

In a Chapter 13 proceeding, an individual with regular income⁷ repays all or a percentage of pre-petition debts according to a court-approved repayment plan.⁸ The debtor usually makes the payments called for by

3. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

4. *E.g.*, *Sampsell v. Imperial Paper Corp.*, 313 U.S. 215, 219 n.15 (1941); *Peper v. Litton*, 308 U.S. 295, 307 (1939).

5. H.R. REP. NO. 595, 95th Cong., 1st Sess. 5, 116-118, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5966, 6076-78.

6. *Id.* at 118, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6078.

7. An "individual with regular income" is defined in 11 U.S.C. § 101(29) as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of this title, other than a stockbroker or a commodity broker." *See, e.g., In re Fiegi*, 61 Bankr. 994, 997 (Bankr. D. Or. 1986) (single annual payment to creditors under the plan is sufficiently stable at least where creditors agree to the annual payment); *In re King*, 9 Bankr. 376, 380 (Bankr. D. Or. 1981) (attorney who represented that his income fluctuated from month to month was an individual qualified to be a debtor under Chapter 13 plan); *In re Iaccovani*, 2 Bankr. 256, 260 (Bankr. C.D. Utah 1980) (welfare payments are sufficiently stable to qualify as regular income); *In re Hines*, 7 Bankr. 415, 418 (Bankr. D.S.D. 1980) ("[A] farmer qualifies as an individual with regular income where the farmer has an annual income from the farming business even though the future annual income is not readily ascertainable with any degree of certainty").

8. Only the debtor may file a plan. 11 U.S.C. § 1321. Court approval is conditioned on the debtor's compliance with the confirmation standards set forth in *id.* § 1325.

the plan from post-petition income.⁹ It is this repayment plan which distinguishes a Chapter 13 case from a consumer liquidation case under Chapter 7 and which accounts for the realization of the third purpose of American consumer bankruptcy legislation, rehabilitating financially troubled individuals. Unlike the Chapter 13 debtor, the Chapter 7 debtor does not attempt to repay all creditors. The Chapter 7 debtor is principally interested in the discharge of the debts owed these creditors.

Like Chapter 7, Chapter 13 facilitates a fresh start for individuals overburdened with debt through the discharge of pre-petition indebtedness.¹⁰ If the debtor successfully completes the plan, any debts not already paid in full through the plan are discharged.¹¹ Only child and spousal support and certain other long-term obligations for which the last payment is due after the plan is completed are not discharged when the debtor has successfully completed the plan.¹²

If unable to carry out the plan as originally approved by the court, the debtor has two options: the debtor may file a modified plan, perhaps reducing the amounts to be paid to creditors,¹³ or if modification is not practical, the debtor may obtain a "hardship" discharge.¹⁴ If the court finds that the debtor's failure to complete the plan is due to circumstances for which the debtor ought not be held accountable, and that the payments to unsecured creditors under the plan are not less than what they would have received in a Chapter 7 liquidation, the debtor can discharge those debts that would be dischargeable in a Chapter 7 proceeding.¹⁵

To encourage consumers to repay at least a portion of their obligations, Congress provided a number of advantages to the Chapter 13 debtor not accorded the Chapter 7 debtor. First, the Chapter 13 debtor remains in possession of all "property of the estate" except to the extent otherwise provided by the plan or the court order confirming the plan.¹⁶ In a Chapter 7 case, the trustee takes charge of non-exempt property of the estate, sells it and distributes the proceeds to creditors.¹⁷ In

9. The debtor's plan must provide for the submission of the portion of the debtor's future earnings necessary for the execution of the plan to the supervision of the trustee. *Id.* § 1322(a)(1). The debtor is required to commence payments proposed by the plan within 30 days after the plan is filed. *Id.* § 1326(a)(1). Confirmation of a Chapter 13 plan is conditioned on the debtor's ability to make all payments under the plan. *Id.* § 1325(a)(6).

10. Chapter 7 discharge is governed by *id.* §§ 523, 727.

11. *Id.* § 1328(a).

12. *Id.* § 1328(a)(1), (2) construed in *In re Foster*, 670 F.2d 478, 484 (5th Cir. 1982).

13. 11 U.S.C. § 1329(a). "The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved." *Id.* § 1329(b)(2).

14. *Id.* § 1328(b).

15. *Id.* § 1328(b), (c).

16. *Id.* § 1306(b).

17. *Id.* § 704.

Chapter 13, "property of the estate" includes not only all legal and equitable interests the debtor had in property at the time the Chapter 13 case was commenced, but also property acquired after the case is filed, including the debtor's post-petition wages.¹⁸ This property remains property of the estate at least until confirmation of the plan.¹⁹ On confirmation, all property of the estate is vested in the debtor unless the plan or the order of confirmation provides otherwise.²⁰ Post-petition property (including wages necessary for the support of the debtor) not devoted to the plan or submitted to the control and supervision of the Chapter 13 trustee as necessary for the execution of the plan does not constitute property of the estate.²¹ Distinctions between property of the estate and property of the debtor are important because they determine the scope and applicability of the automatic stay.²²

Greater protection from collection activity is also afforded by Chapter 13. The filing of a Chapter 13 case, like a Chapter 7 case, triggers an automatic stay of debt-collection actions against the debtor, the debtor's property, and property of the estate.²³ Only in the event of a Chapter 13 filing, however, is a stay of collection actions against individuals who are jointly liable with the debtor on consumer obligations imposed.²⁴ Furthermore, the automatic stay of acts against the debtor and the debtor's property remains in effect longer than in Chapter 7. Most collection efforts against the debtor and the debtor's property remain stayed until the plan is completed.²⁵ In addition, if a creditor's claim is provided

18. *Id.* §§ 541(a)(1), 1306(a).

19. *In re Sak*, 21 Bankr. 305, 307 (Bankr. E.D. N.Y. 1982) (confirmation of Chapter 13 plan vested all property not provided for in the plan in the debtor); *See In re Denn*, 37 Bankr. 33, 36 (Bankr. D. Minn. 1983) (garnishment of debtor's post-petition wages violated stay because Chapter 13 plan expressly vested post-petition wages in the estate).

20. 11 U.S.C. § 1327(b).

21. *In re Johnson*, 36 Bankr. 958, 959 (Bankr. D. Utah 1983) (seizure of debtor's tax return for child support debt not provided for under Chapter 13 plan did not violate automatic stay because tax return was property of the debtor and not property of the estate, since it was not devoted to the plan); *In re Adams*, 12 Bankr. 540, 543 (Bankr. D. Utah 1981) (upon confirmation of Chapter 13 plan former spouse permitted to proceed against debtor's wages for alimony in the amount of wages exceeding payments required under the plan and not devoted to funding the plan because such wages were the debtor's property and not property of the estate).

22. *See* 11 U.S.C. § 362(a), (b). *See infra* text accompanying notes 27-30.

23. 11 U.S.C. § 362(a).

24. *Id.* § 1301.

25. The stay of an act against property of the estate continues until the property is no longer property of the estate. *Id.* § 362(c)(1). The stay of actions against the debtor or the debtor's property continues until the earliest of the time the case is closed, dismissed, or a discharge is granted. *Id.* § 362(c)(2). In both Chapter 7 and Chapter 13 cases, the earliest of these three events is usually the discharge. In Chapter 13 cases, however, this can be as long as five years from the time the plan is confirmed. *See id.* § 1322(c).

for by the plan, the property of the estate vesting in the debtor on confirmation vests free and clear of any claim or interest of such creditor except as otherwise provided by the plan or the order confirming the plan.²⁶

An important exception to the automatic stay of collection actions benefits spousal and child support claimants. Actions to collect spousal and child support claims from the debtor's property (as opposed to property of the estate) are not stayed.²⁷ In a Chapter 7 case, the debtor's earnings after the petition is filed are considered property of the debtor rather than property of the estate.²⁸ This distinction allows the support claimant almost immediately to reach the Chapter 7 debtor's post-petition earnings in order to satisfy the support indebtedness. The operation of this exception to the automatic stay in a Chapter 13 case is more complex because the "debtor's property" generally consists of earnings not devoted to the plan payments which the debtor intends to devote

Creditors may also seek relief from the automatic stay for cause, including the lack of adequate protection of the creditor's interest in property. *Id.* § 362(d).

26. 11 U.S.C. § 1327(c) construed in *In re Mason*, 45 Bankr. 498, 500 (Bankr. D. Or. 1984), *aff'd* 51 Bankr. 548 (1985). *But see In re Dennis*, 31 Bankr. 128, 131 (Bankr. M.D. Ga. 1983).

27. 11 U.S.C. § 362(b)(2). *See supra* notes 19 and 21 and accompanying text. This exception has been interpreted by most courts to except only actions and proceedings to enforce monetary obligations for support, alimony and maintenance evidenced by an order for support entered before the bankruptcy case is filed. *See Amonte v. Amonte*, 17 Mass. App. 621, 461 N.E.2d 826, 830 (1984) ("collection" applies to proceedings and actions to collect domestic obligations where a final judgment adjudicating the obligation was entered prior to the filing of bankruptcy); *In re Murray*, 31 Bankr. 499, 501 (Bankr. E.D. Pa. 1983) (stay must be modified in order to permit debtor's wife to obtain an adjudication of the right to alimony and child support before § 362(b)(2) exception applies); *In re Garrison*, 5 Bankr. 256, 260-61 (Bankr. E.D. Mich. 1980) (state court decree fixing alimony and child support must precede bankruptcy court confirmation of a plan). *Contra In re Lovett*, 6 Bankr. 270, 272 (Bankr. D. Utah 1980) (entry of state court judgment for delinquent child support after bankruptcy filing was not stayed). Under the majority view all other family law actions, such as dissolution proceedings, actions in which an award of support is sought, or in which division of marital property is sought are stayed. *In re Shock*, 37 Bankr. 399 (Bankr. D.N.D. 1984) (stay prevented continuation of action to divide marital property); *Amonte v. Amonte*, 17 Mass. App. 621, 461 N.E.2d 826 (1984) (stay applied to proceedings to award alimony and support); *In re Murray*, 31 Bankr. 499, 502 (Bankr. E.D. Pa. 1983) (stay applied to action in which ex-spouse sought an adjudication of her rights to alimony and child support and division of marital realty); *In re Howard*, 27 Bankr. 894 (Bankr. W.D. Ky. 1983) (state court proceeding against debtor seeking an award of separate maintenance was automatically stayed); *Rogers v. Rogers*, 671 P.2d 160, 165 (Utah 1983) automatic stay applied to state court action seeking adjudication of alimony and child support); *In re Kaylor*, 25 Bankr. 394 (Bankr. M.D. Fla. 1982) (stay applied to an action seeking spousal and child support and division of marital property). *But see In re Flagg*, 17 Bankr. 677, 679 (Bankr. E.D. Pa. 1982) (divorce action not stayed).

28. 11 U.S.C. § 541(a)(6); *In re Hellums*, 772 F.2d 379 (7th Cir. 1985).

to living expenses.²⁹ The post-petition earnings devoted to making the plan payments remain property of the estate.³⁰ The scope of this exception in Chapter 13 is a key ingredient in an analysis of whether a debtor should be allowed to include past due support obligations in a Chapter 13 plan and is explored in detail later in this Article.

Another significant advantage of Chapter 13 lies in its broad discharge provisions. The discharge in a Chapter 13 case in which the plan has been completed is more comprehensive than a Chapter 7 discharge.³¹ This makes Chapter 13 decidedly more advantageous for individuals with debts which cannot be discharged in a Chapter 7 liquidation case.³²

To accommodate the diverse debtors — and their equally diverse debt structures — encouraged to file Chapter 13, it was necessary that Chapter 13 permit great flexibility in the formulation of a plan.³³ As a result, Congress enacted few mandatory plan provisions. The debtor's plan must only provide for full payment of all priority claims, provide that the debtor will submit the fraction of future wages to the supervision of the court necessary for making the payments called for by the plan, and, if the plan classifies claims, provide the same treatment for each claim within a particular class.³⁴

29. See *supra* text accompanying notes 19-21.

30. 11 U.S.C. §§ 1306(a)(2), 1327(b).

31. Compare *id.* § 523(a) with § 1328(a). See *supra* notes 10-12 and accompanying text.

32. See, e.g., *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 428-29 (6th Cir. 1982) (debts incurred through fraud or dishonesty which are nondischargeable in Chapter 7 may be discharged in Chapter 13); *In re Estus*, 695 F.2d 311, 314 n.5 (8th Cir. 1982) (student loans which are nondischargeable in Chapter 7 are dischargeable in Chapter 13).

33. "The bill permits great flexibility in the formulation of the plan. The only requirements are that the debtor pay all priority claims (mainly administrative expenses and certain taxes) in full, and submit such portion of his future earnings to the supervision of the court as is necessary for the execution of the plan." H.R. REP. NO. 595 *supra* note 5 at 123, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6084. "Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor. Section 1322 emphasizes that purpose by fixing a minimum of mandatory plan provisions." S. REP. NO. 989, 95th Cong. 2d Sess. 141 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5927.

34. 11 U.S.C. § 1322(a). By further requiring the full payment of allowed priority claims, mandating that general unsecured creditors receive at least what they would have received in a liquidation (the "best interests of creditors" test), and protecting the present value of secured creditors' interests in collateral, Chapter 13 insures an equitable division of the debtor's future assets among creditors. See *id.* § 1325(a)(4) and (5). In a Chapter 7 liquidation, an equitable basis for distributing the debtor's present rather than future assets is accomplished through the operation of the sections of the Code governing claim allowance (*id.* § 502), subordinating certain claims (*id.* § 510), defining property of the state (*id.* § 541), authorizing the avoidance of certain transfers and liens (*id.* §§ 544-549, 553), and dictating the order of distribution (*id.* §§ 724-726).

Similarly, Congress imposed relatively few barriers to court approval of a Chapter 13 plan. The few barriers Congress did impose insure that Chapter 13, rather than Chapter 7, serves the interests of both creditors and debtors. Creditors who hold allowed unsecured claims must receive at least as much as they would have received in a Chapter 7 liquidation.³⁵ Further, if the trustee or the holder of an allowed unsecured claim objects to confirmation, the plan must either propose to pay the claim in full or must devote all of the debtor's projected disposable income to plan payments for three years.³⁶ Unless they consent to different treatment, creditors holding allowed secured claims³⁷ must receive an amount equivalent to the value of their allowed secured claims.³⁸ From these confirmation requirements and the criterion that the debtor must be able to make all payments under the plan,³⁹ it is evident that not all consumer debtors can avail themselves of the advantageous relief afforded by Chapter 13.⁴⁰ For these consumers, only Chapter 7 can provide appropriate relief.

The stringency of Congress in structuring confirmation requirements is tempered by the minimal number of statutorily mandated plan provisions, thus assuring that Chapter 13 relief will not be restricted to a

35. *Id.* § 1325(a)(4).

36. *Id.* § 1325(b)(1). "Disposable income" is defined as income which is received by the debtor and which is not reasonably necessary to be expended:

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

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business. *Id.* § 1325(b)(2).

See generally Corish & Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47 (1986).

37. A secured claim is an "allowed" secured claim only to the extent of the value of the collateral securing the debt. If the claim is a recourse claim, the balance of the obligation is an "allowed" unsecured claim. 11 U.S.C. § 506(a).

38. *Id.* § 1325(a)(5)(B)(ii). A secured creditor must also be allowed to retain its lien. *Id.* § 1325(a)(5)(B)(i). Alternatively, the secured creditor may accept the plan or the debtor may surrender the property securing the allowed secured claim to the creditor. *Id.* § 1325(a)(5)(A),(C).

39. *Id.* § 1325(a)(6).

40. "The court will necessarily be required to consider the debtor's ability to meet his primary obligation to support his dependents, because otherwise the plan is unlikely to succeed. Moreover, it may force the debtor or his dependents to become a public charge, to the detriment of the debtor, his dependents, his creditors, and the public. If the debtor is able to meet his obligations, both under the plan and to his dependents, the court confirms the plan" H.R. REP. NO. 595, *supra* note 5, at 124 reprinted in 1978 U.S. CODE CONG. & AD. NEWS. at 6085. In addition, some debtors will not be eligible for relief under Chapter 13 because their debts exceed the maximum debt ceilings imposed by virtue of 11 U.S.C. § 109(e). Only individuals with noncontingent, liquidated unsecured debts of less than \$100,000 and noncontingent, liquidated secured debts of less than \$350,000 are eligible for Chapter 13.

narrow group of consumer debtors. This, together with the greater advantages of Chapter 13, implements Congress' stated goal of encouraging individuals to file for relief under Chapter 13 and of insuring that Chapter 7 liquidations are viewed as the bankruptcy proceeding of last resort.⁴¹ Arguments which seek to impose additional restrictions on plan provisions, debtor eligibility, or plan confirmation must be viewed from this vantage point in order to ensure implementation of congressional consumer bankruptcy policy.

III. THE CASE LAW

A number of federal courts have been asked to consider whether a Chapter 13 plan may properly include payment provisions for spousal and child support that is past due. The courts which have considered the question vary not only in the conclusions they reach but also in their analytical approach to the question. This section examines the cases in which a debtor has sought to include past due family support debts in a Chapter 13 plan.

The Fourth Circuit Court of Appeals held in *Caswell v. Lang*⁴² that past due child support obligations may not be included in a Chapter 13 plan.⁴³ In that case, the debtor filed a Chapter 13 plan in which he proposed to pay past due child support to his former wife.⁴⁴ The plan created two classes of unsecured creditors. One class consisted solely of the child support debt and the other included all other unsecured claims.⁴⁵ The

41. See *supra* text accompanying note 6. The congressional preference for Chapter 13 is also evidenced by 11 U.S.C. § 707(b) which authorizes the court, on its own motion, to dismiss a Chapter 7 case filed by an individual whose debts are primarily consumer debts if the court finds the Chapter 7 filing to be a substantial abuse. Furthermore, Official Bankruptcy Form 1 requires the debtor's attorney to declare that the debtor has been advised that he or she may proceed under either Chapter 7 or 13 of the Code.

42. 757 F.2d 608 (4th Cir. 1985).

43. *Id.* at 611.

44. *Id.* at 608.

45. *Id.* In *Caswell*, as well as in the other cases in which the debtor has attempted to pay past due support through a Chapter 13 plan, the obligation appears to have been unsecured. See *infra* notes 57, 62, 67-68. It is perfectly possible, however, for a spousal or child support obligation to be a secured debt. For example, in some jurisdictions a judgment automatically arises on the date a support payment is due and not made. See, e.g., ORE. REV. STAT. § 107.095(2) (1979); NEB. REV. STAT. § 42.371 (Supp. 1986). In these jurisdictions, a judgment lien on the debtor's real property located in the county where the support order was entered is also automatically created. *Id.*; ORE. REV. STAT. § 18.350 (Supp. 1986); NEB. REV. STAT. § 25-1504 (Reissue 1985). However it is obtained, a judgment lien, as well as an execution lien, gives the support creditor the status of a secured creditor in bankruptcy. 11 U.S.C. §§ 101(32); 506(a). The support claimant has an allowed secured claim to the extent the lien is not avoided and to the extent there is value in the property subject to the lien after deducting all secured claims with greater priority rights in the property. *Id.* § 506(a), (d). As states begin to comply with the federal 1984

plan proposed full repayment of the child support claim and 25 percent repayment of all other unsecured claims.⁴⁶

The bankruptcy court sustained the objection of the debtor's spouse to confirmation of the plan. The court reasoned that because the state has the exclusive authority to award child and spousal support, it would be an "unwise assumption of a jurisdiction for a federal court"⁴⁷ to include such claims in a Chapter 13 plan.⁴⁸ Including support debts in Chapter 13 plan would require the federal courts to "police child support" and perhaps "shelter a Chapter 13 debtor... from child support payments when due."⁴⁹

The debtor appealed the denial of confirmation to the district court.⁵⁰ The district court affirmed the order of the bankruptcy court and observed that Congress did not intend federal courts to "intervene directly with the remedies provided by the state courts."⁵¹

On appeal to the Fourth Circuit Court of Appeals, the debtor argued that past due child support debts should be included in a Chapter 13 plan to assure a comprehensive manner of dealing with debts.⁵² The Fourth Circuit rejected this argument and affirmed the district court's decision.⁵³ In support of its decision, the *Caswell* court cited a federal policy favoring exclusive state control over the collection of child support as well as a federal policy of non-interference with state court remedies in these matters.⁵⁴ The court perceived the inclusion of plan payment provisions for past due support obligations as "invit[ing] a federal bankruptcy court to alter or modify a state court decision regarding the payment and discharge of the overdue [support] debt."⁵⁵ In concluding that past due child support obligations may not be included in a Chapter 13 plan, the court observed: "[t]he state court's determination respecting the rights of the parties in those areas of state concern should not be disturbed by federal bankruptcy courts."⁵⁶

Child Support Enforcement Amendments to the Child Support Enforcement Program, pre-petition child and spousal support obligations are more likely to be secured claims. Pub. L. 93-647, 88 Stat. 233 (1975); Pub. L. 98-378, 98 Stat. 1305 (1984). (Codified at 42 U.S.C. §§ 651 *et. seq.*) (1982 & Supp. III 1985). This is because the 1984 Amendments require states to implement procedures to impose liens against real and personal property for amounts of overdue support. 42 U.S.C. § 666(a)(4) (Supp. III 1985).

46. *Caswell*, 757 F.2d at 608-09.

47. *Id.* at 609.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 610-11.

54. *Id.* at 610.

55. *Id.*

56. *Id.* at 611.

The *Caswell* case provided the rule of decision for a Colorado bankruptcy court in *In re McCray*.⁵⁷ The debtor proposed a Chapter 13 plan which separately classified a \$7,400 overdue child support debt and provided for its full payment plus 8 percent interest in installments.⁵⁸ Prior to confirmation, the debtor's ex-spouse moved the court for a declaration that the automatic stay did not apply to garnishment actions to collect child support from the debtor's post-petition earnings.⁵⁹ The court held that although the garnishment action was stayed because the debtor's post-petition wages remained property of the estate at least until confirmation of the plan, the automatic stay should be lifted on the ground that the support claimant was not adequately protected.⁶⁰ The support claimant could not be adequately protected because, the court ruled, a Chapter 13 plan may not provide for payment of the support debt.⁶¹

Both the *Caswell* and *McCray* decisions relied on *In re Garrison*⁶² in which the debtor sought to modify current and past due child support obligations by reducing monthly payments from \$25 to \$12 through his Chapter 13 plan.⁶³ The *Garrison* case is therefore factually distinguishable from the *Caswell* and *McCray* cases in which the debtors sought to repay support arrears in full.⁶⁴ The *Garrison* court held that the filing of a Chapter 13 petition does not stay the collection of alimony and child support where the state court decree fixing the obligation precedes an order confirming a Chapter 13 plan.⁶⁵ The court justified this ruling on the ground that Congress did not intend to convert the bankruptcy courts into domestic relations courts which would modify support obligations. The court suggested that if the debtor was unable to maintain a Chapter 13 plan under which dischargeable debts were paid while simultaneously complying with the state court ordered child support obligations, the debtor should file a Chapter 7 bankruptcy and rid himself or herself of the dischargeable obligations. In the court's view, the discharge of these debts through Chapter 7 would enable the debtor to pay child support obligations.⁶⁶

Debtors have successfully included past due family support obligations in Chapter 13 plans in a number of reported bankruptcy cases.

57. 62 Bankr. 11 (Bankr. D. Colo. 1986).

58. *Id.* at 12.

59. *Id.* at 11.

60. *Id.* at 12.

61. *Id.*

62. 5 Bankr. 256 (Bankr. E.D. Mich. 1980).

63. *Id.* at 260.

64. *Caswell*, 757 F.2d at 608; *McCray*, 62 Bankr. at 12.

65. *Garrison*, 5 Bankr. at 260-61.

66. *Id.* at 260.

In these cases the courts either squarely hold⁶⁷ or assume⁶⁸ that Chapter 13 plans may provide for repayment of obligations at least if repayment in full is proposed⁶⁹ or if other conditions are met.⁷⁰ However, these courts fail to articulate either a statutory basis or a policy-based rationale for their holdings. Instead, the courts flatly assert that such provision may be included in a Chapter 13 plan and, as such, their decisions fail to provide an effective source of reasoned opposition to *Caswell, McCray* and *Garrison*. The purpose of the next section is to articulate a reasoned statutory and policy basis for the inclusion of provisions in a Chapter 13 plan proposing repayment of spousal and child support arrearages.

IV. ANALYSIS

Because the Bankruptcy Code does not address the question of whether Chapter 13 plans may properly include payment provisions for past due support obligations, an answer must necessarily be provided by the federal courts, the only tribunals with jurisdiction over the matter.⁷¹ While federal courts ordinarily interpret federal statutes as a matter of course, some courts have expressed doubts about whether they possess the judicial power to supply a federal rule of decision.⁷² These reservations stem from the nexus between nondischargeable child support and alimony obligations and domestic relations — an area traditionally left to the states.

67. *Combs v. Combs*, 34 Bankr. 597 (Bankr. S.D. Ohio 1983) (spousal support arrearages may be included in Chapter 13 plan but confirmation denied because plan must propose that 100% repayment of past due and current support debts); *In re Sak*, 21 Bankr. 305 (Bankr. E.D.N.Y. 1982) (agrees with cases suggesting that plan may provide for 100% repayment of past due support); *In re Lanham*, 13 Bankr. 45 (Bankr. C.D. Ill. 1981) (past due child support claim for which full repayment within reasonable time is proposed is properly included in Chapter 13 plan).

68. *In re Stewart*, 52 Bankr. 281 (Bankr. W.D. N.Y. 1985) (assumes that Chapter 13 plan may provide for repayment of child support arrears but holds that an unsecured support claim may not be classified separately from other unsecured claims); *In re Moore*, 22 Bankr. 200 (Bankr. M.D. Fla. 1982) (denied ex-spouse's request to lift stay to enforce spousal support award against Chapter 13 debtor whose amended plan would propose full repayment of obligation); *In re Adams*, 12 Bankr. 540 (Bankr. D. Utah 1981) (best solution to dealing with the problem of support arrears is for Chapter 13 plan to provide for full payment of support obligation); *In re Curtis*, 2 Bankr. 43 (Bankr. W.D. Mo. 1979) (Chapter 13 plan which designated separate classification and 100% repayment of past due child support and 10% repayment of other unsecured claims did not unfairly discriminate between claims).

69. See note 67 *supra*.

70. *Stewart*, 52 Bankr. 281.

71. The federal district courts have original and exclusive jurisdiction of cases under title 11. 28 U.S.C. § 1334(a). The proper scope of a Chapter 13 plan is so closely related to the Chapter 13 case itself that it would seem that federal courts have exclusive jurisdiction over the issue.

72. See, e.g., *Caswell*, 757 F.2d 608.

This section examines and evaluates the validity of the contention that the federal courts cannot, or should not, supply a federal rule of decision regarding the inclusion of alimony and child support obligations in Chapter 13 plans.

A. *State Substantive Law and Federal Common Law*

The Supreme Court, in *Erie*,⁷³ laid to rest the notion that a grant of jurisdiction to federal courts carries with it the inherent power to displace state law. Even in non-diversity settings, federal courts do not have power to devise independent federal rules of decision in areas in which state law governs by its own force.⁷⁴

Bankruptcy jurisdiction exemplifies the *Erie* principle that the grant of federal jurisdiction over a case arising under the laws of the United States does not exclude operation of state law of its own force.⁷⁵ The clearest example of the simultaneous operation of federal and state law in bankruptcy arises in the context of property of the estate. Whether an asset is property of the bankruptcy estate is ultimately governed by federal law.⁷⁶ State law, however, identifies the nature, extent and other attributes of the asset because state law is the principal source of property rights.⁷⁷

In bankruptcy, as elsewhere, state and federal law do not always co-exist in a harmonious fashion. This is so whether the federal law is statutory or decisional in character. In a liquidation bankruptcy, for example, a federal system of equitable and collective distribution is superimposed on what are essentially state-created rights. In many states there are no statutory or decisional prohibitions against the debtor's preferential treatment of creditors. Federal bankruptcy law condemns preferential treatment of creditors and instead opts for a distributional policy of equality and equity.⁷⁸ State laws which conflict with this policy will not control due to the operation of the Supremacy Clause.⁷⁹ Since Congress has clearly manifested its intention that federal law should over-

73. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

74. *Garrett v. McCormack Co.*, 317 U.S. 239, 245 (1942); *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107 (1939).

75. See generally, Hill, *The Erie Doctrine In Bankruptcy*, 66 HARV. L. REV. 1013 (1952-53).

76. *In re Matto's, Inc.*, 9 Bankr. 89 (Bankr. E.D. Mich. 1981).

77. *Butner v. United States*, 440 U.S. 48, 55 (1979); *In re Golden Plan of California, Inc.*, 37 Bankr. 167, 169 (Bankr. E.D. Cal. 1984); *In re Langley*, 30 Bankr. 595 (Bankr. N.D. Ind. 1983).

78. 11 U.S.C. § 547.

79. *In re Elletson*, 193 F. 84, 87-89 (N.D. W. Va. 1912); *In re Hurst*, 188 F. 707, 709-11 (N.D. W. Va. 1911); *aff'd on other grounds*, 194 F. 830 (4th Cir. 1912), *appeal dismissed*, 232 U.S. 717 (1914).

ride state law by enacting a statute authorizing the avoidance of preferential transfers, it is easy to determine that notwithstanding *Erie*, federal law governs on the issue of preferences.⁸⁰

It is more difficult to conclude that *Erie* principles do not control the question of whether Chapter 13 plans may include payment provisions for support arrears because Congress has not expressly made known its intention on this issue through the enactment of express statutory language.

Although it is difficult to draw precisely the outer limits of federal judicial power to fashion federal common law in order to resolve all conceivable issues which might arise in the cases before the federal courts, certain kinds of questions clearly are within these borders. The principles of *Erie* do not extend to problems which bear significantly on established federal operations, or to areas heavily dominated by federal statutes.⁸¹ There is federal judicial power to declare the governing federal law in order to implement legislative powers committed to the federal government.⁸²

The Supreme Court's decision in *Clearfield Trust Co. v. United States*⁸³ addressed the role of federal common law in resolving an issue concerning recovery on a guaranty of prior endorsements. The Court said:

We agree with the Circuit Court of Appeals that the rule of *Erie R.R. Co. v. Tompkins* . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. . . . In [t]he absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. . . .⁸⁴

80. 11 U.S.C. § 547.

81. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797, 799 (1957). For a recent discussion of the federal courts' power to make federal common law see Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

82. Mishkin, *supra* note 81. The reverse of this proposition is that if Congress is devoid of power to legislate in areas reserved to the states by virtue of the Tenth Amendment, the federal courts necessarily lack the power to displace state law by supplying federal common law as the basis of decision. *Id.*

83. 318 U.S. 363 (1943).

84. *Id.* at 366-67.

Further, as Professor Mishkin has argued, the very constitutional structure of our federal government requires "recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."⁸⁵ Thus, if the source of a right or obligation at issue is federal, then federal judicial power exists to declare the characteristics of the right according to federal common law.⁸⁶ This is particularly true where the resolution of an issue will address an unanswered question regarding a right or obligation controlled by Congress.⁸⁷

Accordingly, there must be federal power to choose whether federal common law or state law, through federal incorporation, shall govern in the decision whether a Chapter 13 plan may properly include payment provisions for past due family support. The constitutional power to promulgate uniform laws on the subject of bankruptcies is a federal power.⁸⁸ In exercising this power, Congress created a bankruptcy proceeding in which consumer debtors may devise a plan to repay some or all of their debts. When questions regarding the propriety of particular Chapter 13 plans and plan provisions cannot be resolved by federal courts by reference to express statutory directive, there must be federal judicial power to decide, as a matter of federal common law, the propriety of particular Chapter 13 plan provisions in order to effectuate congressional intent in creating Chapter 13 proceedings. Only in this way can the federal bankruptcy power be fully implemented.

B. Federal Deference to the States in Domestic Relations Matters

Even if federal judicial power to resolve the dispute concerning the inclusion of family support debts in a Chapter 13 plan by formulating federal common law is acknowledged, some courts may believe that Congress did not intend the federal courts to exercise this power.⁸⁹ Arguably, Congress created Chapter 13 proceedings against a backdrop of federal non-involvement in domestic relations matters and this fact might militate in favor of deference to state law and policy.⁹⁰ Federal courts have long

85. Mishkin *supra* note 81, at 800.

86. *Supra*, notes 82-85 and accompanying text.

87. Mishkin, *supra* note 81, at 800.

88. U.S. CONST. art. I § 8 cl. 4.

89. The *Caswell* court obliquely suggested that it believed this to be the case by its reference to several of the Supreme Court's domestic relations exception cases. *Caswell*, 757 F.2d at 610.

90. For extensive analysis and criticism of the domestic relations exception to federal jurisdiction, see Atwood, *Domestic Relations Cases In Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L. J. 571 (1984); Vestal & Foster, *Implied Limitations in the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 23-31 (1956); Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search For Parameters*, 31 UCLA L. REV. 843 (1984).

refused to grant divorces, award spousal or child support, or determine rights to custody of children⁹¹ even though diversity jurisdiction may grant the court subject matter jurisdiction. Federal courts have also dismissed claims seeking enforcement of state decrees of spousal and child support,⁹² or dividing marital property,⁹³ and those alleging tortious interference with custody rights,⁹⁴ or alleging civil rights violations by state officials in child custody matters⁹⁵ despite the existence of diversity or federal question jurisdiction.

1. The Domestic Relations Exception

Dismissal of these claims results from an application of what has been termed the domestic relations "exception" to federal jurisdiction. Persuasive arguments have been made that this judicially created doctrine is not, strictly speaking, an "exception" to federal subject matter jurisdiction at all; rather, it is an abstention doctrine, a discretionary decision not to exercise federal jurisdiction over a broad spectrum of

91. *See, e.g.*, *Goins v. Goins*, 777 F.2d 1059 (5th Cir. 1985) (suit dismissed for lack of subject matter jurisdiction despite diversity where former spouse sought modification of child custody provision); *Brown v. Hammonds*, 747 F.2d 320, 322 (5th Cir. 1984) (diversity action to seek a declaration as to which state's divorce proceeding will be binding was dismissed for lack of subject matter jurisdiction notwithstanding diversity); *McCarty v. Hollis*, 120 F.2d 540 (10th Cir. 1941) (petition seeking declaratory judgment concerning marital status and an injunction against any further divorce proceedings, separate maintenance and division of property or, in the alternative, an annulment was dismissed as being "exclusively" within the realm of state jurisdiction).

92. *See, e.g.*, *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1218 (6th Cir. 1981) (suit seeking enforcement of past due alimony, child support, and property division dismissed for lack of jurisdiction); *Solomon v. Solomon*, 516 F.2d 1018, 1027 (3d Cir. 1975) (remanded for entry of order indicating lack of subject matter jurisdiction over suit for collection of past due child support); *Morris v. Morris*, 273 F.2d 678 (7th Cir. 1960) (action to collect alleged past due alimony and maintenance payments dismissed absent a final state court judgment).

93. *See, e.g.*, *Firestone*, 654 F.2d at 1212; *Robinson v. Robinson*, 523 F. Supp. 96, 99 (E.D. Pa. 1981) (spouse brought a breach of contract action, among other causes of action, to enforce a settlement agreement incident to a prior divorce. The court held that this cause of action merged into the divorce decree, thereby precluding the court from exercising jurisdiction); *Thrower v. Cox*, 425 F. Supp. 570, 574 (D. S.C. 1976) (action to enforce property settlement was "so completely permeated with domestic relations law that it can only be rationally and logically characterized as an action arising from that field.").

94. *See, e.g.*, *Cassburro v. Daher*, 569 F. Supp. 835, 836 (S.D. N.Y. 1983) (child custody disputes are peculiarly ill-suited for federal jurisdiction when a state court is available); *Kilduff v. Kilduff*, 473 F. Supp. 873, 874 (S.D. N.Y. 1979) (custody dispute labeled as "false imprisonment" not sufficient to bring the dispute within federal diversity jurisdiction).

95. *See, e.g.*, *Peterson v. Babbitt*, 708 F.2d 465 (9th Cir. 1983) (*per curiam*) (dismissing on grounds of abstention a 42 U.S.C. § 1983 action brought by a father denied visitation rights with his minor children by state authorities); *Denman v. Leady*, 479 F.2d 1097, 1098 (6th Cir. 1973) (*per curiam*) (the substance of this 42 U.S.C. § 1983 action is, "an intrafamily custody battle" ... and "[the] court has no jurisdiction...").

claims arising in a domestic relations context.⁹⁶ These distinctions aside, even the narrowest application of the doctrine by the lower courts uniformly results in the dismissal of divorce actions, actions to determine rights to spousal or child support, or to divide marital property where subject matter jurisdiction is based on diversity of citizenship.⁹⁷ The lower federal courts disagree as to the doctrine's applicability in cases where state court determinations of status and rights to property and support have already been made and the action seeks only enforcement of these decrees based on diversity jurisdiction.⁹⁸ Finally, the federal courts disagree about the applicability of the doctrine in federal question cases.⁹⁹

The domestic relations "exception" to federal jurisdiction does not compel any inference that Congress intended that federal courts refrain from exercising their power to fashion federal common law concerning the propriety of including support claims in Chapter 13 plans. The Supreme Court's domestic relations exception cases stand, at most, for the proposition that federal courts may not hear cases in which the parties seek a judicial determination of marital status and property based on diversity jurisdiction. The Supreme Court's decisions in no way negate the power of federal courts to properly exercise their jurisdiction to enforce support and property rights once the state court has resolved questions of status and entitlement to property.¹⁰⁰

The power and propriety of the exercise of federal jurisdiction to enforce support and property rights is evident when the actual holdings rather than the dicta of the Supreme Court's domestic relations deci-

96. Atwood, *supra* note 90, at 598-628.

97. *Supra* note 91.

98. See, e.g., *Solomon*, 516 F.2d at 1018 (diversity suit seeking to enforce contractual separation agreement dismissed for lack of subject matter jurisdiction). *But see* *Jagiella v. Jagiella*, 647 F.2d 561, 564 (5th Cir. 1981) (federal court had subject matter jurisdiction over past due alimony and child support claim based on diversity where damages sought were calculable and involved no litigation regarding the parties' marital relationship); *Firestone*, 654 F.2d at 1212.

99. See, e.g., *Peterson*, 708 F.2d 465 (*per curiam*) (dismissing on grounds of abstention, 42 U.S.C. § 1983 action brought by a father denied visitation rights with his minor children by state authorities; *Firestone*, 654 F.2d at 1215 ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained by a federal court"); *La Montagne v. La Montagne*, 394 F. Supp. 1159 (D. Mass. 1975) (42 U.S.C. § 1983 action was nothing more than a domestic relations case "dressed in constitutional clothing"). Others have found the domestic relations exception inapplicable in federal question cases. *Franks v. Smith*, 717 F.2d 183 (5th Cir. 1983) (federal question cases arising in domestic relations context should be treated in the same manner as all other federal question cases); *Kelser v. Anne Arundel County Dept. of Social Services*, 679 F.2d 1092 (4th Cir. 1982) (42 U.S.C. 1983 claim by mother against county department of social services held within jurisdiction of federal court).

100. *Supra* note 96.

sions are examined.¹⁰¹ In *Barber v. Barber*¹⁰² the Supreme Court upheld the district court's exercise of diversity jurisdiction to enforce an accrued alimony claim.¹⁰³ The Court's decision in *In re Burrus*,¹⁰⁴ frequently cited for the proposition that federal courts lack jurisdiction over domestic relations issues, held only that a federal habeas corpus petition, filed by a father in order to recover custody of his child from the child's grandfather, lacked the critical jurisdictional allegations.¹⁰⁵ The Court's decision in *Ohio ex rel. Poprovici v. Agler*¹⁰⁶ is similarly misunderstood as the Supreme Court's "first square holding" that the federal courts lack jurisdiction to entertain divorce and alimony actions.¹⁰⁷ The Supreme Court actually held only that the Ohio state court had jurisdiction in a divorce action against the vice-consul of Romania despite the constitutional provision for exclusive federal jurisdiction in suits against ambassadors.¹⁰⁸ This is scarcely a square holding that federal courts lack all jurisdiction over divorce cases.¹⁰⁹ The Supreme Court's more recent cases, with one exception,¹¹⁰ do not address the domestic relations exception.¹¹¹

2. Deference to the States as the Principal Source of Substantive Domestic Relations Law

101. For some inexplicable reason, few lower federal courts have focused on the holdings of these cases. See, e.g., *Robinson*, 523 F. Supp. at 97; *Thrower*, 425 F. Supp. at 571-72; *Solomon*, 516 F.2d at 1021-23.

102. 62 U.S. (21 How.) 582 (1859).

103. *Id.* at 591.

104. 136 U.S. 586 (1890).

105. *Id.* at 591, 593; *Atwood*, *supra* note 90, at 578-79.

106. 280 U.S. 379 (1930).

107. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1190 (2d ed. 1973). *Atwood*, *supra* note 90, at 583-84 n.86.

108. *Ohio ex rel. Poprovici v. Agler*, 280 U.S. at 383-84.

109. *Supra* note 91. The Supreme Court has consistently upheld the exercise of federal jurisdiction by territorial legislatures and courts in granting divorces and deciding related issues of rights to property. *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906) (territorial courts of Phillipines had jurisdiction to grant divorce and to make an award of marital property); *Simms v. Simms*, 175 U.S. 162, 167-88 (1899) (territorial assembly of Arizona had power to grant divorce); *Maynard v. Hill*, 125 U.S. 190, 209-10 (1888); (legislative divorce granted by territorial assembly of Oregon upheld).

110. In *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982) the Court held that the federal habeas corpus statute's "custody" requirement was not satisfied where a parent alleged that a state statute under which the state obtained custody of the parent's children was unconstitutional. *Id.* at 505-06, 510-11.

111. The Court has referred, however, to the important role played by the states in making the substantive law of domestic relations. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256 (1983); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *United States v. Yazell*, 382 U.S. 341, 352 (1966); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

Even if Supreme Court decisions do not preclude federal courts from exercising their judicial power to formulate a rule regarding inclusion of support and alimony in Chapter 13 plans, a failure to exercise such power could be based on the policy of deferring to the states in areas touching on domestic relations. The Supreme Court has often discussed the dominant role of the states in making substantive domestic relations law.¹¹² Such deference is in no way compromised by the exercise of federal judicial power to formulate rules regarding the inclusion of alimony and child support in Chapter 13 proceedings.

The Supreme Court's deference to the paramount role of state legislatures and state courts in making the substantive law of domestic relations dates from the period prior to the Court's decision in *Erie*.¹¹³ During the pre-*Erie* period, federal courts, under the authority of *Swift v. Tyson*,¹¹⁴ believed that they were authorized to fashion federal common law in diversity cases.¹¹⁵ The Supreme Court's deference to state dominance in domestic relations during that era may have been an effort to preserve the important role of the states in these matters despite the teachings of *Swift v. Tyson*.¹¹⁶

The advent of the *Erie* doctrine has eliminated the need for broad policy-based deference to state dominance in domestic relations. *Erie* protects the states' roles by requiring that state substantive domestic relations law be applied to resolve nearly all issues raised in cases in federal court based on diversity jurisdiction, and may in fact govern on many questions in cases based on federal question jurisdiction. *Erie* in no way affects the existence of federal jurisdiction or the power of federal courts to decide issues not governed by the *Erie* doctrine. Courts which continue to rely on pre-*Erie* dicta indicating that "the whole subject of domestic relations. . . belongs to the laws of the [s]tates and not to the laws of the United States. . .,"¹¹⁷ are ignoring the vast structural changes *Erie* instituted. The historical anomalies dating from the pre-*Erie* era are of no current assistance in the arduous task of determining whether state or federal common law governs the resolution of an issue with domestic relations overtones arising in a bankruptcy case.

3. Distinguishing Between Domestic Relations Issues Controlled by *Erie* and Those Which Are Bankruptcy Issues

112. *Id.*

113. *Erie*, 304 U.S. 64.

114. 41 U.S. (16 Pet.) 1 (1842).

115. See, e.g., *Black & White Taxicab Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910).

116. 41 U.S. (16 Pet.) 1. *Atwood*, *supra* note 90, at 591.

117. *Burrus*, 136 U.S. at 593-594.

The conceptual confusion regarding the exercise of judicial power to decide issues which touch on the topic of domestic relations pervades cases which involve bankruptcy jurisdiction as well as those involving diversity and federal question jurisdiction.¹¹⁸ Federal courts must begin to distinguish between the paramount role of the states in creating the substantive law governing marriage, divorce, custody, marital support and property and the power to apply federal common law to resolve federal bankruptcy issues only tangentially related to domestic relations law if they are to effectuate the policies of federal bankruptcy statutes.

The Fourth Circuit's decision in *Caswell v. Lang*¹¹⁹ is an example of analysis which fails to even consider whether judicial power exists to formulate federal common law on the issue of whether the scope of Chapter 13 plan provisions may embrace past due support. The court simply declared that "a federal court may not interfere with the remedies provided by a state court in these areas of particular state concern, provided, of course, that these remedies are constitutional."¹²⁰ The *Caswell* court observed that since Congress had not specifically provided that Chapter 13 plans could include past due support obligations, no federal rights or expectations were extinguished and no congressional policies were frustrated by the operation of state law. Hence, the court concluded, there was no Supremacy Clause question presented because there was no conflict with state law.¹²¹

Given the Fourth Circuit's lack of examination of the question whether the issue before it was appropriately decided as a matter of federal common law, the court's failure to find a conflict between state and federal law is not surprising. Rather than considering the possibility of a judicially-fashioned rule, the court searched the Bankruptcy Code for an express pronouncement of federal law and, finding none concluded that no Supremacy Clause issue existed and that state law must control.¹²² Such an analysis significantly subverts bankruptcy policy in that all questions not specifically governed by the Code are deemed to be controlled by state law. This perception of the controlling force of state law is not consistent with the recognized power of the federal courts to fill in the interstices of federal law.

Federal courts should and must determine their power to decide the proper reach of a Chapter 13 plan. If such an inquiry is undertaken, it is evident that the articulated rationales for the domestic relations exception are not persuasive evidence of a congressional intent to deprive

118. *Caswell*, 757 F.2d at 610.

119. *Id.*

120. *Id.*

121. *Id.* at n.3.

122. *Id.*

the federal courts of the power to decide the issue according to federal common law. Although the states have a strong interest in regulating family relations¹²³ and have developed special expertise in resolving domestic relations issues,¹²⁴ the issue of whether past due support may be included in a Chapter 13 plan is principally a federal bankruptcy issue and is not a domestic relations issue. Decision of the issue by federal courts requires no intrusion into the state law issues governing the entitlement of spouses or children to such awards. Apart from the analytical differences between the questions ordinarily presented in state domestic relations cases and bankruptcy cases touching these issues, it is important to recognize that federal courts are the only tribunals which can decide how state-awarded alimony and child support orders ought to be treated in a Chapter 13 case. Federal courts appear to have exclusive jurisdiction over the issue because of its intimate connection with the Chapter 13 case.¹²⁵ And even if they had jurisdiction to do so, state courts would have minimal expertise in resolving the issue.

In summary, neither the holdings of the Supreme Court's domestic relations exception cases nor the articulated rationales for federal non-involvement in domestic relations matters are persuasive evidence of a congressional intention to deprive the federal courts of the power to decide the proper scope of Chapter 13 plan provisions even though they affect state-imposed support obligations.

C. *The Search for a Federal Common Law Rule*

Because there is no state law which applies directly or may be used analogously on the subject of Chapter 13,¹²⁶ and the Constitution requires Congress to promulgate uniform laws on the subject of bankruptcies,¹²⁷ federal common law must be developed to decide the question of whether Chapter 13 plans may include payment provisions for spousal and child support arrearages. The choice of the particular federal common law rule of decision must be guided by the purposes of Congress in enacting Chapter 13 and its stated preference for financial rehabilitation of in-

123. See, e.g., *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978) (federal courts do not hear domestic relations matters due to the strong state interest in domestic relations matters and the competence of state courts in settling family disputes); *Solomon*, 516 F.2d at 1025 (rationale of domestic relations exception is premised on state courts' expertise in domestic relations cases and the states' strong interest in such matters).

124. *Id.*; *Atwood*, *supra*, note 90, at 598-600.

125. *Supra* note 71.

126. Because the federal courts have original and exclusive jurisdiction of all cases under 28 U.S.C. § 1334(a), no directly applicable state law on the issue of the proper scope of Chapter 13 plans or the confirmation of Chapter 13 plans exists.

127. U.S. CONST. art. I § 8 cl. 4.

128. See *supra* note 6 and accompanying text.

dividuals.¹²⁸ The substantive rule chosen should harmonize with the treatment of family support obligations in other bankruptcy contexts in order fully to effectuate Congress' underlying intent regarding the relative status of family support obligations in bankruptcy.

As these issues are addressed, consider the possible substantive rules which could be formulated. First, the rule chosen could prohibit the inclusion of past due support payment provisions in Chapter 13 plans. Alternatively, a rule might be formulated to allow Chapter 13 plans to include payment provisions for overdue support debts provided, of course, that the confirmation requirements of Chapter 13 are met. Several variations on this rule might be adopted at this juncture. For example, the rule might require Chapter 13 plans proposing repayment of unsecured support debts to propose repayment of general unsecured claims at the same rate and to the same extent. Alternatively, the rule might require that support claims be repaid in full and allow a lesser repayment of other dischargeable obligations. Finally, a hybrid approach might be adopted in which support claims are paid first and in full through the plan and other obligations paid thereafter either to the same or a lesser extent as the support debt.

1. The Treatment of Family Obligations in Bankruptcy

Congress has accorded special treatment to child support and spousal support claims by declaring those obligations to be nondischargeable in both Chapter 7 and Chapter 13 proceedings.¹²⁹ In so doing, however, Congress intruded into an area traditionally viewed as within the exclusive province of the states by conditioning nondischargeability on a finding that the obligations are truly in the nature of "support" rather than in the nature of a "property settlement" obligation.¹³⁰ The legislative history of the exception to discharge for family support indicates that Congress intended the determination of the status of the obligations to include more than an inquiry into the state law classification of the obligation: "What constitutes alimony, maintenance, or support, will be determined under bankruptcy law, not State law."¹³¹ Thus, Congress intended that the courts develop a body of federal family law for purposes of the determination of dischargeability rather than simply defer to the

129. 11 U.S.C. §§ 523(a)(5), 1328(a), (c).

130. 11 U.S.C. § 523(a)(5) provides in pertinent part:

A discharge . . . does not discharge an individual debtor from any debt - to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . but not to the extent that . . . (b) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of support. . . .

131. H.R. REP. NO. 595, *supra* note 5, at 364, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5865.

state law characterization of the obligation as "spousal support" or as a "property settlement."

Further evidence of congressional concern for the plight of the support claimant is the fact that, unlike the holders of other non-dischargeable claims, the holder of a support claim may look to the property claimed as exempt in the bankruptcy proceeding to satisfy the claim.¹³² This property may be levied on even before the debtor receives a discharge in Chapter 7, since the support claimant is not stayed from enforcing the claim against property which is not property of the estate.¹³³

The fact that support obligations are nondischargeable and are, under certain circumstances, immune from the effects of the automatic stay does not support the inference that Congress intended the interests of support claimants to eclipse the interests of all other creditors. To be sure, Congress intended that support claims enjoy better treatment in bankruptcy than dischargeable general unsecured claims. Yet Congress did not afford unsecured support claims superordinate treatment in bankruptcy, as is evidenced by the absence of priority status in distribution.¹³⁴

In addition, Congress treated family obligations less favorably than dischargeable claims in certain contexts. For example, bankruptcy generally accelerates the principal amount of all of the debtor's obligations. Thus, an obligation, whether secured or unsecured, which is unmaturing on the petition date is allowable in full except to the extent the claim is for unmaturing interest.¹³⁵ Nondischargeable support obligations are an exception to this general rule. A claim is not allowable to the extent it is for support which is unmaturing on the date of the filing of the petition.¹³⁶ This is significant because only holders of allowed claims may participate in a Chapter 7 distribution of the debtor's assets.¹³⁷ In the case of a fully secured claim, this participation takes the form of satisfying the claim from the property which secures the claim.¹³⁸ The secured support claim will be disallowed, and therefore unenforceable against the property securing the claim, to the extent it is unmaturing

132. 11 U.S.C. § 523(c)(1).

133. *Id.* § 362(b)(2). See also *supra* notes 20-22; 27-29 and accompanying text.

134. Many tax obligations are nondischargeable in Chapter 7 cases or in Chapter 13 cases in which the debtor receives a "hardship" discharge. *Id.* §§ 523(a)(1), 1328(c). Some of these nondischargeable tax debts are entitled to priority status in distribution. Compare *id.* § 523(a)(1) with § 507(a)(7).

135. 11 U.S.C. § 502(b)(1), (2).

136. *Id.* § 502(b)(5).

137. *Id.* § 726; Bankruptcy Rule 3009.

138. The secured creditor is able to satisfy the claim from this property after the automatic stay is lifted or dissolved pursuant to 11 U.S.C. § 362(c) or (d) and the trustee has abandoned or otherwise disposed of the property. See *id.* §§ 554, 725.

on the petition date. In the case of unsecured claims, this participation is confined to sharing *pro rata* in any assets available for distribution after the allowed claims of secured and priority creditors are paid and the debtor has claimed his or her exemptions.¹³⁹ An unsecured support claimant's participation in the distribution of the debtor's non-exempt assets is more limited than that of a general unsecured creditor whose claim was unmatured on the filing date because the unmatured, post-petition portion of the support claim will be disallowed. Accordingly, the unsecured support claimant's *pro rata* share in the debtor's non-exempt assets will be smaller because the claimant's allowable claim is smaller. Congress deliberately decreased the support claimant's *pro rata* share because it viewed the availability of the debtor's post-petition property to satisfy the nondischargeable post-petition claim as a sufficient remedy.¹⁴⁰

In decreasing the support claimant's *pro rata* share in distributions in liquidation bankruptcies, Congress implicitly balanced the support claimant's interests and post-bankruptcy remedies against the interests of creditors holding dischargeable, unmatured claims and against the debtor's interest in obtaining a fresh start. Congress concluded that the combination of nondischargeability status for both pre-petition and post-petition support obligations, the denial of immunity for assets exempted in the bankruptcy proceeding, and the potential availability of the debtor's post-petition property to satisfy the remaining support obligations accorded sufficient protection to the support claimant.¹⁴¹

At first blush, the disallowance of post-petition support obligations in Chapter 7 proceedings might seem to indicate that support debts should not be taken into account in Chapter 13. The legislative history, however, clearly indicates that the debtor's ability to support his or her dependents is an integral part of the court's determination whether a Chapter 13 plan is feasible.¹⁴² The plan should not be confirmed unless the debtor can remain current in post-petition alimony, maintenance, and support obligations using post-petition income while simultaneously maintaining the payments proposed by the plan.¹⁴³ These concerns are not present in Chapter 7 cases because the debtor does not attempt to repay most creditors from post-petition earnings and other property.

Further, by making pre-petition support debts fully allowable, Congress appears to have intended that those debts could be paid through

139. *Id.* § 726(b).

140. *See infra* note 141.

141. H.R. REP. NO. 595, *supra* note 5, at 353, *reprinted in* U.S. CONG. CODE & AD. NEWS at 6309.

142. *Id.* at 124, *reprinted in* U.S. CODE CONG. & AD. NEWS at 6085.

143. 5 COLLIER ON BANKRUPTCY § 1322.14[1] (15th ed. 1986).

a Chapter 13 plan. The discharge provisions of Chapter 13 support this inference. The only debts which may be discharged in Chapter 13 are those provided for by the plan or which have been disallowed.¹⁴⁴ In other words, if a Chapter 13 plan fails to include a claim in the plan, the claim cannot be discharged. If Congress had intended to prohibit Chapter 13 plans from including provisions concerning child and spousal support, it would not have been necessary to specifically except such debts from discharge under Chapter 13.¹⁴⁵

2. The Purpose and Texture of Chapter 13

The Bankruptcy Code's legislative history unambiguously indicates that Congress intended consumer debtors to file Chapter 7 liquidation cases only where rehabilitation under Chapter 13 is impossible.¹⁴⁶ Congress attempted to ensure that Chapter 13 proceedings would be the preferred method of dealing with financial over-extension. By making relief under Chapter 13 more advantageous than that available in Chapter 7, Congress created incentives for those contemplating bankruptcy to file for relief under Chapter 13.¹⁴⁷ By specifying a minimum number of

144. 11 U.S.C. § 1328(a), (c); *In re Doane*, 19 Bankr. 1009 (W.D. Va. 1982) (Chapter 13 discharge extends only to those debts included in the plan).

145. *Id.* § 1328(a)(2), (c)(2).

146. "The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under Chapter 13 . . . and finally whether the debtor uses Chapter 7 . . . or Chapter 13, . . . bankruptcy relief should be effective, and provide the debtor with a fresh start." H.R. REP. NO. 595, *supra* note 5, at 118 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6078-79. "Some consumer debtors are unable to avail themselves of the relief provided under Chapter 13. For these debtors, straight bankruptcy is the only remedy that will allow them to get out from under the debilitating effects of too much debt." *Id.* at 125, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6086.

147. Chapter 13 of proposed title 11, though derived in basic concept from chapter XIII of the present Bankruptcy Act, is new in many of its essential features. It gives the debtor more flexibility in the formulation of a plan; it defines the rights of creditors, especially secured creditors, more clearly than under current law; it is available to a wider class of debtors; it places limits on the length of time of a plan; and it relieves indirect pressure on the debtor through his friends or relatives by protecting non-ordinary-course co-debtors. The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement. During the repayment period, creditors may not harass the debtor or seek to collect their debts. They must receive payments only under the plan. This protection relieves the debtor from indirect and direct pressures from creditors, and enables him to support himself and his dependents while repaying his creditors at the same time. The benefit of the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under

mandatory Chapter 13 plan provisions,¹⁴⁸ Congress recognized that the financial difficulties in which individuals find themselves embroiled are as diverse as the individuals themselves.¹⁴⁹

The legislative history of Chapter 13 does not indicate that Congress intended to prohibit individuals with past due child or spousal support claims from including those obligations in the plan. The absence of a congressional prohibition against such plans is certainly not a conclusive indication that such plans are permissible. Nevertheless, the failure of Congress to provide specifically that Chapter 13 plans may include payment provisions for support claim is consistent with the overall statutory texture of Chapter 13. Congress' approach was not to designate which of the wide variety of debts owed by consumers could be dealt with through a plan. Instead, Congress specified the types of claims that must be treated in a particular fashion in Chapter 13.¹⁵⁰ For example, the statute does not expressly provide that the debtor may pay student loan obligations, nonpriority tax claims or other obligations which are non-dischargeable in a Chapter 7 case through the plan.¹⁵¹ Nonetheless, Chapter 13 plans proposing partial or full repayment of obligations which cannot be discharged in Chapter 7 have been confirmed.¹⁵² Furthermore,

chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

H.R. REP. NO. 595, *supra* note 5, at 118, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6079. *See also Caswell*, 757 F.2d at 610.

148. *See supra* note 33.

149. "The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances. As in current law, 100 per cent payment plans will be encouraged by the limitation of a subsequent discharge in section 727(a)(8). This kind of plan has provided great self-satisfaction and pride to those debtors who complete them and at the same time effect a maximum return to creditors." S. REP. NO. 989, *supra* note 33, at 113 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5799.

150. The plan must provide for the full payment, in deferred cash payments, of all priority claims unless the holder of a claim agrees to different treatment. 11 U.S.C. § 1322(a)(2). Under section 1322(b)(2) the plan may not modify the rights of a secured creditor secured only by a security interest in the debtor's principal residence. *Id.* § 1322(b)(2).

151. Nondischargeable tax claims are described in *id.* § 523(a)(1). Nondischargeable student loan obligations are described in *id.* § 523(a)(8).

152. *United States v. Reynolds*, 38 Bankr. 725 (W.D. Va. 1984) *aff'd*, 764 F.2d 1004 (4th Cir. 1985) (IRS retention of taxpayer's refund held to be a violation of the stay where

the Code does not even specifically provide that typical consumer obligations may be paid through a Chapter 13 plan. Obviously, plans containing such provisions are routinely confirmed.¹⁵³

Further evidence of congressional intent to allow pre-petition support debts to be paid through a Chapter 13 plan lies in the fact that matured pre-petition support obligations are defined as "claims."¹⁵⁴ Section 1322(b)(8)¹⁵⁵ provides that a Chapter 13 plan may "provide for the payment of all or part of a *claim* against the debtor from property of the estate or property of the debtor." (emphasis supplied). Congress did not exclude support "claims" from the operation of this section or from the operation of Section 502(b)¹⁵⁶ concerning claims and claim allowance. The inference, therefore, that Congress intended to allow pre-petition support debts to be repaid in a Chapter 13 proceeding is strong.

3. Selective Chapter 13 Plans

In light of the express affinity of Congress for Chapter 13, a federal common law rule tending to restrict the availability of relief to only select debtors should be avoided. A rule prohibiting plans which propose repayment of pre-petition child and spousal support claims does exactly that. Chapter 13 will be available to debtors with unpaid support obligations only in jurisdictions in which "selective" Chapter 13 plans can be confirmed.

debtor had provided for full repayment of the claim under Chapter 13 plan); *In re Frost*, 19 Bankr. 804 (Bankr. D. Kan. 1982) *rev'd on other grounds*, 47 Bankr. 961 (D. Kan. 1985) (under debtor's Chapter 13 plan, tax liens that were undersecured were voided, other nonpriority unsecured claims treated as all other unsecured claims); *In re Reese*, 38 Bankr. 681 (Bankr. E.D. N.Y. 1981) (student loans that are nondischargeable under Chapter 7 may be composed through a plan under Chapter 13); *In re Lambert*, 10 Bankr. 223 (Bankr. E.D. N.Y. 1981) (student loans that are nondischargeable in a Chapter 7 not a bar to Chapter 13 confirmation).

153. See, e.g., *In re Kitchen*, 64 Bankr. 452 (Bankr. D. Mont. 1986) (secured computer debt dischargeable in Chapter 13 plan); *In re Hoffman*, 63 Bankr. 737, 738-39 (Bankr. N.D. Ga. 1986) ("cram down" permitted of debtor's lease-purchase agreement of electric kitchen range).

154. "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . ." 11 U.S.C. § 101(4)(A). Only matured pre-petition support obligations are "allowed" claims. *Id.* § 502(b). See *supra* notes 135-37 and accompanying text.

155. *Id.* § 1322(b)(8). Since this section allows the debtor's plan to provide for the repayment of any "claim" rather than limiting repayment only to "allowable" claims, it might be argued that even post-petition, "disallowed" claims can be included in a Chapter 13 plan. This argument is beyond the scope of this Article. Certainly post-petition support is properly considered when determining the amount of the debtor's disposable income and plan feasibility. *Id.* § 1325(a)(6), (b).

156. *Id.* § 502(b).

A selective Chapter 13 plan includes only certain creditors' claims in the plan. Others are dealt with outside the plan.¹⁵⁷ Although there are no statutory criteria for determining when a claim has been "provided for" by a plan, the case law indicates that plan provisions dealing with a claim "provide for" that claim.¹⁵⁸

Some courts refuse to confirm selective Chapter 13 plans.¹⁵⁹ Others will approve a selective plan if the confirmation standards of Chapter 13 are met.¹⁶⁰ The most formidable confirmation hurdles for a selective Chapter 13 plan are those which require that the plan not discriminate unfairly,¹⁶¹ that it be proposed in good faith,¹⁶² and that the debtor be able to make all payments proposed by the plan.¹⁶³

For the debtor who must omit pre-petition support claims from treatment under the plan, the highest of these hurdles is plan feasibility.¹⁶⁴ In the classic selective Chapter 13 plan, omitted claims are likely to be treated preferentially in order to prevent omitted creditors from obtaining relief from the automatic stay.¹⁶⁵ Collection efforts by omitted creditors who have obtained relief from the stay will imperil a debtor's ability to make plan payments.¹⁶⁶ In the ideal selective Chapter 13 plan, actions to lift the automatic stay are rare because debtors neither omit claims that are in default nor default upon omitted claims.¹⁶⁷

The paradigmatic selective Chapter 13 plan presupposes a debtor who desires to omit certain debts from the plan.¹⁶⁸ If a rule prohibiting

157. See generally Dole, *Selective Chapter 13 Plans: A Permissible Use or A Prohibited Abuse of the Bankruptcy Code Following the 1984 Amendments?* 3 BANKR. DEV. J. 511 (1986).

158. *In re Gregory*, 705 F.2d 1118, 1120, 1122 (9th Cir. 1983) (plan which proposes repayment to unsecured creditors provides for claims of unsecured creditors); *In re Foster*, 670 F.2d 478, 489 (5th Cir. 1982) (plan which proposes that debtor rather than trustee make payments to mortgagee provides for mortgagee's claim); *In re Garcia*, 42 Bankr. 33, 35 (Bankr. D. Colo. 1984) (payments made "outside" a Chapter 13 plan as proposed by the plan are provided for by the plan).

159. See, e.g., *In re Stein*, 36 Bankr. 521, 522-24 (Bankr. M.D. Fla. 1983).

160. See, e.g., *In re Taddeo*, 685 F.2d 24 (2d Cir. 1982).

161. 11 U.S.C. § 1322(b)(1).

162. *Id.* § 1325(a)(3).

163. *Id.* § 1325(a)(6).

164. *Id.* Shortly before this Article was published, a Colorado bankruptcy court refused to confirm a Chapter 13 plan proposing repayment of past due child support outside the plan on precisely these grounds. See *In re Davidson*, 72 Bankr. 384, 390-91 (Bankr. D. Colo. 1987).

165. Dole, *supra* note 157, at 525.

166. Courts have lifted the automatic stay for creditors omitted from a Chapter 13 plan. See, e.g., *In re Rich*, 42 Bankr. 350, 351-54 (Bankr. D. Md. 1984) (affirming bankruptcy court's decision to lift the automatic stay for omitted judgment creditor); *In re Shahid*, 27 Bankr. 673, 674-75 (Bankr. S.D. Ohio 1982) (stay lifted on mortgagee's request when debtor failed to make current mortgage payments outside the plan).

167. Dole, *supra* note 157, at 517-18.

168. *Id.*

inclusion of support debts from a plan is adopted, the debtor with an overdue support debt must omit that debt from the plan. Thus, the debtor must omit a claim which is in default, for this is the very essence of a pre-petition support debt. The debtor will not necessarily be able to make payments large enough or quickly enough to satisfy the omitted support claimant.

Moreover, the support claimant, unlike the archetypical omitted creditor, need not first seek relief from the automatic stay before commencing collection activity directed against the debtor's property not devoted to making the plan payments.¹⁶⁹ Since the support claimant's debt is not provided for by the plan, and since the automatic stay does not stay efforts to collect spousal and child support from non-estate property, the omitted support claimant may jeopardize the debtor's ability to perform a confirmed plan. The unsecured support claimant will be able to garnish the portion of the debtor's post-petition income not devoted to making the plan payments and, if secured, to foreclose on the property securing the claim if it is not devoted to making plan payments. A considerable body of case law holds that the support claimant may seize property not devoted to making plan payments because on confirmation, all property not devoted to making the plan payments vests in the debtor and does not constitute property of the estate.¹⁷⁰ It is only where full payment of the support claim is provided for by the terms of a confirmed plan that the support claimant may not garnish the portion of the debtor's income not devoted to making plan payments.¹⁷¹ Thus, omitted spousal or child support claimants can im-

169. 11 U.S.C. §§ 362(b)(2), 1327(b). See *supra* notes 27-29 and accompanying text.

170. *Id.* See *supra* notes 18 and 22.

171. Only one court has squarely addressed the question of whether a support claimant whose claim will not be paid in full through a confirmed Chapter 13 plan will be allowed to garnish post-petition wages not devoted to making plan payments. In *In re Adams*, 12 Bankr. 540 (Bankr. D. Utah 1981) the issue was whether a spousal support claimant whose claim was not provided for under a confirmed plan could garnish the portion of the debtor's income not devoted to the plan payments without violating the automatic stay. The court ruled that the garnishment proceeding was not stayed under section 362(b)(2), because the property was not property of the estate. The court further held that because the support debt was not provided for by the plan the debtor's post-petition earnings did not vest in the debtor free and clear of the support claim under section 1327(c). *Adams*, at 543. Several courts that have assumed that Chapter 13 plans may, under certain circumstances, include payment provisions for past due support appear also to assume that the support claimant may not garnish the portion of the debtor's wages not devoted to making the plan payments since under section 1327(c) the debtor's post-petition wages vest in the debtor free and clear of the interests of any creditor whose claim is provided for by the plan. *Combs v. Combs*, 34 Bankr. 597 (Bankr. S.D. Ohio 1983); *In re Sak*, 21 Bankr. 305 (Bankr. E.D. N.Y. 1982); *In re Lanham*, 13 Bankr. 45 (Bankr. C.D. Ill. 1981); See also *In re McCray*, 62 Bankr. 11 (Bankr. D. Colo. 1986) (automatic stay lifted to allow support claimant to garnish debtor's wages characterized as property of the estate

peril the debtor's ability to make the payments proposed by the plan by garnishing the portion of the debtor's wages earmarked for the debtor's own living expenses, including post-petition support. Ironically, the omitted support claimant may thus divert the sums earmarked for the debtor's current support obligations for application to the pre-petition arrearage. Consequently, the debtor must divert the funds required to make the plan payments to pay living expenses. A failure to make the payments proposed by the plan, if material, constitutes grounds for dismissing the case or converting it to a Chapter 7 case.¹⁷²

Absent evidence that the debtor can pay the support claimant in full on confirmation or has negotiated a repayment schedule satisfactory to the support claimant, a selective Chapter 13 plan omitting pre-petition support claims cannot meet the feasibility standard of confirmation. As a result, Chapter 7 will be the only available bankruptcy proceeding for many otherwise eligible debtors. This cannot have been the result Congress intended.

4. The Alternatives

The problem of non-support is serious. The question is whether it is best addressed by narrowing the availability of Chapter 13 to those who are either current in their support obligations or who can make arrangements satisfactory to the support claimant in those jurisdictions in which selective Chapter 13 plans can be confirmed. For debtors who cannot meet these criteria, only relief under Chapter 7 is available. This means that the majority of their creditors' claims will be discharged, and that their creditors will receive, at most, pennies on the dollars owed them. The ultimate issue is whether the support claimant's legitimate interests are so compelling that the debtor's interests in attempting financial rehabilitation and the interest of creditors in receiving a greater distribution through a Chapter 13 plan should be extinguished.

One method of deciding this question is to examine the results of an affirmative response. If a Chapter 13 plan is unavailable to a debtor who owes past due child or spousal support, the debtor is likely to file a Chapter 7 bankruptcy case. Most consumer bankruptcy cases are "no asset" cases. This means that after secured claims are satisfied from the property securing the claims, and the debtor's exemptions are allowed, there are no assets to distribute to unsecured creditors. If the

because support claim could not be dealt with by the plan and, thus, claimant could not be adequately protected); *In re Johnson*, 36 Bankr. 958 (Bankr. D. Utah 1983) (post-petition tax refund could be seized by state and applied to past due, post-petition child support because refund was not property of the estate and Chapter 13 plan did not provide for payment of the claim).

172. 11 U.S.C. § 1307(c)(6).

support claim is an allowed secured claim, the support claimant will satisfy the claim by disposing of the property securing the claim. However, it also means that an unsecured support claimant and other unsecured creditors are unlikely to receive any payment on account of their claims. Unlike the unsecured support claimant, who may look both to exempt property and future assets to satisfy nondischargeable pre-petition and post-petition support claims,¹⁷³ the typical unsecured creditor holds a dischargeable debt. Such a creditor must be content with whatever distribution is made through the debtor's Chapter 7 case. Further attempts to collect the debt as a personal liability of the debtor are barred.¹⁷⁴

The alternative is to allow a debtor with sizeable unpaid support and other obligations to file a Chapter 13 petition and plan. The plan might classify separately general unsecured claims and, if unsecured, the support claim. The debtor might propose to pay the overdue support claim in full over three years and, as part of the Chapter 13 budget, to remain current in post-petition support payments. The plan might further propose to pay 25 percent of all other unsecured claims over three years. The plan might even propose that all plan payments would be applied first to the past due support debt and, when it was fully repaid, to the debtor's other obligations. For purposes of examining this scenario, we will assume that all of the debtor's projected disposable income is devoted to making these payments and that the plan is feasible and filed in good faith.¹⁷⁵

On considering a plan structured as described above, some would contend that the classification scheme is improper and that the plan unfairly discriminates between the unsecured support claim and other unsecured claims.¹⁷⁶ These arguments are unsupported by the Code. The Code requires only that the plan provide the same treatment for claims within a particular class if the plan classifies claims.¹⁷⁷ Only claims which are substantially similar may be classified together.¹⁷⁸ Any presumption that all general unsecured claims should be classified together and receive identical treatment should be overcome by a showing justifying separate

173. See, *supra* notes 19-21; 27-29; 164-65 and accompanying text.

174. 11 U.S.C. § 524(a).

175. Further assume that this amount is more than unsecured creditors would receive in a Chapter 7 distribution. *Id.* § 1325(a)(4).

176. *Id.* § 1322(b)(1). See, e.g., *In re Stewart*, 52 Bankr. 281 (Bankr. N.D. N.Y. 1985). See generally Anderson, *Classification of Claims and Interests in Reorganization Cases Under the New Bankruptcy Code*, 58 AM. BANKR. L. J. 99 (1984); Blair, *Classification of Unsecured Claims in Chapter 11 Reorganization*, 58 AM. BANKR. L. J. 197 (1984).

177. 11 U.S.C. § 1322(a)(3).

178. *Id.* §§ 1322(b)(1), 1122(a).

classification and differing treatment.¹⁷⁹ There are strong reasons for separately classifying and providing more favorable treatment for unsecured child and spousal support obligations. First, these obligations are non-dischargeable and, therefore, have a status higher than ordinary indebtedness.¹⁸⁰ Second, the debtor remains liable for any support obligation not paid through the plan.¹⁸¹ Third, federal bankruptcy policy can and should promote the prompt and full payment of support obligations just as federal law has done in other contexts.¹⁸² This is ample justification for separately classifying support and other unsecured debt and proposing 100 percent repayment of the support claim and a lesser repayment of dischargeable unsecured obligations.¹⁸³

If the support claim is fully secured, the debtor's plan would separately classify the claim and might propose full repayment over a three year period in installments with a present value equal to the claim.¹⁸⁴ In addition, the plan would propose that the support claimant retain the lien securing the claim.¹⁸⁵ As in the above scenario, the debtor would propose to remain current in post-petition support payments and to pay 25 percent of unsecured claims over three years. Again, we will assume that all of the debtor's projected income is devoted to making the proposed payments and that the plan is feasible and filed in good faith.¹⁸⁶

Arguments that the classification scheme is improper where the support claim is secured are patently invalid. It is well-recognized that the claims of secured creditors must be separately classified from those of unsecured creditors because their lien rights distinguish them from unsecured creditors.¹⁸⁷ As a result, the claims of secured and unsecured creditors are not "substantially similar."¹⁸⁸ Further, a secured creditor's

179. *In re Wolff*, 22 Bankr. 510, 511-12 (Bankr. App. 9th Cir. 1982) (*per curiam*) (debtor failed to justify differential treatment).

180. See 11 U.S.C. §§ 362(b)(2), 522(c)(1), 523(a)(5), 1328(a), (c).

181. *Id.* § 1328(a).

182. The 1984 Child Support Enforcement Amendments to the Child Support Enforcement Program evidence federal concern for the collection of both past due and current support obligations. Pub. L. 93-647, 88 Stat. 233 (1975); Pub. L. 98-378, 98 Stat. 1305 (1984). (Codified at 42 U.S.C. §§ 651 *et. seq.*). Similarly, federal consumer protection legislation authorizes a support creditor to garnish a greater percentage of the obligor's aggregate disposable income than that available to the obligor's other creditors. Compare 15 U.S.C. § 1673(a)(1) with 15 U.S.C. § 1673(b)(1)(A), (b)(2).

183. *In re Sak*, 21 Bankr. 305, 308 (Bankr. E.D. N.Y. 1982); *In re Lanham*, 13 Bankr. 45, 46 (Bankr. C.D. Ill. 1981); *In re Adams*, 12 Bankr. 540, 543 (Bankr. D. Utah 1981); *In re Curtis*, 2 Bankr. 43, 44 (Bankr. W.D. Mo. 1979); *In re Haag*, 3 Bankr. 649, 651 (Bankr. D. Or. 1980). *Contra In re Stewart*, 52 Bankr. 281, 283 (Bankr. W.D. N.Y. 1985).

184. 11 U.S.C. § 1325(a)(5)(B)(ii).

185. *Id.* § 1325(a)(5)(B)(i).

186. See *supra* note 175.

187. Anderson, *supra* note 176, at 117-19.

188. 11 U.S.C. § 1322(a)(3) - (b)(1).

claim is usually not classified with other secured claims even if the claims are secured by the same property, because the priority of the liens securing the claims is different. As a result, secured claims are nearly always classified separately.¹⁸⁹

The interests of the support claimant are better served through a Chapter 13 case than a Chapter 7 case because the plan proposes periodic payments on account of the pre-petition support claim and offers some assurance that post-petition support obligations will be paid in a timely manner. The survival of the support claim after a Chapter 7 liquidation does not automatically ensure payment of the arrearage or the current support obligation either through garnishment or even through the foreclosure of liens securing the claim. If the support claim is secured, the Chapter 7 trustee will not necessarily sell the property securing the claim and distribute the proceeds to the secured support claimant. The Chapter 7 trustee is more likely to abandon the property.¹⁹⁰ The secured support claimant must then foreclose on the lien pursuant to state law in order to satisfy the claim. The discharge of other obligations may enhance the collectibility of the support claim, but it does not operate as a collection mechanism. In Chapter 13, however, the trustee monitors the debtor's compliance with the plan and acts as a disbursing agent with respect to the payments made under the plan.¹⁹¹ This can be of great assistance to the support claimant by relieving him or her of the burdens of wage withholding, garnishment, or other collection mechanisms.

The interests of general unsecured creditors are also far better protected under Chapter 13 than under Chapter 7. The Chapter 13 plan offers these creditors the prospect of receiving a 25 percent recovery. A Chapter 7 offers the near certainty of a zero recovery.

Finally, Chapter 13 offers the debtor an opportunity to attempt financial rehabilitation and the moral satisfaction of repaying a portion of his or her dischargeable obligations. Chapter 13 offers the debtor the opportunity of repaying support obligations in a structured fashion, but only if they may be paid through the plan.

Considering the interests of the debtor, general unsecured creditors, and support claimants, it is clear that Chapter 13, and not Chapter 7, can best serve the interests of all parties to a consumer bankruptcy. Chapter 13 can fulfill this function, however, only if the debtor may include pre-petition support debts in the plan.

189. See *supra* note 187.

190. See *supra* note 138. This is particularly likely where there is little or no non-exempt equity in the property subject to the lien.

191. 11 U.S.C. §§ 1302(b)(4), (5), 1306(c), 1322(a)(2).

V. CONCLUSION

To encourage consumers to choose repayment under Chapter 13 rather than liquidation under Chapter 7, Congress made Chapter 13 relief more advantageous than relief under Chapter 7. Further, Congress specified only a minimum number of mandatory plan provisions and plan confirmation standards to enable a broad range of consumer debtors to obtain relief under Chapter 13. Unfortunately, courts which have held that a debtor may not include payment provisions for past due family support debts in a Chapter 13 plan have not sufficiently taken into account the congressional preference for Chapter 13 or the treatment of support obligations in other bankruptcy contexts. This analytical flaw is compounded by the failure to consider whether the question is properly decided as a matter of federal common law or whether state law must be applied under the principles of *Erie*. The question of the proper scope of a Chapter 13 plan is a federal bankruptcy issue and, therefore, federal judicial power exists to decide the question as a matter of federal common law. The domestic relations "exception" to federal jurisdiction does not compel any inference that Congress intended federal courts to refrain from exercising their power to fashion federal common law concerning the propriety of including support claims in Chapter 13 plans. Furthermore, deciding this question as a matter of federal common law does not compromise the paramount role of the states in creating the substantive law of domestic relations.

In fashioning a federal common law rule, federal courts should not unnecessarily restrict the availability of Chapter 13 to a narrow group of debtors. In addition, the substantive rule chosen should harmonize with the treatment afforded family support debts in other bankruptcy contexts. When these matters are considered, it is evident that only a federal common rule allowing pre-petition family support debts to be repaid through a Chapter 13 plan can fulfill the preference of Congress for Chapter 13 and best serve the interests of the debtor, support creditors, and the debtor's remaining creditors.