Testimony of

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I welcome the opportunity to discuss the effect the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" will have on the collection of child support and alimony when a support debtor has filed a petition for relief under the Bankruptcy Code. For the past 31 years I was employed as an attorney by the City and County of San Francisco, the last 28 of which was spent establishing and enforcing support obligations in the Family Support Bureau of the Office of the District Attorney. At the end of 2000 the Bureau became the Department of Child Support Services, an independent county agency operated in compliance with the federal child support program under Title IV-D of the Social Security Act. For the last 16 years I specialized in the collection of support during bankruptcy and have taught this subject to attorneys both in California and nationally. I have litigated bankruptcy support cases before the numerous bankruptcy courts, the district court for the Northern District of California, the Ninth Circuit Bankruptcy Appellate Panel, and the Ninth Circuit Court of Appeals. I retired from the service in San Francisco in 2004.

Seven years ago I proposed amendments to the Bankruptcy Code which were incorporated in bankruptcy reform legislation of the 105th, 106th, 107th and 108th Congresses. The original language of those amendments was subsequently refined in a collaborative effort between myself and other child support attorneys in coordination with the National Association of Attorneys General. These amendments were adopted pretty must verbatim in the bankruptcy reform conference reports of the 105th through the 108th Congresses and now appear in the current bill, S 256. It is my opinion, and the opinion of every professional support collector with whom I have discussed the issue, that the support amendments contained in Sections 211 through 219 of S 256 will revolutionize the enforcement of support obligations against debtors in bankruptcy. These enhancements will also result in a more efficient and economical use of attorney and court resources.
The support amendments have been endorsed by many individuals and organizations, including three national associations whose members consist of persons whose primary professional duty is the enforcement of support obligations in the federal child support enforcement program. These organizations include: the National Child Support Enforcement Association, the National Association of Attorneys General, and the National District Attorneys Association. In giving my testimony on this issue, I am authorized to speak on behalf of the National Child Support Enforcement Association. The membership of these organizations carries out the federal child support enforcement program in the states.

During the past 17 years in which I have taught the subject of support enforcement during bankruptcy, I have appeared continuously in bankruptcy court, written a manual for support attorneys to use when dealing with bankruptcy cases filed by support debtors, counseled support attorneys in handling bankruptcy cases , and have reviewed virtually every court opinion written on this subject since the enactment of the Bankruptcy code in 1978. Based on this experience, I developed, in association with my colleagues, what essentially became a "wish list" of amendments to the Bankruptcy Code aimed at facilitating support collection from bankruptcy debtors. This wish list is reflected in sections 211 - 214 and 216 - 217 of S 256. In this statement I will discuss not only how these amendment affect support debtors during bankruptcy, but what they mean in the larger context of support enforcement generally. Before discussing specific sections, I would like to comment on the overall effect of these amendments. I believe they

achieve the following: (1) a reduction in the need to appear in bankruptcy court and the consequential reduction in the cost and uncertainty of litigation; (2) a reduction in the current conflicts in law and policy between the Bankruptcy Code and the federal child support enforcement program [Social Security Act, Title IV-D]; (3) reasonable insurance that significant support enforcement mechanisms will not be frustrated by the bankruptcy process; and (4) a clear recognition of the policy that all generally recognized support debts are entitled to a preferential treatment in bankruptcy.

The most important amendment is found in section 214 which removes several significant collection remedies from the effect of the automatic stay. Of these, the most valuable by far, is a provision allowing the continued operation of an earnings withholding order for support as defined in the Social Security Act. [42 U.S.C. 666(b)]. Since state courts or administrative agencies have already determined the appropriate level of support and arrearage payment, the removal of withholding orders from the reach of the stay will require a support debtor to design his or her bankruptcy plan to accommodate support debts--the most serious and primary of all financial obligations. Under current bankruptcy law the reverse is true. The support creditor is often forced to take a back seat to ordinary commercial creditors when a support arrearage payment is sought in a bankruptcy case.

The importance of this amendment cannot be underestimated. Federal law requires all support to be paid by employees through wage withholding orders. Such orders account for the lion's share of support collection receipts. Under current bankruptcy law, when a debtor files for protection under Chapters 12 or 13, the collection of even ongoing support is stayed. The economic detriment to a debtor's family, which is not receiving public assistance, can be devastating. Surely sound public policy must recognize that there are some obligations which must be met, even when a debtor should be relieved from obligations to ordinary debtors. Of these, none can be greater than the payment of support needed for the health and welfare of the debtor's family.

All too often a domestic court may reduce the current support order to accommodate the payment of arrears. In such cases the total amount of payment through the assignment order may not only be helpful, but crucial, in providing for the daily needs of the debtor's spouse, former spouse, and children.

This amendment, therefore, not only insures that the payment of support by wage earners will not be interrupted by bankruptcy, it will also avoid the need to entangle the debtor's family in the bankruptcy process. Under current bankruptcy law the support creditors would have to seek relief from the automatic stay in bankruptcy court in order to re-institute the earnings withholding order and file a claim to collect arrearage debt from the bankruptcy trustee. And even if these procedures were performed by an attorney provided by federal the child support program, delays in support enforcement would be inevitable and the outcome unsure. For support creditors who cannot afford an attorney, receipt of support may simply cease.

In addition to the removal of the earnings withholding process from the automatic stay, other federally mandated collection processes would be exempt under section 214 of the bill. These include the interception of the debtor's income tax refunds to pay support arrears; the license revocation procedures for those debtors who are not paying support; the continued enforcement of medical support obligations; and the continued reporting of support delinquencies to credit reporting agencies.

Perhaps the second most important and useful amendment to the Code is found in section 213 of the bill which prevents a debtor from obtaining confirmation of a bankruptcy plan and a subsequent discharge if that debtor has not made full payment of all support first becoming due after the petition date. This section is significant for two reasons. First it will prevent a support debtor from paying other debts at the expense of familial obligations. And second, this provision is self-executing. Neither the support creditor, an attorney for the creditor, nor a public attorney will have to seek enforcement of this provision in bankruptcy court.

In addition this section allows a support creditor to seek dismissal of an ongoing plan at any time the debtor fails to pay the on-going support payment. These provisions working together, provide crucial check points at three stages in the bankruptcy process. At the earlier confirmation stage, the support debtor will be reminded that payment of all important current support obligation is a critical step in getting approval of a bankruptcy plan as well as the lesson that payment of this obligation is essential to financial rehabilitation. It will set an example for the debtor early in the bankruptcy process. Further, since the goal of the debtor is to obtain a discharge of debt, this debtor will, at the outset of his case, understand that the failure to meet continuing support obligations will also doom the prospects of discharge at the end of the bankruptcy process. Finally, the creditor will have the option to seek a dismissal of the case during the bankruptcy process if the support debtor ceases to honor payment of on-going support obligations.

Section 211 of S 256 provides a definition of support obligations. This definition is then incorporated in other areas of the Code. The purpose of this definitional addition is to streamline the provisions of the Code dealing with support debts and to give all debts generally recognized as deriving from support obligations similar treatment in the Code.

This provision will not necessarily change current law, but it will resolve many conflicting bankruptcy decisions which turn upon very technical interpretations of what a support debt is and what it might not be. Most significantly, highly arcane decisions concerning the dischargeability of such debts will be made moot and litigation over these issues minimized. Finally, support debts of all kinds will be subject to the same dischargeability, lien avoidance, and preference recovery rules.

Under current law only a lien securing unassigned support is exempted from statutory lien avoidance procedures. With the new definition of support in section 211, all support obligations will be excepted from lien avoidance procedures. Not only will this change protect the tax payer when the debt is assigned to the government, it may also benefit the support creditor/parent who assigned the debt if the debt becomes unassigned under the assignment rules established in the 1996 welfare reform legislation (the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 or PRWORA). For example, under current bankruptcy law if a support debtor files a Chapter 7 case when the support obligation has been assigned to the government under the Social Security Act, the bankruptcy court may rule that a lien securing this debt impairs the debtor's homestead exemption and then void it. The debtor would then be free to sell or encumber the property. If this property were the only known asset of the debtor, the debt would become uncollectible. If the support creditor then ceased receiving public assistance, that debt, now unassigned would likewise be uncollectible. However, under section 216 of S 256, the lien would not be removed and the support debt would remain secured and thus collectible.
Under current bankruptcy law if the debtor pays support during the 90 day period prior to filing a bankruptcy petition, the bankruptcy trustee cannot recover this payment for the benefit of the bankruptcy estate unless the debt is assigned. Under section 217 of S 256 the trustee would not be able to recover any support paid by the support debtor during the preference period. This rule significantly benefits the debtor because this debt is not dischargeable and would otherwise remain owing if the support debt were recovered for the estate as a preference.
No more significant statement of public policy has been made concerning the primacy of the payment of support debts than that found in section 212 of S 256. Here the Code provides child support with the first priority for payment of unsecured claims. This section is divided into two sub-priorities so that distribution within the child support priority will go first to the family of the debtor, then to the government after the family has been paid, if the support has been assigned.
When these proposed amendments are reviewed, it is not difficult to see why support enforcement professionals so strongly endorse them. Many of these amendments literally remove bankruptcy as an obstacle to support enforcement, and they do so in a self-executing manner. Consequently, no claims or stay litigation is required to continue the collection of a support debt when an earnings withholding order is feasible; no confirmation litigation is be needed when the debtor is not paying a postpetition preconfirmation support order; and no dismissal or stay relief litigation would be required to insure postpetition support is paid before a discharge may be granted.

Avoiding the necessity of litigation in bankruptcy court is important to support creditors and their attorneys. Even when a support creditor is financially able to hire a bankruptcy attorney, litigation of support issues in bankruptcy is likely to eat up large chunks of recoverable support. Most support creditors would be totally lost if required to navigate through the complex set of rules and procedures to seek relief in bankruptcy court without counsel. And government support attorneys are generally ill equipped to litigate bankruptcy issues and do not have the luxury of referring the case to bankruptcy specialists. After all, it should be remembered that the law of bankruptcy is a speciality with its own bar, judges, code, rules, procedures and, indeed, its own language.
Some criticism has been raised that bankruptcy reform would be detrimental to women and children because it would pit them against banks, credit card companies, or other financial institutions for collection of nondischarged credit card debt. Although this argument has some surface logic, no support collection professional that I know believes this concern to be serious. Of course, if support and credit card creditors were playing on a level field, banks with superior resources might have an advantage. However, nonbankruptcy law has so tilted the field in favor of support creditors that competition with financial institutions for the collection of post-discharge debts presents no problems for support collectors.

In the first place the ubiquitous earnings withholding process for support collection absolutely trumps any financial institution's attempt to collect this debt from the debtor's wages or salary since withholding orders have priority, no matter when issued or served. In most cases, if the support collection was 25% or more of the debtor's wages, the Consumer Credit Protection Act would lock out the financial institution from collection of its debt from the debtor's wages. Thus, with respect to creditors of wage earners, there is no conceivable way that the existence of postpetition credit card debt, dischargeable under current law, would adversely affect the collection of support.
Even when the debtor is not a wage earner, support creditors have numerous and highly significant advantages over

other creditors. While this list is certainly not exhaustive, support creditors have the following remedies not possessed by other creditors, and certainly not credit card or other financial creditors: (a) support debts are already reduced to judgments and have the advantages of court process to collect judgments; (b) tax intercept collection; (c) interception of unemployment benefits/worker compensation benefits; (d) free or low cost collection services by the government; (e) license revocation for nonpayment of support; (f) free or low cost interstate collection, including interstate wage withholding and interstate real property liens; (g) criminal prosecution or contempt actions; (h) no avoidance of judicial liens securing the support debt; (i) federal collection and prosecution for support debts; (j) denial of passports; (k) collection from otherwise protected sources: ERISA plans, trusts, and federal remuneration.

To say that these advantageous remedies will necessarily result in the collection of support is not possible. Many support debtors are actually quite skillful evaders of support obligations. These same people will probably be just as adept at avoiding collectors from financial institutions. The point to be made, however, is not that support debts will necessarily be collected after bankruptcy, but that the collection of support debt is in no way hampered simply because credit card debt has survived bankruptcy and financial institutions are going to attempt to collect it.

Some have argued that after bankruptcy a support debtor will be inclined to pay credit card debt to retain a credit card and not pay support. Of course, this argument assumes that after bankruptcy the debtor will find an institution willing to extend credit. Even if one did, it seems unlikely that retention of a credit card would be more important than retention of a driver's license, staying out of jail, or keeping a passport.

The bottom line as I see it in analyzing S 256 with respect to its effect on the collection of support is to note that the advantages explicit in the bill far outweigh any speculative concerns that some debtors might not pay support if they are left with credit card debt after bankruptcy. What concerns support collection professionals the most in carrying out their duties is not competition with financial institutions outside bankruptcy, but competition with other general creditors, including financial institutions, during bankruptcy. S 256 readjusts the relative strength of support creditors during the bankruptcy process, giving them meaningful, even crucial, assistance. The support provisions of this bill certainly justify the approval given them by virtually all of the national public child support collection organizations in this country.

In addition to these remarks I am also including my legislative analysis of the bill in order to address more detailed questions regarding the effect and legal underpinnings of S 256.