SOME ISSUES ARISING IN THE COLLISION OF BANKRUPTCY AND DIVORCE

Married couples can file a bankruptcy petition jointly. 11 U. S. C. §302(a). Each may file a petition separately, before or after the entry of a divorce decree. §301(a).

Each alternative may have a significant impact on the composition of the bankruptcy estate, the exemptions which may be claimed, the application of §524, and concerning the scope of a discharge. In some circumstances, the choice of filing jointly or individually may impact §523 and §727.

THE ESTATE IN A JOINT FILING AND IN AN INDIVIDUAL FILING BY A MARRIED PERSON

> [A bankruptcy estate] is comprised of ...
> (1) ... all legal or equitable interests of the debtor in property ...
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--
> (A) under the sole, equal, or joint management and control of the debtor; or
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

11 U.S.C. § 541(a)(1) and (2); *In re Hicks*, 300 B. R. 372, 376-377, 03.4 I.B.C.R. 210, 211-212 (Bankr. D. Idaho 2003)(Pappas, J.).

> If married individuals file separate bankruptcies, the
>
> bankruptcy estate of a married debtor filing an individual case would include, as of the petition date, all of his or her interest in separate property; all of his or her interest in any community property; and all of his or her spouse's interest in any community property subject to the parties' joint management and control. In the event a divorce action is pending, so long as a state court has not yet divided the couple's property, all community property of the spouses becomes property of the bankruptcy estate of the first spouse to file a petition. *Dumas [v. Mantle (In re Mantle)],* 153 F.3d [1082 (9th Cir. 1998)] at 1085 ("[A]ll community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate."). [Footnote omitted.] If the other spouse later files a petition, the bankruptcy estate would include only any community property acquired since the first spouse's bankruptcy filing, together with the filing spouse's

> separate property. 5 *Collier on Bankruptcy,* ¶ 541.13[2] at 541-81 (Alan N. Resnick & Henry J. Sommer, eds., 15 ed. rev.2004).

In re Bauer, 2005 WL 4705284 05.3 I.B.C.R. 60 (Bankr. D. Idaho 2005)(Pappas, (J), *citing In re Martell*, 05.2 I.B.C.R. 27 (Bankr. D. Idaho 2005). The division of the property by the state court, rather than the entry of a divorce decree, seems to control the composition of an estate in this situation. If the community property has been divided at the time of the bankruptcy filing, there is no longer "community" property to be part of the estate of the first to file.

In *Hicks,* married debtors filed a joint chapter 7. Mrs. Hicks had a separate asset, a claim against a former employer for discrimination. She objected to the use of proceeds of her separate asset to pay Mr. Hicks' separate debts. Analyzing Idaho's community property laws, Idaho Code §32-901 *et. seq.* and *Twin Falls Bank & Trust Company v. Holley*, 111 Idaho 349, 723 P.2d 893 (1986), the Court determined that the community assets were liable for debt incurred for the benefit of the community, and that the separate property of the spouse who incurs the debt is also subject to that creditor's claim. 300 B. R. at 376.

The Court ruled that, under Idaho community property law, the separate property of the spouse "is not subject to seizure to satisfy a debt incurred by the other spouse acting alone." *Id.* Idaho Code §§32-910 and 32-911 establish that separate property of each spouse is not liable for the debts of the other spouse, contracted before the marriage. Idaho Code §32-912 states that "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent." *See Hicks*, 03.4 I.B.C.R. at 211.

Hicks contains an analysis of sub-estates created when joint debtors' estates consist of both community property and separate property, as established by the distribution scheme of §726(c).[1] *Id.* Four sub-estates, corresponding to the four subsections of §726(c)(2)(A)-(D), are

---

[1] 11 U.S.C. § 726(c) provides:
Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:
(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.
(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

established by an individual filing. Six sub-estates are established by a joint filing. Sub-estate (A) and (D) are consolidated in a joint case. Each estate has a separate sub-estate (B) and (C). See *Hicks* and authorities cited in *Hicks* for a more detailed analysis of §726(c).

The Hicks' joint bankruptcy filing created two estates. §302. *In re Hicks*, 300 B. R. 377, 03.4 I.B.C.R. 211-212. While the two estates could be consolidated, if they are not, each estate is determined under §541. 300 B. R. at 378, 03.4 I.B.C.R. 211-212. Section 726(c) controls the distribution of funds of each estate when the estate contains community property. As to Mrs. Hicks' estate, the Court stated:

> Because Mrs. Hicks' estate contains community property, all the assets of her estate must be distributed as described in § 726(c). Under § 726(c), a debtor's separate property would be liable for payment of allowed administrative claims made in her case "as justice requires," 11 U.S.C. § 726(c)(1); for any allowed community claims, 11 U.S.C. § 726(c)(2)(C), (D); and for payment of any allowed claims flowing from her separate debts, 11 U.S.C. § 726(c)(2)(C). But § 726(c) does not allow a distribution of Ms. Hicks's separate property to holders of claims that are enforceable against only Mr. Hicks's separate property under state law. *Fitzgerald v. Crain* (*In re Crain*), 86 I.B.C.R. 224, 225 (Bankr. D. Idaho 1986) ("non-community debts other than [the debtor's] separate debts shall be denied by the Trustee."). [Footnote omitted.] Indeed, a creditor's claim that is enforceable against only Mr. Hicks's separate property (*i.e.,* his "separate debt") could be disallowed in Ms. Hicks's bankruptcy case because she is not legally obligated to pay such a claim under state law. *See* 11 U.S.C. § 502(b)(1) (instructing the court to disallow a claim that "is unenforceable against the debtor and property of the debtor, under any ... applicable law ....").

Hicks, 300 B. R. at 378-379.

However, if there is community debt, it appears that the separate assets of either could be used to pay community debt. *Id.* at 378. To the extent that there is community debt, a potential

---

> (A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.
> (B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.
> (C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.
> (D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

debtor who has separate property may consider whether any filing by that debtor should come after a divorce is finalized.

In *Twin Falls Bank & Trust Company v. Holley*, 111 Idaho 349, 723 P.2d 893 (1986), Twin Falls Bank & Trust attempted to collect a debt owed by Defendant Holley's ex-husband, and incurred during the course of the marriage. The Idaho Supreme Court noted that the difference between having a judgment against one married individual, or both married individuals, is the type of property that is subject to execution or attachment for the debt involved. 111 Idaho at 352, 723 P.2d at 896. In *Holley,* the bank's promissory note was signed by the Defendant's husband during the marriage. The Defendant, "not having signed the note, was not contractually liable for the debt evidenced by the promissory note; only [the ex-spouse,] John Holley signed and is liable for the note." *Id.*

The Court also acknowledged that while the debt was a "community debt," that does not "imply the existence of a "community debtor." The Court distinguished between separate legal entities such as a business partnership or corporation, and the marital community. *Id.* A creditor may enter into a creditor-debtor relationship with either member of the marital community, or with both members. The creditor would have such relationship only with the individuals who actually signed the contract creating a contractual obligation. *Id.* When either spouse "incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property. [citations omitted.]" *Id* at 353, 723 P.2d at 897.

The Court further held that, absent a contractual liability, a creditor may not proceed against community assets distributed to a former spouse pursuant to a divorce decree. *Id.* However, if the contractually liable spouse was not awarded sufficient community assets to satisfy a debt, the creditor holding that debt "may properly seek satisfaction for the debt from *community* property distributed to the other spouse." *Id.*[2]

[2] In dicta, the Idaho Court of Appeals, relying on *Holley* in *Lowry v. Ireland Bank,* 116 Idaho 708, 779 P.2d (Idaho APP.1989), reiterated that "the mere fact that Lowry's husband borrowed the money would not impose personal liability upon her as a spouse. Idaho's community property laws do not displace fundamental principals governing individual liability for a debt. Rather, they simply affect the property to which creditors may look for satisfaction of the debt. [citation omitted.] In the footnote, the Court of Appeals noted that "[p] resumably because Mrs. Lowry has no individual liability for the $5,600 loan, the bank has conceded that in oral argument that it can make no claim against any of her separate property." Fn.2, 116 Idaho at 713, 779 P.2d at 27.

For purposes of advising married individuals as to a joint or individual filing, considerations may include whether there are any community assets or community debt. For those marrying a second time, and/or not married for very long, there may be neither. If so, it would seem that the assets of each would constitute the separate bankruptcy estate of each. Those assets would then be used only to pay the separate debts of each debtor.

If there are community debts, and either party has separate assets, having the party who does not have separate assets file first discharges the first-filer's liability on those community debts. If the party with separate assets has not signed any contract for any of the community debt, that party may not need to file any bankruptcy. Alternatively, that party may finalize the divorce first, and then consider whether a bankruptcy filing is warranted.

If the party with separate assets does have contractual liability for some community debt, whether to file a bankruptcy separately, before a divorce, or after a divorce, may depend on whether that party can service the debt and the extent of assets to be protected.

For a creditor, the amount of assets, the nature of the assets as separate or community, and the size of the creditor's debt may be such as to warrant closer scrutiny. By excluding other creditors from sharing in a distribution, a creditor can increase its own distribution.

What happens if the divorce court has ordered the former spouse to pay any such debts? The only source of a former spouse' obligation is a court order, of which the community creditors may have no knowledge. If the spouse who incurred the community debt files a bankruptcy and discharges his or her contractual liability, will any of those creditors pursue the other spouse? If they do, will the divorce court order be sufficient to allow such a creditor to obtain a judgment or enforce a claim if the other spouse files a bankruptcy?

THE IMPACT OF INDIVIDUAL FILINGS BY A MARRIED COUPLE.

In *Bauer*, Brad and Wendy Bauer had separated and commenced, but not finalized, divorce proceedings. No property settlement agreement had been entered, and the parties were litigating whether a residence was Brad's separate property or community property.

Brad filed his bankruptcy petition, followed eleven minutes later by Wendy's petition. Each claimed a homestead exemption, Brad in bare ground which was his separate property, and

Wendy in a home that the two had shared as community property. Mr. Bauer had recorded a Declaration of Abandonment of Homestead, as to the home. Mrs. Bauer recorded a Declaration of Nonabandonment for the home. Mr. Bauer subsequently recorded a Declaration of Homestead in the bare ground. In their respective bankruptcies, each claimed a homestead exemption.

The Court determined that both parcels were assets of the first bankruptcy filed, Brad's. Sec. 541(a)(2). If the residence was Brad's separate property, or if it was community property, it was part of Brad's estate, because Brad filed first.

Brad had claimed the bare land as exempt. The Court overruled the trustee's objection to Brad's claim of a homestead exemption in the bare ground. That exemption was allowed.

Wendy had no real property in her estate in which to claim an exemption. Her claim of exemption was disallowed. *Accord In re Pixler*, 02.2 I.B.C.R. 87 (Bankr. D. Idaho 2002) (automobile which was community property was included in the bankruptcy estate of the first spouse to file, leaving no property interest in the automobile in the estate of the second spouse to file to be exempted).

Had the parties stipulated to a property settlement agreement which had been approved by the state court, and which awarded the home to Wendy, that home would have been part of Wendy's estate. However, unless the Bauers had finalized their divorce before filing, they would not be entitled to each claim a homestead exemption in separate properties.

ONLY THE FILING SPOUSE MAY CLAIM EXEMPTIONS, AND ONLY FOR HIMSELF OR HERSELF

A second consequence of a married individual filing a separate bankruptcy is the loss of exemptions which the spouse might have claimed under Title 11, Chapter 6. Most, although perhaps not all, exemptions under that title are provided to an individual. In a variety of cases, courts have held that where only one spouse files a bankruptcy petition, that debtor may claim only one set of exemptions in the assets which are included in the bankruptcy estate. All told, §11-605 provides for about $17,000 of potential exemptions for an individual. A joint filing allows each spouse to claim that set of exemptions, potentially protecting $34,000 of assets.

In re DeHaan, 02.1 I.B.C.R. 59, 2002 WL 471336 (Bankr. D. Idaho March 20, 2002) (Myers, J), the Court addressed whether a debtor who is married but files a separate bankruptcy

may assert exemptions for himself only, or for himself and his non-filing spouse. Relying on *Burman v. Homan (In re Homan)*, 112 BR 356, 359 (9th Cir. BAP 1989) and *Fitzgerald v. Clarke (In re Taylor-Clarke)*, 99.4 I.B.C.R. 164, the Court stated that the debtor spouse has the sole right to claim exemptions in community property. 02.1 I.B.C.R. at 62. The Court further ruled that, to the extent the applicable exemptions statutes provided that "an individual debtor" could claim exemptions, a married debtor filing alone may claim only his or her exemptions, and may not claim an exemption belonging to his non-debtor dependents, including a non-filing spouse. The Court decided that the bankruptcy code did not provide for a non-filing spouse to claim exemptions in a single spouse filing. *Cf. In re Perez*, 302 B.R. 661, 663 (Bankr. D. AZ 2005)(holding that a married debtor filing individually may assert exemptions allowed under state law, and, under Arizona law, may contract debts and otherwise act for the benefit of the community, including by asserting exemptions for a spouse.).

DOES EACH SPOUSE WANT TO RELY ON THE ACCURACY OF THE INFORMATION THE OTHER PROVIDES?

On the Declaration Concerning Debtor's Schedules, and on the signature page for the Statement of Financial Affairs, each debtor states under oath, under penalty of perjury, that all of the information is true and correct, to the best of their knowledge, information and belief. That means that all information required is supplied, and that the information supplied is accurate. If the parties are separated, they may not be able to state under oath, in a joint filing, that the information provided by the other is true, correct, complete and accurate. If the parties are engaged in an acrimonious split, neither may want to rely upon the information provided by the other. If the parties can not agree on a property division, to be entered by the Court dividing the property before any bankruptcy filing, either party may have to choose between (1) signing off on potentially inaccurate schedules and statements, (2) filing an individual bankruptcy preemptively to control the choice of exemptions, the accuracy of the information provided, and perhaps any pre-bankruptcy planning, or (3) losing that control to the other spouse.

In *Krommenhoek v Covino (In re Covino)*, 99.4 I.B.C.R. 138 (Bankr. D. Idaho 1999) (Myers, J.) the Court revoked the discharge of Mr. Covino on the basis of concealment of assets of the estate. It also addressed Mrs. Covino's role, and ultimately revoked her discharge too.

The Court relied upon the Ninth Circuit's decision in *Arm v. A. Lindsay Morrison, M.D., Inc. (In re Arm)*, 87 F.3d 1046 (9th Cir. 1996)

> that the indirect benefit to a debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person. *See In re Ashley*, 903 F.2d 599, 604 n.4 (9th Cir. 1990).

The Court found that:

> Florence signed the Statement of Affairs and Schedules and was obligated to know the truth of those assertions. While she was not at the first meeting, . . . her husband was testifying on behalf of both debtors. Even if she did not learn of this testimony until the March 1999 trial, when the tape and transcript were introduced as Plaintiff's exhibits, she knew of Peter's testimony in time to disavow any inaccuracy or error. She did not. And she either became involved with knowledge, or let herself be used, when the property was sold post-petition to Campbell.
>
> Once the Trustee presented a prima facie case, it was up to Florence to present evidence or explanation to show that she lacked knowledge of the improper conduct, to explain away the contrary indications from the evidence, and to show an absence of "knowing and fraudulent" intent. She did not do so. Florence did not testify as to her awareness, if any, about what Peter was doing. The Court was not provided an opportunity to gauge her credibility or lack thereof, or evaluate the extent of her knowledge of these various events.
>
> For these reasons and on this record, therefore, her discharge shall also be revoked.

99 I.B.C.R. at 145.

The courts are fond of saying that choices have consequences. The choice of filing a joint bankruptcy can have serious consequences if either debtor is at risk of having a discharge denied under §727.

Can a debtor protect himself or herself from the other's conduct by filing jointly, to get all exemptions possible, and then bifurcating their bankruptcy case into separate bankruptcies? *E.g. In re Monroe,* Slip Copy, 2007 WL 3022801 (Bankr. D. Mont. 2007). Bifurcation is the splitting of a joint case into two separate cases, each with its own case number and each treated as a separate case.

There is no explicit statutory authority for bifurcation. *In re Devers*, 759 F.2d 751 (9th Cir. 1985). Bifurcation is arguably implicit in the analysis of *Bauer* and other cases, that there are two estates created in a joint filing, and each is to be administered separately unless the court

orders consolidation. *Hicks*, *supra; Bauer, supra; In re Ross,* 1995 WL 495952 (Bankr. D. Idaho 1995)(Hagan, J.); *cf. In re Estrada,* 224 B.R. 132 (Bankr. S.D. Cal. 1998)(rejecting bifurcation as a remedy but noting at p. 136 that where debtors file a joint bankruptcy, either could convert to a case under a different chapter); *C.f. In re Yackley,* 03.1 I.B.C.R. at 84 (holding that "bifurcation" of a joint case into two individual bankruptcy cases would not enable the husband to claim an additional homestead exemption for himself).

By bifurcating, one debtor might well protect him/herself from any inappropriate conduct by the other joint debtor occurring after the bifurcation, so long of course as the debtor is not a party to that conduct. It might protect one debtor from being charged with the obligation to come forward with information about perjured testimony of the other, so long as the perjured testimony was not itself part of a scheme to cover up wrongdoing that both were involved with. However, if the debtor was simply distancing himself or herself because of the concern that the other would likely try to thwart the bankruptcy laws at some point, bifurcation might provide some protection.

SECTION 523 ACTIONS DETERMINING DISCHARGEABILITY.

Where one potential debtor, but not the debtor's spouse, may be at risk of a §523 action, filing a joint bankruptcy may result in both spouses having to defend that action. Courts have consistently stated that " 'a marital union alone, without a finding of a partnership or other agency relationship between spouses, cannot serve as a basis for imputing fraud from one spouse to the other.' *Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa)*, 258 B.R. 192, 198 (9th Cir. BAP 2001); *see also [Custer v Dobbs,)in re] Dobbs*, [115 B. R. 258] at 269 [(Bankr. D. Idaho 1990)]." *Wells Fargo Bank v. Covino (In re Covino)*, 04.3 I.B.C.R. 98, 105 (Bankr. D. Idaho 2004). That issue of course come sup when both joint debtors are defending a litigation, and one is claiming innocence.

A creditor may pursue a claim against the wrongdoer and name the spouse in the hope of turning up evidence later to support a claim against the spouse. The greater the likelihood of a 523(a) action, the more a married couple, particularly one on the verge of divorce, should consider not filing a joint bankruptcy. Rather than having to defend the innocent spouse, filing a

separate bankruptcy for each, or not filing a bankruptcy at all for the innocent spouse, may be advisable.

Alternatively, completing a divorce before the filing of a bankruptcy by either may avoid subjecting an innocent spouse to §523 litigation against an allegedly wrongdoing spouse.

THE IMPACT OF THE DISCHARGE OF COMMUNITY CLAIMS AND THE PROTECTION OF COMMUNITY ASSETS, AND EXCEPTIONS TO THAT PROTECTION UNDER §524(C) IF ONLY ONE SPOUSE FILES

Section 524 provides in relevant part:

> (a) A discharge in a case under this title–
> * * * *
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.
>
> (b) Subsection (a)(3) of this section does not apply if–
>
> (1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and
> (B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or
> (2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
> (B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

Section 524(a)(3) provides for the protection of community property that is acquired after the commencement of the case from any allowable community claim, with important exceptions. That protection essentially extends the benefit of a discharge to a non-filing spouse. *In re*

Kimmel, 378 B.R. 630, 636 (9th Cir. BAP 2007). A creditor could still seek a judgment against a non-filing spouse, if the creditor can establish that the non-filing spouse has liability to that creditor. However, that creditor could not execute on after-acquired community property. It would be limited to the non-filing spouse's separate non-exempt property.

The exceptions are stated in §524(b). First, there is no protection of community assets if the debtor's spouse has been a debtor in a bankruptcy case within the six years before the current debtor's case, and the court did not grant a discharge. Taking the phrase "did not grant a discharge" literally, the protections of §524(a)(3) are lost if the debtor's spouse filed a bankruptcy within six years, and then dismissed it, whether voluntarily or involuntarily. *E.g. Homan*, 112 B. R. 360, n. 2.

It would seem that Congress would have intended to say that the court "denied the debtor's spouse a discharge under section 727." Losing the benefit of §524(a)(3) because a debtor's spouse had previously tried and failed to reorganize in a chapter 11, 12 or 13, without any wrongdoing, does not seem to further any beneficial goal.

The protection of community property under §524(a)(3) does not extend to a community claim which is excepted under section 523, 1228(a)(1) or 1328(a)(1). The failure to timely pursue, or prevail on a 524 action against the debtor is fatal to a creditor's claim. Creditors receive notice of the bankruptcy and are on notice that they must act diligently to protect their rights.

Section 524(a)(3) also contains a trap for the unwary creditor. As the Ninth Circuit BAP stated in *Kimmel*, 378 B.R. at 636-637:

> We previously have noted in dictum that § 524(a)(3) can operate to provide nondebtor spouses with a de facto partial discharge of their separate debts by enjoining a creditor from attaching community property in which the nondebtor spouse has an interest:
>
> [A] nondebtor spouse in a community property state typically benefits from the discharge of the debtor spouse. According to Section 524(a)(3), after-acquired community property is protected by injunctions against collection efforts by those creditors who held allowable community claims at the time of filing. This is so even if the creditor claim is against only the nonbankruptcy spouse; the after-acquired community property is immune.

Burman v. Homan (In re Homan), 112 B.R. 356, 360 (9th Cir. BAP 1989) (citation omitted). In other words, the personal liability of a nondebtor spouse that survives the bankruptcy only can be enforced against property of the nondebtor spouse that is not community property.

Although the nondebtor spouse is not actually discharged of liability, the consequence of § 524(a)(3) is that the property that is vulnerable to judgment enforcement against a nondebtor spouse is diminished by the protection of after-acquired community property. Hence, a judgment creditor of the nondebtor spouse on a community claim loses the ability to collect from anything other than the judgment debtor's separate property.

There is also a temporal aspect to the § 524(a)(3) discharge injunction in the sense that it applies only so long as there is community property. Dissolution of the marriage or death of a spouse terminates the community, at which point after-acquired community property loses its § 524(a)(3) protection. 4 COLLIER ON BANKRUPTCY ¶ 524.02[3][c] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.2007).

None of this, however, means that nondischargeability concepts do not apply to community claims. If a debt on a community claim would be excepted from discharge in a bankruptcy of the nondebtor spouse, then § 523(a)(3) provides that a nondischargeability action directed at the nondebtor spouse can be initiated in order to establish an exception to the allowable community claims that are discharged. The operative statutory language provides that the protection of after-acquired community property from liability for a prepetition community claim does not apply when the claim "is excepted from discharge ... [or] would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a [hypothetical] case concerning the debtor's spouse commenced on the date of the filing of the petition...."11 U.S.C. § 524(a)(3).

Similarly, an objection to discharge may be focused on the nondebtor spouse. Under § 524(b)(2), if the court would not grant the nondebtor spouse a discharge in a hypothetical case filed on the date of the filing of the debtor spouse's petition, or if the nondebtor spouse has been denied a discharge within the preceding six years, then the community property discharge does not apply. 11 U.S.C. § 524(b)(2). [Footnote omitted.]

The net result is that §§ 524(a)(3) and 524(b)(2) combine to prevent a wrongdoer from hiding behind an innocent spouse's discharge, but correlatively require the innocent spouse in a community property state to bear some burden of responsibility for the wrongdoing spouse. 4 Collier on Bankruptcy ¶ 524.02 [3].

These provisions for nondischargeability and objection-to-discharge actions directed at the nondebtor spouse are, however, subject to a diligent creditor requirement. The failure by creditors to raise nondischargeability and discharge objection issues in a timely

manner in the case of the debtor spouse will allow the community property discharge to be effected.

If creditors are not diligent, as one commentator has explained, "the Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White." Alan Pedlar, *Community Property and the Bankruptcy Act of 1978,* 11 ST. MARY'S L.J. 349, 382 (1979); *cf. Gonzales v. Costanza (In re Costanza*), 151 B.R. 588, 590 (Bankr.D.N.M.1993) ("I would add: if [the Devil] does not treat her better than his creditors, [Snow White] will, by divorcing him, deny his discharge.").

CONCLUSION

All of these issues may be relevant to a decision by a debtor to file jointly or separately while married, or to delay a filing until after a divorce is finalized. Each choice has the potential for benefit, and for harm, to each spouse.

Randy French is a partner in the firm of Bauer and French. He graduated Boise State University in 1980 and the University of Idaho College of Law in December 1982, and was admitted to the Idaho State Bar in 1983. He clerked for the Hon. Jesse R. Walters, then the Chief Judge of the Idaho Court of Appeals, and for the Hon. Alfred C. Hagan, U. S. Bankruptcy Judge for the District of Idaho. He practices in the areas of bankruptcy and commercial litigation, in the U. S. Bankruptcy Court and the U. S. District Court for the District of Idaho, the Bankruptcy Appellate Panel, and the Ninth Circuit Court of Appeals, occasionally with some success. He has represented both debtors and creditors in consumer and business reorganizations and liquidations, and in adversary proceedings including issues involving dischargeability issues and contempt proceedings. He is also admitted to the U. S. Supreme Court.