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# THE EQUAL CREDIT OPPORTUNITY ACT'S SPOUSAL COSIGNATURE RULES AND COMMUNITY PROPERTY STATES: REGULATORY HAYWIRE

by  
Winnie F. Taylor\*

THE Equal Credit Opportunity Act (ECOA)<sup>1</sup> was enacted in October 1974 to prohibit discrimination in the credit granting process. As amended in 1976,<sup>2</sup> nine areas were carved out as impermissible bases of inquiry. These prohibited bases are sex, marital status, age, race, color, national origin, religion, receipt of public assistance income, and good faith exercise of rights under the Consumer Credit Protection Act.<sup>3</sup> Congress delegated authority to the Board of Governors of the Federal Reserve System to prescribe regulations to implement the Act,<sup>4</sup> and in accordance, the Board has promulgated Regulation B.<sup>5</sup>

Few of the compliance problems created by Regulation B are potentially as complex as those raised in community property states<sup>6</sup> by the regulation's spousal signature rules.<sup>7</sup> One Regulation B provision in particular

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1. Pub. L. No. 93-494, tit. V, § 503, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (1982)).

2. 15 U.S.C. § 1691 (1982).

3. *Id.* § 1691(a).

4. *Id.* § 1691(b).

5. 12 C.F.R. § 202 (1983).

6. Spousal cosignature problems in separate property states are beyond the scope of this Article.

7. Loeb, *Equal Credit/Equal Management: Spousal Signatures in Community Property States*, 34 PERS. FIN. L.Q. REP. 190 (1980). According to the Federal Reserve Bank of San Francisco: "The signature provisions of [Regulation B] are by far the most complicated and difficult to understand in the entire regulation. It is with the signature area we have had the most problems in achieving state member bank compliance . . . ." 9 WASHINGTON CREDIT LETTER, Sept. 26, 1983, at 3. Equal Credit Opportunity Act (ECOA) spousal cosignature problems have for years created difficulty for creditors. The ECOA enforcement agencies have indicated each year since 1977 that spousal cosignature violations are significantly high. For example, the Federal Reserve System (FRS), which enforces the ECOA for member banks, reported in 1977 that the inability of banks to understand and comply with limits on requests for spouses' signatures was a major problem involved in ECOA enforcement. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON THE EQUAL CREDIT OPPORTUNITY ACT FOR THE YEAR 1977, at 3 (1978) [herein-

has recently triggered considerable controversy. Under old Regulation B, this provision stated:

Where a married applicant applies for unsecured credit in a community property State, a creditor may request or require the signature of a non-applicant spouse if:

(i) The applicable State law denies the applicant power to manage

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after cited as 1977 REPORT]. Although the Federal Reserve Board made no statement concerning unlawful spousal cosignature requests, failure to comply with signature rules was cited in 1979 as a typical violation of examined banks. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON THE EQUAL CREDIT OPPORTUNITY ACT FOR THE YEAR 1979, at 3 (1980) [hereinafter cited as 1979 REPORT]. One of those banks had a "standard policy of requiring spouses of married borrowers to sign debt instruments on mortgage loan transactions." *Id.* at 4. Unlawful spousal signature requests were not among the most common violations cited by the FRS in its 1980 report; however, requiring cosigners on a prohibited basis was one of the serious violations identified in 1981. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON THE EQUAL CREDIT OPPORTUNITY ACT FOR THE YEAR 1981, at 7 (1982) [hereinafter cited as 1981 REPORT]; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON EQUAL CREDIT OPPORTUNITY ACT FOR THE YEAR 1980, at 2 (1981) [hereinafter cited as 1980 REPORT].

The Office of the Comptroller of the Currency (OCC), which enforces the ECOA for national banks, reported similar findings. In 1977 the OCC reported that 86% of reported substantive violations involved the "unlawful request for the signature of the non-applicant spouse and the denial of separate credit to married applicants." *See* 1977 REPORT, *supra*, at 8. In 1978 approximately 33% of violations concerned requests for spousal signatures or other cosignatures. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON THE EQUAL CREDIT OPPORTUNITY ACT FOR THE YEAR 1978, at 7 (1979) [hereinafter cited as 1978 REPORT]. In 1979 the OCC reported that unlawful requests for signatures constituted one of the "most frequently reported violations." 1979 REPORT, *supra*, at 10. Similarly, the 1980 Report commented that failure to observe prohibitions against requesting marital status information was one of the most frequently reported violations. *See* 1980 REPORT, *supra*, at 8.

The Federal Trade Commission (FTC) is responsible for enforcing the ECOA for all creditors not subject to the jurisdiction of any other enforcement agency (e.g., retail businesses, department stores, finance companies). In 1978 the FTC cited unlawful obtaining of spousal signatures as a frequently reported violation. *See* 1978 REPORT, *supra*, at 9. The 1979 FTC summary stated that improper requests for the signature of the applicant's spouse "persisted . . . particularly in sales finance and small loan industries." *See* 1979 REPORT, *supra*, at 6. The FTC's 1980 Report cited continuing compliance problems with signature regulations in these two markets. *See* 1980 REPORT, *supra*, at 6.

The National Credit Union Administration (NCUA) enforces the ECOA for federally chartered credit unions. Although no statistics are available on NCUA reported signature violations for either 1977 or 1978, the NCUA determined that improper signature requests were one of the most common violations of the 172 institutions examined in a one-month period ending Sept. 30, 1979. *See* 1979 REPORT, *supra*, at 7.

The Federal Home Loan Bank Board (FHLBB) enforces the ECOA for federally chartered savings and loan associations. Although the Board's 1977-1980 summaries do not contain specific data on signature rule infractions, the FHLBB's 1978 report stated that 25% of 211 consumer complaints charged sex/marital status discrimination. *See* 1978 REPORT, *supra*, at 4. Unlike most other enforcement agencies, the FHLBB determined in 1980 that Regulation B signature infractions did not constitute one of the three most common types of the 3000 violations it reported. *See* 1980 REPORT, *supra*, at 5.

While the FRS reports to Congress for the years 1977-1981 do not contain any violations of the spousal cosignature rules of Regulation B reported by the Small Business Administration, the Securities and Exchange Commission, the Interstate Commerce Commission, the Civil Aeronautics Board, the U.S. Department of Agriculture, or the Farm Credit Administration, the 1981 Report collectively cited all federal financial institutions' regulatory agencies as determining that spousal signature violations was one of the most common ECOA violations. *See* 1981 REPORT, *supra*, at 2-3.

or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to any community property.<sup>8</sup>

Regulation B as amended states the provision in this way:

(3) If a married applicant requests unsecured credit and resides in a community property State or if the property upon which the applicant is relying is located in such a State, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable State law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.<sup>9</sup>

At the hub of the controversy surrounding Regulation B, section 202.7(d)(3) is the question of whether lenders in community property states that allow each spouse to share equally in the management of community assets can require the signature of a non-applicant spouse when the other spouse applies for individual unsecured credit but is relying on the non-applicant spouse's income to repay the debt. Many creditors believe that Regulation B authorizes them to obtain both spouses' signatures in this instance. The Federal Reserve Board, however, has determined that Regulation B precludes creditors from obtaining the signature of the non-applicant spouse in these situations.<sup>10</sup> The answer to the spousal cosignature question depends largely on a determination of the proper intersection of the equal credit movement with a parallel reform inspired by the movement toward equal rights for women: the enactment of laws in community property states giving wives powers of management and control over community property equal to those of their husbands.<sup>11</sup>

This Article examines the community property spousal cosignature question. To facilitate an understanding of the complexity of this question, the Article begins with a brief history of community property systems in the United States, followed by an overview of a typical marital community. The Article then analyzes creditor arguments supporting acquisition of both spouses' signatures and counter-arguments to the creditor position, and examines the Federal Reserve Board's staff response to the creditor

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8. 12 C.F.R. § 202.7(b) (1976).

9. *Id.* § 202.7(d)(3) (1983).

10. Fed. Reserve Bd. Interpretative Letter No. 73 (May 28, 1982).

11. Loeb, *supra* note 7, at 190.

arguments. The Article concludes with a determination of the current status of the law in regard to spousal cosignatures in community property states and a recommendation for remedying its major deficiency.

## I. THE HISTORY OF COMMUNITY PROPERTY SYSTEMS IN THE UNITED STATES

Eight states<sup>12</sup> have marital property laws substantially different from the other forty-two.<sup>13</sup> These states use the community property system of defining marital property rights.<sup>14</sup> Community property law in the United States is a civil law system introduced into this country from Spain via Mexico and Spanish territorial possessions within the United States.<sup>15</sup>

Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington either continued the community property system without interruption after acquisition by the United States government or re-adopted it by statute after a brief period of abolition through the adoption of the general common law of England.<sup>16</sup> Several states originally governed by Spanish law, and therefore using the community property system, abandoned it and adopted the common law of England after coming under

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12. The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See ARIZ. REV. STAT. ANN. §§ 25-211 to -217 (1976); CAL. CIV. CODE §§ 5100-5137 (West 1983); IDAHO CODE §§ 32-901 to -920 (1963 & Supp. 1983); LA. CIV. CODE ANN. arts. 2334-2369 (West Supp. 1983); NEV. REV. STAT. §§ 123.010-.310 (1983); N.M. STAT. ANN. §§ 40-3-1 to -17 (1983); TEX. FAM. CODE ANN. §§ 5.01-.62 (Vernon 1975 & Supp. 1982-1983); WASH. REV. CODE ANN. §§ 26.16.010-.205 (1961 & Supp. 1983-1984). The Appendix compares the community property provisions of the eight states in detail.

13. These 42 states operate under the separate property system of defining marital property rights. This system considers all property to be held under individual title. I. LOEB, *THE LEGAL PROPERTY RELATIONS OF MARRIED PERSONS* 50, 51 (1900). Under early common law in the United States the husband gained exclusive control over all of the wife's property upon marriage. This included title to all the wife's personal property and exclusive control and management of, as well as a certain interest in, her real property. See Greene, *Comparison of the Property Aspects of the Community Property and Common Law Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 78 (1979). This extreme circumstance was altered by statute in the United States in the 1800s when all states adopted some form of the Married Women's Property Act. *Id.* at 79. This changed the character of marriage so that neither party acquired any right or interest in the other party's property by marriage. I. LOEB, *supra*, at 52. Both the wife and the husband retained control and administration over any property owned upon entering the marriage, as well as any property earned by the party's separate labors during the marriage. See Green, *supra*, at 90.

14. Community property is differentiated from the common law or separate property system by shared ownership of the property acquired during the marriage. The community property system provides for the joint and concurrent ownership of all property acquired during the marriage by the joint efforts of the spouses. See W. REPPY & W. DEFUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* 1-42 (1975); see also Bartke, *Marital Sharing—Why Not Do It by Contract?*, 67 GEO. L.J. 1131, 1134-35 (1979).

15. W. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* 70 (1943); cf. Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 TUL. L. REV. 77 (1979) (Louisiana community property system was taken both from French and Castilian sources). See generally W. REPPY & W. DEFUNIAK, *supra* note 14, at 1-42.

16. Greene, *supra* note 13, at 74.

the dominion of the United States Government.<sup>17</sup> Many of these states were originally part of the Louisiana Purchase and later the Northwest Territory, including Illinois, Indiana, Michigan, Ohio, and Wisconsin.<sup>18</sup> The Floridas, which included the present day states of Alabama, Florida, and Mississippi, also originally used the Spanish civil law community property system, but rejected it in favor of the English common law system after acquisition by the United States.<sup>19</sup>

Though the eight states mentioned above are the only states to adhere consistently to the community property system, Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania adopted it for a brief period prior to the Revenue Act of 1948 to gain available tax advantages. The statutes enacting these community property systems were repealed after the Revenue Act made them unnecessary for favorable tax treatment.<sup>20</sup>

## II. THE MARITAL COMMUNITY

A community property system is any system of defining marital property rights that recognizes common ownership of a part of the property of the married persons. A general community of property exists when the entire fortune of each of the married parties is considered community property.<sup>21</sup> A limited community exists when a general class of property, such as that owned by a party prior to the marriage, is excluded from the common ownership.<sup>22</sup> The United States community property states recognize a limited community property system, called a community of acquisitions, under which property acquired during the marriage by the parties is considered community property.<sup>23</sup> Separate property includes property owned by a spouse prior to marriage, property received during the marriage by gift, devise, or descent, and other property acquired by the spouse during the marriage that can be traced to property included in either of the first two classes.<sup>24</sup>

Until very recently,<sup>25</sup> community property law in the United States reflected the Spanish view that, except in unusual circumstances, the management and control of community property rested solely with the husband.<sup>26</sup> The husband had sole responsibility for the administration of

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17. W. DEFUNIAK, *supra* note 15, at 71.

18. *Id.* at 89, 92.

19. *Id.* at 89, 95.

20. Greene, *supra* note 13, at 71 n.2.

21. I. LOEB, *supra* note 13, at 50.

22. *Id.*

23. *Id.* at 68.

24. Greene, *supra* note 13, at 72-73.

25. Louisiana was the last state to amend its laws to provide for equal management and control of community property, having done so in 1980. See generally Bartke, *The Reform of the Community Property System of Louisiana—A Response to Its Critics*, 54 TUL. L. REV. 294 (1980); Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83 (1979); Comment, *The New Community of Acquets and Gains in Louisiana*, 26 MCGILL L.J. 320 (1981).

26. See Bartke, *Community Property Law Reform in the United States and in Canada—A Comparison and Critique*, 50 TUL. L. REV. 213, 218-26 (1976).

the common property and was the sole owner until the dissolution of the community.<sup>27</sup> In most instances, however, the wife was given the right to control and manage her separate property.<sup>28</sup> Presently most of the states have modified their community property laws to provide also for equal management of the common property.<sup>29</sup>

The community property system did not recognize the common law concept of coverture, by which the rights of the wife were consolidated with those of the husband.<sup>30</sup> It regarded the husband and wife as distinct and separate persons with separate rights and as capable of holding distinct and separate estates.<sup>31</sup> Originally, the community property system was intended to protect the wife from her husband by providing her with property rights that could not be taken away by the husband in any event.<sup>32</sup> The concept as developed in the United States, with the wife first gaining control over her separate property and then becoming an equal partner in the management of the common fund, gives the wife a share in the fruits of the marital partnership. This share provides a source of wealth on which she can rely, an important security since the wife is traditionally the non-wage earning spouse and would otherwise be totally dependent on her husband for her economic status.<sup>33</sup>

Commentators have said that the community property system most accurately reflects the modern trend toward viewing marriage as a partnership<sup>34</sup> and is therefore superior to the common law theory of marital property.<sup>35</sup> Viewed from the partnership perspective, the community prop-

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27. G. MCKAY, A COMMENTARY ON THE LAW OF COMMUNITY PROPERTY 39-41 (1910).

28. *Id.*

29. Greene, *supra* note 13, at 88-89.

30. R. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANCIAL SYSTEM 4 (1895).

31. *Id.*

32. G. MCKAY, *supra* note 27, at 49.

33. Greene, *supra* note 13, at 82-83.

34. See generally W. REPPY & W. DEFUNIAK, *supra* note 14, at 37-40.

35. *Id.* Several distinctions between the two systems support this claim of superiority. One distinction is the nature of the interest the non-acquiring spouse has in the accumulation of wealth during the marriage. See Greene, *supra* note 13, at 87. Under the community system the non-acquiring spouse has a vested present ownership interest in one-half of the community property. *Id.* Under the common law separate property system, the non-acquiring spouse has no vested present interest. Instead the spouse has at best an inchoate expectancy interest that will vest at the termination of the marriage. *Id.* This can affect the creditworthiness of the non-wage-earning spouse. Under the community property system this spouse is the present owner of an interest in the common property and has the power of management and control, and so can use it to support her credit qualifications. *Id.* at 89.

Another distinction is the responsibility of each spouse for his or her own debts as well as the debts of the other spouse. The community property states vary in their treatment of obligations assumed by the spouses during the marriage. *Id.* at 94. In Arizona, for example, creditors of debts incurred as a benefit to the community can reach the entire interest of both spouses in the community as well as the separate property of the contracting spouse. *Id.* at 94-95. Creditors holding debts that do not benefit the community can reach only the separate property of the contracting spouse. *Id.* at 95. The presumption is, however, that debts created during the marriage are communal. *Id.* In California no distinction exists between separate and community debts. *Id.* All debts created during the marriage are obligations of the entire community property. *Id.* The separate property of the contracting spouse is also liable for the obligations. *Id.* at 96. In Texas there is also no distinction between separate

erty system efficiently regulates property rights and conduct of the spouses.<sup>36</sup> Additionally, the community property system grants a distinctive form of concurrent ownership<sup>37</sup> that provides for the marital sharing of property acquired during the marriage.<sup>38</sup> The characterization of the property acquired therefore takes on a significant meaning in the community property states.<sup>39</sup> Likewise, the concept of equal management and control<sup>40</sup> of the community property is critical both to interspousal property rights and to the rights of third parties such as creditors.<sup>41</sup>

### III. SPOUSAL COSIGNATURE CONTROVERSY

The current controversy regarding spousal cosignatures in community property states can be traced to a 1976 Federal Reserve Board interpretative letter.<sup>42</sup> Subsequent to the 1976 Regulation B revisions, the Board was asked whether a creditor may continue to require the signature of the ap-

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and community debts; the community property subject to the control of the contracting spouse, plus the separate property of the contracting spouse, is liable for any obligation incurred by that spouse during the marriage. *Id.* In the common law separate property jurisdictions neither the husband's nor the wife's separate property is liable for the other's debts. Necessaries purchased by the wife or children on credit may be an exception, however, as the husband's separate property may be reached to satisfy these obligations. *Id.* at 97.

There is also a distinction between distribution of the marital assets upon dissolution in community property versus separate property states. In a community property state, upon dissolution, each spouse retains ownership of his or her separate property and only the community property is divided. It is not necessarily divided equally under all state law, however. In some states the distribution of the community is determined according to equitable considerations. *Id.* at 97-98. In separate property states one spouse may receive an interest in the other spouse's property owned at the time of the marriage or acquired by gift, devise, or descent, as part of the equitable distribution of the parties' assets upon dissolution. *Id.* at 86.

36. W. REPPY & W. DEFUNIAK, *supra* note 14, at 13-15.

37. See Bartke, *supra* note 14, at 1135.

38. *Id.*

39. Whether property is considered community or separate property depends both on the time of purchase and the intent of the parties at the time of acquisition. See, e.g., *Callo-way v. Downie*, 195 Cal. App. 2d 348, 15 Cal. Rptr. 747 (1961); *In re Kalben's Estate*, 127 Cal. App. 2d 302, 273 P.2d 693 (1954) (intention of parties rather than form of conveyance determines whether property is community property). This question is discussed in greater detail later in this Article. One area of particular confusion concerns acquisition of property through credit arrangement. For an in-depth discussion of this aspect of community property law, see Young, *Community Property Classification of Credit Acquisitions in California: Law Without Logic?*, 17 CAL. W.L. REV. 173 (1981).

The characterization of the property is of primary importance when deciding whether the property is to be managed under equal management and control, sole management, or "dual management." See W. REPPY & W. DEFUNIAK, *supra* note 14, at 296-360.

40. The phrase "equal management and control" is generally defined to mean that either spouse may control, manage, dispose of, or bind the community without the consent of the other. Each "equal management" state, however, does employ slightly different language and all impose limitations on the application of this power. Such limitations include joinder of the marital parties for certain transactions, sometimes referred to as "dual management." See generally *id.* The Appendix to this Article, *infra*, contains a detailed comparison of equal management provisions in community property states.

41. See W. REPPY & W. DEFUNIAK, *supra* note 14, at 361-408. Note, however, that the laws in Louisiana, Nevada, and Texas have changed since the publication of this text. These changes are addressed later in this Article.

42. Fed. Reserve Bd. Interpretative Letter No. 4 (July 23, 1976).



plicant spouse. Noting that creditors in community property states were particularly concerned over the possibility that access to community assets would be lost after divorce unless a signature was obtained from the non-applicant spouse, the Board's staff responded in the following manner:

One of the purposes of the ECOA is to make separate credit more readily accessible to married women. In view of this purpose, 202.7(b) of Regulation B [section 202.7(d) of revised Regulation B] provides that in a community property State, a creditor may not require the signature of the non-applicant spouse if the applicant is empowered by state law to manage and commit community assets. The staff is of the opinion that permitting a creditor to obtain the signature of the non-applicant spouse in all cases would defeat the intent of Congress as expressed in the Act.<sup>43</sup>

More recently, the Board reiterated its position on the spousal cosignature question. In September 1981 a New Orleans attorney asked the Board's staff to confirm his conclusions regarding the applicability of the ECOA and Regulation B to community property states generally and Louisiana in particular.<sup>44</sup> One specific question raised by this attorney inquired whether creditors in community property states may require a non-applicant spouse to cosign an individual extension of credit to a married applicant if the income of the non-applicant spouse is relied on to repay the debt.<sup>45</sup>

The Board's staff responded in May 1982 by issuing an informal interpretative letter.<sup>46</sup> In this letter the staff noted that in an equal management state the earnings of either spouse constitute community property and not merely an expectancy, and that a creditor must consider the earnings of both in making a decision when either spouse applied for credit.<sup>47</sup> The staff further noted that such earnings would fail to become community property only if the community is dissolved before the income is actually earned, or if the parties to the marriage have agreed, according to the procedures established by state law, to keep their property separate.<sup>48</sup> Finally, the staff concluded that to require the signature of the non-applicant spouse when the applicant has the power to control, manage, or dispose of community property would violate the provisions of the regulation.<sup>49</sup>

Is this an accurate interpretation of Regulation B? Many creditors believe it is not. Nineteen creditor attorneys challenged the interpretation and requested the Board to withdraw it.<sup>50</sup> These creditors maintain that

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43. *Id.*

44. Letter from Louisiana attorney David S. Willenzik to Delores Smith, Assistant Director, Federal Reserve System (Sept. 4, 1981) (requesting interpretation of Regulation B as related to spousal cosignatures in community property states) [hereinafter cited as Willenzik Letter].

45. *Id.* at 6.

46. Fed. Reserve Bd. Interpretative Letter No. 15 (May 28, 1982).

47. *Id.* at 2.

48. *Id.*

49. *Id.*

50. The Federal Reserve Board received the following 19 letters in response to its May 28 interpretation of Regulation B: Letter from Walter F. Emmons, Freedom Finance, to

Regulation B allows them to obtain the non-applicant spouse's signature, notwithstanding state equal management and control provisions. The rationale supporting the creditors' position merits careful examination.

### A. Creditor Arguments

1. *Future Income Is Not Community Property.* A primary objection to the staff interpretation is that it improperly equates future income with community property. Creditors assert that because income does not become community property until it is earned,<sup>51</sup> the signature of the spouse whose earnings qualify for credit must be obtained to ensure repayment in case the marriage dissolves. As expressed by one attorney:

The essential shortcoming [of the staff interpretation] is the failure of the staff to differentiate between earnings that have been "earned" and future earnings that have not been "earned" at the time an application for credit is made. Without question, the laws of every equal management community property state create the presumption that income, when "earned," is community property and, thus, subject to the equal management provisions of state law. However, it is equally true that future, as yet unearned income is *not* property subject to classification either as separate or community property and, therefore, is *not* subject to the equal management provisions of state law.<sup>52</sup>

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Secretary, Board of Governors, Federal Reserve System (June 29, 1982); Petition to Withdraw Informal Interpretation from Vernon L. Evans, Assistant General Counsel, National Consumer Finance Association to Secretary, Board of Governors, Federal Reserve System (July 16, 1982) [hereinafter cited as NCFA Petition]; Petition for Withdrawal of Informal Interpretation from Washington attorney Milton W. Schober to William Wiles (July 23, 1982) [hereinafter cited as Schober Petition]; Letter from Iowa attorney Harry N. Sandstrom to William W. Wiles (Aug. 24, 1982) [hereinafter cited as Sandstrom Letter]; Letter from Chicago attorney Lawrence X. Pusateri to William W. Wiles (Sept. 7, 1982); Letter from Washington attorney Warren L. Dennis on behalf of Beneficial Corporation to William W. Wiles (Sept. 8, 1982) [hereinafter cited as Dennis Letter]; Letter from Oregon attorney Keith Burns to William W. Wiles (Sept. 20, 1982); Letter from Virginia attorney David Meade White to Board of Governors, Federal Reserve System (Sept. 20, 1982); Letter from Oklahoma attorney Bryce A. Baggett to William W. Wiles (Sept. 21, 1982) [hereinafter cited as Baggett Letter]; letter from Ohio attorney Kenneth F. Seibel to William Wiles (Sept. 21, 1982); Letter from attorney Robert C. Duke, Texas Consumer Finance Association, to William W. Wiles (Sept. 21, 1982) [hereinafter cited as Duke Letter]; Letter from Georgia attorney Jacob Beil to William W. Wiles (Sept. 22, 1982); Letter from Alabama attorney Perry Hubbard to William W. Wiles (Sept. 22, 1982) [hereinafter cited as Hubbard Letter]; Letter from Minnesota attorney Gregory J. Pulles to William W. Wiles (Sept. 22, 1982); Letter from Alabama attorney James A. Harris, Jr. to William W. Wiles (Sept. 23, 1982); Letter from Alabama attorney R. Bernard Harwood, Jr. to William W. Wiles (Sept. 23, 1982); Letter from Iowa attorney George A. Wilson to William W. Wiles (Sept. 27, 1982); Letter from Edward J. Heiser, Jr., Executive Director, Wisconsin Consumer Finance Association, to William W. Wiles (Oct. 4, 1982) [hereinafter cited as Heiser Letter]; Letter from Kentucky attorney William R. Mapother to William W. Wiles (Oct. 19, 1982).

51. See Schober Petition, *supra* note 50, at 11 (citing *In re Marriage of Rives*, 130 Cal. App. 3d 138, 153, 181 Cal. Rptr. 572, 580 (1982); *Cook v. Cook*, 637 P.2d 799, 802 (Idaho 1982); *Bridgeman & Conway v. The Korner Realty Co.*, 405 So. 2d 344 (La. Ct. App. 1981); *Cord v. Neuhooff*, 573 P.2d 1170 (Nev. 1978); *Hughes v. Hughes*, 573 P.2d 1194 (N.M. 1978); *Pacific Gamble Robinson Co. v. Lapp*, 622 P.2d 850 (Wash. 1980)).

52. Letter from Washington attorney Milton W. Schober to Griffin L. Garwood, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System 1-2 (Oct. 20, 1982) (emphasis in original) (responding to letter of Oct. 8, 1982).

Regulation B, section 202.7(d)(3) allows creditors to obtain the non-applicant spouse's signature if the applicant spouse does not manage and control sufficient community property to satisfy the debt.<sup>53</sup> If future income is not community property, then the applicant spouse lacks management and control over it. Creditors can thus legally obtain the signature of the wage-earner spouse.

The assertion has also been made that future earnings are not community property because those earnings will be community property only if the spouses remain married and continue to cohabit.<sup>54</sup> Upon divorce, the earnings of each spouse become his or her separate property.<sup>55</sup> The separate property of a nonsignatory spouse is not liable for debts incurred by the other spouse.<sup>56</sup>

2. *Footnote 10 Permits Community Property Lenders to Obtain the Wage-Earner Spouse's Signature.* Another common argument contends that the Federal Reserve Board's staff incorrectly applied Regulation B. Creditors argue that Regulation B, section 202.7(d)(5)<sup>57</sup> rather than section 202.7(d)(3), should govern credit decisions involving applicants seeking unsecured credit in reliance on their spouse's income flow.<sup>58</sup> Although section 202.7(d)(3) clearly applies to married applicants' requests for unsecured credit in community property states, section 202.7(d)(5) arguably applies as well. Footnote 10 to section 202.7(d)(5) states: "If an applicant requests individual credit relying on the separate income of another person, a creditor may require the signature of the other person to make the income available to pay the debt."<sup>59</sup> If footnote 10 of section 202.7(d)(5) is applicable to community property states, then creditors are correct in asserting that the Federal Reserve Board's staff misinterpreted Regulation B. Footnote 10 permits creditors to obtain the signature of the non-applicant spouse. The meaning of footnote 10, however, is unclear. According to one commentator's analysis:

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53. 12 C.F.R. § 202.7(d)(3)(i) (1983).

54. Letter from Professor Grace Ganz Blumberg, U.C.L.A. School of Law 15 (Nov. 19, 1982) (presenting opinion on impact of California's community property laws on Federal Reserve Board's interpretation of Regulation B cosignature rules) [hereinafter cited as Blumberg Letter].

55. *See, e.g.*, CAL. CIV. CODE §§ 5118-5119 (West 1983); N.M. STAT. ANN. § 40-3-8(A) (1983).

56. For example, in New Mexico, community debts are satisfied first from community property. If this property is insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable. N.M. STAT. ANN. § 40-3-11(A) (1983); *see also* LA. CIV. CODE arts. 2345, 2357 (West Supp. 1983); WASH. REV. CODE §§ 26.16.010-.020, .205 (1961 & Supp. 1983-1984).

57. 12 C.F.R. § 202.7(d)(5) (1983).

58. Of the 19 creditor complaints received by the Board in response to the May 28 ECOA interpretation, six specifically mentioned that Regulation B, § 202.7(d)(5) was the applicable section governing loan transactions where one spouse relies on the income of another. *See supra* note 50 (Schober Petition, Dennis Petition, Hubbard Letter, Sandstrom Letter, Baggett Letter, and Duke Letter). At least one commentator has also advanced this argument. *See* Loeb, *supra* note 7, at 191.

59. 12 C.F.R. § 202.7(d)(5) n.10 (1983).

If the term "separate" refers to a spouse's separate as opposed to community sources of income . . . the phrase merely restates the rule that a creditor can require the signature of a nonapplicant spouse if an applicant relies on the separate property of the spouse to establish creditworthiness. . . . If the term "separate" is not a community property term of art, then the provision was not intended to refer to community property law at all and does not apply in community property states.<sup>60</sup>

Is the reference to "separate income" in footnote 10 intended to ensure the applicability of Regulation B, section 202.7(d)(5) to community property states? Creditors argue that footnote 10 applies whenever a married applicant applies for an individual credit extension relying tacitly or impliedly on the income of the other spouse, regardless of whether a community property or separate property state is involved. They assert that the reference in footnote 10 to "separate income" must be read in its ordinary sense.<sup>61</sup> They reject the notion that the Board intended "separate income" to carry a specialized meaning. According to one commentator, if the Board had intended "separate income" as a community property term of art, it would have said so.<sup>62</sup>

Additionally, creditors contend that because future earnings cannot be classified as either community or separate property, Regulation B, section 202.7(d)(3) does not apply.<sup>63</sup> They further argue that section 202.7(d)(5) is the applicable section because that provision clearly refers to income and footnote 10 should apply because it refers to the income of a non-applicant spouse.

Finally, creditors contend that the legislative history of footnote 10 supports its applicability to community property states. Noting that the word "separate" was never used in the Board commentary explaining footnote 10, creditors cite this omission as additional support for their position that footnote 10 establishes a general rule for both separate property and community property states.<sup>64</sup> Although those espousing the creditor position are forceful in their assertions, they do admit that there is a "sublime am-

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60. Johnson, *Limitations on Creditors' Rights to Require Spouse's Signatures Under the ECOA and Washington Community Property Law*, 4 U. PUGET SOUND L. REV. 333, 346 n.68 (1981).

61. See Dennis Letter, *supra* note 50, at 14-15.

62. See Loeb, *supra* note 7, at 191.

63. See Schober Petition, *supra* note 50, at 8.

64. The commentary to footnote 10 states:

Section 202.7(d)(5) relates to credit in connection with which the personal liability of a person other than the applicant (other than a joint applicant or applicants, if any) has been found necessary. An example, given in footnote 10, is the situation where an applicant requests individual credit and *relies on income of another person*.

42 Fed. Reg. 1247 (1977) (emphasis added). In reference to the above commentary one commentator has stated: "This explanation addresses all applications relying on 'income of another person.' The qualifying adjective 'separate' is not used, and there is no suggestion whatsoever that the footnote incorporates community property complexities." See Loeb, *supra* note 7, at 191.

biguity"<sup>65</sup> in the regulation's use of the phrase "separate income of another person."

3. *Even if Future Income Is Community Property, It Is Not Subject to the Non-Earner's Control.* Creditors argue that the applicant spouse is unable to "control" the future income of the non-applicant spouse as required by Regulation B, section 202.7(d)(3).<sup>66</sup> Thus the signature of the non-applicant spouse whose income is being relied upon can be obtained. The crux of this argument holds that unearned income is a mere expectancy<sup>67</sup> that cannot be controlled until those earnings are acquired. As asserted by one attorney, "[t]here is no way, either legally or practically, that anyone can control that which is not in being."<sup>68</sup> Thus the anticipated income of the non-applicant spouse is not community property until the work is performed and is not susceptible to the applicant's sole management and control.<sup>69</sup>

4. *The Federal Reserve Board Position Creates Collection Difficulties.* Creditors cite collection difficulties as a primary reason why they should be allowed to obtain the signature of a non-applicant spouse whose income is relied on to repay a debt.<sup>70</sup> While no one disputes that income is community property as long as the community endures,<sup>71</sup> creditors point out that a number of contingencies exist that can result in termination of

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65. *See id.*

66. Schober Petition, *supra* note 50, at 24-25; *see* Dennis Letter, *supra* note 50, at 17-20.

67. Letter from Professor Jack J. Rappeport, University of Arizona Law School, to Milton W. Schober 3 (Feb. 10, 1983) (discussing relationship of Arizona community property law to Board's Regulation B interpretation) [hereinafter cited as Rappeport Letter]; *see also* Schober Petition, *supra* note 50, at 24. Schober cites *Black's Law Dictionary* to substantiate his point that unearned income is an expectancy:

Expectancy as applied to property, is [a] contingency as to possession, that which is expected or hoped for. At most it is a mere hope or expectation . . . and hardly reaches the height of a property right, much less a vested right, because where there is no obligation, there is no right. It is a possibility for which a party may under certain circumstances properly hope for or expect.

BLACK'S LAW DICTIONARY 517 (5th ed. 1979).

68. *See* Schober Petition, *supra* note 50, at 25. Another attorney notes that even after income is earned, there may not be sufficient control.

It is axiomatic that a creditor cannot reach assets his debtor is unable to reach, such as contingent interests, and inchoate rights. With one rarely invoked exception, California statutes do not provide a mechanism through which earned income or other property may be required to be turned over to a person's spouse, or placed in a jointly held account. In this writer's opinion the *right* of equal management and control exists as between the parties to a marriage, just as the spouses have the *right* to change their existing or later-acquired community property into separate property, and vice-versa. However, the *power* of one spouse acting alone to effectively exercise such control either directly or indirectly is extremely limited.

Letter from California attorney JoAnn Blackstone to author 4-5 (Aug. 24, 1983) [hereinafter cited as Blackstone Letter].

69. *See* Rappeport Letter, *supra* note 67, at 4.

70. *See* Schober Petition, *supra* note 50, at 13-24; *see also* Dennis Letter, *supra* note 50, at 15-25 (non-applicant signature necessary to reach income relied upon). For an excellent statement of the creditor collection dilemma, *see generally* Blackstone Letter, *supra* note 68.

71. *See* Rappeport Letter, *supra* note 67, at 3.

the community and conversion of the income to separate property. In every community property state, divorce will end the community regime.<sup>72</sup> When the community ends in this manner, the earnings of each spouse become his or her separate property and the separate income is presumably not liable for debts contracted solely by the other spouse.<sup>73</sup> Without the wage earner's signature, therefore, the creditor is precluded from reaching these earnings, even though the obligation incurred was a valid community debt.

Other methods of terminating the community create an identical collection problem for creditors. For example, with the exception of New Mexico, each community property state allows the spouses to agree during the marriage to a separation of property.<sup>74</sup> These interspousal agreements can convert the spouses' earnings from community property to separate property. Similarly, emigration from a community property state to a separate property state will terminate the community and convert the earnings of each spouse to his or her separate property.<sup>75</sup> Once the income becomes separate property, it is beyond the reach of creditors to satisfy a debt incurred during the marriage for which a spouse did not sign.

*5. Policy Arguments Support Requirement that Spouse Sign.* Creditors have presented several policy-based arguments in support of their contention that they have the right to obtain the signature of the non-applicant spouse whose income is relied on to repay a debt. First, creditors contend that by not requiring the cosignature of the income-earning spouse, similarly situated unmarried applicants are discriminated against because they must provide the signature of the income earner on whom they are relying.<sup>76</sup> Creditors regard this as a classic case of marital status discrimination.<sup>77</sup> Second, creditors assert that requiring a second signature is not discrimination because the requirement applies equally regardless of sex or marital status.<sup>78</sup> As stated by one creditor's attorney, the dual signature requirement is not contrary to the mandate of the ECOA because it is "not based on the sex or marital status of the applicant, or of the persons whose earnings are offered, but rather on the creditor's need to be reasonably assured of the availability of future earnings to satisfy the debt."<sup>79</sup>

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72. In all community property states the community terminates expressly or impliedly by statute upon divorce. *See, e.g.*, LA. CIV. CODE ANN. art. 2336 (West Supp. 1983).

73. *See supra* notes 55-56 and accompanying text.

74. *See* ARIZ. REV. STAT. ANN. § 14-2204 (1976); CAL. CIV. CODE § 5103 (West 1983); LA. CIV. CODE ANN. art. 2336 (West Supp. 1983); TEX. FAM. CODE ANN. § 5.42 (Vernon Supp. 1982-1983).

75. *See, e.g.*, *Kraemer v. Kraemer*, 52 Cal. 302, 305 (1877); R. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 47 (rev. ed. 1981); *see also* Schober Petition, *supra* note 50, at 23; Dennis Letter, *supra* note 50, at 22-23 (on moving, court may prevent creditor from reaching non-applicant spouse's income).

76. *See* Dennis Letter, *supra* note 50, at 5.

77. *Id.*

78. *See* Sandstrom Letter, *supra* note 50, at 2.

79. Schober Petition, *supra* note 50, at 26.

Third, creditors argue that they have the right to make rational credit decisions.<sup>80</sup> They further argue that the legislative history of the ECOA and Regulation B encourages prudent decisionmaking and that the Federal Reserve Board's May 28 interpretation results in unrealistic credit decisions.<sup>81</sup> Finally, creditors predict that the ultimate danger of the staff's interpretation is that it will force creditors to accept "a substantial amount of potentially uncollectible paper, thus impairing liquidity and undermining the already hard pressed credit markets in this country."<sup>82</sup> The equally harsh alternative is to severely restrict the availability of unsecured credit in community property states.<sup>83</sup>

6. *The Board's Position Usurps State Functions.* All nineteen creditor responses to the May 28 interpretative letter criticized the Board's staff on the grounds that it usurped the power of the states to determine the parameters of community property law by defining community property to include future unearned income.<sup>84</sup> Creditors argue that the question of whether future income constitutes community property should be answered by the states, not by the Board.<sup>85</sup> One creditor summed up the usurpation argument in this way:

Inasmuch as the extent to which income is treated as community property is a matter of statutory interpretation in the several states having community property laws, the Board and its staff should defer to the individual states in this matter, at least until such time as there is uniform agreement among those states that future income is community property and not a mere expectancy.<sup>86</sup>

Another creditor reminded the Board that on an earlier occasion it declined a request to interpret community property law. Citing a 1977 letter, this creditor noted that the staff earlier concluded that

[t]he definition of 'community property' and the determination as to whether the applicant has power to manage or control certain property are questions of state law. As a general rule, the Board does not

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80. In support of this argument, one petitioner cited the following from the ECOA's legislative history:

"While H.R. 6516 applies to all credit transactions it is not intended to force creditors to make unrealistic credit decisions." H. REP. NO. 210, 94th Cong., 1st Sess. (1975), p.6 . . . .

" . . . this bill identifies characteristics of applicants which the Committee believes are, and must be, irrelevant to a credit judgment and prohibits or curtails their use. At the same time the Committee recognizes and affirms the creditor's right to make a rational decision about an applicant's creditworthiness." S. REP. NO. 589, 94th Cong., 2d Sess. (1976), p.6 . . . .

Schober Petition, *supra* note 50, at 14.

81. *Id.*; see also Sandstrom Letter, *supra* note 50, at 2.

82. Letter from Milton W. Schober to Lyle E. Gramley, Board of Governors of the Federal Reserve System 3 (Sept. 21, 1982) [hereinafter cited as Schober Letter]; Sandstrom Letter, *supra* note 50, at 2; Dennis Letter, *supra* note 50, at 6 (creditors forced to rely on "phantom income").

83. Schober Letter, *supra* note 82, at 3.

84. See *supra* note 50.

85. See, e.g., Blackstone Letter, *supra* note 68, at 5-6.

86. NCFA Petition, *supra* note 50, at 5-6.

interpret state law, and therefore, the staff is not in a position to provide a definitive answer to the question you raise.<sup>87</sup>

Consequently, creditors assert that the Board is venturing into the interpretation of state law, contrary to its long-standing policy of refusing to decide state law questions.<sup>88</sup>

### B. Consumer Arguments

The major consumer-oriented arguments directly in opposition to the creditor position were advanced by the New Orleans attorney who originally submitted the community property spousal cosignature question to the Federal Reserve Board.<sup>89</sup> According to consumerists, the present as well as future earnings of either spouse constitute a form of community property.<sup>90</sup> Rejecting the notion that unearned income is merely an expectancy that cannot be evaluated by creditors,<sup>91</sup> they point out that most creditors operating under judgmental credit check systems consider income as the primary factor in passing on an applicant's relative creditworthiness.<sup>92</sup> They emphasize that Regulation B, section 202.6(b)(5) specifically prohibits creditors from refusing to consider the income of the applicant's spouse because of a prohibited basis.<sup>93</sup> Therefore, excluding the earnings of the non-applicant spouse as merely an expectancy violates this Regulation B anti-discriminatory provision.<sup>94</sup>

Consumerists support their claim that future earnings are community property by citing *Clark v. AVCO Financial Services*.<sup>95</sup> They interpret *Clark* as standing for the proposition that one spouse in an equal management community property state has the right to apply for an individual extension of credit in his or her own name, thereby binding all sources of community owner property, including the earnings of the non-applicant spouse.<sup>96</sup> Consequently, consumerists believe that Regulation B, section 202.7(d)(3) is applicable to community property states, and that section 202.7(d)(5), footnote 10, clearly applies only to separate property states.<sup>97</sup>

Consumerists also claim that future earnings are community property by analogizing them to a community tort claim for loss of earnings of an injured spouse.<sup>98</sup> They note that in Louisiana damages for future earnings

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87. Dennis Letter, *supra* note 50, at 10 (quoting Letter from Janet Hart, Federal Reserve Board Staff, to C. Richard Fisher (Feb. 18, 1977) (regarding staff's position on interpreting state community property law)).

88. *E.g.*, Heiser Letter, *supra* note 50, at 1.

89. See Willenzik Letter, *supra* note 44.

90. *Id.* at 4.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. No. CIV 80-272 (D. Ariz. Oct. 29, 1981).

96. Letter from Louisiana attorney David S. Willenzik to Delores Smith (Nov. 10, 1981) (regarding *Clark v. AVCO*).

97. See Willenzik Letter, *supra* note 44, at 9.

98. Letter from Louisiana attorney David S. Willenzik to Delores Smith 2 (Oct. 7, 1981) (rebuttal of Letter from Michael Cutshaw).



are a claim of the community and not a separate claim of the injured spouse.<sup>99</sup> Further, when the community terminates the loss of earnings claim becomes a separate one, with only those earnings lost during the existence of the community supporting a community loss of earnings claim.<sup>100</sup> The future existence of the community, however, is presumed in such tort actions.

In response to the collections argument, consumerists contend that the possibility that earnings will cease to be community property at some future date is a risk that creditors take in extending credit. As stated by one attorney:

[T]he possibility that married applicants may . . . change the community nature of the non-applicant spouse's earnings is a *credit risk* . . . the same as the applicant subsequently becoming disabled, or losing his or her job, or dying, thereby resulting in the applicant's income stream being diminished or no longer available to satisfy the extension of credit.<sup>101</sup>

Thus, consumer attorneys believe that the practice of disregarding the income of a non-applicant spouse because of a possibility that the spouses may separate or divorce violates the anti-discriminatory prohibitions under the ECOA and Regulation B.<sup>102</sup>

Finally, consumerists espouse a policy argument against requiring the income-earning spouse's signature. A nonsignatory wage-earner spouse is only liable to the extent of his community property.<sup>103</sup> If the spouse's signature were required, the spouse would become personally liable for the debt of the applicant spouse and his or her entire separate property would be subject to the obligation.<sup>104</sup>

### C. The Federal Reserve Board's Response to Creditors

On October 8, 1982, the Federal Reserve Board's staff responded to the nineteen creditor complaints.<sup>105</sup> The response was written by Griffith L. Garwood, Director of the Board's Division of Consumer and Community Affairs. Garwood denied the requests to withdraw the May 28, 1982, unofficial interpretation, and reiterated the staff's position that community property state lenders cannot require the cosignature of the non-applicant spouse whose income is relied on to repay the debt.<sup>106</sup> Garwood stated that the staff's position is "based on the premise that earnings are community property."<sup>107</sup> He substantiated this premise by citing *Clark v. AVCO*

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99. See LA. CIV. CODE ANN. art. 2344 (West Supp. 1983).

100. *Id.*

101. See Willenzik Letter, *supra* note 44, at 5.

102. *Id.* at 6.

103. See LA. CIV. CODE ANN. art. 2345 (West Supp. 1983).

104. *Id.*

105. See Letter from Griffith L. Garwood, Director, Federal Reserve System (Oct. 8, 1982) (responding to Schober Petition, *supra* note 50) [hereinafter cited as Garwood Letter].

106. *Id.* at 1.

107. *Id.*

*Financial Services*<sup>108</sup> and referring to several state attorney general opinions from community property states.<sup>109</sup>

Garwood responded to the footnote 10 argument by stating that the note refers to "legally separate property" while section 202.7(d)(3) refers to earnings of the spouse in community property states.<sup>110</sup> He cited Regulation B's drafting history to support this position.<sup>111</sup> Finally, Garwood responded to the creditor argument about collection difficulties by citing *Moucka v. Windham*.<sup>112</sup> He interpreted this opinion as holding that creditors can collect on a valid community debt from the nonsignatory spouse.<sup>113</sup> Garwood stated that the staff would reconsider its opinion if collection difficulties actually result because of Regulation B and not because of state law.<sup>114</sup>

#### D. The Case Law

The case law on the community property state spousal cosignature question is scant. Only a few cases address the issue in sufficient detail to merit discussion. Thus, there is no definitive body of case law shaping a resolution of the spousal cosignature problem.

Initially the Justice Department took a position contrary to that of the Federal Reserve Board's staff regarding a community property lender's right to obtain the non-borrowing spouse's signature. In *United States v. Beneficial Corp.*<sup>115</sup> the Justice Department charged Beneficial with several ECOA and Regulation B violations. Among them was a claim of marital status discrimination involving Beneficial's blanket requirement of spousal cosignatures whenever one spouse applied for individual, unsecured credit.<sup>116</sup> In a 1980 consent order entered into with Beneficial,<sup>117</sup> the Department noted that cosignatures could not be routinely required in community property states when an applicant is seeking individual unsecured credit and is independently creditworthy.<sup>118</sup> The Justice Department distinguished situations where one spouse relies on the income of the other by noting that cosignatures may be required under these circumstances.<sup>119</sup> The Department reasoned that the non-applicant spouse's signature could be required to assure the availability of the income relied upon by the applicant.<sup>120</sup> Accordingly, the consent order guidelines relating to spousal

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108. No. CIV 80-272 (D. Ariz. Oct. 29, 1981).

109. Garwood Letter, *supra* note 105, at 1.

110. *Id.* at 2.

111. *Id.* (citing 40 Fed. Reg. 49,298 (1975) to support his view of applicability of footnote 10).

112. 483 F.2d 914 (10th Cir. 1973).

113. See Garwood Letter, *supra* note 105, at 2.

114. *Id.*

115. No. 79-1393 (D.N.J. 1980).

116. *Id.*

117. *United States v. Beneficial Corp.*, No. 79-1393 (D.N.J. Nov. 18, 1980) (consent order).

118. *Id.* app. B, at 1.

119. *Id.*

120. *Id.* at 2.

signatures in community property states declare:

- b. However, where the applicant is relying, in whole or in part, on the future wages, income, or earning power of the *spouse* in order to be qualified for credit under our income standards, the applicant does not satisfy our creditworthiness standards for individual credit. Accordingly, since the applicant will not qualify for individual credit on the basis of his or her own income flow, you should turn down the applicant on account of insufficient income.<sup>121</sup>

The guidelines indicate that the lender can suggest that the applicant obtain a cosigner, who may be any person, including the applicant's spouse.<sup>122</sup> The lender can require the person whom the applicant selects as cosigner to sign the note evidencing the indebtedness.<sup>123</sup> The non-applicant spouse's signature cannot be required only where "the credit is based on the applicant's own income or from sources other than the non-applicant spouse and the applicant qualifies on this basis."<sup>124</sup>

Although the *Beneficial* guidelines unequivocally state that lenders may properly require the signature of the non-applicant spouse when the applicant relies on that spouse's income to establish creditworthiness, the Justice Department reserved the right to change this part of the consent order in the event of "future legislative, regulatory, or judicial developments."<sup>125</sup> In 1983 the Department and *Beneficial* requested an amendment to the *Beneficial* order,<sup>126</sup> citing the "controversy as to the requirements of the ECOA where it intersects with state community property laws"<sup>127</sup> as a sufficient development to warrant the amendment. The request was granted.<sup>128</sup> The amendment prohibits requiring the signature of the non-applicant spouse when the applicant relies on such spouse's income to establish creditworthiness for individual unsecured credit in a community property state.<sup>129</sup> Under the amendment a non-applicant spouse will now

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121. *Id.* at 3.

122. *Id.*

123. *Id.*

124. *Id.* at 2.

125. *Id.* app. N, at 4. The reservation clause is indicative of the Department of Justice's uncertainty on the spousal cosignature question in community property states. The reservation clause reads:

6. *Spousal Signatures in Community Property States*

Appendix B to the order contains a set of guidelines with respect to obtaining spousal signatures in community property states. It is understood that the parties, and in particular the Department of Justice, reserve the right to seek modification of these guidelines in the event of changed legal circumstances. The Department of Justice has stated expressly that it takes no position on the question of whether Appendix B will be in compliance with future legislative, regulatory or judicial developments.

*Id.*

126. See Letter from attorney Warren Dennis to the Honorable H. Lee Sarokin (Apr. 21, 1983) (regarding request to amend *Beneficial* consent order) [hereinafter referred to as Sarokin Letter]. The Justice Department concurred in this request.

127. *Id.* at 2.

128. *United States v. Beneficial Corp.*, No. 79-1393 (D.N.J. May 20, 1983) (stipulated amendment to consent order filed).

129. *Id.* at 2.

be regarded as having authorized the applicant to commit the non-applicant's income in equal management community property states without the non-applicant's consent or knowledge.<sup>130</sup>

While Beneficial agreed to the amendment in the interests of expediency, since the order was scheduled to run out in November 1983, it did so with the stipulation that it did not "believe that the ECOA requires this result because of the many circumstances under which, pursuant to state law, the non-applicant's income may become unavailable to the creditor."<sup>131</sup> Because the parties did not agree on the current status of the law, the stipulation leaves an opening for future amendment of the order in the event of hardship or changed legal or factual circumstances.<sup>132</sup>

The Justice Department's reversal on the community property state spousal cosignature question epitomizes the uncertainty regarding this problem's proper resolution. While the Department's view of the issue is now consistent with that of the Federal Reserve Board's staff, those who relied on the former position are subject to liability for violating the ECOA and Regulation B.<sup>133</sup> Although a court or enforcement agency may consider good faith reliance on the Beneficial consent order in determining the extent to which the violation was intentional,<sup>134</sup> the ECOA contains no provision permitting creditor exoneration because of such good faith reliance. The ECOA does exonerate from liability those lenders who rely "in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board."<sup>135</sup> Nonetheless, reliance on a Justice Department consent order does not fall within this category. Thus, even though the positions of the Board's staff and the Justice Department are now consistent on the community property spousal cosignature issue, a major problem exists for those who relied in good faith on the former Justice Department consent decree.

One very recent case alleging violations of California law involved the community property state spousal cosignature question under state law. In *Consumer's Union v. American Express*<sup>136</sup> the plaintiffs instituted a class action suit alleging that American Express engaged in credit discrimination in violation of California law by denying female applicants' credit applications if they lived in a community property state and relied on their husbands' income to establish creditworthiness. The representative plaintiff was a woman whose annual salary was \$4000; her husband's annual salary totalled \$36,000. American Express denied her credit because of

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130. *Id.*

131. See Sarokin Letter, *supra* note 126, at 2.

132. See *United States v. Beneficial Corp.*, No. 79-1393, at 3 (D.N.J. May 20, 1983) (stipulated amendment to consent order filed).

133. See Schober Petition, *supra* note 50, at 1-2, 31-33.

134. Although the ECOA does not require proof of intent to discriminate for a creditor to be found in violation of the Act, a court may consider the extent to which the creditor's failure of compliance was intentional in assessing punitive damages. See 15 U.S.C. § 1691e(b) (1982).

135. *Id.* § 1691e(e) (emphasis added).

136. No. 79-8378 (Cal. Super. Ct., City & County of San Francisco Aug. 19, 1982).

insufficient income. The pleadings alleged that American Express "uniformly refused to consider the community earnings and property of a marriage thereby subjecting each class member's application to review without credit for community property earnings for which the man would be given credit."<sup>137</sup> Consequently, American Express was charged with illegally discriminating against married women on the basis of their sex. The pleadings relied on a statement by the drafter of the state's equal management and control provisions of the community property law that he intended the legislation "to assure the granting of credit to married men or women based on their control and management of community property, no matter the source of earnings of that property."<sup>138</sup>

Unfortunately for resolution of the issue, the case was settled out of court primarily because American Express had already ceased its alleged discriminatory practices by the time the suit was filed.<sup>139</sup> Although the suit was based on California credit discrimination law and the factual situation involved denial of credit rather than the requirement of a cosignature, a resolution of the issues presented could have impacted significantly on resolution of the ECOA spousal cosignature question. If the court had determined that the plaintiff's analysis of the legislative intent was accurate, then the decision would also have implied that a non-applicant spouse's signature could not be required to enable the applicant to rely on the non-applicant's earnings to establish creditworthiness. Certainly such a requirement would violate the spirit of the legislative intent to make creditworthiness coextensive with the ability to manage and control community property. Thus the settlement represents a missed opportunity to gain judicial perspective on the proper interplay between state equal management law and spousal cosignature requirements.

*Clark v. AVCO Financial Services*,<sup>140</sup> a 1981 decision, is the only case to date in which the community property state spousal cosignature issue under federal law was litigated. In *Clark* a wife applied for individual unsecured credit, relying on community property, including her husband's earnings, to establish creditworthiness. Credit was denied because the husband did not sign the credit application. In granting plaintiff's motion for summary judgment, the district court judge held that because the amount of community property subject to plaintiff's managerial authority as defined by Arizona law was sufficient to qualify for the amount of credit requested under the creditor's standards of creditworthiness, AVCO vio-

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137. Plaintiff's Pleadings at 7.

138. *Id.* at 1 (quoting state Assembly member Howard Berman). Ironically, the plaintiffs did not cite to the legislative history itself for support of the intent underlying the California equal management and control provisions. While the quotation of California Assembly member Howard Berman may accurately reflect his opinion that equal management was intended to allow each spouse to manage and control the community earnings of the other, the opinion of one Assembly member arguably is not representative of those who voted in favor of the provisions.

139. *Consumer's Union v. American Express*, No. 79-8378 (Cal. Sup. Ct. Apr. 1983) (stipulation and request for dismissal filed).

140. No. CIV 80-272 (D. Ariz. Oct. 29, 1981).

lated Regulation B by requiring the husband's signature.<sup>141</sup> The court noted that Arizona law permits either spouse to bind the community property and income for a community obligation.<sup>142</sup>

Consumerists<sup>143</sup> and the Board's staff<sup>144</sup> cite *Clark* for the proposition that creditors violate Regulation B by routinely requiring spousal cosignatures in equal management community property states when one spouse applies for individual unsecured credit in reliance on the income of the other spouse. Although this holding of the case is clear, the decision has major shortcomings. First, the opinion fails to discuss the legislative history of the Arizona equal management law that it cites in support of the conclusion that spousal cosignatures are prohibited in Arizona.<sup>145</sup> Evidence of legislative intent to afford one spouse the right to rely on the earnings of the other spouse to obtain credit would have substantiated the discrimination claim. Second, the decision contained no discussion of the creditor collection problem. Thus the issue of whether cosignatures are prohibited notwithstanding collection difficulties was not clearly addressed. Third, the spousal cosignature issue was disposed of in one paragraph of a two-page memorandum opinion with little background on the rationale for the court's holding. Although *Clark* is regarded as the most definitive source on the community property state spousal cosignature question,<sup>146</sup> a more detailed analysis would have provided greater precedential value. Fourth, because each state's equal management law is different, *Clark* may not be representative of how courts in all community property states will resolve the spousal cosignature question.

Perhaps a more comprehensive exploration of the community property state spousal cosignature issue will be provided by resolution of a law suit filed in August 1983 by the Justice Department at the request of the Federal Trade Commission. In *United States v. ITT Consumer Financial Corp.*<sup>147</sup> the Justice Department charged defendants with violating the ECOA and Regulation B by denying credit to community property state applicants, particularly married women, who rely on their spouse's income to establish creditworthiness.<sup>148</sup> The complaint further alleges that the practice of requiring spousal cosignatures of married applicants who apply for individual unsecured credit relying on the earnings of a non-applicant spouse violates Regulation B.<sup>149</sup> The basis of the Justice Department's position is that Regulation B, section 202.7(d)(3) and the equal management and control provisions of the community property states proscribe defend-

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141. *Id.*, slip op. at 2.

142. *Id.*

143. *See supra* notes 95-97 and accompanying text.

144. *See supra* notes 107-09 and accompanying text.

145. The court cited ARIZ. REV. STAT. ANN. § 25-214 (1976), which is Arizona's equal management and control provision. For the text of this provision and a discussion of it, see *infra* note 284 and accompanying text.

146. *See supra* notes 95 & 108.

147. No. C-83-3923-TEH (N.D. Cal. 1983).

148. *Id.* at 3.

149. *Id.* at 4.

ant's conduct. The complaint cites Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Washington as community property states whose laws provide that spouses have equal management and control over community property, including but not limited to income earned by either spouse, and that either spouse, acting alone, has the power to bind the marital community for the repayment of certain consumer debts.<sup>150</sup>

The *ITT* case may lead to a judicial resolution of the community property state spousal cosignature question. Unlike *Clark*, *ITT* involves the equal management law of all community property states except Texas, and not just the law of California, the state in which the suit was filed. Thus, the court's decision could be dispositive of the cosignature issue in all community property states except Texas.

### *E. Analysis of Creditor and Consumer Arguments*

Director Garwood's reaffirmation of the Federal Reserve Board staff's position on October 8, 1982, means that creditors in community property states violate the ECOA and Regulation B if they routinely require the signature of a non-applicant spouse whose income is relied on to repay a debt. This regulatory response raises the issue of whether the staff accurately interpreted the requirements of Regulation B. An analysis of the arguments presented by creditors and countered by consumerists and the Board's staff is helpful in resolving this issue.

1. *Unearned Income.* The consumerist view that unearned income is community property is more logical than the creditor view that it is a mere expectancy, notwithstanding the fact that most community property systems are based on the acquisition theory.<sup>151</sup> Under this theory, property acquired during the marriage is presumptively community property.<sup>152</sup> Under a strict application of the theory unearned income is neither separate nor community property, and is analogous to a house that a married couple has saved for but has not yet purchased. Neither has yet been acquired.

While it is true that unearned income has not been acquired, it is also true that creditors typically consider and evaluate such income. As consumerists correctly point out, income is a primary factor considered in determining whether credit will be extended.<sup>153</sup> Usually credit applicants are asked to list their annual income on the credit application. Upon receiving this information, creditors evaluate whether the amount is sufficient to support repayment of the requested extension of credit. If the amount is sufficient and the applicant is otherwise creditworthy,<sup>154</sup> the credit is

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150. *Id.* at 3. Texas was omitted from the list because in regard to spousal income it is not a true equal management state. See *infra* notes 362-70 and accompanying text.

151. See I. LOEB, *supra* note 13, at 68.

152. *Id.*

153. See Willenzik Letter, *supra* note 44, at 4.

154. Creditors usually focus on three factors to determine an applicant's creditworthiness: character, capacity, and collateral.

Capacity reflects an individual's earning power and provides a measure of his ability to repay. Collateral is some form of tangible asset owned by the indi-

granted. Generally the credit is extended even though the income figure listed on the application represents a future projection and clearly has not been earned. Thus, creditor reliance on anticipated income is the norm.<sup>155</sup>

The concept of equality embodied in the equal management provisions of the community property states suggests that if a husband can rely on his unearned income to incur a community debt,<sup>156</sup> so can his wife. Consequently, if a husband in an equal management community property state lists \$30,000 as his annual income and receives credit because a creditor determines that the community is creditworthy based on this amount, then his unemployed wife must also be allowed to bind that income and receive credit. The essence of the equal management provisions is that both spouses must be treated equally with respect to community assets, unless otherwise provided by law.<sup>157</sup> If unearned income will be considered and evaluated when a husband applies for credit that the community will be responsible for repaying, it must likewise be considered and evaluated when his spouse applies for such credit. Consideration of the unearned income in evaluating each spouse's creditworthiness presumes that such income is community property. This is especially true when such income is relied on to incur a community debt.

The community property laws of several states support this presumption of unearned income as community property. For example, California community property law broadly defines property to include unvested pensions as well as business and professional goodwill, which is merely the present discounted value of anticipated, as yet unearned, future income.<sup>158</sup> The Louisiana law appears equally broad.<sup>159</sup> If these states are typical of

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vidual which is offered for security against the loan. Character . . . refers to the person's moral qualities, particularly the individual's ethical resolve to repay the loan.

Churchill, Nevin & Watson, *Credit Scoring: Why and How*, THE CREDIT WORLD, Mar. 1977, at 3.

155. Primary focus on income is the norm for creditors operating under judgmental systems of evaluating creditworthiness. Seldom is any one factor overriding in credit scoring systems. See generally Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFFALO L. REV. 73, 87 (1980).

156. Arizona, Louisiana, and New Mexico explicitly recognize a distinction between separate and community debts, and the liability of the community for each. California statutorily eliminates this distinction and makes the community liable for all contracts of either spouse. Idaho, Nevada, and Washington do not expressly distinguish between separate and community debts; however, Washington case law indicates that a distinction exists. It is unclear whether Idaho and Nevada distinguish community and separate debts. See *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wash. App. 351, 613 P.2d 169 (1980); ARIZ. REV. STAT. ANN. § 25-215 (1976); CAL. CIV. CODE § 5116 (West 1983); LA. CIV. CODE ANN. art. 2360 (West Supp. 1983).

157. See, e.g., LA. CIV. CODE ANN. art. 2346 (West Supp. 1983).

158. See Blumberg Letter, *supra* note 54, at 26 (citing *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (pensions); *In re Marriage of Slater*, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1979); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974) (professional goodwill)); see also *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977) (unvested military pension rights divided as item of community property as form of deferred compensation for services rendered during marriage, following lead of California, Texas, and Washington).

159. See Willenzik Letter, *supra* note 44, at 4-5 (analyzing LA. CIV. CODE ANN. art. 2338 (West Supp. 1983)).



the other equal management community property states, then unearned income is clearly community property. Even if these states are atypical,<sup>160</sup> a logical view of actual creditor practices supports the conclusion that unearned income is a form of community property.<sup>161</sup>

2. *Sufficient Control.* Creditors argue that even if unearned income is community property, they should be allowed to obtain the wage earner's signature because the applicant lacks sufficient control over this income as required by Regulation B, section 202.7(d)(3). This argument misses the point of the equal management component of that provision. A more sensible reading of section 202.7(d)(3) suggests that the drafters expected equal management to permit each spouse independently to bind community property, including the earnings of the other spouse, and thus provide sufficient control over such income.

Historically, community property law gave the husband authority to control and bind all community property.<sup>162</sup> Louisiana, Arizona, and New Mexico extended the husband's power to control to the earnings of his wife.<sup>163</sup> In California, Idaho, Nevada, Texas, and Washington the wife was allowed to manage her own earnings.<sup>164</sup> The wife's actual control over her earnings was limited, however. For example, in Nevada the husband had sole control over community property, except in the case where the wife's earnings were used "for the care and maintenance of the family."<sup>165</sup> Texas<sup>166</sup> and California<sup>167</sup> allowed the wife sole control of her earnings unless they became commingled with other community property. In Texas the wife's earnings, if commingled, became subject to joint management and control<sup>168</sup> while in California they became subject to sole management by the husband.<sup>169</sup> Once the wife's earnings became subject to the husband's sole control, he could commit them to the same extent as if they were his own.<sup>170</sup> Before the days of equal management and control,

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160. There is authority to the contrary that supports the position that future earnings are not community property. See NEV. REV. STAT. § 123.130 (1983) (personal injury damages are separate property).

161. Where there is equal management and control, consideration of the wage earner's unearned income when he or she applies for credit while refusing to consider that income when the wage earner's spouse applies for credit seems unfair.

162. G. MCKAY, *supra* note 27, at 41.

163. See *Garver v. Thoman*, 15 Ariz. 38, 135 P. 724, 726 (1913); *Frazzio v. Krieger*, 226 La. 511, 76 So. 2d 713, 714 (1954); *Albright v. Albright*, 21 N.M. 606, 157 P. 662, 664-65 (1916).

164. CAL. CIV. CODE § 5124 (repealed 1973); IDAHO CODE § 32-913 (1963) (repealed 1974); NEV. REV. STAT. § 123.230 (1983); TEX. REV. CIV. STAT. ANN. art. 4619 (repealed 1969); WASH. REV. CODE ANN. § 26.16.130 (1961) (repealed 1972).

165. See NEV. REV. STAT. § 123.230 (1983).

166. See TEX. FAM. CODE ANN. § 5.22 (Vernon 1975).

167. See CAL. CIV. CODE § 5125(d) (West 1983).

168. See TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975).

169. See *General Ins. Co. v. Schian*, 248 Cal. App. 2d 555, 56 Cal. Rptr. 767 (1967). In California "the husband has the management and control of the entire community estate (except for earnings of the wife which have not been commingled with other community property) . . ." 56 Cal. Rptr. at 768.

170. Comment, *Credit for Women in California*, 22 U.C.L.A. L. REV. 873, 883 (1975).

California creditors were arguably justified in their reluctance to extend credit to married women because

a [married] woman's signature alone did not bind the commingled community property, and her own earnings were available to satisfy her debts only as long as she kept them separate from the community property managed by her husband. In contrast, a husband's signature by itself bound both his separate property and the community personal property of the marriage, including the wife's commingled earnings.<sup>171</sup>

Equal management and control is premised on the notion that the wife can now bind her husband's earnings to the same extent that he formerly could bind hers. Thus, under an equal management and control regime, the creditor should have no more valid reason to require a husband to cosign a wife's credit application than to require a wife to cosign on her husband's credit application.<sup>172</sup> Each should be able to bind the earnings of the other as if they were his or her own.<sup>173</sup>

Ironically, at least two community property states clearly deny such control. Although the concept of equal management and control implies that both spouses have control over all income acquired during the marriage because that income is usually community property, in reality this is untrue. Each community property state places limitations on the degree to which the spouses can equally manage and control community assets.<sup>174</sup> For example, under Louisiana law the non-applicant spouse's current earnings received by check may be under the exclusive management of that spouse.<sup>175</sup> This spouse may then deposit these earnings in a bank account in his name alone or invest them in securities in his own name,<sup>176</sup> or begin a community enterprise<sup>177</sup> or a partnership<sup>178</sup> under his sole management. In each of these instances the applicant spouse cannot manage those earnings and cannot reach them to repay her loan, regardless of the fact that she owns a one-half interest in these monies since income earned during the marriage is presumed to be community property.

Texas is another community property state with an equal management and control provision that limits one spouse's control over the earnings of the other. Under Texas law each spouse has sole control over that part of the community property that results from his or her individual efforts.<sup>179</sup> Income is the primary source of this type of community property.<sup>180</sup> Consequently, as a general proposition in Texas, one spouse does not have control over the earnings of the other spouse. Only if both spouses are

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171. *Id.* (footnote omitted).

172. *Id.*

173. *Id.*

174. *See generally* Appendix *infra*.

175. LA. CIV. CODE ANN. art. 2351 (West Supp. 1983).

176. *Id.*

177. *Id.* art. 2350.

178. *Id.* art. 2352.

179. TEX. FAM. CODE ANN. § 5.21 (Vernon 1975).

180. *Id.* § 5.22(a).

employed and they agree to commingle their incomes will one spouse have the power to control the income of the other.<sup>181</sup> The equal management and control provisions of Texas law provide the classic example of a condition in which Regulation B, section 202.7(d)(3) will allow creditors to obtain the signature of the non-applicant spouse. That provision states that if the applicant spouse does not *control* sufficient community property to support credit extension, the signature of the non-applicant spouse whose income is being relied on can be required.<sup>182</sup>

Under the equal management and control provisions of Texas law, it is clear that the principle of footnote 10 of Regulation B, section 202.7(d)(5), as incorporated in section 202.7(d)(3), renders the cosignature rule applicable in Texas. While the income of a spouse in Texas is literally community property, by definition it is not automatically subject to equal management and control. Thus, practically speaking, the income is more characteristic of separate property than community property. Regulation B, section 202.7(d)(3) implies that where state law treats community property as if it were separate because of management and control considerations, the signature of the earner can be required, just as under footnote 10. Consequently, section 202.7(d)(3) achieves the same result for a community property state such as Texas as footnote 10 to section 202.7(d)(5) achieves for separate property states.

This does not mean, however, that section 202.7(d)(5), footnote 10 can never apply to community property states. If, for example, state law declared the future income of a spouse to be separate property, the classic case for footnote 10 application would exist. Notably, Texas and Louisiana allow *community* property to be solely *controlled* by the income earner.<sup>183</sup> Thus section 202.7(d)(3) is applicable instead of footnote 10, which refers to separate property.

It is uncertain whether the Louisiana law that gives one spouse sole control over his earnings received by check will trigger the spousal cosignature rule. A comment to the law states that it "is not intended to limit the right of a creditor of a spouse to seize community property that the other spouse has the exclusive right to manage . . . ."<sup>184</sup> The comment suggests that the legislature did not intend to impair creditor collection rights by departing from traditional notions of equal management and control. Consequently, the single signature rule may still apply without affecting creditor remedies if default occurs.

Problems still exist for creditors, however, because the sole management

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181. *Id.* § 5.22(b).

182. For the full text of Regulation B, § 202.7(d)(3), see *supra* text accompanying note 9.

183. These situations must be distinguished from those in which the spouses are allowed to transmute their community property to separate property. Transmutation implies that the community property was originally under the management and control of both spouses. Thus, it could be considered in evaluating creditworthiness at any time prior to conversion. On the other hand, property subject to sole management cannot be considered under Regulation B, § 202.7(d)(3) in evaluating the creditworthiness of the spouse who lacks control.

184. LA. CIV. CODE ANN. art. 2351 comment (b) (West Supp. 1983).

provision is subject to the general rules of commercial law.<sup>185</sup> Although Louisiana has not adopted the entire Uniform Commercial Code, it has adopted article 3, which states that a person is not liable on an instrument unless he or she signs it.<sup>186</sup> Thus the creditor collection difficulty does not seem to be adequately resolved. Because of this inadequacy, the cosignature rule may apply.

3. *Footnote 10.* Whether footnote 10's reference to separate property was meant as a term of art is not entirely clear. Despite the apparent ambiguity, if the Board had intended a common sense meaning for the phrase "separate income of another person" it need not have used the word "separate."<sup>187</sup> A common sense interpretation would render the term superfluous because in non-community property states all income is separate. Use of the term logically implies that the drafters recognized that although Regulation B, section 202.7(d)(3) deals exclusively with community property states, that provision is inapplicable in certain instances. For example, in most community property states, if an applicant sought to rely on the earnings derived from the separate property of her spouse, footnote 10 would clearly apply because such earnings are separate property.<sup>188</sup>

In most instances income is the primary community asset.<sup>189</sup> It seems highly unlikely that the drafters would have excluded income from a provision that specifically addresses community property. Had the drafters intended such a major exclusion, they could have unambiguously said so. Instead, they chose to place income under the broad umbrella of community property where it logically belongs. One may therefore reasonably conclude that the drafters probably intended that footnote 10 not be generally applied to community property states.

The assertion that future earnings are neither separate nor community property but instead income and thus subject to section 202.7(d)(5), which refers to income, rather than section 202.7(d)(3), which refers to property, is also unpersuasive. If this logic were followed, future income would not fall within either provision. Literally, future income is no closer to being

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185. *Id.* art. 2351 comment (a).

186. LA. REV. STAT. ANN. § 10:3-401 (West 1983).

187. Proponents of the creditor position point out that Regulation B's commentary to § 202.7(d)(5) n.10 does not contain the word "separate." Thus they conclude that the drafters never intended that term to be used as a term of art. Instead, they assert that a common-sense meaning was intended. See Loeb, *supra* note 7, at 191; Dennis Letter, *supra* note 50, at 14-15.

188. In Arizona, California, Nevada, New Mexico, and Washington the earnings of either spouse from separate property are separate property. See ARIZ. REV. STAT. ANN. § 25-213 (1976); CAL. CIV. CODE §§ 5107-5108 (West 1983); NEV. REV. STAT. § 123.130 (1983); N.M. STAT. ANN. § 40-3-8 (1983); WASH. REV. CODE ANN. § 26.16.010 (1961); Schober Petition, *supra* note 50, at 21-22. In Idaho and Louisiana "such earnings are presumed to be community property unless their separate status has been preserved by written and recorded instrument." Schober Petition, *supra* note 50, at 21-22; see IDAHO CODE § 32-906 (Supp. 1983); LA. CIV. CODE ANN. art. 2339 (West Supp. 1983).

189. This is especially true where the credit requested is unsecured. Although the family home and the family automobile are major community assets, their value is more significant when secured credit is sought because they are normally used as collateral.

income than it is to being property. Surely the Board did not intend an interpretation that produces such an absurdity.

4. *Collection Difficulties.* The collection difficulty that creditors may encounter in reaching the income of the non-applicant spouse is the most persuasive reason why creditors should be able to require that spouse's signature. Each community property state has laws that potentially can block a creditor from recovering from the nonsignatory spouse. An examination of these laws is necessary to put creditor concern about collection into proper perspective.

*Interspousal Agreements.* All of the eight community property states except New Mexico explicitly allow the spouses to partition the community property through an agreement under either statutory or case law.<sup>190</sup> These agreements convert community property into separate property. Consequently, income that is normally community property becomes the separate property of each spouse. Once the income becomes separate property, it is no longer available to satisfy community or separate debts incurred by the other spouse.

In Louisiana the legitimacy of separation of property agreements was upheld in *Bridgeman & Conway v. The Korner Realty Co.*<sup>191</sup> In *Bridgeman* a husband signed a note evidencing a community debt that later ended in default. Although the wife did not sign the note, her income was garnished to satisfy the judgment that the plaintiffs obtained against the marital community. Several weeks after the garnishment order became effective, the defendants entered into an agreement pursuant to Louisiana law permitting them to end the community regime and subsequently become owners of separate rather than community property.<sup>192</sup> The separation of property agreement became effective after January 1, 1980. Immediately after the agreement took effect, the wife sought to have the garnishment discontinued.

In granting the motion to discontinue the garnishment, the Louisiana Court of Appeal reversed the district court and held that the effect of the separation of property agreement was to make the wife's earnings her separate property after January 1, 1980.<sup>193</sup> Beyond that date, her income was immune from satisfaction of community debts for which she did not sign.<sup>194</sup> The court further noted that a judgment against a garnishee does not vest in the creditor-garnisher a right to the unearned wages of the

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190. Estate of Bogert, 96 Idaho 522, 531 P.2d 1167 (1975); *In re Monighan's Estate*, 198 Wash. 253, 88 P.2d 403 (1939); ARIZ. REV. STAT. ANN. § 14-2204 (1975 & Supp. 1982-1983); CAL. CIV. CODE § 5133 (West 1983); LA. CIV. CODE ANN. art. 2356 (West Supp. 1983); NEV. REV. STAT. § 123.220 (1983) (agreement effective only between spouses; does not affect rights of creditors); TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1982-1983).

191. 405 So. 2d 344 (La. Ct. App. 1981).

192. *Id.* at 346.

193. *Id.*

194. *Id.*

debtor.<sup>195</sup>

The dissenting opinion vehemently disagreed with the majority on the grounds that spouses should not be allowed by unilateral agreement to defraud a judgment creditor.<sup>196</sup> The dissenting judge viewed the separation of property agreement as an obvious attempt by the spouses to deprive the creditor of his right to collect. Citing another Louisiana law<sup>197</sup> in support of his position, the dissenting judge concluded:

[The wife-debtor] cannot enter into a contract with her husband and co-debtor obviously intended to, and [that] under this majority reversal will, deprive the creditor of the right it has upon the mover's salary. Certainly, the present action by the majority "prejudices" the third party creditor in that it deprives the creditor of a right it has on mover's property, her salary, during the time she receives a salary and until the debt is paid or otherwise validly extinguished.<sup>198</sup>

Notwithstanding the inability of the creditor to collect on an otherwise valid community debt, the Louisiana Court of Appeal upheld the constitutionality of the separation of property agreement and declared that once the status of the debtor-spouse's salary changed as a result of that agreement, her salary became exempt from seizure to satisfy a community debt incurred by the other spouse.<sup>199</sup> Had the wife's signature been obtained, the separation of property agreement would not have affected her liability. Like most community property states, Louisiana law permits a community debt to be satisfied from the community as well as from the separate property of the contracting spouse.<sup>200</sup>

Obviously the *Bridgeman* decision disturbs creditors who are unable to obtain the signature of a non-applicant spouse whose income is relied on to repay a debt. Without that signature, a creditor's ability to collect could be severely impaired by an interspousal agreement to separate community property. The fact that these agreements can be entered into after judgment justifiably elevates creditor concern about their ability to reach the income that was relied on to support the debt. It seems unfair to require creditors to rely on a non-applicant spouse's "phantom income."<sup>201</sup> This is especially true in cases like *Bridgeman* where the community continues until default, and thereafter dissolves in order to protect the non-contracting spouse's income from seizure by the creditor.

The harshness of *Bridgeman* originates from state rather than federal law. The community property states that allow separation of property agreements permit them to coexist with equal management laws. By allowing coexistence, the state legislatures seem to have disregarded the rights of creditors to collect on valid community claims. Implicit in the

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195. *Id.* at 348.

196. *Id.* at 349 (Samuel, J., dissenting).

197. LA. CIV. CODE ANN. art. 1969 (West 1977).

198. 405 So. 2d at 349 (Samuel, J., dissenting).

199. *Id.* at 347-48.

200. See *infra* note 332 and accompanying text.

201. See Dennis Letter, *supra* note 50, at 6.

equal management provisions is the notion that one spouse can bind community property without the consent of the other.<sup>202</sup> Regulation B presumes this in barring creditors from routinely requiring the signature of the non-applicant spouse. The question is whether the state legislatures intended to impose such an unreasonable burden on creditors, not whether Congress or the Federal Reserve Board intended such harsh results. Thus the community property state legislatures may need to consider this issue in light of the collection difficulties creditors encounter when nonsignatory spouses are exonerated from liability by the execution of valid separation of property agreements.

*Emigration to Separate Property States.* The possibility that a couple may move from a community property state to a separate property state is another way in which a creditor's collection efforts can be hampered, since such a move would terminate the community and put the income of the nonsignatory spouse beyond the creditors' reach.<sup>203</sup> As members of a highly mobile nation<sup>204</sup> with an unstable economy, the probability is great that an American couple may permanently relocate in another state.<sup>205</sup> As a result, creditor concern that the community might terminate due to emigration from a community property state to a separate property state is quite realistic.

*Separation and Divorce.* In addition to interspousal agreements and emigration to separate property states, other contingencies exist that could result in the non-applicant spouse's income evading the creditor's reach. Creditors argue that the possibility of divorce or separation jeopardizes their right to collect from the nonsignatory spouse. In each community property state divorce terminates all subsequent community property rights.<sup>206</sup> Thereafter, the earnings of each spouse become his or her separate property.<sup>207</sup> Although separation or divorce may potentially cause collection problems for creditors, this observation alone may not warrant requiring spousal cosignatures.

Justifying spousal cosignatures in equal management community property states because a divorce may occur requires the assumption of several

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202. See Comment, *supra* note 170, at 883.

203. See *supra* notes 75-76 and accompanying text.

204. The 1980-1981 data from the United States Bureau of the Census indicates that the overall mobility rate rests at the 17% level. Although this is slightly lower than the rates for the 1970-1971 and 1960-1961 periods, which were 18.7% and 20.6% respectively, the regional rates for the West and the South, where all of the community property states are located, were significantly higher. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-20, No. 37, GEOGRAPHICAL MOBILITY: MARCH 1980 TO MARCH 1981, at 1 (1983).

205. Of the 48 million persons over five years of age in the community property states in 1980, nearly 11% had moved there from another state in the five-year period since 1975. U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF THE POPULATION SUPPLEMENTARY REPORT, STATE OF RESIDENCE IN 1975 BY STATE OF RESIDENCE IN 1980, at 3 (1983). Military, two-career families, and corporate employees are particularly vulnerable to relocation.

206. See *supra* note 72.

207. See *supra* note 55 and accompanying text.

facts. First, that a default will occur; second, that a divorce will occur; and third, that the community assets will be insufficient to repay the debt.<sup>208</sup> These facts must be carefully examined in order to determine the validity of this collection argument.

First, creditors presume that a default will occur. This is not an unusual speculation. Creditors have always had the flexibility to anticipate defaults and determine how the loan will be repaid if default in fact occurs.<sup>209</sup> Thus, creditors are already capable of protecting themselves from this contingency.

Second, creditors presume that a divorce will occur. This expectation causes the most problems and sharpest disagreement. Consumer advocates argue that creditors violate the anti-discriminatory prohibitions under the ECOA and Regulation B by making assumptions about divorce. As stated by one proponent of this argument:

One of the basic principles of ECOA is that creditors may not operate under any type of presumption which will have the effect of discriminating as to any aspect of a loan transaction on a prohibited basis. Section 202.6(b)(3), for example, prohibits creditors from assuming that women of child bearing age will cease to work, and therefore have diminished or interrupted income in the future.<sup>210</sup>

While the above principle is correctly stated, it has marginal utility in resolving the question of whether creditors may factor divorce into their considerations in evaluating creditworthiness. A presumption that women will terminate employment and leave the workforce to raise children is substantially different from a presumption that a marriage may end in divorce. Although both relate to a prohibited basis, they are distinguishable. The pregnancy presumption emanates from stereotypical attitudes toward women.<sup>211</sup> Congress thoroughly explored this issue during the ECOA hearings and heard testimony that these assumptions were not factually based.<sup>212</sup>

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208. See generally Bingaman, *Equal Management of Community Property and Equal Credit Opportunity*, 13 IDAHO L. REV. 161 (1977) (favorable impact of ECOA on obtaining truly equal management of community property).

209. See Maltz & Miller, *The Equal Credit Opportunity Act in Regulation B*, 31 OKLA. L. REV. 1, 17 (1978).

210. See Willenzik Letter, *supra* note 44, at 4.

211. Traditionally, creditors have considered married women less creditworthy than men based on the assumption that married women will quit their jobs upon the birth of a child. As stated by one proponent of this theory: " 'Betting on her to be able to work every day for the next four years isn't the same as betting on a man. It is impossible to put a man and a woman on the same level completely as far as extending credit is concerned.' " Comment, *supra* note 170, at 880 (citing Hyatt, *No Account Females, Women Complain Often They Can't Get Credit Because of Their Sex*, Wall St. J., July 18, 1972, at 1, col. 6 (Pac. Coast ed.)).

212. One of the operational rules sometimes applied by lenders in the determination of creditworthiness of married couples is that women of childbearing age do not have reliable incomes. This presumption has often been applied even in the face of contradictory facts. For example, a Connecticut mortgage lender refused to extend a \$16,000 mortgage on a \$20,000 home even though the joint annual income of the husband and wife, both school teachers, was \$20,000. The basis of this decision was that the wife was 29 years old, and the couple had not yet had children; from this, the lender had placed the wife in the prohibited



On the other hand, the presumption that divorce may occur appears to be solely a statistical judgment. It is common knowledge that the American divorce rate is notoriously high.<sup>213</sup> Current statistics indicate that divorce rates in community property states are soaring at a disproportionate level.<sup>214</sup> Although these states comprise less than fifteen percent of the states in America, they reported more than twenty-six percent of all divorces obtained nationwide in 1982.<sup>215</sup> Among all states, California continues to be the site of more divorces than any other state, with eleven percent of the national total in 1982.<sup>216</sup> Texas ranks in second place with

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childbearing age category. The presumption may even be applied to a couple who have already had children, where the wife has assumed a full-time position in the labor force.

The effect of the childbearing presumption varies greatly from lender to lender. Sometimes the impact is that the wife's income is entirely discounted. At other institutions, the same facts may lead to only a partial discounting of the income generated by the wife's labors. The type of discount used may vary even within a single lending institution. Generally, bank officers with more authority favor greater inclusion of the wife's income, while lower ranking officials are more conservative. See *Hearings Before the Joint Economic Comm.*, 93d Cong., 1st Sess. 546, 550 (1973) (statement of Hon. Frankie M. Freeman, Member of the U.S. Comm'n on Civil Rights, on the Economic Problems of Women) [hereinafter cited as *1973 Hearings*].

In the same hearings it was noted that the FHA does recognize the basic principle that the fact that a woman may be of childbearing age is not a relevant factor in underwriting a mortgage loan. See *id.* at 551. Indeed, a 1972 FHA handbook contained the following policy statement:

The principal element of mortgage risk in allowing the income of working wives as effective income is the possibility of its interruption by maternity leave. Most employers recognize this possibility and provide for maternity leave, with job retention, as an inducement of employment. With strong motives for returning to work any failure to do so after maternity leave would probably be due to causes which would be unpredictable and would represent such a very small percentage of volume that it could be accepted as a calculated risk.

*Id.* at 551 (quoting U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, MORTGAGE CREDIT ANALYSIS HANDBOOK FOR MORTGAGE INSURANCE ON ONE TO FOUR-FAMILY PROPERTIES § 1-22b (July 1972)).

213. The divorce rate has been rising nearly constantly in the United States for the past 20 years. NAT'L CENTER FOR HEALTH STATISTICS, U.S. 1982, MONTHLY VITAL STATISTICS REP., VOL. 31, NO. 12, DHHS PUB. NO. (PHS) 83-1120, at 3 (Mar. 14, 1983) [hereinafter cited as 1982 VITAL STATISTICS]. The divorce rate increased most quickly during the late sixties and early seventies and began to slow slightly at the end of the seventies. The rate peaked in 1979, but has fluctuated since that time. *Id.* For example, in March 1983, 98,000 divorces were granted nationwide. NAT'L CENTER FOR HEALTH STATISTICS, U.S. 1983, MONTHLY VITAL STATISTICS REP., VOL. 32, NO. 3, DHHS PUB. NO. (PHS) 83-1120, at 3 (June 17, 1983). Twenty-five percent of these divorces occurred in community property states. *Id.* at 6. Although the national rate in March 1983 was slightly lower than that of March 1982, the overall rate for the first quarter of both years was identical. *Id.* at 3.

For every 1000 marriages, there were nearly 600 divorces during March 1983 in the United States. *Id.* at 2-3. These statistics are particularly worrisome for community property creditors because even though the divorce rate has levelled off in the last several years, the number of divorces nearly tripled between 1962 and 1981 nationwide, with the community property states continuing to outpace the other states. 1982 VITAL STATISTICS, *supra* at 3, 6.

214. Forty-eight states reported figures on their divorce rates. *Id.* Therefore, all statistics reported herein are based on the seven reporting community property states (excluding Louisiana) in relation to the totals for all 48 reporting states.

215. 1982 VITAL STATISTICS, *supra* note 213, at 6.

216. *Id.*

nine percent of the national total.<sup>217</sup> In light of these statistics, a community property state lender's concern about divorce may reflect the unfortunate realities of modern life instead of a calculated bias against married couples.

The ECOA's legislative history indicates that congressional concern regarding divorce presumptions focused primarily on the biased treatment of divorced women.<sup>218</sup> During the ECOA hearings, Congress learned that divorced women had an unusually difficult time establishing credit after their marriages ended.<sup>219</sup> Divorced men did not encounter similar difficulties.<sup>220</sup> In light of this legislative focus, equal treatment of divorced men and women would seem to be the chief aim of any prohibitions on divorce assumptions pertaining to creditworthiness. Whether Congress believed divorce assumptions to constitute marital status discrimination as well as sex discrimination is not clearly supported by the ECOA's legislative history.

The fact that divorce is statistically probable and may create collection difficulties for community property state lenders does not alone justify requiring spousal cosignatures if congressional intent is to the contrary. The ECOA contains at least one example of congressional rejection of similar collection difficulty arguments. During the ECOA hearings, creditors forcefully argued that they should be allowed to declare welfare income as insufficient income to support an extension of credit.<sup>221</sup> They pointed out

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217. *Id.*

218. See 1973 *Hearings, supra* note 212, at 529 (Report of Washington, D.C., Commission on the Status of Women). Creditors generally argue that divorced women are poor credit risks because they are often supported by alimony, which is considered to be unstable or temporary income. Comment, *supra* note 170, at 884. Additionally, divorced women are often penalized if their husbands have bad credit ratings, yet they seldom benefit if they have good credit ratings, even if the wife provided the couple's sole support during marriage. *Id.* at 878.

Many creditors deny accounts to divorced people because they believe that they are generally unstable and less reliable than married or never-married persons. . . . [T]he burden of this policy falls most heavily on women.

. . . [If married women have] failed to establish themselves as an independent economic entity in the credit market [during the marriage], they are likely to be treated unfairly when they try to develop a credit record as a divorced person.

Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 417-18 (1974).

219. For example, one complaint at the National Commission on Consumer Finance Hearings was that a business woman earning \$20,000 a year was unable to charge purchases at a department store because her ex-husband, many of whose debts she had paid off, had gone through bankruptcy proceedings. He had no trouble re-establishing credit. Comment, *supra* note 170, at 879 n.23. In its report to Congress the National Commission on Consumer Finance noted the difficulty of divorced women in reestablishing credit as among the major problems faced by women seeking credit. See NAT'L COMM'N ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 151, 153 (1972).

220. Divorced women experience greater difficulty in obtaining credit than do divorced men for the simple reason that upon separation the woman more often is the one who has to subject herself to creditor prejudice against divorced people by reapplying for credit. Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 972 (1976).

221. See S. REP. NO. 589, 94th Cong., 2d Sess. 5, 639 (1976); see also *Credit Discrimina-*

that welfare income is exempt from judgment, attachment, and other means by which creditors collect on defaulted loans.<sup>222</sup> Notwithstanding this major collection difficulty, Congress concluded that creditors must consider welfare payments in the same manner as income derived from any other legitimate source. Consequently, Congress included receipt of public assistance income as one of the nine ECOA prohibited bases.<sup>223</sup> This congressional action suggests that Congress was unpersuaded by creditors' arguments that welfare recipients had higher default rates than non-welfare recipients and generally presented difficult collection problems.

The ECOA's legislative history does not indicate whether Congress intended to prohibit creditors from structuring their loan policies to avoid collection problems based on divorce predictions. Where Congress felt strongly that collection problems should yield to other considerations, as in the case of welfare income, it articulated its preference. Absent a specific congressional mandate to the contrary, community property state creditors should be allowed to consider the possibility of divorce based on current statistical data in assessing a married applicant's creditworthiness. Unless Congress indicates otherwise, a creditor should not have to ignore the devastating effects of divorce on a loan where the income relied on is the income of a non-borrower.<sup>224</sup>

One commentator has suggested that creditors should not be allowed to obtain a second signature in order to reach the non-borrower's income because Regulation B offers a "less drastic means" for dealing with the problem of divorce.<sup>225</sup> Regulation B, section 202.7(c)(2)<sup>226</sup> is cited as the

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tion: *Hearings on H.R. 14856 & H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 2d Sess. 502-06 (1974) (availability of credit to the poor).

222. *Hearings on S. 983, S. 1927 & H.R. 6516 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 362 (1975).

223. 15 U.S.C. § 1691(a)(2) (1982). Section 202.2 of Regulation B specifies that:

(z) *Prohibited basis* means race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act . . . .

(aa) *Public assistance program* means any Federal, State, or local governmental assistance program that provides a continuing periodic income supplement, whether premised on entitlement or need. The term includes, but is not limited to, Aid to Families with Dependent Children, food stamps, rent and mortgage supplement or assistance programs, Social Security and Supplemental Security Income, and unemployment compensation.

12 C.F.R. § 202.2(z), (aa) (1983) (emphasis added).

224. See Dennis Letter, *supra* note 50, at 7.

225. Bingaman, *supra* note 208, at 174.

226. Section 202.7(c)(2) of Regulation B states that:

A creditor may require a reapplication regarding an open end account on the basis of a change in an applicant's marital status where the credit granted was based on income earned by the applicant's spouse if the applicant's income alone at the time of the original application would not support the amount of credit currently extended.

12 C.F.R. § 202.7(c)(2) (1983).

appropriate regulatory response to the divorce credit risk problem. That section allows creditors to reevaluate the creditworthiness of a divorced woman previously granted credit on the basis of her husband's income.

To expect the divorce credit risk problem to be solved by section 202.7(c)(2) is to engage in wishful thinking. While that section has its merits, it clearly does not dispose of the creditor collection problem. Reevaluation of the applicant spouse is helpful in assuring that the creditor will be able to collect on debts incurred subsequent to divorce, but it does not address the problem of how debts incurred during the marriage will be repaid. The repayment of these obligations presents the creditors' greatest concern. Thus the proposed "less drastic means" to resolving the problem are simply ineffective in allaying this primary creditor concern.

The third assumption creditors must make to justify obtaining a non-applicant spouse's signature is that community property will be insufficient to satisfy the debt incurred. Most community property states require that community debts be satisfied first from community property, then from the separate property of the contracting spouse.<sup>227</sup> Normally a creditor evaluates the community and not the individual when a spouse in a community property state seeks credit.<sup>228</sup> A decision to rely on the income of the non-applicant spouse probably means that the community is uncreditworthy without that income.<sup>229</sup> In other words, an applicant would probably not rely on the income of a spouse if credit would be extended without that reliance.<sup>230</sup> The community might therefore very well have insufficient assets to repay a debt if the income that served as a basis for the credit extension were removed. Absent the nonsignatory spouse's income, most other community property, such as the car, house, or household effects, is likely to be exempt or subject to a security interest. These community property assets are obviously beyond an unsecured creditor's reach.<sup>231</sup> The fact that the community could be diminished by interspousal agreement,<sup>232</sup> sole

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227. See, e.g., CAL. CIV. CODE §§ 5120-5121 (West 1983); LA. CIV. CODE ANN. art. 2357 (West Supp. 1983); N.M. STAT. ANN. § 40-3-11 (1983).

228. Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights*, 3 PEPPERDINE L. REV. 26, 31-32 (1975).

229. An applicant can request that the creditor not consider the earnings of his or her spouse in determining creditworthiness for an individual extension of credit. If the applicant qualifies for credit without including the spousal earnings, then credit must be extended.

230. Regulation B, § 202.7(d)(3) also states that the applicant must not have sufficient separate property to support repayment of the debt if relying on a spouse's income to establish creditworthiness. See 12 C.F.R. § 202.7(d)(3)(ii) (1983). Thus, even though the applicant spouse is personally liable and subject to liability to the extent of his or her separate property, the separate property will no doubt be inadequate to repay the debt since it was originally insufficient to permit the applicant to receive the credit requested without relying on the spouse's income.

231. An unsecured creditor relies primarily on income to support debt repayment. If income is unavailable, the creditor must seek unencumbered community property. Those who hold a security interest in community property have priority over the unsecured creditor. See generally U.C.C. art. 9 (secured transactions), § 9-201 (general validity of security agreement) (1977).

232. See *supra* note 190 and accompanying text.

management provisions,<sup>233</sup> or other contingencies<sup>234</sup> increases the probability that the community may be insufficient to repay a debt if default occurs. Consequently, creditors are not overreacting in anticipating that the community itself may be unable to handle the loan repayment adequately if the nonsignatory spouse's income is excluded.

Divorce imposes a serious credit risk of genuine concern to creditors. The possibility that the contingencies of default, divorce, and insufficient community assets to satisfy the outstanding debt may all impact on the same transaction is far from remote; rather, it has the potential to become a commonplace occurrence. While community property lenders cannot accurately anticipate the frequency of these cases, they can safely assume that such cases are likely to arise at any given time and in significant numbers. Thus, predicated loan policy on the probability of default, divorce, and diminished community assets is a sensible business practice consonant with economic and human realities. When viewed in this fashion, creditors are justified in seeking the optimal means to reduce the credit risk imposed by divorce.

5. *Policy Arguments.* Creditor concern that unmarried couples are discriminated against by a rule that requires them to produce two signatures where similarly situated married applicants may produce only one is unjustified. Although one commentator has euphemistically labelled this argument "The Markham Fallout"<sup>235</sup> because he believes the decision in *Markham v. Colonial Mortgage Service Co. Associates, Inc.*,<sup>236</sup> proscribes discrimination against unmarried couples, that case does not support the claim that married and unmarried couples must always be similarly treated.

In *Markham* an engaged couple applied jointly for a mortgage but were refused because their incomes would not individually support the loan repayment. The lender normally aggregated the income of married couples but refused to do so for unmarried couples. The district court held that the creditor's policy was non-discriminatory and justified because state law allowed creditors greater remedies against married joint applicants than unmarried joint applicants. The appellate court reversed, holding that marital status discrimination results when similarly situated couples are treated differently solely on the basis of their marital status.<sup>237</sup>

At first glance the *Markham* result appears strongly to suggest that giving married non-earners the advantage of their spouses' income without requiring a cosignature is contrary to ECOA marital status prohibitions. Closer scrutiny reveals that the *Markham* rationale does not support this

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233. See *supra* notes 175, 179, and accompanying text.

234. For example, emigration to a separate property state will terminate the community. Thereafter the earnings of each spouse are separate property. See *supra* notes 203-05 and accompanying text.

235. See Loeb, *supra* note 7, at 192-93.

236. 605 F.2d 566 (D.C. Cir. 1979).

237. *Id.* at 569.

argument as forcefully as initially appears. The appellate court based its decision on the conclusion that state law did not allow creditors greater remedies against married as opposed to unmarried couples.<sup>238</sup> Arguably, the court would have permitted the difference in treatment between the married and unmarried couples if convinced that a state property law affecting creditworthiness was involved. Similarly, under the ECOA consideration or application of such laws does not constitute discrimination.<sup>239</sup> The *Markham* court would probably sanction a difference in treatment of married and unmarried couples with respect to cosignature requirements because this unequal treatment is anchored in state community property law. Unmarried couples are required to produce two signatures because they are outside the equal management scheme adopted by the community property state legislatures. Recognizing that the states have exclusive dominion over state property law enactments,<sup>240</sup> the ECOA left to the states the decision whether married and unmarried couples would be similarly treated with respect to property rights. By allowing equal management and control over the community and thereby permitting one spouse to bind the community without the consent of the other, the equal management provisions of the community property states, not Regulation B, permit different treatment of married and unmarried couples. When a community property state lender treats a married couple differently from an unmarried couple, the disparity in treatment is not caused by the couple's marital status per se, but rather by the property law attributes conferred on the married couple by state law. Thus the difference in treatment is not predicated upon a basis prohibited by the ECOA.

Parallel to the argument relating to unmarried couples is the creditor argument that not requiring the non-applicant spouse's signature in community property states is discrimination against married applicants in non-community property states where the signature would be required. Again, the nature of the community property law system, and not the applicant's marital status, is the primary reason for the difference in treatment. The same reasoning applies to the argument that requiring a second signature is not discrimination because the requirement is imposed equally, regardless of sex or marital status. Equality of application is irrelevant in the face of state property law requirements. Thus discrimination must be defined in the context of state community property law as well as the ECOA

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238. The district court favored defendant's argument that state law provided greater legal remedies on default to creditors against married joint applicants than it did against unmarried ones. The appellate court rejected this contention and reasoned that state marital laws were irrelevant in the instant case because joint applicants, whether married or not, are jointly and severally liable on their debts. *Id.* at 568-69.

239. 15 U.S.C. § 1691d(b) (1982).

240. The courts have faithfully reinforced the federal government's ironclad reluctance to disturb state property law. In *United States v. Yazell*, 382 U.S. 341 (1966), the United States Supreme Court declared that state property laws should be overridden by the federal courts "[o]nly where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Id.* at 352.

and Regulation B. Similarly, if application of community property law results in irrational credit decisions, rationality must yield to the mandate of state law. Hence, even though failure to require the signature of a non-applicant spouse results in imprudent decisionmaking, that practice must stand if supported by the equal management provisions of the community property laws. Although this approach will leave questionable state law practices undisturbed,<sup>241</sup> it reflects the clear intent of Congress to defer to the wisdom of the states on these matters.

6. *Usurpation.* The creditors' argument that the Board's staff exceeded its authority by defining community property to include future earnings is most persuasive. The ECOA and Regulation B explicitly defer property law determinations to the states.<sup>242</sup> Some commentators have asserted that Congress had community property law in mind when it formulated the ECOA provision stipulating that consideration or application of state property laws directly or indirectly affecting creditworthiness shall not constitute discrimination.<sup>243</sup>

As previously noted, the prerogative of the states to decide state property law has been zealously guarded by the courts. Because congressional intent not to allow preemption of state property law is clear, state law determinations will prevail even though they may result in discrimination on a prohibited basis.<sup>244</sup> Thus the usurpation issue reaches beyond the question of whether the Board's staff correctly determined that Regulation B considers future income as community property. The threshold issue asks whether the Board's staff had authority to decide the future income question at all. Under the ECOA and Regulation B state property law exemptions, the Board's staff lacked such authority.

#### F. *Analysis of Federal Reserve Board Staff Responses*

After considering the creditor arguments discussed above, the Federal Reserve Board's staff refused to change its position or withdraw the May 28 informal interpretation.<sup>245</sup> In effect, the staff reaffirmed its position that future earnings are community property, that footnote 10 is generally inapplicable to equal management community property states, and that creditors will not encounter major collection difficulties as a result of its interpretation. The staff's reaffirmation means that creditors in community

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241. For example, if state law permitted a lender to deny credit to an applicant who relies on a spouse's signature, even though the community is creditworthy, due to collection difficulties, it could be argued that ECOA is violated. Although the creditor's policy may reflect sound business practices, the state law it relies on is itself discriminatory. Despite this fact, the federal courts are reluctant to interfere with the operation of state property laws, particularly those that pertain to intrafamilial rights, in order to assert a federal right under the Supremacy Clause. See *Gates*, *supra* note 218, at 429.

242. 15 U.S.C. § 1691d(b) (1982); 12 C.F.R. § 202.6(c) (1983).

243. See Maltz & Miller, *supra* note 209.

244. See Taylor, *The Equal Credit Opportunity Act's Spousal Cosignature Rules: Suretyship Contracts in Separate Property States*, 48 ALB. L. REV. 1 (1984).

245. Garwood Letter, *supra* note 105.

property states violate the ECOA and Regulation B if they routinely require the signature of a non-applicant spouse whose income is relied on to repay a debt. This stance raises the issue of whether the staff accurately interpreted the requirements of Regulation B.

Despite creditor arguments to the contrary, the Board's staff accurately interpreted Regulation B. The arguments advanced by creditors do not convincingly support their position that Regulation B as currently written allows them to obtain the signature of a non-applicant spouse whose income is relied on to repay a debt. On the contrary, Regulation B mandates that for purposes of evaluating creditworthiness unearned income is community property subject to the equal management and control provisions of each community property state.

A primary purpose of equal management and control was to give the non-working spouse the authority to obligate the community to the same extent as the wage earner.<sup>246</sup> Regulation B furthers this purpose by prohibiting creditors from routinely requiring the signature of the non-applicant spouse. Accordingly, one commentator has suggested:

[I]n the . . . community property states with completely equal management provisions for community personal property, including California, a wife, whether employed or unemployed, may obtain credit on exactly the same terms and in exactly the same amounts as her husband may, without his signature or consent to any transaction. This is so because she has a one-half ownership of all the community property which includes both his and her earnings, and has the legal right to manage and incur debts binding the entire community personal property, just as he does.<sup>247</sup>

Although it is reasonable to interpret equal management to allow one spouse to bind the community, including the future earnings of the other spouse, without the earner's consent or signature, creditors make two compelling arguments why the Regulation B spousal cosignature rule should be reconsidered. First, the fact that creditors are severely restricted in their ability to collect on the debt without the wage earner's signature warrants an examination of whether the single signature rule should have limited applicability. Second, because the question of whether two signatures should be required involves an interpretation of state community property law, the states and not the Board should determine the resolution of this issue.

The staff's position seems to interpret correctly the views of the drafters on the meaning of section 202.7(d)(3). The problem lies in the failure of Regulation B's drafting history to indicate whether the Board perceived the differences in state equal management law or the collection problems that result from application of that section. Creditors correctly point out that section 202.7(d)(3) as currently interpreted represents a generalized

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246. See Bingaman, *supra* note 228, at 38-39.

247. *Id.* at 31.



notion of how community property law operates.<sup>248</sup> While some states may agree with the Board that two signatures cannot be required, all community property states may not adopt this view. As previously noted, even though all eight community property states have some form of equal management and control, these provisions are far from equal in scope and application.<sup>249</sup> Their variations exacerbate creditor difficulties and give legitimacy to creditor collection anxieties.

Thus, while the staff is correct in articulating the current status of Regulation B, section 202.7(d)(3), the collection arguments raised by creditors in opposition to it suggest that the community property spousal cosignature question needs to be reconsidered. A more thorough examination of this issue is crucial in light of the collection problems creditors encounter when they follow the present requirements of Regulation B and state community property law. The Board's staff interpretative letters do not indicate that the collections issue has been thoroughly explored.<sup>250</sup>

A major disadvantage of the staff's reassessed position is that it represents only a cursory review of the ancillary creditor concerns and fails to address adequately the more important collection problem. For example, most creditor complaints questioned whether unearned income is community property. The Garwood letter glossed over this issue, stating that the staff's position is "based on the premise that earnings are community property. . . ." <sup>251</sup> That response evades the main issue. No one objects to the premise that earnings are community property. In fact, the premise is settled law.<sup>252</sup> The question that remains unsettled is whether that premise covers unearned income. If the Board's staff has an empirical basis for the position that unearned income is included, it should articulate such evidence.

Another example of cursory review is the Board's handling of the footnote 10 issue. Lack of substantive support for the position taken, and not the position itself, is the main criticism of the Board's approach. While the staff's position on footnote 10 is more logical than the creditor assertions, its position is not factually based. The staff's sole support for the proposition that footnote 10 is not directed at the earnings of a spouse in a community property state is a Federal Register citation that only marginally relates to the proposition.<sup>253</sup> If concrete support for the staff's interpreta-

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248. See Dennis Letter, *supra* note 50, at 4.

249. See Appendix *infra*.

250. The May 28 letter does not mention the collection problem. The October 8 letter states that the collection dilemma will be addressed if in fact collection difficulties result from application of Regulation B. See Garwood Letter, *supra* note 105, at 2.

251. *Id.* at 1.

252. See, e.g., *Shaw v. Greer*, 67 Ariz. 223, 194 P.2d 430, 431 (1948).

253. 40 Fed. Reg. 49,298 (1975). The commentary to the provision on unsecured credit in community property states gives the following example of when spousal cosignatures can be required: "[A] creditor in Louisiana may require that an employed married woman obtain the signature of her spouse when applying for a separate unsecured account because Louisiana presently denied a married woman the power to manage and control her own earnings." *Id.* at 49,303. The cited example is not relevant to the issue discussed herein

tion exists, that support should be presented. If substantive support is lacking and the staff interpretation is merely a projection of what the staff thinks the Board would want the law to be, then the staff should indicate that its position is speculative and does not necessarily represent the intent of the Board. The Board should then be encouraged to clarify its position in light of considerations raised by the staff as well as those raised by creditors. If the staff does not substantiate its position to reflect the intent of the drafters, then creditors will justifiably question the wisdom of staff interpretations and remain doubtful that their arguments have been "carefully considered."<sup>254</sup>

A request to examine the collections issue will come as no surprise to the Board or its staff. Indeed, Director Garwood stated in his October 8 letter that if collection difficulties result from application of Regulation B and not from state law, the Board would reconsider its interpretation.<sup>255</sup> The arguments made by creditors on the collection issue sufficiently indicate that Regulation B and state law are at the core of the collection issue. In any event, if there is doubt whether Regulation B is partially responsible for the problem, then that issue should also be carefully explored.

The Federal Reserve Board's staff does not believe that creditors will have major difficulty collecting from the wage-earner spouse if the community terminates.<sup>256</sup> The staff cites *Moucka v. Windham*<sup>257</sup> for the proposition that creditors may collect from the nonsignatory spouse on a valid community debt. The staff's reliance on *Moucka* is misplaced, however. In *Moucka* a creditor instituted an action against a divorced couple to recover on a promissory note executed by the husband during the marriage on behalf of the community. Although the wife did not sign the note, the court found her liable to the extent of the community property awarded her by the divorce decree.<sup>258</sup> The court declared that all the community property, including that partitioned to the wife by reason of the divorce decree, was subject to enforcement of the judgment for the community debt, but that the judgment was not enforceable against any of the wife's other property.<sup>259</sup> The court noted that although the wife could not be held personally liable unless she signed the note, under New Mexico law a community debt incurred prior to the dissolution of the marital community and for the benefit thereof would properly be payable out of community funds notwithstanding the fact that such community property had been transmuted into separate property by virtue of a divorce decree.<sup>260</sup>

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because the example does not indicate that the spouse applied for credit relying on the income of her spouse.

254. Garwood Letter, *supra* note 105, at 2.

255. *Id.*

256. *Id.*

257. 483 F.2d 914 (10th Cir. 1973).

258. *Id.* at 917.

259. *Id.*

260. *Id.* at 916-17. Several cases support the *Moucka* principle. In *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wash. 2d 893, 425 P.2d 623 (1967), a community obligation was entered into during the existence of the marital relationship for the rental of two televi-

The court stated: "[a]ssuming that the 'community' funds now in [the wife's] possession can be traced and identified as such, they are subject to the payment of the amount due on the promissory note of . . . Moucka."<sup>261</sup>

Director Garwood's interpretation is questionable because *Moucka* only held that creditors can collect from a nonsignatory spouse out of property whose status as community property prior to divorce can be traced. Although a spouse's unearned income can be regarded as community property for purposes of evaluating the creditworthiness of the community,<sup>262</sup> equating unearned income to community property for the purpose of obtaining the benefit of *Moucka* unduly strains the scope of that decision. *Moucka* logically applies to community property in existence at the time the marriage terminates. A divorce decree can transmute only this property from community to separate property. It is therefore inappropriate to say that the divorce decree transmutes income to separate property and irrational to conclude that income received subsequent to divorce can be traced and identified as community property in existence during the mar-

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sion sets with an option to buy. Most of the amount due accrued prior to the dissolution of the marriage, but some of the rental payments due accrued after the dissolution. The court held that "[a]n agreement between spouses . . . can not determine the nature of the obligation as to, or affect the rights of, creditors holding obligations which have become fully binding before the dissolution of the marital community." 425 P.2d at 630. The plaintiff in this action was entitled to satisfy its judgment out of any property held by either spouse that was formerly the couple's community property. *Id.*

In *Capital Nat'l Bank v. Johns*, 170 Wash. 260, 16 P.2d 452 (1932), the husband signed a guarantee of indebtedness of a corporation in which he and his wife held stock as community property. They were subsequently divorced. The community property was divided and the share of each spouse became his or her separate property. The husband's share of the community property included the stocks from the above corporation. The wife did not know of the execution of the guarantee until after the divorce. Renewal notes were executed for the guarantee both before and after the couple divorced. The court held that the guarantee was an original obligation incurred during the existence of the community, not merely a continuing guarantee. 16 P.2d at 454. The court held the wife liable for the corporation's indebtedness to the extent of the community property she received at the time of the dissolution. *Id.* The court stated, "If appellant and her property, considered as community property, were bound by the original written instrument, as we must conclude it to be, the liability of appellant and her property manifestly continued until the obligations were satisfied . . ." *Id.* The court also stated that "[w]hether appellant knew of the existence of the guaranty is immaterial." *Id.*

The case of *Messer v. Miner*, 118 Ariz. 291, 576 P.2d 150 (Ct. App. 1978), throws an interesting light on the question of the community nature of a spouse's earnings. The court entered a decree of separate maintenance after a 33-year marriage. An amended decree was entered 11 years later. The husband subsequently died and the wife claimed the widow's statutory allowances. The question was whether the amended decree of separate maintenance was a complete property settlement agreement thus precluding the wife's claim to the allowances. The court held that it was not a complete agreement due to the omission of a determination of the disposition of certain assets in the separation decree. 576 P.2d at 152. Included in the discussion of the husband's assets was the consideration of the husband's earnings during the period of legal separation. The court stated that "[p]roperty acquired with the earnings of a husband during a period of legal separation is community property." *Id.* (footnote omitted). In a footnote the court noted that ARIZ. REV. STAT. ANN. § 25-211 (1976) was amended in 1973 to include the earnings of either spouse during legal separation as community property. *Id.* at 152 n.5.

261. 483 F.2d at 918.

262. See *supra* notes 51-61 and accompanying text.

riage. While this interpretation of *Moucka* implies that unearned income is not community property, an interpretation inconsistent with earlier determinations, consistency should not be achieved at the expense of rationality. In view of this analysis, the present creditor collection dilemma is beyond the scope of *Moucka*.

The May 28 informal interpretation is objectionable for the same reasons as the Garwood letter. The informal interpretation simply echoed the views presented in the Willenzik letter without independent substantiation of the positions presented there.<sup>263</sup> Additionally, the interpretation does not mention the creditor collection dilemma and therefore is not directly responsive to creditor collection concerns.

Over and above its substantive deficiencies, a jurisdictional flaw in the Board's staff interpretation is fatal. Although the staff's interpretation is sound in several respects, it encroaches upon areas reserved to the states. The staff decided a state property law question affecting creditworthiness when it determined that future income is community property in equal management community property states. In so doing, it failed to consider the possibility that a state might decide to the contrary and allow spousal cosignatures because of the peculiarities of its community property law. Because of state differences in equal management provision, the states most probably will not decide this question uniformly. For example, Louisiana may be more disposed to enact a rule that future income is not community property in view of the harshness of the *Bridgeman* decision, which allows the spouses to put the income relied on beyond the creditor's reach even though a judgment has been obtained. Louisiana's sole management provisions may also lead to the state's adoption of the cosignature rule.<sup>264</sup> The staff's position therefore may well describe Louisiana law inaccurately on the spousal cosignature question. On the other hand, California equal management law seems clearly consistent with the staff's interpretation that future earnings are community property. Commentators have suggested that the California Legislature intended for the unemployed spouse to rely on the income of the wage earner without that spouse's signature or consent.<sup>265</sup> Thus, California appears to favor the single signature rule. In light of the *Clark* decision,<sup>266</sup> Arizona clearly fits the equal management profile envisioned by the Board's staff. With *Clark* specifically holding that future earnings are community property, Arizona is directly attuned to the staff's position that under these circumstances spousal cosignatures cannot be required.

Because the community property laws differ significantly, it is difficult to predict how the other equal management states will decide the future earnings question. The states certainly must make this determination them-

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263. See Fed. Reserve Bd. Interpretative Letter No. 73 (May 28, 1982); Willenzik Letter, *supra* note 44.

264. See LA. CIV. CODE ANN. art. 2346 (West Supp. 1983).

265. See Comment, *supra* note 220, at 971; Comment, *supra* note 170, at 883-84, 886.

266. See *supra* notes 140-46 and accompanying text.

selves. The Board's position sets an example for states to follow but it cannot dictate a specific result. While uniformity of result is desirable, achievement of it is doubtful in light of state community property law variations.

Some commentators have asserted that creditors have traditionally been able to decline credit applications when, in the event of default, state law does not provide an adequate means to enforce the debt.<sup>267</sup> This proposition is at variance with the equal management implication that one spouse may bind the community without the signature of the other if the applicant relies on the non-applicant's wage earner's income to repay the debt. Regardless of the apparent conflict, the ECOA was clearly not intended to preempt state property laws that regulate rights and remedies in the event of default.<sup>268</sup> In light of this rule, the merits of the staff's interpretation are overshadowed by federal/state preemption rules. Thus, although the staff's position accurately postulates what the Board perceived as the proper interplay between Regulation B and state equal management provisions, it must yield to state law interpretations of whether future earnings constitute community property. For this reason, the staff interpretation should be withdrawn or clarified.

#### IV. SUMMARY

The equal management provisions of the community property states have left open a number of gaps that result in unequal management by the spouses. For example, if a husband deposits his check into a separate account, his wife will be unable to reach it despite the fact that (1) it is technically community property in which she has a one-half interest, and (2) she legally has authority to manage and control the community assets.<sup>269</sup> This result is particularly deleterious to a spouse who does not work outside the home. This spouse is theoretically the intended beneficiary of equal management and control so that he or she can be considered creditworthy although unemployed.<sup>270</sup> When either spouse has the ability to remove so easily his or her income from the other spouse's control, it is questionable whether control can properly be labelled equal. The coexistence of equal management and control provisions and state law provisions that allow community property to be unilaterally diverted from the control and management of one spouse illustrates a major defect in community property law.<sup>271</sup> In effect, what the law gives with the right hand it takes away with the left. Commentators have explored these deficiencies

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267. See Maltz & Miller, *supra* note 209, at 17 n.86 (citing Fed. Reserve Bd. Interpretation § 202.1103 (effective July 8, 1977), 42 Fed. Reg. 36,810 (1977)).

268. *Id.*; see also *supra* note 240 and accompanying text (deference to state law).

269. See Bingaman, *supra* note 228, at 38.

270. One commentator has noted that because of unequal management provisions "the unemployed wife in a community property state with entirely 'equal' management provisions was totally dependent on her husband's goodwill or a creditor's willingness to extend credit to her based on her husband's earnings." *Id.*

271. *Id.*

and have pondered whether equal management is in fact, not so equal.<sup>272</sup>

Regulation B fills the gap caused by community property law by allowing unemployed spouses in equal management community states to borrow without their spouses' signatures if the community itself is creditworthy.<sup>273</sup> Creditors oppose this regulatory intervention on the grounds that it interferes with the prerogative of the state to establish its own property laws. Their primary concern is that Regulation B, as interpreted, fails to address their collection problems.

Divorce or separation, emigration to noncommunity property states, and state interspousal agreements can put the income relied on to repay the debt beyond the creditor's reach at any time during the term of the loan. If at the time the loan is made, however, the community is creditworthy and the creditor has no reason to suspect that the non-applicant spouse's income that is relied on will be diverted away from the community in one of these ways,<sup>274</sup> the creditor must extend credit to the applicant. Under Regulation B as written, failure to do so violates section 202.7(d)(3) if the applicant has equal management and control over a community whose credit rating justifies the amount of credit requested.

Regulation B does not address the risk taken by creditors that the diversion will occur after credit has been extended. While this risk is arguably not included among the usual risks creditors take when extending credit,<sup>275</sup> it seems that the drafters of Regulation B would have considered this risk since the regulation impacts so heavily on creditor default remedies. In spite of its significance, Regulation B's drafting history gives no indication that the Federal Reserve Board considered the creditor collection problem. Likewise, nothing indicates that this issue was explored at the state level, even though equal management community property laws exacerbate the collection dilemma.

Federal and state law thus unintentionally compound ordinary collection problems. Regulation B prohibits creditors from requiring the wage-earner, non-applicant's signature, yet without that signature creditors risk losing that spouse's income because state law allows him to convert these community funds unilaterally to his sole control. Because this situation creates severe hardship for creditors, the Federal Reserve Board and the community property state legislatures must consider this problem and formulate means by which it can be adequately resolved.

The Board drafted Regulation B with a utopian view of equal management and control. Unfortunately, state law is not yet so refined. The Board presumed that in all community property states future earnings are

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272. See Younger, *Not Equal Yet*, 13 IDAHO L. REV. 227 (1977).

273. See Bingaman, *supra* note 228, at 39.

274. One commentator has suggested that in most situations the ECOA will probably be interpreted to prohibit the creditor's requiring the non-applicant spouse's signature unless the separation or divorce is sufficiently certain as to support a reasonable belief in the necessity of requiring the spouse's signature to ensure the availability of the non-applicant spouse's income flow in the event of default. See Johnson, *supra* note 60, at 345-46.

275. See Willenzik Letter, *supra* note 44, at 5.

community property. While this interpretation is the most logical result of equal management and control provisions, it may not be an accurate interpretation of how each community property state will decide the question. Regulation B will not allow the Board to preempt the states on this question. Thus, while the Board can suggest an appropriate definition to the states, it cannot dictate a state legislative or judicial response.

## V. RECOMMENDATIONS AND CONCLUSION

The major deficiency highlighted by creditors regarding Regulation B, section 202.7(d)(3) is its failure to embrace their collection problems. Although the Federal Reserve Board could resolve the collection problem by amending Regulation B to allow creditor access to the signature of the non-applicant spouse, the Board should not adopt this approach for several reasons. First, the Board would be defining community property law by enacting a two-signature rule and therefore would be usurping state authority much as current provisions do. Second, the two-signature rule could be viewed as a giant step backwards in the advancement of credit equality for women. The single signature rule is of tremendous benefit to the non-gainfully employed spouse because the rule allows this spouse to receive credit and establish a credit history without the other spouse's consent.<sup>276</sup> Women comprise the majority of this group.<sup>277</sup> Third, the two-signature rule would have a detrimental effect on the non-applicant, wage-earner spouse. When he has not signed for an extension of credit, the non-applicant spouse is liable only to the extent of his share of community property. His separate property cannot be reached. On the other hand, if his signature were obtained, his exposure to liability becomes personal and goes beyond the reach of his income. All of his separate property becomes liable for repayment of the debt.<sup>278</sup> It is grossly unfair to expose one who signs in such a limited capacity to this type of liability.<sup>279</sup>

The more desirable approach to resolving the creditor collection problem is by amendment of state community property law. As a general proposition, creditors do not challenge the reasonableness of a cosignature requirement in equal management community property states. Their primary contention is that it is manifestly unreasonable to require them to consider income in granting credit when they cannot reach that income if a default occurs. If state law were amended to allow creditors to collect from the nonsignatory spouse, the tensions between state and federal law would be significantly reduced.

Several Louisiana attorneys envision this as the better approach and have already begin to draft appropriate amendments to the Louisiana

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276. See Bingaman, *supra* note 28, at 31.

277. *Id.*

278. See, e.g., N.M. STAT. ANN. § 40-3-11 (1983).

279. One way to achieve this result is to temper the broad exposure to liability by requiring the wage earner's signature to be in the form of a limited guarantee. Under this approach the non-applicant can only be exposed to liability to the extent of the earnings relied on to repay the debt. See Dennis Letter, *supra* note 50, at 20.

Equal Management Law that provide for contingencies such as the possibility that the spouses may subsequently separate or divorce, move to a non-community-property state, or otherwise engage in activity that would make the non-applicant spouse's income unavailable to satisfy the borrower's indebtedness.<sup>280</sup> Louisiana law would not require major modification to remedy creditor collection difficulties. Indeed, it currently appears to be headed in that direction. A 1980 Louisiana law states that "[a]n obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation."<sup>281</sup>

To address creditor collection concerns, the Louisiana law could be amended as follows:

An obligation incurred by a spouse before or during the community property regime, may be satisfied after termination of the regime from the property of the former community, *including the earnings of a non-signatory spouse that were relied on for an extension of credit*, and from the separate property of the spouse who incurred the obligation.

By amending its community property law in this way, Louisiana would have, in effect, expanded the *Moucka* decision<sup>282</sup> to include earnings. Thus a creditor could collect from former community property and earnings relied on for a debt, regardless of whether those earnings are community or separate property. All of the community property states should consider adopting and extending the *Moucka* rule to specifically include earnings. A similar provision could be adopted stating that interspousal agreements cannot affect creditor collection rights. While amending state law in this manner is not a panacea for resolving the spousal cosignature problems in community property states, it is certain to reduce some of the pandemonium that currently exists regarding the proper interplay between Regulation B, section 202.7(d)(3) and state community property law.

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280. See Willenzik Letter, *supra* note 44.

281. LA. CIV. CODE ANN. art. 2357 (West Supp. 1983).

282. *Moucka v. Windham*, 483 F.2d 914 (10th Cir. 1973).



## APPENDIX

### COMPARISON OF THE EQUAL MANAGEMENT PROVISIONS IN THE COMMUNITY PROPERTY STATES

Each community property state has adopted a unique community property scheme through its constitution, legislation, and judicial interpretations<sup>283</sup> and has incorporated a provision regarding equal management and control of community property into that scheme. While in some respects similar, each equal management provision is different enough to warrant separate attention. Below is a brief discussion of each community property state's equal management and control provisions viewed from a historical perspective.

#### *A. Arizona*

The State of Arizona has perhaps one of the most direct provisions for equal management and control. The language of the statute as amended in 1973 is most clear:

A. Each spouse has the sole management, control and disposition rights of his or her separate property.

B. The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

2. Any transaction of guaranty, indemnity or suretyship.<sup>284</sup>

In defining the community's liability, again the Arizona statutes speak very clearly:

A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse absent agreement of the property owner to the contrary.

B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.

C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.

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283. See *supra* notes 12, 14, and accompanying text.

284. See ARIZ. REV. STAT. ANN. § 25-214 (1976).

D. Except as prohibited in § 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.<sup>285</sup>

Thus under Arizona law each spouse has equal management and control of the community property and either spouse may bind community personal property; however, transactions involving community realty usually require joinder of both spouses. No provision is made for sole management of a community property business. Separate property is under the sole management and control of its owner and is not liable for the separate debts of the other spouse.

The community liability provision partially rejects the community and separate debt distinction that once prevailed in the state.<sup>286</sup> Consequently, debts incurred after September 1, 1973, may be satisfied from the contracting spouse's separate property and from the community property to the extent of that spouse's contribution to the community. In contrast, separate debts incurred prior to September 1, 1973, are satisfied only from a spouse's separate property. Community debts are satisfied first from community property, then from the separate property of the contracting spouse. Even where the husband and wife are separated, the community still continues to exist and either party may bind the community subject to the aforementioned statutory limitations.<sup>287</sup>

### B. California

Since 1975 either spouse in California has possessed the right to determine the management and control of the community personal property.<sup>288</sup> The spouses exercise joint management and control<sup>289</sup> over their community real property or interest therein leased for longer than one year.<sup>290</sup> The former rule in California held that the husband was the head of the household with the power to manage and control the community, including the absolute power of disposition.<sup>291</sup> On the other hand, the wife was only allowed to exercise management and control over community property stemming from her uncommingled earnings and personal injury damage awards.<sup>292</sup>

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285. *Id.* § 25-215.

286. *Id.* § 25-216 (repealed 1973).

287. *See* *Neal v. Neal*, 116 Ariz. 590, 570 P.2d 758, 761 (1977).

288. *See* CAL. CIV. CODE § 5125 (West 1983). *See generally* Sabban & Hoffman, *California's Community Property Laws: Planning a Move to California*, TR. & EST., June 1982, at 10.

289. Joint management and control, or "dual management" as it has been referred to, means that each spouse must consent to the transaction in order for it to be valid.

290. *See* CAL. CIV. CODE § 5127 (West 1983).

291. 1850 Cal. Stat. 254, ch. 103, 89 (repealed 1872, but embodied in California community property system until Jan. 1, 1975).

292. *See* Bonanno, *The Constitution and "Liberated" Community Property in California*—

Today, with respect to separate<sup>293</sup> and quasi-community property,<sup>294</sup> the spouse who acquires the property has the sole right of management and control.<sup>295</sup> The extent to which a creditor can reach the property of the couple depends both on the nature of the property at issue and the time the debt was incurred.<sup>296</sup> Since either spouse may bind the community personal property, the community becomes liable for all debts of either spouse made during the marriage, whether or not they are incurred for the benefit of the community.<sup>297</sup> California thus does not seem to follow the community debt doctrine.

Each spouse's separate property is liable for the debts he or she incurred both prior to and after the marriage.<sup>298</sup> Although the separate property of the spouse is not liable per se for the debts of the other spouse incurred during the marriage,<sup>299</sup> it is liable where the items contracted for are considered "necessaries of life."<sup>300</sup> Additionally, each spouse's earnings are liable for the respective debts incurred prior to marriage.<sup>301</sup> Finally, departing from the general notion of equal management and control, a spouse operating or managing a business that is community personal property has sole management and control of that business.<sup>302</sup>

### C. Idaho

Idaho enacted an equal management and control statute in 1974, which granted to both spouses the equal right to manage and control community property.<sup>303</sup> Separate property is controlled individually by each

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*Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill*, 1 HASTINGS CONST. L.Q. 97, 97 n.2 (1974).

293. "Separate property" is defined in California as: "All property [owned by the wife/husband] before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is [her/his] separate property. The [wife/husband] may, without the consent of [the other spouse], convey [her/his] separate property." See CAL. CIV. CODE §§ 5107 (wife's separate property), 5108 (husband's separate property) (West 1983).

294. "Quasi-community property" is defined in California as:

[A]ll real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

*Id.* § 4803.

295. See Sabban & Hoffman, *supra* note 296, at 10, 11.

296. *Id.*

297. See CAL. CIV. CODE § 5116 (West Supp. 1983).

298. See *id.* §§ 5120-5121.

299. Separate property of the contracting spouse is liable on the debt; however, separate property of the non-contracting spouse is only liable where the items contracted for are considered "necessities of life." See *id.*

300. *Id.* § 5121.

301. *Id.* § 5120. See generally Sabban & Hoffman, *supra* note 288, at 10-11.

302. CAL. CIV. CODE § 5125(d) (West 1983).

303. IDAHO CODE § 32-912 (Supp. 1983).

spouse.<sup>304</sup> The new provision allows both spouses to contractually bind the community for debts incurred for the use and benefit of the community.<sup>305</sup> Because either spouse may also subject the community to liability for their separate debts,<sup>306</sup> however, Idaho does not appear to follow the community debt doctrine. Instead of benefiting the community exclusively, community debts are simply any debts incurred by the husband and/or the wife during the marriage.<sup>307</sup>

Like California and Arizona,<sup>308</sup> Idaho also requires joinder of the spouses for conveyances of real property.<sup>309</sup> Neither spouse is liable for the obligations of the other unless that spouse consents to such liability in writing.<sup>310</sup> Prior to 1974, the community property was not subject to management and control by the wife and therefore the community was not liable for her separate debts.<sup>311</sup> The community property was liable for all debts of the husband, however, including his separate obligations.<sup>312</sup> Although some inequities exist in the equal management and control provisions,<sup>313</sup> it must be assumed that because a wife now possesses that control, her creditors will also be able to reach both the community property and her separate assets.<sup>314</sup>

#### D. Louisiana

In 1979 the Louisiana Legislature amended Title VI of Book III of the

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304. *Id.* § 32-904 (1963).

305. See Crapo, *Equal Management of Community Property: Creditors' Rights*, 13 IDAHO L. REV. 177, 178 (1977).

306. See *id.* For a complete discussion of the Idaho equal management and control provisions as they relate to the ECOA, see Bingaman, *supra* note 208.

307. See Comment, *The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy*, 63 CALIF. L. REV. 1610, 1652 n.232 (1975) (citing Brockelbank, *The Creditor and the Community in Idaho*, 15 LA. L. REV. 535 (1955)).

308. See ARIZ. REV. STAT. ANN. § 25-214 (1976); CAL. CIV. CODE § 5127 (West Supp. 1983). Additionally, all other community property states with the exception of Texas also require joinder of the parties for conveyances and acquisitions of real property. See IDAHO CODE § 32-912 (Supp. 1983); LA. CIV. CODE ANN. arts. 2347, 2349 (West Supp. 1983); NEV. REV. STAT. § 123.230(3) (1983); WASH. REV. CODE ANN. § 26.16.030(3) (Supp. 1983-1984).

Texas classifies property in accordance with the doctrine of inception of title. Under this rule the character of the property, community or separate, is determined at the time the asset is acquired. See generally Kinnebrew, *Texas Community Property*, TR. & EST., June 1982, at 15. Therefore, where the marital home is purchased by making a down payment from one spouse's separate property and the balance through the execution of a mortgage, based on the credit of both, the property acquired is both community and separate property. The property is then subject to both sole management, to the extent separate property is involved, and joint management. See, e.g., Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405 (1956) (credit established in mortgage is that of both spouses, i.e., the community, unless creditor agrees to look solely to separate property of one spouse), *aff'd*, 353 U.S. 941 (1957); Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d 881 (1937). See generally Kinnebrew, *supra*, at 15.

309. IDAHO CODE § 32-912 (Supp. 1983).

310. *Id.*

311. See Crapo, *supra* note 305, at 177 nn.4-5.

312. See Holt v. Empey, 32 Idaho 106, 110, 178 P. 703, 704 (1919); Crapo, *supra* note 305, at 177 nn.4-5.

313. See Younger, *supra* note 272.

314. See Comment, *supra* note 307, at 1652.

Louisiana Civil Code to provide for equal management and control of community property.<sup>315</sup> The amendments became effective January 1, 1980, and Louisiana became the final community property state to adopt an equal management provision.<sup>316</sup> The new law deposed the husband as "head and master" of the household<sup>317</sup> and ended the infirmity of interspousal contracts.<sup>318</sup>

Under the equal management and control provisions in Louisiana, each spouse has the right to manage community property.<sup>319</sup> "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."<sup>320</sup> That a spouse may so act without the consent or concurrence of the other spouse is tempered by the requirement of joinder in certain transactions:

The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly.<sup>321</sup>

If the spouses manage a business, either may control the movable assets under the same rules as above.<sup>322</sup> Each spouse also has the exclusive right to control movables that are registered to him as well as any partnership interests.<sup>323</sup> Additionally, the donation of community property to a third person requires the consent of each spouse unless it is a "usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation."<sup>324</sup>

When joinder is required but not obtained, the transaction is void unless the other spouse has renounced his right to concur.<sup>325</sup> A spouse may, however, receive judicial authorization to act alone on behalf of the community where he/she would not ordinarily have the authority to do so by

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315. LA. CIV. CODE ANN. art. 2346 (West Supp. 1983); see Comment, *supra* note 25, at 320 n.1.

316. Louisiana became the seventh community property state to adopt a true equal management and control provision. See Flanders, *Louisiana Community Property Laws: A Legal and Historical Perspective*, TR. & EST., June 1982, at 20, 21. Texas does not yet have a true equal management and control provision.

317. See Comment, *supra* note 25, at 323.

318. LA. CIV. CODE ANN. arts. 2325-2329 (1971) (amended 1979); see Comment, *supra* note 25, at 323.

319. LA. CIV. CODE ANN. art. 2346 (West Supp. 1983).

320. *Id.*

321. *Id.* art. 2347.

322. *Id.*; see Comment, *supra* note 25, at 331.

323. LA. CIV. CODE ANN. arts. 2351-2352 (West Supp. 1983); see Comment, *supra* note 25, at 331.

324. LA. CIV. CODE ANN. art. 2349 (West Supp. 1983).

325. *Id.* art. 2350.

A spouse may expressly renounce the right to concur in the alienation, encumbrance, or lease of a community immovable or some or all of the community immovables, or all or substantially all of a community enterprise. He also may renounce the right to participate in the management of a community enterprise. The renunciation may be irrevocable for a stated term.

*Id.* art. 2348.

showing that such action is in the best interests of the family and the other spouse has arbitrarily refused to concur or that concurrence is impossible, as in a case of legal disability.<sup>326</sup> Where a spouse acts in a fraudulent manner in the management of community property or in bad faith with respect thereto, he is liable for any resulting damage to the community.<sup>327</sup>

The new law also provides that each spouse owns a present undivided one-half interest in the community property, which may not be judicially partitioned prior to dissolution of the regime.<sup>328</sup> This is a significant change from the previous view, which held that the community was part of the husband's patrimony during the regime.<sup>329</sup> While the wife's interest now could be said to be more than an expectancy,<sup>330</sup> she will not realize her one-half interest in the community until the termination of the regime. It follows that both the husband and wife may now bind the community<sup>331</sup> and that a separate or community debt may be satisfied from the community property and/or the separate property of the contracting spouse.<sup>332</sup> Where the community has satisfied a separate obligation, it is entitled to reimbursement from the separate estate.<sup>333</sup>

### E. Nevada

Nevada was the fifth state to adopt an equal management community property law.<sup>334</sup> The interests of the husband and wife in the community are "present, existing and equal."<sup>335</sup> Separate property is under the sole management and control of its owner.<sup>336</sup> Under section 123.230 of the Nevada statutes, as amended in 1977, a spouse may elect to give the other a power of attorney "to sell, convey or encumber any property held as community property or [e]ither spouse, acting alone, may manage and control community property . . . with the same power of disposition as the acting spouse has over his separate property . . . ."<sup>337</sup> The limitations of the equal management and control provision in Nevada are six-fold:

326. *Id.* art. 2355.

327. *Id.* art. 2354.

328. *Id.* art. 2336.

329. Comment, *supra* note 25, at 329.

330. *Id.* at 329 n.43.

331. LA. CIV. CODE ANN. arts. 2345, 2357 (West Supp. 1983); see Bartke, *supra* note 25, at 298.

332. LA. CIV. CODE ANN. art. 2357 (West Supp. 1983). Where the community is threatened with diminishment through the fraud, fault, neglect, or incompetence of one spouse, the other may petition the court to separate the property. See *id.* art. 2374 (creditors may intervene in action or may later sue to annul separation of property).

333. *Id.* art. 2364.

334. NEV. REV. STAT. § 123.230 (1983). Little has been written about the Nevada equal management provision. The few articles that do exist compare Nevada's equal management provisions to those of other states. See, e.g., Bartke, *supra* note 26, at 213; MacDonald, *The Impact of Equal Management Upon Community Property Businesses*, 13 IDAHO L. REV. 191 (1977); Young, *supra* note 39, at 240.

335. NEV. REV. STAT. § 123.225 (1983).

336. *Id.* § 123.170.

337. *Id.* § 123.230.

1. Neither spouse may devise or bequeath more than one-half of the community property.
2. Neither spouse may make a gift of community property without the express or implied consent of the other.
3. [Joinder of the parties is required] in the execution of the deed or other instrument by which the real property is sold, conveyed or encumbered . . . .
4. Neither spouse may purchase or contract to purchase community real property unless [entered into by both parties].
5. Neither spouse may create a security interest, other than a purchase money security interest . . . , in, or sell, community household goods, furnishings or appliances unless both join in executing the security agreement or contract of sale, if any.
6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of a business where both spouses participate in its management without the consent of the other. If only one spouse participates in management [of the business, however, consent of the other spouse is not required].<sup>338</sup>

Debts incurred prior to marriage may be satisfied from a debtor spouse's separate property as well as from that spouse's interest in the community property.<sup>339</sup> Debts incurred for necessities are satisfied first from the community, then from the husband's separate property.<sup>340</sup> The question of whether or not Nevada follows the community and separate debt doctrine is unsettled;<sup>341</sup> however, the modern trend seems to be that the community is at least partially liable for separate debts of the spouses.<sup>342</sup>

#### *F. New Mexico*

Each spouse in New Mexico may exercise equal management and control over the community personal property.<sup>343</sup> As with most other community property jurisdictions,<sup>344</sup> however, New Mexico requires joint management and control of real property.<sup>345</sup> Under section 40-3-2 the "[h]usband and wife may hold property as joint tenants, tenants in common or as community property;"<sup>346</sup> however, the presumption is that property acquired during the marriage is community property.<sup>347</sup> Spouses individually manage and control their separate personal and real property.<sup>348</sup> No special provision is made for community property business. As

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338. *Id.* § 123.230(1)-(6).

339. *Id.* § 123.050.

340. *Id.* § 123.090.

341. *See* Comment, *supra* note 307, at 1652 n.239.

342. *Id.* at 1653 n.240.

343. N.M. STAT. ANN. § 40-3-14 (1983).

344. *See supra* note 308 and accompanying text.

345. N.M. STAT. ANN. § 40-3-13 (1983).

346. *Id.* § 40-3-2.

347. *Id.* § 40-3-12.

348. *Id.* § 40-3-11. Real property if individually managed cannot be held by spouses as tenants in common or in joint tenancy. *Id.*

in Nevada,<sup>349</sup> a spouse may receive the other's power of attorney, giving that spouse sole management and control of the community.<sup>350</sup> With respect to the equal management and control of community personal property, the New Mexico statute contains some of the most forceful language: "[E]ither spouse alone has full power to manage, control, dispose of and encumber the entire community personal property."<sup>351</sup>

New Mexico does not appear to strictly adhere to the community debt doctrine. Although it distinguishes between separate and community debts, separate debts may be satisfied from all of the contracting spouse's separate property as well as from one-half of the community property.<sup>352</sup> Community debts may be satisfied from the contracting spouse's separate property and all of the community property, but creditors generally may

349. See *supra* note 337 and accompanying text.

350. N.M. STAT. ANN. §§ 40-3-14, 47-1-17 (1983).

351. *Id.* § 40-3-14(A). New Mexico followed Washington's lead in the area of equal management and control and the language of Washington's provision is quite similar. See WASH. REV. CODE ANN. § 26.16.030 (Supp. 1983-1984) ("Either spouse, acting alone, may manage and control community property . . ."); *infra* note 377 and accompanying text. Although similar, the New Mexico provision still contains the more forceful language on its face. The addition of the words "full" and "entire" give this statute the strongest possible literal meaning and yet it is constrained by the language of the spouses' commercial agreements with third parties. This paradox, if it is such, is quite interesting and could be the subject for further review of New Mexico's underlying policies. The statute is unique because of the limiting language. This forceful equal management and control provision is not applicable to the following two situations:

B. Where only one spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement . . . ; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.

C. Where both spouses are:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement with a third party as having joint authority to dispose of or encumber the community personal property which is described in or the subject of the agreement . . . both spouses must join to dispose of or encumber such community personal property where the names of the spouses are joined by the word "and." Where the names of the spouses are joined by the word "or," or by the words "and/or," either spouse alone may dispose of or encumber the community personal property.

N.M. STAT. ANN. § 40-3-14(B)-(C) (1983). This language tends to negate the equal management and control provision when commercial agreements come into existence. Property that would otherwise be defined as community property pursuant to *id.* § 40-3-8(B), and thus subject to equal management and control of the spouses, can lose that status merely if the property is designated or named in a commercial agreement between a third party and a spouse and the agreement states that the signing spouse has sole authority to manage and control the property in question. While this provision was probably added to protect the rights of creditors, it contains the potential for abuse. In effect, the spouse's contracts for purchase also serve to define and limit management and control rights.

352. *Id.* § 40-3-10(A).



not reach the other spouse's separate property.<sup>353</sup>

### G. Texas

Texas pioneered the equal management and control movement.<sup>354</sup> Prior to the 1913 reforms,<sup>355</sup> a husband in Texas exercised management and control over not only the community property but also his wife's separate property.<sup>356</sup> By the middle of the twentieth century, however, it was well recognized in all the community property states that the wife had sole management and control over her separate property.<sup>357</sup> In 1967 Texas eliminated the dual definitions of community and separate property for the husband and wife and replaced it with comprehensive definitions that referred to the parties as spouses.<sup>358</sup> While this change was purely linguistic, it signaled the initial move toward equal management and control.<sup>359</sup>

The Texas Constitution was amended in 1980 to provide for the latest changes in its community property laws.<sup>360</sup> Under the new constitutional framework many of the interspousal contract infirmities were removed and the state was brought more in line with the other community property states.<sup>361</sup> While some commentators discuss the new Texas marital property law as if it were a true equal management and control state, it is arguably not.<sup>362</sup> The community property system in Texas is unique. The statutory scheme delineates three types of community property, (1) that which is under the sole management and control of the husband, (2) that which is under the sole management and control of the wife, and (3) "combined community property."<sup>363</sup> The community property under the sole control of a spouse consists primarily of wages, revenue from separate property, and personal injury recoveries.<sup>364</sup> Thus each spouse exercises exclusive management and control over that portion of the community

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353. *Id.* § 40-3-11(A).

354. *See* Bartke, *supra* note 26, at 222-23.

355. *See id.*

356. *Id.* at 223.

357. *Id.* at 227.

358. *Id.* at 227 & n.84.

359. *Id.* at 227.

360. *See* Kinnebrew, *supra* note 308, at 16. *See generally* Comment, *The 1980 Texas Marital Property Amendment: An Analysis of Its Meaning and Effect*, 33 BAYLOR L. REV. 307 (1981) [hereinafter cited as Comment, *1980 Amendment*]; Comment, *Amendment to Article XVI, § 15 of the Texas Constitution: Greater Uniformity Among the Community Property States*, 21 S. TEX. L.J. 239 (1980) [hereinafter cited as Comment, *Article XVI*].

361. *See generally* Comment, *Article XVI*, *supra* note 360.

362. The Texas scheme of management and control of property is unique among the community property states. The Texas system more closely parallels that of the common law states. *See* Bartke, *supra* note 26, at 228; Kinnebrew, *supra* note 308, at 15.

363. TEX. FAM. CODE ANN. § 5.22 (Vernon 1975); *see* Bartke, *supra* note 26, at 228. The 1980 constitution has brought about some changes in the statutory scheme, but the basic structure remains the same.

"Combined community property," also known as "mixed" community property, results from the mixing or commingling of the spouses' sole management property. *See* TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975); Bartke, *supra* note 26, at 228-29; Kinnebrew, *supra* note 308, at 15-16.

364. TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975).

that is the result of his/her individual efforts and income from his/her separate property.<sup>365</sup>

Texas does not adhere to the community debt doctrine.<sup>366</sup> Creditors of a spouse, whether or not the debt was incurred in community or separate activities, or before or after marriage, may reach that spouse's separate property, the community property under that spouse's sole management and control, and the community property under joint management and control.<sup>367</sup> The third type of community property, "combined community property," results from the commingling or mixing of the first two types of community property and is jointly managed and controlled by the spouses.<sup>368</sup> This provision implies that both spouses must be gainfully employed in order to share management responsibilities.<sup>369</sup> In the situation where the wife is not employed but rather serves as the homemaker, she generally would exercise no control over any combined property.<sup>370</sup>

Like most of the community property states,<sup>371</sup> a provision has also been made for a power of attorney or other agreement as to the management and control by a spouse in variation to the statutory scheme.<sup>372</sup> Texas has also provided specific rules for the protection of third parties dealing with the marital parties<sup>373</sup> due primarily to this unique system of property.

#### H. Washington

In 1972 the Washington Constitution was amended to include an equal rights provision.<sup>374</sup> This led to statutory changes that same year in the community property provisions.<sup>375</sup> The Washington equal management and control language is not unlike many of the other community property states and indeed several of the others have copied this language almost

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365. *Id.* § 5.21.

366. *See* Comment, *supra* note 307, at 1654.

367. *Id.*; *see* TEX. FAM. CODE ANN. § 5.61(a), (c) (Vernon 1975).

368. TEX. FAM. CODE ANN. § 5.22(b) (Vernon 1975).

369. Each spouse is said to own an individual one-half interest in the community property regardless of which spouse has management and control. *See, e.g.*, *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). Management and control of the community that would be owned by one spouse, if single, is, however, under the sole management of that spouse. Therefore, the earnings of one spouse are under his sole management and control, although it is community property. *See* TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975). If a wife has no personal earnings, revenue from separate property, recoveries for personal injuries, or revenue from any property under her sole management and control, then there can be no commingling or mixing of community property, and therefore she would exercise no control over any of the community property. *See id.* § 5.22(a)-(b); *see also* Bartke, *supra* note 26, at 219-30.

370. *See* TEX. FAM. CODE ANN. § 5.22(a)-(b) (Vernon 1975).

371. *See, e.g.*, NEV. REV. STAT. § 123.230 (1983); N.M. STAT. ANN. § 40-3-14 (1983).

372. TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975).

373. *Id.* § 5.24(b) (unknowing third party may rely on a spouse as having right of management and control over property in that spouse's name or possession); *see also* Comment, 1980 Amendment, *supra* note 360, at 313-14.

374. WASH. CONST. art. 31; *see* Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527, 528 (1973).

375. *See* Cross, *supra* note 374, at 530.

verbatim.<sup>376</sup> The provision states that "[e]ither spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property . . . ."<sup>377</sup> As with the other states' provisions, Washington is not without limitations on the application of this rule.<sup>378</sup> In fact, the limiting language is nearly identical to that of Nevada.<sup>379</sup>

The case law of the state now imposes a duty on both spouses to manage

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376. Compare ARIZ. REV. STAT. ANN. § 25-214(C) (1976) ("Either spouse separately may acquire, manage, control or dispose of community property, or bind the community . . . ."); CAL. CIV. CODE § 5125(a) (West 1983) ("[E]ither spouse has the management and control of the community personal property . . . with like absolute power of disposition; other than testamentary, as the spouse has of the separate estate of the spouse."); IDAHO CODE § 32-912 (Supp. 1983) ("Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract . . . ."); LA. CIV. CODE ANN. art. 2346 (West Supp. 1983) ("Each spouse acting alone may manage, control or dispose of community property . . . ."); NEV. REV. STAT. § 123.230 (1983) ("[E]ither spouse, acting alone, may manage and control community property . . . with the same power of disposition as the acting spouse has over his separate property . . . ."); and N.M. STAT. ANN. § 40-3-14 (1983) ("[E]ither spouse alone has full power to manage, control, dispose of and encumber the entire community personal property."); with WASH. REV. CODE ANN. § 26.16.030 (Supp. 1983-1984) ("Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property . . . .").

377. WASH. REV. CODE ANN. § 26.16.030 (Supp. 1983-1984). For a discussion of creditors' rights under the Washington statutory scheme and its relation to the ECOA, see Johnson, *supra* note 60, at 333.

378. See WASH. REV. CODE ANN. § 26.16.030 (Supp. 1983-1984).

379. Compare NEV. REV. STAT. § 123.230(1)-(6) (1983) (quoted *supra* text accompanying note 338); with WASH. REV. CODE ANN. § 26.16.030(1)-(6) (Supp. 1983-1984), which states:

- (1) Neither spouse shall devise or bequeath by will more than one-half of the community property.
- (2) Neither spouse shall give community property without the express or implied consent of the other.
- (3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.
- (4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.
- (5) Neither spouse shall create a security interest other than a purchase money security interest . . . in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse joins in executing the security agreement or bill of sale, if any.
- (6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of a business where both spouses participate in its management without the consent of other: *Provided*, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the goodwill of the business without the consent of the nonparticipating spouse.

(Emphasis in original.) Washington first introduced the concept of equal management and control in 1972. Since that time six other community states have followed suit. See ARIZ. REV. STAT. ANN. § 25-214(B) (1976) (effective 1973); CAL. CIV. CODE § 5125(a) (West 1983) (passed in 1973, effective 1975); IDAHO CODE § 32-912 (Supp. 1983) (effective 1974); LA. CIV. CODE ANN. art. 2346 (West Supp. 1983) (effective 1980); NEV. REV. STAT. § 123.230 (1983) (effective 1975); N.M. STAT. ANN. § 40-3-14 (1983) (effective 1973). As previously noted, Texas law is unique. See *supra* notes 362-70 and accompanying text.

and control the community property for and in the best interests of the community.<sup>380</sup> The standard employed in this respect appears to be good faith, as opposed to good judgment.<sup>381</sup> Prior to the amendments, the wife had an inherent emergency power to act for the community.<sup>382</sup> Such emergencies included the "serious absence of the husband" and legal incompetence. The suggestion has been made that with the equal management and control provision each spouse would still retain emergency powers to act alone where the statute mandates joint exercise of control.<sup>383</sup>

As in the other community property states,<sup>384</sup> joinder is required for the sale, devise, or encumbrance of household goods, furnishings, or appliances.<sup>385</sup> Where both spouses operate a business, joinder is required for contractual obligations.<sup>386</sup> On the other hand, joinder is not required if there is only one spouse participating in the management of the business.<sup>387</sup> Neither spouses' separate property is liable for the separate debts of the other spouse.<sup>388</sup> Debts incurred prior to marriage may be satisfied from the separate property of the debtor only and, provided the claim is reduced to judgment within three years of the marriage, the community earnings and accumulations of the debtor.<sup>389</sup> Washington follows the community debt theory by distinguishing between separate and community debts. Separate debts are limited to the separate property of the debtor. Community debts may be satisfied from all community property as well as from the separate property of the contracting spouse.<sup>390</sup>

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380. See, e.g., *Jarrett v. Arnerich*, 44 Wash. 2d 55, 265 P.2d 282, 286 (1954); *Hanley v. Most*, 9 Wash. 2d 429, 115 P.2d 933, 946 (1941); see also Cross, *supra* note 374, at 541-43.

381. See *Jarrett v. Arnerich*, 44 Wash. 2d 55, 265 P.2d 282, 286 (1954).

382. E.g., *Marston v. Rue*, 92 Wash. 129, 159 P. 111, 113 (1916) (emergency found to exist in "serious absence of the husband"); *Foster v. Williams*, 4 Wash. App. 659, 484 P.2d 438, 440 (1971) (emergency powers granted where husband became "totally incompetent to conduct the affairs of the marital community"); see also Cross, *supra* note 374, at 544.

383. See Cross, *supra* note 374, at 544.

384. See *supra* note 308 and accompanying text.

385. WASH. REV. CODE ANN. § 26.16.030(3) (Supp. 1983-1984).

386. *Id.* § 26.16.030(6).

387. *Id.*

388. *Id.* §§ 26.16.190, .200.

389. *Id.* § 26.16.200.

390. The assumption is that the former rights of the husband's creditors will now be extended to include creditors of the wife. See Comment, *supra* note 307, at 1657 n.265; see also text accompanying note 307.

