WEDDED BLISS II

BANKRUPTCY ISSUES INVOLVING THE NON-FILING SPOUSE

UNIVERSITY OF TEXAS SCHOOL OF LAW

29TH ANNUAL JAY L. WESTBROOK BANKRUPTCY CONFERENCE

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Accounting for the Non-Filing Spouse's Income

Form B22A, Line 17 and **B22C, Line19** are the means test provisions for dealing with the income of a non-filing spouse. All of this is wrong because the form doesn't match the Code, but until the powers that be fix the problem, this is how we get to deal with it. The analysis I provide here for Line 17 is based upon MANY filings with a non-filing spouse and the local US Trustee's office statements about how (they think) we are supposed to make the marital adjustment.

Income

To account for the non-filing spouse's income, fill in the appropriate information for the spouse on Line 3 (**gross** wages for an employed person), Line 4 (**gross** revenue and expenses for a self employed person), Line 5 (**gross** revenue and expenses for rental income), etc.

Expenses

The instructions for Line 17 say: "If you checked the box at Line 2.c, enter on line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero." [Line 2.c is "Married, not filing jointly, without the declaration of separate households set out in Line 2.b above."]

1. Start with the obvious. Take the spouse's pay checks and itemize amounts which are deducted from the spouse's gross income, such as:

   Taxes
   - Withholding
   - Social Security
   - Medicare

   Insurance
   - Medical
   - Dental
   - Vision
   - Life
   - Disability
   - Prepaid legal

   Retirement
   - Mandatory (for public employees)
   - 401(k) and similar plans

401(k) loans

Miscellaneous
Child support
Parking
Gym
Union dues
Uniforms
Charity

Be careful with cafeteria plan deductions (health savings accounts and dependent care savings accounts) as these amounts will typically be contributed toward the household expenses of the debtor or a dependent. This is an easy double or triple dip. Line 19B gives you the National Standard for out of pocket health care costs. ($54 per person under age 65.) Line 31 gives you out of pocket health care in excess of the National Standard. (Be prepared to document.) If the debtor has a health savings account (Line 34.c.), you would normally deduct the payroll deduction for that amount from Line 31.

2. Next, go the spouse's credit report. (The UST will ask you to prove the amount of any debt payments which you are excluding from the spouse's income and this will have all of it in one place.)

Deduct any payments for secured installment debt (ie, car, boat, motorcycles, jet skis) which are **not** going to be listed on Line 42, payments on secured debt. (i.e., debts which are only in the name of the non-filing spouse or which are joint debts but are not allowable for the debtor - the ski boat loan.)

Deduct any payments for other installment debt (ie, student loans, installment agreements with the IRS).

Deduct at least the minimum monthly payments on revolving debt. If the spouse makes more than the minimum payments and you can document this from the monthly statements, use the higher amount.

Be careful with the spouse's credit card debt as some of the expenses charged on the cards may be "amounts regularly contributed to the household expenses of the debtor or the debtor's dependents." There may also be payments on secured debt that fit in this category, i.e., the car (and car loan) in the non-filing spouse's name only, but that is driven by the filing spouse. That sounds like it should be included in income as amounts regularly contributed to the household expenses of the debtor, but the filing spouse should **either** get the vehicle ownership expense deduction for the car payment on Line 42 and the vehicle operating expense deduction on Line 22 or should get to take that amount back out on Line 17. (You don't include the income if you don't include the expense. See.e.g., Line 4 where the debtor includes gross revenue from a business but then reduces that amount by the amount of the operating expenses.)

3. Ask questions. I get a lot of cases where there are past due amounts owed to the IRS but no formal repayment plan and the spouse is sending in $200 per month. I get a lot of cases where child support is being paid without a court order. I see quite a few cases where there is a probation fee for DWI or bad checks.

The UST will argue with you on some of these and may even file a motion to dismiss [usually under 707(b)(3), not 707(b)(2)], but in Austin they usually withdraw the motions prior to hearing.

Remember, the issue is "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)." Sec. 101(10B). Our local UST's office frequently opines that certain expenses of the non-filing spouse are "not allowed" based upon what expenses are allowed ***for a debtor***. Its not the same. Congress says so. So does the case law.

The Law

Analysis and understanding of current monthly income (and by extension, disposable income in a Chapter 13) and a non-filing spouse **must** include an analysis of both the Bankruptcy Code and Texas marital property law.

General Bankruptcy Code Provisions:

The relevant Bankruptcy Code sections which apply in both Chapter 7 **and** 13:
101(10A)
101(10B)
101(13)
541(a)(2)

Definitions:

101(13) defines "**debtor**" as "a person or municipality concerning which a case under this title has been commenced." A non-filing person (including the spouse of a filing person) is **not** a debtor.

101(10A) defines "currently monthly income" as "the average monthly income from all sources that the **debtor** receives (**or in a joint case the debtor and the debtor's spouse receive**)... [for the six month period prior to filing]."

101(10B) further defines "current monthly income" as including "any amount paid by any entity **other than the debtor** (**or in a joint case the debtor and the debtor's spouse**), on a regular basis for the household expenses of the **debtor** or the debtor's dependents (**and in a joint case the debtor's spouse** if not otherwise a dependent).

Both 101(10A) and 101(10B) speak specifically in terms of income received by the "**debtor**"

[singular]. Under the express terms of 101(13), **"debtor"** does **not** include a **non-filing** spouse. (No case has been commenced with respect to the non-filing spouse.) Under the express terms of 101(10A) and 101(10B), "current monthly income" does **not** include the income of a non-filing spouse **unless** that income is an amount paid "...on a **regular** basis for the **household expenses** of the **debtor** or the debtor's dependents."

Property of the Estate:

541(a)(2) provides that property of the estate includes "all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

> (A) under the sole, equal, or joint management and control of the **debtor**; or
> (B) liable for an allowable claim against the **debtor,** or for both an allowable claim against the debtor **and** an allowable claim against the **debtor's spouse**, to the extent that such interest is so liable." [Emphasis added.]

The issue of what interest in community property of the debtor is liable for a claim against the debtor's spouse is an issue of **state** law. There are no Bankruptcy Code provisions which purport to address this issue.

Texas Marital Property Law:

The relevant Texas Family Code sections are:
3.002
3.102
3.104
3.201
    2.501
3.202

All of the foregoing sections are contained in Texas Family Code, Title 1. The Marriage Relationship, Subtitle B. Property Right and Liabilities, Chapter 3 Marital Property Rights and Liabilities. As we go down the list of cited sections, the subchapters become more specific. For instance, 3.002 is contained in Subchapter A. General Rules for Separate and Community Property. 3.102 and 3.104 are contained in Subchapter B. Management, Control and Disposition of Marital Property. 3.201 and 3.202 are contained in Subchapter C. Marital Property Liabilities.

The general rule that property acquired during marriage is presumed to be community is contained in Tex. Fam. Code Sec. 3.002 which provides that "Community property consists of the property, other than separate property, acquired by either spouse during marriage."

Just because property is community does **not** mean that it is liable for every debt of either spouse. Community property which is subject to the **sole management** of the non-debtor spouse is **not liable** for the **non-tortious debts** of the debtor spouse. Tex. Fam. Code Sec. 3.102 provides:

> "(a) During marriage, each spouse has the sole management, control, and disposition of the

community property that the spouse would have owned if single, including:
(1) personal earnings...

(b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement." (If the non-debtor spouse deposits sole management community property, i.e., wages, in a joint management checking account, the sole management community property becomes joint management. Simple answer: keep separate bank accounts.)

Tex. Fam. Code Sec. 3.104(a) provides:

"During the marriage, **property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership**, or if it is in that spouse's possession and is not subject to such evidence of ownership." [Emphasis added.]

Tex. Fam. Code Sec. 3.201 provides:

"(a) A person is personally liable for the acts of the person's spouse **only if**:

(1) the spouse acts as an agent for the person; or

(2) the spouse incurs a debt for necessaries as provided by Subchapter F, Chapter 2.

(b) Except as provided by this subchapter, community property is not subject to a liability that arises from the act of a spouse.

(c) A spouse does not act as an agent for the other spouse solely because of the marriage relationship."

Tex. Fam. Code Sec. 2.501 [Subchapter F, Chapter 2, referenced in 3.201(a)(2) above] provides:

"(a) Each spouse has the duty to support the other spouse.

(b) A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed."

Tex. Fam. Code Sec. 3.202 provides:

"(a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouse's are liable by other rules of law.

(b) Unless both spouse's are personally liable as provided by this subchapter, the **community property subject to a spouse's sole management, control, and disposition is not subject to:**

(1) any liabilities that the other spouse incurred before marriage; or

(2) **any nontortious liabilities that the other spouse incurs during marriage**.

(c) The community property subject to a spouse's sole or joint management, control and disposition is subject to the liabilities incurred by the spouse before or during marriage.

(d) All community property is subject to tortious liability of either spouse incurred during marriage." [Emphasis added.]

Pay attention to cased law cited for the proposition that a spouse is liable for the debts of the other spouse. Most of this case law is ancient. One of the cases I am cited to regularly is Walling v. Hannig, 11 S.W. 547 (Tex.1889.) That's right folks: 1889. This is a case where the husband and wife went to a store and wife purchased "many articles of house furnishing goods." Wife made payments for a time, but then defaulted. Store owner sues husband who denies liability because he did not authorize the purchases. The Court ruled in favor of store owner stating: "Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. She is considered as his agent, and the law implies a promise on his part to pay the value." A few things have changed since 1889. Like Texas Family Code Sec. 3.201(c), which specifically provides that a spouse is not the other spouse's agent just because they are married. (And we let women vote and own property now, too. Times, they are a changin.')

* There really is no such thing in Texas as "community debt." Texas Family Code Sec. 7.001 provides that in a divorce decree, the court "shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." The rest of Chapter 7 of the Family Code. **The phrase "community debt" does not appear anywhere in the Texas Family Code**. (Try a Westlaw search of the Family Code for the phrase "community debt" and you get "no results match your request.") This is an unfortunate term that gained common usage **before** there was a Family Code and has survived as a shorthand abbreviation when it is really just a lazy way of saying "debt incurred during marriage" in the context of dividing the marital estate.

There are some very specific and limited exceptions to a Texas spouse's future income being liable for the other spouse's debts. See, e.g., Medaris v. U.S., 884 F.2d 832 (5th Cir. 1989) which held that one-half of the non-filing spouse's earnings were subject to levy to satisfy the debtor's tax liability, but that resulted from application of the Internal Revenue Code, not the Texas Family Code.

Chapter 7:

The relevant Bankruptcy Code sections in a Chapter 7 case are:
707(b)(2)(A)(i)
707(b)(2)(A)(ii)(I)
707(b)(2)(A)(ii)(II)
707(b)(2)(C)
707(b)(3)(B)

707(b)(2)(A)(i) provides that in determining whether the granting of relief would be an abuse, the court shall presume abuse if the "**debtor's** current monthly income" (singular possessive) reduced by the amounts in the following subparagraphs exceeds certain specified amounts.

707(b)(2)(A)(ii)(I) specifies what certain of the debtor's expenses shall be for the purposes of the means test "for the debtor, the dependents of the debtor, **and the spouse of the debtor in a joint case**." 707(b)(2)(A)(ii)(II) provides for additional allowable expenses paid by the debtor for care and support of an elderly, chronically ill, or disabled member of the debtor's immediate family, including

"**the spouse of the debtor in a joint case** who is not a dependent."

707(b)(2)(C) provides that "As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the **debtor's** (singular possessive) current monthly income." (There is no requirement that the income of the non-filing spouse be disclosed.)

707(b)(3)(B) provides that in considering whether the granting relief under paragraph 1 in case where the presumption does not arise, the court "shall" consider whether the debtor filed the petition in bad faith or the totality of the circumstances ... of the **debtor's** (singular possessive) financial situation demonstrates abuse."

I routinely receive requests for information and even the occasional motion to dismiss from the UST that refers to "debtors' household current monthly income." Could someone please show me the Bankruptcy Code section that refers to "debtors'" (plural possessive) "household" current monthly income. (There isn't one.)

Chapter 13:

The relevant Bankruptcy Code sections in a Chapter 13 case are:
1306(a)(2)
1322(d)
1325(b)(1)(B)
1325(b)(2)
1325(b)(3)
1325(b)(4)

1306(a)(2) provides that property of the estate in a Chapter 13 case includes (in addition to the property listed in 541), "earnings from services performed by the ***debtor*** after the commencement of the case." [Emphasis added.] In other words, the debtor's post-petition wages are property of the estate in a Chapter 13. If there is a non-filing spouse, that spouse is **not** a debtor and his/her earnings are **not** property of the estate. (Although 541 brings in all interests of both the debtor spouse and the non-debtor spouse in any community property liable for an allowable claim against the debtor and an allowable claim against the debtor's spouse ***as of the commencement of the case***, 1306 is limited to the earnings of the **debtor** and contains no similar provision for the post-petition sole management community earnings of the non-filing spouse.)

1322(d)(1) provides that "if the current monthly income of the debtor **and the debtor's spouse** combined" is more than the median family income for a family of the same size, the plan term may not exceed five years. 1322(d)(2) provides that "if the current monthly income of the debtor **and the debtor's spouse** combined" is less than the median family income for a family of the same size, the plan term may not exceed three years, unless the court, for cause, approves a longer period not to exceed five years.

1325(b)(1)(B) provides that the court may not approve a plan unless it provides that "all of the

debtor's projected disposable income to be received" during the applicable commitment period will be paid to unsecured creditors. Note that the statute refers to the **"debtor's"** (singular possessive) disposable income, **not** the debtor **and the debtor's spouse**.

1325(b)(2) provides that for the purposes of that section, the term "disposable income" means "current monthly income received by the **debtor**" (singular) less certain exceptions.

1325(b)(3) provides that amounts reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor shall be determined pursuant to 707(b)(2) "if the **debtor** (singular) has current monthly income" greater than the median family income for a family of the same size.

1325(b)(4) provides for determination of the applicable commitment period, which is not less than five years "if the current monthly income of the debtor ***and the debtor's spouse*** combined" is more than the median family income of the same size. Although there is certainly an argument that all of the spouse's income should be included for purposes of determining the applicable commitment period, the case law **so far** is saying that interpretation does not make sense given the definitions in 101(10A) and (B) and so income of the non-filing spouse is considered only to the extent it is regularly contributed to household expenses of the debtor or a dependent.

Case Law Post-BAPCPA:

Chapter 13 Cases

Texas Cases

In In re Charles, 375 B. R. 338 (Bankr.E.D.Tex.2007), the debtor's non-filing spouse had a car note which the non-filing spouse would continue to pay directly which note would pay off during the term of the Chapter 13 plan. The plan did not propose to increase the plan payment when the car loan paid off. The Trustee objected to confirmation on the ground that the plan did not satisfy 1325(b)(1)(B) in that the plan did not apply all of the debtor's projected disposable income to the plan during the applicable commitment period (in that case, 36 months.)

Judge Parker acknowledged pre-BAPCPA jurisprudence which had generally required that a non-filing spouse's income be considered in determining the amount of income available to fund a plan, but also noted "courts disagreed to varying degrees as to whether this requirement mandated the actual dedication of all excess family income, including that of the non-debtor spouse, to the proposed plan, and whether a non-debtor spouse could be precluded from utilizing non-estate earnings to address any debts which he may have incurred."

Judge Parker acknowledged that "The rationale behind including non-debtor spouse income in debtor's individual plan under the disposable income test is simple: a portion of the non-debtor spouse's income is likely to be applied to the basic needs of the debtor and to potentially increase the share of the debtor's own income that is not reasonably necessary for support. In other words, it is fair that the non-debtor spouse's income should be considered in calculating the appropriate chapter

13 plan payment." Citing In re Carpenter, 318 B.R. 645 at 647 (Bankr.E.D.Va.2003.

Judge Parker concluded, however, that "While the Trustee's position might be viable under the former [pre-BAPCPA] standard, its foundation has been completely eradicated by the BAPCPA amendments in this area." (Oh, by the way, plan confirmed over objection.)

In re Louviere, 2008 WL 925824 (Bankr.E.D.Tex.2008) is kind of a goofy case where the debtor retired the month before she filed so her income on the means test was approximately double her income on Schedule I. (I'm thinking wait a few months and avoid at least one issue, but there may have been some creditor poking her with a sharp stick that prompted an earlier filing.) The Chapter 13 trustee, apparently having not read Hardacre or the "projected" appended to disposable income, objected because her plan did not pay her disposable income under the job she didn't have anymore to unsecured creditors. That one didn't work.

The Chapter 13 trustee also objected to confirmation because "the Debtor failed to demonstrate that a sufficient contribution [from the non-filing spouse] is being made to the household expenses of the family unit." The court described the testimony on the non-filing spouse as "somewhat disjointed" (a polite way of saying "not credible"?) On the amended I and J, the debtor took out her non-filing spouse's gross income altogether and included a line for "husband's contribution to household." Correct interpretation of 101(10B), but doesn't disclose what the form asks for. The court found that despite "the Debtor's difficulty in quantifying her husband's income and expenditures" the evidence "clearly" indicated that the non-filing spouse contributed "a minimum" of 69.5% of the household expenses. The Court concluded "Under whatever standard one might wish to apply, that does not constitute an inequitable apportionment of the household expenses nor can it be said that the Debtor in this case is improperly diverting potential plan payments in order to subsidize the lifestyle of her non-filing spouse." He does conclude, however: "In this case [her] income is dedicated to paying creditors. To the extent there is a surplus after payment of obligations incurred by her, it is devoted to necessities and satisfaction of the terms of the Plan. Were that surplus being used to underwrite luxuries to be enjoyed by the Debtor and [her], while the Debtor used Chapter 13 for lien stripping, extensions of indebtedness and discharge of unsecured claims, there might exist grounds for dismissal of the case or denial of confirmation on the basis that the chapter 13 filing was in bad faith." He does not address the fairly common (at least in my practice) situation where the non-filing spouse simply chooses not to help the debtor pay his or her unsecured credit card debt and simply elects to put his or her "surplus" funds into saving, or to pay for a child's college expenses or to indulge in recreational activities, or........

In In re Barfknecht, 378 B.R. 154 (Bankr.W.D.Tex.2007), Judge Clark held that the debtors exclusion of Social Security benefits in determining projected disposable income was proper under the definition of current monthly income contained in 101(10A). He also concluded that failing to include those amounts did not constitute lack of good faith under 1325(a)(3) because the debtors were simply taking an exclusion that Congress authorized them to take. This is **not** a non-filing spouse case, but Judge Clark correctly follows the definition in the statute to get to the answer. As a debtor's attorney, cite this case for "the correct approach is read the statute."

In In re Aprea, 368 B.R. 558 (Bankr.E.D.Tex.2007), the court held that a debtor's voluntary payment of his non-working fiancé's car ownership and operating expenses were to be excluded in calculating the debtor's disposable income for purposes of 1325(b)(2)(A). [This is an expense case, not an income case, and so not directly on point, but it's from Texas and its in the neighborhood, so be aware.]

In re Ariyaserbsiri, 2008 WL 5191200 (Bankr.E.D.Tex.2008) held that 1325(b)(4) means what it says and that all of a non-filing spouse's income is used in determining the applicable commitment period. The opinion does not address to what extent, if any, the non-filing spouse's income must be included in determining disposable income for determining if all of the debtor's disposable income was being committed to the plan.

I would also refer you to a pre-BAPCPA case out of the Northern District. Although it is a pre-BAPCPA case, I recommend it to you because I would suggest that Judge Lynn reached the correct result under the old law, thus establishing a continuity of result under both versions of the Code. See, In re Nahat, 278 B.R. 108 (Bankr.N.D.Tex.2002). Specifically, Judge Lynn held that post-petition earnings of a non-debtor spouse were not property of the estate under either 541(a)(2) or 1306(a), because she was not a "debtor" and that for the same reason, her earnings were not included in the "debtor's" disposable income. He further held that "it stands to reason that [she] should have the right to pay obligations in her name before contributing to the disposable income under the plan." In an interesting side note, the non-filing spouse actually filed a later, separate Chapter 13, which Judge Lynn also confirmed over the trustee's objection. See, In re Nahat, 315 B.R. 368 (Bankr.N.D.Tex.2004). But see Judge Clark's opinion in In re Reiter under the codebtor stay section of this paper in which he held that the post-petition earnings of a non-debtor spouse are not property of the estate under 1306(a)(1).

Elsewhere

The most cited case on this issue is In re Quarterman, 342 B.R.647 (Bankr.M.D.Fla.2006). This case states several noteworthy conclusions. First, the opinion clearly states: "The burden is on the objecting party, here the Trustee, to provide satisfactory evidence in order for the Court to make a decision." In that case the court concluded that due to the "absence of evidence" on what amount of the non-filing spouse's income was contributed to household expenses of the debtor or a dependent of the debtor , the court "cannot presume" that the non-filing spouse's income was contributed to such expenses. The same analysis applies to the UST in a Chapter 7 case.

The Quarterman court analyzed the statutory language in 101(10A) and (B) and concluded: "...current monthly income does not include all the income of the non-debtor spouse, but rather only amounts expended on a regular basis for household expenses. If income is not (1) expended regularly (2) on household expenses, then it is not included in the debtor's current monthly income." Simple enough, right? But wait, the above quote ends with a footnote which states: "Problems may arise with respect to determining the non-debtor spouse's contribution to household expenses. If the family maintains joint accounts, it may be difficult to determine what part of the income of the non-debtor spouse is used for household expenses and what part is used for that spouse's personal expenses or

investments." [Citation omitted.]

I would agree that if the family maintains joint accounts, there may generally be a fundamental problem with making that distinction, but not in all cases. I had a recent case in which the UST filed a motion to dismiss under 707(b)(2) and (3) in which the non-filing husband was the sole breadwinner for the family and the filing wife's debts resulted primarily from a failed business. (They were recently married and she was pregnant with their child which was born while the motion to dismiss was pending. Not directly relevant, but what judge would not want to know those facts?) The couple maintained a joint checking account and she could write checks for whatever she wanted. Their total monthly household expenses were $5000. His monthly take home pay was $6500. The UST's position was that if the $1500 net was funded into a Chapter 13, it would pay $90,000 to her creditors. Sounds good, but the issue is, were those "excess" funds were "regularly contributed to household expenses of the debtor or a dependent of the debtor." The answer is absolutely, unequivocally, no. They went into savings. Remember, the undisputed facts were that total household expenses were $5000. If there was money beyond that, it went to something else, not household expenses, and is not included in current monthly income pursuant to 101(10A) and (B).

Perhaps the larger issue, regardless of whether the family maintains joint accounts, is what constitutes "household expenses of the debtor or a dependent of the debtor." This gets complicated where the non-filing spouse (or non-married significant other) and the debtor share expenses. If they each pay half of the rent, is the half contributed by the non-filing spouse contributed to the household expenses of the debtor? What if the debtor has two kids not from the non-filing spouse and they have to rent/own a bigger house so they have enough space for the debtor's kids? How do you allocate percentages where the expense is higher because of the debtor's situation and the non-filer would have a much lower expense but for the debtor?
In re Hall, 2007 WL 445517 (Bankr.C.D.Ill.2007) cites Quarterman for both its analysis of the current monthly income issue under 101(10A) and (B) and for the proposition that the burden is on the objecting party to prove how much of a non-filing spouse's income should be imputed to the debtor in determining the disposable income calculation.

In re Shahan, 367 B.R. 732 (Bankr.D.Kan.2007) involves analysis of the proper way to account for expenses of the non-filing spouse. If you just read the headnotes, it sounds like the opinion supports the Chapter 13 trustee's objection, but the real result is that if you move the expenses to the correct line of the form they are still deductible. This case doesn't break any new ground, but it does give you a judge's eye view on the issue of how you fill out the forms.

In re Grubbs, 2007 WL 4418146 (Bankr.E.D.Va.2007) addresses inclusion of the non-filing spouse's income for purposes of determining the applicable commitment period in a Chapter 13. The court concludes that the use of "current monthly income of the debtor and the debtor's spouse" in 1325(b)(4)(A)(ii) includes the income of the non-filing spouse **only to the extent** that is contributed to household expenses of the debtor or a dependent under 101(10A) and (B). See, also, In re Borders, 2008 WL 1925190 (Bankr. S.D.Ala.2008) which reaches the same result citing Grubbs extensively.

In a case which I include only because it is too much fun to ignore, in In re Zahn, 526 F.3d 1140 (8th

Cir. 2008), the court had previously denied confirmation of the debtor's plan because she had not included her non-filing husband's IRA distributions as "current monthly income" and filed a 36 month plan. The debtor then amended her plan to extend it to 60 months and objected to her own plan. The court confirmed the debtor's plan over her objection and the debtor appealed. The only issue on appeal was whether the debtor had standing to appeal the confirmation order. The Eighth Circuit held that debtor was an "aggrieved party" and had such standing and remanded the case. (As a practice tip, I would suggest that objecting to your own plans on a regular basis will not score you a lot of points with the judges.)

In in In re Barnes, 378 B.R. 774 (Bankr.D.S.C.2007), the court starts off with a correct analysis of the law post-BAPCPA (citing in part Quarterman), but then goes off on a side road that leads to the insane asylum. The court concludes that the non-filing spouse's current annual bonus is not included in current monthly income because "there is no evidence the Debtor received the bonus." The court then goes on to conclude that "the burden shifts to Debtor to demonstrate, by a preponderance of the evidence, that [his future] bonus is not paid on a regular basis for her household expenses." The Court also states: "... if paid in the future, the bonus should be captured in Debtor's plan payment absent evidence that the bonus is *necessary for the husband's non-household expenses*." [Emphasis added.] This statement is particularly jarring given the Court's correct analysis of 101(10A) and (B). The objecting party has to prove that the non-filing spouse's income is regularly contributed to the household expenses of the debtor. Why does the burden now shift to the debtor to show that a non-filing spouse will (or won't) get a bonus and what it might be spent on in the future?

In a slightly less goofy opinion, the court in In re Vollen, 426 B.R. 359 (Bankr.D.Kan.2010), properly held that a non-debtor spouse's wages which were not regularly contributed to the household expenses of the debtor or a dependent of the debtor should be included in determining the applicable commitment period, but should be excluded in determining projected disposable income of the debtor. The court held that amounts withheld from the spouse's paycheck for payment of taxes or for voluntarily contributions to a retirement plan were not contributed to household expenses. The court also held that amounts spent by the non-filing spouse for golf and other unspecified recreational activities were not regularly contributed and should be excluded from the debtor's projected disposable income. A potentially troubling part of the holding was that payments made on a mortgage in a property titled in the name of the spouse and for which only the spouse was liable had to be included in the debtor's current monthly income since it was the house both the debtor and the non-filing spouse resided in. I'm not sure I disagree in this case, but I am concerned that this should not be a hard and fast rule, but a case by case determination. Another potentially troubling part of the holding is the court held that payments made by the non-filing spouse on a loan he took out to pay credit card debt incurred for "food, apparel, and other personal incidental expenses of himself and his family" had to be incurred in the debtor's current monthly income. The court assumed that any such payment contributed to the household expenses of the debtor without any evidence of what was spent on what. Most troubling, the court held that college expenses of the debtor's "dependent" daughter, even though she was over 18 and did not live at home, were household expenses of the debtor or a dependent of the debtor although they were paid for by the non-filing spouse. (Either she is a dependent of the debtor or she is not. And how could the daughter's college expenses away from home be regularly contributed to the household expenses of the debtor?)

In another somewhat odd opinion, In re Stanley, 2010 WL 3304273 (Bankr.M.D.N.C.2010), the court denied confirmation of the debtor's chapter 13 plan for lack of good faith because his non-filing spouse chose to continue to pay her car lease, student loan, and credit cards rather than contributing her income to provide an equal distribution to both her and the debtor's unsecured creditors. (The debtor made about $3400 per month from his trucking business and she made about $1000 per month from unemployment.) Essentially, the debtor paid all of the household expenses and she just paid her debts. The court doesn't really cite any authority related to the specific facts of this case, but it does illustrate how courts grapple with situations where there are disparate earnings between the spouse's and how the court's feel they should divide up their money. (The means test was supposed to make all of this objective and take away the subjective biases of the bankruptcy judges. It didn't work here.)

For contrast, see In re Duran, 2010 WL 3947318 (Bankr.S.D.Ca.2010) which addressed the issue of accounting for the income of the debtor's adult child (and her three children) who resided with the debtor.. The debtor listed $1200 per month on line 7 of B22C as "amounts regularly contributed to the household expenses of the debtor or a dependent of the debtor." The Chapter 13 trustee objected, contending that the debtor should be required to account for all of the daughter's income in determining the debtor's ability to fund a plan. The court agreed with the debtor and compared the non-filing spouse case where the debtor is required to disclose all of the non-filing spouse's income and then take out amounts which are not contributed under the marital adjustment.

In re Trimarchi, 421 B.R. 914 addressed a case where the debtor and her non-husband spouse attempted to confirm a plan in a case where they included both the standard housing allowance for the wife AND the actual mortgage payment as a marital adjustment. The court rejected this classic attempt at a double dip. Perhaps worthy of some note was the court's preoccupation with the debtor's claim of $250 per month for heating their swimming pool. (The court held that they could drain the pool during the winter and that it was still usable during the summer.)

In re Thompson, 2010 WL 3583400 (8th Cir.2010) reached the same result as judge Clark in Barfknecht, holding that the debtors' failure to devote all of their social security income to the plan, without more, did not establish lack of good faith based upon the statutory provision excluding social security benefits from disposable income.

Chapter 7 Cases

Texas Cases

There really aren't any.

See In re King, 2008 WL 1808522 (Bankr.S.D.Tex.2008) in which Judge Steen held that a debtor was not entitled to take a deduction from her non-filing spouse's income for "court ordered payments" for a wage order in his Chapter 13 which had subsequently been converted to Chapter 7 so there was no more deduction. (Seriously?)

Elsewhere

You have to start here with Baldino and Travis because they were two of the earlier cases and everybody since then cites them. They are actually both good opinions except for some wayward statements in Travis which will be discussed below.

In In re Baldino, 369 B.R. 858 (Bankr.M.D.Pa.2007) the debtor earned approximately $1200 per month. Her non-filing spouse earned $6722 per month. The debtor provided a list of the monthly expenses paid by the non-filing spouse (mortgage payment, ad valorem taxes, insurance, groceries, utilities, car insurance, medical insurance, and home maintenance) totaling $1978 per month. On Form B22A (the opinion says B22C, but that is the form in a Chapter 13 case) the debtor listed a marital adjustment of $4794 which represents the balance of the non-filing spouse's income. There was no explanation what the non-filing spouse did with the rest of his income.

The UST argued for dismissal on two grounds: first, that the non-filing spouse's income should be considered as a relevant factor when determining the filing spouse's ability to repay her debts, and second, that the non-filing spouse's income should be included under the totality of the circumstances test of 707(b)(3)(B).

The Baldino court rejected both of these arguments. The court focused on the "plain meaning" of the language of 101(10A) and 101(10B) which speak in terms of the **debtor's** (singular possessive) income. The non-filing spouse's income is included **only** to the extent that it is regularly contributed to household expenses of the debtor. The court rejected the UST's second argument as well, concluding that the general language of 707(b)(3)(B) cannot override the express language used elsewhere in the statute.

The court also considered it of "some import" that all of the debts listed in the debtors schedules were in the debtor's name only, "meaning therefore, that the creditors extended the Debtor the credit based on her creditworthiness alone, and thus assumed the risk in doing so, i.e., losing her higher paying job and becoming unable to repay her debts."

Finally, the court notes that it also of "some import" that the debtor's creditors would not be able to reach the income of the non-filing spouse under Pennsylvania state law. (Check the language of the statute. It is very similar to Texas law.)

In re Travis, 353 B.R.520 (Bankr.E.D.Mich.2006), reaches the correct result, but contains some language which will no doubt be of comfort to the UST. (The fact that the language is dicta and is patently wrong will not stop the UST from citing that language, so be prepared.) In Travis, the debtor earned $3500 per month and his non-filing spouse earned $3291 per month. The UST contended that the debtor filled out the B22A incorrectly and that if the form was filled out properly a presumption of abuse resulted. After much wrangling over the proper amount of expenses which might be deducted the court came up with a negative disposable income number, so no presumption of abuse resulted.

In its analysis of the marital adjustment the court starts by stating: "As a preliminary matter, the Court notes that the calculation of current monthly income when there is a non-filing spouse is complicated. The requirements which the Code imposes on a non-filing spouse in reference to the non-filing spouse's income are not clearly defined and are subject to interpretation." The first sentence is correct, the analysis is complicated. (Fifteen Bankruptcy Code sections and six Family Code sections are relevant.) The second sentence is nonsense. Although the analysis may be complicated, the requirements of the Code with respect to a non-filing spouse's income are very clearly defined. In addition, the notion that the Code imposes some requirement on the non-filing spouse is clearly incorrect. The Code imposes a duty on the **debtor** to account for the non-filing spouse's income, but it imposes no obligation on the debtor's non-filing spouse who is not a party to the bankruptcy case.

The Travis court does correctly note that some expenses of the non-filing spouse may contribute to the debtor's household expenses. For instance, if the non-filing spouse chooses to spend his/her income on a luxury home in which the debtor resides, some portion of that expense **might be** imputed to the debtor as an amount contributed for the household expenses of the debtor.

The UST also moved to dismiss the case under 707(b)(3) under the totality of the circumstances test. The Travis court did agree with the UST that the non-filing spouse's income should be considered under 707(b)(3)(B) [based upon pre-BAPCPA law], which led to two questions: "first, how much consideration does the Court give to the non-filing spouse's income and, second, even if all of the non-filing spouse's income is available to the Debtor, is there an ability to commit any of that income to repayment of unsecured creditors?" The court answers the first question that "the non-filing spouse's income should be considered only if his/her income is substantial enough to significantly raise the debtor's standard of living and generate total household income in excess of the reasonable costs of food, clothing, shelter and other necessities." The court answers the second question with a factual analysis that concludes that in this case, the debtor and the non-filing spouse spend all of their combined income in supporting their extended family and that there is no money left at the end of the day. The court fails to address the legal issue of whether the debtor spouse has any ability to compel the non-filing spouse their income to pay the debtor spouse's debts. This author would suggest that is the more relevant analysis. This author also agrees with the Baldino court that the plain language of the sections defining a debtor's current monthly income precludes use of 707(b)(3)(B) to "override" those express provisions.

A great case for debtors is In re Newman, 2008 WL 2228746 (Bankr.D.Neb.2008). This is a "totality of the circumstances" case under 707(b)(3). The debtor's current monthly income was $5448. Her non-filing spouse's monthly gross was $7080. There was no presumption of abuse because their mortgage payments totaled $4493 per month. The court started by stating its practice of reviewing cases for abuse under a number of factors, including whether the case was precipitated by an unforeseen catastrophic event such as illness or job loss. In this case the debtor lost her longstanding, stable job when the company she worked for was sold. Apparently after being unemployed for some amount of time, she was only able to find new employment making a third less than her former employment. The court concluded "This is not an easy decision because the mortgage payment is so high. However, the bottom line is that this bankruptcy was precipitated by a job loss. Further, the non-filing spouse is not receiving a discharge but is covering most of the expense for the house

payment. Debtor's own income (approximately $65,000.00) is not excessively high and she does not otherwise have excessive expenses." Motion to dismiss denied.

This is what our local UST calls a "lifestyle" case. I have a pending motion to dismiss in a case where the debtor is a homebuilder and when things were "blowin' and goin'" four years ago (it seems so long now), he bought a house with a $3500 payment which the UST deems excessive. Of course, back in the day, he was making a lot more money than he is now and it wasn't "excessive." (How convenient to have 20/20 hindsight.) It's one thing to act in bad faith, it's an entirely different thing to think that things will always be wonderful. (And do we really want the DOJ being the lifestyle police?)

In re Lightsey, 374 B.R. 377 (Bankr.S.D.Ga.2007) is a sad case where the debtor incurred a car loan during a prior marriage, was only able to make the payments with the help of her spouse, the marriage blew up, the car was repossessed, she remarried, and now the car creditor is garnishing her wages for the deficiency. The debtor's attorney apparently filled out the means test form incorrectly because at hearing on the UST's motion to dismiss, the debtor stipulated that if her non-filing spouse's contribution to household expenses was included in her "current monthly income," the presumption of abuse arises. Since the presumption arises, the only issue remaining was whether there were "special circumstances" sufficient to rebut the presumption. The debtor's explanation for special circumstances was based upon the fact that the debt in question was incurred prior to her current marriage and that her new husband would be forced to help her pay for a car which she no longer owned. The court stated that the result was "unpleasant" and that circumstances which led to her filing were "unfortunate and arguably unfair," but concluded that although her position was "compelling," it did not fit within the "special circumstances" exception.

In re Sale, 2007 WL 3028390 (Bankr.M.D.N.C.2007) is a stupid case where the debtor tried the clear "double dip" and got busted. In that case, the debtor took a marital adjustment (Line 17) for the payments on three vehicles titled in her spouse's name for which she was not liable AND included the vehicle ownership (Line 23) and operating expense (Line 22A) deductions for the same vehicles. Guess what? It didn't work. UST's motion to dismiss granted.

Setting aside the double dip, Sale does address a significant issue. Let's say we have a non-filing spouse who has a car note solely in his/her name, but the vehicle is driven by the filing spouse. How do we account for that payment? The vehicle ownership expense on B22A is for "vehicles for which you claim an ownership/lease expense." The courts have generally held that if the debtor is not liable for the loan payment, they don't get this expense. The amount of income imputed to the debtor (or for which the non-filing spouse is entitled to a marital deduction) is limited to the amount of the actual car payment, not the IRS standard allowance.

In re Lipford, 2008 WL 1782640 (Bankr.M.D.N.C.2008) is another stupid case where the original means test was filed showing disposable income of $428 per month for a family with $21,250 in unsecured debt. (Can you say 100% plan?) AFTER the UST filed a motion to dismiss, the debtor amended their B22A and Schedule J to increase their expenses resulting in disposable income of negative $10. (Miracle of miracles.) Accepting that there was no presumption of abuse (which seems

generous, under the circumstances, but of no real significance considering the ruling), the court considered the UST's motion to dismiss only under the totality of the circumstances under 707(b)(3). With respect to the amended schedules, the court states "Any amendment that a debtor makes to Schedule I or J subsequent to a motion to dismiss under Section 707(b) is viewed with inherent suspicion" and "self serving amendments... which are made in direct response to an unfavorable action, are not viewed favorably." After noting that the husband only started his 401(k) contribution in the month prior to filing and that the wife's 401(k) loans would pay off in about 36 months, and after disallowing some of the expenses (primarily the new and improved expenses) the court concluded that the debtors had $529 per month of disposable income which would fund a 100% plan. The lesson here (if nothing else) is do the forms right the first time.

In re Springirth, 2008 WL 748138 (Bankr.S.D.Ind.2008) is one of those "bad facts make bad law" cases. The debtor earned $1443 per month. His non-filing spouse earned $10,331. Ultimately, the court concluded "...the Court finds that the Debtor has the ability to pay under the totality of the circumstances" test,' based entirely on the fact that "Susan's income easily covers and exceeds the costs of household necessities." This court conveniently never mentions 101(10A) and (B). The court would no doubt say that they have no application here because the case was dismissed under 707(b)(3), not 707(b)(2). Nice try, but the statutory definition of current monthly income should not be so cavalierly ignored. As noted in the discussion of Travis, there is dicta in that opinion that will give comfort to the UST. It also gave comfort to the Springirth court which quoted Travis for the proposition that a non-filing spouse's income should only be counted if that income "is substantial enough to significantly raise the debtor's standard of living and generate total household income in excess of reasonable costs of food, clothing, shelter and other necessities." Would someone please cite me to the Code section which even mentions "total household income?" (Oh, by the way, the Travis court denied the UST's motion to dismiss, in case anybody cares.)

One can certainly argue that this is exactly the kind of result BAPCPA was intended to avoid. In case we forget, one of the principal arguments for the new Code was that the old "substantial abuse" standard was too subjective and we needed a more objective standard (ie, the means test) to take discretion away from soft hearted (or soft headed) bankruptcy judges in favor of a more uniform standard written, bought and paid for by the credit card industry. If the credit card industry was gracious (or asleep at the wheel) enough to exclude income of a non-filing spouse, what business do the courts have giving them something they didn't even ask for?

Behave Yourself

The debtor cannot "assume" responsibility for all of the household expenses leaving all of the non-filing spouse's income available for frivolousness. See, Louviere, infra, and In re Bush, 120 B.R. 403 (Bankr.E.D.Tex.1990). (A pre-BAPCPA case, but lack of good faith is still lack of good faith.)

The Codebtor Stay - 1301(a)

1301(a) provides: "Except as provided in subsection (b) and (c) of this section, after the order for

relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless –

> (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
>
> (2) the case is closed, dismissed or converted to a case under chapter 7 or 11 of this title.

1301(c) provides that upon request of a party in interest, the court **shall** grant relief from the stay if

> "(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;
>
> (2) the plan filed by the debtor proposes not to pay such claim; or
>
> (3) such creditor's interest would be irreparably harmed by continuation of such stay."

The first important limitation of the scope of this section is that it only applies to "consumer debt" which is defined by 101(8) as a debt "incurred by an individual primarily for a personal, family, or household purpose." In short, the codebtor stay would not apply to a guaranty or cosigning of a "business" (as opposed to consumer) debt.

The second important limitation to the effect of this section is that the court "shall" grant relief from the stay if certain conditions are not met. First, if the non-debtor received the consideration for the debt, the court shall grant relief. This would seem to be most common where the debtor cosigned a debt for another individual and the nondebtor obtained possession of tangible property as a result of the transaction. The most common example of this would be where the debtor cosigns a car loan for another person and that person has possession of the car. Second, if the debtor's plan proposes not to pay the claim, the court shall grant relief. Which raises the obvious question of what if the plan proposes to pay part of the claim? (ii.e., the plan proposes to pay 30% to unsecured creditors and the claim in question is unsecured.)

Not surprisingly (at least to me), there are not a ton of cases on this section. One case of interest is In re Reiter, 126 B.R. 961 (Bankr.W.D.Tex.1991), a pre-BAPCPA case in which the debtor filed a motion for sanctions against the IRS for violating the stay and the codebtor stay. Judge Clark ruled that a joint federal tax liability did **not** constitute a "consumer debt" under then section 101(7), and also held that property subject to a spouse's sole management under the Texas Family Code did not constitute property under the sole. equal or joint management of the **debtor** for the purposes of 541(a)(2)(A), but was property of the estate under 1306(a)(1), so that the IRS attempt to levy on the non-filing spouse's post-petition wages to pay a pre-petition debt violated 362(a)(3) and (4).

But see, In re Medaris, 884 F.2d 832 (5th Cir. 1989), in which the Fifth Circuit held that even though the debtor's spouse's wages were not subject to the claims of her husband's creditors under Texas law, the Internal Revenue Code trumped Texas law and the Internal Revenue Service was authorized to levy on one half of the wife's wages.

See, also, In re Westberry, 215 F.3d 589 (6th Cir.2000) which affirmed the district court's reversal of the bankruptcy court's holding that a debt owed to the IRS was a "consumer debt" for the

purposes of the codebtor stay. Since the debt was not a consumer debt, the codebtor stay did not preclude the IRS from enforcing its claim against the non-debtor spouse.

In re Allen, 300 B.R. 105 (Bankr.D.C.2003) addressed the scope of the relief which could be granted pursuant to 1301(c) which provides only that the court shall be granted "relief" from the stay. In Allen, the court was asked to annul the stay to validate a deed of trust foreclosure sale. The court held that it had the power to annul the stay to grant "relief" which was appropriate under the circumstances.

In In re King, 362 B.R. 226 (Bankr.D.Md.2007) the court held that although there was no stay with respect to the debtor because two prior cases had been dismissed due to failure to obtain credit counseling and failure to pay the filing fee, the codebtor stay still applied and the court declined to annul the stay retroactively for the benefit of a lender which had conducted a foreclosure sale.

In In re Lemma, 394 B.R. 315 (Bankr.E.D.N.Y.2008), the stay terminated with respect to a mortgage lender, but then a plan was confirmed which provided for continued payments to the lender and cure of the pre-petition arrearage. The lender posted the property for foreclosure and the debtor moved for a determination that the posting violated the codebtor stay. The court held that the confirmed plan was binding on the creditor even though the stay had terminated under principles of res judicata. The court declined to terminate the codebtor stay under the provision that the consideration was received by the codebtor finding that the debtor was the "primary beneficiary" of the consideration and holding that subsection applies only where the codebtor was the "exclusive" recipient of the consideration. The court further decline to terminate the codebtor stay where the creditor was not being paid in full immediately, but the full amount of the arrearage claim was being paid during the life of the confirmed plan. Finally, the court declined to terminate the stay under 362(d)(4)(B) where the lender failed to prove that the current filing was part of a scheme to hinder, delay or defraud creditors where the debtor confirmed a plan providing for full payment of the lender's claim, had been making the plan payments post-confirmation and had tendered post-petition mortgage payments to the lender.

In In re Galvan, 1998 WL 246015(D.N.D.Ill.1998), the district court reversed the bankruptcy court which terminated the stay with respect to a non-filing spouse with respect to a condo owners association's attempt to collect pre-petition condo owner's assessments. The district court held that condo owners fees constitute a "consumer debt" as it was primarily for "household" purposes. The court also reversed the bankruptcy court finding that the because he wife received some consideration, the stay should be lifted. The district court that the codebtor stay was meant to apply in just this type of situation where terminating the stay would allow the creditor to exert indirect pressure on the debtor to pay the claim. The court finally held that the condo owners association would not be irreparably harmed by not terminating the stay as the debtor's plan provided for full payment of the claim over time.

In one of the few Texas cases addressing 1301, In re Pardue, 143 B.R. 434 (Bankr.E.D.Tex.1992) Judge Sharp held that where a plan provided for the full amount of the creditor's claim as filed but does not provide for payment of interest and attorneys fees, the creditor is entitled to relief from the

codebtor stay to collect those additional amounts. The court specifically addressed the issue of the application of 506(b) and held that although it limited the ability of a creditor to collect interest and attorneys fees from the debtor, it had no application to a non-debtor.

See also In re Schaffrath, 214 B.R. 153 (6th Cir. B.A.P. 1997) where the Sixth Circuit BAP addressed the issue of whether the stay should terminate with respect to the codebtor where the debtor's plan provided for less than full payment of the creditor's claim and concluded that relief was mandatory where the plan provided for less than full payment.

In re Moore, 2008 WL 2225757 (Bankr.D.Al.2008), the court held that a creditor did not violate the codebtor stay where there had been a pre-petition garnishment but that order was vacated immediately after the bankruptcy filing, then reinstated sua sponte by the state court. Although the garnishee continued to hold the garnished funds post-petition, it was not at the request of the creditor. (Although the creditor took no affirmative action to maintain the garnishment, it took no affirmative action to release the garnishment, either.)

In In re Hughes, 2005 WL 1293982 (Bankr.M.D.N.C.2005), the court held that J.C. Penney violated the codebtor stay by making no less than ten calls to the debtors mother demanding payment on a joint debt, but held that the court had no authority to sanction the creditor under 1301 and that 362(h) did not apply. (1301 makes no reference to 362.)

The Community Property Discharge - Section 524(a)(3)

Section 524(a)(3) provides:
"A discharge in a case under this title -
-operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived."

Probably because there are only a limited number of community property states, there really aren't that many reported opinions on the community discharge. For some reason, however, when I talk to creditor's attorneys about non-filing spouse issues, they always want to talk about the community discharge like it is depriving their clients of significant substantive rights on a frequent basis. In very few of my cases is it an issue because (being in Texas) all of the "effected" property is typically exempt in any event.

The only Fifth Circuit case I could find which mentions this issue is In re Gauthier, 349 Fed. Appx. 943 (5th Cir.2009), which really addressed the issue of whether fraud by one spouse could be

imputed to the other spouse for the purpose of contesting dischargeability of a debt. (The court held that it could not absent any evidence that the non-debtor spouse participated in the fraud.) The creditor also complained that a discharge as to the wife would effectively preclude any recovery from the husband, specifically, that the creditor would be unable to garnish the husband's future wages which are community property under Louisiana law. Calling that argument "questionable", the court declined to rule on the issue as it was not before the court on appeal.

There are only a handful of Texas bankruptcy court cases addressing 524(a)(3). One of the first was In re Karber, 25 B.R. 9 (Bankr.N.D.Tex.1982). In that case, the husband filed Chapter 7 as a result of a failed business. No creditor filed any adversary under 523 or 727. After his discharge, his non-filing spouse sold a separate property asset (an apartment complex) paid off all of the debt related to the asset, paid a substantial IRS liability, and refused to tell the bank what she did with the other $140,000. As a result, the bank sued the wife in state court and later filed an involuntary Chapter 7 against her. Because her husband received a discharge in his Chapter 7, Judge Brister held that his creditors were enjoined from attempting to collect their debt from her after acquired community property. (But not necessarily from her separate property.)

In re Braziel, 127 B.R. 156 (Bankr.W.D.Tex.1991), was a case where the husband filed Chapter 7 and a creditor filed an adversary objecting to both his discharge and her hypothetical discharge under 727. Judge Monroe made the candid admission: "At the hearing, counsel for all parties, and the Court, confessed a certain amount of uncertainty with regard to the effect that should be given Section 524(a)(3) in this case." After taking the matter under advisement, the court concluded that she was a necessary party to the adversary because if the adversary proceeded without her and her husband was discharged, the creditor would thereafter be precluded from proceeding against her after acquired community property. Apparently finding very little authority, the court cited Collier as "the clearest statement of the purpose of this section, and therefore what Congress intended." Collier states:

> "In short, Congress has chosen to grant fresh-start protection for after-acquired community property when *both* spouses are *innocent* of any wrong doing, although one spouse chooses not to file a bankruptcy case. In the other situation, when a *wrongdoer seeks to hide behind* his or her *spouse's discharge*, a partial *discharge for the non-debtor is denied*, and after-acquired community property remains liable for the debts of the non-discharged spouse thereby frustrating the innocent spouse's fresh start."