STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G WASDEN

ATTORNEY GENERAL OPINION NO. 05-1

Mr. Gavin M. Gee, Director
Idaho Department of Finance
Statehouse Mail

Per Request for Attorney General's Opinion

BACKGROUND

The Equal Credit Opportunity Act, 15 U.S.C. § 1691, *et seq.*, and its implementing regulation, Regulation B, 12 CFR § 202.1, *et seq.*, limit the circumstances under which creditors may require a loan applicant's spouse or another person to sign the promissory note or contract in a credit transaction.

In view of Regulation B's spousal signature prohibitions, the basic question arising is whether creditors making loans to individual married loan applicants and strictly complying with Regulation B's spousal signature rules in the process, run the risk of not being able to collect on a loan in default if the married couple divorces and only the applicant spouse signed the promissory note or loan contract. Specifically, you requested an Attorney General Opinion regarding the following questions.

QUESTIONS PRESENTED

1. If a creditor receives an individual application for a loan from a married person residing in Idaho, in determining whether to require the signature of the non-applicant spouse on the promissory note or loan contract, does the creditor risk not being able to collect on the loan in the event of default if the creditor does not consider the possibility that the spouses may divorce?

2. If a creditor receives an individual application for a loan from a married person residing in Idaho, if the creditor will rely on both spouses' income to satisfy the loan in the event of default, can the creditor reach the income of the non-applicant spouse

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upon default of the loan after the parties divorce, if the non-applicant spouse has not signed the promissory note or loan contract?

3. If a creditor receives an individual application for a real property-secured loan from a married person residing in Idaho, will the creditor be able to reach the real property of the marital estate to satisfy the loan in the event of default if the non-applicant spouse signs a deed of trust or mortgage as to the subject real property but not the promissory note or loan contract?

4. If a creditor receives an individual application for an unsecured loan from a married person residing in Idaho, and if the creditor relies on community personal property to satisfy the loan in the event of default, will the creditor be able to reach the community personal property to satisfy the loan after the borrower divorces, if the non-applicant spouse has not signed the promissory note or loan contract?

5. Are other risks presented to creditors attempting to collect on loans in default, due to Idaho law's effect on spousal signatures on loan documents by married persons residing in Idaho?

CONCLUSIONS

1. In the case of an individual application for a loan by a married person residing in Idaho, in determining which signatures should be required on the promissory note or loan contract, a creditor will incur significant risk in collecting on the loan in the event of default if the creditor does not consider the possibility of divorce.

2. In the case of an individual application for a loan by a married person residing in Idaho, even if a creditor relies on both spouses' income to satisfy the loan in the event of default, the creditor will not be able to reach the non-applicant spouse's income following divorce if that person has not signed the promissory note or loan contract.

3. In the case of an individual application for a community real property-secured loan by a married person residing in Idaho, the creditor should be able to reach the real property securing the loan following divorce, if the non-applicant spouse signs a deed of trust or mortgage to the subject property, but not the promissory note.

4. In the case of an individual application for an unsecured loan by a married person residing in Idaho, when the creditor relies on community personal property to satisfy the loan in the event of default, upon the borrower's divorce, the creditor may not be able to reach the non-applicant spouse's awarded share of community personal property, if the non-applicant spouse does not sign the promissory note or loan contract.

5. A creditor may be unable to collect on a loan in default in the event of the death of the signing spouse if the creditor relies on personal property of the spouses to satisfy an unsecured loan and the surviving spouse has not signed the promissory note or loan contract.

ANALYSIS

A. Statutory Authority

1. <u>Regulation B, 12 C.F.R. Part 202</u>

The Equal Credit Opportunity Act (E.C.O.A.), 15 U.S.C. § 1691, *et seq.*, and its implementing regulation, Regulation B, 12 CFR § 202.1, *et seq.*, significantly limit the circumstances under which creditors may require a loan applicant's spouse or another person to sign the promissory note or loan contract in a credit transaction. Regulation B's signature rules are found at 12 CFR § 202.7(d). The general rule for signatures on loan documents appears in 12 CFR § 202.7(d)(1), which provides:

> *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

Regulation B has special rules pertaining to unsecured credit, unsecured credit in community property states, and secured credit. Unsecured credit in community property states is governed by 12 CFR § 202.7(d)(3), which provides:

> *Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property 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 credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to the community property.

In the case of secured credit, 12 CFR § 202.7(d)(4) provides:

> *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

As will be noted from the discussion of relevant Idaho law appearing below, complying with Regulation B's signature rules in applications for unsecured credit by an individual married applicant is a difficult task for creditors in Idaho. To add to that difficulty, adherence to Regulation B's signature rules and the Official Staff Interpretations of the rules may reduce an Idaho creditor's prospects of successfully collecting on a loan in default.

2. <u>Idaho Code</u>

Certain Idaho statutes and case law construing those statutes affect a creditor's ability to pursue a debtor's former spouse or his or her property to satisfy a debt following divorce. The threshold issue in such circumstances is the characterization of property of the spouses as either separate property or community property.

For example, Idaho Code § 32-903 provides:

> **Separate property of husband and wife.**—All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either gift, bequest, devise, or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

Idaho Code §§ 32-910 and 32-911 provide that a spouse's separate property is not subject to the individual or separate debts of the other spouse.

Idaho Code § 32-912 provides that either spouse has the ability to manage and control community property and to bind and encumber community property, with the exception of community real property. This statute further provides that "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent . . . ."

These statutes suggest that one spouse can obligate the community property of the marital estate and make that property available to a creditor desiring to execute on that property in the event of loan default, in the case of an unsecured loan incurred without the signature of the other spouse to the promissory note or loan obligation. Cases construing these statutes, however, attach significant qualifications to this conclusion.

B. Case Law

One of the more recent court decisions considering the liability of spouses and the availability of their property to creditors is In re Hicks, 300 B.R. 372 (Bankr. D. Idaho 2002). In Hicks, the Idaho Bankruptcy Court reviewed many of the Idaho community property rules pertaining to the debtor-creditor relationship. As to creditors' rights against separate and community property, the court noted:

> The characterization of property as separate or community is important in determining creditors' rights of recourse against each type of property. As explained in *Twin Falls Bank & Trust Co. v. Holley,* 111 Idaho 349, 723 P.2d 893 (1986), "under the community property system . . . when either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property." In addition, the separate property of the spouse who incurs an obligation, whether that obligation benefits the marital community or only the individual, is subject to the creditor's claim. *Id.* at 897; *Williams v. Paxton,* 98 Idaho 155, 559 P.2d 1123, 1132 (1976).

300 B.R. at 376.

Following its discussion of the ability of creditors to look to separate or community property to satisfy debts, the court noted limitations on that ability:

> [A] spouse's separate property is not subject to seizure to satisfy a debt incurred by the other spouse acting alone. Specifically, Idaho Code § 32-910 provides that "[t]he separate property of the husband is not liable for the debts of the wife contracted before marriage." So, too, Idaho Code § 32-911 provides that "[t]he separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before

> or after marriage." Finally, Idaho Code § 32-912 states that "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent . . . ." *See also Holley,* 723 P.2d at 897 (noting a bank would have a claim against a husband's separate property and any community property when borrowed funds benefited the marital community but only the husband signed a note).

300 B.R. at 376.

The Bankruptcy Court's survey of Idaho community property statutes and cases affecting creditors' rights in Hicks was not intended as an exhaustive listing of the limitations placed on those rights.

There is a rebuttable presumption in Idaho law that property acquired during the marriage is community property. Simplot v. Simplot, 96 Idaho 239, 246; 526 P.2d 844, 851 (1974). Determining whether property acquired on credit is community or separate is more difficult than in other forms of property acquisition. Winn v. Winn, 105 Idaho 811, 813, 673 P.2d 411, 413 (1983). Factors such as the character of any property given in exchange, the procurement of the loan, and the use of the loan proceeds are part of the inquiry. *Id.*, 673 P.2d at 413, 414.

A court analyzing whether the community is liable for a loan will consider factors such as the source of repayment and the basis of credit relied upon by the lender. Winn, 673 P.2d at 415. The intent of the spouses is a key factor in determining whether a loan is a separate or community obligation. Under the California Rule, the intent of the lender conclusively determines the nature of the loan. *Id.* The Idaho Supreme Court has rejected that approach and instead looks to the intent of the spouses. Factors such as the nature of the down payment, the names on the deed, and the party who signed the documents of indebtedness are considered by Idaho courts to be probative of intent. *Id.*

From a creditor's perspective, proving the intent of the borrowers at the time the loan was made may be difficult. The intent of the married borrowers as to the character of the loan might not be shared with the lender at the time the loan is made. Borrowers could very well change their view of whether an obligation was community or separate in the event of an action by a creditor to collect on a debt following divorce or the death of one of the spouses.

In First Idaho Corporation v. Davis, 867 F.2d 1241 (9th Cir. 1988), the creditor was not able to obtain a judgment against a surviving spouse for a loan in default, or reach the couple's community property to satisfy the loan, because only the deceased husband had signed the note, and the creditor did not allege in the suit that the loan was for the benefit of the community. The surviving spouse also claimed that the real property securing the loan belonged to her deceased husband. Davis, 867 F.2d at 1243.[1]

Under the authorities discussed above, even if it were proven that a loan obligation benefited the community, a creditor would not be able to collect from a spouse or his or her separate property in the event of loan default, if the spouse did not sign the promissory note. Hicks, 300 B.R. at 376 (citing Twin Falls Bank & Trust v. Holley, 723 P.2d at 897). The question then presented is whether a creditor can look to community assets distributed to a non-signing spouse in a divorce.

In Twin Falls Bank & Trust v. Holley, 111 Idaho 349, 723 P.2d 893 (1986), the husband, John Holley, was the only signer on a promissory note to the bank. The note was signed on June 26, 1981. At some point after the note was signed, the bank became aware of the fact that John and his wife Joan had filed for divorce. The divorce was granted on August 28, 1981. After the loan became due on September 28, 1981, the bank and Mr. Holley executed an "extension agreement" in which the bank agreed to extend the due date of the note until November 22, 1981. As with the promissory note, only John Holley signed the extension agreement. Holley, 723 P.2d at 895.

John Holley ultimately defaulted on the loan and filed for bankruptcy. After the bank liquidated some equipment that secured the loan, $65,000 of the original principal balance of $125,000 remained due and owing, along with more than $50,000 in interest. *Id.*, 723 P.2d at 895. In an attempt to collect the loan balance, the bank brought suit against Joan Holley. The district court granted summary judgment in favor of Joan Holley, and the bank appealed.

On appeal, the Idaho Supreme Court noted that Joan Holley was not contractually liable for the debt. The Court set forth some principles giving clarification to the rights of creditors and borrowers when the borrowers divorce. The Court pointed out that the phrase "community debt" is imprecise and misleading:

> The marital community is not a legal entity such as a business partnership or corporation (citations omitted). . . . To the extent a lending institution enters into a creditor-debtor relationship with either member of the marital community or with both members, it does so on a purely

[1] In *Davis*, the Ninth Circuit did not discuss the presumption that property acquired during the marriage is community. Possibly, the surviving spouse's statement that the property belonged to her deceased husband, with nothing in the record to refute that assertion, overcame the presumption.

> individual basis. Thus, the lending institution may have a creditor-debtor relationship with either spouse separately or with both jointly.

723 P.2d at 896.

The Idaho Court held in Holley that there is no such thing as a community obligation in the contractual sense. Spouses are liable to a creditor individually or jointly, depending on which spouse or spouses have signed the promissory note or loan contract.

As to the effect of spouses' co-equal management powers over community assets, the court stated:

> [W]hen either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property.

723 P.2d. at 897 (citations omitted).

The court then discussed the ability of creditors to look to community assets awarded to a non-signing spouse in a divorce, holding as follows:

> Absent allegations of such contractual liability, a creditor may not, with one exception, proceed against community assets distributed to Mrs. Holley pursuant to a divorce decree. The sole exception to this rule was set forth in our case of *Spokane Merchants Ass'n v. Olmstead,* 80 Idaho 166, 327 P.2d 385 (1958). In that case we held that where, pursuant to divorce proceedings, one member of the marital community is responsible for a community obligation but is not awarded sufficient assets to satisfy such a debt, a creditor may properly seek satisfaction for the debt from community property distributed to the other spouse.

723 P.2d at 897.

The court noted that under the facts presented in *Holley*, for the bank "to avail itself of the exception set forth in the Olmstead case, it must allege and prove that Mr. Holley was not awarded sufficient community assets which would enable him to satisfy the community debt which he assumed pursuant to the property settlement agreement." 723 P.2d at 897, 898.

It has been noted that the Idaho Supreme Court in Holley "significantly restricted creditors' rights under a property settlement agreement by choosing not to follow the general rule adopted in other community property states." Mont E. Tanner, *Twin Falls Bank & Trust v. Holley: Restricting Creditors' Rights Under A Property Settlement Agreement—A Departure That Sets Idaho Apart*, 26 Idaho L. Rev. 595, 595 (1989/1990).

> Case law in other community property jurisdictions clearly states that property acquired from community assets pursuant to a property settlement, contract, or gift becomes the spouse's separate property and remains subject to the appropriate liability for debts of the community and of the other spouse which were incurred during marriage. The basis for the rule that spouses may not alter ownership rights between themselves in a manner which prejudices the rights of pre-existing creditors may have derived in part from the common law theory that "a divorce action . . . cannot adjudicate the rights of creditors who are not parties to the action."

Id., at 600 (citations omitted).

From the foregoing review of Idaho case law, one may conclude that a creditor may not normally look to community assets distributed to a non-signing spouse in a divorce, to satisfy a community obligation incurred by the signing spouse. The only exception is when the signing spouse was not awarded sufficient community assets to satisfy the obligation. In such event, the creditor must allege and prove the insufficient award in order to reach community assets in the hands of the non-signing divorced spouse. Holley, 723 P.2d at 897, 898. The result would not be changed if the community property distributed to the debtor spouse is no longer available or resalable by the creditor to satisfy the debt. Additionally, the creditor will need to allege and prove that the obligation was incurred for the benefit of the community. First Idaho Corporation v. Davis, 867 F.2d at 1243.

C. Application of Authority to Questions Presented

1. Spousal Loan Obligations and the Prospect of Divorce

Idaho courts have made it clear that if only one spouse signs a promissory note or loan obligation, the non-signing spouse is not personally liable for an obligation, even if the obligation benefited the community. Hicks, 300 B.R. at 376; Holley, 723 P.2d at 896. The non-signing spouse's separate property may not be looked to in satisfaction of the debt. Hicks, 300 B.R. at 376. Further, a creditor may not be able to look to community property awarded to a non-signing spouse in a divorce, unless the creditor alleges and proves that the obligated spouse was awarded insufficient community property to satisfy the debt. Holley, 723 P.2d at 897.

It has been recognized that Idaho law imposes a unique consequence upon creditors dealing with married borrowers:

> Idaho case law and statutes have been construed by the Idaho Supreme Court to produce an anomaly within the community property jurisdictions. . . . The anomaly specifically is that Idaho takes a strict contractual approach and will not allow a creditor to pursue a nondebtor spouse's separate property, including the nondebtor spouse's separate property that was formerly community property before the divorce. With the exception of California, all other community property states provide some protection for the creditor upon divorce, possibly more than the creditor bargained for, by allowing the recently transmuted separate property to still be subject to execution and attachment.

Lamont C. Loo, *Contractual Creditor Rights Upon Dissolution of Marriage: Revisiting Twin Falls Bank & Trust v. Holley, Proposal: A Tripartite Analysis,* 30 Idaho L. Rev. 777, 782 (1994).

In view of the authorities discussed above, when a married person in Idaho applies individually for credit, a prudent creditor should consider the possibility of divorce in deciding whether to require both spouses to sign the promissory note or loan contract. Even though spouses in Idaho have co-management powers as to community property and the ability to bind and encumber community personal property (Idaho Code § 32-912), in attempting to satisfy a debt, a creditor might not be able to reach community property awarded to a non-signing spouse in a divorce, even if the debt benefited the community. Holley, 723 P.2d at 897.

Regulation B prohibits a creditor from considering the possibility of divorce when an applicant requests unsecured credit in a non-community property state and relies upon property owned jointly with another person to satisfy credit standards. The Official Staff Interpretation of Regulation B, Paragraph 7(d)(2)(1)(i), requires that the creditor's determination of the value of the applicant's interest in the jointly owned property be based on the existing form of ownership, and not on the possibility of subsequent change, including divorce. It is not clear from the language of Paragraph 7(d)(2)(1)(i) if the prohibition on considering divorce applies to the remainder of Regulation B. In Idaho, therefore, in evaluating an individual loan application made by a married person, a prudent lender should consider the possibility that community property may be transmuted into separate property of the non-applicant spouse following divorce.

2. Reliance on Spouse's Income

When a creditor is relying on both spouses' income in granting credit to a loan applicant, or the income of the non-applicant spouse, a prudent creditor would require both spouses to sign the promissory note or loan obligation. Non-signing spouses are not personally liable for a debt, even if the loan benefited the community. Hicks, 300 B.R. at 376; Holley, 723 P.2d at 896. Similarly, the separate property of a non-signing spouse cannot be reached to satisfy a debt, including a debt benefiting the community. Hicks, 300 B.R. at 376. The income of a formerly married person is that person's separate property following the date of entry of a divorce decree. Shill v. Shill, 115 Idaho 115, 765 P.2d 140, 143-46 (1988).

In view of the fact that income of a married person residing in Idaho becomes separate property following a divorce, a creditor should require each person whose income is relied upon in making the loan to sign the promissory note or loan obligation. Failure to do so in the event of the borrower's divorce likely places the income of the non-signing spouse beyond the creditor's reach.

This result is contemplated in the commentary to Regulation B:

> *Reliance on income of another person—individual credit.* An applicant who requests individual credit relying on the income of another person (including a spouse in a non-community property state) may be required to provide the signature of the other person to make the income available to pay the debt. In community property states, the signature of a spouse may be required if the applicant relies on the spouse's separate income. If the applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature, but need not do so—even if it is the creditor's practice to require the signature when an applicant relies on the future earnings of a person other than a spouse. (See §202.6(c) on consideration of state property laws.)

Official Staff Interpretations to Regulation B, Paragraph 202.7(d)(5) (emphasis added).

3. Signatures of Spouses on Promissory Notes, Deeds of Trust, and Mortgages

Federal Reserve Board Regulation B contains a signature rule pertaining to applications for secured credit. 12 CFR § 202.7(d)(4) provides:

> *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

The Idaho statute relevant to 12 CFR § 202.7(d)(4) is Idaho Code § 32-912. It provides in pertinent part:

> [N]either the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered . . . .

The Idaho Supreme Court has considered the effect of a non-applicant spouse's signature on a mortgage or deed of trust but not the promissory note. In Pocatello Railroad Employees Federal Credit Union v. Galloway, 117 Idaho 739, 791 P.2d 1318 (1990), both spouses signed a deed of trust to their residence but only Mr. Galloway signed the promissory note. On appeal of a judgment of foreclosure on the property following the Galloways' default on the promissory note, the Galloways argued that Mrs. Galloway's lack of signature on the promissory note failed to meet the requirement of Idaho Code § 32-912 that both spouses join in encumbering community real property. The Idaho Supreme Court found that Mr. Galloway's signature on the note, accompanied by both spouses' signatures on the deed of trust, was sufficient to give force to the note and encumber the property. Pocatello Railroad Employees Federal Credit Union, 791 P.2d at 1321.

A married person's homestead claim under Idaho law cannot be posed as a bar to a real property foreclosure, if the person claiming the homestead has executed a deed of trust or mortgage, thereby giving a creditor a consensual lien on the property. Idaho's homestead law provides in pertinent part:

> **55-1005. To what judgments subject**—The homestead is subject to execution or forced sale in satisfaction of judgments obtained:
>
> . . . .

> (3) On debts secured by mortgages, deeds of trust or other consensual liens upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant.

In view of the foregoing authority, a non-applicant spouse would likely not be able to prevent a foreclosure on real property in the event of default, if the non-applicant spouse has signed the mortgage or deed of trust in the loan transaction, but not the promissory note or loan obligation.

One exception to the above general rules applies when a creditor acts in collusion with one spouse to hide an obligation from the other spouse. In that instance, the creditor's contract may not be enforceable against the innocent spouse. Smith v. Idaho State University Federal Credit Union, 114 Idaho 680, 760 P.2d 19 (1988). Although possible, it is unlikely that a non-applicant spouse was unaware of a loan if that spouse signed a mortgage or deed of trust to secure the loan with community real property.

In summary, absent collusion between the creditor and a spouse who is the sole signer on a promissory note, the non-obligated spouse's signature on a deed of trust or mortgage should be sufficient to make the real property available to satisfy a secured loan in the event of default.

4. Unsecured Loans and Community Personal Property

As indicated previously, Regulation B has specific rules governing unsecured credit applications in community property states. 12 CFR § 202.7(d)(3) provides:

> *Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property 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 credit requested under the creditor's standards of creditworthiness; and
>
> (ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to the community property.

At first blush, Idaho Code § 32-912 appears to give each spouse the unfettered ability to manage, control, bind, and encumber community personal property. However, some of the cases discussed above, including Hicks, Holley, Davis, Olmstead, and Shill, suggest the conclusion that an individual spouse applying for unsecured credit may not have the power to manage or control all community property, due to the possibility of divorce.

As noted above, Idaho and California depart from the general rule that creditors can attach and execute upon community personal property that transmuted into separate property following divorce. The rule followed by Idaho courts is that creditors may not normally look to community personal property awarded to a spouse in a divorce if the spouse receiving that property did not sign the promissory note or loan contract. Holley, 723 P.2d at 897. This is true, even if the debt benefited the community. The only exception is when the creditor alleges and proves that the signing spouse was awarded insufficient community property to satisfy the debt and the spouses intended for the debt to be a community obligation. *Id.*, and Davis, 867 F.2d at 1243.

In light of the above-discussed court decisions, in Idaho, state law in effect denies an individual married loan applicant the power to manage and control sufficient community personal property to satisfy a creditor's standards of creditworthiness, within the meaning of 12 CFR § 202.7(d)(3)(i). This is the case when the creditor will rely on community personal property to satisfy an unsecured loan in the event of default. If an Idaho applicant does not have sufficient separate property to qualify for the credit requested, a creditor may reasonably believe that the signature of the applicant's spouse is necessary on the promissory note or loan contract.

5. Risks Presented Under Idaho Probate Law

In the case of an individual application for an unsecured loan by a married person in Idaho, if the creditor relies on personal property belonging to the spouses to satisfy the loan in the event of default, and if the signing spouse dies, some or all of the personal property may be beyond the creditor's reach, due to provisions in Idaho probate law.

Idaho Code § 15-2-403 provides:

> **Exempt property.**—In addition to any homestead allowance, the decedent's surviving spouse is entitled from the estate to value, not exceeding ten thousand dollars ($10,000) in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value unless the decedent's will provides

> otherwise. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than ten thousand dollars ($10,000), or if there is not ten thousand dollars ($10,000) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the ten thousand dollar ($10,000) value. <u>Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate</u> . . . .

(Emphasis added.) Under Idaho Code § 15-2-403, personal property belonging to the decedent at the time of death, up to the value of $10,000, will be beyond the reach of a creditor if the surviving spouse did not sign the promissory note or loan contract and either the surviving spouse or the decedent's children assert their claim under this statute.

In addition to the exempt property claim given to a decedent's surviving spouse and children under Idaho Code § 15-2-403, Idaho Code § 15-2-404 gives the decedent's surviving spouse and minor children a reasonable allowance (family allowance) in money out of the estate for their maintenance, during the administration of the estate or for a period of one year if the estate is inadequate to discharge allowed claims. This allowance is in addition to the survivor's homestead allowance under Idaho Code § 15-2-402 and the exempt property allowance under Idaho Code § 15-2-403. In determining the amount of the family allowance under Idaho Code § 15-2-404, pursuant to Idaho Code § 15-2-405, the personal representative may pay the survivors a lump sum not exceeding eighteen thousand dollars ($18,000) or periodic payments of one thousand five hundred dollars ($1,500) monthly for a period of one year.

The combined effect of Idaho Code §§ 15-2-403, 15-2-404, and 15-2-405 likely puts personal property belonging to the signing spouse at the time of death, with a value of up to $28,000, beyond a creditor's reach in the event of the death of the sole spouse who signed the promissory note or loan obligation.

SUMMARY

In summary, creditors evaluating individual loan applications from married borrowers residing in Idaho diminish their prospects of collecting on the loan in the event of default if they do not consider the possibility that the borrower may divorce. If the non-applicant's spouse does not sign the promissory note or loan contract, the non-applicant spouse's income will be beyond the creditor's reach if the borrower divorces. In the case of an unsecured loan application by an individual married applicant in Idaho, if the creditor relies on community personal property to satisfy the loan in the event of default, some of that personal property may be beyond the creditor's reach in the case of divorce if the non-applicant spouse did not sign the promissory note or loan contract. In the event of the death of the signing spouse, if the creditor relies on personal property to satisfy an unsecured loan in the event of default, and the surviving spouse has not signed the promissory note or loan obligation, in attempting to satisfy the loan in default, the borrower's personal property may be beyond the creditor's reach.

AUTHORITIES CONSIDERED

1. Idaho Statutes:

Idaho Code § 15-2-402
Idaho Code § 15-2-403
Idaho Code § 15-2-404
Idaho Code § 15-2-405
Idaho Code § 32-903
Idaho Code § 32-910
Idaho Code § 32-911
Idaho Code § 32-912
Idaho Code § 55-1005

2. Federal Cases:

First Idaho Corp. v. Davis, 867 F.2d 1241 (9th Cir. 1988).
In re Hicks, 300 B.R. 372 (Bankr. D. Idaho 2003).

3. Idaho Cases:

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DATED this 20th day of May, 2005.

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