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# Divorced - And Then Bankrupt

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Imagine this scenario: You represent a spouse in a divorce proceeding in which the couple has co-owned credit card debt. Your client never made a single purchase in connection with that credit card. After the divorce is finalized, the other spouse files for bankruptcy. Your client becomes the target for the credit card company to pursue for the full balance due on that credit card, and the separation agreement you drafted did not specifically account for this possibility. How could this situation have been avoided?

The current state of bankruptcy law dictates that virtually all debts owed to a former spouse awarded in the divorce are not dischargeable and still must be paid despite a bankruptcy filing. For example, domestic support obligations existing at the time of the bankruptcy filing, such as child support and alimony, or child support and alimony that are subject to establishment pursuant to a decree after the commencement of the bankruptcy case, are not dischargeable in a bankruptcy pursuant to 11 U.S.C. §523(a)(5).

In addition to alimony and child support, by virtue of the amendments to the Bankruptcy Code in 2005, property settlements and awards of one party to pay the other party's counsel fees also are not dischargeable in bankruptcy pursuant to 11 U.S.C. §523(a)(15) in individual Chapter 7 and Chapter 11 cases. Aside from debts encompassed by section 523(a)(15) in a Chapter 13 case, essentially any and all debt owed to a spouse arising out of a marital relationship is simply not dischargeable in bankruptcy.

Co-owned credit card debt poses a distinct problem when a couple divorces and then one spouse files for bankruptcy protection. Understanding the basics of how co-owned credit cards work is an essential first step in addressing this debt in a divorce. A co-owned credit card is a credit card account that is opened in the name of two people and both people have agreed to be responsible for the charges on the card — no matter who actually makes the purchases. If both spouses are co-owners of the credit card, then each person is 100 percent responsible for the credit card balance.

Most divorcing couples mistakenly believe they are each only 50 percent responsible to the credit card company on such debt. It is very important to explain to your clients that this is not the case. Take the time to explain that each spouse is responsible for the full balance on the card until that balance is repaid in full — regardless of which spouse incurred the charges and regardless of what amount each spouse paid to reduce the balance up until the time of the divorce. A co-owned credit card account is distinct from an account in which the second person is only an authorized user on the account; an authorized user obtains a credit card in his or her own name to make purchases but they are not responsible for paying the bill.

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Co-owned credit card debt becomes an issue if one party files for bankruptcy after their divorce. While the bankrupt party no longer has any obligation to the credit card company with respect to the full balance, the bankruptcy does not alleviate the bankrupt party's obligation to the former spouse on that debt. In many cases, neither party knows or contemplates at the time of the divorce that one of them will file for bankruptcy at some point in the future. The divorce attorney should know and believe that bankruptcy is always an option for either or both spouses after the divorce is finalized, and should address the co-owned credit card debt at the time the divorce agreement is crafted with this possibility in mind.

There are several ways to accomplish this.

**Liquidating Assets**

Ideally, for a couple with marital assets, co-owned credit card debt should be paid off at the time of the divorce even if assets must be liquidated to pay the debt. With the debt paid off by the time the divorce is finalized, a future bankruptcy by either party will not create issues with regard to co-owned credit card debt. In most cases, however, assets are minimal or nonexistent and paying the co-owned credit card debt is simply not possible.

In the event that the co-owned debt must exist after the divorce, the divorce agreement should be structured in a way that contemplates a bankruptcy by either party. One possibility is to allocate the co-owned debt between the two parties in the divorce agreement. The allocation could be based upon the amount that each party charged on the card that benefited that person only (as opposed to benefitting the couple), or how much each party individually paid towards the balance with his or her own funds up to the time of the divorce.

It is important to keep in mind that credit card companies are not bound by divorce decrees, and therefore, any language providing an allocation of the co-owned debt will not change the fact that each spouse is 100 percent liable to the credit card company until the debt is paid in full. This language is necessary and helpful, though, to clarify what each party is responsible for toward the other in the event one spouse files for bankruptcy post-divorce.

As an example, if during the marriage the husband charged $7,500 for a solo trip to Santorini, Greece on a co-owned Capital One credit card and the wife charged $2,500 at the Apple Store on that same card, both parties would be responsible for the $10,000 balance to the credit card company, jointly and severally, until that balance is paid in full, even after they are divorced.

If the wife were to file for Chapter 7 post-divorce, even though she will be absolved of the full $10,000 liability to the credit card company, she will not be absolved of the obligation to her former husband. Once again, this is because any obligation to a former spouse is not discharged in a Chapter 7 proceeding. The separation agreement could include the following boilerplate language to address this issue: "In the event the wife files for bankruptcy protection, she shall remain liable to the husband in the amount of $2,500 for the Capital One credit card debt to the extent that the husband has voluntarily paid some or all of the balance to the credit card company or has been garnished against for non-payment. In the event the husband files for bankruptcy protection, he shall remain liable to the wife in the amount of $7,500 for the Capital One credit card debt to the extent that the wife has voluntarily paid some or all of the balance to the credit card company or has been garnished against for non-payment."

This allocation sets the parameters and defines what amount is not dischargeable between the spouses and still owed despite any bankruptcy filing.

**Unnecessary Expense**

If the co-owned debt between the parties is not addressed, it will undoubtedly result in post-divorce judgment motion filings and unnecessary expense for both sides. An allocation such as the one illustrated above is critical, because while neither spouse knows or can control whether the other will file for bankruptcy in the future, both parties and their attorneys should be aware at the time of the divorce that debts between spouses are likely not going to be discharged. Therefore, the parties should use the separation agreement as a tool to define what one party will owe the other.

While the allocation approach is one way to deal with the co-owned debt, family attorneys can be creative in addressing the co-owned debt issue in a way that works best for their clients. Regardless of the approach used, the lesson here is to make sure the issue of co-owned credit card debt is addressed in some manner in the separation agreement with an eye towards a potential bankruptcy filing and the impact of such a filing on both parties.•

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## Practice Areas

Family Law

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