Preventing Credit Damage in Divorce Cases

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The recent Sixth Circuit decision in *Boggio v USAA Federal Savings Bank*[1] highlights the continuing credit reporting problems facing family law practitioners. In that case, the wife of a soon-to-be-divorced couple signed her husband's name to a check to buy a car. Mr. Boggio, who had been separated from his wife for some time, first learned of the purchase during the divorce proceedings. The final divorce settlement itemized the vehicle as a marital asset and allocated the debt to the wife, who acknowledged buying the car. Following the divorce, the wife failed to pay for the car, and the bank reported the unpaid debt on the husband's credit report.

Mr. Boggio disputed the debt, but the bank refused to respond unless he first filed a police report. Beyond his refusal to submit the police report, the bank claimed that by signing the final divorce decree acknowledging the vehicle as a marital asset, Mr. Boggio had ratified the debt as his own. After unsuccessfully disputing the item with the credit bureaus, Mr. Boggio sued the bank for damages under the Fair Credit Reporting Act.[2]

The trial court dismissed the case, holding that the husband was responsible for the joint debt by reason of ratification. In effect, the trial court held that the bank had no viable way of sorting out the financial mess that had resulted from the divorce and therefore could not have acted unreasonably under the circumstances. The Sixth Circuit reversed and permitted Mr. Boggio to proceed to trial, allowing him to prove that he had not ratified the debt.

Boggio represents only the most recent in a line of Fair Credit Reporting Act cases involving credit reporting issues arising from divorce and family relationships.[3] This article explores some of the prevailing misconceptions concerning credit and credit reporting that occur within divorce cases and offers plain advice for avoiding problems before, during, and after the final decree.

Understanding the landscape of credit and divorce

Even when the parties completely liquidate the marital assets, these assets rarely stretch far enough to discharge all the marital debts. When marital debts survive the divorce, the parties remain financially bound until they discharge all those debts. Sometimes this cannot be accomplished until long after the entry of the final divorce decree. These remaining financial ties present fertile ground for disputes between parties who have already conceded the failure of their personal relationship.

For example, the failure of one former spouse to pay a marital debt may cause creditors to begin collection activity or adverse credit reporting against the other, even if that spouse has no responsibility for the debt under the final decree. Some dishonest creditors have responded to bankruptcies of a cardholding spouse by adding the name of the noncardholding spouse to billing statements and attempting to collect against the noncardholder even though he or she never agreed to pay for the card. More commonly, a spouse who is dissatisfied with a final property division engages in self-help by refusing to pay marital debt or even stealing the other spouse's identity.

Thus, practitioners who leave any marital debt in place expose their clients to the financial choices and misfortunes of their former spouses as well as potential mischief. Even when the parties succeed in completely dividing the debts of the marital estate, widespread credit reporting practices may yet cause the debts of one spouse to follow the other. These common situations present known risks a practitioner should address with clients throughout the divorce process to avoid harm to their credit.

The conventional wisdom misconceptions related to credit reporting

Our training and experience teach us that we generally can remedy harms to our clients. This is simply not the case with credit reporting. In that arena, federal law preempts almost all other remedies and often leaves clients with no remedy at all for false credit reporting. Following are some of the most common misconceptions concerning credit reporting—misconceptions that can cause attorneys to unwittingly harm their clients.

The dissolution of the marriage automatically terminates joint liability for debts

Courts routinely allocate responsibility for payment of marital debt between divorcing spouses as part of the division of the marital estate. Many lay people and practitioners believe the court's allocation of debt to one party relieves the other party of any potential liability for that debt. Unfortunately, the final judgment of divorce does not bind nonparties, and creditors may continue to seek payment from any party that previously incurred or agreed to be responsible for the debt.

Unless the parties pay off and close all joint marital accounts, divorcing spouses stay financially "married" with regard to any joint accounts that remain open at the time of the divorce. This means the credit history of any accounts opened in both spouses' names will follow both. Short of paying off and closing the accounts, the only way to terminate joint liability of a spouse is through the agreement of the creditor.

False credit reporting can be fixed through the legal system

One of the most persistent myths concerning credit reporting revolves around the available remedies. Those laboring under this misconception believe that false information in a credit report can simply be "corrected" through existing legal procedures designed to rectify false reporting. While courts have the power to prevent most forms of continuing harm through injunctive relief, the language of the Fair Credit Reporting Act offers no such relief and, more importantly, preempts all forms of state-law relief practitioners might use against creditors who report misinformation to credit bureaus.[4]

Fast Facts

Every day, family law practitioners help their clients separate assets and allocate debts in divorce proceedings. While many attorneys know how to allocate responsibility for debt, few know how to protect their clients' credit ratings after a divorce. Even when a client has no responsibility for a marital debt in the judgment of divorce, adverse credit reporting and liability may follow both spouses. To properly advise clients, attorneys must learn the limits of what the law can and cannot do to help.

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A consensus of those courts reviewing the issue has held that consumers may not pursue declaratory or injunctive relief for violations of the act.[5] Unless a congressional change occurs or new caselaw rides to the rescue, consumers have no right to compel credit reporting agencies to remove false information from a consumer's credit report.

Credit bureaus and creditors must pay damages for false credit reporting

The idea that credit bureaus and creditors *must* pay damages for *any* false reporting is akin to the idea that merchants *must* pay for *any* harm that comes to visitors in their stores. Neither of these propositions is true. The Fair Credit Reporting Act is not a strict liability statute. It holds credit bureaus and creditors liable only for negligent or willful violations of the act. Consequently, whether a client can recover damages will depend on whether the credit bureau or creditor acted reasonably in light of the information provided under the circumstances.[6] Under this standard, consumers will suffer irremediable injury unless the attorney can prove the credit bureau or creditor acted unreasonably and the harm occurred as a proximate result. The Fair Credit Reporting Act provides the sole remedy against creditors for their actions in reporting debt to the credit bureaus and preempts claims in the nature of defamation, slander, libel, false light, and invasion of privacy.

Consumers only need to dispute the false reporting to the creditor

When consumers find errors in their credit reports, they typically attempt to dispute these matters directly with the creditors. Unquestionably, courts dismiss more claims on the basis of this common error than any other. While the Fair Credit Reporting Act specifically permits consumers to initiate direct disputes with creditors and requires those creditors to investigate the disputes,[7] the act provides creditors with immunity from civil suits arising from direct disputes.[8] For a consumer to perfect a claim against a creditor, the consumer must first lodge the dispute with one or more of the credit bureaus that reported the debt.[9] This bears repeating: *Consumers cannot sue creditors unless they have previously lodged the dispute with a credit bureau.*

Only jointly incurred debt follows spouses after a divorce

Under some circumstances, the Equal Credit Opportunity Act[10] requires creditors to report debts of both spouses even though only one spouse owes the debt. Specifically, when a creditor issues a credit card to one spouse with the other spouse as an authorized user of the card, that creditor *must* report credit information concerning the payment history on both spouses' credit reports.[11] This rule applies only when the spouse is an authorized user on open-end credit accounts such as credit cards, store charge accounts, and equity credit lines. Thus, credit card debt will follow both spouses not only on joint credit cards, but also on credit cards belonging to one spouse when the other spouse is merely an authorized user.

Only professional criminals steal identities

Many identity thefts come at the hands of former spouses who harbor ill will or feel cheated by the final judgment of divorce. These former spouses stand in a unique position to create mischief. Generally, they have had unfettered access to all the personal identification information relating to their former spouses. Often, preapproved credit offers can follow both spouses long after the separation of the parties and dissolution of the marriage. The ease of access to personal information and motivation to "get even" places former spouses in a prime position to engage

in what they may think of as "self-help property settlement reformation"; in other words, identity theft.

Preventing credit damage with proper planning

While it is impossible to guarantee that the conduct of a former spouse will not harm the other spouse's credit, there are ways of reducing the likelihood of this occurring. The following steps can reduce the risk of credit harm to a client and avoid an unhappy client's return with the expectation that you will provide free credit repair services.

- **Create a separate credit file for the client**: Given the difficulties that can arise from credit reporting, the single most helpful service an attorney can provide to a divorce client is to establish a separate file for debt and credit reporting matters. Neither credit bureaus nor creditors maintain copies of monthly reporting. Consequently, unless the consumer requests a copy of his or her credit report, there is virtually no way to establish the contents of the consumer's credit report at a particular point in time. Additionally, most creditors and consumer reporting agencies destroy dispute correspondence after five years. Because debts often reappear after many years, the retention of the dispute letters, credit reports, denials, and billing histories relating to marital accounts will provide proof of the client's credit history and reputation if needed at a later date.
- **Obtain credit reports for each spouse before severing the estate**: Before you begin the task of severing the estate, make sure you have an accurate picture of the financial relationship of the parties. The best source is the credit report of each spouse. A review of the credit reports will identify accounts held jointly and individually, and may unearth previously unknown debts that must be divided. While your client can order his or her credit report, *you as the attorney may not obtain the report without a written authorization or a court order. This is equally applicable for the opposing party*. Any misuse of a credit report opens you up to criminal and civil liability.[12] Each party's credit report may be obtained by court order. The best approach is to obtain a stipulation for issuance of a subpoena signed by the judge or agree to exchange these reports.
- **Close all joint credit accounts to new charges**: Contact creditors on open accounts and make sure the parties close these accounts to new charges. Unless the parties receive a written confirmation of closure from the creditor, the client remains exposed to potential liability for new charges.
- **Discharge joint debt using existing or new individual debt**: Because joint debt poses such a great risk of credit damage to spouses after divorce, a smart strategy is to discharge all joint debt. Creditors rarely release a single party from liability for outstanding joint debt. Consequently, best practice dictates that the parties pay off any outstanding joint debt. Parties who do not have the funds to discharge outstanding debt outright are advised to refinance that outstanding debt. This may be accomplished using a combination of existing assets, existing lines of credit, and new credit in only one spouse's name. To the extent possible, the legal liability for debt should mirror the individual responsibility for marital debt. Any strategy the parties can use to accomplish this will reduce opportunities for unforeseeable credit damage.
- **Advise clients to monitor open accounts**: Once an account goes into delinquent status, the Fair Credit Reporting Act provides no remedy against creditors who accurately report those late payments. Consequently, the exclusive remedies of the act provide no mechanism for repairing damage to a credit report that accurately sets forth the client's credit history. Attorneys should advise clients to monitor their

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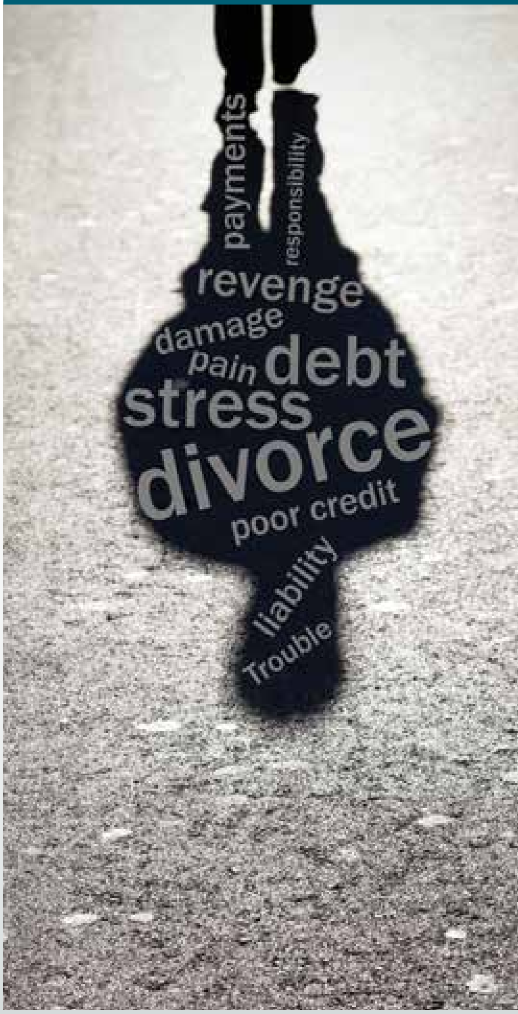

credit reports for any outstanding joint accounts. Virtually all major creditors now allow consumers to electronically monitor their accounts via the Internet and receive automated notifications when payments are late. Similarly, many credit card companies and credit reporting agencies offer monitoring services, allowing clients to receive advance warning of potential harm to their credit before it becomes significant or irreparable. Because industry standards require reporting of delinquencies after 30 days in arrears, a client who continues to monitor open accounts for late payments can avert serious credit damage before it occurs by paying bills on time and seeking reimbursement from his or her former spouse.

- **Negotiate protection in the divorce settlement**: The judgment should include contractual protections for your client regarding remaining joint debt including indemnity for credit damage arising from joint obligations, a prohibition on incurring any new debt in the other spouse's name, and fee shifting for enforcement of these provisions.

- **Notify credit reporting agencies**: Notify the credit reporting agencies to remove your client from any prescreened lists and inform them of any change in the status of the marriage, joint accounts, and addresses. This notice will:
  - Reduce the possibility that a new credit account may be opened jointly or in the name of a spouse who has not consented
  - Provide an important predicate to liability against the major credit reporting agencies in the event of identity theft by the spouse
  - Prevent misdelivery and misuse of any preapproval offers arriving at the home of the former spouse
  - Reduce the opportunity for identity theft by a former spouse

  The credit reporting agencies can be reached at http://www.experian.com/, http://www.equifax.com, and http://www.transunion.com/.[13]

- **Give your clients clear advice about what to expect**: One of counsel's greatest responsibilities is providing clients with clear information about potential future problems. Most clients believe that with the conclusion of their divorce, all matters will be settled. To the same extent that parenting, alimony, and support issues can persist after the final judgment, so too can credit issues. Given the likelihood of credit reporting problems down the road, attorneys should give clients a clear idea of what to expect in relation to credit reporting and their continued legal obligations regarding debts that survive the marriage. Unless the practitioner gives clients clear expectations, those clients will no doubt look back to the attorney to fix issues as they occur. A smart strategy is to provide the client with a summary of all marital debts, along with the client's responsibility for each of the debts, and a description of how the debts should appear on the client's credit reports, how to monitor surviving debts, and what to do in the event of a problem.

- **Follow up**: In the vast majority of cases, the credit bureaus, banks, and debt collectors will not correctly document the status of the debt after the final decree. Consequently, by following up and simply reminding clients to review their credit reports, attorneys can provide a great service and an opportunity to assess continuing legal needs, and potentially find new cases. ■

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ENDNOTES

1. *Boggio v USAA Fed Savings Bank*, 696 F3d 611 (CA 6, 2012).
2. 15 USC 1681 *et seq.*
3. See, e.g., *Johnson v MBNA Am Bank, NA*, 357 F3d 426 (CA 4, 2004); *Morris v Equifax Information Servs, LLC*, 457 F3d 460 (CA 5, 2006); *Northrop v Hoffman of Simsbury, Inc*, 12 Fed Appx 44 (CA 2, 2001).
4. *Purcell v Bank of Am*, 659 F3d 622, 623–625 (CA 7, 2011); *Macpherson v JPMorgan Chase Bank, NA*, 665 F3d 45 (CA 2, 2011); *Ross v FDIC*, 625 F3d 808 (CA 4, 2010).
5. See *Washington v CSC Credit Servs*, 199 F3d 263, 266–267 (CA 5, 2000); but see *Beaudry v TeleCheck Servs, Inc*, 579 F3d 702, 707 (CA 6, 2009).
6. 15 USC 1681n and o.
7. 15 USC 1681s–2(a).
8. 15 USC 1681s–2(c).
9. 15 USC 1681s–2(b).
10. 15 USC 1679 *et seq.*
11. 12 CFR 202.10(a).
12. 15 USC 1681b and q.
13. Parties should order these reports directly from the credit bureaus. While many services offer "merged" or "tri-merge" reports that provide data from all three agencies in a single report, these reports are exceedingly difficult to use in legal settings as the reports must be authenticated through two sources.