Limitations on Creditors’ Rights to Require Spouses’ Signatures Under the ECOA and Washington Community Property Law

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The Federal Trade Commission regulations accompanying the Equal Credit Opportunity Act (ECOA)\(^1\) limit the circumstances a creditor can require the signature of both spouses on a


1. The relevant regulations state:

*Signature of spouse or other person.*

(1) Except as provided in this subsection, 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.

(2) If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant’s interest in the property. If necessary to satisfy the creditor’s standards of creditworthiness, the 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 relied upon available to satisfy the debt in the event of default.

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

(i) Applicable State law denied the applicant power to control sufficient community property to qualify for the amount of credit requested under the creditor’s standards of creditworthiness, and

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

(4) If an applicant requests secured credit, a creditor may require the signature of the applicant’s spouse or other person on any instrument 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, any instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

12 C.F.R. § 202.7(d)(1)-(4) (1980).
loan instrument or an accompanying security agreement. These regulations are designed to insure spouses nondiscriminate access to credit while protecting the creditor's ability to maintain reliable and stable credit transactions. While these are laudable goals, the federal regulations and Washington community property laws are sufficiently vague as to hinder the creditor's ability to determine what signatures he can lawfully require from individual spouses seeking credit. The final resolution of these difficulties must await judicial clarification. Analysis of the interaction between federal credit regulations and Washington community property law, however, reveals some practical considerations which should give interim aid to creditors extending secured or unsecured credit to married individuals.

This article examines the federal regulations' interaction with Washington community property law to determine when a creditor can require the signature of a Washington applicant's spouse on either a loan instrument or security agreement in five common situations: (1) a married applicant's request for credit secured by community property, (2) a married applicant's request for credit secured by separate property, (3) a married applicant's request for general unsecured credit, (4) a married applicant's request for unsecured credit in specific reliance upon his or her income flow, and (5) a married applicant's request for unsecured credit in specific reliance upon the income flow of his or her spouse. Further, the article will consider the impact of the ECOA regulations upon each of these fact situations and possible variations, including the effect of the applicant's separation or divorce on the unsecured creditor's ability to reach the nonapplicant's spouse's income flow. Finally, this article summarizes the signature policies a creditor should consider applying in light of the Equal Credit Opportunity Act regulations.

II. CREDIT SECURED BY COMMUNITY PROPERTY

In Washington, spouses have equal power to unilaterally encumber community property, except in three major situations. Because creditors do not need the nonapplicant spouse's

2. The Washington Administrative Code places similar restrictions upon a creditor's right to obtain a spouse's signature. See WASH. AD. CODE § 162-40-161 (1977). However, the Washington provision is more liberal than the federal regulations and therefore a creditor subject to both standards should be concerned primarily with the stricter federal regulations.

signature to perfect an encumbrance on most forms of community property, the ECOA regulations prohibit a creditor from requiring that signature in most credit or loan transactions.\(^4\) Three exceptions to this general rule, however, are real property, household goods, and certain types of community businesses, none of which can be encumbered without both spouses’ signatures.

**A. The Real Property Exception**

Washington statutes prohibit one spouse from encumbering community real property without the other’s consent.\(^5\) Unless the nonapplicant spouse signs the “instrument by which the real estate is encumbered,”\(^6\) an attempted encumbrance of real property is void.\(^7\) Therefore, federal regulations permit a creditor to require the signature of the nonapplicant spouse on the security instrument when entering a real property security agreement with a Washington applicant.

Notably, the nonapplicant spouse’s signature is apparently unnecessary on the “debt instrument” itself to perfect the encumbrance. The Washington statute specifically states that real property may be encumbered if both spouses join in the execution of the security instrument by which the real property is encumbered.\(^8\) The instrument of encumbrance, or security instrument, presumably refers to the mortgage, deed of trust or other document which evidences a lien upon the property. This document must be differentiated from the note, loan agreement or other instrument which embodies the debt. The ECOA, therefore, prohibits the creditor from requiring either spouse’s signature on the “debt instrument” because the “security instrument” is enforceable without such signatures.

**B. The Household Goods Exception**

The second exception to the general “one signature” rule applies when the applicant offers community household goods,

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5. “Neither spouse shall . . . encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is . . . encumbered, and such deed or other instrument must be acknowledged by both spouses.” WASH. REV. CODE § 26.16.030(3) (1980).
6. Id.
7. See id.
8. See id.
furnishings, or appliances as security for a loan. One spouse acting alone cannot encumber such property unless the encumbrance is a purchase money security interest. Therefore, the ECOA permits a creditor to require the nonapplicant spouse's signature on the security agreement if the applicant offers this type of property as security for a loan.

Although the legislature enacted the community household goods exception in 1972, the courts have not yet defined the parameters of the statutory language, "household goods." Professor Harry M. Cross suggested that a good general rule is that a household good includes any permanent article, purchased or acquired for use in and about the house, which is not an article of consumption. Regardless of the precise definition eventually adopted, in most instances, creditors should be able to make accurate, common sense determinations whether the property offered as security falls within the statute's meaning. If a proper determination is difficult, the creditor might require the applicant to specify whether the offered collateral is a "household good, furnishing or appliance." If the applicant identifies the collateral as a household good, the creditor can proceed to require the nonapplicant spouse's signature. The applicant's admission will probably estop him from claiming sex or marital discrimination in violation of the ECOA. If the applicant states that the collateral is not a household good, the creditor can ask for the nonapplicant spouse's written concurrence before accepting the offered property as security. That concurrence will probably estop the nonapplicant spouse from thereafter asserting that the encumbrance is ineffective for failure to obtain both spouses' signatures on the security agreement.

9. "Neither spouse shall create a security interest other than a purchase money security interest . . . in . . . community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement . . . ." WASH. REV. CODE § 26.16.030(5) (1980).

10. Id. This statutory provision mirrors the real estate exception to the extent of stating that an applicant may encumber community household goods, furnishings, or appliances if both spouses join in executing the security instrument. Creditors do not need the spouse's signature on the debt instrument to secure such property, and therefore the ECOA prohibits requiring the spouse's signature on the debt instrument.


12. Cf. Witzel v. Tena, 48 Wash. 2d 628, 295 P.2d 1115 (1956) (a spouse who stipulates during litigation that property is not community is estopped from claiming that it is community in later litigation).
C. The Community Business Exception

A third exception to the general rule is the community business exception. Both spouses must consent to the encumbrance of community business assets if (1) both participate in management of the business or (2) the encumbrance is outside the ordinary course of business.\(^\text{13}\) A definition of the scope of the "community business" provision must await judicial clarification and interpretation. A creditor wishing to be certain of a Washington loan applicant's unilateral right to encumber community business property should, therefore, view the applicant's offer of such property in light of the following three general rules.

First, if both spouses participate in the management of a business, their joint action is necessary to encumber the community business' personal and real property. The statutory term "participate" probably refers to the situation where both spouses manage a "sole" proprietorship or partnership\(^\text{14}\) but does not include incorporated businesses, unless both spouses own most of the corporation's shares and essentially ignore the corporate form.\(^\text{15}\) Absent judicial clarification, however, it is difficult for creditors to ascertain whether there is sufficient participation by both spouses in a community sole proprietorship or partnership such that the creditor can lawfully require both spouses' signatures on the security agreement encumbering business property. According to the FTC regulations, a creditor may require a nonapplicant spouse's signature merely upon a reasonable belief that, under state law, the signature is necessary to ensure the subsequent availability of the offered collateral.\(^\text{16}\) Because of the indefinite boundaries of the community business exception, a creditor could successfully demonstrate such a reasonable belief whenever an applicant offers community business

13. Neither spouse shall . . . encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: Provided, that where only one spouse participates in such management the participating spouse may, in the ordinary course of business, . . . encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse. WASH. REV. CODE § 26.16.030(6) (1980).


15. Cross, supra note 14, at 795 n.320.

property as security, and the nonapplicant spouse minimally participates in policy-making business decisions. However, if the credit applicant insists that the nonapplicant spouse's activity in a community business does not constitute the requisite managerial participation, the creditor's safest course is to require an affidavit of "nonparticipation" from the nonapplicant spouse. 17

Second, if only one spouse participates in the business, that spouse may encumber the community business personality and realty without the other spouse's consent. 18 Once again, if the creditor is uncertain whether the nonapplicant spouse is sufficiently active in managing the community business to be considered "participating," the creditor may require the nonapplicant spouse to execute an affidavit of nonparticipation. 19 However, if the nonapplicant spouse is clearly not a managing participant in the business, the creditor, under the ECOA, cannot require the nonapplicant spouse's signature on a security agreement created in "the ordinary course of" the community business operations.

Third, if only one spouse participates in the business, that spouse may unilaterally encumber the community business property only in the "ordinary course of business." 20 In Pixton v. Silva, a Washington appellate court held that the purchase of an entire business was not in "the ordinary course of business" as that phrase is used in the community property statute. 21 The courts will probably continue to interpret the phrase liberally rather than unduly hamper the managing spouse's exercise of business discretion in entering security agreements involving community business assets. Professor Cross suggested that the courts should analogize to cases interpreting the phrase as it is used in the Uniform Commercial Code. 22 Presently, a creditor should be safe in presuming that most community business loans are sought "in the ordinary course of business" and, there-

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17. Commentators suggest this approach to prevent challenges to encumbrance of community business assets. WASHINGTON STATE BAR ASSOCIATION, WASHINGTON COMMUNITY PROPERTY DESKBOOK § 24.2 (1977). No reported Washington decision has challenged this method.
19. See note 17 supra.
22. Cross, supra note 11, at 540. Alternatively, Professor Cross suggested that courts might adopt the definition, defining the ordinary course of business as "the transaction of business according to the usages and customs of the commercial world generally . . . ." Cross, supra note 11, at 540 n.49 (quoting BLACK'S LAW DICTIONARY 989 (5th ed. 1979)).
fore, ordinarily should not require the nonapplicant spouse’s signature on the security agreement. In the event of an extraordinary transaction apparently outside of the ordinary course of business, the creditor should seek an attorney’s advice respecting the individual situation before completing the transaction.

In summary, each spouse has the power to manage and therefore encumber most community assets under Washington community property law. Because either spouse can encumber community assets, the ECOA regulations prohibit creditors from requiring the signature of the nonapplicant spouse when most community assets are offered as security. However, married applicants cannot encumber community real property, community household goods, and some community business assets without the participation of their spouses. In those instances, a creditor can require the signature of the nonapplicant spouse, although the ECOA regulations only permit the creditor to require the spouse’s signature on the security instrument.

III. CREDIT SECURED BY SEPARATE PROPERTY

The Washington community property statute grants each spouse total management power over their separate property.\(^{23}\)
The ECOA regulations therefore prohibit creditors from requiring the nonapplicant spouse’s signature when the applicant offers sufficient separate property as collateral to cover the amount of the loan obligation. \(^{24}\)

The creditor’s real problem in this fact situation is determining whether the applicant in fact separately owns the property offered as security. As noted above, married applicants generally can unilaterally encumber community property as well as their own separate property, and, therefore, the creditor need not be concerned if the property offered is community property which the applicant can encumber without the nonapplicant spouse’s consent. Potential problems exist, however, when (1) the applicant offers his allegedly separate property as collateral when it is in fact the nonapplicant spouse’s separate property and (2) the applicant offers his allegedly separate property as collateral when it is in fact the type of community property that requires both spouses’ signatures to create an enforceable

\(^{24}\) See 12 C.F.R. § 202.7(d)(4) (1980).
encumbrance. This article does not seek to recite the myriad factors in Washington law that can affect the characterization of property as community or separate. However, a creditor should certainly be aware of the following considerations when an applicant offers realty, household goods, or business assets as “separate” security.

An asset acquired by labor or industry or other valuable consideration during marriage is presumptively community property. In turn, property acquired before marriage or by gift, inheritance, succession or other “nonvaluable” means during marriage is presumably separate property. Washington requires clear and convincing proof to overcome these presumptions. However, the fact that property is in one spouse’s name does not determine whether the offered collateral is either community or separate property, and a creditor should not heavily rely on the location of title. Instead, creditors should examine the means of acquisition or the source of the funds used to obtain that asset. If the person acquired the property by “separate” means or if the funds he used to obtain the asset were separate property, then the asset is separate property as well.

The creditor should also inquire into the property’s history subsequent to the applicant’s acquisition. If the applicant or the nonapplicant spouse have expended, or if the nonapplicant has made personal efforts to improve the separate property, the community may have a lien against that separate property for any resulting increase in its value. Although Washington authorities are unclear as to the priority of such a community lien over subsequent creditors’ interests, the Washington Supreme Court, in Pekola v. Strand, hinted that it might grant the community lien such a priority. In addition, if the applicant and spouse have commingled separate property with com-

25. See text accompanying notes 5-22 supra.
27. Id.
30. See text accompanying note 27 supra.
31. Burch v. Rice, 37 Wash. 2d 185, 222 P. 2d 847 (1950); In re Estate of Pugh, 18 Wash. 2d 501, 139 P.2d 698 (1943). Natural increases in property value due to appreciation are the “issue” of and take on the character of the underlying property. Guye v. Guye, 63 Wash. 340, 348-49, 115 P. 731, 733-34 (1911).
33. See id. at 101, 168 P.2d at 409.
munity property, that property may have lost its separate characterization in whole or to the extent that the separate property has become indistinguishable from surrounding community assets. Stock certificates and bank accounts are examples of easily commingled property.

Thus, the ECOA regulations generally prohibit a creditor from requiring the nonapplicant spouse's signature if the applicant offers separate property as security. If, however, the property consists of real property, household goods, or business assets, the creditor should carefully verify the property's alleged separate character because security interests in those categories of community property are void without both spouses' signatures on the security agreement. If the offered collateral's character remains in doubt, the creditor may wish to obtain a quit-claim deed from the nonapplicant spouse with respect to the property, thereby preventing that spouse from later claiming an interest in the property and reducing its value as security.

IV. UNSECURED CREDIT

The ECOA regulations permit a creditor to require the nonapplicant spouse's signature on an unsecured debt instrument only when it appears reasonably necessary to ensure that the property tendered as proof of creditworthiness will be available to the creditor upon default. This places responsibility upon the creditor to ascertain the "character" of the debt the applicant is seeking. If the unsecured debt is a "community debt," the creditor can reach community property to satisfy it. Additionally, the creditor can be sure that the spouse who signs the debt instrument thereby also obligates his or her separate property for payment of the debt. However, if the applicant incurs the debt solely for a separate purpose or in the management of


This analysis of unsecured credit presumes, in every instance, that the separate or community property offered by the applicant is sufficient to meet the creditor's standards of creditworthiness. Thus the analysis is limited to whether the type of property offered, and not the quantity offered, is such that the creditor may require the nonapplicant spouse's signature.

separate property, the debt is a separate obligation and only the applicant’s separate assets are available to satisfy it.\textsuperscript{39} In fact, the creditor cannot reach the applicant’s undivided one-half interest in the community property in satisfaction of that spouse’s separate liability.\textsuperscript{40}

Thus, the creditor must consider both the character of the property the applicant offers to establish creditworthiness and the character of the resulting debt in determining whether he can require the nonapplicant spouse’s signature. If the character of the debt is the same as the character of the property offered to establish creditworthiness, then the creditor can reach that property upon default. In such a case, the creditor is prohibited by the federal regulations accompanying the ECOA from requiring the nonapplicant spouse’s signature on the debt instrument.\textsuperscript{41} If, on the other hand, the property is of a different character than the debt obligation, the creditor may be able to require the nonapplicant spouse’s signature to ensure that the offered property is available to satisfy the debt\textsuperscript{42} in the event of default.

In applying these rules, the creditor can presume that the majority of loans will create community debts. A loan creates a community debt so long as the applicant incurs it in good faith for a community business purpose.\textsuperscript{43} It is irrelevant whether the other spouse desires the loan or even whether the loan reflects a lack of good judgment.\textsuperscript{44} Washington courts presume that all debts the community incurs are community in character even if the applicant subsequently uses the funds for separate purposes.\textsuperscript{45} These rules so favor the creation of community debts, that, if the court can find merely a community property benefit, it will find community liability.\textsuperscript{46} If a debt does create a commu-

\textsuperscript{39} U.S. Lumber Co. v. McDonald, 68 Wash. 2d 741, 415 P.2d 77 (1966).
\textsuperscript{40} Aichlmayr v. Lynch, 6 Wash. App. 434, 435, 493 P.2d 1026, 1027 (1972).
\textsuperscript{41} See 12 C.F.R. § 202.7(d)(3) (1980).
\textsuperscript{42} See id.
\textsuperscript{43} Sun Life Assurance Co. v. Outler, 172 Wash. 540, 544, 20 P.2d 1110, 1112 (1933).
\textsuperscript{44} Bellingham Motors Corp. v. Lindberg, 126 Wash. 684, 219 P. 19 (1923).
\textsuperscript{45} Auernheimer v. Gardner, 177 Wash. 158, 31 P.2d 515 (1934).
\textsuperscript{46} If some community property benefit, direct or indirect, can be found, the presumption of community liability will not be overcome. For example, a purpose to benefit a corporation which employs the husband or of which he is an officer or director will supply sufficient indirect benefit . . . [to establish a community liability].

Cross, supra note 14, at 824. Cases “suggest that a community ‘business’ purpose test may be met by any activity except that clearly related to separate property or clearly
nity liability, the creditor must then determine whether the property offered as proof of creditworthiness is community property.\textsuperscript{47} If the property is community property, the ECOA regulations prohibit the creditor from requiring the nonapplicant spouse's signature on the debt instrument or security agreement.\textsuperscript{48}

ECOA regulations still prohibit the creditor from requiring the nonapplicant spouse's signature\textsuperscript{49} if the applicant separately owns the property he offers to establish creditworthiness. The applicant, by signing the debt instrument, obligates his separate property on the debt, regardless of whether he incurs the obligation for a community business purpose. The nonapplicant spouse's signature, therefore, is unnecessary to ensure the availability of the applicant's separate property upon default. However, if the property the applicant offers to establish creditworthiness is the nonapplicant spouse's separate property, the creditor can require the nonapplicant spouse's signature on the debt instrument. Although a spouse creates both community liability and personal separate liability by signing a debt agreement for community purposes, this does not ordinarily create separate liability in the non-acting spouse.\textsuperscript{50} In addition, the mere signature of the nonapplicant spouse upon a financial statement or other document to establish solvency does not create a separate liability in that spouse for the debt.\textsuperscript{51} Therefore, if the creditor provides an applicant with community credit in reli-

donative." \textit{Id.} at 825.

\textsuperscript{47} See text accompanying notes 26-34 supra.

\textsuperscript{48} A creditor may require the signature of the spouse on any instrument necessary . . . to make the community property available to satisfy the debt in the event of default if:

\begin{itemize}
  \item[(i)] Applicable State law denied the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness.
\end{itemize}


\textsuperscript{49} [A] creditor may require the signature of the spouse on any instrument necessary . . . to make the community property available to satisfy the debt in the event of default if:

\begin{itemize}
  \item[(ii)] The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.
\end{itemize}


\textsuperscript{50} Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488 (1916).

\textsuperscript{51} U.S. Lumber Co. v. McDonald, 68 Wash. 2d 741, 744, 415 P.2d 77, 80 (1966); Yakima Plumbing Supply Co. v. Johnson, 149 Wash. 257, 282, 270 P. 829, 831 (1928).
ance upon the nonapplicant spouse's separate property, the ECOA permits the creditor to require the nonapplicant spouse's signature on the debt instrument to create separate liability in that person and, thereby, ensure the availability of his separate property upon default.

There is a major exception to the general rule that the nonapplicant spouse's signature is necessary to encumber his separate property. Each spouse is obligated, jointly and severally, for debts incurred for the "necessary family expenses" of the community. The nonapplicant spouse's separate property will therefore be liable to satisfy such debts. Each spouse may be jointly and severally liable for the full amount of the debt, subject to a possible one-half contribution from the other spouse. Courts have defined the scope of "necessaries" broadly to include hospital expenses of the spouse or minor dependent children, rent for the family home, child support including education, and other varied expenses of the community.

Spouses' obligation to maintain and support one another ceases when the community relationship terminates, but the obligation to support and educate minor children survives separation and divorce. Even after a spouse remarries, the property belonging to the new community may be liable, to the extent just and equitable, for support of children by a previous marriage. The characterization of a debt as a necessary family expense is significant because then a creditor can reach either spouse's separate or community property to the full extent of that debt regardless of whether the nonapplicant spouse signed the debt instrument. Consequently, if the applicant is seeking credit for a necessary family expense and relies on separate

53. "The expenses of the family and the education of the children . . . are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately . . . ." WASH. REV. CODE § 26.16.205 (1980).
54. See id.
property of the nonapplicant spouse to establish creditworthiness, the creditor cannot require the nonapplicant spouse's signature on the debt instrument.

In summary, if an applicant seeks unsecured credit, the creditor must determine whether the property offered to establish creditworthiness will be available to satisfy the debt upon default. If the applicant offers property of the same character as the debt obligation, or if the debt is incurred for a necessary family expense, the property will be available to satisfy the debt, and the ECOA regulations prohibit the creditor from requiring the nonapplicant spouse's signature on the debt instrument. If the property is of a different character from the debt obligation, and if that property will not be available to the creditor upon default, the creditor may require the nonapplicant spouse's signature.

V. Unsecured Credit in Reliance Upon Income Flow

The ECOA regulations require that if a married applicant from a community property state seeks unsecured credit, the creditor can require the nonapplicant spouse's signature only if, under applicable state law, the applicant controls insufficient community or separate property to satisfy the debt upon default.63 Income of either spouse is an accretion to the wealth of the community and therefore community property.64 Either spouse can manage and, therefore, obligate that property upon a debt.65 If the debt is incurred for a community purpose, the creditor can look thereafter to the community income flow of either spouse for satisfaction of the debt.66 Therefore, the ECOA regulations do not permit a creditor to require the nonapplicant spouse's signature on the debt instrument merely because the community property the applicant relies upon to establish creditworthiness is his own income flow.

It should be noted that because either spouse is empowered to obligate the community on a debt, there is always the danger the spouses, jointly or separately, will obtain more unsecured

64. In re Witte's Estate, 21 Wash. 2d 112, 127, 150 P.2d 595, 602 (1944). However, the rents, issues, and profits of separate property can remain separate income to the extent that no community funds or efforts are expended to generate that income. In re Harshman, 18 Wash. App. 116, 126, 667 P.2d 667, 672-73 (1977).
credit than their community assets can satisfy. There is equal danger that the spouses, jointly or separately, will transfer the assets during the unsecured debt’s term, thereby diminishing the community’s ability to repay its debts on default. This applies to wages as well as all other forms of community property. This possibility alone, however, does not entitle a creditor to require the nonapplicant spouse’s signature on the security agreement or debt instrument. No cases have dealt with the issue, but Professor Cross concluded that the rules respecting competing transfers of community property probably will be similar to rules for other types of property.67 The creditor issuing an unsecured community debt in reliance on existing community property, such as an applicant’s wages, implicitly accepts the risk that there will be insufficient community property to satisfy the debt upon default. The mere fact that the nonapplicant spouse can transfer the unencumbered community property during the debt’s term is not a unique risk to the creditor and does not enable the creditor to require the spouse’s signature on the debt instrument.

It is not uncommon for an applicant to seek unsecured credit in reliance on his spouse’s income flow. The ECOA regulations clearly govern this situation.68 However, when an applicant relies on his spouse’s income flow to establish creditworthiness, there may be additional complications in determining whether the creditor can require the nonapplicant spouse’s signature. A nonapplicant spouse’s income, like the applicant’s income, is community property and is available to satisfy community


68. Although it is clear that some provision of the ECOA regulations applies to this situation, it is not clear which provision is applicable. Regulation 12 C.F.R. § 202.7(d)(3) (1980) applies to married applicants’ requests for unsecured credit in community property states. See note 1 supra. The regulation, however, states: “If an applicant requests individual credit relying on the separate income of another person, a creditor may require the signature of the other person to make income available to pay the debt.” 12 C.F.R. § 202.7(d)(5) n.10 (1980). This footnote’s meaning is unclear. If the term “separate” refers to a spouse’s separate as opposed to community sources of income, see note 65 supra, the phrase merely restates the rule that a creditor can require the signature of a nonapplicant spouse if an applicant relies on the separate property of the spouse to establish creditworthiness. 12 C.F.R. § 202.7(d)(3) (1980). If the term “separate” is not a community property term of art, then the provision was not intended to refer to community property law at all and does not apply in community property states. In either case, the two provisions do not contradict one another, and therefore it is safe to rely on 12 C.F.R. § 202.7(d)(3) to determine whether a creditor may require the signature of the nonapplicant spouse in this situation.
debts. 69 Therefore, a creditor should ordinarily treat an offer of a nonapplicant spouse's income to establish creditworthiness like any other offer of community property. 70 This analysis changes, however, if a creditor is aware that separation of the community is imminent or has occurred.

Separation or divorce has an effect upon the availability of the nonapplicant spouse's income different from its effect on other forms of community property. Generally, community debts can be enforced against property held by either spouse if it was community property prior to a divorce. 71 As a general rule, court dissolution decrees fixing spousal liability for community debts have no effect upon the creditor's rights in this regard. 72 Washington Revised Code § 26.16.140, however, states that spouses' future earnings and accumulations, arising out of a spouse's labor or other separate sources, 73 while living separate and apart

70. See text accompanying notes 36-40 supra.
72. Farrow v. Ostrom, 16 Wash. 2d 547, 552-53, 133 P.2d 974, 977 (1943). The Washington State Supreme Court recently articulated a narrow exception to this general rule. Griggs v. Averbeck Realty, 92 Wash. 2d 576, 599 P.2d 1289 (1979). In Griggs, a creditor brought an action upon a community debt against a marital community for delinquent payments on the purchase of an apartment house. The action was started in 1970, but the trial involving the wife, who was not separately liable for the debt, did not take place until 1976, 19 months after she and her husband were divorced. The wife prevailed on the merits of that case. The court thereafter refused to allow the creditors to sue the wife's community obligation on the debt to reach the former community property now held by the wife, noting:

[W]e hold that when the community creditors have not obtained, during the existence of the marriage, a judgment against the community, and when a former spouse, after termination of the marriage, prevails on the merits, then property distributed to that former spouse—even though previous community property—cannot be used to satisfy a judgment against the other former spouse. Our holding is limited necessarily to such narrow facts.

Id. at 586, 599 P.2d at 1294.

The scope of this decision is uncertain. It implies that a creditor should at least join both spouses in a single suit in any action in which the creditor seeks satisfaction of a community debt.

It is possible that Washington courts might expand such a decision to hold that debts are not binding upon the community when they are made just prior to, but in contemplation of, the dissolution of the community. Creditors probably cannot require the signature of both spouses whenever a married loan applicant is in the process of a divorce, merely on the grounds that the Griggs exception may be expanded. However, a married applicant's offer of community property to establish creditworthiness should be viewed circumspectly.

are each individual's property. Moreover, the statute operates whenever spouses are separated with an intent to permanently terminate the community relationship; legal divorce is not necessary. Thus, if the creditor relied on the continuous income flow of the nonapplicant spouse to establish creditworthiness, and that spouse had not signed the debt instrument, this statute eliminates the sole source for debt repayment.

The danger of separation or divorce may sufficiently diminish the value of a nonapplicant spouse's income flow as a source of creditworthiness to permit the creditor to require the nonapplicant spouse's signature on the debt instrument. There are no cases interpreting the ECOA regulations on this point. If a creditor is apprised that the community is separated, and the applicant still relies upon the spouse's income flow to establish creditworthiness, the ECOA should permit the creditor to require the nonapplicant spouse's signature. In most other situations the ECOA will probably be interpreted to prohibit the creditor's requiring the nonapplicant spouse's signature unless the separation or divorce is sufficiently certain so as to support a reasonable belief in the necessity of requiring the spouse's signature to ensure the availability of the nonapplicant spouse's income flow in the event of default.

Regardless of the imminence of separation or divorce, if the debt was incurred for a necessary family expense a creditor could not require a nonapplicant spouse's signature on the debt instrument. As noted above, each spouse is jointly and severally liable for the full amount of any debts incurred as necessary family expenses. Dissolution of the marital community subsequent to assumption of the debt does not alter this liability. The ECOA would, therefore, prohibit a creditor from requiring the nonapplicant spouse's signature if the debt is for a necessary family expense, even though the nonapplicant spouse's income flow is offered as evidence of creditworthiness and separation or divorce is imminent. If separation has already occurred, the spouse's obligation for necessary family expenses terminates, except for the obligation to support and educate minor chil-

75. Id.
76. See note 53 supra.
dren.\textsuperscript{78} Therefore, if separation has already occurred, the creditor could require the nonapplicant spouse's signature for unsecured credit involving most necessary family expenses.

In summary, the income flow of either spouse is a community asset. If either spouses' income is offered as evidence of creditworthiness for a community debt, the ECOA regulations prohibit the creditor from requiring the signature of the nonapplicant spouse. If a separate debt is sought, the rules generally applicable to unsecured credit apply. When the nonapplicant spouse's income flow is offered, the imminence or existence of a separation or divorce may permit the creditor to require that spouse's signature. However, if the debt is incurred for necessary family expenses the ECOA regulations generally will not permit the creditor to obtain the spouse's signature until separation or divorce.

VI. CONCLUSION

Except for community real property, household goods, furnishings and appliances, and business assets, the ECOA regulations prohibit creditors from requiring the nonapplicant spouse's signature when sufficient community assets are offered as security. If an applicant offers sufficient separate property of his own as security, the ECOA regulations again prohibit the creditor from requiring the nonapplicant spouse's signature. The creditor can require the nonapplicant spouse's signature in most other circumstances, when that signature is "necessary" to make the offered property available to satisfy the debt upon default.

If an unsecured debt is sought, the creditor must examine both the character of the debt sought and the character of the property offered to establish creditworthiness. If the character of the debt sought is the same as the character of the property offered to establish creditworthiness, the creditor will be able to reach that property upon default regardless of whether the nonapplicant spouse signed the debt instrument. In that case, the nonapplicant spouse's signature may not be required. If, however, a community debt is sought and the separate property of the nonapplicant spouse is offered, the property will not be available to satisfy the debt unless the nonapplicant spouse signs the debt instrument. In this situation, the creditor may

\textsuperscript{78} See note 61 and accompanying text \textit{supra}.
require the nonapplicant spouse's signature. Similarly, if the
applicant seeks a separate debt and community property or his
spouse's separate property is offered, that property will be
unavailable unless the nonapplicant spouse signs the debt
instrument. Again, in this context, the creditor may require the
nonapplicant spouse's signature. These general rules contain an
exception, however, because both spouses are jointly and sever-
ally liable for debts incurred for necessary family expenses.
Consequently, the nonapplicant spouse's signature may not be
required for such debts.

The income flow of either spouse is generally considered
community property. Therefore, so long as an unsecured com-
munity debt is sought, the ECOA regulations prohibit the credi-
tor from requiring the nonapplicant spouse's signature. If either
spouse offers income flow to establish creditworthiness for a sepa-
rate unsecured debt, the community income flow will not be
liable to satisfy the debt and the ECOA regulations permit the
creditor to require the nonapplicant's signature. If the nonap-
pli
cant spouse's income flow is offered in particular, and the com-
munity's separation or divorce is imminent, ECOA regulations
may permit the creditor to require the nonapplicant spouse's
signature because upon separation or divorce each spouse's
income flow becomes his or her separate property. Once again,
however, if the debt is for necessary family expenses, the nonap-
plicant spouse's signature may not be required unless separation
or divorce has actually occurred.

As the above analysis demonstrates, major uncertainties
exist in applying the ECOA regulations to Washington commu-
nity property law. This is largely because the regulations and the
1972 amendments to the Washington community property stat-
utes are new and undefined. Amendments to the regulations and
new decisions shaping the Washington statutes will eventually
resolve many of these problems. In the meantime, creditors will
continue to face difficult questions in fashioning signature poli-
cies which will both protect their outstanding credit and avoid
costly litigation under the ECOA. Consideration of the above
policies, however, should minimize such problems.