

Marital Property in Credit Transactions

Frequently we are involved in credit transactions involving a guaranty to be signed by various principals of the borrowing entity. Because of the State of Wisconsin's marital property law, creditors require either or both of the following: (1) a statement from the guarantor that the obligations are incurred in the interest of the marriage and family, and (2) execution of a spousal consent if the giving of the guaranty could be considered a gift of over \$1,000. But, there are situations in which these representations and consents should be required and when they should not be required. This article will set the framework for these situations so that unnecessary representations and consents can be avoided.

Under Wisconsin law, it is presumed that the obligations of an individual guarantor/obligor, for example, are entered into "in the interest of his/her marriage or family." If certain obligations, including a standard credit obligation, are entered into in the interest of the obligor's/guarantor's marriage or family, all of the marital property and any individual property of the obligor/guarantor can be used to satisfy the obligation. This presumption is rebuttable, if, for example, there is evidence of a marital property agreement classifying all debt as individual debt of one spouse. This presumption becomes conclusive if the guarantor/obligor executes a statement to that effect, expressly confirming that the obligations are entered into in the interest of the marriage or family. The practice of requiring the spouse's consent further bolsters the credit provider's right to pursue the marital property in satisfaction of the obligation because the spouse, by its execution, acknowledges that his/her marital property may be subject to use by the creditor for satisfaction of the obligations of the guarantor/obligor.

Often, an individual guarantor/obligor has entered into a marital property agreement with his/her spouse. Such an agreement is typically used to classify property by contract into three categories: (1) Spouse 1's property, (2) Spouse 2's property, and (3) marital property. If a marital property agreement exists, it could limit what property a creditor may seek in satisfaction of a guarantor's/obligor's obligations. However, delivery of the marital property agreement must be made prior to the extension of credit which is the subject of the obligation in order to limit the creditor's rights. Furthermore, the title of the asset securing the debt should reflect the appropriate classification—individual property or marital property.

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Consider the following examples:

Mrs. B is a Guarantor for the Loan by Bank to Borrower, LLC a limited liability company solely owned by Mrs. B. Mrs. B and Mr. B are married and have entered into a marital property agreement that has been properly delivered to Bank prior to the making of the Loan. The marital property agreement provides:

- Mrs. B owns Borrower, LLC
- Mr. B has no interest in Borrower, LLC
- Mr. B owns the house, vacation house and all contents of each and all vehicles
- Mr. B and Mrs. B agree that there is no marital property.

In this case, there is no need for Mrs. B to execute a statement that says that the Guaranty signed by Mrs. B was entered into in the interest of the marriage or family because there is no marital property. It follows that Mr. B would not sign a consent to such guaranty.

If the facts were changed slightly and Mr. B and Mrs. B agreed that there is, in fact, marital property, but it consists only of the contents of the homes, the desire for the marital property statement (and the consent of the spouse of the Guarantor) may exist because there is marital property, however its value may seem inconsequential since it is unlikely that Bank would pursue any of the household contents to satisfy the obligations due to their limited marketability.

If the facts were further changed and Mr. B and Mrs. B agreed that there is, in fact, marital property consisting of the homes and/or other valuable assets, the desire for the marital property statement escalates (as does the desire for the consent of the spouse of the Guarantor). Executing the marital property statement (and the spousal consent) in this case, helps to ensure Bank's access to the valuable marital property.

Delivery of the marital property agreement alone does not eliminate the need for the marital property statement (and spousal consent). An analysis of the marital property agreement is necessary to determine whether marital property exists and if it does, as illustrated above, whether it has value from a credit provider's perspective is necessary before the credit provider should waive the obligation for the execution of the marital property statement (and spousal consent). Further, married couples should consider whether a marital property agreement could



benefit them in protecting certain personal assets. A marital property agreement is a key component to any Wisconsin estate plan. In addition to classifying assets, it can help avoid probate upon the death of the first spouse. If you would like to discuss these concepts further, or to explore how a marital property agreement might benefit you, please contact [Melanie Lee](#) or your Reinhart [real estate attorney](#).

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