Tort Debts Versus Contract Debts: Liability of the Community under California's New Community Property Law

Robert J. Stumpf
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LIABILITY OF THE COMMUNITY UNDER
CALIFORNIA'S NEW COMMUNITY
PROPERTY LAW

Should the liability of community property for the debts of the spouses be different depending on whether the debt incurred is for tort or contract? This was one of the most controversial questions debated by the California Legislature in enacting Senate Bill 569, sponsored by then Senator Mervyn Dymally,1 which became effective as the law of the state on January 1, 1975.2 The new legislation made fundamental changes in California community property law,3 perhaps the most significant of which is the recasting of sections 5125 and 5127 of the Civil Code to provide that either spouse, not just the husband, has the management and control of community personal and real property.4

With the advent of what has been called “joint and several management and control”5 comes an increase in the liability of com-

1. Mervyn Dymally is now serving as Lieutenant Governor of the State of California. Senate Bill 569 in its final form was cosponsored in the State Senate by Senators Dymally, Alfred H. Song, and Alan Robbins. Its coauthor in the Assembly was Assemblyman Edwin L. Z’Berg.

2. Cal. Stat. 1973, ch. 987. A “trailer bill,” Senate Bill 1601, was introduced in 1974 and was cosponsored in the Senate by Senators Dymally and Song. It was approved by Governor Reagan on September 23, 1974, and appears in Cal. Stat. 1974, ch. 1206. Together these two bills constitute the “new law” as that phrase is used herein.

3. The new law amends sections 5102, 5105, 5110, 5113.5, 5116, 5120-23, 5125, 5127, and 5131-32 of the Civil Code. It repeals former sections 5101 (“The husband is the head of the family. He may choose any reasonable place or mode of living.”); section 5117 (which set certain limits on the liability of the earnings and community personal injury awards of the wife for the debts of the husband); 5124 (which gave the wife exclusive management and control over her earnings and personal injury awards); and 5130 (which under certain circumstances made the husband liable to third persons who in good faith supplied necessaries to the wife). Added is new section 199, which provides that “[t]he obligation of a father and mother to support their natural child . . . shall extend only to, and may be satisfied only from, the earnings and separate property of each, if there has been a dissolution of their marriage . . . .” The new law also amends sections 12101 and 17300 of the Welfare and Institutions Code.

4. Neither spouse’s management powers over community personal property are unlimited, however. See text accompanying notes 90-95 infra. New section 5125 provides that “[a] spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.” For limits placed upon a spouse’s management and control over community real property, see CAL. CIV. CODE § 5127 (West Supp. 1975).

5. Bonanno, The Constitution and “Liberated” Community Property in Califor-
community property for the debts of the spouses. Under the old law the entirety of community property could not, in most circumstances, be charged with the contract debts of the wife, except those incurred for necessaries; the tort debts of either spouse "for death or injury to person or property" could be satisfied only out of the tortfeasor-spouse's separate property and that part of the community over which such spouse exercised management and control. The new law, by contrast, renders the entirety of community property liable for all torts and contracts of either spouse incurred after marriage, expressly extending community liability to contract debts incurred even before the January 1 effective date.

The Dymally legislation does not, however, treat the two kinds of debts in precisely the same way. With regard to tort debts, it is now necessary to ask whether the liability arose "while the married person was performing an activity for the benefit of the community." If so,

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7. The husband, and presumably the community property under the control of the husband, were liable under certain circumstances to third persons who in good faith supplied necessaries to the wife. Cal. Stat. 1969, ch. 1608, § 8, at 3343 (repealed 1975).
8. "(a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist. (b) The liability of a married person for death or injury to person or property may be satisfied only from the separate property of such married person and the community property of which he has the management and control." Cal. Stat. 1969, ch. 1608, § 8, at 3341, as amended, CAL. CIV. CODE § 5122 (West Supp. 1975). See note 11 infra.
9. See notes 10-11 infra. Under the new law community property is also liable for debts incurred by the spouses before marriage, or at least such liability would be consistent with the principle that liability for debts should follow management and control. See text accompanying notes 53-57 infra. Presumably either spouse could claim reimbursement if community funds were used to satisfy the antenuptial debts of the other, just as under the old law the community could claim reimbursement if community property was used by the husband to benefit his separate estate. See Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967). One important exception to general community liability under the new law appears in CAL. CIV. CODE § 199 (West Supp. 1975). See note 3 supra.
11. "(a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist. (b) The liability of a married person for death or injury to person or property
community property is primarily liable. If not, the tortfeasor-spouse must first exhaust his or her separate property before resorting to community funds.\textsuperscript{12} No analogous determination need be made as to contract debts, however, as new section 5116 provides merely that "the property of the community is liable for the contracts of either spouse made after marriage . . . ."\textsuperscript{13}

This note will examine the development of this asymmetric result and its practical implications, particularly for the "innocent" spouse interested in protecting his or her share of community property against debts incurred by the other, and for the creditor interested in levying upon as much community property as possible. The conclusion reached is that, for the first time in California, neither of these parties need be greatly concerned whether the debt in question arose in tort or in contract.

\textbf{Tort Debts Versus Contract Debts: Historical Summary}

At common law in California the entirety of community property was liable for all debts incurred by either spouse before marriage—including tort debts, contract debts, and obligations of all kinds.\textsuperscript{14} When a husband married his wife, it was said, he married her debts as well.\textsuperscript{15}

Postnuptial debts were a different story, however, and neither the common law nor its subsequent statutory modifications ever equated

\textbf{CAL. CIV. CODE § 5122 (West Supp. 1975).}\textsuperscript{12} \textit{Id.} \textsuperscript{13} See note 10 supra. Traditional Spanish community property law, from which the California system (with various modifications) is derived, also distinguished between contracts and "delicts" in holding the community liable. There, however, it was only with regard to contracts, not torts, that it was necessary to ask whether a "community debt" had been incurred. If not, neither the wife's separate property nor her share of the common property could be charged. With regard to torts, however, this question was irrelevant; for under no circumstances could the innocent spouse's share of the community be taken to discharge the liability arising out of the other spouse's delict. W. de Funiak & M. Vaughan, Principles of Community Property §§ 159, 181 (2d ed. 1971) [hereinafter cited as de Funiak]. For a discussion of the early history of the community property system in California, see \textit{id.} § 51. \textsuperscript{14} \textit{See, e.g.,} Vlautin v. Bumpus, 35 Cal. 214 (1868); Van Maren v. Johnson, 15 Cal. 308 (1860). \textsuperscript{15} Van Maren v. Johnson, 15 Cal. 308, 312 (1860).
the ways in which such tort and contract debts might be chargeable against community property. In the early 1870's, for example, various sections of the Civil Code made it clear that community property was not liable for the contracts of the wife. On the other hand, the common law rule charging the community property (and the husband's separate property) for the wife's torts was still in force. Such tort liability was said to rest upon, alternately, the merger of the wife's legal personality into that of the husband, the control that the husband was entitled to exercise over his wife, the frequent insufficiency of the personal estate of the wife to satisfy tort judgments against her, and the difficulty of determining whether she was acting at her own instance or the instance of her husband.

It was not until 1913 that the legislature enacted statutory restrictions upon the common law rule. In that year Civil Code section 171a was added which read: “For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor . . . .” The new statute clearly exempted the separate property of the husband from execution for his wife's torts, but was ambiguous as to whether all or any part of the community property was also exempt.

Part of the answer was provided twenty-two years later in Smedberg v. Bevilockway. In that case a California District Court of Appeal held that a tort creditor of the wife could neither impress a lien upon her share of community property, nor secure a compulsory partition to satisfy his judgment. The court did not, however, pass upon

16. As originally enacted in 1872, section 167 of the Civil Code stated that “[a] wife cannot make a contract for the payment of money.” This section was rewritten in 1873-74 to provide that “[t]he property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.”

18. Id. at 274, 70 P. at 22.
19. Id.
20. Id. at 275, 70 P. at 21-22.
21. Id. at 274-75, 70 P. at 21. See also Zeliff v. Jennings, 61 Tex. 458, 471 (1884).
22. The husband would be liable, however, in cases where he would be jointly liable with the wife if the marriage did not exist. Cal. Stat. 1913, ch. 131, § 1, at 217. For the subsequent history of § 171a, see text accompanying note 30 infra.
24. “However . . . the plaintiffs seek to hold the wife's interest in the community property in liquidation of said judgment. Can it be so segregated and applied? At the instance of the wife her interest could be segregated by a mutual contract between her and her husband (Civ. Code, sec. 158); or in a divorce action (Civ. Code, sec. 146); or a separate action based on a divorce action [citation omitted]; or, on her death, by reason of the provisions of her will (Prob. Code, sec. 201). Our statutes provide no
the liability of the whole of the community for the wife's torts. This issue was decided twelve years later in *McClain v. Tufts*,25 where another California appellate court held that the community in toto could not be charged for the wife's postnuptial torts. To hold otherwise, the court stated, would be "an unwarranted interference with, and infringement upon, the husband's right to management and control..."26

By 1947, then, community property was as immune from the tort debts of the wife as it had been in 1874 from her contracts. By this time, however, the rule as to the latter had been changed, *i.e.* in 1937 a sentence was added to Civil Code section 167 to provide that "the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage."27 The statutory addition did not, however, also specify that such earnings were available to satisfy tort judgments against the wife. Curiously, therefore, by 1947 the result was that at least a part of community property could be charged with the wife's contracts (from which it had previously been entirely exempt), while not even the wife's one-half share of community property was liable for her torts (for which the community in its entirety had previously been chargeable).

This tort-contract asymmetry presented an interesting question of strategy for a creditor of the wife whose claim sounded both in tort and contract: could he waive the tort and sue on the contract, hoping in this way to reach that part of community property consisting of the wife's earnings? The court in *Tinsley v. Bauer*28 said that he could:

The fact that under section 171a, Civil Code, the community property in general is not liable for the torts of the wife does not prevent that the earnings of the wife may be liable under section 167, certainly when the tort has been waived and a contract action instituted... 20

But the immunity of community property as to the wife's torts, which had apparently been provided under old section 171a, came to an end in 1968 when that section was substantially rewritten. The now-renumbered section 5122 of the Civil Code stated in part that

(b) The liability of a married person for death or injury to person or property may be satisfied only from the separate property
of such married person and the community property of which he has the management and control.\textsuperscript{30}

While this new section did not affect the liability of the community for the husband's torts,\textsuperscript{31} it meant that for the first time since 1913 at least a part of community property was clearly liable for the torts of the wife, that part over which she exercised management and control. Nor was this latter phrase an empty one, for in 1951 the wife had been given exclusive management and control over her earnings and community property personal injury damages.\textsuperscript{32}

Even this change, however, did not mean that the community was at last identically liable for the wife's contracts and the wife's torts. Recall, for example, that the 1937 amendment\textsuperscript{33} had rendered the wife's earnings liable for her contracts. But section 5122 now subjected both her earnings and her personal injury damages to liability for her torts, since she exercised management and control over both. Why such personal injury damages were not made available for her contracts as well is not clear.

This, then, was the situation immediately prior to passage of the Dymally bill in October 1973. If the new law treats the spouses' post-nuptial tort and contract debts somewhat differently as far as the liability of the community is concerned, such differential treatment has been present at least as far back as the early 1870's. At no time has community property in California been held liable for the two kinds of debts in precisely the same way.\textsuperscript{34}

Holding the Community Liable: Community Debts Versus the Coextensiveness Principle

The different treatment accorded tort and contract debts under the new law reflects, at least in part, the tension between two funda-

\textsuperscript{30} Subsection (a), which has been retained under the new law, provides that "[a] married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist." Cal. Stat. 1968, ch. 457, § 6, at 1079, as amended, \textsc{Cal. Civ. Code} § 5122 (West Supp. 1975).

\textsuperscript{31} The 1937 amendment had, for example, already exempted the wife's earnings and community property personal injury awards, \textit{i.e.} that part of community property over which she was later given management and control, from the debts of the husband, except for necessaries. Cal. Stat. 1937, ch. 508, § 3, at 1497-98 (repealed 1975). For a definition of "community property personal injury damages," see \textsc{Cal. Civ. Code} § 4800 (West 1970).

\textsuperscript{32} Cal. Stat. 1951, ch. 1102, § 1, at 2860 (repealed 1975).

\textsuperscript{33} See text accompanying note 27 \textit{supra}.

\textsuperscript{34} The two kinds of debts have, of course, been treated alike in some instances. For example, as enacted in 1872, former section 168 of the Civil Code exempted the wife's earnings from liability for her husband's debts, and no distinction was made between tort and contract debts in this regard,
mentally different rationales for the imposition of liability on community property for the spouses' tort and contract debts.\textsuperscript{35} The first is the notion of \textit{community debts}, \textit{i.e.} that the common property should be charged only with those debts a spouse incurs while acting for the benefit of the community; the second is the \textit{coextensiveness principle},\textsuperscript{36} \textit{i.e.} that that part of community property which a spouse manages and controls should be liable for his debts, while being exempt from his spouse's debts. These two principles are not irreconcilable in all cases, of course.\textsuperscript{37} In certain situations, however, conflict between them is unavoidable. For example, when a spouse who manages all or part of community property incurs a separate debt, the two dictate opposite conclusions as to whether community property should be held liable. Further, the logic of the coextensiveness principle also requires that community property be charged with \textit{all} the manager-spouse's debts, even those incurred before marriage, while such would in most cases be "separate" under the notion of community debts. Thus the coextensiveness principle is more favorable to creditors, at least in a situation like that established under the new law, where both spouses manage and control all the community property. This note will next examine the status of these principles and the conflict between them in California law prior to the new legislation.

\textbf{Community Debts}

The basic concept of a "community debt" derives from Spanish community property law, which as early as 1255 provided by statute that debts incurred by either spouse (or the both of them) for the common benefit were payable from the common property.\textsuperscript{38} Those debts were community debts, it was said, "which concerned the actual marriage of man and wife and their partnership, and which were contracted on its account . . . ."\textsuperscript{39} In Washington, a community property state which has adopted the notion of community debts, the state supreme court has stated the key criterion in this way: "The test of a community

\begin{itemize}
\item 35. See generally Pruzan, \textit{Community Property and Tort Liability in Washington}, 23\textit{ WASH. L. REV.} 259 (1948).
\item 36. This term is taken from the preamble to Senate Bill 1601, the "trailer bill," which provides, among other things, that "[t]he Legislature further finds and declares that (1) the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property and should remain so . . . ." Cal. Stat. 1974, ch. 1206, § 1 (emphasis added).
\item 37. The Washington court, for example, has on occasion treated the two principles almost interchangeably. See Pruzan, \textit{Community Property and Tort Liability in Washington}, 23\textit{ WASH. L. REV.} 259, 260-61 (1948).
\item 38. De Funiak, \textit{supra} note 13, § 159, at 378.
\end{itemize}
obligation is: "Was the transaction carried on for the benefit of the community?" The positive aspect of this doctrine, then, holds the spouses' common property accountable for those losses and expenses incurred on behalf of the conjugal partnership.

There is a negative aspect as well: community property should not be charged for those debts which a spouse incurs to benefit his separate estate. This was a well-established rule under Spanish law. Similarly, in New Mexico, another community property state which has incorporated the notion of community debts, the legislature recently enacted a statute which provides in part that "[n]either spouse's interest in community property or separate property shall be liable for the separate debt of the other spouse."42

But should community property be entirely exempt from liability for separate debts? Two views are prevalent. The first starts from the premise that the "community" constitutes a separate juristic entity in itself.43 As such, because it is more than merely the sum of its parts, the community should not be chargeable to any extent for debts not incurred for its benefit.44

The second view proceeds from the premise that each spouse owns one-half of the community property, just as each spouse owns his or her separate property. It follows, then, that the entirety of community property should not be held for the separate debts of the other spouse, for this would levy upon property "owned" by the other spouse as well. But this ownership principle would appear to require that at least the debtor-spouse's one-half share be available, as this would not similarly infringe the other spouse's ownership rights. Such a scheme exists in New Mexico, for example, where it is provided by statute that the debtor's interest in the community is chargeable for his separate debts, at least if his separate property is not sufficient.45

Prior to the Dymally bill, however, California law explicitly rejected this concept of community debts in any form, the classic state-

41. De Funiak, supra note 13, § 160, at 380.
43. See, e.g., In re Wallace, 22 F.2d 171 (E.D. Wash. 1927). But cf. Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930). In a more recent case the Washington court stated that "[w]e have denied that a community was a separate and distinct juristic entity, [citation omitted]; however, the exact nature of a community has been somewhat less than crystal clear . . . . The community, like the Kingdom of Heaven, is 'like unto' a number of things (see Matthew 13:24-33), but seems to defy precise definition." Household Fin. Corp. v. Smith, 70 Wash. 2d 401, 403, 423 P.2d 621, 622 (1967).
ment in this regard being given by the court in Grolemund v. Cafferata: "But in California there is no like concept of ‘community debts,’ though occasionally the courts in this state refer to such, overlooking the fact that the phrase is not appropriate to the California system."46 This statement notwithstanding, the notion of community debts was not entirely absent from prior community property law in this state. First, it is quite similar to the concept of “necessaries” (or “necessities of life”), which was and still is recognized by statute.47 That is, debts for food, clothing, shelter, medical expenses and so forth are by their very nature almost always incurred for the benefit of the community. As a result, debts for necessaries in California, like community debts in other states, were chargeable against parts of community property not otherwise available.48

Second, California courts have frequently used the concept and even the terminology of community debts in settling rights between the spouses at divorce,49 and between the surviving spouse and creditor’s of a deceased spouse.50 For example, in Provost v. Provost, a divorce action, the California court held that the community was entitled to reimbursement to the extent of community funds taken by the husband for the improvement of his separate property.51 Similarly, the court in the more recent case of Weinberg v. Weinberg acknowledged the traditional California view as set out in Grolemund, but added that “[i]t does not follow, however, that the community can never claim reimbursement from the husband’s separate estate when community property has been used to discharge a husband’s [separate] obligation.”52 When the time for an accounting comes, then, California courts have been willing to recognize categories which look very much like “community” and “separate” debts. Unlike the true concept of community debts, however, this principle has not been applied in California to limit the power of creditors in levying upon community assets to satisfy separate debts.

48. For example, under the old law the wife’s earnings and personal injury awards were liable for the husband’s debts for necessaries, though being otherwise exempt from his obligations. Cal. Stat. 1969, ch. 1608, § 8, at 3340 (repealed 1975).
51. 102 Cal. App. 775, 283 P. 842 (1929).
52. 67 Cal. 2d 557, 563, 432 P.2d 709, 712, 63 Cal. Rptr. 13, 16 (1967).
The Coextensiveness Principle

If California does not expressly accept the doctrine of community debts, upon what theory has community property in this state been charged with the debts of one or both spouses? The short answer is that liability for debts has been designed to follow management and control; therefore, that part of the community which a spouse manages and controls should be liable for his debts. On this theory the court in Grolemund allowed a tort creditor of the husband to reach community assets, stating that "to hold that the husband could not subject the community property to liability for his tort would be to hold that he could not manage and control the same."\(^{53}\)

This coextensiveness principle has a negative aspect as well: that part of community property which a spouse manages and controls should be exempt from debts incurred by the nonmanaging spouse. Accordingly, a California District Court of Appeal held in Grace v. Carpenter\(^ {54}\) that community property could not be used to support the wife's relatives without the husband's consent, stating that this result followed from the fact that community property was under the husband's management and control.\(^ {55}\)

Though until recently this principle did not exist in California by statute,\(^ {56}\) its presence under the old law was implicit in the way that liability for debts did in fact follow management and control. For example:\(^ {57}\)

**Management and Control**

1. Husband (H) has management and control over community property. (5124, 5127)
2. Wife (W) has management and control over her earnings. (5124)
3. W has management and control over her earnings and tort injury awards. (5124)
4. Tort debts of either spouse may be satisfied only from the community property over which that spouse has the management and control. (5122)

**Liability for Debts**

1. Community property is generally liable for H's contracts,\(^ {58}\) but generally exempt from W's contracts. (5116)
2. W's earnings are liable for her contracts. (5116)
3. W's earnings and tort injury awards are not generally liable for H's debts. (5117)


\(^{54}\) 42 Cal. App. 2d 301, 108 P.2d 701 (1941).

\(^{55}\) Id.

\(^{56}\) See note 36 supra.

\(^{57}\) Numbers in parentheses refer to sections of the California Civil Code, paraphrased as they appeared immediately prior to passage of the new legislation.

\(^{58}\) No specific code section expressly rendered community property liable for the
This correlation was not perfect, however. For example, the wife's earnings were made liable for her contracts long before she was given management and control thereof; and her community property personal injury damages were never made liable for her contracts, despite her management and control. Further, either spouse could charge debts for necessaries against parts of community property which that spouse did not manage and control.

Community Debts and Coextensiveness Under the New Law

The new law resolves the conflict between these two principles differently for contract and for tort debts, enacting two different ways of protecting the ownership rights of each spouse in the community property against liability for the separate debts of the other. As to contract debts, now that both spouses manage and control all the community assets, both can make contracts chargeable against all the community property. Such appears to be a straightforward application of the coextensiveness principle. The new law neither limits such liability to contracts made for the benefit of the community, nor includes any new sanctions which explicitly prevent one spouse from charging the community with contract debts benefiting only his or her separate estate.

One somewhat ambiguous "protection," however, has been added: section 5125 now provides that "[e]ach spouse shall act in good faith with respect to the other in the management and control of the community property." Exactly what this new subsection means is not clear, though its wording suggests that it at most provides an interspousal remedy not directly affecting the rights of third-party creditors. Whether it is mere surplusage or in fact affords the spouses new ways of protecting their respective ownership interests remains to be seen.

husband's contract debts. Such liability, however, was early established by case law. See, e.g., Adams v. Knowles, 22 Cal. 283 (1865).

59. See text accompanying notes 27, 33 supra.

60. For example, the wife's earnings and personal injury awards were liable for her husband's debts for necessaries. Cal. Stat. 1969, ch. 1608, § 8, at 3340, as amended, CAL. CIV. CODE § 5117 (West Supp. 1975).


62. See text accompanying notes 108-09 infra. A prior version of this section had imposed more explicit limitations on a spouse's powers of management and control, at least so far as management of a community property business was concerned: "On or after January 1, 1975, a spouse may not (1) acquire or commence to operate or manage a business or an interest in a business which would be community personal property or (2) transfer community personal property to a business or an interest in a business which the spouse is managing, without the written consent of the other spouse." That this section created only an inter-spousal remedy was clear: "any spouse who is injured by a violation of [the above subsection] may bring an action to enjoin the violation
When it comes to tort debts, on the other hand, the protection given community property under the new law is more concrete. Section 5122 is consistent with the coextensiveness principle in that it ultimately subjects the entirety of community property to liability for tort debts, but it incorporates the concept of community debts as well. That is, the tortfeasor-spouse must first exhaust his or her separate property if at the time the liability arose the spouse was not performing an activity "for the benefit of the community." Community property does become available, however, if such separate property is insufficient. In such situations the innocent spouse presumably can claim reimbursement for whatever community funds are used to satisfy the separate tort.

Community Liability for Tort Debts: Solutions in Other States and in Prior Versions of the Dymally Bill

At the time California's new law was debated, three different schemes existed in other community property states for holding community property liable for the spouses' postnuptial torts. Each reflected its own peculiar balance between community debts and coextensiveness, and between these two and what will here be called the "adequacy principle," which stresses the importance of providing an adequate fund out of which legitimate tort claims can be satisfied.

and may recover any diminution in the value of the community personal property caused by the violation. The rights of any good faith purchaser or encumbrancer without knowledge of the violation shall not be affected by the existence of the violation." S.B. 1601 (1974), as amended in Senate June 10, 1974.

A subsequent version broadened the protection given third persons: "The rights of any purchaser, encumbrancer, or other person dealing with a spouse without knowledge of a violation of this subdivision shall not be affected by the existence of the violation. The purchaser, encumbrancer, or third person shall not have any duty of inquiry into the existence of a written consent." S.B. 1601 (1974), as amended in Assembly Aug. 19, 1974. Two days later, however, this plan was discarded in favor of the simple "good faith" provision. S.B. 1601 (1974), as amended in Assembly Aug. 21, 1974.

63. See text accompanying notes 79-89 infra.

64. If one or both spouses have liability insurance, another interesting question of reimbursement is presented: if a spouse commits a separate tort and is indemnified under an insurance policy paid for with community funds, is the community entitled to reimbursement in an amount equal to the premiums paid? Section 5113 of the Civil Code provides that "[t]his section [dealing with interspousal torts] does not affect the right to indemnity provided by any insurance or other contract to discharge the tortfeasor spouse's liability, whether or not the consideration given for such contract consisted of community property," but does not address the question of reimbursement. CAL. CIV. CODE § 5113 (West 1970).

Elements of each scheme can be discerned in the several versions the Dymally Bill went through before reaching final form.66

**Washington: Liability for Community Torts Only**

In Washington, community assets are not available in any amount to satisfy judgments based on the "separate" torts of the spouses.67 Such a provision appears to follow from the concept of community debts, which has expressly been adopted in that state. At the same time, however, Washington courts have placed community tort liability on the theory of respondeat superior: the community can be charged for the tortious acts of its agent, which until recently was usually the husband because of his dominant powers of management and control.68 In apparent deference to the adequacy principle, respondeat superior has also been liberally construed in the form of the "family car doctrine" to charge the community for torts committed by either spouse while using the family automobile.69

**Texas: Liability for all Postnuptial Torts**

At the opposite extreme is Texas, which charges the entirety of community property for torts committed by either spouse after marriage—whether or not the spouse was acting for the community's benefit,70 and whether or not the judgment includes punitive damages.71 Such broad community liability appears to indicate the dominance of the adequacy principle. Aspects of the coextensiveness principle have been incorporated as well: that part of the community under the sole management of a spouse is liable for his antenuptial torts, and that part under the joint control of both is liable for the antenuptial torts of either.72

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69. For example, the Washington court in one case found "community benefit" in the actions of the husband in driving the family auto to a dance (though his wife was not present), reasoning that recreation is beneficial to the welfare of the community. King v. Williams, 188 Wash. 350, 62 P.2d 710 (1936). For a discussion of the "family car doctrine" in California community property law prior to the new legislation, see de Funiak, Personal Injuries Under California Community Property Law, 3 CAL. WEST. L. REV. 69, 71-73 (1967).


71. See Patterson & Wallace v. Frazer, 100 Tex. 103, 94 S.W. 324 (1906).

New Mexico: One-half the Community is Liable for Separate Torts

In *McDonald v. Senn*, a New Mexico decision antedating recent statutory changes in that state, the supreme court held that the wife's one-half share of community property should be deemed vested, and as such was available to satisfy a tort judgment against her. Unlike the courts in California, the court here found no inconsistency between this result and the then-existing powers of the husband as exclusive manager of the community.

With new legislation giving both spouses management and control, it is also provided that though community property is liable for community torts, neither spouse's one-half share can be charged for the separate torts of the other.

In Washington, then, we see clear emphasis on the *community debts* principle which exempts all community property from liability for separate torts; in Texas we observe the dominance of the *adequacy principle* in that no restrictions whatsoever are placed on the community's liability for postnuptial torts; and in New Mexico we note the emphasis placed on the *ownership principle* that each spouse has a vested interest in one-half the community property. Recall that California, immediately prior to the new law, had applied the *coextensiveness principle* in providing that community liability for tort debts should follow management and control.

California Legislative Proposals

The California Legislature adopted none of these schemes in its entirety in enacting new section 5122. Instead, the result is the rather unique strategy of community tort liability described above. Before reaching its final form, however, section 5122 went through a rather complicated legislative metamorphosis, each stage of which afforded the innocent spouse a different way of protecting his or her share of community property against liability for the other spouse's torts. In

74. *Id.*
75. See text accompanying notes 25-26 *supra*.
77. *Id.* ch. 57-4A-4.
78. See text accompanying note 8 *supra*. Oklahoma once had a somewhat similar scheme: "The separate property of the wife and that portion of community property, record title to which is in her name or which is under the management, control and disposition of the wife, shall be subject to debts contracted by the wife arising out of tort, or otherwise, but not to debts or liabilities of the husband. [And similarly for the husband and his debts]." Okla. Laws 1939, § 7 (repealed 1945).
79. See note 11 *supra*. 
addition, certain stages were clearly more favorable to creditors than others.

SENATE BILL 45 (as amended on February 28, 1972): provided that the tort liability of a married person should be satisfied first out of such person's separate property; then out of his earnings; and only then out of the other community property.80

This method sought to protect the innocent spouse by requiring the tortfeasor to use up assets which were peculiarly his (or hers) before turning to general community funds.81 Unlike the old law, however, it placed no limit on the amount of community property which might ultimately become available to tort creditors.

SENATE BILL 569 (as amended on June 11, 1973): provided that a spouse's tort debts were to be satisfied first out of such spouse's separate property, then out of community property.82

This version set up a priority arrangement identical to that above, except that no distinction was drawn between a spouse's earnings and the rest of the community property. As above, all the common property might under certain circumstances be subject to execution.

SENATE BILL 569 (as amended on June 11, 1973): provided that a spouse's tort debts were to be satisfied first out of such spouse's separate property, then out of the community property over which the spouse had management and control.83

This stage incorporated yet another priority arrangement, one which ostensibly limited community liability to that part which the tortfeasor-spouse managed and controlled. This "limitation" seems somewhat curious, however, in light of the fact that this version also gave either spouse, with certain exceptions, management and control over all the community property.84

SENATE BILL 569 (as amended on June 18, 1973): provided that a spouse's tort debts be satisfied first out of such spouse's separate property, then out of community property.85

Were this new priority plan the only change, this particular revision would hardly have been notable. But two other changes were introduced as well. First, it was provided that the liability of the community could not exceed one-half the value of community property at the time judgment was entered. This, of course, would have been a

81. Under the old law a similar priority scheme existed as to interspousal torts. CAL. CIV. CODE 5113 (West 1970). This section was not changed by the new legislation.
84. Id.
major setback for tort creditors, since under no circumstances would they have been allowed to reach the entirety of community property. Second, if even this one-half were taken in any amount, an equal amount was to be set aside to become the separate property of the innocent spouse. In short, this was simply a statutory requirement that reimbursement take place.

SENATE BILL 569 (as amended on September 10, 1973): provided that a spouse's tort liability should be satisfied first out of such spouse's separate property, then community property—unless the liability arose out of an activity which was performed for the benefit of the community, in which case the priority was to be reversed. This version also limited community liability to one-half the value of community property at the time of judgment and continued the set-aside procedure for adding to the innocent spouse's separate property.

This was the last revision before section 5122 was rewritten in its present form. In it the terminology of community debts appears for the first time, but in somewhat confused fashion. That is, even when the tortfeasor had been acting "for the benefit of the community," no more than half the community property could be reached; and even when tort liability had been incurred on the community's behalf, any resort to community funds would be matched by a set-aside to the "innocent" spouse. Such spouse would therefore have been protected to the point of overkill, at the expense of both the tortfeasor-spouse and community tort creditors.

Thus, by the time that this section was amended for the last time in conference on September 14, 1973, three different strategies for protecting the ownership interest of the innocent spouse had been proposed: a priority scheme requiring an initial resort to separate property, a formal set-aside procedure, and a fixed limit on the percentage of community property available to satisfy a spouse's tort liability. Of these three, only the priority notion was incorporated in the bill as enacted—with priority as between separate and community property being made to turn on whether the tortfeasor had been acting for the benefit of the community at the time liability was incurred. New section 5122, unlike its predecessor, makes all the community property available to tort creditors if the tortfeasor's separate property is not sufficient. Nor is reimbursement made mandatory, though it is of course still possible. The result is that section 5122 provides comparatively little protection for the innocent spouse's share of community property. On the other hand, when the debt is for contract, not tort, not even

86. Id.
88. See note 11 supra.
89. See note 11 supra.
SPOUSES' DEBTS

this modified concept of community debts has been incorporated to limit community liability.

Community Liability for Contract Debts: Limitations Under Prior Versions of the Dymally Bill

Though the Dymally law equalizes the rights of the spouses in the management and control of community property, such rights are not without limits. For example, the following restrictions are expressly set out under the new law: (1) A spouse may not make a gift of community personal property or dispose of community personal property without a valuable consideration.90 (2) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children, without the written consent of the other spouse.91 (3) In general, both spouses must join in executing any instrument by which community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.92 Under the old law the first two restrictions similarly limited the husband in his management of community property generally,93 and a restriction similar to the first precluded the wife from giving away that part of the community which she managed and controlled.94 The third restriction was carried over from the old law without substantial change.95 Each may be seen as, among other things, a way of protecting the ownership rights of one spouse against the detrimental management actions of the other.

During the debate over the new law, three additional protections were at one time or another written in. Each would have constituted a significant limitation on the ability of the spouses to make contracts chargeable against community property. Two involved opting for a different system of management and control, while the third established a strict trusteeship relationship between the spouses.

The first was included in an early version of Senate Bill 45, the predecessor of Senate Bill 569. The management and control section there provided that "[t]he community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney or other agreement

91. Id.
92. Id. § 5127.
in writing." Such a system of joint control had been frequently discussed, though rarely approved, by the commentators. It should be noted that this was not the same as equal control, wherein each spouse would have power to dispose of community assets without the consent of the other. Instead, joint control requires both spouses to join in the acquisition or disposition of all community property in the same way that the consent of each was required to encumber or convey community real property under the old law.

Such a scheme would have provided each spouse strong protection against irresponsible contracts made by the other. On the other hand, a system of unqualified joint control threatened to generate considerable inconvenience for the spouses and slow the pace of commercial transactions. By the time this bill had been amended on April 10, 1972, the section providing for joint control had been deleted.

A second system of management and control was proposed in Senate Bill 569, as amended on June 11, 1973. After stating that either spouse was to have management and control of community personal property, this version further provided that neither spouse could do any of the following without the written consent of the other: (1) Purchase personal property the value of which exceeds one thousand dollars with community personal property; (2) transfer or otherwise dispose of community personal property the value of which exceeds one thousand dollars; (3) encumber the community personal property by a debt or obligation the amount of which exceeds one thousand dollars; and (4) incur a debt of obligation the amount of which exceeds one thousand dollars for which the community personal property is liable. This system of hybrid joint-equal control, equal below $1000, joint above $1000, had been recommended by at least two commentators as a means of accomodating the interests of the spouses in preventing dissipation with the needs of the commercial world for untrammeled business transactions. Of course, this plan would not have prevented a spouse bent on dissipating community assets from doing so by incurring a large number of contract debts so long as each was

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below the $1000 limit. This scheme was discarded a few versions later when Senate Bill 569 was again amended on August 15, 1973.

As originally introduced, the Dymally Bill would also have given the spouses a third way of protecting their respective ownership interests in community property, as that version's section 5125 provided in part:

(c) In dealing with the community property, whether pursuant to an agreement between husband and wife or without agreement, each spouse acts as a trustee for the other and is subject to the rule governing fiduciary relationships . . . . If a spouse violates his or her fiduciary obligation under this section the other spouse may petition the superior court for an accounting or other equitable relief, if informal methods of adjustment, including arbitration, are unavailable or have proved unsuccessful. The court may make any order necessary to protect the rights of both spouses. 100

So stated, this section did two important things: it crystallized the nature of the duty each spouse owed the other and expressly included an action for an accounting, presumably including a nondissolution accounting, among the remedies available to an aggrieved spouse. Neither was unambiguously established in the case law antedating this legislation. 101 For example, though a number of cases had characterized the duty a husband owed his wife in managing community assets as being in the nature of a fiduciary or trustee, 102 at least one recent case held that he was not required to be as prudent as a trustee, or to keep detailed records of income to and payments from community property. 103 Nor was the husband, like a true fiduciary, to be held personally liable for losses stemming from an improvident investment of the managed assets. 104 On the other hand, there is dicta in Somps v. Somps, 105 decided only a few years earlier, that the husband "has the duty of accounting for disbursements and keeping records if he intends charging the community with the obligation." 106

Though this particular section would have eliminated the uncertainty in this regard, it is questionable whether as a practical matter

100. S.B. 569 (1973).
104. See id. at 566-67, 92 Cal. Rptr. at 388.
106. Id. at 340, 58 Cal. Rptr. at 312.
imposing a strict trustee relationship between the spouses would have been feasible, given the special nature of the marriage relationship.

At various points in its legislative history, then, the Dymally bill included three rather elaborate proposals for limiting community liability for contract debts incurred by the spouses. Two of these—those which focused on different systems of management and control—would have imposed such limitation by expressly limiting the ability of each spouse to make contracts binding upon the community in the first place. The third would have provided each spouse with an after-the-fact remedy which presumably would not have affected the rights of third-party creditors. In the end each was rejected in favor of a simple "good faith" provision. As was the case with regard to restricting the community's liability for tort debts, that alternative which afforded the least explicit protection of each spouse's ownership rights had become law.

**Tort Debts Versus Contract Debts: The Practical Impact of the New Law**

On its face, the new community property law does not treat tort debts and contract debts in the same way. In particular, it is only with regard to tort debts that the new law expressly incorporates a modified concept of community debts to limit community liability.

This apparently asymmetric result is consistent with a broad historical pattern in California of holding the community differentially liable for the two kinds of debts. In the early years the community was liable for the wife's postnuptial torts, but not her contracts. Then, as community property became increasingly liable for her contracts, it began to be protected against her torts. The near-immunity of community property in this regard came to an end in 1968, but the wife's tort debts were still not chargeable against the community to the same extent as were her contracts.

Much of the controversy surrounding the Dymally Bill stemmed from the conflict between two fundamentally different theories for imposing liability on community property for debts: the so-called coextensiveness principle and the concept of community debts. In short, the problem facing the legislature was how to equalize the management powers of the spouses over the entirety of community property while protecting the ownership rights of each in one-half. This conflict is epitomized by the situation in which a managing spouse incurs a separate debt.

This conflict was resolved in a different way for tort and contract debts, and different schemes were enacted to limit community liability.

107. See text accompanying notes 90-107 supra.
for each. For tort debts incurred while a spouse is acting "for the ben-

efit of the community," community property is primarily liable. Other-

wise, the tortfeasor-spouse must first exhaust his or her separate prop-

erty. As to contract debts, each spouse is now under a statutory duty
to act in "good faith" toward the other in the management of commu-
nity property. What are the practical consequences, if any, of this dif-
ference in approach?

Impact on the Innocent Spouse

The scope of the protection afforded the nondebtor spouse under the new law hinges upon two key questions of statutory interpretation. First, as to tort debts, when is a spouse acting "for the benefit of the community"? In Washington, where only community debts can be charged against community property, this phrase has been interpreted quite broadly in order to provide an adequate fund for the injured plaintiff. In California, this would not be required since the entirety of community property is ultimately available to satisfy separate as well as community tort debts. Thus a narrower interpretation of this phrase could be adopted to protect the ownership interest of the innocent spouse without jeopardizing the rights of tort creditors.

Second, as to contract debts, what is the nature of the good faith duty now imposed on both spouses by section 5125? On the one hand, the choice of a "good faith" rather than a "prudent man" standard would seem to indicate an intention to create something less than the strict fiduciary relationship sometimes mentioned in the cases. On the other, the fact that the legislature saw fit for the first time to include a section like this at all should be taken as clear evidence of its concern with the problem of dissipation. That even stronger measures were considered underlines this concern; that they were rejected may mean only that the legislature concluded that imposing a more technical system of accountability upon the spouses would not be feasible. The good faith clause simply allows California courts to exercise wide discretion in adjusting rights as between the spouses by fashioning whatever remedy is appropriate, presumably including such equitable remedies as injunctions and a nondissolution accounting.

In the end, however, the protection afforded one spouse against debts incurred by the other is not likely to differ significantly as a result of the tort or contract nature of the debts. With regard to either kind of debt the community is now liable in its entirety. With regard to both kinds of debts, the innocent spouse can make a claim for reimbursement if the other spouse takes community property to satisfy a separate debt. The only difference is that the modified concept of

108. See note 69 supra.
community debts, which requires an initial resort to separate property to satisfy separate debts, is explicitly spelled out in section 5122, whereas it receives only implicit recognition in the good faith clause of section 5125. The most this is likely to mean in practice is that there may be a difference in the time when the claim for reimbursement can be made. That is, with regard to contract debts the innocent spouse has no statutory authority to defeat a creditor's levy upon nonexempt community property. A claim for reimbursement must be asserted in a separate action following execution. With regard to tort debts, on the other hand, such spouse might be able to defeat a levy on particular community property by citing the mandatory priority scheme in section 5122 and demonstrating that the separate property of the debtor-spouse is sufficient. Conceivably, the required proof could be made in a procedure similar to that set out in section 689 of the Code of Civil Procedure, which provides a way in which third persons claiming an interest in property which has been levied upon can assert their claims. If successful, this strategy would of course make reimbursement unnecessary since no community property would be taken in the first place. However, whether California courts will be willing to construe section 5122 so as to make this potential difference a real one remains to be seen.

Impact on Creditors

There is perhaps even less reason for the creditor of a married person to be concerned whether his claim is for tort or contract. In either case, he is now able to reach and levy against all the community property. And, even if his levy on particular community property is attacked by an innocent spouse using the procedure described above, such attack can succeed only upon a showing that sufficient separate property exists to satisfy the creditor's claim.

If the tort-contract distinction is no longer of great significance, what is the broader impact of the new law on creditors? In theory, the result would seem to be a substantial increase in community liability, Senator Dymally once characterizing his bill as a "creditor's bill of rights."

It is true, for example, that for the first time in California the entirety of community property can now be charged with all the postnuptial debts of either spouse. As to tort debts, this increase is a real one, as community tort liability under the old law was limited to that part of community property which the tortfeasor-spouse managed and controlled.

109. Interview with Ms. Mari Goldman, former member of Senator Dymally's staff, Oct. 7, 1974, in Sacramento, Cal. Ms. Goldman is now serving as Chief Counsel to the Joint Committee on Legal Equality, Sacramento, Cal.

110. See note 11 supra.
The increase in liability for contract debts, however, may not be as important as it seems at first glance. For example, even what would appear to be the most notable expansion in this regard—the fact that community property is now liable for the contracts of the wife—does not in practice make the wife's creditors much better off than they were under the old law. Before, if the wife incurred a small debt, community assets could ordinarily be reached on the theory of necessaries. If a more substantial purchase was involved, creditors invariably required the husband to sign as well. If for some reason the husband's signature was not obtained, a creditor could still hope to recover against community property on the theory that the wife was acting as the husband's agent. Only rarely, then, did creditors lose very much because the old law did not expressly charge the entirety of community property with the wife's contracts.

Does the new law at least mean that creditors can now feel safe in contracting with the wife without bothering to obtain the husband's signature as well? Probably so, but even here some ambiguity remains. That is, though sections 5125 and 5127 specify that both spouses are to have the management and control of community property, there are at least two exceptions to this rule. First, section 5125 also provides that "[a] spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest." Second, the spouses might attempt to change the statutory pattern of shared management and control by express agreement between themselves, for example, to reinvest the husband with sole power in this regard. In either case the coextensiveness principle that liability for debts should follow management and control could conceivably be interposed in an effort to avoid liability for debts incurred by the managing spouse. Such a result would undoubtedly be contrary to legislative intent, but litigation of these and related problems will probably have to take place before community creditors adopt a "one signature" policy as a general rule.

Robert J. Stumpf*

111. The inability of married women in California to obtain credit in their own names was frequently cited in a series of hearings held by a joint interim committee of the California Legislature as a major problem stemming from the management and control provisions of the old law. See California Legislature Joint Interim Committee on Judiciary, Hearings on Community Property, Transcript No. 270, at 69, 98-99, 107-08, 116-20, 123-31 (Sept.-Oct. 1972).
112. See, e.g., Hulsman v. Ireland, 205 Cal. 345, 270 P. 948 (1928).
* Member, Second Year Class