# *BARTENWERFER V. BUCKLEY* AND COERCED DEBT

by

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*In* Bartenwerfer v. Buckley, *the Supreme Court held that 11 U.S.C. § 523(a)(2) barred a spouse who did not commit fraud from discharging a debt that her husband obtained by fraud. This holding raises concerns that coerced debts forced on an abused partner will become nondischargeable. Coerced debt occurs when the abusive partner in a relationship characterized by domestic violence uses fraud or coercion to incur debt in an intimate partner's name. The Supreme Court's holding that "§ 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it" is particularly concerning because each coerced debt actually has two victims: the victim whose credit was used to incur the debt and the creditor who provided funds or services.* Bartenwerfer *thus raises the possibility that creditors could prevent victims of coerced debt from discharging these debts due to the abusive partner's fraud. A close reading of* Bartenwerfer, *however, reveals crucial limits that may protect spousal victims of coerced debt. In sum, the innocent spouse and the fraudster must have a business relationship that can impute fraud under applicable non-bankruptcy law. This article argues that barring discharge is not mandatory under* Bartenwerfer *and the precedent it embraced. It also makes the normative case for allowing discharge of coerced debts using data from the first in-depth study of coerced debt.*

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## I. Introduction

In *Bartenwerfer v. Buckley*, the Supreme Court held that Mrs. Kate Bartenwerfer could be denied the discharge of a debt under § 523(a)(2) of the Bankruptcy Code on the basis of fraud that her business partner and husband, Mr. David Bartenwerfer, committed in selling a house that he remodeled and both spouses owned.[1] We, the authors, were concerned that *Bartenwerfer* would make many coerced debts—debts created by an abusive partner using fraud or coercion—nondischargeable, because of the fraud that victims' abusive partners committed, both against the victims and the creditors. But *Bartenwerfer* is much narrower than it appears at first glance. The opinion contains significant limits on imputing fraud to innocent debtors, and in this article, we outline how to read *Bartenwerfer* so that coerced debt victims' access to discharge remains intact.[2]

Coerced debt occurs when the abusive partner in an intimate relationship characterized by domestic violence uses fraud or coercion to incur debt in his partner's name.[3] For example, abusive partners may fraudulently open credit cards in their partners' names or coerce their partners into opening Home Equity Lines of Credit (HELOC).[4] Coerced debt takes place in the context of coercive control, a form of domestic violence in which the abusive partner seeks to undermine the free will of the victim.[5] With coercive control, abusive partners often attempt to isolate victims, for example, by cutting them off from friends and family, restricting access to the family's financial information, and barring them from workings outside the home.[6] Coercive control enables coerced debt by making it more difficult for victims to discover and address fraudulent transactions or resist coercive transactions.[7]

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[1] 598 U.S. 69, 73–83 (2023) (interpreting 11 U.S.C. § 523(a)(2)(A)).

[2] *See infra* Part II.

[3] *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CAL. L. REV. 951, 951 (2012) [hereinafter *Coerced Debt*] (exploring coerced debt within the consumer credit system).

[4] *See infra* Part III.B.1.

[5] EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 253–54 (2nd ed. 2023) (comparing coercive control to other capture crimes).

[6] *Id.* (discussing various control tactics used by perpetrators).

[7] *Coerced Debt*, *supra* note 3, at 977–78.

Coerced debt, in turn, can exacerbate the coercive control by making it more difficult for the victim to leave the relationship.[8] For example, coerced debt appears to harm credit scores,[9] and poor credit can restrict access to employment, rental housing, and utilities—exactly what a victim needs to start an independent household.[10] Coerced debt is also associated with staying longer than one wants to in a controlling relationship due to financial concerns.[11]

We just completed the first in-depth study of coerced debt with a grant from the National Science Foundation.[12] Our research team interviewed 187 women who recently divorced abusive men.[13] Approximately two-thirds of participants reported coerced debt; the remaining participants served as a comparison group of women who experienced coercive control but not coerced debt. We assessed for coerced debt by systematically reviewing participants' credit reports and interviewing participants about whether their ex-husbands created each debt using fraud or coercion.[14] We also asked about

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[8] *See id.* at 955; Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 367 (2013) [hereinafter *Escaping Battered Credit*].

[9] Adrienne E. Adams, Angela K. Littwin & McKenzie Javorka, *The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence*, 26 VIOLENCE AGAINST WOMEN 1324, 1333 tbl.5 (2020) ("[W]omen with coerced debt were 6 times more likely to have their credit report or credit score hurt by the actions of an intimate partner.").

[10] *Escaping Battered Credit*, *supra* note 8, at 370.

[11] Adams, Littwin & Javorka, *supra* note 9, at 1335 ("Nearly three quarters (73%) of women reported that they had stayed longer than they had wanted in a relationship with someone who was controlling because of concerns about financially supporting themselves or their children.").

[12] Abstract of *Debt as a Control Tactic in Abusive Marriages*, NAT. SCI. FOUND., https://www.nsf.gov/awardsearch/showAward?AWD_ID=1920557&HistoricalAwards=false (last visited June 8, 2023).

[13] In heterosexual relationships, coercive control tends to be gendered—perpetrated by men against women—which is why, when unavoidable, we use male pronouns to describe abusive partners and female pronouns to describe victims. It is also why we recruited women who had divorced men for this first in-depth study of coerced debt. *Coerced Debt*, *supra* note 3, at 978–81; STARK, *supra* note 5, at 213–14; Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1010 (2006); Michael P. Johnson, Janel M. Leone & Yili Xu, *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required*, 20 VIOLENCE AGAINST WOMEN 186, 187 (2014) (defining the behaviors that constitute coercive control as intimate terrorism).

[14] We also asked about debts created by manipulation, i.e., debts generated in an abusive relationship through lying or trickery, but we do not include the results of manipulated

coerced debts on open accounts not on the credit report. We found that victims of domestic violence can hold a wide variety of coerced debts, ranging from fraudulent refinancings of the marital home to coerced vehicle loans to student loans in which the victim was coerced into borrowing the maximum amount allowed by the lender to massive amounts of credit card debt incurred by both fraud and coercion.

Bankruptcy is one of the only avenues for relief from coerced debt. Duress law theoretically protects people from involuntary contracts, but it generally does not help victims of coerced debt reduce liability, because the creditor is an innocent third party who gave value and thus is not subject to duress remedies.[15] Family law is similarly unavailing. Even if the victim divorces the abusive partner and the family court assigned the coerced debt to the abuser, that does not change the victim's contract with the creditor.[16]

Thus, when the Supreme Court held in *Bartenwerfer* that 11 U.S.C. § 523(a)(2) could bar an innocent spouse from discharging debt, we were concerned about its potential to limit the discharge of coerced debt in bankruptcy, particularly because the fraud that would prevent discharge is the very fraud that saddled the victim with the coerced debt in the first place. Indeed, one of us had served as an amicus on a brief urging the Court to rule the other way for that very reason.[17] Of particular concern is that the Supreme Court's decision rested in part on § 523(a)(2) being written in the passive voice. The statutory provision refers to debt "obtained by" fraud and does not specify who must do the obtaining.[18] Indeed, the Court concluded the first paragraph of its decision with the statement: "Written in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it."[19] This formulation implicates coerced debt because each coerced debt actually has two victims—the innocent partner in whose name it is incurred and the creditor.[20] If it does not matter who created the debt via fraud,

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transactions in this article.

[15] RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981). *See* Adams, Littwin & Javorka, *supra* note 9, at 1338 (explaining that coerced debt involves third-party creditors who extend credit without knowledge of the coercion).

[16] *Escaping Battered Credit*, *supra* note 8, at 366.

[17] Brief for the National Consumer and Bankruptcy Rights Center and Professor Angela K. Littwin as Amici Curiae Supporting Petitioner, Bartenwerfer v. Buckley, 598 U.S. 69 (2023) (No. 21-908).

[18] *See* 11 U.S.C. § 523(a)(2).

[19] Bartenwerfer v. Buckley, 598 U.S. 69, 72 (2023).

[20] This is a point that creditors begin to understand when states enact laws providing victims with relief from coerced debt. *See generally* Consumer Data Indus. Ass'n v. Frey, 26

then creditors could use § 523(a)(2) to prevent victims from discharging coerced debt. And the implications go beyond coerced debt incurred via fraud. A coerced debt incurred by the threat of physical harm could be a form of fraud on the creditor because the abusive partner is misrepresenting that the victim is the one creating the debt.

Three factors, however, make this broad interpretation unpersuasive. First, for the victim of coerced debt to be liable, she and the abusive partner who created the debt must be in a business relationship, such as a partnership or agent-principal relationship, that can impute fraud liability.[21] And though the Bartenwerfers were marital partners too, the Court characterized them as "business partners."[22] Second, it is underlying law, usually state law, that determines the liability of an innocent party for fraud, and a victim of coerced debt must be found liable for the fraud under state law for its discharge to become an issue.[23] Third, because the Court "embraced" *Strang v. Bradner*,[24] a Nineteenth Century Supreme Court case that held that the fraud of one partner is the fraud of all,[25] *Bartenwerfer* comes with more than a century's worth of precedent that can be applied to coerced debt.[26] A close examination

F.4th 1 (1st Cir. 2022) (ruling against an industry group seeking to prevent the enactment of a Maine law regulating debt resulting from economic abuse). Throughout this article, we refer to intimate partner victims of coerced debt as "victims" and creditor victims as "creditors." When it is necessary to refer to a creditor as a victim of coerced debt, we clarify that we mean a creditor-victim, not a victim of intimate partner violence.

[21] *See infra* Subsection III.B.1.

[22] *Bartenwerfer*, 598 U.S. at 72.

[23] *Id.* at 81–82.

[24] 114 U.S. 555 (1885).

[25] *Bartenwerfer*, 598 U.S. at 80 (summarizing the holding of Strang v. Bradner, 114 U.S. 555, 561 (1885)).

[26] Although *Strang* was decided in 1885, we limited our search to cases dated 1970 or later on the theory that cases before 1970 would not reflect modern gender norms in determining whether intimate partners were also business partners. As it turned out, we found a 1971 case in which the question of whether the wife's gender prevented her from being a competent businessperson was at issue. The Sixth Circuit overturned a lower court holding that the wife not responsible for the consequences of her husband's tax fraud because the husband was the "dominant partner" in the business. *See* Calvey v. United States, 448 F.2d 177, 178 (6th Cir. 1971) ("Let's face it, gentlemen, she is an intelligent woman. She is not stupid. She knows what a partner is, and when she put the word 'partner' down, I am satisfied that she knew what she was doing."). We excluded cases addressing the fraud liability between family members that applied non-*Strang* approaches because the *Bartenwerfer* Court's embrace of *Strang* made these other cases invalid as precedent. *See, e.g.*, *In re* Huh, 506 B.R. 257, 266 (B.A.P. 9th Cir. 2014) (adopting the "knew or should have known standard"); *In re* Walker, 726 F.2d 452, 454 (8th Cir. 1984), *abrogated by* Bartenwerfer v. Buckley, 598 U.S. 69 (2023) (same); *In re* McGuire, 284 B.R. 481, 492 (Bankr. D. Colo.

of precedent under *Strang* reveals that courts have limited its reach to business relationships. And of the states whose laws the cases under *Strang* have applied, only one considers marriage or other intimate partnership between the parties to be a positive factor in finding a business relationship, while two consider it a negative factor.[27]

We apply *Bartenwerfer*'s limits to two recent cases to demonstrate how findings of nondischargeability are not necessarily mandatory in cases of marriage and fraudulent debt. Specifically, courts can examine any underlying judgment closely, applying collateral estoppel conservatively[28] and requiring that the underlying judgment show that all *Bartenwerfer* and *Strang* elements are met.[29] If the underlying judgment does not meet the above requirements—or there is no underlying judgment—the bankruptcy court can make detailed findings about the innocent spouse's role in the business and allow a discharge unless the innocent spouse holds a fraud-imputing business relationship with the fraudster spouse under applicable non-bankruptcy law. There is, however, one doctrine—fraudulent inducement of partnership—that is unlikely to help innocent spouses.[30]

The limitation of *Bartenwerfer* to business relationships is crucial for victims of coerced debt because coerced debt takes place within a marriage or other intimate relationship, and business coerced debts may be relatively uncommon. For example, in our study, coerced debts that involved businesses were rare. Of the 2,833 participant accounts in our study, 506 were coerced debts, but only twenty-one appeared to relate to a business. We may have undercounted business coerced debts, because we asked explicitly about whether a debt was for a business only when the participant's divorce decree mentioned a business owned by one or both spouses. We did, however, also examine participants' responses to an open-ended question about the purpose of coerced debt to determine whether they identified it as being for a business

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2002) (same). We also excluded cases that applied agency principles but with a knowledge standard. *See, e.g.*, *In re* Floyd, 177 B.R. 985, 988 (Bankr. M.D. Fla. 1995) (finding that there was no evidence to support the claim that the husband was authorized to act as his wife's agent because she had no knowledge of his actions); *In re* Steinman, 61 B.R. 368, 374 (Bankr. W.D. Mo. 1986) (same).

[27] *See infra* Subsection III.B.3.

[28] Much precedent suggests that a conservative application of collateral estoppel is correct. *See, e.g.*, *In re* Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001); *In re* Hyman, 502 F.3d 61, 66 (2d Cir. 2007); *In re* Harris, 3 F.4th 1339, 1343 (11th Cir. 2021).

[29] *See infra* Subsection III.C.1.

[30] *See infra* Subsection III.C.3.

expense or for investment real estate. Moreover, the undercount would need to be of major proportions for *Bartenwerfer* to cover a significant percentage of coerced debts.

The presence of these twenty-one business debts in our study, however, enables us to use them as a case study of how *Bartenwerfer* could apply to actual coerced debts.[31] Thus, after demonstrating how to read *Bartenwerfer* to allow for the discharge of coerced debts, we make the normative case for why coerced debts deserve access to discharge.[32] First, there are significant differences between business debts that arise in a purely business context and those that arise in any intimate relationships, even non-abusive relationships, such that courts should be less likely to infer a business partnership in the context of a marriage than otherwise.[33] People do not choose intimate partners based on business acumen, and the dynamics of the intimate relationship can make it difficult for the spouse who is less involved in the business to oversee the more-involved spouse in the way that we expect business partners to monitor each other.[34] In addition, the irony is that in a true business relationship, the option of incorporating reduces or eliminates principals' liability for each other's frauds.[35] But in an intimate relationship that is deemed a business partnership, parties are unlikely to consider incorporation, and unsophisticated innocent spouses may be entirely unaware of it as an option.

The normative case for allowing discharge is even stronger for victims of coerced debt because they have little ability to resist becoming liable. First, abusive partners often take control of the family's finances and cut off victims' access to financial information, making it impossible for victims to exercise vigilant oversight of their finances.[36] Second, the mechanics of coerced debt give victims little or no choice about incurring debt.[37] Victims cannot prevent fraudulent transactions because they do not know of them until after they are incurred.[38] Victims cannot prevent coercive

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[31] *See infra* Section IV.B.

[32] *See infra* Section IV.

[33] *See infra* Subsection IV.A.1.

[34] *See infra* Subsection IV.A.2.

[35] Bartenwerfer v. Buckley, 598 U.S. 69, 82 (2023) ("Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts.").

[36] *Coerced Debt*, *supra* note 3, at 981–86; Adams, Littwin & Javorka, *supra* note 9, at 1337.

[37] *See infra* Section IV.B.

[38] *See infra* Subsection IV.B.1.a.

transactions because abusive partners use as much force as necessary to obtain compliance with their abusive demands to incur debt.[39] Our analysis of the twenty-one business coerced debts in our study illustrates some of the challenges victims face in resisting coerced debt. We also consider whether *Bartenwerfer* would apply to these debts based on business relationships between our participants and their ex-husbands—with inconclusive results. Finally, it is typically more difficult for a victim of coerced debt to leave an abusive relationship than for someone to leave an intimate relationship not characterized by abuse.[40]

We conclude that a coerced debt victim's best bankruptcy strategy in cases where a creditor has not filed a complaint seeking to declare their debt nondischargeable may be to not mention a debt's coerced status.[41] In cases under *Bartenwerfer* and *Strang*, there is always a creditor of the business bringing an action to hold the debt nondischargeable.[42] In contrast, with coerced debt, the creditor who is the third-party victim rarely, if ever, knows that the debt was coerced. Indeed, the intimate partner victim herself may not know her debts were coerced or understand "coerced debt" as a concept. The downside of this approach is that it will limit bankruptcy courts' firsthand knowledge of coerced debt, which can have other implications for bankruptcy cases. It would also reduce bankruptcy community awareness of coerced debt, which may make it less likely that bankruptcy actors will seek legal change to address coerced debt in the bankruptcy system.

This article proceeds in four additional Sections. Part II describes coerced debt and its consequences as well as providing a brief description of our study methods. Part III analyzes *Bartenwerfer*'s potential effect on the discharge of coerced debts, arguing that the opinion's effect will be more limited than it appears. Part IV makes the normative case for allowing discharge of coerced debts, first by discussing business debt in the context of intimate partnerships generally and then by showing how victims of coerced debt lack options for preventing it, using the business coerced debts in our data as a case study. Part V concludes.

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[39] *See infra* Subsection IV.B.1.b.
[40] *See infra* Subsection IV.B.2.
[41] *See infra* Section V.
[42] *See infra* Subsection III.C.1.

## II. Coerced Debt, its Consequences, and its Measurement

### A. How Coerced Debt Happens

To understand coerced debt, one must know a little about domestic violence, which is also called intimate partner violence. Recent research suggests that there are two main types: (1) situational violence, in which both partners in the relationship use relatively minor violence against each other; and (2) coercive control, in which one partner in the relationship seeks to control the other.[43] In coercive control, the abusive partner's goal is oftentimes to undermine the victim's agency to the point of eliminating her free will.[44] The abuser accomplishes this through demands and threats of consequences.[45] The demands could be in any area of life, such as work, childrearing, housekeeping, finances, or health.[46] For example, an abusive partner may demand that his partner dress a certain way, avoid seeing family members, or quit working outside the home. These demands are enforced with threatened consequences, which can range from psychological (threats to leave the relationship, dirty looks, name calling, general nastiness, public or private humiliation) to financial (hiding money, taking control of the family's finances, and threatening to cut off funds) to physical (intimidation, beating, sexual assault, threats to kill).[47] Threats can be explicit or implicit, based on the partners' shared history.[48]

An abusive partner can target a victim's existing vulnerabilities to tailor the threats. For example, a woman with children is vulnerable to threats to remove them from her custody, and an illegal immigrant is vulnerable to reports to the authorities.[49] In our study, we often saw that, even in relationships with physical abuse, participants cited emotional consequences as the threats that led to coerced debt.[50] The abusive partner only needs to issue enough of a threat to obtain compliance with the demand. For example,

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[43] STARK, *supra* note 5, at 132–34 (defining situational violence and coercive control); Johnson, *supra* note 13, at 1006.

[44] Johnson, *supra* note 13, at 1010.

[45] Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 743 (2005) (explaining how an abuser uses threats to gain power in the relationship).

[46] *Id.* at 749–50.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 747–51.

[50] *See, e.g.*, *infra* Subsection IV.B.1.b.

we interviewed a woman whose ex-husband demanded that she buy him expensive vehicles in her name. For much of the relationship, the consequence of not meeting this demand was that he would throw a tantrum at the dealership, yelling and screaming until she gave in. Eventually, the participant became so overwhelmed by the amount of debt she owed that her husband's tantrums ceased to be effective in getting her to incur more debt. That is when he began to physically intimidate her.[51]

Coerced debt derives from coercive control.[52] An abuser who has control over other aspects of his partner's life can incur coerced debt in her name relatively easily. For example, if the abusive partner is controlling access to the family's mail,[53] that prevents his partner from learning of credit cards opened in her name.[54] Or if a victim is afraid of the abuser, she is likely to sign a document he tells her to sign without questioning it.[55] This is also why we include debt incurred via fraud under the umbrella of coerced debt. Coercive control and fraud can reinforce each other. For example, if a victim discovers fraudulent debt in her name, she may feel unsafe addressing it with the abusive partner.[56] The intimate relationship itself also makes fraud easier. Intimate partners have each other's personal information, which is a primary way creditors verify the identity of someone applying for a loan.[57]

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[51] Telephone Interview with Nicole, Study Participant. To maintain participant confidentiality, we gave pseudonyms to the participants discussed in this article. In domestic violence research, confidentiality is of particular importance due to the risk of retaliation by abusive partners. *See, e.g.*, *When Men Murder Women*, VIOLENCE POL'Y CTR. 3 (Sept. 2022), https://vpc.org/studies/wmmw2022.pdf. In accordance with best practices, we assigned participants identification numbers during the study and no longer have access to their real names. In publications, we identify them by pseudonym instead of identification number to humanize their stories and because the identification numbers themselves contain information about the timing of their divorces.

[52] This is why we named the phenomenon "coerced debt." *Coerced Debt*, *supra* note 3, at 977–78.

[53] In our study with the National Domestic Violence Hotline, 71 percent of callers reported that an intimate partner had hidden financial information from them. Adams, Littwin & Javorka, *supra* note 9, at 1334.

[54] In our Hotline study, callers who reported hidden financial information were more than 3.5 times more likely to report coerced debt than other callers. *Id.* at 1332 tbl.4.

[55] *Coerced Debt*, *supra* note 3, at 989–90.

[56] *Escaping Battered Credit*, *supra* note 8, at 375.

[57] *Coerced Debt*, *supra* note 3, at 986–87.

B. Consequences of Coerced Debt

Coerced debt stays with the victim. Duress is the doctrine that protects people from coerced contracts, but it usually does not apply to coerced debt because duress law protects innocent third parties who gave value.[58] The creditor in a coerced debt is an innocent third party because it has no reason to know the debt is coerced, and it gives value, albeit value that the abuser appropriates. Duress law covers the scenario in which one party coerces a second party into a contract that creates a debt to the first party, because duress law originated long before the development of the mass consumer-lending market.[59] With the advent of widely-available consumer credit, creating debt via a third-party creditor is a much more lucrative way to obtain funds.[60]

Divorce law is also of little help. Even if the victim and abuser are married, divorce, and the divorce decree assigns the coerced debt to the abuser, that does not change the victim's contract with the creditor.[61] Family courts do not have jurisdiction over creditors and thus cannot alter victims' creditor contracts.[62]

Coerced debt, in turn, can become an element of coercive control, making it more difficult for a victim to leave an abusive relationship. In a prior study, in which we surveyed callers to the National Domestic Violence Hotline (NDVH), we found that callers who reported coerced debt were 2.5 times more likely than other callers we surveyed to report staying longer than they wanted in an abusive relationship due to financial concerns.[63] One mechanism of this financial dependence may be credit reporting. Coerced

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[58] RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981) ("If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.").

[59] *See, e.g.*, Hackley v. Headley, 45 Mich. 569, 574, 8 N.W. 511, 512–13 (1881) (finding no duress where the defendant paid the plaintiff less than the plaintiff was owed and issued a receipt saying the debt was paid in full because the plaintiff was in dire financial straits and felt obliged to accept).

[60] Identity theft is a multi-billion-dollar business. *See, e.g.*, Megan Leonhardt, *Consumers Lost $56 Billion to Identity Fraud Last Year*, CNBC (Mar. 23, 2021 12:56 PM), https://www.cnbc.com/2021/03/23/consumers-lost-56-billion-dollars-to-identity-fraud-last-year.html.

[61] *Escaping Battered Credit*, *supra* note 8, at 368.

[62] *Id.*

[63] Adams, Littwin & Javorka, *supra* note 9, at 1334 tbl.6.

debt is associated with damage to credit scores. In our NDVH study, we found that callers who reported coerced debt were more than six times as likely to report damaged credit as other callers who took our survey.[64] Our current study also found damage to credit scores, although these findings are still preliminary and thus not included in this article.

C. Measuring Coerced Debt

The data presented in this article are from the study, Debt as a Control Tactic in Abusive Marriages.[65] It was the first in-depth study of coerced debt, and the key aims were to describe coerced debt in detail, examine it in the context of coercive control, analyze the outcomes of having coerced debt, and assess legal remedies for it. This article's focus is on *Bartenwerfer*, so the only study data we present involve the twenty-one business coerced debts we found.

The study used a sequential mixed-method longitudinal design to collect data from a sample of women recently divorced from an abusive partner. We used public divorce records to recruit a sample of 187 women in Texas, 116 women with coerced debt and a comparison group of seventy-one without. Participants' divorces were finalized between April 2020 and February 2021, and we interviewed them three to seven months after divorce finalization.

The original study design called for one three-hour, in-person interview with each participant, but that plan was modified to a multi-stage, remote protocol when the coronavirus pandemic struck just before data collection was to begin. Our research team collected quantitative data through a self-administered online survey, a life history calendar,[66] and two telephone interviews with the full sample. The first telephone interview focused on the

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[64] *Id.* at 1333 tbl.5.

[65] *Debt as a Control Tactic in Abusive Marriages*, NAT'L SCI. FOUND., https://www.nsf.gov/awardsearch/showAward?AWD_ID=1920557&HistoricalAwards=false (last visited June 8, 2023).

[66] The Life History Calendar is a research tool that prior studies have shown to improve autobiographical recall. *See, e.g.*, Mieko Yoshihama, Julie Horrocks & Saori Kamano, *The Role of Emotional Abuse in Intimate Partner Violence and Health Among Women in Yokohama, Japan*, 99 AM. J. PUB. HEALTH 647, 647 (2009); Mieko Yoshihama, Amy C. Hammock & Julie Horrocks, *Intimate Partner Violence, Welfare Receipt, and Health Status of Low-Income African American Women: A Lifecourse Analysis*, 37 AM. J CMTY. PSYCH. 95, 95 (2006).

participant's credit report, the second on her divorce decree. We collected qualitative data through in-depth, follow-up interviews with a small subset of participants.

We assessed for coerced debt during participant interviews by systematically reviewing the relevant accounts on each participant's credit report, asking whether each account was opened and/or used by the participant's ex-husband via fraud or coercion.[67] We also screened open accounts not on participant credit reports.

We considered a debt to be fraudulent if a participant's ex-husband opened or used a credit account in her name without her knowledge. We defined coercion with a two-part question based on the operation of coercive control, in which abusers make demands of their partners and then enforce those demands with the threat of consequences if the partner does not comply.[68] The consequences can be explicit or implied. In the study, the demand was one to open or use a participant's account. To elicit threatened consequences, we asked participants who said yes to the demand question, "What if you said, 'no' to opening/using the account? Did your ex-husband make you think he might hurt you or a loved one in some way if you didn't do what he wanted? By 'hurt you,' I mean physically, emotionally, financially, or any other way." We framed the question in terms of predicted consequences to capture implied threats as well as explicit ones. Accounts for which participants answered "yes" to this question were counted as coerced. We asked two follow up questions to learn more about the threats and have coded those answers. Also relevant for this article is that we screened for five types of abuse.

We closed the interview portion of the study in July 2021 and embarked on an intensive process of preparing the data for analysis, coding additional information from participant credit reports and divorce decrees, and transcribing the coerced-debt assessment portions of the interviews using a professional transcription company.

We determined which coerced debts were business debts in three ways. First, when a business was listed among the property to distribute in a participant's divorce decree, we asked the participant whether each account was for a business. Second, two of this article's authors coded the interview transcripts to determine the purpose of each coerced debt in the study. Author

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[67] We also asked about debt incurred by manipulation, but we do not use the results of that screening in this article.

[68] *See* Dutton & Goodman, *supra* note 45, at 743 (exploring coercive control in intimate partner relationships).

Adams open-coded all coerced debts, and author Littwin read the coded transcripts and noted disagreements with author Adams' coding decisions. The two authors then reconciled any discrepancies in their coding. We counted a debt as being for a business purpose if the participant said that it was for a business of one or both spouses. Third, because the business in *Bartenwerfer* was the sale of investment property,[69] author Littwin and a law student research assistant reviewed the transcripts for each coerced mortgage and HELOC to determine whether the participant said that the real estate encumbered by the debt was investment property. We considered accounts to be business debts for this article if they were flagged by at least one of these three methods.

## III. *Bartenwerfer*'s Effect on Discharging Coerced Debt

### A. Passive Voice in *Bartenwerfer*

The *Bartenwerfer* Court's language about passive voice is concerningly broad. As mentioned earlier, the Court concluded its first paragraph summarizing its holding with the statement: "Written in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it."[70] The Court's more detailed textual analysis later in the opinion is equally broad. Kate Bartenwerfer had argued that, despite § 523(a)(2)(A)'s passive construction, the most natural reading of the provision was that it referred to the debtor's fraud. In response, the Court made passive voice the centerpiece of its textual analysis. The Court stated: "Passive voice pulls the actor off the stage,"[71] adding that Congress framed § 523(a)(2)(A) to focus "on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability."[72] The Court cited a reference on English usage for the premise that "the passive voice signifies that the actor is 'unimportant' or 'unknown,'"[73] and described Congress as being "agnostic" about who committed the fraud.[74]

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[69] Bartenwerfer v. Buckley, 598 U.S. 69, 72 (2023).

[70] *Id.*

[71] *Id.* at 75.

[72] *Id.* at 75–76 (quoting Dean v. United States, 556 U.S. 568, 572 (2009)).

[73] *Id.* at 76.

[74] *Id.* (internal brackets omitted) (quoting Watson v. United States, 552 U.S. 74, 81 (2007)).

Furthermore, the Court described Congress' decision to delete the debtor from § 523(a)(2)(A)'s predecessor as the "linchpin" of its analysis.[75] In the nineteenth century case *Strang v. Bradner*, the Court analyzed a prior version of § 523(a)(2)(A) that specified that the fraud was "of the bankrupt,"[76] which is how bankruptcy statutes referred to the debtor before 1978,[77] and found that the partners of the fraudster could not discharge their liability because "the fraud of one partner . . . is the fraud of all."[78] To the *Bartenwerfer* Court, the "linchpin" was that, thirteen years later, Congress deleted the words "of the bankrupt" from the statute, thus confirming the Court's view that *Strang*'s interpretation is the correct one.[79]

B. Limits on *Bartenwerfer's* Breadth

1. The Law of Fraud and Partnership

The first limit on § 523(a)(2)(A)'s application to innocent parties who did not commit fraud is the law of fraud. It is because the law of fraud holds Kate Bartenwerfer liable for the deceit of her husband that she cannot discharge her debt. As the *Bartenwerfer* Court stated, "The relevant legal context—the common law of fraud—has long maintained that fraud is not limited to the wrongdoer."[80] Thus, the law of fraud constrains the extension of liability. More specifically, the set of actors covered by § 523(a)(2)(A)'s passive voice are limited to those who would be liable under the law of fraud.

Parties cannot be prevented from discharging debts resulting from frauds to which they had no relationship. In response to what the Court characterized as Kate Bartenwerfer's argument that its opinion would impose liability "willy-nilly on hapless bystanders," the Court stated that, "the law of fraud does not work that way. Ordinarily, a faultless individual is responsible

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[75] *Id.* at 80.

[76] *Id.* at 79 (citing Act of Mar. 2, 1867, § 33, 14 Stat. 533).

[77] When Congress enacted the modern Bankruptcy Code in 1978, it substituted the word "debtor" for the word "bankrupt." *See, e.g.*, Eric A. Posner, *Bankruptcy Act of 1978*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/bankruptcy-act-1978 (last visited Jan. 30, 2024) ("When a person or business files for bankruptcy, the person or business is labeled the debtor (not the bankrupt, which was the term under prior law).").

[78] *Bartenwerfer*, 598 U.S. at 80 (citing Strang v. Bradner, 114 U.S. 555, 561 (1885)).

[79] *Id.* at 81 ("The unmistakable implication is that Congress embraced *Strang*'s holding—so we do too.").

[80] *See id.* at 76.

for another's debt only when the two have a special relationship . . . ."[81] Thus, in the context of coerced debt, a coerced debt victim cannot be held liable for just anyone's fraud in creating the coerced debt; she must have a relationship with the perpetrator of a type that the law of fraud holds can transmit liability.

Partnership is a particularly salient relationship because Kate Bartenwerfer's specific relationship with her husband, who committed the fraud, was that of a business partner.[82] Indeed, in a short, 3,518-word opinion, the Court uses the term "partner" or "partnership" twenty-four times.[83] Throughout the opinion, the only two examples of non-wrongdoers the Court cited as liable for fraud are principals who are liable for the frauds of their agents and partners who are liable for each other's frauds.[84] For example, from the opening paragraph, where the Court first concluded that Kate Bartenwerfer is liable for her husband's fraud, it stated: "But sometimes a debtor is liable for fraud that she did not personally commit—for example, deceit practiced by a partner or an agent."[85] Later, when discussing common-law fraud, these are the two examples the Court provided: "For instance, courts have traditionally held principals liable for the frauds of their agents," and "[t]hey have also held individuals liable for the frauds committed by their partners within the scope of the partnership."[86] Still later in the opinion, when the Court discussed defenses an innocent party may raise to shield itself from liability for another party's fraud, the two examples the court used are an employer being liable for the actions of its employees, an example of a principal-agent relationship, and partnerships.[87]

But even if a later Court were to identify further examples of the relationships that can transmit fraud liability, the Court is clear that the law of fraud limits such a determination.[88] Indeed, since *Bartenwerfer*, there is already one appellate-court opinion holding just that. In *In re Hann*, the Fifth Circuit found a debt nondischargeable because an underlying arbitration had

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[81] *Id.* at 82.

[82] *Id.* at 72.

[83] *See generally* Bartenwerfer v. Buckley, 598 U.S. 69 (2023).

[84] *Id.* at 76. Although the Supreme Court treats partnership and principal-agent law as two separate examples, under some state law, they are part of the same doctrine. *See, e.g.*, *In re* Tsurukawa, 287 B.R. 515, 520 (B.A.P. 9th Cir. 2002) (determining whether fraud may be imputed to a spouse under partnership/agency principles in an § 523(a)(2)(A) action).

[85] *Bartenwerfer*, 598 U.S. at 72.

[86] *Id.* at 76.

[87] *Id.* at 82.

[88] *Id.* at 81–82 ("It also bears emphasis . . . that § 523(a)(2)(A) does not define the scope of one person's liability for another's fraud.").

determined that the debtor was liable for the fraud as the alter ego of the corporation that committed it and the law of fraud did not limit the liability of an owner who used a corporation to commit fraud for the owner's benefit.[89] Even though alter ego was not one of the statuses mentioned in *Bartenwerfer* as transmitting fraud liability,[90] it can transmit liability under Texas' law of fraud,[91] so *Hann* falls squarely within *Bartenwerfer*'s holding that the law of fraud determines the limits of § 523(a)(2)'s application to innocent parties.[92]

2. The Role of Underlying Law

Under *Bartenwerfer*, it is underlying law, which will usually be state law, that determines whether a victim of coerced debt would be liable for the fraud due to her relationship with the fraudster. Importantly, it is only if a debtor is found liable for the fraud via underlying law that the issue of discharge arises. *Bartenwerfer* made this clear when it stated:

> [Section] 523(a)(2)(A) does not define the scope of one person's liability for another's fraud. That is the function of the underlying law—here, the law of California. Section 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, § 523(a)(2)(A) would have no role to play. Bartenwerfer's fairness-based critiques seem better directed toward the state law that imposed the obligation on her in the first place.[93]

This language states in the strongest terms that underlying law, rather than bankruptcy law, determines whether an innocent party can be held liable for the fraud of another. Bankruptcy courts appear to have received this message. We found seven cases[94] interpreting *Bartenwerfer* in which the

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[89] *In re* Hann, No. 22-20407, 2023 WL 6803541, at *6 (5th Cir. Oct. 16, 2023). Specifically, the *Hann* Court applied Texas law on this point ("Accordingly, Texas law determines the scope of Hann's liability relative to the misrepresentations . . . ."). *Id.* But we do not discuss *Hann* in the following subsection because it did not involve an intimate partnership.

[90] *See Bartenwerfer*, 598 U.S. at 76 (citing cases where fraud liability was not limited to the wrongdoer).

[91] *See id.* at 81–82.

[92] *See In re* Hann, 2023 WL 6803541, at *6 (citing Bartenwerfer v. Buckley, 598 U.S. 69, 81–82 (2023)).

[93] *Bartenwerfer v. Buckley*, 598 U.S. 69, 81–82 (2023).

[94] There is also an eighth case that raised the issue, but the Bankruptcy Appellate Panel for the Tenth Circuit ultimately did not determine the dischargeability of the innocent spouse's debts, because it remanded on the preliminary question of whether or not the

potential business partners were also intimate partners.[95] In four of these cases, the bankruptcy courts specifically found that the existence or absence of an underlying judgment holding the innocent party liable for the fraud was an important factor in determining discharge and relied on state law. Two other cases ruled on the *Bartenwerfer* issue without judgments holding the innocent spouse vicariously liable and without interpreting underlying law, but the procedural postures of both cases justified these approaches.[96] The final case, we argue, misinterpreted *Bartenwerfer*.[97]

In *In re Lee*,[98] Judge Grossman of the Southern District of New York applied New York law to hold that the creditor failed to establish a § 523(a) claim against the wife of the husband who committed fraud. Importantly, one way the court distinguished *Bartenwerfer* was by pointing out that, unlike in *Bartenwerfer*, there was no underlying judgment holding the wife liable for her husband's fraud.[99] The court then analyzed New York State law to hold that the spouses were not business partners, even though the wife owned one of the corporations involved in the fraud.[100] The second case, *In re Beach*, applied Wisconsin law and also found it relevant that the innocent spouse was not found liable in the underlying judgment.[101] Similarly, in *In re Zolnier*, the bankruptcy court revoked the discharge of a wife due to the fraud of her husband because she was liable in an underlying judgment.[102] In *In re*

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fraudster's debts were dischargeable. *In re* Woods, 660 B.R. 905, 925 (B.A.P. 10th Cir. 2024).

[95] We conducted this research through January 9, 2025. Six of these seven cases involved married couples, and one involved a domestic partnership. This constitutes a general trend in the case law. We did not find any cases under *Strang* that considered the liability of intimate partners who were not spouses. *See* cases cited *infra* notes 98, 101–104, 109.

[96] *See In re* Rassbach, 650 B.R. 568, 571 (Bankr. W.D. Wis. 2023) (ruling on a motion for failure to state a claim upon which relief can be granted); *In re* Sharp, No. 22-30854, 2024 WL 2819674, at *10 (Bankr. N.D. Ohio June 3, 2024) (granting summary judgment for the debtor on the *Bartenwerfer* issue because the creditor alleged no facts regarding the debtor's vicarious liability).

[97] *In re* Csigi, No. 23-00617 (Bankr. D. Haw. Dec. 17, 2024).

[98] No. 22-70367-REG, 2024 WL 1261790 (Bankr. E.D.N.Y. Mar. 25, 2024).

[99] *Id.* at *12–13 ("In *Bartenwerfer v. Buckley*, the liability had already been found by a pre-petition judgment. Here, we have no such finding . . . .").

[100] *Id.*

[101] 651 B.R. 359, 374 (Bankr. E.D. Wis. 2023) ("SLK did not name Theresa as a defendant in its state court action, and thus there is no state court judgment deeming her liable to SLK.").

[102] No. 14-35884, 2024 WL 206357, at *4 (Bankr. S.D. Tex. Jan. 18, 2024) ("The United States Supreme Court recently opined that where debtors 'were found jointly responsible in

*Glasser*, the court distinguished *Bartenwerfer* because the creditor had not obtained a prior judgment against the innocent domestic partner and failed to provide sufficient evidence to show that he was the business partner of the fraudster.[103]

In contrast, the *In re Rassbach* court ruled against the innocent spouse, despite her not being a party to the underlying judgment against the husband and the company both spouses owned.[104] This case does not contradict the prior four, however, because the procedural posture of the opinion was on a Fed. R. Civ. P. 12(b)(6) motion, with the debtors arguing that the creditor's claims under, inter alia, § 523(a)(2)(A) should be dismissed for failure to state a claim upon which relief can be granted. In addition, *Rassbach* was decided less than a month after the Supreme Court issued its opinion in *Bartenwerfer*.[105] Thus, it is not surprising that the *Rassbach* court declined to dismiss the § 523(a)(2)(A) action against the wife so early in the case.[106] The court's statement of its holding suggests that it was erring on the side of caution: "[C]onsidering Bartenwerfer, it's at least plausible that [the wife] can be held personally liable for the debt of [the company], whether as an imputed partner or acting principal, as alleged by Plaintiff."[107] There are no later opinions in the case,[108] so we do not know if the *Rassbach* court ultimately used underlying state law to decide whether the wife could discharge her debt under § 523(a)(2)(A).

*In re Sharp* is also consistent with our analysis due to its procedural posture.[109] The underlying judgment had held the debtor liable for his

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state court . . . in a project in which [one] debtor was [allegedly] largely uninvolved . . . [the code] precludes debtor from discharging in bankruptcy a debt obtained by fraud . . . .'"). The *Zolnier* court cites the Supreme Court in *Bartenwerfer* for this quotation, but we cannot find it in the Supreme Court's *Bartenwerfer* opinion. *See generally* Bartenwerfer v. Buckley, 598 U.S. 69 (2023). Nevertheless, we include the quote as a representation of the *Zolnier* court's interpretation of *Bartenwerfer*.

[103] No. AP 23-7006, 2024 WL 4471916, at *28–29 (Bankr. D.N.D. Oct. 11, 2024).

[104] 650 B.R. 568, 571 (Bankr. W.D. Wis. 2023) ("[S]he was not a party to the state court lawsuit.").

[105] The *Rassbach* court issued its opinion on March 13, 2023. 650 B.R. at 568. The Supreme Court handed down *Bartenwerfer* on February 22, 2023. Bartenwerfer v. Buckley, 598 U.S. 69 (2023).

[106] *See In re* Rassbach, 650 B.R. at 577.

[107] *Id.* at 578.

[108] Case History of *In re Rassbach*, WESTLAW PRECISION, https://1.next.westlaw.com (search "In re Rassbach"; then follow "History" hyperlink) (showing no further case history); Case History of *In re Rassbach*, LEXIS+, https://plus.lexis.com (search "In re Rassbach"; then follow "History" hyperlink) (showing no further case history).

[109] *See generally* No. 22-30854, 2024 WL 2819674 (Bankr. N.D. Ohio June 3, 2024).

spouse's fraud, but it was in his personal rather than vicarious capacity.[110] The judgment was not dispositive, however, because it was a default judgment and the debtor provided evidence that he never received service for that lawsuit.[111] Thus, the court found that there were disputed facts and denied summary judgment on the issue of the debtor's own potential misconduct.[112] The court did, however, grant summary judgment to the debtor on the *Bartenwerfer* issue—and did not need state law to do so—because the creditor alleged no facts to support the debtor's vicarious liability.[113]

The only case to develop a broader reading of *Bartenwerfer* is *In re Csigi*,[114] but we argue that *Csigi* expanded *Bartenwerfer* beyond its terms. In *Csigi*, a wife misappropriated $858,639 from a trust of which she was the trustee.[115] The wife filed for bankruptcy, and the court found that her debt was the result of "defalcation while acting in a fiduciary capacity" and thus nondischargeable under § 523(a)(4).[116] Later, her husband filed for bankruptcy, and the creditor filed a motion for nondischargeability under § 523(a)(4). The bankruptcy court found that the husband was liable for $563,935.91 under the Hawaii doctrine of unjust enrichment because the wife had used some of the trust's money to buy him a vehicle, expand their home, and settle a debt against a business they both owned.[117]

The bankruptcy court then found that the husband's debt was nondischargeable under *Bartenwerfer* because it was "for" his wife's defalcation.[118] But, when analyzing the husband's liability, the *Csigi* court did not find that the husband was liable for his wife's defalcation; it found him liable for unjust enrichment,[119] which is a separate cause of action. The *Csigi* court misapplied *Bartenwerfer*'s statement that "underlying law" defines "the scope of one person's liability for another's fraud,"[120] because it did not analyze Hawaii's law of defalcation and find the husband liable under it.[121]

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[110] *Id.* at *1.
[111] *Id.* at *1, *9.
[112] *Id.* at *13.
[113] *Id.*
[114] No. 23-00617 (Bankr. D. Haw. Dec. 17, 2024).
[115] Slip op. at 2.
[116] *See* 11 U.S.C. § 523(a)(4).
[117] *In re Csigi*, slip op. at 8–9, 17.
[118] *Id.* at 11–12, 17.
[119] *Id.* at 17.
[120] Bartenwerfer v. Buckley, 598 U.S. 69, 81–82 (2023).
[121] *See In re Csigi*, slip op. at 8, 11–16 (analyzing the husband's liability solely under the theory of unjust enrichment).

The Supreme Court in *Bartenwerfer* clarified that it expected the analysis to include an evaluation of the underlying law of fraud when it stated, "And while Bartenwerfer paints a picture of liability imposed willy-nilly on hapless bystanders, the law of fraud does not work that way. Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship . . . ."[122] A finding of unjust enrichment is a not a finding of a special relationship or any other type of liability under Hawaii's law of fraud or defalcation.

Moreover, if the *Csigi* court was concerned that it would be inequitable to allow the husband to keep the benefits of his wife's fraud, there was another way for the creditor to recover from the husband. The creditor's remedies against the wife include fraudulent transfer law, which would enable the unwinding of the transactions that unjustly enriched the husband.[123] And if the husband were liable for a fraudulent transfer made with actual fraudulent intent,[124] then his debt would be nondischargeable under § 523(a)(2) without the need to invoke *Bartenwerfer*.

In contrast to the recent decisions under *Bartenwerfer*, the pre-*Bartenwerfer* cases on this question are mixed about using underlying law. Of the eighteen pre-*Bartenwerfer* cases we found that apply the *Strang* rule[125] and touch on the issue of whether a spousal or other family relationship[126] constitutes a business partnership for purposes of discharging fraudulent debt, ten of them rely on state (or District of Columbia) law to determine whether the family members were also partners.[127] There are, however, pre-

[122] *Bartenwerfer*, 598 U.S. at 82.

[123] 11 U.S.C. §§ 544, 548; UNIF. VOIDABLE TRANSACTIONS ACT (UNIF. L. COMM'N 2014).

[124] *See* 11 U.S.C. § 548(a)(1)(A); UNIF. VOIDABLE TRANSACTIONS ACT § 4(a)(1) (UNIF. L. COMM'N 2014).

[125] Strang v. Bradner, 114 U.S. 555, 561–562 (1885) (holding that business partners are liable for each other's frauds).

[126] *See In re* Budd, No. 16-00429, 2018 WL 312246, at *1 (Bankr. D.D.C. Jan. 3, 2018) (determining partnership liability between a sister and brother). The remaining cases concern married couples.

[127] *See In re* Shart, 505 B.R. 13, 24 (Bankr. C.D. Cal. 2014), *aff'd*, No. 2:10-BK-29973-B.R., 2014 WL 6480307 (B.A.P. 9th Cir. Nov. 19, 2014) (relying on state law to determine partnership status); *In re* Tsurukawa, 287 B.R. 515, 523–24 (B.A.P. 9th Cir. 2002) (same); *In re* Budd, 2018 WL 312246, at *7 (same); *In re* Donohue, No. 12-43535-CAN7, 2014 WL 29111, at *5–6 (Bankr. W.D. Mo. Jan. 3, 2014) (same); *In re* Baker, No. 08-93509-BHL-7, 2011 WL 4549156, at *10–11 (Bankr. S.D. Ind. Sept. 28, 2011) (same); *In re* Asbury, No. 08-21989, 2011 WL 44911, at *3–4 (Bankr. W.D. Mo. Jan. 6, 2011) (same); *In re* Paolino, 75 B.R. 641, 644–45 (Bankr. E.D. Pa. 1987) (same); *In re* Lau, No. 11-40284, 2013 WL 5935616, at *21–22 (Bankr. E.D. Tex. Nov. 4, 2013) (using Texas law to impute the

*Bartenwerfer* cases under *Strang* that do not rely on state law. The United States Court of Appeals for the Fifth Circuit decided four cases which mainly cite federal cases, especially at the Court of Appeals level.[128] Similarly, the United States Court of Appeals for the Eighth Circuit decided a case in which it relied primarily on its own and Supreme Court precedent.[129] There are also a few bankruptcy court opinions that cite federal law.[130] Given the Supreme Court's strong statement about California law in *Bartenwerfer*, it is likely that, going forward, even courts of appeals will focus on state law.[131]

husband's fraud to the wife under agency principles based on a business relationship between the spouses); *In re* Gill, 181 B.R. 666, 670 (Bankr. N.D. Ga. 1995) (applying collateral estoppel regarding a state-court judgment to hold a spouse's debt nondischargeable); *In re* Savage, 176 B.R. 614, 616 (Bankr. M.D. Fla. 1994) (finding that under the laws of Florida there is no presumption that husband and wife are agents to each other based solely on their marriage).

[128] *See In re* Osborne, 951 F.3d 691, 703–04 (5th Cir. 2020) (holding the wife was husband's agent based on Fifth Circuit precedent); *In re* Gauthier, 349 F. App'x 943, 945–46 (5th Cir. 2009) (applying agency theory from Fifth Circuit to hold that the wife's debt from husband's loan fraud was dischargeable where there was no business partnership between them); *In re* Allison, 960 F.2d 481, 485–86 (5th Cir. 1992) (pointing to a Fifth Circuit case and three district court cases to apply the same principles as *Strang* to hold that the wife's debt from her husband's fraudulent purchase of real property was dischargeable); *In re* Luce, 960 F.2d 1277 (5th Cir. 1992) (relying on Supreme Court precedent to hold that the wife's debt as a result of her husband's fraud was not dischargeable in part because she monetarily benefited from his fraud both personally and as his business partner).

[129] *In re* Treadwell, 423 B.R. 309, 316–19 (B.A.P. 8th Cir. 2010), *rev'd and remanded*, 637 F.3d 855 (8th Cir. 2011) (finding the husband's debt was dischargeable despite his wife's fraud because Eighth Circuit case law followed the Supreme Court's holding in *Strang* and also required that the husband neither knew nor should have known of wife's fraud).

[130] *See, e.g.*, *In re* Gordon, 293 B.R. 817, 822–28 (Bankr. M.D. Ga. 2003) (examining trends in federal case law across the country to hold that intent to defraud should not be imputed to the wife under agency principles because she was not a partner in the husband's farming business); *In re* O'Connor, 145 B.R. 883, 892 (Bankr. W.D. Mich. 1992) (citing Sixth Circuit precedent to hold that the wife was not a partner because the business was a corporation of which she was not an active officer); *In re* Smith, 98 B.R. 423, 426–27 (Bankr. C.D. Ill. 1989) (citing federal law to hold that wife was liable for her then-husband's fraud under principal-agent law).

[131] *See supra* notes 95–96 and accompanying text.

### 3. Partnership and Agency Precedent

The *Bartenwerfer* Court embraced *Strang v. Bradner* as the case that provides the mechanism for imputing fraud liability to an innocent party.[132] *Strang* itself involved partnership,[133] although the cases under it also involve agent-principal relationships,[134] which is the other example the *Bartenwerfer* court gave for a doctrine that can impute fraud liability.[135] Thus, the constraints in partnership and agency law serve as constraints on an innocent party's potential liability for fraud. Crucially for victims of coerced debt—which occurs in the context of intimate partnerships—it is only business relationships that can transmit fraud liability. *Bartenwerfer* itself characterized the Bartenwerfer spouses as "business partners,"[136] and this comports with prior case law. *Strang* involved business partners who had no personal relationship.[137] In cases under *Strang*,[138] the relevant partnership or agent-principal relationship is always a business relationship,[139] and courts have universally held that a marital relationship alone is not enough to impute fraud.[140] Further, when considering whether spouses are business partners or agent-principals, the overwhelming majority of courts consider marriage to

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[132] Bartenwerfer v. Buckley, 598 U.S. 69, 79–81 (2023).

[133] Strang v. Bradner, 114 U.S. 555, 555–56 (1885).

[134] *See, e.g.*, *In re* Lau, No. 11-40284, 2013 WL 5935616, at *21–22 (Bankr. E.D. Tex. Nov. 4, 2013) ("With regard to Defendant Deborah Lau, a debt may be determined to be non-dischargeable for fraud based upon a spouse's fraudulent conduct when imputed under agency principles based upon a business relationship between the spouses.").

[135] *Bartenwerfer*, 598 U.S. at 76, 82.

[136] *Id.* at 72.

[137] Strang v. Bradner, 114 U.S. 555, 556 (1885).

[138] *Id.*

[139] The other example the *Bartenwerfer* Court gave of doctrines that transmit fraud liability to innocent parties is agency law. 598 U.S. at 76, 82. Some of the pre-*Bartenwerfer* cases under *Strang* involve agency relationships rather than partnerships, but these cases also require that the relationship pertains to a business.

[140] *See, e.g.*, *In re* Tsurukawa, 258 B.R. 192, 198 (B.A.P. 9th Cir. 2001) ("[A] a marital union alone, without a finding of a partnership or other agency relationship between spouses, cannot serve as a basis for imputing fraud from one spouse to the other."); *In re* Savage, 176 B.R. 614, 615–16 (Bankr. M.D. Fla. 1994) ("Neither independent nor research by counsel located any authority to support the proposition that under the laws of this State there is a presumption that husband and wife are agents to each other based simply by virtue of their marriage."). *See also* Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2552 (1996) ("[A]s a matter of substantive nonbankruptcy law, it is axiomatic that the marital relationship does not alone give rise to either a legal partnership or an agency.").

be a neutral or negative factor; we identified only one case saying that a marriage made it more likely that the parties were business partners.[141]

In all cases we found under *Strang* that involve family relationships,[142] the courts find that the innocent family member's debt is nondischargeable only when there is a business relationship—either a partnership or one of agent-principal—between the parties. For example, in *In re Luce*, the Fifth Circuit upheld a denial of discharge for the wife because she was a partner in the couple's business at the time her husband committed the fraud.[143] Similarly, cases reaching the opposite result and allowing a discharge do so because the spouses were not partners in a business enterprise. For example, in *Tower Credit Inc. v. Gauthier*, the Fifth Circuit upheld the allowance of a discharge for the wife because, "[w]here we have imputed fraud from one spouse to another, we have relied on agency theory, and done so only where the spouses were 'involved in a business or scheme.'"[144]

In addition, in the *Strang* cases, the business relationships usually involve actual businesses. For example, in *In re Treadwell*, the spouses ran a travel agency, while the spouses in *In re Luce* operated several businesses that supplied computers.[145] In *In re Shart*, the business, Malibu Equestrian Estates, involved selling, training, and boarding horses.[146]

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[141] *See* case cited *infra* note 152 and accompanying text.

[142] *See* cases cited *infra* Subsection III.B.3.

[143] 960 F.2d 1277, 1283 (5th Cir. 1992). *See also In re* Tsurukawa, 287 B.R. 515, 522 (B.A.P. 9th Cir. 2002) (holding wife's debt was not dischargeable because she was actively involved in ordinary business operations); *In re* Asbury, No. 08-21989, 2011 WL 44911, at *3 (Bankr. W.D. Mo. Jan. 6, 2011) (refusing to discharge wife's debt where she was actively engaged in the business partnership with her husband).

[144] 349 F. App'x 943, 945–946 (5th Cir. 2009) (addressing the appeal of *Tower Credit, Inc. v. Gauthier*, No. CIVA 08-609-JVP-DLD, 2009 WL 1309795, (M.D. La. May 11, 2009)). *See also In re* Beach, 651 B.R. 359, 374 (Bankr. E.D. Wis. 2023) (holding that wife held no liability for husband's debt where there was no evidence of her ownership interest in the business); *In re* Donohue, No. 12-43535-CAN7, 2014 WL 29111, at *6 (Bankr. W.D. Mo. Jan. 3, 2014) (holding no imputation of debt to wife under partnership principles); *In re* Gordon, 293 B.R. 817, 828 (Bankr. M.D. Ga. 2003) (allowing for discharge of wife's debt because she was not involved in husband's farming business).

[145] *In re* Treadwell, 637 F.3d 855, 857 (8th Cir. 2011); *In re* Luce, 960 F.2d 1277, 1283 (5th Cir. 1992).

[146] 505 B.R. 13, 21 (Bankr. C.D. Cal. 2014), *aff'd*, No. 2:10-BK-29973-B.R., 2014 WL 6480307 (B.A.P. 9th Cir. Nov. 19, 2014). *See also In re* Osborne, 951 F.3d 691, 704 (5th Cir. 2020) (medical business); *In re* Baker, No. 08-93509-BHL-7, 2011 WL 4549156, at *1 (Bankr. S.D. Ind. Sept. 28, 2011) (business comprised of oil distribution and gas station ownership).

Further, these cases look closely at the extent of the innocent spouse's involvement in the business associated with the fraud. For example, in *In re Shart*, the Bankruptcy Appellate Panel (BAP) for the Ninth Circuit upheld a finding that the wife was not a partner in the husband's business despite her having mailed a "fraudulent" package (of which she did not know the contents), used a business bank account to send her husband money when he was abroad, and given the husband's bookkeeper some business advice, because the bankruptcy court "sifted through the voluminous evidence" and determined that the wife had "no interest, or right to participate, in" the husband's business.[147] Similarly in *In re Treadwell*, the BAP for the Eighth Circuit reversed and remanded because the husband could be a partner in the wife's business when he was listed as a 50% owner of the business, the company reported profits and losses under his Social Security Number, and he was very involved in the convention that perpetuated the fraud by getting comped rooms and organizing events.[148] Likewise, in *In re Luce*, the Fifth Circuit upheld a finding of no discharge because the wife "signed leases, guarantees and acceptances of delivery connected with the lease financing."[149]

Moreover, some courts are particularly cautious about inferring business partnerships between spouses because they are concerned that normal spousal financial comingling could be misinterpreted as signs of a business partnership. For example, when applying Indiana law to spouses, "courts have required a heightened showing, since 'cotenancy of property and the sharing of losses and profits of a business . . . are consistent with the usual marital arrangement.'"[150] Similarly, under California law, courts are "careful" when finding spouses to be business partners because, "[t]he assumption of [business functions] by a spouse may not carry the weight that such conduct on the part of a stranger would imply . . . ."[151]

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[147] *Id*. at 18, 27 (holding that a wife was not responsible for the debt caused by her husband's fraud where her involvement in the business was "minimal").

[148] 637 F.3d at 864–65.

[149] 960 F.2d 1277, 1283 (5th Cir. 1992). *See also In re* Asbury, No. 08-21989, 2011 WL 44911, at *3–4 (Bankr. W.D. Mo. Jan. 6, 2011) (considering factors such as wife's endorsement of business checks and signature on loan documents as well as the spouses holding themselves out as partners); *In re* Antonious, 358 B.R. 172, 185–86 (Bankr. E.D. Pa. 2006) (finding the wife's debt dischargeable because the use of her bank account was not sufficient to show that she was a partner in her husband's business).

[150] *In re* Baker, No. 08-93509-BHL-7, 2011 WL 4549156, at *11 (Bankr. S.D. Ind. Sept. 28, 2011) (quoting Soley v. VanKeppel, 656 N.E.2d 508, 513 (Ind. Ct. App. 1995)).

[151] *In re* Tsurukawa, 287 B.R. 515, 522 (B.A.P. 9th Cir. 2002) (alteration in original) (quoting Pearson v. Norton, 230 Cal. App. 2d 1, 12, 40 Cal. Rptr. 634, 641 (Ct. App. 1964));

Pennsylvania law is the only underlying law applied in a case under *Strang* that makes marriage a positive factor in determining that the innocent party is a partner of the party who committed fraud. In *In re Paolino*, the court stated, "[u]nder Pennsylvania law, there is no automatic agency arising from marriage, but there is a presumption that either spouse has the power to act for both so long as the acting spouse's action benefits both."[152] The court declined to grant summary judgment to either side on the question of a partnership between the spouses but thought that a partnership was plausible for reasons that suggest a low threshold for finding partnership: "The debtors acquired the school property as tenants by the entireties. They also purchased more than ten other investment properties jointly."[153]

All but one of the seven bankruptcy cases that have applied *Bartenwerfer* in the context of an intimate relationship also involved businesses. In *In re Lee*, the bankruptcy court found the wife's debt dischargeable because the business was a corporation, not a partnership,[154] which is a holding in several pre-*Bartenwerfer* cases under *Strang*.[155] In *In re Beach*, the husband's business was an LLC, and the court found that the wife had no role in it.[156] In *In re Rassbach*, the business was also a corporation.[157] Although the *Rassbach* court declined to remove the wife from the adversary proceeding on a Rule 12(b)(6) motion, the court planned to hold the wife's debt nondischargeable under *Bartenwerfer* only if she were "an imputed partner or acting principal" of the business which had been found liable for fraud.[158] *In re Zolnier* also involved a business in that the fraud was transferring assets out of a business that was listed as holding assets on the

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*In re* Tsurukawa, Bankr. No. 98-34249-STC, Adv. Proc. No. 98-3501-TC, (consolidated with Adv. Proc. No. 99-3175-TC) (Bankr. N.D. Cal. Jan. 14, 2002) (discussing why it is inappropriate to find a partnership merely because one spouse performs minor services for the other spouse's business).

[152] 75 B.R. 641, 644 (Bankr. E.D. Pa. 1987).

[153] *Id.* at 645.

[154] No. 22-70367-REG, 2024 WL 1261790, at *12–13 (Bankr. E.D.N.Y. Mar. 25, 2024) (finding the wife's debt was dischargeable because (1) "100 percent shareholders are not subject to vicarious liability for the torts of a corporation's agents or employees" and (2) "a partnership may not exist where a business is conducted as a corporation").

[155] *See, e.g.*, *In re* Velasco, 617 B.R. 718, 734 (Bankr. M.D. Fla. 2020) (allowing a discharge because there cannot be a partnership when the business at issue is a corporation); *In re* Wright, 299 B.R. 648 (Bankr. M.D. Ga. 2003) (same).

[156] 651 B.R. 359, 374 (Bankr. E.D. Wis. 2023).

[157] 650 B.R. 568, 571 (Bankr. W.D. Wis. 2023).

[158] *Id.* at 578.

debtors' bankruptcy schedules.[159] In *In re Sharp*, the fraudster spouse had been convicted of stealing from her former employer, Kuns Northcoast Security Center, LLC.[160] Finally, in *In re Glasser*, the business was a photography company that allegedly defrauded its credit card payment processer.[161] In contrast, while the husband and wife in *In re Csigi* did own a business together,[162] the *Csigi* court's *Bartenwerfer* reasoning did not involve the couple's business.[163] But if Hawaii's law of fraud is anything like that of the other underlying laws in the cases we have cited,[164] a business relationship would be necessary to impute the wife's fraud to the husband. This is yet another way in which *Csigi* appears to be an outlier.

4. Room for Determining Discharge

Despite this analysis, there is still a counterargument that a simple textual analysis of § 523(a)(2)(A) would hold that a coerced-debt victim who is liable for a debt "obtained by fraud" cannot discharge it[165]—or at the very least, that a future Supreme Court could take this position. According to this argument, all we have demonstrated thus far is that in many cases, the victim will not be liable for the fraudulent debt under underlying law. Under this counterargument, there is no room for determining discharge under *Bartenwerfer*, because if the innocent spouse is liable for the fraudulent debt, the denial of discharge under § 523(a)(2)(A) is automatic, but if she is not liable for the fraudulent debt, then there is no debt to discharge. There are three reasons, however, why this counterargument is not persuasive.

First, the *Bartenwerfer* Court embraced *Strang*,[166] so it is unlikely that it meant to overturn cases applying *Strang's* principles of imputation of fraud.[167] And the cases under the *Strang* rule do allow the innocent spouse to discharge the potentially fraudulent debt. The strongest example is *Tower Credit Inc. v. Gauthier*.[168] There, the creditor argued that "the language of §

[159] No. 14-35884, 2024 WL 206357, at *1–2 (Bankr. S.D. Tex. Jan. 18, 2024).
[160] No. 22-30854, 2024 WL 2819674, at *1 (Bankr. N.D. Ohio June 3, 2024).
[161] No. AP 23-7006, 2024 WL 4471916, at *1 (Bankr. D.N.D. Oct. 11, 2024).
[162] No. 23-00617, slip op. at 4 (Bankr. D. Haw. Dec. 17, 2024).
[163] *Id.* at 12–14.
[164] *See* cases cited *supra* notes 146–149.
[165] *See* 11 U.S.C. § 523(a)(2)(A).
[166] Bartenwerfer v. Buckley, 598 U.S. 69, 81 (2023) ("The unmistakable implication is that Congress embraced *Strang*'s holding—so we do too.").
[167] Strang v. Bradner, 114 U.S. 555, 561 (1885).
[168] 349 F. App'x 943 (5th Cir. 2009).

523(a) speaks only in terms of which debts—rather than individual debtors—may be discharged, and therefore the bankruptcy court may not enter an order of discharge as to [the innocent spouse] alone."[169] But the Fifth Circuit rejected this argument because, "[w]e impute fraud to debtors 'only if the fraudulent representations were made by a formal partner or agent.'"[170] Another example is *In re Shart*, in which the BAP for the Ninth Circuit affirmed a bankruptcy court finding that, because there were no grounds to impute the husband's fraud to the wife, her debt to the creditor alleging fraud was dischargeable.[171] Similarly, in *In re Allison*, the Fifth Circuit affirmed lower court decisions holding that the wife's debt was dischargeable because the wife had no agency relationship that could impute the fraud to her.[172]

Second, the Supreme Court stated in the strongest terms that bankruptcy law does not determine whether innocent parties are liable for fraud: "§ 523(a)(2)(A) does not define the scope of one person's liability for another's fraud. That is the function of the underlying law."[173] Thus, the Court has left itself little room to expand *Bartenwerfer*'s holding beyond our analysis. If state law (or other underlying law) requires a business relationship between the fraudster and innocent spouse—as is in the case for all the state

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[169] *Id.* at 945.

[170] *Id.* While it is true that the Fifth Circuit was applying Supreme Court precedent as well as its own precedent, this analysis is analogous to the reasoning in cases applying state law. *See, e.g.*, *In re* Tsurukawa, 287 B.R. 515, 527 (B.A.P. 9th Cir. 2002) ("We have held, therefore, that in order to impute fraud to a spouse, there must be a 'partnership or other agency relationship.'") (quoting *In re* Tsurukawa, 258 B.R. 192, 198 (B.A.P. 9th Cir. 2001)).

[171] No. CC-14-1065-SpDTa, at *1 (B.A.P. 9th Cir. Nov. 19, 2014) ("In addition to finding that no partnership existed, the bankruptcy court held that there was no basis for imputing Mr. Shart's fraud to his wife for purposes of nondischargeability under § 523(a)(2)(A). Although Appellants argue otherwise, these findings are well supported by the record. For these reasons, we affirm.").

[172] 960 F.2d 481, 482 (5th Cir. 1992) ("We conclude that under the provisions of 11 U.S.C. § 523(a)(2)(A) the debt of Dean Allison is not dischargeable but that the debt of Phyllis Allison is."). *See also In re* Baker, No. 08-93509-BHL-7, 2011 WL 4549156, at *1 (Bankr. S.D. Ind. Sept. 28, 2011) ("[T]he Court finds Mr. Baker to be liable to [creditor] in the amount of $691,757.78, which judgment may not be discharged in Mr. Baker's bankruptcy case . . . . In contrast, [creditor] did not meet its burden of proof in its case against Mrs. Baker, and the Court finds that her obligations to [creditor] are wholly discharged . . . ."); *In re* Gordon, 293 B.R. 817, 828 (Bankr. M.D. Ga. 2003) ("The Court is persuaded that [wife's] obligations to Plaintiff are dischargeable in bankruptcy."); *In re* O'Connor, 145 B.R. 883, 895 (Bankr. W.D. Mich. 1992) ("The discharge of [wife] under 11 U.S.C. § 727 does discharge her from any debt owed to Plaintiff.").

[173] Bartenwerfer v. Buckley, 598 U.S. 69, 81–82 (2023).

laws applied by courts under *Strang*[174]—then it is difficult to see how the Supreme Court could drop that requirement.

Third, this counterargument proves too much because it would apply to traditional, stranger-perpetuated identity theft as well. Identity theft remedies do not always work even for victims of traditional identity theft. For example, the unauthorized use provisions granting relief for credit card fraud under the Truth in Lending Act cease to apply once the victim has paid off the fraudulent debt,[175] so identity theft victims who set their credit card bills on autopay and do not notice the fraudulent debts until after paying them cannot use this remedy. Yet, it is difficult to imagine that courts would prevent the discharge of debts that strangers incurred fraudulently.[176]

Rebutting this overly broad reading of *Bartenwerfer* has crucial implications for coerced debt, because coerced debt includes situations in which underlying law would hold the victim liable for the debt but not necessarily for the fraud used to incur it. In *In re Bartenwerfer* itself, as well as in many of the cases just discussed, the debt is a judgment for fraud,[177] so if the innocent spouse is liable for that judgment, her debt is likely nondischargeable. But with coerced debts, liability and fraud are often separate issues. Unless identity theft remedies apply, and they frequently do not,[178] the victim of coerced debt is liable under simple contract law. The abusive partner put the debt in her name, and there is no way to change the contract with the creditor.[179] But this is a default position of contract law based on the lack of effective remedies for coerced debt. It does not necessarily mean that the coerced-debt victim is liable for the fraud. In *In re Donohue*, a pre-*Bartenwerfer* decision applying the *Strang* rule,[180] the court

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[174] *See supra* Subsection III.B.3.

[175] 15 U.S.C. § 1666i(b) ("The amount of claims or defenses asserted by the cardholder may not exceed the amount of credit outstanding with respect to such transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of such claim or defense.").

[176] *See, e.g.*, *Bartenwerfer*, 598 U.S. at 82 ("And while Bartenwerfer paints a picture of liability imposed willy-nilly on hapless bystanders, the law of fraud does not work that way.").

[177] *In re* Bartenwerfer (*In re Bartenwerfer I*), 549 B.R. 222, 225 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).

[178] *Escaping Battered Credit*, *supra* note 8, at 390–94.

[179] *See supra* Section II.B (explaining the limitations of duress and divorce law).

[180] The *Donohue* court was applying Eighth Circuit precedent, but the rule is the same as *Strang*'s: "[T]he 8th Circuit authorizes imputation of fraud in bankruptcy dischargeability proceedings under partnership, agency or conspiracy vicarious liability principles . . . ." No.

held just that.[181] The wife was liable for the debt through which her husband committed fraud, because she had personally guaranteed it, but she could discharge the debt because she was not a partner or agent of her husband's business.[182] More generally, under all the state laws applied in the cases under *Strang*, fraud imputation to an innocent spouse is an active matter. The creditor must bring an action and prove the business relationship that can impute the fraud.[183]

### C. Implications for Future Cases

Missed opportunities in two recent cases, one of which is the finding of partnership in *Bartenwerfer* itself, illustrate how future cases can implement the limiting principles discussed in this section and find that barring the innocent spouse from discharge is not mandatory. First, when there is an underlying judgment, bankruptcy courts can examine whether that judgment determines both liability for fraud and a fraud-imputing relationship tying the victim of coerced debt to the fraud. The *Bartenwerfer* bankruptcy court handled the fraud liability portion of this inquiry in an ideal manner by applying collateral estoppel cautiously and making thorough findings about fraud for the remaining elements.[184] The other case we discuss, *In re Zolnier*, took place under § 727(d)(1) and did not examine the underlying judgment closely.[185]

Second, if there is no underlying judgment or the judgment does not address the coerced debt victim's role as a partner or principal, courts can use state-law precedent to require a detailed showing of the coerced-debt victim's

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12-43535-CAN7, 2014 WL 29111, at *5 (Bankr. W.D. Mo. Jan. 3, 2014) (citing *In re* Treadwell, 637 F.3d 855, 860 (8th Cir. 2011)). *See* Strang v. Bradner, 114 U.S. 555, 561 (1885).

[181] 2014 WL 29111, at *1, *8.

[182] *Id.* at *1, *8.

[183] *See, e.g.*, *In re* Asbury, No. 08-21989, 2011 WL 44911, at *2–3 (Bankr. W.D. Mo. Jan. 6, 2011) (finding that fraud could be imputed to the wife because the creditor met its burden of proof by demonstrating that her actions and conduct supported the existence of a partnership); *In re* Paolino, 75 B.R. 641, 649–650 (Bankr. E.D. Pa. 1987) (holding that the husband's fraud may be imputed to the wife if the guarantors can establish that the husband was acting as the wife's agent).

[184] *In re Bartenwerfer I*, 549 B.R. 222, 226–27 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).

[185] No. 14-35884, 2024 WL 206357, at *1–4 (Bankr. S.D. Tex. Jan. 18, 2024).

involvement in the business to ensure that she really is a partner or principal in the business. In both cases we discuss, the findings of a relevant business relationship under state law were lacking. There is, however, one potential defense that applies in both cases and to victims of coerced debt that is unlikely to be availing: fraudulent inducement to partnership.

1. Underlying Judgments

Although the *Bartenwerfer* Court was clear that fraud liability must be established under state law,[186] it did not discuss the necessity of an underlying judgment establishing fraud, so a bankruptcy court could confront a *Bartenwerfer* issue with or without an underlying judgment. Even if there is a judgment, that does not necessarily mean that the debt is nondischargeable. Creditors have the burden of showing that collateral estoppel applies,[187] so if the exact issue was not litigated and decided in state court, the bankruptcy court can hold a trial on the issue.[188]

The original bankruptcy court opinion in *Bartenwerfer* handled the fraud issue in an ideal manner on this point. The court found that three of the five elements required for a finding of fraud under § 523(a)(2) were litigated and decided in the California state court trial that preceded the bankruptcy filing. The opinion directly matched the findings in the California case to the three fraud elements and further found that "the principles underlying the doctrine of collateral estoppel are furthered by its application here."[189] The court held a bench trial on the remaining two elements—"knowledge of the falsity of the statement and intent to deceive the creditor"—because they were not litigated and decided in the prior lawsuit.[190] The parts of the opinion covering those two elements are rich and detailed, at least as they apply to David Bartenwerfer. Because both elements require a finding of the debtor's state of mind, the opinion systematically reviewed each defect in the house,

[186] *See supra* Subsection III.B.2.

[187] *In re Bartenwerfer I*, 549 B.R. at 226.

[188] *See* John Rao, *New Supreme Court Ruling: When Is a Bankruptcy Debtor on the Hook for Partner's Fraud?*, NAT. CONSUMER L. CTR. (Mar. 2, 2023), https://library.nclc.org/article/new-supreme-court-ruling-when-bankruptcy-debtor-hook-partners-fraud ("If a default judgment is entered against a debtor and issues related to the debtor's innocence or lack of agency or partnership relationship were therefore not actually litigated, collateral estoppel should not prevent the debtor from litigating these issues in the bankruptcy court.").

[189] *In re Bartenwerfer I*, 549 B.R. at 227.

[190] *Id.*

contrasting the condition of the house with information in the seller disclosures and analyzing Mr. Bartenwerfer's statements about the discrepancies.[191]

In contrast, in *In re Zolnier*, the court did not analyze the underlying judgment holding both spouses liable, which was for an eviction that does not appear to have involved fraud.[192] Rather, the fraud appears to be the husband hiding assets during the creditor's attempts to collect on the eviction debt, including bankruptcy fraud; on their bankruptcy schedules, the spouses stated that a company they owned had assets, when in fact, the husband had transferred the assets elsewhere.[193] The fraud must have been in the bankruptcy schedules rather than the eviction judgment, because the court revoked the debtors' discharge under § 727(d)(1), which applies to discharges obtained by fraud, not debts.[194]

2. Findings of a Relevant Business Relationship

In contrast to the actual businesses discussed in the cases under *Strang*, the Bartenwerfers were a married couple who sold a piece of investment real estate that had several defects not mentioned in the Bartenwerfers' disclosure statements.[195] And in contrast to the prior cases' detailed findings about the role of the innocent party in the fraudster's business, the facts supporting a business partnership between David and Kate Bartenwerfer are sparse. The opinion mentioned that the Bartenwerfers operated a property-development business called RJUOP I, LLC, but did not tie that business to the investment property at issue.[196] The Court did not discuss the spouses' roles in the business,[197] and Kate Bartenwerfer played no role in renovating the property.[198] The opinion tied Kate Bartenwerfer to the

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[191] *Id.* at 228–32.

[192] No. 14-35884, 2024 WL 206357, at *1 (Bankr. S.D. Tex. Jan. 18, 2024).

[193] *Id.*

[194] 11 U.S.C. § 727(d)(1) ("[T]he court shall revoke a discharge . . . if such discharge was obtained through the fraud of the debtor . . . .").

[195] *In re Bartenwerfer I*, 549 B.R. at 224–25.

[196] *Id.*

[197] *See id.* at 225 (noting only that the Bartenwerfers operated two businesses together).

[198] *In re* Bartenwerfer (*In re Bartenwerfer III*), 596 B.R. 675 (Bankr. N.D. Cal. 2019), *aff'd*, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), *aff'd in part, rev'd in part, remanded*, 860 F. App'x 544, 678 (9th Cir. 2021), *aff'd sub nom. Bartenwerfer v. Buckley*, 598 U.S. 69 (2023).

seller disclosures by noting that she signed them.[199] And in a footnote with no legal citations, the opinion set forth three facts that established Kate Bartenwerfer as a legal partner in the house sale: (1) she was on the deed to the house; (2) she signed the disclosure statements; and (3) she stood to benefit financially from the sale.[200] These factors apply to any person who co-owns real property.[201]

Despite reversing the bankruptcy court on the question of whether to apply partnership liability or the "known or should have known" approach,[202] the BAP for the Ninth Circuit upheld the bankruptcy court's finding that Kate Bartenwerfer was a business partner[203] under its prior case, *In re Tsurukawa*, which applied California law.[204] But *Tsurukawa* is easily distinguishable because the wife who was vicariously liable for her husband's fraud was extensively involved in the business. The BAP's opinion cited twelve factual findings detailing the wife's participation in the business, including that she: (1) held herself out as the sole owner of it; (2) made the initial capital contribution; (3) opened the business's checking account, initially designated herself as the sole signatory, and regularly balanced the business's books; (4) wrote and signed hundreds of business checks; (5) wrote one check to herself with the note that it was for "legal compensation of ownership"; (6) filed the business's tax returns, listing herself as the sole owner; and (7) applied for and used the business's credit card.[205] Moreover, it is not clear that the wife in *Tsurukawa* was entirely innocent of the fraud. The BAP noted that she "executed and filed the fictitious business name statement" and knew that the business's revenues were comprised entirely of funds from the company the husband defrauded.[206]

It is true that the *Bartenwerfer* BAP applied a legal standard with a low threshold for finding partnership when it affirmed the bankruptcy court's finding that Kate Bartenwerfer was her husband's business partner: "A

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[199] *In re Bartenwerfer I*, 549 B.R. at 227–28.

[200] *Id.* at 225 n.3.

[201] Residential real estate is probably not an issue, however. On the facts of *Bartenwerfer*, the real estate was for investment purposes, and it is difficult to characterize a couple buying a home for residential purposes as forming a "business partnership," because the purchase of a home to live in would be for personal, family, or household purposes. *See generally* Bartenwerfer v. Buckley, 598 U.S. 69 (2023).

[202] *In re* Bartenwerfer (*In re Bartenwerfer II*), No. AP 13-03185, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).

[203] *Id.*

[204] 287 B.R. 515, 523 (B.A.P. 9th Cir. 2002).

[205] *Id.* at 523–24.

[206] *Id.*

partnership can exist as long as the parties have the right to manage the business, even though in practice one partner relinquishes the day-to-day management to the other partner,"[207] a standard also employed in *Tsurukawa*.[208] However, the BAP opinion in *Tsurukawa* discussed caveats to this standard in the context of marriage:

> Thus, it is not appropriate to find an agency relationship in every instance in which a spouse takes bare legal title to business property held for the benefit of the couple, or where one spouse performs minor services for a business run by the other spouse. It is also inappropriate to find a partnership in every instance in which spouses share the profits of an enterprise, because under community property law a husband and wife generally share the profits of a business managed by either spouse.[209]

The *Tsurukawa* court concluded: "This is not such a case."[210] But *Bartenwerfer* arguably is such a case. The facts supporting Kate Bartenwerfer's role as a partner in the real estate project were entirely based on her ownership of the property. As an owner, she was required to sign the disclosure statements for the sale to take place,[211] and she would automatically stand to profit from the sale. Kate Bartenwerfer did not even perform minor services for the business.

Similarly, it is not clear that the *Zolnier* spouses had the necessary fraud-transmitting business relationship. This is especially poignant because the court took the unusual step of stating that it was "not happy" with revoking the wife's discharge[212] but felt bound by *Bartenwerfer*.[213]

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[207] *In re Bartenwerfer II*, 2017 WL 6553392, at *10.

[208] *In re Tsurukawa*, 287 B.R. at 522.

[209] *Id.* (quoting *In re* Tsurukawa, Bankr. No. 98-34249-STC, Adv. Proc. No. 98-3501-TC, (Consolidated with Adv. Proc. No. 99-3175-TC) (Bankr. N.D. Cal. Jan. 14, 2002)).

[210] *Id.* (quoting *In re* Tsurukawa, Bankr. No. 98-34249-STC, Adv. Proc. No. 98-3501-TC, (Consolidated with Adv. Proc. No. 99-3175-TC) (Bankr. N.D. Cal. Jan. 14, 2002)).

[211] *See* CAL. BUS. & PROF. CODE § 10018.02 (2019) (defining a seller as a transferor in a real property transaction); CAL. CIV. CODE § 1102.3 (2020) (requiring a seller of any single-family real property to deliver a completed written statement to the prospective buyer).

[212] In a footnote, the court stated, "The Court stresses that it is not happy with this result but feels bound by Supreme Court precedent." *In re* Zolnier, No. 14-35884, 2024 WL 206357, at *4 n.25 (Bankr. S.D. Tex. Jan. 18, 2024).

[213] *Bartenwerfer* was key to the *Zolnier* court's decision to revoke the wife's discharge. The creditor filed suit against the spouses to revoke their discharge in 2019. Bankruptcy Judge David Jones held a trial, after which the parties took a break to attempt to settle,

In *Zolnier*, *Strang* was actually the controlling Supreme Court precedent, not *Bartenwerfer*, because *Zolnier* involved fraud under § 727(d)(1),[214] which states that the relevant "fraud" is "of the debtor"[215] and thus is not "agnostic"[216] about who committed the fraud. *Strang* interpreted a predecessor of § 523(a)(2)(A) that similarly specified that the "fraud" was that "of the bankrupt."[217] *Strang* nevertheless found that the innocent partner was bound by the fraud of his business partner because "the fraud of one partner . . . is the fraud of all,"[218] language that the *Zolnier* court quoted.[219] Because *Strang* applied, the only way to revoke the innocent spouse's discharge was through a fraud-imputing business relationship. The *Zolnier* court, however, did not make such a finding, perhaps because the wife did not argue that one was necessary.[220]

It is unclear whether a fraud-imputing business relationship actually existed. As mentioned earlier, the fraud appears to have been misleading statements in the couple's bankruptcy schedules rather than a finding in the underlying judgment, which was for an eviction.[221] The *Zolnier* court ultimately revoked the wife's discharge because she benefited from the fraud, although the opinion did not state how she benefited.[222] Benefit was one of three factors that the *Bartenwerfer* bankruptcy court used to establish a business partnership between the spouses.[223] In addition, analogs of the other

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although a settlement was never reached. In 2023, Judge Jeffrey Norman took over the case after Judge Jones's resignation from the bench. *In re* Zolnier, No. 14-35884, 2024 WL 206357, at *4 n.25 (Bankr. S.D. Tex. Jan. 18, 2024). Judge Norman emphasized that Judge Jones "would not have revoked" the wife's discharge, but that "this matter was heard by Judge Jones prior to the opinion in *Bartenwerfer* and so he was unaware of its holding." *Id.* at *4 n.25.

[214] *Id.* at *3.

[215] 11 U.S.C. § 727(d)(1).

[216] Bartenwerfer v. Buckley, 598 U.S. 69, 76 (2023) (internal brackets omitted).

[217] *Id.* at 79 (quoting Strang v. Bradner, 114 U.S. 555 (1885)).

[218] *Id.*

[219] No. 14-35884, 2024 WL 206357, at *4 (Bankr. S.D. Tex. Jan. 18, 2024).

[220] In *Zolnier*, the wife, Michell, appears to have relied entirely on the findings of the bankruptcy judge who held the original trial and was not persuaded that the wife contributed to the fraud. *Id.* at *4 ("As stressed by Michell Zolnier's counsel, the trial court did not believe that William Zolnier's testimony should impact Ms. Zolnier.").

[221] *Id.* at *1–2.

[222] *Id.* at *4 ("Unfortunately for Michell Zolnier, she also received the benefit of the fraud, and therefore her discharge must also be revoked.").

[223] *In re Bartenwerfer I*, 549 B.R. 222, 225 n.3 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).

two factors that the *Bartenwerfer* bankruptcy court used to find a business partnership were present. In both cases, the wives co-owned the property with which the husband committed fraud and signed statements that turned out to contain fraudulent information (the disclosure statement in *Bartenwerfer*, the bankruptcy schedules in *Zolnier*).[224] So, the creditor in *Zolnier* may have been able to establish that the spouses had the requisite business relationship, but the underlying Texas law may differ from the California law in *Bartenwerfer*. And without an underlying judgment holding both spouses liable for fraud, it would be more difficult to show the relevant business relationship than it was in *Bartenwerfer*.[225]

### 3. The Limits of Fraudulent Inducement to Partnership

There is, however, one important doctrine applicable to these two cases and to coerced debt that is unlikely to protect victims of coerced debt. Although the husbands in both *Bartenwerfer* and *Zolnier* appear to have induced their wives to sign the relevant statements via fraud, that fact is unlikely to release the wives from business partnership liability.

For the *Bartenwerfer* bankruptcy court, the key fact establishing Kate Bartenwerfer's liability as a partner appears to have been that she signed the disclosure statements,[226] and Kate's signatures were probably fraudulently induced. The bankruptcy court found that David Bartenwerfer lied to Kate Bartenwerfer about the truthfulness of the disclosure statements,[227] and she seems to have relied on his assertions and authorized him to prepare the disclosure statements on her behalf.[228]

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[224] *Id.* at 225; *In re* Zolnier, No. 14-35884, 2024 WL 206357, at *2 (Bankr. S.D. Tex. Jan. 18, 2024).

[225] *See In re Bartenwerfer I*, 549 B.R. at 226–27 ("The state court jury verdict on Mr. Buckley's cause of action for Seller Non–Disclosure of Material Facts found that the Bartenwerfers failed to disclose material information that they knew or should have known (misrepresentation); that Mr. Buckley did not know nor could have known about the omitted information (justifiable reliance); and that the omission of material information was a substantial factor contributing to Mr. Buckley's harm (proximate cause and damages).").

[226] *In re Bartenwerfer I*, 549 B.R. at 227.

[227] *In re* Bartenwerfer III, 596 B.R. 675, 680 (Bankr. N.D. Cal. 2019), *aff'd*, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), *aff'd in part, rev'd in part, remanded*, 860 F. App'x 544 (9th Cir. 2021), *aff'd sub nom.* Bartenwerfer v. Buckley, 598 U.S. 69 (2023).

[228] During the adversary proceeding at the bankruptcy court, David Bartenwerfer tried to dissemble whether he prepared the disclosure statements for his wife in what the

The facts in *Zolnier* are even stronger because the Zolnier spouses were separated at the time that they filed for bankruptcy,[229] which puts the spouse who did not commit fraud at a further remove from the fraud of the spouse who did. Michell Zolnier, the innocent spouse, testified that she requested the information from her husband to complete her bankruptcy schedules.[230] The bankruptcy judge that heard the case appeared to find both that Mrs. Zolnier was credible on this point[231] and that her husband lied on their bankruptcy schedules.[232] These combined facts suggest that William Zolnier fraudulently induced Michell Zolnier to sign false bankruptcy schedules. And without that signature, Michell Zolnier could not have received her discharge via fraud.

Fraudulent inducement, however, would not change either wife's partnership liability or the partnership liability of a victim of coerced debt. Under the Revised Uniform Partnership Act (RUPA) and its most recent predecessor, the Uniform Partnership Act (UPA), a defrauded partner is still liable to the partnership's creditors.[233] The prior UPA at least had a provision that allowed a fraudulently-induced partner to rescind the partnership and recoup any losses via a lien on any surplus of the partnership.[234] RUPA, however, deleted the provision that created these rights, and the official comments state that "RUPA leaves it to the general law of rescission to determine the rights of a person fraudulently induced to invest in a

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bankruptcy court characterized as "an apparent effort to try to protect Mrs. Bartenwerfer from having any findings of fraudulent intent imputed to her." *In re Bartenwerfer I*, 549 B.R. at 228. In one instance, he stated that he did not prepare the disclosure statements for her, and in another instance, he avoided answering the question directly. But the bankruptcy court found that David Bartenwerfer's testimony on this point was contradicted by his statements in the California jury trial that established the Bartenwerfers' liability. *Id.*

[229] No. 14-35884, 2024 WL 206357, at *1 (Bankr. S.D. Tex. Jan. 18, 2024). It is unclear whether the Zolniers later reconciled or divorced.

[230] *Id.*

[231] The court stated that the bankruptcy judge who originally heard the case was not going to revoke Ms. Zolnier's discharge. *Id.* at *1–4.

[232] The court cut off Mr. Zolnier's rambling response to the court's question of whether he lied on his bankruptcy schedules by stating, "No, you need to stop talking." *Id*. at *1 (quoting Transcript of Trial at 197, *In re* Zolnier, No. 14-35884, 2024 WL 206357 (Bankr. S.D. Tex. Jan. 18, 2024)).

[233] REV. UNIF. P'SHIP ACT § 306(a) (1997); J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 16:37 (2023) ("[T]he defrauded partner remains liable to creditors that deal with the partnership during its existence . . . .").

[234] UNIF. P'SHIP ACT § 39 (1914).

partnership."[235] Although a few states have not adopted RUPA,[236] the UPA's remedies against one's partner are less helpful in the context of coerced debt, because coercive control may make it unsafe to sue one's ex-intimate partner for indemnification.[237]

## IV. The Normative Case for Not Extending Nondischargeability

There are strong normative arguments for not extending the imputation of liability to innocent intimate partners beyond the contours of current case law. Important differences between purely commercial enterprises and those that take place within the context of intimate relationships suggest that courts should be cautious about extending liability there. This is especially true when the business is less of an established business than a single project of the couple, as was the case in *Bartenwerfer*.[238] When the issue is coerced debt, the equities shift even further in favor of the innocent partner, because victims of coerced debt do not consent to incurring debts in their names and may face barriers in leaving abusive relationships.

### A. Intimate Partnerships Generally

#### 1. Partner Selection

In a purely commercial enterprise, potential business partners select each other and principals select agents based on business attributes. Does the person being considered have the background, skills, and knowledge necessary for the project? Does she have good business judgment and enough sophistication to handle problems that may arise?[239] In contrast, people select intimate partners based on factors like chemistry, availability, temperament,

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[235] REV. UNIF. P'SHIP ACT § 405 cmt.5 (1997).

[236] REV. UNIF. P'SHIP ACT app.C (2023).

[237] *See infra* Subsection IV.B.2.

[238] *In re* Bartenwerfer I, 549 B.R. 222, 224–25 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).

[239] *See, e.g.*, Christine Hurt, *Startup Partnerships*, 61 B.C. L. REV. 2487, 2488 (2020) (finding differences between informal partnerships resulting from romantic relationships and formal business entities).

shared interests, common life goals (such as raising children), and values.[240] Values can play a major role in both types of decisions, and selecting an intimate partner with a strong moral compass could have the side-effect of protecting one from imputation of fraudulent debt. And there is plenty of advice warning people to consider the finances of potential romantic partners[241] and to be on the alert for romance-based scams.[242] But in general, the selection of intimate partners is not a domain known for its rationality,[243] and the difficulty of finding a mate[244] can compromise decision making.[245] Regardless of good advice, it is safe to say that, when selecting a mate, factors such as chemistry, opportunity, and shared life goals are likely to supersede qualities related to business acumen.[246]

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[240] GARTH FLETCHER ET AL., THE SCIENCE OF INTIMATE RELATIONSHIPS 152–53 (Garth Fletcher et al. eds., 2nd ed. 2019) (citing Richard Lippa, *The Preferred Traits of Mates in a Cross-National Study of Heterosexual and Homosexual Men and Women: An Examination of Biological and Cultural Influences*, 36 ARCHIVES SEXUAL BEHAV. 193, 208 (2007)) (explaining that men and women in every culture around the world select mates based on availability, trustworthiness, warmth, intelligence, attractiveness, health, ambition, and the possession of status and resources).

[241] *See* Elizabeth Gulino, *When Can You Ask The Person You're Dating: "How Much Money Do You Make?"*, REFINERY 29 (Feb. 20, 2024, 10:30 a.m.) (emphasizing the importance of considering a partner's attitudes about debt and spending); Erin Lowery, *Dear Valentine, Can You Love Me for My Credit Score?*, BLOOMBERG (Feb. 16, 2024, 11:40 a.m.), https://www.refinery29.com/en-us/how-to-talk-about-money-in-a-relationship; https://www.bloomberg.com/opinion/articles/2024-02-13/valentine-s-day-share-your-love-and-your-credit-score (arguing that prospective partners should be evaluated based on financial status, in addition to other metrics).

[242] *Romance Scams*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/how-we-can-help-you/scams-and-safety/common-scams-and-crimes/romance-scams (last visited June 19, 2024).

[243] Christine B. L. Adams, *Why Do We Make Irrational Choices in Love Relationships?*, PSYCH. TODAY (Apr. 25, 2024), https://www.psychologytoday.com/us/blog/living-on-automatic/202404/why-do-we-make-irrational-choices-in-love-relationships.

[244] In 2022, approximately 42% of single U.S. adults were looking for a committed romantic relationship and/or casual dates. *The share of single men in the U.S. who are looking for dates or a relationship has declined since 2019*, PEW RSCH. CTR. (Feb. 7, 2023), https://www.pewresearch.org/short-reads/2023/02/08/for-valentines-day-5-facts-about-single-americans/ft_2023-02-08_facts-single-americans_03-png/.

[245] SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY 13 (2013) (showing how scarcity can compromise decision making).

[246] FLETCHER ET AL., *supra* note 240, at 152–53.

2. Dynamics of Intimate Partnerships

Once in an intimate partnership, the decision to start a project that a court may later characterize as a business can result from non-business factors. For example, a participant in our study who had coerced debt from investment real estate stated that the house-renovation projects began as her then-husband's "passion project," which she supported to make him happy.[247] We were struck by the similarities of that participant's marriage-career situation to that of the Bartenwerfers. Kate Bartenwerfer had a career as a regulatory attorney, while David Bartenwerfer's full-time job was renovating the house whose sale led to the fraud, "even though he had no training or education in construction and did not possess a contractor's license."[248] A hint that Kate Bartenwerfer would not have chosen this project if it were a purely commercial venture comes from her testimony about the real estate broker license she obtained but never used. She considered the real estate industry "too risky and too unstable" for a career.[249]

And once a business is running, the intimate partner with no role in the business may be unlikely to question the other partner. As an earlier law review article argued, "[s]pouses may be especially vulnerable to one another's deceptions and susceptible to wishful thinking about each other's character or financial prospects."[250] As mentioned earlier, the bankruptcy court found that David Bartenwerfer lied to Kate Bartenwerfer about the veracity of the assertions in the seller disclosure forms,[251] and the context of the intimate relationship may have led her to believe him.

Further, questioning one's intimate partner or seeking to document their claims may not be tenable without upsetting the dynamics of the romantic relationship, because suspicion of errors or fraud "may be

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[247] Telephone Interview with Jennifer, Study Participant.

[248] *In re* Bartenwerfer III, 596 B.R. 675, 677 (Bankr. N.D. Cal. 2019), *aff'd*, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), *aff'd in part, rev'd in part, remanded*, 860 F. App'x 544 (9th Cir. 2021), *aff'd sub nom.* Bartenwerfer v. Buckley, 598 U.S. 69 (2023).

[249] *Id.* at 677–78.

[250] Steven H. Resnicoff, *Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse—Bankruptcy Dischargeability of Vicarious Debt?*, 42 CASE W. RSRV. L. REV. 147, 172 (1992).

[251] *In re Bartenwerfer III*, 596 B.R. at 680 ("Unfortunately, much of what Mr. Bartenwerfer told [Kate Bartenwerfer]—and much of the information disclosed in the [disclosure]—was false, and Mr. Bartenwerfer knew it was false when he prepared the [disclosure].").

overshadowed by a spouse's desire to avoid acts, such as demanding access to hard facts regarding the other spouse's conduct, which might cause unpleasant disruption of a sensitive relationship."[252] Alternatively, the partner not involved in the business might—legitimately, from a relationship perspective—take a hands-off approach to her partner's business, just as she would expect her partner to avoid interfering in her career. We see hints of these possibilities in the Bartenwerfers' home renovation project. The initial proposed remodeling was "relatively modest," but it expanded into a "gargantuan project" after David Bartenwerfer became "inspired" (Kate Bartenwerfer's word).[253] Another sign that Kate Bartenwerfer did not control the contours of the project is that she initially obtained a real estate license to sell the renovated house, but later decided that she was too inexperienced to handle a "complicated" real estate transaction.[254]

In short, someone like Kate Bartenwerfer is between a rock and a hard place if her partner is committing fraud. If she signs the disclosure statements, she may be liable for the fraud. But if she attempts to verify her husband's statements or does not sign, she risks significant damage to her marriage. She does, however, have one option—however undesirable—that many victims of intimate partner violence cannot easily access: divorce.[255]

### 3. Incorporation Irony

One of the major ways that associates of a business—intimate partners or otherwise—can protect themselves from vicarious liability is by incorporating. Indeed, the Supreme Court mentions the possibility of incorporation as one reason why its *Bartenwerfer* holding will not impose liability "willy-nilly on hapless bystanders."[256] The prior cases under *Strang*

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[252] Resnicoff, *supra* note 250, at 172–73 (quoting Macaux v. Commissioner, 47 T.C.M. (CCH) 225, 229 (1983)) ("It is unlikely that in many marriages one spouse will risk domestic violence or even sacrifice domestic tranquility for the [accurate reporting of financial information]."). Nevertheless, during the *Bartenwerfer* bankruptcy court's second bench trial, the creditor seeking nondischargeability argued "that the court received no evidence that Mrs. Bartenwerfer could not have reviewed the permits, construction drawings, invoices, or other relevant documents; or that she could not have spoken to contractors or to others" about the property." *In re Bartenwerfer III*, 596 B.R. at 681.

[253] *In re Bartenwerfer III*, 596 B.R. at 677.

[254] *Id.* at 678.

[255] *See infra* Subsection IV.B.2.

[256] Bartenwerfer v. Buckley, 598 U.S. 69, 82 (2023) ("Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts.").

recognize this principle as well; holdings that there is no vicarious liability in the context of a corporation are common.[257]

The irony is that the less formal the business and the less sophisticated the uninvolved partner (and thus the more deserving of protection she is as an "honest but unfortunate"[258] debtor), the less likely she is to know of or consider incorporation. Purely commercial businesses operate only in the sphere of commerce and thus are more likely to consider practical ramifications; nearly three-quarters of small businesses with employees incorporate.[259] In contrast, intimate partners managing a project may not even consider themselves to be running a business. For example, of the seven coerced debts secured by investment real estate in our study, none of them were flagged by the divorce decree and/or the participant as being business debts. Three of them were for participants who did not have businesses mentioned in the property distributions of their divorce decrees.[260] The other four debts belonged to one participant who answered that none of these debts were business-related when asked.[261]

## B. Coerced Debt

As the factual scenario shifts from an apparently non-abusive relationship, albeit one featuring deception,[262] to relationships characterized by coercive control, the equities shift even further in favor of innocent partners. Victims of coerced debt have little or no control over acquiring the debts and a decreased ability to leave the relationship.

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[257] *See, e.g.*, *In re* Lee, No. 22-70367-REG, 2024 WL 1261790, at *12–13 (Bankr. E.D.N.Y. Mar. 25, 2024); *In re* Velasco, 617 B.R. 718 (Bankr. M.D. Fla. 2020).

[258] Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[259] U.S. SMALL BUS. ADMIN., HOW ARE MOST SMALL BUSINESSES LEGALLY ORGANIZED 5 tbl.2 (2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf (finding that 74.7 percent of small employer firms are corporations while only 6.2% of small businesses without employees are).

[260] To avoid over-taxing participants during the intensive coerced-debt screening, we asked if a participant's debts were for a business only if a business was listed in the property distribution of her divorce decree.

[261] Telephone Interview with Jennifer, Study Participant.

[262] *See, e.g.*, *In re* Bartenwerfer III, 596 B.R. 675, 680 (Bankr. N.D. Cal. 2019), *aff'd*, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), *aff'd in part, rev'd in part, remanded*, 860 F. App'x 544 (9th Cir. 2021), *aff'd sub nom.* Bartenwerfer v. Buckley, 598 U.S. 69 (2023) ("Unfortunately, much of what Mr. Bartenwerfer told her—and much of the information disclosed in the TDS—was false . . . .").

1. Lack of Control

There are two reasons why victims of coerced debt lack control over its acquisition. First, hiding financial information is common in abusive relationships and significantly correlated with coerced debt. In a prior study, we surveyed women who called the NDVH about coerced debt. We found that seventy-one percent reported that their partner had kept financial information from them[263] and that these women who reported hidden financial information were more than 3.6 times more likely than other women to report coerced debt.[264] Cutting off access to information about the family's finances makes it easier for abusive partners to incur coerced debt and more difficult for victims to address it.[265]

Second, the mechanisms of coerced debt leave little room for choice. In the following subsections, we use the twenty-one business debts from our study as a case study for applying *Bartenwerfer* to coerced debt. We address the mechanisms of fraud and coercion separately.

a. Fraud

When an abusive partner uses fraud to incur a coerced debt, the victim has no knowledge of it and thus no way to prevent the transaction. For example, a participant we have called Heidi had two credit cards that her ex-husband opened in her name without her knowledge.[266] She suspected that he used the funds for his day-trading business and thus classified them as business debts.[267] We do not have direct information about her role in the business, although her ex-husband received the business in the divorce.[268] But even if Heidi had a partnership role in the business, it is highly inequitable to view someone who had no knowledge of the credit card accounts as a partner in their fraudulent opening and use.

And because the fraud on the victim of coerced debt is also a fraud on the creditor, there could be facts that support an argument against discharging

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[263] Adams, Littwin & Javorka, *supra* note 9, at 1331.

[264] *Id.* (predicting the likelihood of having coerced debt (odds ratio = 3.57, $p < .001$) after controlling for age and race/ethnicity).

[265] *Coerced Debt*, *supra* note 3, at 981–86.

[266] Telephone Interview with Heidi, Study Participant.

[267] The other possible purchases she listed were an air conditioner, a fence, electronics for him, and guns.

[268] Final Decree of Divorce, Heidi and Anonymous.

the debt. On the other hand, bankruptcy is not the only option for fraudulent transactions; victims of fraud do have recourse to identity theft remedies.[269] These remedies, however, are often unavailing. Victims of coerced debt can face barriers accessing them due to decision maker skepticism of fraud within an intimate relationship.[270]

Another participant, Skylar, had nearly $40,000 of tax penalties in her name from a business that she and her ex-husband jointly owned and operated.[271] It was her then-husband's role in the business to pay the taxes, and the participant thought he was paying them. But for three years, he did not even file the business's federal income taxes and instead took the funds set aside for taxes and hid them in his own account. Not filing a business's taxes and appropriating the business's funds for personal use is fraud on the Internal Revenue Service (as well as on the business's other creditors) in addition to being fraud on the participant. And as a joint owner-operator, Skylar would be considered a partner.[272] But two points mitigate the harm that *Bartenwerfer* could cause in this case. First, these taxes probably were not dischargeable anyway.[273] Second, Skylar had applied for innocent spouse relief under the tax code[274] and believed that she would receive it.

b. Coercion

For coercive transactions, the abusive partner's goal is to leave the victim with no choice besides incurring the debt in her name. In the study, we operationalized coerced transactions with a two-part question based on a mechanism of coercive control.[275] In coercive control, abusive partners make

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[269] Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 and 20 U.S.C.).

[270] *Escaping Battered Credit*, *supra* note 8, at 378.

[271] Telephone Interview with Skylar, Study Participant.

[272] Even if the business was organized as a corporation, the participant believed that she was personally liable. *See supra* Subsection IV.A.3 (suggesting that corporate status can protect from partnership liability).

[273] At least some of the taxes were incurred within three years of the interview. 11 U.S.C. § 523(a)(1)(A) (referencing section 507(a)(8)) & (a)(7)(A)). In addition, the failure to file a return would make any older taxes ineligible for discharge too. 11 U.S.C § 523(a)(1)(B)(i). Under Fifth Circuit law, it would not matter if the business later filed a return. *In re* McCoy, 666 F.3d 924, 932 (5th Cir. 2012) (holding that filing a tax return even one day late makes it ineligible for discharge).

[274] 26 U.S.C. § 6015.

[275] MARY ANN DUTTON, LISA GOODMAN & R. JAMES SCHMIDT, DEVELOPMENT AND

demands of their partners and enforce them with threatened consequences. For coerced debt, the demand is to incur debt. Demands are enforced with threats of harm.[276] The threatened consequences are typically forms of abuse—physical, financial or psychological—and the threats can be stated outright or implied based on past behavior or history.[277] So, in the study, if the participant reported that her ex-husband issued a demand to incur debt, we asked a follow up question: "What if you said 'no' to opening this account? Did your ex-husband make you think he might hurt you or a loved one in some way if you didn't do what he wanted? By 'hurt you,' I mean physically, emotionally, financially, or any other way." We specified the type of account, such as mortgage, student loan, vehicle loan, etc., and for revolving accounts like credit cards, we also asked about the use of the account in addition to its opening.

Two participants had coercive business transactions in which the feared consequence was physical abuse, a third experienced physical intimidation, and a fourth participant refinanced a mortgage under a subtle combination of implied threats. For the first participant, Bianca, the loan was a HELOC in which her husband used fraud and coercion to borrow nearly $200,000 to cover taxes for his business and property.[278] In response to the consequences question, Bianca said, "It wasn't an option. It wasn't an option. I don't know what he would've done. That's all speculation. I just had to," and then said she was worried about potential physical violence.[279] To add insult to injury, her ex-husband established the HELOC so that she was only a co-debtor and could not borrow on it, which she discovered when she tried to use it to pay for her attorney in their divorce.[280]

The second case in which the participant feared physical abuse involved Heidi, the participant whose ex-husband fraudulently opened two credit cards in her name.[281] Heidi's ex-husband also coerced her into opening a HELOC, saying that he needed $20,000 for his day-trading business. When asked what she thought might happen if she said no, Heidi said: "He might have gotten physically violent. I mean, I don't know . . . . I mean, even if it wasn't physically violent with me, it might have been physically violent with

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VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE app.C (2005), https://www.ojp.gov/pdffiles1/nij/grants/214438.pdf.

[276] *Id.*

[277] Dutton & Goodman, *supra* note 45, at 751.

[278] Telephone Interview with Bianca, Study Participant.

[279] *Id.*

[280] *Id.*

[281] Telephone Interview with Heidi, Study Participant.

the house, because he's done that in the past, too."[282] She described her ex-husband as "pretty terrifying" and discussed the gun collection he kept on the walls of their home, which included assault rifles and silencers. During the divorce, Heidi learned that her ex-husband had actually borrowed more than $70,000 total on the HELOC, making many of the ex-husband's charges fraudulent. In contrast, she did not know how to access it. The divorce decree instructed the spouses to sell the house and split the proceeds 50/50. She got an additional $10,000 back for charges he made on the HELOC after she moved out, but that was a drop in the bucket compared to the charges he made.[283]

For both HELOCs, the initial coercion to sign off on the opening of the HELOC could count as fraud on the creditor because the ex-husband was misrepresenting that the participant was willingly agreeing to the loan. In both cases, the ex-husband used fraud and coercion to charge money on the HELOC, but that may not matter, because arguably, any charges on a fraudulently-induced line of credit could be considered fraud on the creditor. The partnership question is interesting in these cases. Both spouses were on the deeds to both houses, and the participants signed for the HELOCs, albeit unwillingly, but the homes were primary residences and thus could not be construed as parts of business partnerships. On the other hand, at least part of the HELOC funds in both cases went to the ex-husbands' businesses, and we have little information about the participants' roles in them, although in both cases, the ex-husbands received all businesses mentioned in the divorce decrees.

Camilla, the third participant who reported fearing physical threats, opened a personal loan to buy a commercial-grade power washer that her then-husband and his father were using to start a side business cleaning outdoor areas.[284] She reported that her ex-husband pressured her to open the loan with a combination of emotional coercion and intimidation: "He'd make me feel bad for not helping him and his dad out . . . . And he would throw things and break dishes and punch the door and intimidation tactics."[285] This participant reported a general atmosphere of coercion in her marriage. Her physical abuse score reflected a significant amount of abuse,[286] and she

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[282] *Id.*

[283] *Id.*

[284] Telephone Interview with Camilla, Study Participant.

[285] *Id.*

[286] *See* Murray A. Straus, *Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales*, 41 J. MARRIAGE & FAM. 75, 75–88 (1979); Cris M. Sullivan and

"strongly" or "somewhat" agreed (the two highest levels), with all but one of the twelve items on the battering scale, which measures the effects of living with coerced control.[287]

Camilla was left paying the debt; she stated that her father-in-law gave her husband money for the loan payments, but her then-husband kept the money for himself.[288] The divorce decree assigned the debt to her ex-husband, but he was still not paying it and had not refinanced it to remove her name, as required by the decree.[289]

Camilla clearly described the business as belonging to her then-husband and his father when stating the purpose of the loan: "It was to purchase a commercial grade power washer, and him and his dad were going to have a little side business."[290] But the divorce decree did not mention the business, and a court could find facts we do not know to determine that she was a business partner.

The comments of the fourth participant, Maya, paint a picture of the subtle interaction of fear of emotional and physical abuse in coercive control.[291] This participant had a refinancing in her name that cashed out home equity that her ex-husband used to invest in rental properties. Interestingly, she was not on the deed to the house.[292] Her ex-husband nevertheless coerced her into signing the refinancing because she had a steady income and better credit than he did. When asked if her ex-husband would hurt her in some way if she said no to the refinancing, the participant said he would get angry and upset, that it would be "very ugly." She elaborated, "So if I said no, it did not go well because then that was me not allowing the growth of these

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Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women With Abusive Partners*, 67 J. CONSULTING & CLINICAL PSYCH. 43, 46 (1999). The instrument contains twenty-two items and allocates points based on the frequency with the participant endorses each item. The points are: never = 0, one time/once = 1, two times/twice = 2, three or four times = 3, five to ten times = 4, and more than 10 times = 5. The points are totaled for a scale score; Camilla's scale score was 10.

[287] Paige Hall Smith, Jo Anne Earp & Robert DeVellis, *Measuring battering: development of the Women's Experience with Battering (WEB) Scale*, 1 WOMEN'S HEALTH: RSCH. ON GENDER, BEHAV., & POL'Y 273, 288 (1995).

[288] Telephone Interview with Camilla, Study Participant.

[289] Final Decree of Divorce, Camilla and Anonymous.

[290] Telephone Interview with Camilla, Study Participant.

[291] Telephone Interview with Maya, Study Participant.

[292] In author Angela Littwin's first article on coerced debt, several of the professionals she interviewed stated that they regularly saw situations in which the husband was the only person listed on the deed to real estate and the wife was the only person listed on the mortgage. *Coerced Debt*, *supra* note 3, at 993.

investments, property . . . . But physically, no. Not in this instance . . . but I can say I lived on eggshells."[293] So, even though she was not worried about physical abuse in this instance, fear of it led her to walk on eggshells and thus could reasonably contribute to her placating her ex-husband to avoid "very ugly" situations. It appears that the participant's name was on the deed to at least some of the rental properties—the couple eventually owned nearly fifty units, and we do not have information about all of them—so she probably would be considered a partner under the factors that the *Bartenwerfer* bankruptcy court applied.

The remaining potential business debts in our study were coerced with the threat of emotional or psychological consequences, although these participants' choices could still be highly constrained. With coercive control, abusive partners use as much leverage as necessary to control the victim.[294] So if an emotional threat is enough to obtain compliance, then the abusive partner does not need to resort to physical threats–until the emotional threats stop working.[295] In addition, the context of abuse in a relationship can influence decisions in the background. Most of these participants experienced some physical abuse from their ex-husbands, and most of them endorsed some items on the battering scale that indicated genuine fear of their ex-husbands: (1) "He [made] me feel unsafe even in my own home"; (2) "I [tried] not to rock the boat because I [was] afraid of what he might do"; (3) "He [could] scare me without laying a hand on me"; and (4) "He [had] a look that went straight through me and [terrified] me."[296] On the other hand, to the extent that these participants were not forced to open and use these accounts, then the obtaining of credit may not constitute fraud on the creditor because the ex-husband did not misrepresent the participant's consent to the transaction.

Regardless, exploring the circumstances of these debts and psychological coercion used to obtain them can illustrate the relationship dynamics that courts should consider when determining whether intimate partners are also business partners.

Two of these debts were lines of credit that participant Jennifer opened under pressure.[297] One was a HELOC with $70,000 of charges and

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[293] Telephone Interview with Maya, Study Participant.

[294] Dutton & Goodman, *supra* note 45, at 743 (exploring coercive control in intimate partner relationships).

[295] *See supra* Section II.A.

[296] Smith, Earp & DeVellis, *supra* note 287, at 288.

[297] Telephone Interview with Jennifer, Study Participant.

the other was a general line of credit that had charges of at least $30,000.[298] When asked what would happen if she had not agreed to open the HELOC, Jennifer said, "And yes, I felt pressured and yes, the emotional side, I knew he would not be happy if I didn't agree."[299] For the non-HELOC line of credit, the threat she feared was that her ex-husband would cease speaking to her and generally be nasty. To provide more context, the psychological abuse tactics Jennifer reported that her ex-husband most frequently employed during their relationship were treating her like an inferior, monitoring her time and making her account for her whereabouts, being jealous or suspicious of her friends, keeping her from helping herself, and blaming her for his problems.[300] She reported a low level of physical abuse,[301] but "strongly" or "somewhat" agreed (the two highest levels of agreement) with all four battering measure items that tap into fear.[302]

Jennifer's ex-husband then used the line of credit without her knowledge for business expenses for one of his start-up companies. He also used the line of credit via emotional coercion mostly for his business and partly for unspecified personal expenses. On the HELOC, her ex-husband accessed the credit without her knowledge and used most of it for his business. He charged the remaining amount for luxury travel via emotional coercion. We have little information about any role Jennifer played in her ex-husband's business, although he received it in the divorce. If using emotional coercion to pressure the participant to open the accounts does not count as fraud on the creditor, then fraudulent or coercive use of the account would not count either because the husband had the right to use lines of credit in his name.

Three other participants had credit cards that were opened and/or used with emotional coercion. The first participant, Maeve, had a credit card that her ex-husband pressured her to open via emotional coercion and then used for fraudulent and coercive transactions for his business.[303] The emotional coercion was that he guilted her by using his status as a provider for their

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[298] The participant said she did not know how much her ex-husband charged on the line of credit, stating that he regularly incurred charges, paid them off, and then incurred further charges. But the participant's credit report listed the high balance for this account as a little over $30,000.

[299] Telephone Interview with Jennifer, Study Participant.

[300] *See* Richard M. Tolman, *The Validation of the Psychological Maltreatment of Women Inventory*, 14 VIOLENCE & VICTIMS 25, 25–37 (1999).

[301] *See* sources cited *supra* note 286.

[302] *See supra* note 296 and accompanying text.

[303] Telephone Interview with Maeve, Study Participant.

family: "He probably would've given me a guilt story about, 'Well, without it, I can't buy materials and I can't help take care of my family' and all that stuff."[304] For context of their relationship, she reported a significant level of physical abuse[305] and endorsed three of the four battering scale items that tap into fear.[306] The psychological abuse behaviors she experienced most frequently during her relationship with her ex-husband were that he treated her like an inferior, monitored her time and made her account for her whereabouts, told her that her feelings were irrational or crazy, blamed her for his problems, and tried to make her feel crazy.[307]

Maeve's then-husband initially agreed to pay for the debt, but during the divorce, he refused to take responsibility for it.[308] She referred to the business as her ex-husband's: "I was just pressured to [open the credit card] because he's a contractor, so for supplies,"[309] and the business was not mentioned in the divorce decree.[310]

The second participant with credit card debt incurred for her ex-husband's business was Serena. She felt emotionally coerced into opening a credit card in her name for his business use because she was afraid he would blame her for his business not succeeding:

> I felt like I didn't have a whole lot of choice in the matter. It was like, if you don't do this, then his business will not be able to progress and we will never be able to make ends meet . . . . I think that if I had not opened that account for him, he probably would have . . . . It would've been really easy for him to blame me for his business not being successful because he could never really get ahead.[311]

Even though the credit card was Serena's individual responsibility, her ex-husband used it as his own. When asked if he used it without her knowledge, she stated: "Almost exclusively. It was basically his card."[312] For context, Serena reported significant physical abuse in the relationship

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[304] *Id.*
[305] *See* sources cited *supra* note 286.
[306] *See supra* note 296 and accompanying text.
[307] *See* Tolman, *supra* note 300, at 25–37.
[308] Telephone Interview with Maeve, Study Participant.
[309] *Id.*
[310] Final Decree of Divorce, Maeve and Anonymous.
[311] Telephone Interview with Serena, Study Participant.
[312] *Id.*

generally[313] and endorsed three of the four battering scale items that implicate fear at the highest level.[314] She reported frequently experiencing nine of the fourteen items on the psychological abuse scale, including her ex-husband swearing, yelling and screaming; interfering with relationships with her other family members; and telling her that her feelings were irrational or crazy.[315]

Sophie was the third participant with credit card debt.[316] Her ex-husband pressured her into using two credit cards for his businesses. She used both credit cards to buy "product" for his businesses. Sophie said, "I was trying to support him in several different businesses, so he would ask me to buy product. He would sell the product, and instead of giving me the money to pay the credit card, he would just put the money in his own pocket . . . ."[317] The second credit card was additionally used to buy URLs.[318] The consequences she feared if she did not make the purchases were: "He would just punish me with the silent treatment or just be unreachable, unfriendly, just hard to live with. Punitive . . . . He would make sure I was unhappy if he was unhappy." For context, she reported no physical abuse[319] and did not strongly endorse any of the battering items that implicate fear.[320] The psychological abuse items she reported experienced frequently were that her ex-husband monitored her time and made her account for her whereabouts, kept her from helping herself, and tried to make her feel crazy.[321]

The remainder of the potential business coerced debts were seven real estate debts on investment properties that are thus subject to the same partnership analysis as the facts in *Bartenwerfer*, depending on the law in their states.[322] These seven debts belonged to three participants who opened the loans due mostly to emotional coercion. The first participant, Lettie, described how her ex-husband badgered her until she said yes: "And that was something that he pressured and pressured until I said yes to it."[323] She further explained that she thought part of his goal with this transaction was to hurt her; he also pressured her into cashing out her retirement account to finance

[313] *See* sources cited *supra* note 286.
[314] *See supra* note 296 and accompanying text.
[315] *See* Tolman, *supra* note 300, at 25–37.
[316] Telephone Interview with Sophie, Study Participant.
[317] *Id.*
[318] *Id.*
[319] *See* sources cited *supra* note 286.
[320] *See supra* note 296 and accompanying text.
[321] *See* Tolman, *supra* note 298, at 25–37.
[322] Although all participants divorced in Travis County, Texas, many had real estate transactions that took place earlier in their relationships in other states.
[323] Telephone Interview with Lettie, Study Participant.

the investment property purchase: "Basically I cleared one of my retirement accounts . . . . And again, I was not working at the time. So to me, that meant a certain amount of security that he was taking from me."[324] For context, Lettie did not report physical abuse,[325] but "somewhat agreed" (the second-highest response) with three of the four fear-based battering items, although she "strongly disagreed" with the fourth.[326] She reported frequently experiencing seven of the fourteen psychological abuse items, including that her ex-husband treated her like an inferior, was jealous or suspicious of her friends, blamed her for his problems, and tried to make her feel crazy.[327]

The second participant, Maya, explained the effectiveness of her ex-husband's emotional coercion partly in terms of cultural factors:

> He would just get really angry. Really angry. I'm Asian, and for the most part . . . especially the spouse follows what the husband wants . . . . Yeah, that's how I was raised. My mom followed exactly without question what my dad wanted . . . . I just feel there's a cultural . . . . Because people say, 'Well, you didn't have to sign those things.' I said that's not how it works, not in this culture.[328]

Like the participant discussed above who signed off on a refinancing, there was the possibility of physical abuse in the background as well as emotional coercion, although this participant stated that the fear of physical abuse did not affect her consent to the mortgages:

> They're very few times I felt physically harmed that I almost called the police. That wasn't from mortgages. . . . It was just easier than the battle because it would've been very ugly . . . . And even though it caused a lot of debt that you see in my credit card, it was still easier to deal with paperwork than deal with him.[329]

That calculation had severe consequences; the mortgage discussed was in the participant's name only, not joint with her ex-husband, despite her not wanting to own investment property. The deed appears to have been in both spouses' names.[330] In summary, even though this participant would not

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[324] *Id.*
[325] *See* sources cited *supra* note 286.
[326] *See supra* note 296 and accompanying text.
[327] *See* Tolman, *supra* note 300, at 25–37.
[328] Telephone Interview with Maya, Study Participant.
[329] *Id.*
[330] We do not have definite information about which spouse(s) were on the deed to the

describe herself as physically forced to sign off on this mortgage, she felt that she had no choice due to cultural factors and pressure from her ex-husband. She summarized her feelings of lack of choice with a telling statement: "If it's up to me, I wouldn't own any investment properties."[331]

The final participant with coerced mortgages for investment property in her name was Jennifer, who had a total of seven coerced debts related to her ex-husband's businesses. She had four coerced mortgages for investment property and was concerned entirely about emotional abuse. When asked if she thought her ex-husband might hurt her if she did not agree to the mortgages, she stated:

> He would've felt that I was crushing his dreams. That was the narrative, not supporting his dreams . . . . And it's hard to describe emotional abuse. It was more like he would get mad about something and then go to just a dark place and passive aggressive and dirty stares and just mean. And just want to punish me in that way emotionally.[332]

Even though these threats probably would not rise to the level of leaving the participant with no choice in the eyes of the law, the couple purchased the properties for her ex-husband's benefit. She described one of the properties as being purchased so her ex-husband "could have a creative project, architecture project" and another as "a passion project for him in terms of building something and getting to architect a house."[333] She described herself as "bending to him in order to try and find ways to make him happy." Like Kate Bartenwerfer,[334] this participant stood to benefit financially from the sale of the property, but her comments illustrate that whether she benefited was not under her control: "And then we sold it and we liquidated and it helped pay the debt. We made a lot of money, but he spent a lot of money."[335]

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real estate because they sold it before filing for divorce, and we asked whose name was on the deed or title to property only at the time the divorce was filed. However, the participant referred to the property as "ours," which suggests that both spouses were on the deed.

[331] Telephone Interview with Maya, Study Participant.

[332] Telephone Interview with Jennifer, Study Participant.

[333] *Id.*

[334] *In re* Bartenwerfer I, 549 B.R. 222, 225 n.3 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017) ("[S]he . . . would financially benefit from the successful completion of the project and sale of the Property.").

[335] Telephone Interview with Jennifer, Study Participant.

2. Difficulty Leaving the Relationship

The final point in the normative case against expanding *Bartenwerfer*'s logic when considering coerced debts is the challenges of leaving relationships characterized by coercive control. Nationally, one in three women in the United States is killed by an intimate partner per day,[336] and leaving the relationship is the time when women are at greatest risk for being killed.[337]

Fear of physical violence is not the only challenge. Economic factors play a major role. The empirical literature on intimate partner violence has identified a concept called financial dependence, which refers to financial barriers to leaving an abusive relationship.[338] Coerced debt may contribute to keeping victims trapped. In our earlier study with the NDVH, seventy-three percent of callers reported that they had stayed longer than they wanted in a relationship with someone who was controlling because of concerns about supporting themselves or their children.[339] Coerced debt had a statistically significant correlation with this specification of financial dependence.[340] Callers who reported coerced debt were approximately 2.5 more likely than other callers to report staying longer than wanted in a controlling relationship due to concerns about supporting themselves or their children.[341]

This relationship between coerced debt and financial dependence emerged as a theme for several qualitative participants in our current study. Below, one participant illustrated how coerced debt–along with health insurance–kept her trapped in the relationship with her ex-husband:

> So, as we got closer to the end of our marriage he was like, "You can't leave me because there's all this debt and how are you going to pay off the debt? . . . How are you going to handle

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[336] VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN 3 (2022), https://vpc.org/studies/wmmw2022.pdf.

[337] *Id.*

[338] *See, e.g.*, Adams, Littwin & Javorka, *supra* note 9, at 1324; Judy L. Potmus et al., *Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review*, 21 TRAUMA, VIOLENCE & ABUSE 261, 279 (2020); Joanne Hulley et al., *Intimate Partner Violence and Barriers to Help-Seeking Among Black, Asian, Minority Ethnic and Immigrant Women: A Qualitative Metasynthesis of Global Research*, 24 TRAUMA, VIOLENCE & ABUSE 1001, 1001 (2023).

[339] Adams, Littwin & Javorka, *supra* note 9, at 1331.

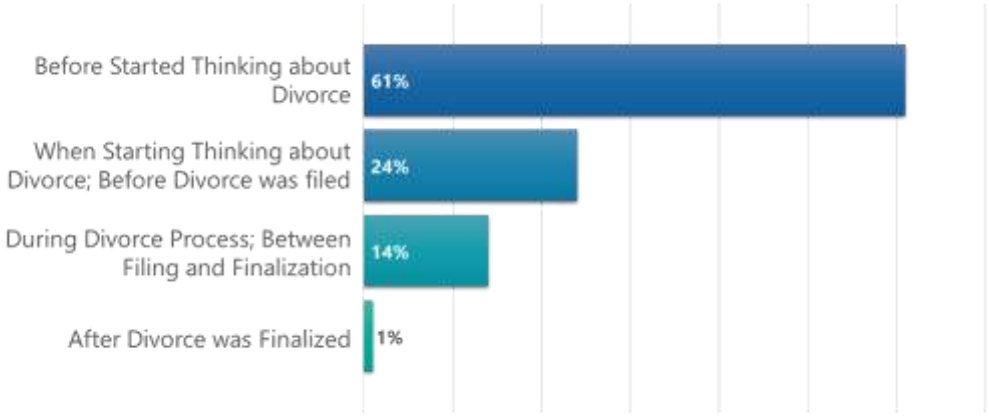
[340] $p < .001$ in a logistic regression controlling for age and race/ethnicity of participants. *Id.* at 1333.

[341] *Id.*

> your finances?" I have an auto immune disease . . . . Going to purchase healthcare on my own is not fun and very expensive . . . So there was always that, whenever the [divorce] conversation was happening . . . And it would be like prefaced with, "I don't want to fuck you over, but how could you possibly handle all of that?' . . . It was just, 'I have you trapped, try and escape."[342]

Another indication of the difficulty of leaving a relationship with coerced debt is that a majority of participants who discovered fraudulent transactions in their name learned of them before they were even considering a divorce, meaning that, if the discovery of fraudulent debt caused any participants to rethink their marriages, participants were not yet in a position to initiate a potential divorce. Figure 1 shows the point in their relationships when participants discovered fraudulent debt in their names.

*Figure 1: Point in Relationship When Discovered Fraudulent Debt*




**n = 136, missing = 30.**

Similarly, Maya, the participant who cited cultural factors as a reason why she felt she had to sign up for loans she did not want also explained how long it took her to move from the cultural position of compliance with her husband to divorce. After explaining how her mother never questioned her father, she said, "So, I followed suit until I filed for the divorce. Now, I don't do that, but it took twenty years to figure that out."[343]

[342] Telephone Interview with Morgan, Study Participant.
[343] Telephone Interview with Maya, Study Participant.

## V. Conclusion

A victim of coerced debt's best bankruptcy strategy may be to not make coerced debt an issue during the bankruptcy case. For § 523(a)(2) to bar discharge of a debt, a creditor must bring an action for nondischargeability.[344] In all cases under *Bartenwerfer* and *Strang*, there are creditors who know they were defrauded[345] and may have viewed a nondischargeability action as their only chance for substantial repayment.[346] In contrast, coerced debt creditors are very unlikely to know of a debt's coerced status because creditors do not inquire into the details of consumers' intimate relationships. The lenders on our study participants' credit reports almost certainly had no idea that any debts were coerced.

Not mentioning a debt's coerced status in a bankruptcy is not bankruptcy fraud for three reasons. First, it is unlikely that many debtors know of coerced debt as a concept, much less understand *Bartenwerfer*'s implications for it. Indeed, few women in our study conceptualized their debts as fraudulent or coerced transactions until our team interviewed them. Second, it is a creditor's responsibility to bring an action for nondischargeability under § 523(a)(2).[347] If a creditor is unaware of the coerced nature of the debt, then the coerced nature of the debt is not relevant to the bankruptcy. Third, many victims of coerced debt attempt to pay them. With the exception of the tax penalties, which are by definition in default, participants were never late on any coerced business debts in the study. Unlike, for example, in *Bartenwerfer*, where the debtors lost a lawsuit and sought to discharge the resulting large debt,[348] coerced debts tend to arise in the ordinary course of consumer lending.

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[344] *See, e.g.*, HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE § 15.4.3.2. (2005); John Rao, *New Supreme Court Ruling: When Is a Bankruptcy Debtor on the Hook for Partner's Fraud?*, NAT. CONSUMER L. CTR. (Mar. 2, 2023), https://library.nclc.org/article/new-supreme-court-ruling-when-bankruptcy-debtor-hook-partners-fraud.

[345] *See, e.g.*, *In re* Tsurukawa, 287 B.R. 515, 523 (B.A.P. 9th Cir. 2002).

[346] *See, e.g.*, ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 148 (8th ed. 2020) ("For a creditor, of course, prevention of a discharge is usually the creditor's last remaining hope to receive any payment on the debt.").

[347] *See* sources cited *supra* note 344.

[348] *In re* Bartenwerfer I, 549 B.R. 222, 224 (Bankr. N.D. Cal. 2016), *aff'd in part, vacated in part, remanded*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).

The strategy of not mentioning the coerced nature of coerced debts in bankruptcy, however, has two major downsides. First, it reduces the likelihood that bankruptcy courts will develop firsthand knowledge and understanding of coerced debt. This lack of knowledge may create problems because coerced debt has other implications for bankruptcy cases. For example, abusive partners may file for bankruptcy to surrender property belonging to victims.[349] Second, if the best strategy is to avoid mentioning coerced debt in bankruptcy, other members of the bankruptcy community are less likely to learn of it firsthand. For example, consumer bankruptcy attorneys are unlikely to screen for it. Lack of firsthand experience with coerced debt may limit bankruptcy community interest in pushing for legal reforms that would, for example, unambiguously eliminate § 523(a)(2) as a barrier to discharge for all victims of coerced debt.

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[349] *See* Andrew Cosgrove, *Breaking Up Is Hard to Do . . . Especially When Bankruptcy Is Involved: A Look at the Unfair Results That Occur When Bankruptcy Intervenes in Domestic Relations*, 14 AM. BANKR. INST. L. REV. 235, 236 (2006) (arguing that bankruptcy should not be used to attack the non-debtor spouse).