

**“...Or For Worse”
Prenuptial Agreements and the Compensation Paradox in Divorce**

Aristides N. Hatzis & Tspasia Tsaoussis
ahatzis@phs.uoa.gr / atsaoussi@abanet.org.

Abstract

The most substantial impediment to the equitable distribution of marital property between the spouses after divorce is the difficulty of measuring the contribution of wives. The problems of evaluating and quantifying marriage-specific nonpecuniary contributions faced by judges are similar to those that arise in contract disputes, when they are called upon to measure expectation damages. Despite the existence of sophisticated human capital models and the help of reliance interest theory, it is very difficult (if not impossible) for judges to accurately measure the contribution of wives in marriage. In this case, a property rule (i.e. the abolition or restriction of no-fault divorce) could create even greater inefficiencies (overreliance) and it would hinder the freedom of the parties. As a result, the outcome will be either a suboptimal number of divorces and overreliance during marriage (property rule regime) or a divorce surplus and suboptimal marriage-specific investment by married women (current liability rule regime with imperfect expectation damages). The best solution that contract law can offer to the compensation paradox in marriage is perfect expectation damages (full compensation and efficient reliance). However, given the measurement problems precluding perfect expectation damages, we suggest that the most viable alternative is the enforcement of liquidated damages in prenuptial agreements. This provides the spouses with the proper incentives to rely efficiently during marriage and to be adequately compensated in case of divorce.

JEL Classification: J12, K10, K12

Keywords: Economics of Divorce; Prenuptial Agreements; Liquidated Damages; Compensation Paradox; Reliance