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A Split Supreme Court Leaves Spousal Guarantees Up in the Air

By Michael J. Lichtenstein and Megan A. Raker*

The authors of this article review the issue of spousal guarantees under the Equal Credit Opportunity Act in light of a recent U.S. Supreme Court ruling affirming a U.S. Court of Appeals for the Eighth Circuit decision concluding that protection under the Act does not apply to spouse guarantors who are not "applicants" for the extension of credit. Because of the Supreme Court's split vote, the decision only has precedential value for courts in the Eighth Circuit.

When extending loans to corporate borrowers, lenders typically require that the business owner and his/her spouse execute personal guarantees. In part, the Equal Credit Opportunity Act ("ECOA") is intended to protect credit applicants against discrimination based upon marital status. Some guarantors have sought to avoid liability under their guaranty by asserting a violation of the ECOA. Faced with this argument, circuit courts have split on whether, under the ECOA, a spouse-guarantor should be included as an "applicant" to whom protection extends. Recently, the U.S. Supreme Court, in a 4-4 split vote, affirmed a U.S. Court of Appeals for the Eighth Circuit decision, concluding that protection under the ECOA does not apply to spouse guarantors who are not "applicants" for the extension of credit. Because of the split, the decision only has precedential value for courts in the Eighth Circuit. Other courts across the country remain divided on this issue.

ECOA AND REGULATION B

The ECOA provides that a creditor may not "discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or *marital status*, or age. . . ."[1] The statute defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly

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[1] 15 U.S.C.A. § 1691 (emphasis added).

by use of an existing credit plan for an amount exceeding a previously established credit limit."[2]

The initial purpose of the ECOA, at least in part, was to eradicate credit lending discrimination directed towards women.[3] Specifically, the statute was aimed to address creditors who historically refused to consider women for individual credit, without a guaranty from their husbands.[4] Under the original Federal Reserve Board Regulation, a spouse (typically, the wife) who was denied credit because the other spouse refused to guarantee a loan might have a cause of action against the lender.[5] When a spouse did guarantee the loan, he or she had no basis for a claim or defense against collection should the borrower-spouse default.[6]

In 1986, the Federal Reserve Board revised these regulations and, in administering ECOA, issued Regulation B, which defined "applicant" to include guarantor. Specifically, Regulation B provides that:

> Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.[7]

Since its promulgation, courts are split on the propriety of Regulation B, and its inclusion of a guarantor in the term "applicant."

CIRCUITS THAT DEFER TO REGULATION B

Some circuit courts have allowed guarantors to allege ECOA violations, relying on Regulation B's more expansive interpretation of the ECOA. For example, in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group*,[8] after a default, the lender sued the borrower and both guarantors.[9] The wife argued that the guaranty was unenforceable because it violated ECOA.[10]

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[2] 15 U.S.C.A. § 1691a.

[3] *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

[4] *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 10 (1st Cir. 1994).

[5] *Id.*

[6] *Id.*

[7] 12 C.F.R. § 202.7(d).

[8] 754 F.3d 380 (6th Cir. 2014).

[9] *Id.* at 383.

[10] *Id.*

The district court disagreed and entered judgment against the wife.[11] The U.S. Court of Appeals for the Sixth Circuit reversed, affording deference to Regulation B.[12] The Sixth Circuit noted that "Regulation B was promulgated under ECOA's express grant of rulemaking authority."[13] Because the definition of "applicant" was ambiguous in its view, the Sixth Circuit analyzed whether Regulation B stemmed from a reasonable interpretation of the statute.[14] Finding that at least one meaning of "applicant" could include guarantors, the Sixth Circuit concluded that the Federal Reserve's interpretation was entitled to defense.[15]

The U.S. Court of Appeals for the Third Circuit has taken a similar approach to the ECOA. In *Silverman v. Eastrich Multiple Inv'r Fund, L.P.*,[16] the wife guarantor appealed the dismissal of her complaint claiming violations of ECOA. The plaintiff had sued the lender on the basis that the lender had required her to sign a guaranty loan for the benefit of her spouse in violation of the ECOA.[17] In reversing the district court's grant of Eastrich's motion to dismiss, the Third Circuit held that the guarantor could assert discriminatory practices in violation of the ECOA as a defense to a creditor's attempt to enforce an improperly obtained guarantee.[18] Without reaching a conclusion on the merits, the Third Circuit adopted the application of Regulation B. The court held that if the plaintiff was required to sign a spousal guarantee solely for the purpose of facilitating a loan for her spouse and his business, without any inquiry by the lender into her creditworthiness, the guarantee cannot be enforced against her by the original lender of any subsequent holder with

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[11] *Id.*

[12] *Id.* at 384; *see also Empire Bank v. Dumond,* 2013 U.S. Dist. LEXIS 169984 (N.D. Okla. Dec. 3, 2013) (following Regulation B and holding that spousal guarantors are applicants under the ECOA).

[13] *Id.*

[14] *Id.* at 385. Following the analysis established by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), a court will defer to a regulatory interpretation of a federal statute if the statute was "silent or ambiguous" as to Congress's intent and if the "agency's answer is based on a permissible construction of the statute."

[15] *Id.* Therefore, a "creditor who violates Regulation B necessarily violates the ECOA itself" and an "applicant harmed by the creditor's violation of Regulation B has the full range of ECOA remedies available to her." *Id.* at 387.

[16] 51 F.3d 28 (3d Cir. 1995).

[17] *Id.* at 29.

[18] *Id.* at 32.

knowledge of those circumstances.[19]

The U.S. Court of Appeals for the Fourth Circuit has also allowed a spouse guarantor's claims alleging ECOA violations. In *Ballard v. Bank of Am. N.A.*,[20] a business owner's wife was required to sign a guarantee for loans her husband sought to obtain for his business. After demand, Mrs. Ballard sued the bank alleging that the bank violated the federal and state ECOA by requiring her to serve as her husband's guarantor.[21] The Fourth Circuit agreed that ECOA regulations prohibited lenders from requiring a spouse-guarantee when the applicant individually qualified for the requested credit.[22] The court clarified, however, that "not every signature required of a borrower's spouse . . . constitutes credit discrimination under the ECOA."[23]

The Fourth Circuit recognized that several exceptions exist under the ECOA in which lenders are permitted to require the signature of the borrower's spouse on a loan agreement.[24] First, if a borrower does not independently qualify for credit, a lender can require a spouse's guaranty.[25] Second, a lender can also obtain a spousal guaranty if the spouse co-owns the entity borrowing money.[26] Finally, a lender can obtain a spouse's signature if two spouses co-own property that serves as collateral for the lien.[27] The court concluded, however, that under

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[19] *Id.* at 33. While the transaction at issue occurred more than two years prior to the lender's suit, and any affirmative claim of an ECOA violation was time barred, the Third Circuit held that the ECOA could be used defensively against a lender's suit to collect on a spousal guarantee. *Id.*; *see also Roseman v. Premier Fin. Servs.-E.*, (E.D. Pa. Sept. 3, 1997) (recognizing that in the Third Circuit, a spouse-guarantor may defensively assert an ECOA claim against a lender); *Sony Elecs., Inc. v. Putnam*, 906 F. Supp. 228, 229 (D.N.J. 1995) (same).

[20] 734 F.3d 308 (4th Cir. 2013).

[21] *Id.* at 310.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*; *see also Ramsdell v. Bowles*, 64 F.3d 5 (1st Cir. 1995) ("Lender-bank did not violate [ECOA] when it required spouse of owner of borrower-construction company to sign both note evidencing loan to borrower and guaranty; neither wife nor her husband met bank's standards for creditworthiness.").

[26] *Id.*; *see also Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 700 (3d Cir. 1995) (holding that because loans financed a company co-owned by the spouses, the wife "at the very least" was a de facto joint applicant who could be required to guarantee the loans).

[27] *Id.*; *see also Richardson v. Everbank*, 152 So. 3d 1282 (Fla. Dist. Ct. App. 2015) (holding that the bank did not discriminate against the wife-guarantor on the basis of her marital status because the financial statement "did not distinguish between assets owned individually of jointly by the spouses, and included one company exclusively owned by the wife"); *Cty. Banking & Trust*

these facts, Bank of America could have violated the ECOA by not meeting one of the aforementioned exceptions.[28] Notwithstanding the foregoing, because Mrs. Ballard had waived her claims in various loan modifications, including a right to assert ECOA violations, the Fourth Circuit decided not to consider her ECOA claims.[29]

In *Anderson v. United Fin. Co.*,[30] the U.S. Court of Appeals for the Ninth Circuit held that a lender discriminated against a husband in violation of the ECOA by requiring him to sign the loan documents when his wife, the loan applicant, qualified individually under the lender's standards of creditworthiness. The lender required the husband to sign the promissory note and a security agreement even though the wife specifically requested that the loan be in her name only so she could establish credit.[31] The husband sued under the ECOA but the district court held that despite a "technical violation," there was no discrimination.[32] The Ninth Circuit reversed, holding that a violation of Regulation B should be considered discrimination within the meaning of the ECOA.[33]

CIRCUITS THAT DO NOT VIEW SPOUSAL GUARANTORS AS CREDIT APPLICANTS

In *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*,[34] the U.S. Court of Appeals for the Seventh Circuit held that the requirement of a guaranty by the franchise owner's spouse was not discrimination on the basis of marital status. Without directly relying on *Chevron*, the Seventh Circuit found that there was "nothing ambiguous about 'applicant' and no way to confuse an applicant with

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Co. v. Lacey (Del. Super. Sept. 16, 1993), *aff'd,* 642 A.2d 836 (Del. 1994) (holding that a lender's "policy of requiring the co-owners of jointly held assets to co-sign a guaranty is not the equivalent of a requirement that the borrower's spouse co-sign a guaranty" and thus, lender's policy was "consistent with Regulation B").

[28] *Id.* at 312–13.

[29] *Id.* at 313. "A valid waiver can prevent a borrower from recovering under a federal statue." *Id*. The Fourth Circuit distinguished, however, between an ECOA waiver obtained as a precondition for a loan—which impermissibly would permit a bank to circumvent the ECOA—from an ECOA waiver obtained in exchange for a loan restructuring. *Id*. at 314. The latter of the two, which was present in the case, was a valid and enforceable waiver. *Id*.

[30] 666 F.2d 1277 (9th Cir. 1982).

[31] *Id.* at 1276.

[32] *Id*.

[33] *Id.* at 1277.

[34] 476 F.3d 436 (7th Cir. 2007).

a guarantor."[35] Furthermore, even if the Federal Reserve Board's interpretation in Regulation B was authorized, the guarantor failed to prove discrimination.[36] Because a significant amount of the assets that the husband/borrower listed on his credit application were actually owned by his wife, the court held it was "therefore sound commercial practice unrelated to any stereotypical view of a wife's role for Moran to require that she guarantee the debt along with her husband."[37]

In *Hawkins v. Community Bank of Raymore*,[38] the U.S. Court of Appeals for the Eighth Circuit had found no basis for the Regulation B application because the statute itself is clear that it applies only to applicants. Two wives were required to sign personal guarantees for loans extended to a limited liability company that was owned by their husbands and in which they had no interest.[39] After the lender demanded payment, the wives sued seeking damages and an order declaring that the guarantees were unenforceable.[40] They argued that requiring them to sign spousal guarantees constituted discrimination under the ECOA.[41] The district court granted summary judgment in favor of the lender, holding that the wives were not applicants under the ECOA.[42]

The Eighth Circuit affirmed, noting that if the wives did not qualify as applicants then the lender did not violate the ECOA by requiring the execution of guarantees.[43] Reviewing the ECOA statute, the Eighth Circuit concluded that a person does not qualify as an applicant by executing a guaranty to secure someone else's debt.[44] In light of the perceived unambiguity in the statute, the Eighth Circuit deemed it unnecessary to defer to the Federal Reserve's interpretation of "applicant."[45] Also, the court reasoned that this conclusion

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[35] *Id.* at 441.

[36] *Id.*

[37] *Id.*; *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 10 (1st Cir. 1994) (holding that spouse-guarantor could not raise ECOA violations as defense to lender's suit on guaranty when the lender required the guarantee prior to the Federal Reserve Board's revision of Regulation B); *Arvest Bank v. Uppalapati,* 2013 WL 85336 (W.D. Miss. Jan. 7, 2013) (finding no basis for alleging that lender violated ECOA by requiring applicant's spouse's signature).

[38] 761 F.3d 937, 940 (8th Cir. 2014).

[39] *Id.* at 939.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 940.

[43] *Id.*

[44] *Id.* at 942.

[45] *Id.*; *see also LOL Finance Co. v. F.J. Faison Revocable Trust,* 2010 U.S. Dist. LEXIS 78908

comported with the initial policies underlying the ECOA—that is, the desire to "curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband."[46]

THE RECENT SUPREME COURT DECISION IN *HAWKINS*

In upholding *Hawkins*, the Supreme Court issued no written opinion but merely a one-line decision.[47] As a result of the tied vote, the Supreme Court's decision in *Hawkins* applies only to the courts within the Eighth Circuit (Missouri, Arkansas, Nebraska, Iowa, Minnesota, South Dakota, and North Dakota). Unfortunately, this leaves significant uncertainty for lenders that are located outside of these states, or even to lenders located in both the Eighth Circuit and other circuits.

CONCLUSION

Although the Supreme Court affirmed the Eighth Circuit's position in *Hawkins*, it did so with only eight justices on the bench. The Supreme Court's decision did not change the law in any of the circuits that follow the Federal Reserve's interpretation of "applicant"—as of now, that includes the Third, Fourth, Sixth, and Ninth Circuits. While the Seventh and Eight Circuits have affirmatively decided not to adhere to the definition of "applicant" in Regulation B, the outcome remains unclear in the First, Second, Fifth, Tenth, and Eleventh Circuits. Accordingly, these courts may still apply ECOA to prohibit a commercial lender from requesting a guaranty solely because the prospective guarantor is married to the borrower.

(D. Minn. July 13, 2010) (holding that, as a matter of law, requiring spouse guarantors' signatures did not violate the ECOA); *Smithville 169 v. Citizens Bank & Trust Co.,* 2013 WL 434028 (W.D. Miss. Feb. 5, 2013) (wife guarantor's estate could not sue under ECOA).

[46] *Hawkins*, 761 F.3d at 942 (*citing Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994)). Here, the spouse-guarantors' argument was not that they were excluded from the lending process due to their marital status, but rather that they were improperly *included* in the process. *Id*.

[47] *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 194 L. Ed. 2d 163 (2016) ("The judgment is affirmed by an equally divided Court.").