Does the Equal Credit Opportunity Act Apply to Spousal Guarantors? The Eleventh Circuit Says No

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Trade creditors considering extending credit to a customer sometimes seek a guaranty of the customer's indebtedness—in many instances, from the customer's principal and/or the principal's spouse. The Equal Credit Opportunity Act ("ECOA") and its coinciding Regulation B grant the customer (i.e., the credit applicant) certain rights and protections, as the ECOA makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of ... marital status." Regulation B, which was adopted by the Federal Reserve Board ("FRB") to provide guidance with respect to the ECOA, states that an applicant includes a guarantor. However—the FRB's definition of "applicant" notwithstanding—the courts have grappled over whether guarantors are entitled to the ECOA's rights and protections, as courts differ with respect to whether guarantors are considered "applicants" under the ECOA and, therefore, whether guarantors have standing to invoke the protections of the ECOA.

The United States Courts of Appeals have been divided over whether the ECOA and Regulation B apply to spousal guarantees due to differing interpretations of ECOA's definition of "applicant." The United States Court of Appeals for the Eighth Circuit, in *Hawkins v. Community Bank of Raymore*, and the United States Court of Appeals for the Seventh Circuit in *Moran Foods, Inc., v. Mid-Atl. Mkt. Dev. Co.*, both rejected Regulation B's limits on spousal guarantees, holding that the ECOA's definition

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of "applicant" is unambiguous and does not include guarantors. The United States Court of Appeals for the Sixth Circuit, in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC, et al.*, has taken a contrary approach, applying the ECOA's protections to spousal guarantors by

holding that the ECOA's definition of applicant is ambiguous and includes guarantors.

The United States Supreme Court confronted this issue in March 2016, when it affirmed the Eighth Circuit's opinion in *Hawkins*. However, the Supreme Court's decision has no precedential value outside of the Eighth Circuit because it was a split 4-4 decision when the Supreme Court sat short-handed at eight justices. The Circuit-split will remain unsettled until the Supreme Court has an opportunity to reexamine the issue.

We may not have to wait long, thanks to the August 28, 2019 decision of the United States Court of Appeals for the Eleventh Circuit, in *Regions Bank v. Legal Outsource PA*. The Eleventh Circuit joined the Seventh and Eighth Circuits in holding that guarantors do not have standing to assert claims under the ECOA because the ECOA's definition of applicant does not include guarantors. This ruling elicited a dissenting opinion supporting the opposing view that applicants include guarantors. This division among the United States Circuit Courts of Appeals and within the Eleventh Circuit might present an opportunity for the Supreme Court to finally settle the split. But until then, creditors should remain vigilant by either following the ECOA's/Regulation B's requirements when seeking a spousal guarantee, or seeking alternative security with respect to their claims.

The ECOA and Regulation B

As noted, the ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of marital status."

The ECOA defines an "applicant" as "any person who applies to a creditor directly for ... credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." Notably, the ECOA's definition of "applicant" does not expressly include guarantors.

The ECOA granted authority to the agency charged with overseeing the statute, the FRB (now the Consumer Financial Protection Bureau), to adopt regulations to assist in implementing the ECOA. Accordingly, the FRB adopted Regulation B, which prohibits creditors from "requir[ing] the signature of an applicant's spouse ... 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."[1] Regulation B defines an "applicant" as "any person who requests or who has received an extension of credit from a creditor," which includes "any person who is or may become contractually liable regarding an extension of credit." In 1985, the FRB amended Regulation B to expand the definition of "applicant" to explicitly include "guarantors, sureties, endorsers and similar parties."

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A creditor that violates the ECOA is subject to claims for recovery of actual and punitive damages and attorneys' fees. Critically, only "applicants" seeking credit can sue for ECOA violations. The issue addressed by the *Regions Bank* case is whether a guarantor is considered an applicant with standing to pursue claims arising under the ECOA and, therefore, whether the ECOA applies to spousal guarantees.

Split on the Meaning of 'Applicant' Among the U.S. Circuit Courts and Within the U.S. Supreme Court

The Sixth Circuit, relying on Regulation B's definition of applicant (which includes guarantors), has held that guarantors have standing to pursue claims under the ECOA. The Sixth Circuit noted that the ECOA's definition of an applicant is ambiguous and could encompass guarantors. Likewise, the Sixth Circuit rejected excluding guarantors as applicants since the ECOA prohibits discrimination with respect to "any aspect of a credit transaction."

In contrast, the Eighth Circuit, in *Hawkins*, has held that spousal guarantors are not entitled to the protections of the ECOA and a creditor that obtained a spouse's guaranty did not violate the ECOA. According to the Eighth Circuit, the ECOA's text plainly indicates that executing a guaranty of a third party's indebtedness does not make the guarantor an "applicant." An "applicant" for credit must actually request credit. The Eighth Circuit noted that a guarantor does not request credit by executing a guaranty, but merely promises to pay another person's debt or perform another person's obligations under a contract in the event of default. A guarantor engages in different conduct, receives different benefits, and is exposed to different legal consequences than a credit applicant. The Eighth Circuit also observed that the ECOA was initially intended to curtail the practice of creditors refusing to grant a wife's credit application without her husband's guaranty and other practices intended to unfairly deny borrowers access to the credit market based on marital status—practices that were not at issue in the *Hawkins* case.

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The Seventh Circuit in the *Moran Foods* case had similarly ruled that guarantors are not applicants entitled to ECOA's protections. The Seventh Circuit refused to defer to Regulation B's inclusion of guarantors as applicants for credit.

1 There are also limited exceptions where (a) the applicant requires unsecured credit and is relying, in part, upon property that applicant and spouse jointly own, and (b) where a married applicant requests unsecured credit and resides in a community property state, or if the property on which the applicant is relying in its credit decision is located in a community property state.

The Supreme Court granted certiorari to hear, and ultimately affirmed, the *Hawkins* case. However, the Supreme Court's decision has no precedential value (other than within the Eighth Circuit) because it was a split decision among only eight justices, as the ninth seat on the Supreme Court was vacant at the time due to the passing of the late Justice Scalia.

While Justice Scalia never had the opportunity to participate in the decision in the *Hawkins* case, he did participate in oral argument in the case and his insights during oral argument are quite telling. Notably, Justice Scalia drew an analogy to an individual who writes a letter of recommendation for a law school applicant; the recommender could not reasonably be considered an applicant to the law school just because the recommender had supported the application. Justice Scalia seemed to tip his hand—that he would have provided the fifth vote in a majority ruling that a guarantor is not an applicant, and, therefore, is not entitled to the ECOA's protections and rejecting Regulation B's inclusion of guarantors as credit applicants.

The *Regions Bank* Case

In 2011, Regions Bank had made a mortgage loan in the amount of approximately $1.7 million to Periwinkle Partners, LLC ("Periwinkle") as funding for the purchase of a shopping center on Sanibel Island, Florida. Periwinkle's owner, Lisa Phoenix, her husband, Charles Phoenix, and Mr. Phoenix's law firm, Legal Outsource PA (which itself had a loan from Regions Bank) had guaranteed the Periwinkle loan. In August 2013, Regions Bank declared events of default with respect to both loans. One year later, Regions filed a complaint in the United States District Court for the Middle District of Florida against Mr. and Mrs. Phoenix, Legal Outsource and Periwinkle for breach of the respective promissory notes and coinciding guaranties.

The defendants asserted counterclaims that Regions Bank had discriminated against the defendants on the basis of their marital status, in violation of the ECOA, by requiring Mr. and Mrs. Phoenix and Legal Outsource to guarantee the $1.7 million loan provided to Periwinkle. The district court dismissed all but one of the ECOA-based claims that the guarantor-defendants had asserted, ruling that all of the guarantors of the Periwinkle loan had lacked standing to assert ECOA claims because the guarantors are not "applicants" under the ECOA.

However, the district court did not dismiss one of the ECOA-based counterclaims asserted by Mrs. Phoenix and Periwinkle because, according to the district court, Mrs. Phoenix and Periwinkle had sufficiently alleged that they were "applicants" under the ECOA. Thereafter, Regions Bank filed a motion for summary judgment. The district court granted summary judgment dismissing Mrs. Phoenix's ECOA claim, referring back to its prior ruling that guarantors are not "applicants" under the ECOA and holding that Mrs. Phoenix, as a guarantor, was not entitled to ECOA protections because she was not an "applicant." The district court also noted that there was a "lack of any evidence to establish any alleged discrimination on the basis of marital status."[2]

The defendants appealed the district court's ruling that a guarantor is not an applicant under the ECOA and, as a result, is not entitled to ECOA's protections. The Eleventh Circuit affirmed the district court's ruling dismissing the guarantors' ECOA counterclaims. Referring to the ECOA's definition of an applicant as "any person who applies … directly for … credit," the Eleventh Circuit noted that the ordinary meaning of the term, "apply," is to make a request for the benefit of oneself. The Eleventh Circuit concluded that a guarantor—who by definition does not make a request for oneself—does not "apply" for credit and, therefore, is not an applicant. Interestingly—and in what might have been a subtle reference to the insights of the late Justice Scalia—the Eleventh Circuit compared the guarantor-applicant relationship to a promise made by the parents of a college applicant to make a bequest to the college if the college grants the child's application. The fact that the parents supported the child's admission does not mean that the parents are applicants.

Additional factors weighed into the Eleventh Circuit's decision. First, the Eleventh Circuit also noted that several provisions of the ECOA include the term, "applicant," in a manner that can only refer to a first-party applicant. Additionally, the court noted that the statutory definition of an "adverse action" on a credit application excludes "a refusal to extend credit *under an existing credit arrangement where the applicant is delinquent or otherwise in default*." This suggests that the applicant had received credit and is responsible for making payments on an existing obligation (which would not apply to a guarantor). Finally, while there are ECOA provisions recognizing that a third party can be involved in requesting an extension of credit to a first-party applicant, the ECOA "distinguishes between the third-party requestor and the applicant." The Eleventh Circuit concluded that these factors further indicate that, when examining the term, "applicant," in the context of the ECOA as a whole, Congress intended an "applicant" to bear its ordinary meaning of "a person who requests a benefit for himself."

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The Eleventh Circuit's decision included an extensive dissenting opinion that a guarantor has standing as an applicant to pursue claims arising under the ECOA. The dissent relied on three grounds: (1) the ordinary meaning of the word "applicant" reasonably includes guarantors; (2) the majority opinion failed to reflect the "overriding national policy against discrimination that underlies

2 The district court also granted summary judgment dismissing Periwinkle's ECOA claim, holding the claim was "frivolous" because a business entity, like Periwinkle, has no marital status and, therefore, is not afforded any of the ECOA protections.

the [ECOA];" and (3) Congress acquiesced to the FRB's definition of an applicant by failing to amend the ECOA to expressly preclude the more expansive definition of "applicant" in Regulation B.

The majority opinion thoroughly addressed, and rejected, the dissent's reasoning. The dissent's analysis focused on the notion that the appearance of the word, "any," four times in two sentences of the ECOA ("making it unlawful for *any* creditor to discriminate against *any* applicant with respect to *any* aspect of a credit transaction" and "defining applicant to mean *any* person who applies to a creditor directly for credit") demonstrates that Congress had intended to expansively define the term "applicant." The majority responded that the use of the word "any" does not change the aforementioned plain meaning of the term, "applicant." The majority reasoned that an applicant applies for credit to benefit the applicant and not any third parties, unlike a guarantor.

Second, the majority opinion rejected the dissent's expansive application of Congress' perceived legislative purpose in enacting ECOA—to further the overriding national policy making it unlawful to discriminate against any credit applicant based on marital status. The majority noted that "when a statute includes limiting provisions [such as the ECOA's definition of the term applicant that did not expressly include guarantors], those provisions are no less a reflection of the genuine purpose of the statute than the operative provisions, and it is not the court's function to alter the legislative compromise."

Finally, the majority rejected the dissent's reasoning that Congress' failure to amend the ECOA to expressly disavow the FRB's more expansive definition of an applicant to include guarantors suggests that Congress had implicitly accepted the FRB's definition. The Eleventh Circuit reasoned that it would be unreasonable to construe Congress' silence when the ECOA was last amended in 2010 as acquiescence to the FRB's expansive definition of "applicant" that includes guarantors where, at that time, the weight of authority was *against* the FRB's expansive definition. Quoting the Supreme Court, the majority opined that when interpreting a statute, "legislative silence is a poor beacon to follow."

Conclusion

The Eleventh Circuit's *Regions Bank* decision shows that the applicability of the ECOA's protections to spousal guarantors continues to be a hot litigation issue following the Supreme Court's non-precedential foray into the matter in March 2016. While the Eleventh Circuit may have taken cues from the Supreme Court's review and affirmation of the Eighth Circuit's *Hawkins* decision, it is clear that the division among the United States Circuit Courts of Appeal over the applicability of ECOA's protections to spousal guarantees will continue to be hotly litigated until the Supreme Court definitively rules on the issue.

It is possible that the U.S. Supreme Court will consider the *Regions Bank* decision, the first by a United States Court of Appeals, since *Hawkins*, to address whether guarantors have standing to assert claims under the EOCA. But that remains to be seen. Until then, trade creditors should proceed cautiously when seeking a spouse's guaranty—particularly in jurisdictions outside of the Seventh, Eighth and Eleventh Circuits—by either following Regulation B's requirements or seeking alternative security to help ensure payment of their claim.