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Until Debt Do Us Part: Eighth Circuit Creates Split on Violation of ECOA for Spousal Guaranties

Richard A. Vance and Brian R. Pollock

The authors of this article explain a split between the Sixth and Eighth Circuit Courts of Appeal on the definition of “applicant” under the Equal Credit Opportunity Act (“ECOA”), which could leave creditors with potentially divergent results when spouses raise ECOA claims. The circuits reviewed the ECOA’s definition for ambiguity. In the Sixth Circuit, the court deferred to the regulation based on an ambiguous definition. The Eighth Circuit, however, found no ambiguity and held the regulation to be an impermissible extension of the ECOA. The Supreme Court has granted certiorari to resolve this circuit split.

While the circuits may disagree on who started the dispute, they certainly disagree on the definition of “applicant” under the Equal Credit Opportunity Act (“ECOA”). In Hawkins v. Community Bank of Raymore, the Eighth Circuit found the statutory definition unambiguous. The Sixth Circuit, in RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC, found the statutory definition ambiguous and gave deference to the regulatory definition promulgated by the Federal Reserve Board (“FRB”). Regardless of who created the split, creditors now face potentially divergent results when spouses raise ECOA claims.

Both Hawkins and RL BB Acquisition involved wives challenging their guaranties of commercial obligations owed by their husbands’ real estate ventures. The ECOA prohibits discrimination in the offering of credit to an

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4 See Hawkins, 761 F.3d at 939; see also RL BB Acquisition, 754 F.3d at 383.
applicant based on race, age, . . . , and marital status.5 The FRB established Regulation B, including the spouse-guarantor rule, which gives standing to a spouse to challenge a guaranty which is required solely from a spouse—often a hotly disputed factual issue dependent on differing recollections of the parties. “The applicant’s spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.”6

**HAWKINS V. COMMUNITY BANK OF RAYMORE**

In *Hawkins*, the two wives signed a guaranty of the $2 million obligation of PHL Development LLC, their husbands’ company in which they had no legal interest.7 “The district court concluded that [the wives] were not ‘applicants.’”8 In deciding whether to apply the regulation’s definition, the Eighth Circuit conducted the *Chevron* analysis.9 The two-step analysis requires the court to first determine if the statute the regulation is interpreting is ambiguous.10 Here, the court held the statute’s definition to be unambiguous. Since a guaranty is collateral to the loan, “a guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA.”11 Acknowledging the Sixth Circuit’s prior, recent decision in *RL BB Acquisition, LLC*, the Eighth Circuit distinguished based on the different conduct, benefits, and legal consequences of a guaranty.12 Further, the Eighth Circuit reminded us that the purpose of the ECOA was to “curtail the practice of creditors who refused to grant a wife’s credit application without a guaranty from her husband.”13 The wives’ complaint in *Hawkins* was not exclusion from the lending process, but rather inclusion. The concurrence further explained the plain meaning of the statute.14 While the term “apply” could encompass making a request on behalf of another in unusual circumstances, the statute’s consistent use of the plain meaning of the defined term “applicant” does not

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6 12 C.F.R. § 202.7(d)(5).
7 *Hawkins*, 761 F.3d at 939.
8 *Id.* at 940.
10 *Id.*
11 *Id.* at 941.
12 *Id.* at 942.
13 *Id.* at 940 (quoting *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994)).
14 *Id.* at 943–5 (Colleton, J., concurring).
support finding ambiguity.\(^{15}\) In ECOA’s first decade, the regulators recognized that a guarantor is not an applicant.\(^{16}\) The FRB may have wanted to give spousal guarantors a cause of action but an unambiguous statute eliminates that option in the Eighth Circuit.\(^{17}\)

**RL BB ACQUISITION, LLC**

In *RL BB Acquisition, LLC*, the Sixth Circuit came to the opposite conclusion. Starr Stone Dixon asserted her guaranty violated the ECOA and Regulation B.\(^ {18}\) Starr’s husband Bernard, a successful franchisee for numerous fast food chains, picked an inopportune time to branch out into residential developments.\(^ {19}\) In short order, the global financial crisis left his projects nearly $10 million in debt.\(^ {20}\) Bernard approached his bank to refinance the two loans on the projects.\(^ {21}\) The lender concluded that Bernard and his company were not independently creditworthy for a refinance loan.\(^ {22}\) Starr, allegedly feeling tremendous pressure from Bernard but not the bank, signed a guaranty of the debt.\(^ {23}\) The company eventually defaulted, the lender sold the note and guaranties, and the debt buyer commenced collection efforts.\(^ {24}\) The district court held that Starr could not raise the alleged violations as an affirmative defense and was liable on the guaranty.\(^ {25}\) Starr appealed.

The Sixth Circuit began with a discussion of the purpose of the ECOA and Regulation B.\(^ {26}\) Congress enacted the ECOA “to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.”\(^ {27}\) Congress directed the FRB to promulgate regulations to carry out the ECOA’s purpose (under the Dodd-

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\(^{15}\) *Id.* at 943.

\(^{16}\) *Id.* at 944 (citing Equal Credit Opportunity, 41 Fed. Reg. 49,123, 49,124, 49,132)).

\(^{17}\) See *id.* at 945.

\(^{18}\) *RL BB Acquisition*, 754 F.3d at 383; *see also* 12 C.F.R. § 202.7(d).

\(^{19}\) *Id.* at 381.

\(^{20}\) *Id.* at 382.

\(^{21}\) *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.* at 383.

\(^{25}\) *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.* (quoting *Mays v. Buckeye Rural Elec. Coop.*, 277 F.3d 873, 876 (6th Cir. 2002)).
Frank Act, this function has been reassigned to the Consumer Financial Protection Bureau (‘CFPB’). 28 The FRB created the ‘spouse-guarantor rule’ to prohibit a creditor from requiring the spouse to be the guarantor when the lender requires an additional party. 29 ECOA’s definition of ‘applicant’ does not explicitly include guarantors but Regulation B permits guarantors to sue for violation of the spouse-guarantor rule. 30

Turning to its Chevron analysis, the Sixth Circuit asked whether the statutory definition of ‘applicant’ unambiguously excluded guarantors. 31 Unlike the Eighth Circuit, it found the definition to be ambiguous “because it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves—a category that includes guarantors.” 32 The court viewed a guarantor as formally approaching the creditor in the “sense that the guarantor offers up her own personal liability to the creditor if the borrower defaults.” 33 The court further found the definition of “credit” to be ambiguous. 34 The court also examined the statute based on its remedial nature and broad reach to “any aspect of a credit transaction.” 35 Viewing “guarantor” as a natural meaning of “applicant,” the court deferred to the regulation. 36 The Sixth Circuit viewed it as significant that Congress had not taken any action to revise the definition of “applicant” when it amended the ECOA. 37 In granting deference to the FRB’s interpretation, the Sixth Circuit permitted the guarantor to seek relief for violations of the spouse-guarantor rule which could be raised as an affirmative defense. 38

In our view, the Sixth Circuit asked the wrong question. It is not whether the definition unambiguously excludes the term but whether the statute is ambiguous enough to necessitate the administrative agency offering a clarification. The term “applicant” is not ambiguous and the spouse-guarantor rule should be an impermissible agency extension of the ECOA. The circuit court

28 Id.
29 Id.; see also 12 C.F.R. § 202.7(d)(5).
30 Id. at 384.
31 Id.
32 Id. at 384–5.
33 Id. at 385.
34 Id.
35 Id. (citing Barney v. Holzer Clinic, Ltd., 110 F.3d 1207, 1211 n.6 (6th Cir. 1997)).
36 Id.
37 Id. at 386.
38 Id. at 387.
that first struck down the spouse-guarantor rule explained that it is a “sound commercial practice unrelated to any stereotypical view of a wife’s role for [the lender] to require that she guarantee the debt along with her husband.”

Often the spouse will have an ownership interest in the assets upon which the creditor is relying in seeking a personal guaranty. The spouse-guarantor rule goes too far and prevents a “harm” which the ECOA never intended to prevent. Creditors must be mindful of which circuit would be determining the enforceability of a guaranty upon default. Given the multi-state transactions of many lenders, that is not always an easy determination.

**U.S. SUPREME COURT GRANTS CERTIORARI IN HAWKINS**

The U.S. Supreme Court has granted certiorari to the spouses in *Hawkins*. The Court will consider two issues not yet decided by it:

1. Are “primarily and unconditionally liable” spousal guarantors unambiguously excluded from being ECOA “applicants” because they are not integrally part of “any aspect of a credit transaction”?
2. Did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as “applicants” to further the purposes of eliminating discrimination against married women?

**PREVENTING POTENTIAL ECOA VIOLATIONS**

But what can creditors do to prevent potential ECOA violations? In the underwriting process, it should be made clear and documented that the lender is not requiring the signature of a spouse, but merely the signature of another person as a guaranty. Many states have unique guaranty laws and now the Sixth Circuit has opened up another pitfall for the unwary creditor. Until the Supreme Court resolves the issue, a review of your form guaranty documents could prevent an unexpected ECOA violation being raised in your next collection action.

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39 *See Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co*, 476 F.3d 436, 442 (7th Cir. 2007). The Sixth Circuit disregarded *Moran* by characterizing it as dicta. See *RL BB Acquisitions*, 754 F.3d at 386.


42 See 12 C.F.R. § 202.7(d)(5).