Published on *The National Law Review* https://natlawreview.com

Eighth Circuit Finds Guarantors Not Afforded Protections under the Equal Credit Opportunity Act

Article By:

Litigation

The application of the Equal Credit Opportunity Act (ECOA) to spousal guaranties is a developing area of law, resulting in a number of recent appellate opinions. One opinion from the Eighth Circuit Court of Appeals, Hawkins v. Community Bank of Raymore, casts doubt on the viability of an ECOA defense for guarantors, finding that guarantors are not applicants for credit under the ECOA and are therefore outside the scope of its protections.

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." "Applicant" is a defined term and means "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." The implementing regulation for the ECOA, Regulation B (Reg B), interprets and expands the definition of "applicant" to include guarantors, which are otherwise excluded.

In Hawkins, the guarantors asserted application of the ECOA as an affirmative defense to enforcement of their guaranties. The guarantors alleged that their only affiliation with the borrower was their status as spouses of its principals and that their guaranties were required in violation of the ECOA. In response, the lender argued the guarantors could not assert the ECOA as a defense because they were not applicants for credit within the statutory meaning of the term. Applying principles of statutory construction, the Eighth Circuit concluded the definition of "applicant" under the ECOA clearly excluded guarantors and Reg B impermissibly expanded its meaning inconsistent with Congress' intent. Based on these conclusions, the Eighth Circuit rejected the guarantors' defense and upheld their guaranties.

In its opinion, the Eighth Circuit court noted a recent decision from the Sixth Circuit, RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., considering the same issue under parallel facts. The Sixth Circuit performed the same analysis, but reached a different conclusion. The Sixth Circuit found that the definition of "applicant" under the ECOA was ambiguous and that Reg. B's definition constituted a valid construction. The Sixth Circuit stated its conclusion was consistent with the majority of courts to previously consider the issue and traced the origin of the counter-argument to a Seventh Circuit case, Moran Foods, Inc. v. Mid-Atlantic Market Development Co. (finding "there is nothing ambiguous about" the statutory definition of "'applicant' and no way to confuse an applicant

with a guarantor"). The Sixth Circuit dismissed the Seventh Circuit's analysis as dicta, but the Eighth Circuit cited it as instructive.

The Eighth Circuit's holding in Hawkins sets up a split between circuits and an issue certain to be litigated in state and federal courts across the country. To date, though the Fourth Circuit (incudes North Carolina) has considered the application of the ECOA in the context of spousal guaranties (most recently, in Ballard v. Bank of Am., N.A.), it has not examined the issue of whether a guarantor constitutes an "applicant" within the statutory definition.

National Law Review, Volume IV, Number 335