Client Alert

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Supreme Court to Determine Whether ECOA Allows Spousal Guarantors to Challenge Liability

By Joe Rodriguez and James Nguyen

On March 2, 2015, the Supreme Court of the United States granted certiorari in *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *cert. granted*, No. 14-520, 2015 U.S. LEXIS 1635 (U.S. Mar. 2, 2015)—on appeal from the Eighth Circuit—to decide whether certain guarantors are excluded from the definition of "applicant" under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.*, and whether the Federal Reserve Board (FRB) had the authority under the ECOA to include certain guarantors as "applicants" in Regulation B, 12 C.F.R. pt. 1002 *et seq*. A decision by the Court could resolve a circuit court split between the Sixth and Eighth Circuits.

CIRCUIT COURTS DISAGREE ON WHETHER THE TERM "APPLICANT" IS AMBIGUOUS

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction" on a number of bases, including marital status. *See* 15 U.S.C. § 1691. While the ECOA defines "applicant" as "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" (15 U.S.C. § 1691a(b)), Regulation B sets forth its own definition, which is broader than the statute and allows guarantors to sue for violations of the spouse-guarantor rule. *See* 12 C.F.R. § 1002.2(e) (defining "applicant" under Regulation B); 12 C.F.R. § 1002.7(d)(5) ("The applicant's spouse may serve as an additional party [supporting the application], but the creditor shall not require that the spouse be the additional party.").

At issue in *Hawkins* is whether the ECOA's definition of "applicant" includes guarantors such that a spousal guarantor can enforce the protection from marital status discrimination under the ECOA. According to the Eighth Circuit, the "text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another." The Eighth Circuit reasoned that a person does not request credit by "executing a guaranty" because a "guaranty is collateral and secondary to the underlying loan transaction between the lender and the borrower." As a result, the Eighth Circuit concluded that it would not need to rule on the reasonableness of the FRB's interpretation of "applicant" because the plain meaning of the statute is "unambiguous" and "a guarantor is not protected from marital status discrimination by the ECOA."

In contrast, the Sixth Circuit in *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380 (6th Cir. 2014) held that the ECOA's definition of "applicant" is ambiguous and "could be construed to cover a

guarantor." Based on an analysis of the terms "applies" and "credit" in the ECOA, the court found that the term "applies" could include "all those who offer promises in support of an application—including guarantors" and the definition of the term "credit" suggests that an applicant and a debtor are "not always the same person" and, thus, "the applicant could be a third party, such as a guarantor." Holding that the ECOA's definition of "applicant" is ambiguous, the court deferred to the FRB's interpretation.

TAKEAWAYS

While not as exciting as the recent arguments heard by the Court in *Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. granted in part*, 135 S. Ct. 46, 189 L. Ed. 2d 896 (2014), which presents the issue of whether disparate impact claims are cognizable under the Fair Housing Act, the Court's ruling in *Hawkins* may have an impact on lenders' compliance management programs, including statistical testing conducted for fair lending analyses. Moreover, depending on the ruling in *Inclusive Communities*, which could come as early as May 2015, the eventual ruling in *Hawkins* could have significant implications for a future challenge to disparate impact liability under the ECOA. A ruling in line with the Sixth Circuit might indicate an inclination toward finding ambiguity in the ECOA, making it difficult to challenge disparate impact. On the other hand, a ruling in line with the Eighth Circuit could signal a strict constructionist approach to the ECOA, making a disparate impact challenge much more likely.

We will continue to monitor the Supreme Court's decisions in *Inclusive Communities* and *Hawkins* and will provide an update when they are announced.

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