**Split Decision by U.S. Supreme Court**

**Fails to Resolve Interpretation of Banking Regulation**

The first 4-4 split decision by the U.S. Supreme Court following the unexpected death of Justice Antonin Scalia failed to resolve conflicting interpretations of a banking regulation by the Sixth and Eighth Circuit Courts of Appeals. In *Hawkins v. Community Bank of Raymore*, the Supreme Court affirmed an Eighth Circuit Court of Appeals decision finding that the Equal Credit Opportunity Act (ECOA) and Regulation B apply only to loan applicants, not to those who guarantee the loans.

In a one line opinion, the Supreme Court stated that the Eighth Circuit’s “judgment is affirmed by an equally divided Court.” The even split among the justices means the Eighth Circuit decision is not overturned and remains the law in the states within the Eighth Circuit. However, the decision does not overturn a Sixth Circuit Court decision that reached the opposite conclusion on the same issue, nor does the decision provide binding precedent for courts in other Circuits, such as Virginia which is in the Fourth Circuit.

The *Hawkins* caseinvolved two wives who executed personal guaranties guaranteeing commercial loans made to their husbands’ business. When the husbands’ business failed to make required loan payments, the bank declared the loans in default and demanded payment from the wives as guarantors. The wives sued the bank seeking an order declaring their guaranties void and unenforceable. They alleged the bank had required them to execute the guaranties solely because they were married to their husbands. They claimed this requirement constituted discrimination against them on the basis of their marital status in violation of the ECOA. The bank argued the wives were not “applicants” within the meaning of the ECOA and thus the bank had not violated the ECOA by requiring them to execute the guaranties.

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, among other things, marital status. The statute 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.” Interpreting this statutory definition, the Federal Reserve Bank promulgated Regulation B which provides that the term “applicant” includes guarantors. Relying on Regulation B, the wives argued they were applicants within the meaning of the ECOA because they guaranteed the debt to the bank.

Applying the framework established by [*Chevron U.S.A., Inc. v. Natural Resources Defense Council*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000708&originatingDoc=Icb80ca101cc411e4b4bafa136b480ad2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to determine whether it should defer to the Federal Reserve's interpretation of the ECOA's definition of applicant, the Eighth Circuit determined the ECOA definition of “applicant” was unambiguous and unmistakably provides that a person is an applicant only if she requests credit. The Eighth Circuit reasoned that while a guarantor desires for a lender to extend credit to a borrower, the guarantor is not requesting credit and therefore does not qualify as an applicant under the ECOA. Because the ECOA definition was unambiguous regarding whether a guarantor constitutes an applicant, the Eighth Circuit refused to defer to the Federal Reserve's interpretation of applicant, and concluded that the guarantor wives were not applicants protected from marital-status discrimination by the ECOA.

The Eighth Circuit further reasoned that its conclusion comported with the purposes and policies underlying the ECOA, which were to curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband, and these policies focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status. The considerations are different in the case of a guarantor, the Eighth Circuit Court said, noting that by requesting the execution of a guaranty, a lender does not exclude the guarantor from the lending process or deny the guarantor access to credit. The Eighth Circuit emphasized that the wives were not excluded from the lending process due to their marital status, instead they complained they were improperly *included* in that process by being required to execute guaranties.

The Sixth Circuit recently reached the contrary conclusion, finding it to be ambiguous whether a guarantor qualifies as an applicant under the ECOA, and deferring to the Federal Reserve’s interpretation. The issue is now settled in the Eighth Circuit. Banks in the Sixth and other Circuits should continue to proceed cautiously until the issue is reconsidered by a full Supreme Court.

For more information about ECOA, Regulation B and the *Hawkins* case, contact Mel Tull, VBA General Counsel, at mtull@vabankers.org or (804) 819-4710.

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