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Supreme Court's Four-to-Four Decision in Hawkins v. Community Bank of Raymore Leaves Open Question about Application of Equal Credit Opportunity Act to Spousal Guarantees of Commercial Loans [Ober|Kaler]

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In its first evenly split vote since the death of Justice Scalia, the U.S. Supreme Court last week affirmed an Eighth Circuit Court of Appeals ruling in *Hawkins v. Community Bank of Raymore*1 that spouses who guarantee commercial loans are not "applicants" under the Equal Credit Opportunity Act, 15 U.S.C. § 1591 *et seq.* (the "ECOA"), and are therefore not entitled protection by the ECOA from marital-status discrimination.

Congress initially enacted the ECOA to address, among other things, the lending practice of refusing to extend credit to a married woman without her husband's guaranty. The ECOA expressly prohibits discrimination "against any applicant, with respect to any aspect of a credit transaction... on the basis of race, color, religion, national origin, sex or *marital status*, or age."2 This prohibition applies to consumer and commercial credit. An "applicant" is defined in the statute 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."3 Further interpreting this statutory definition, the Federal Reserve Board issued Regulation B, which expands the definition of "applicant" to include "*guarantors*, sureties, endorsers, and similar parties."4

It is not unusual for a lender to see spousal guarantors attempt to use the ECOA to invalidate guaranties and/or as the basis for affirmative claims for damages against the lender after a default on a commercial loan. Such was the case in *Hawkins v. Community Bank of Raymore*. When Community Bank of Raymore accelerated and demanded payment of four residential development loans, the spouses of the principals of the development company (the "Spouse-Guarantors"), who held no legal interest in the company, sought to void their guaranties and asserted ECOA claims for damages arising from the bank's discrimination against them based on their marital status. The Spouse-Guarantors claimed that the bank required them to execute guaranties solely because they were married to their respective husbands.

Both the trial court and the Eighth Circuit Court of Appeals focused on the plain language of the ECOA and concluded that the Spouse-Guarantors were not "applicants" as that term is defined in the statute. Those courts found no need to resort to the Regulation B definition of "applicant" (which included guarantors) because the statutory definition of "applicant" was unambiguous. Accordingly, the Eighth Circuit affirmed that the ECOA did not protect the Spouse-Guarantors from marital-status discrimination.

As the *Hawkins* decision put the Eighth Circuit at odds with another federal appeals court on the question,5 the Supreme Court agreed to hear the Spousal-Guarantors' appeal. The Supreme Court's tie vote lets stand the Eighth Circuit's ruling in *Hawkins*, but does not bind courts outside of the seven states comprising the Eighth Circuit.6 The lack of a majority opinion leaves the door open for courts outside of the Eighth Circuit to apply the ECOA and Regulation B to prohibit a commercial lender from requesting a loan guaranty solely because the prospective guarantor is married to the borrower or a principal of the borrower.

Unfortunately, those seeking some clarity from the Supreme Court about the application of the ECOA and Regulation B to spousal guaranties will continue to wait.

In the meantime, litigation relating to the ECOA and spousal guaranties will undoubtedly continue to affect the cost of commercial credit. In all jurisdictions, the ECOA prohibits a lender from requesting a spousal guaranty if an applicant otherwise qualifies under the lender's "standards of creditworthiness." Lenders should proceed deliberately and retain clear documentation of the process when requesting spousal guaranties of commercial loans.

For more information about this topic or assistance with other commercial financing issues, please contact the author or any member of the Ober|Kaler Finance Group or Creditors' Rights, Workouts and Bankruptcy Group.

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[1] 761 F.3d 937 (8th Cir. 2014), affirmed per curiam, 577 U.S. ____ (2016).

[2] 11 U.S.C. § 1691(a).

[3] 11 U.S.C. § 1691a(b).

[4] 12 C.F.R. § 202.2(e). ECOA was subsequently amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act to empower the Consumer Financial Protection Bureau to issue regulations under the statute. See 12 C.F.R. § 1002.1 *et seq*. for Regulation B as adopted by the Consumer Financial Protection Bureau.

[5] *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014).

[6] The Eighth Circuit is comprised of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.