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CFPB files amicus brief in Eleventh Circuit ECOA case

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The CFPB has filed an amicus brief in *Regions Bank v. Legal Outsource PA*, a case on appeal to the Eleventh Circuit that involves two important issues under the Equal Credit Opportunity Act (ECOA): whether the ECOA provides a cause of action to loan guarantors and whether a business entity can assert a marital status discrimination claim under the ECOA.

The ECOA defines an ”applicant” as someone who ”applies to a creditor directly for an extension … of credit, or … indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.” In 1985, the Federal Reserve Board amended the Regulation B definition of ”applicant” to include a guarantor ”[f]or purposes of section 202.7(d)” (as adopted by the CFPB, now Section 1002.7(d)). Section 1002.7(d) of Regulation B specifies when a creditor may require the signature of a spouse or other person (Additional Signature Rule).

Only a few U.S. Courts of Appeal have addressed whether the ECOA provides a cause of action to guarantors. The Seventh Circuit, in a 2007 decision, interpreted the ECOA’s plain language in a straightforward manner and found that there was “nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.” The court went on to explain that interpreting the term “applicant” to include guarantors would “open[] vistas of liability that the Congress that enacted [the ECOA] would have been unlikely to accept.”

In mid-2014, two other circuits ruled on the same issue. The Sixth Circuit, rejecting the Seventh Circuit’s reasoning, found that the ECOA’S definition of “applicant” was ambiguous and that the Federal Reserve Board’s definition of the same term in Regulation B–modified to expressly include guarantors–was entitled to *Chevron* deference. Shortly thereafter, the Eighth Circuit, in *Hawkins v. Community Bank of Raymore*, came to precisely the same result as the Seventh Circuit. The Eighth Circuit found it patently clear that “assuming a secondary, contingent liability does not amount to a request for credit,” and thus concluded that guarantors are not “applicants” within the plain meaning of the statutory definition provided in the ECOA.”

Last year, an equally divided U.S. Supreme Court affirmed the Eighth Circuit’s decision in *Hawkins*, thereby upholding the Eighth Circuit’s ruling that the ECOA does not provide a cause of action to loan guarantors. The affirmance by a 4-4 vote meant that the Eighth Circuit’s ruling had no precedential effect in any other circuit. (The CFPB, jointly with the Solicitor General, filed an amicus brief in the Supreme Court supporting the plaintiffs’ position in *Hawkins*.)

In the Regions Bank case, the Bank made a loan to Legal Outsource, a company owned by Charles Phoenix. It subsequently made a loan to Periwinkle Partners, a company indirectly owned by Lisa Phoenix, the wife of Charles Phoenix. Legal Outsource, Charles Phoenix, and Lisa Phoenix guaranteed the loan to Periwinkle Partners. After Legal Outsource defaulted on its loan, the Bank declared a default on its loan to Periwinkle Partners because, under the terms of that loan, a default on the Bank’s loan to Legal Outsource constituted an event of default on its loan to Periwinkle Partners.

Additional defaults occurred over the the course of more than a year prior to the Bank’s decision to commence suit, including the obligors’ failure to pay ad valorem taxes due on the collateral or provide required financial reports and the transfer of equity interests in Periwinkle Partners to third parties without the Bank’s knowledge

or consent. While under no obligation to do so, the Bank spent over a year attempting to negotiate an out-of-court resolution with the borrower and guarantors, to no avail.

The Bank thereafter sued Periwinkle Partners, Legal Outsource, and Lisa and Charles Phoenix in a Florida federal district court to foreclose on collateral securing its loan to Periwinkle Partners. All of the defendants asserted counterclaims alleging that the Bank had violated the ECOA's prohibition against discrimination on the basis of marital status and the Additional Signature Rule. According to the defendants, the Bank required Charles Phoenix to guarantee the loan to Periwinkle Partners solely because he was married to Lisa Phoenix.

The district court dismissed the counterclaims of Legal Outsource and Lisa and Charles Phoenix "to the extent that defendants are asserting their counterclaims for violation of the ECOA in their capacities as guarantors." In dismissing the counterclaims, the district court relied on the Eighth Circuit's *Hawkins* decision in which the Eighth Circuit concluded that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit. But a person does not, by executing a guaranty, request credit." The Eighth Circuit also ruled that Regulation B's definition of "applicant" was not entitled to *Chevron* deference because the definition contradicted the text's unambiguous statutory definition.

In a subsequent decision, the district court dismissed the ECOA counterclaim asserted by Periwinkle Partners on the grounds that, although it was an "applicant," it could not assert an ECOA claim for discrimination based on marital status. According to the district court, "Periwinkle Partners cannot avail itself of the protections of the Act because it is a company, not an individual, and it cannot have a marital status."

In its amicus brief filed in support of the defendants, the CFPB argues that:

- Under the plain text of the ECOA and Regulation B, a company can be an "applicant" protected against discrimination "on the basis…of marital status" because the ECOA does not require the alleged discrimination to "be on the basis of the applicant's marital status." (emphasis provided).
- Under the Regulation B commentary, the ECOA prohibits discrimination based on the characteristics of corporate officers and of "individuals with whom an applicant is affiliated or with whom the applicant associates." Because the owner of a company is an officer, affiliate, or associate of the company, an applicant company can bring an ECOA claim "if it suffers discrimination on the basis of its owner's marital status."
- The Regulation B definition of "applicant" is a reasonable interpretation of the ECOA's text that is entitled to *Chevron* deference.

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