8th Circuit Rules ECOA Does Not Apply to Guarantors of Loans

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After argument before the U.S. Court of Appeals for the 8th Circuit in *Hawkins v. Community Bank of Raymore*, Case No. 13-3065, Lathrop Gage attorneys Tom Stahl, Greer Lang and Justin Nichols obtained a ruling that the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691 *et seq*., does not apply to guarantors of loans. This holding, consistent with recent decisions of the federal district courts in the state of Missouri (but contrary to Regulation B (12 C.F.R §202.2) promulgated by the Federal Reserve some 30 years ago), invalidates those cases in the 8th Circuit holding that guarantors are protected under the ECOA and gives credence to arguments made in other circuits to that effect as well.

The Case

In the underlying litigation, Valerie Hawkins and Janice Patterson sued Lathrop Gage client Community Bank of Raymore ("CBR"), claiming it violated the ECOA by allegedly requiring their guaranties of several loans made to PHC Development, LLC, an entity they claimed was formed and controlled by their husbands. Per their argument, CBR violated the ECOA by allegedly requiring their guaranties on the loans to PHC Development simply by virtue of the fact that they were the wives of the business' "owners." This alleged requirement, they argued, discriminated against them on the basis of their marital status. As a result, they sought to have their guaranties declared void and unenforceable and to recover statutory and other damages for the alleged violation.

CBR argued that under the clear and unambiguous language of the ECOA, the anti-discrimination provisions of the statute were intended only to apply to those who are "applicants" for credit, and that guarantors are not applicants for credit. Instead, guarantors are simply in a position of providing collateral security to CBR on behalf of the actual "applicant" for credit, in this case, PHC. The district court agreed and granted summary judgment in favor of CBR, holding that the ECOA and Regulation B do not apply to guarantors of loans.

The Decision

The 8th Circuit unanimously affirmed the decision of District Court Judge Dean Whipple. In doing so, the Court utilized the framework developed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to determine whether the regulatory interpretation of the statute was entitled to

deference. Under that framework, the Court first looks at whether the intent of Congress on the precise issue at hand is clear. If it is, then the analysis ends at that point. Only if the statute is silent or ambiguous does the court consider whether the regulatory agency framework fills a gap or defines a term in a reasonable manner in light of Congressional intent.

The 8th Circuit held that under *Chevron,* 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 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 8th Circuit's decision criticized a recent holding from the 6th Circuit to the contrary in *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.,* 754 F. 3d 380. In that case, the Court was faced with much the same issue as in *Hawkins,* but held that by virtue of the regulatory interpretation of the statute, guarantors were covered by the ECOA. The 8th Circuit noted its limited agreement with the 6th Circuit that guarantors are simply third parties in the application process, and suggests that fact alone ends the inquiry as to whether guarantors are covered by the ECOA.

The 8th Circuit held that its decision comports with the purpose of the ECOA, which is to eliminate discrimination on the basis of, among other things, marital status. "By requesting the execution of a guaranty, a lender does not thereby exclude the guarantor from the lending process or deny the guarantors access to credit… Here, Hawkins and Patterson…complain that they were improperly *included* in that process by being required to execute guaranties." The Court also noted, in a footnote, that because Missouri is a state with tenancies by the entirety, there likely was no violation of the ECOA even if it did apply to guarantors, because requiring the guaranties was a "sound commercial practice unrelated to any stereotypical view of a wife's role."

What It Means For Banks

The divergent decisions of the 6th and 8th Circuits may well mean review at the Supreme Court. The 8th Circuit decision will have an immediate impact on all civil cases, federal and state, in jurisdictions within the 8th Circuit. The regulators, including the FDIC and the CFPB, will look at the 8th Circuit decision, but may decide not to issue new guidelines or proposed rule changes due to divergent decisions not only between the 6th and 8th Circuits, but other circuits as well. As banks are aware, Regulation B addresses not only spousal guarantees, but basically all guaranties. Lathrop Gage does not yet recommend that banks change their policies and procedures in complying with Regulation B concerning personal guarantees, especially if the regulators have not written any concerns in their past exams concerning this area. The trend reflected in this case may be the "tip of the spear" on larger possible changes to regulatory issues concerning personal guarantees. However, especially given the rulemaking authority granted to the CFPB regarding ECOA, all trends should be monitored. If the regulators choose to ignore the 8th Circuit decision, it may be necessary

to file some type of declaratory judgment or other action before the regulators will comply with the 8th Circuit decision. We will stay on top of the issue and advise you if further changes to the regulations occur in the future.

If you have questions, please contact your Lathrop Gage attorney or any of the attorneys listed above.