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The Spousal Defense--A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?

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The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?

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I. INTRODUCTION

A defaulting spouse may find a powerful and effective defense to a creditor’s entry of judgment in the Equal Credit Opportunity Act (“ECO A” or “the Act”)¹ and the accompanying federal regulation (“Regulation B”).² The defense arises when a married applicant enters a financial institution seeking a loan, and even though the

1. 15 U.S.C. §§ 1691 et seq. (1994 ed.).

2. This regulation was issued by the Board of Governors of the Federal Reserve System pursuant to the Equal Credit Opportunity Act, and is codified at 12 C.F.R. § 202 (1996).

applicant is unquestionably creditworthy, the creditor requires that the applicant's spouse co-sign the loan as a guaranteeing spouse. The financial institution has just violated the ECOA by discriminating against the applicant on account of the applicant's marital status. If the original applicant later defaults on the loan, the creditor will then pursue a judgment against the guaranteeing spouse. Will the guaranteeing spouse be held liable for the underlying debt notwithstanding the fact that the additional signature was obtained illegally? Courts facing this question have struggled to come to a definitive answer as to whether a guaranteeing spouse may apply the ECOA as a defense to contractual liability.

Congress passed the ECOA in 1974³ to prohibit credit discrimination based on gender or marital status.⁴ Congress's goals were to protect married women from discriminatory credit practices⁵ and to provide all applicants the opportunity to establish individual credit.⁶ The provision was expanded in 1976⁷ to prohibit any type of credit discrimination.⁸ Even though the original purpose of the Act was to prohibit a creditor from discriminating against women by requiring wives to obtain their husbands' co-signatures, the literal language of the Act has been used in recent years by both husbands and wives in

3. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974), codified as amended at 15 U.S.C. § 1691 (1994 ed.) ("ECOA").

4. Federal Reserve System, Proposed Rules to Regulation B of the ECOA, 60 Fed. Reg. 20436, 20437 (April 26, 1995) (presenting proposed amendments to 12 C.F.R. Part 202) ("April Proposals to Regulation B").

5. For examples of discrimination against women before Congress passed the ECOA, including creditors' applying different criteria to women when making decisions of creditworthiness, see Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. Mem. L. Rev. 37, 41 (1994). See also Anne J. Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 Bus. Law. 1641, 1641 (1976) (stating creditors are often unwilling to extend credit to a married woman without her husband's guarantee).

6. See *Anderson v. United Financial Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) ("The purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit."); *Markham v. Colonial Mortgage Service Co., Associates, Inc.*, 605 F.2d 566, 569 (D.C. Cir. 1979) (noting that main purpose of the Act was to eliminate discrimination against women, "especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit").

7. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976), codified at 15 U.S.C. § 1691(a).

8. The ECOA states that "[i]t shall be unlawful for any creditor to discriminate 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 . . ." 15 U.S.C. § 1691(a)(1). See also 12 C.F.R. § 202.1(b) (1996) ("The purpose of this regulation is to promote the availability of credit to all creditworthy applicants . . .").

an attempt to declare underlying notes or guaranties void and unenforceable upon an ECOA violation.⁹

The most common example of an ECOA violation today results from a creditor requiring the *husband* to obtain the signature of his wife even though the husband is individually creditworthy. Another example of an ECOA violation occurs in the commercial lending context. The lender may require the personal guarantee of an owner or officer of the business, often the husband, and then also require the wife to co-sign the guaranty as additional protection.

Either situation violates Regulation B, which specifically provides:

Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.¹⁰

In the last decade, defaulting spouses have increasingly cited this portion of Regulation B as a possible defense to payment of their obligations, claiming that the creditor discriminated against creditworthy husbands by requiring their wives' signatures. Because the legislative intent when enacting the ECOA was to protect married women instead of married men,¹¹ courts have disagreed as to the whether husbands can even claim that they have been discriminated against, and therefore, whether their co-signing wives can seek dismissal of their obligations.

9 To many commentators, the assertion of an ECOA violation by a guarantoeing *wife* distorts the Act's intended use, as the discrimination in that scenario is not against the woman but against the husband. See, for example, Andrew B. Lustigman and Alicia M. Serafty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 *Bank. L. J.* 444, 447 (1994) ("[B]orrowers and guarantors are increasingly asserting claims or defenses under ECOA—not to . . . remedy past 'discrimination'—but as a last ditch effort to prevent a lender from obtaining a quick entry of judgment against them"); *CMF Virginia Land, L.P. v. Brinson*, 806 F. Supp. 90, 96 (E.D. Va. 1992) (stating that the ECOA was enacted to protect women and that voiding a guaranty signed by a male borrower was not the intended use of the ECOA).

10. 12 C.F.R. § 202.7(d)(1).

11. Hearings Before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 93d Cong., 2d Sess. 2-3 (1974) ("Subcommittee Hearings"). The Subcommittee gave special thanks to the National Commission on Consumer Finance for bringing "dramatic attention . . . to the issues of women and credit in hearings almost exactly 2 years ago." As a result of this attention, the Subcommittee became determined to pass federal legislation that would eliminate the problems of gender-based credit discrimination. *Id.* In fact, speakers in the 1974 Subcommittee Hearings suggested that the bill should not address classes other than women, such as race and religion, because the 1972 report produced no evidence of this type of discrimination in the credit industry. *Id.* at 317-18.

The ECOA provides several remedies to an aggrieved credit applicant, including the right to bring private lawsuits against those creditors in violation. The far-reaching potential effects of these remedies form one of the most problematic and unsettled areas of the Act. In addition to monetary damages, section 1691e(c) of the ECOA empowers courts to "grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title."¹² The dispute among courts arises when a creditor clearly violates the ECOA by requiring the signature of the spouse of a creditworthy applicant, the original guarantor defaults on the loan, and the creditor subsequently pursues a judgment against the guaranteeing spouse. In this situation, some courts cite section 1691e(c) as authority for relieving the spouse who was forced to co-sign the guaranty from any future obligation,¹³ while other courts refuse because the statute does not specifically provide for such a remedy.¹⁴

The fact that some courts look to the "equitable and declaratory relief" provision in order to release the guaranteeing spouse from any obligation, while others courts do not, creates an area of unsettled law which is still developing. As a result of the inconsistencies, it is nearly impossible to predict what type of remedy the court will impose in a specific jurisdiction.¹⁵ The unanswered question, and the issue addressed in this Note, is whether a guaranteeing spouse can claim a violation of the ECOA as grounds for dismissal from the collection action, or whether the guaranty remains intact, leaving a compulsory counterclaim as the guaranteeing spouse's only available form of relief. This Note will then explore the legislative history of the

12. 15 U.S.C. § 1691e(c).

13. See *American Security Bank, N.A. v. York*, 1992 WL 237375 *3 (D.D.C. Sept. 1, 1992) (rendering the underlying debt void does not fail as a defense as a matter of law given the broad remedial language of § 1691e(c)); *In re Remington*, 19 B.R. 718, 720 (D. Colo. 1982) (supporting defensive use of ECOA violation as grounds for recoupment).

14. See *Brinson*, 806 F. Supp. at 95-96 (declining to invalidate underlying guaranty by "reading between the lines" of the statute); *Diamond v. Union Bank and Trust of Bartlesville*, 776 F. Supp. 542 (N.D. Okla. 1991) (holding that there is no statutory authority allowing courts to render an instrument void upon ECOA violation).

15. When both husband and wife assert the spousal defense as co-defendants, and the creditor-plaintiff seeks summary judgment, courts have generally not allowed the original guarantor to claim a violation of the ECOA as a defense to payment. See, for example, *Brinson*, 806 F. Supp. at 96; *Diamond*, 776 F. Supp. at 543-44. One court found it particularly untenable to void a couple's guaranty when the husband claimed that he was forced to obtain his wife's signature as a guarantor. *Brinson*, 806 F. Supp. at 96. But see *Remington*, 19 B.R. at 719. The *Remington* court strictly construed the ECOA's text, noting that although the Act may have been promulgated to protect women and other minorities, the plain statutory language bars discrimination against any applicant. As a result, this court concluded that an ECOA violation, even against a husband, may "taint the entire obligation." *Id.*

ECOA¹⁶ and analyze the inconsistent results of various courts.¹⁷ The Note will recommend an approach that not only follows legislative intent and the literal meaning of the statute, but also effectuates Congress's goal in balancing the credit industry's need for protection against the borrower's right to be free from discriminatory credit practices.¹⁸

II. PURPOSE AND STATUTORY REQUIREMENTS OF THE EQUAL CREDIT OPPORTUNITY ACT ("ECOA")

A. *Legislative History*

In the early 1970s Congress conducted several inquiries and hearings in response to widespread allegations of discriminatory credit practices.¹⁹ As a result of a 1972 report released by the National Commission on Consumer Finance exposing the widespread problem of gender-based credit discrimination, Congress's focus of redress quickly centered on married women, who were consistently required to obtain the signatures of their husbands in order to receive credit from financial institutions.²⁰ The original provision of the ECOA in 1974 only barred discrimination based on gender and marital status and prohibited creditors from asking any questions aimed at ascertaining an applicant's marital status.²¹ The inability of creditors to compile this information was thought to prevent creditors from using it as a means to discriminate.²²

16. See Part II.

17. See Part III.

18. See Part IV.

19. The National Commission on Consumer Finance reported evidence of discrimination against women on a widespread basis in the credit industry. Griffith, 25 U. Mem. L. Rev. at 41 (cited in note 5).

20. Subcommittee Hearings, 93d Cong., 2d Sess. at 27 (cited in note 11). Additionally, in 1974 the United States Commission on Civil Rights studied mortgage lending in Hartford, Connecticut. The study found that mortgage procedures permitted opportunities for discriminatory credit decisions, as well as nearly requiring discrimination against women. Under the criteria used by mortgage lenders in Hartford, women were automatically considered credit risks. *Id.* at 247. See also Geary, 31 Bus. Law. at 1652 (stating that the requirement of a signature from the applicant's spouse is common practice in some segments of the credit industry) (cited in note 5).

21. Before Congress enacted the ECOA, women were forced to answer questions on credit application forms that addressed age, sex, race, religion, birth control practices, and child-bearing intentions. Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 Wis. L. Rev. 655, 656.

22. April Proposals to Regulation B, 60 Fed. Reg. at 20437 (cited in note 4).

Evidence of credit discrimination in the United States was not limited to sex and marital status, however, and Congress reacted by expanding the Act to its present scope. In 1976, Congress amended the ECOA to prohibit discrimination based on race, color, religion, and national origin, as well as the original classes of gender and marital status.²³ Additionally, the current Act prohibits discriminatory credit practices at all stages of the credit transaction, including any extensions of credit.²⁴ The broad prohibition differs from other areas of the Consumer Credit Protection Act in that it applies to business and commercial transactions, as well as to any individual who regularly extends credit.²⁵ No creditor, large or small, is immune from the requirements imposed by the ECOA.

B. Statutory Scheme

Even though the ECOA contains broad anti-discrimination language, it is Regulation B that contains the specific protections afforded a spousal guarantor.²⁶ Only those persons deemed "applicants" under Regulation B, however, may seek redress. As of January 1, 1986, Congress expanded the definition of "applicant" to include any person who may become contractually liable for an extension of credit,²⁷ including "guarantors, sureties, endorsers, and similar parties."²⁸ Under the previous statute, which had denied standing to this group until 1986, guaranteeing spouses whose signatures were obtained in violation of Regulation B could not sue as "aggrieved applicants," and were therefore left without recourse. Consequently, the question of whether the court should dismiss a guaranteeing spouse whose signature was illegally obtained from a creditor's claim has only arisen as a result of the 1986 amendments.

23. *Id.*

24. See *Revision of the Board's Equal Credit Regulation: An Overview*, 71 Fed. Res. Bull. 913, 914 (Dec. 1985) ("Equal Credit Regulation Revision"). The credit transaction includes applying for credit, credit investigations, creditworthiness standards, obtaining signatures, credit reporting, and collection of debts. See also *Stern v. Espirito Santo Bank of Florida*, 791 F. Supp. 865, 869 (S.D. Fla. 1992) (holding that a lender must reevaluate an applicant's creditworthiness when extending additional credit); Official Staff Commentaries, 12 C.F.R., Part 202, Supp. I, § 202.7(d)(6) (1996).

25. *Equal Credit Regulation Revision*, 71 Fed. Res. Bull. at 914 (cited in note 24). The ECOA is not limited to banks and financial institutions. See also 12 C.F.R. § 202.2(l).

26. *Equal Credit Regulation Revision*, 71 Fed. Res. Bull. at 914 (cited in note 24). The ECOA is implemented through regulations issued by the Federal Reserve Board.

27. 12 C.F.R. § 202.2(e). "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit." *Id.*

28. *Id.*

The real heart of the protections afforded by the ECOA and Regulation B is section 202.7(d), which provides guidance as to when a creditor may require an additional signature on a guaranty. Generally, a creditor may not require the signature of an applicant's spouse or any other person if the applicant is individually creditworthy.²⁹ It may not seem clear at first why asking for an additional signature is considered discriminatory since the creditor is only protecting itself from default.³⁰ The practice is discriminatory, however, because an application becomes a joint application upon the signature of two people, denying the individual applicant the opportunity to establish an individual credit rating. A similarly creditworthy and unmarried applicant would have received the loan without the penalty of an additional signature being required.

Of course there are exceptions to the general rule. If a creditor decides that the applicant does not qualify under the creditor's own standards of creditworthiness, then the creditor may require an additional party to co-sign the instrument.³¹ Congress makes clear, however, that even though some additional signature may be required in order to protect the creditor, the creditor may not specifically require that it be the spouse who signs in this type of situation.³²

The creditor may require the signature of a guaranteeing spouse if the applicant requests unsecured credit and relies upon

29. 12 C.F.R. § 202.7(d)(1).

30. Many people may not even be aware that financial institutions and other creditors are legally precluded by the ECOA from asking a spouse to co-sign a credit agreement except under specific circumstances (for instance, when the spouse's assets are being used to determine the applicant's creditworthiness). This Act has applications to all persons who may someday seek credit.

31. 12 C.F.R. § 202.7(d)(5). Additionally, the Official Staff Commentaries to Regulation B specifically state that a creditor may not automatically require the spouse of a corporate officer of a closely held corporation to co-sign the instrument, even though the officer's personal guaranty of the corporate loan is required. The Commentary continues by stating that an additional signature may be necessary after evaluating the financial circumstances of an officer, and that this signature may be that of the spouse in "appropriate circumstances." A blanket policy requiring the spouse to sign as a guarantor will likely result in an ECOA claim later, either as an affirmative claim, or as a defense to payment. Official Staff Commentaries, 12 C.F.R., Part 202, Supp. I, § 202.7(d)(6).

32. If the applicant is not independently creditworthy, the regulation states:

(5) *Additional parties*. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, *but the creditor shall not require that the spouse be the additional party*.

12 C.F.R. § 202.7(d) (emphasis added). When an applicant does not meet the creditor's standards for creditworthiness, a creditor typically makes its mistake by specifying that the co-guarantor must be the applicant's spouse. Griffith, 25 U. Mem. L. Rev. at 91 (cited in note 5). But see *Ramsdell v. Bowles*, 64 F.3d 5 (1st Cir. 1995) (holding that a lender may require that the spouse guarantee the instrument if the applicant is not individually creditworthy).

property that is jointly owned with the spouse.³³ This signature, however, can only be used to create a valid security interest in the property upon default or death, and cannot impose personal liability upon the spouse for the entire debt.³⁴ A creditor must always evaluate the form of ownership of any property offered by an applicant before demanding any additional signatures.³⁵ If a financial institution or other creditor fails to perform this evaluation, potential ECOA violations will likely arise, even if the applicant is later deemed to be uncreditworthy, proving the additional signature of a guarantor would ultimately have been necessary.

The creditor may also require the signature of another person, including the applicant's spouse, if collateral is required as a condition to the extension of credit and the creditor reasonably believes the extra signature to be necessary under state law to obtain the property being offered as security.³⁶ This includes "an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings."³⁷ For instance, some states require both spouses to sign a document to create a lien on specific property. In such states, the creditor must in the credit agreement ensure that the obligation of the non-applicant spouse is nonrecourse unless the spouse has voluntarily agreed to assume the obligation for the underlying debt.³⁸ Otherwise, the blanket signature would obligate the non-applicant spouse to the entire debt instead of simply releasing any claim to the specific property.

33. 12 C.F.R. § 202.7(d)(2).

34. *Id.*

35. The Federal Reserve Board recently released proposed amendments and additions to this section of the Official Staff Commentary to Regulation B. One amendment to the Commentary would clarify that:

Where an individual applicant jointly owns property in a form and amount sufficient to establish creditworthiness, a creditor may not require the non-applicant joint owner of the property to execute any instrument that forfeits or conveys that person's interest in the property to the applicant or other owners as a condition of credit.

Federal Reserve System, Proposed Rules to Regulation B of the Equal Credit Opportunity Act, 60 Fed. Reg. 67097-98 (Dec. 28, 1995) (presenting proposed amendments to 12 C.F.R. Part 202) ("December Proposals to Regulation B"). The proposed commentary goes on to give an example of the clarification: the creditor could not require the spouse of the applicant to quitclaim any interest in jointly owned property which was relied upon by the creditor to establish creditworthiness, if the applicant's own interest in the property and other assets would be sufficient in themselves to achieve creditworthiness. *Id.* Other proposed amendments include a clarification of 7(d)(6)-1, which would explicitly state that a creditor can only require that the partners, officers, or directors of a creditworthy business personally guarantee the credit agreement if the guarantee is not required on a prohibited basis (such as all businesses owned by women or minorities). *Id.*

36. 12 C.F.R. § 202.7(d)(4).

37. *Id.*

38. Official Staff Commentaries, 12 C.F.R., Part 202, Supp. I, § 202.7(d)(4).

Each of the above exceptions requires the creditor to determine whether the applicant is individually creditworthy and whether the assets offered by the applicant are owned jointly. Compliance with the ECOA depends heavily upon performance of these two determinations.³⁹ In commercial lending, the lender may ask for an additional signature only if the applicant fails to satisfy the lender's standards for creditworthiness after this opening analysis.⁴⁰ Financial institutions may not require the spouse of an interested applicant to sign a loan instrument otherwise. The lender may, however, restrict the choice of additional parties, but only insofar as its restrictions do not discriminate on the basis of marital status or any other prohibited class within the ECOA.⁴¹

Once a creditor disregards the requirements imposed by the ECOA and wrongfully demands that the spouse co-sign the guaranty, either spouse may bring a private right of action against the creditor. Their potential remedies include recovery of actual damages sustained by an aggrieved applicant,⁴² which may include out-of-pocket expenses, injury to credit or reputation, or emotional distress.⁴³ Punitive damages may be awarded up to \$10,000 for individual actions, or, in class actions, up to \$500,000 or one percent of the creditor's net worth, whichever is less.⁴⁴ Finally, reasonable attorney's fees and court costs are recoverable, with the amount varying according to the facts of the individual cases.⁴⁵

The potential remedy that has become the most powerful and the most controversial for courts in recent years is that found in section 1691e(c), which allows courts to grant equitable relief as necessary to enforce the provisions of the ECOA.⁴⁶ This provision

39. The importance of the creditworthiness analysis includes renewals of credit. One court used the Official Staff Commentary to § 202.7(d)(5) to require the lender to reevaluate the creditworthiness of the applicant so that previous guarantors might be released if the applicant is now individually creditworthy. Failure to perform the reevaluation was considered to be a violation of the ECOA. *Stern*, 791 F. Supp. at 869.

40. 12 C.F.R. § 202.7(d)(1).

41. Official Staff Commentaries, 12 C.F.R., Part 202, Supp. I, § 202.7(d)(5).

42. 15 U.S.C. § 1691e(a).

43. *Anderson*, 666 F.2d at 1277. The court concluded that actual damages include "out-of-pocket monetary losses, injury to credit reputation, and mental anguish, humiliation or embarrassment." These injuries must be specifically proven. *Id.* at 1277-78.

44. 15 U.S.C. § 1691e(b). See also *Anderson*, 666 F.2d at 1278 (stating that actual damages need not be shown before assessing punitive damages but that a court must find, at a minimum, reckless disregard of the law's requirements).

45. 15 U.S.C. § 1691e(d).

46. Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title. 15 U.S.C. § 1691e(c).

appears to grant courts sweeping power to enforce the provisions of the Act in any manner consistent with the broad purpose of the ECOA—eliminating discrimination in the credit industry.⁴⁷ As a result, some courts have used section 1691e(c) as justification for releasing a guaranteeing spouse from liability.⁴⁸ Other courts have declined to accept this view, stating that authority to order this extreme result is found in neither the statute itself nor the Official Staff Commentaries.⁴⁹

III. INCONSISTENT RULINGS IN FEDERAL AND STATE COURTS

Increasingly, borrowers and guaranteeing spouses are asserting the ECOA as an affirmative defense in efforts to avoid debt liability. The characterization of an ECOA action as a compulsory counterclaim rather than an affirmative defense creates tremendous obstacles for an aggrieved applicant attempting to enforce the Act. If courts only allow a debtor-defendant to assert a compulsory counterclaim in response to a creditor's motion for summary judgment, the guarantor will have to pursue the ECOA claim separately from the creditor's motion. As a result, the court may grant summary judgment to the creditor on the defaulted obligation despite the fact that the guarantor's signature may have been obtained in violation of the ECOA. Obviously a court's characterization of the spousal defense will dramatically affect the guaranteeing spouse's efforts in seeking summary disposition of the creditor's claim.

47. For excellent discussions of the different results achieved by affirmative defenses and compulsory counterclaims, see Lustigman and Serafty, 111 *Bank. L. J.* at 444-48 (cited in note 9); Richard J. Wirth and Jonathan B. Alter, *Spousal Defenses Based in Equal Credit Laws*, 99 *Com. L. J.* 93 (1994); Kevin A. Palmer, *ECOA, Regulation B, and the Spousal Guaranty*, 110 *Bank. L. J.* 342, 348-49 (1993).

48. See *York*, 1992 WL 237375 at *3 (noting that rendering the underlying debt void does not fail as a defense as a matter of law given the broad remedial language of § 1691e(c)); *Remington*, 19 B.R. at 719 (supporting defensive use of ECOA violation as grounds for recoupment and leaving open the question as to whether the violation "taints the entire obligation" with illegality).

49. See, for example, *Brinson*, 806 F. Supp. at 95 (stating that the ECOA sets forth the contemplated remedy under the statute in monetary terms); *Diamond*, 776 F. Supp. at 544 (holding that there is no authority for voiding an entire debt upon a violation of the ECOA).

A. *ECOA Claim as a Compulsory Counterclaim—
Obligation Remains Intact*

A creditor will try to preserve a guarantor's obligation by seeking to have the ECOA claim framed as a compulsory counterclaim instead of as an affirmative defense. A counterclaim forces the defendant to pursue the claim in a separate action from the creditor's claim for summary judgment. The creditor will receive a judgment on the debt immediately, but the compulsory counterclaim will be heard either after the default judgment or later in a separate court. This is strategically meaningful for the creditor, who wants to recoup any losses on the outstanding loan as quickly as possible. More importantly, the counterclaim cannot be used by the debtor to avoid repayment of the loan. The aggrieved applicant's only remaining protection is that the counterclaim or recoupment action may still be asserted against the creditor in a separate trial and damages assessed against the violating creditor.

A leading case advocating the position that an ECOA claim may not be raised by a guaranteeing spouse as an affirmative defense in response to the enforcement efforts of a creditor on a guaranty is *CMF Virginia Land, L.P. v. Brinson*.⁵⁰ In *Brinson*, the court limited the use of the spousal defense by reading the specific damages provisions in 15 U.S.C. sections 1691e(a), (b), and (d) as the only remedies contemplated under the statute.⁵¹ Although section 1691e(c) gives courts the ability to render a guaranty void should a defendant prove an ECOA violation, the court held "invalidation of the debt itself [to be] a remedy too drastic . . . to implement simply by reading between the lines of the ECOA."⁵² The court went on to note that no provision of the ECOA contemplates an affirmative defense, while the existence of a defined damage and penalty provision confirms that the legislative intent was to treat the ECOA as a counterclaim.⁵³

The *Brinson* court acknowledged that in the aggregate, the damages assessed against the violating creditor through a compulsory counterclaim could be so large as to have the practical effect of canceling out the underlying debt. In the court's opinion, however, its approach was more consistent with the statute, relieving other individ-

50. *Brinson*, 806 F. Supp. at 93.

51. *Id.* at 95. The court stated that the plain language of the ECOA only allows an aggrieved applicant the ability to bring a "federal civil action for actual damages, punitive damages not to exceed \$10,000, attorneys' fees or injunctive relief." *Id.*

52. *Id.*

53. *Id.*

ual courts from having to answer the difficult question of whether or not the statute authorizes such "a rather extraordinary remedy" as nullifying a guarantor's obligation.⁵⁴

Contrary to many interpretations of the *Brinson* decision,⁵⁵ the court never addressed the issue of whether only the wives, as guarantor spouses, could have sought dismissal from the action. In *Brinson*, the defendants were a group of couples. The creditor had required the husbands, who guaranteed certain loans of a general partnership, to obtain their wives' signatures as guaranteeing spouses.⁵⁶ On these facts, all parties sought to avoid underlying debts through ECOA claims.

The court recognized that even though the plain language of the ECOA prohibits discriminatory credit practices against any applicant,⁵⁷ the original purpose of the ECOA was to protect individually creditworthy married women from having to obtain the signatures of their husbands as conditions to credit. Hence the court stated that it was especially reluctant to render an obligation void "whose execution violated the ECOA in a manner not expressly targeted by the statute."⁵⁸ Apparently, the *Brinson* court chose to ignore Congress's 1976

54. *Id.* at 95-96. The court decided that the remedies most "responsibly exercised" under the ECOA would be to grant the creditor summary judgment for the amount of the guaranty, to realign the affirmative defense as a compulsory counterclaim so that defendants could try and prove the ECOA violation at a later trial and possibly receive damages, and finally, to offset the amount of the guaranty by any damages proven by the defendants at trial. *Id.* at 95.

55. Paul H. Schieber, *Spousal Signatures Revisited (There's Good News and Bad News)*, 47 Consumer Fin. L. Q. Rep. 364, 364 (1993) (stating that the good news for lenders in consumer finance law is that a spousal signature violation does not void a spouse's obligation); Leonard A. Bernstein, *An Overview of Selected Recent Developments in Consumer Financial Services Law*, 48 Consumer Fin. L. Q. Rep. 22, 24 (1994) (exclaiming that the *Brinson* court answered the question of whether illegal spousal guarantees render the obligation void with a "resounding NO").

56. *Brinson*, 806 F.Supp at 94. The defendants argued that the requirement of spousal guarantees as a condition to credit violated Regulation B, rendering the guaranty void and relieving them of any liability on the underlying debt, or at a minimum, entitling them to recoupment of damages. *Id.* A former senior vice president of the financial institution gave testimony that no creditworthiness analysis was performed prior to the request of additional spousal guarantees. Unfortunately for the debtors, verification of this fact could not be addressed until a later trial subsequent to the ruling for summary judgment. *Id.*

57. *Id.* at 96.

58. *Id.* The court noted that Congress enacted the ECOA to prevent the discriminatory practice of lenders, requiring the husband to guarantee extensions of credit when a credit check would have shown that the wife had enough assets on her own to achieve creditworthiness without any additional signature. *Id.* This court seemed to revolt against the idea that any man could ever be discriminated against in the credit decision process. It therefore suggested that the ECOA simply does not apply to men no matter what the plain language of the Act may seem to indicate to the contrary.

amendments extending the Act's protection⁵⁹ to a wide range of borrowers as a means of protecting the integrity of the guaranty.

The United States District Court for the Northern District of Oklahoma, in *Diamond v. Union Bank and Trust of Bartlesville*, espoused a view similar to that expressed in *Brinson* when it held that a debtor-defendant could not assert an ECOA violation as an affirmative defense. The court, in granting summary judgment to the Federal Deposit Insurance Corporation, held that neither statutory language nor case law supported the proposition that an ECOA violation renders a guaranty void.⁶⁰ Once again, the issue of whether a guarantor-spouse alone could avoid liability because of an ECOA violation remained unanswered.

Finally, in 1995, the United States District Court for the District of Kansas offered an answer to the question of whether a wife remained liable when a creditor illegally required her guaranty. In *FDIC v. 32 Edwardsville, Inc.*,⁶¹ the wife argued that the affirmative defense of an ECOA violation discharged her own liability from the action. Hers was not an attempt to void the entire debt.⁶² Even so, the court held that she could not assert an ECOA violation as an affirmative defense that would invalidate the guaranty. Citing *Brinson* and *Diamond*, as well as several other cases,⁶³ the court read the ECOA's statutory language as not authorizing the voiding of underlying obligations.⁶⁴

59. 15 U.S.C. § 1691(a). See note 23 and accompanying text.

60. 776 F. Supp. at 544. The debtor-plaintiffs alleged that Union Bank required the wife's additional signature even though she was not a joint applicant with her husband. This court also cited the purpose of the ECOA, implying that because the husband was the original guarantor, no discrimination claim based on the ECOA could be asserted by the husband and the wife together. *Id.*

61. 873 F. Supp. 1474 (D. Kan. 1995).

62. *Id.* at 1480. The court claimed that even though the guaranteeing spouse described her assertion of an affirmative defense as a recoupment, in reality she was merely trying to use the ECOA claim as a method of voiding her potential liability on the guaranty. *Id.* The court also claimed that the guaranteeing spouse failed to offer enough evidence to suggest that the corporation would have qualified for the loan without the inclusion of property jointly held by husband and wife. The court, however, never considered the possibility that the husband's interest in the jointly held property would be sufficient for creditworthiness standards, negating the necessity for the wife's signature. *Id.* at 1481.

63. *Id.* The court cited *Riggs National Bank of Washington, D.C. v. Lynch*, 829 F. Supp. 163, 169 (E.D. Va. 1993) (holding that a defendant may not assert the ECOA as an affirmative defense), *aff'd* 36 F.3d 370 (4th Cir. 1994), and *United States v. Joseph Hirsch Sportswear Co., Inc.*, 1989 WL 20604 at *1 (E.D.N.Y. Feb. 28, 1989) (ruling that only a counterclaim, and not a defense, may be asserted because the ECOA only provides for actual damages as a remedy), *aff'd*, 923 F.2d 842 (2d Cir. 1990).

64. *32 Edwardsville, Inc.*, 873 F. Supp. at 1480. The court conceded that the ECOA grants courts the ability to provide equitable and declaratory relief. This court, however, followed the

Each of these courts, when prohibiting aggrieved applicants from asserting ECOA affirmative defenses, emphatically declared that it was following the language of the statute, as well as the intent of Congress. Both arguments are questionable upon examination of the actual language of the ECOA⁶⁵ and the 1976 ECOA amendments expanding the class of protected consumers.⁶⁶ More revealing, however, is that each of the courts referred to the "drastic" remedy of voiding an underlying guaranty, that (the courts claimed) would result if debtors framed an ECOA violation as an affirmative defense. This language may expose the courts' true motivation—concern for creditors' inability to recover large outstanding debts. The *Brinson* court, like the courts that follow its lead, uses a result-oriented approach that not only fails to apply the ECOA and punish discriminatory credit practices, but also fails to discern the difference between releasing only illegally obtained co-guarantors and voiding underlying obligations.⁶⁷

B. ECOA Claim as an Affirmative Defense—Releasing Guarantoring-Spouses from Liability

More courts in recent years have allowed defendants to treat ECOA claims as affirmative defenses. In *American Security Bank, N.A. v. York*,⁶⁸ the federal district court cited the broad language of 15 U.S.C. section 1691e(c)—which grants courts the ability to award equitable and declaratory relief to enforce the ECOA—when allowing

reasoning of *Brinson* by holding that this broad power "does not grant courts the power to invalidate underlying obligations." *Id.*

65. In particular, examination of 15 U.S.C. § 1691e(c), the provision authorizing courts to grant equitable and declaratory relief, reveals that all potential remedies are not explicitly stated in the remedial portion of the Act.

66. The original version of this provision prohibited discriminatory credit practices on the basis of gender or marital status, never stating only women were to receive the benefits of the Act. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974), codified as amended at 15 U.S.C. § 1691. The amendments in 1976 adding race, color, religion, and national origin prove the extent to which Congress wanted to provide protection to consumers. Nowhere does this amendment, or its Official Staff Commentaries state that types of discrimination against all these groups, except of course men, are prohibited classes of discrimination. See 15 U.S.C. § 1691(a)(1).

67. When a court releases a guarantoring spouse from her obligation, the underlying debt is not necessarily declared void. The original guarantor remains liable for the debt to the extent that person can pay. The courts in such situations are concerned that a creditor will not be able to recover on the debt because the original guarantor is bankrupt, and if a court releases the guarantoring spouse from liability, the creditor will not have the luxury of seeking assets from any additional parties. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 54 F.3d 28, 33 (3d Cir. 1995) ("[I]f plaintiff's guaranty is voided, this would not void the underlying debt obligation nor any other guaranties").

68. 1992 WL 237375 (D.D.C. 1992).

defendants to raise their ECOA claim as an affirmative defense. The *York* court noted that at least one other court had not let a violation of the ECOA render the underlying debt void, but pointed out that that court did not consider section 1691e(c).⁶⁹ The *York* court ruled that at the very least, the ECOA claim entitles a defendant to a recoupment defense in the form of damages, and perhaps a defense to liability altogether.⁷⁰

Another federal district court, in *Integra Bank/Pittsburgh v. Freeman*,⁷¹ held that the original guarantors (the husbands) could not be released from their original obligations, but that the co-guaranties would be unenforceable against their wives.⁷² In violation of the ECOA, Integra Bank had required the wives of two corporate principals to sign the guaranty agreements, as a condition of a \$12,000,000 loan.⁷³ The court held that the violation would not shield the principal guarantors from their obligation on the underlying debt; however, "an offending creditor should not be permitted to look for payment to parties who, but for the ECOA violation, would not have incurred personal liability on the underlying debt in the first instance."⁷⁴ Thus, the court concluded that if the wives could prove that the creditor impermissibly required their signatures, the court would use the broad equitable powers granted it in section 1691e(c) to bar the creditor from recovering against them on the guaranty.⁷⁵

The Third Circuit, in *Silverman v. Eastrich Multiple Investor Fund, L.P.*,⁷⁶ followed the decision in *Integra*, holding that the two-year statute of limitations would not bar an affirmative defense to

69. *Id.* at *3. The *York* court cited *Diamond v. Union Bank of Bartlesville*, 776 F. Supp. 542, 544 (N.D. Okla. 1991). The *Diamond* court found no authority stating that a violation of the ECOA renders the credit instrument void. 776 F. Supp. at 544.

70. *York*, 1992 WL 237375 at *3. The court stated that although the Congressional intent for enacting the ECOA was to protect married women, the plain meaning of the language of the statute prohibits any type of credit discriminatory practice based on marital status. *Id.* Looking to the holding in *Remington*, the court held that the successful assertion of the ECOA as a defense supports the award of damages in the nature of recoupment. *Id.*

71. 839 F. Supp. 326 (E.D. Pa. 1993).

72. *Id.* at 329.

73. *Id.* at 328.

74. *Id.* at 329. When rejecting the line of intent reasoning of the majority of courts, the *Integra* court doubted whether Congress really intended for sophisticated creditors to "affirmatively benefit from proscribed acts of credit discrimination." *Id.*

75. For a detailed explanation of this case, see Elizabeth C. Yen, *An Unlawfully Obtained Spousal Guaranty May Not Be Enforced by the Creditor, Even Though the Limitations Period for an Affirmative Claim Under the Equal Credit Opportunity Act Has Expired*, 111 Bank. L. J. 509 (1994).

76. 51 F.3d 28 (3d Cir. 1995).

liability for the guaranty.⁷⁷ The creditor required Mrs. Silverman to guarantee a \$10,000,000 loan to her husband's company, in violation of the ECOA.⁷⁸ After the company defaulted on the loan, it agreed to a bankruptcy reorganization plan which extended the loan and required that all guaranty obligations remain intact.⁷⁹ Mrs. Silverman had moved for injunctive relief in federal court, asking the court to dismiss her guaranty obligation. The district court had denied relief, instead granting the creditor's motion to dismiss.⁸⁰

In contrast, the Third Circuit Court of Appeals first analogized the ECOA action to usury, securities fraud, and Truth-in-Lending claims, which are never time-barred as defenses, and concluded that the debtor-defendant could raise an affirmative defense even though the statute of limitations would preclude a cause of action.⁸¹ The court then recognized that the purpose of the Act was to prevent discrimination and that allowing creditors to benefit from ignoring the requirements of the ECOA would undermine this Congressional intent.⁸² Quoting *Integra*, the Third Circuit noted that:

This rule places a creditor in no worse position than if it had adhered to the law when the credit transaction occurred. A creditor may not claim to have relied factually upon a guarantor's assets if it has never requested nor received financial information regarding them. Further, a creditor may not claim legal reliance on a signature that was illegally required in the first instance.⁸³

Accordingly, the Third Circuit summarily rejected the district court's reasoning that the ECOA was not intended as a defense invalidating a guaranty.

77. *Id.* at 32-33. Even though the statute of limitations may have expired on the cause of action if brought independently, "no such bar exists . . . to the utilization of such grounds as a defense." *Id.* at 32. The court recognized this ruling to be similar to other actions that are not time-barred if brought as defenses rather than separate independent actions. For example, a guarantor's right to challenge a loan as usurious, an assertion of a securities fraud claim which is time-barred if an action for judgment on the promissory notes is related to the plaintiff's claim, and a recoupment claim due to a Truth-in-Lending violation after lender's suit to collect on loans are three examples of causes of action not affected by the statute of limitations. *Id.*

78. *Id.* at 29.

79. *Id.* at 30.

80. *Id.* at 28. The district court held that the statute nowhere suggests that relieving the guaranteeing spouse from the guaranty, and thereby invalidating the guaranty, is a remedy for an ECOA violation. As a result, Mrs. Silverman could not use the ECOA as an affirmative defense. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 857 F. Supp. 447, 453 (E.D. Pa. 1994).

81. *Silverman*, 51 F.3d at 32.

82. *Id.* at 33.

83. *Id.* (quoting *Integra*, 839 F. Supp. at 329).

Court decisions treating ECOA claims as affirmative defenses have been more common in recent years.⁸⁴ Two recent federal decisions followed the line of reasoning in *Silverman* and held ECOA violations of this sort to require the dismissal of a guaranteeing spouse's obligation on a guaranty. In *FDIC v. Medmark, Inc.*,⁸⁵ the United States District Court for the District of Kansas granted summary judgment in favor of the defendant, Mrs. Shalberg.⁸⁶ Because both her husband's corporation and her husband defaulted on their guaranties, the lender sued to recover on the wife's guaranty.⁸⁷ The court found that the creditor required the wife's signature even though Mr. Shalberg was independently creditworthy to guarantee the loan amount.⁸⁸ Consequently, the requirement of a spouse as co-guarantor warranted the wife's summary disposition and relief from any obligation on the loan.⁸⁹

Similarly, in *Sharp Electronics Corp. v. Yoggev*,⁹⁰ the United States District Court for the Eastern District of Pennsylvania held that Mrs. Yoggev could use the Act in a defensive manner, thereby voiding her liability on the debt, so long as she demonstrated that Sharp never relied on her creditworthiness when making its initial decision to make a loan.⁹¹ In this case, the plaintiff was not a financial institution providing a commercial loan, but instead a trade creditor that sold and serviced Sharp photocopiers to Mr. Yoggev's company on credit.⁹²

84. See, for example, *Nationsbank v. Sarelson*, 31 Va. Cir. Ct. 544 (1992) (setting aside a confessed judgment entered against guaranters because the guarantors raised an adequate ECOA defense); *First Am. Bank v. McCarty*, 29 Va. Cir. Ct. 182 (1992) (holding that a guaranty obtained in violation of ECOA was void as to wife but not husband) (both of these cases are cited in Lustigman and Serafty, 111 Bank. L. J. at 448 (cited in noto 9)).

85. 897 F. Supp. 511 (D. Kan. 1995).

86. *Id.* at 515.

87. *Id.* at 514.

88. *Id.* The court noted that the guaranteeing spouse had never owned any interest in her husband's corporation, nor had she ever been involved with the operations of the corporation. *Id.*

89. *Id.* at 515. The court cited § 1691e(c) as authority for this action. Additionally, even though the statute of limitations for bringing an ECOA claim is two years from the date of the violation, 15 U.S.C. § 1691e(f), and two years had expired, this court followed the Third Circuit Court of Appeals in *Silverman* when allowing the guaranteeing spouse to nevertheless obtain relief from her obligation. *Id.* at 514.

90. 1995 WL 263533 (E.D. Pa. May 1, 1995).

91. *Id.* at *2. The court rejected Sharp's argument that as a matter of law, the ECOA could not be asserted as a defense to void the co-guarantor's underlying debt. *Id.* at *1.

92. *Id.* at *1. Mr. Yoggev, as sole shareholder of Duplicating Brokers, Inc. ("DBI"), sold and serviced Sharp equipment. The note that Mr. and Mrs. Yoggev signed made them jointly and severally liable should they fail to repay DBI's debt. *Id.* This fact pattern illustrates the breadth of the ECOA, which extends beyond areas not covered by the Consumer Credit

State courts have fallen in line with this latest federal trend.⁹³ In *Eure v. Jefferson National Bank*,⁹⁴ the Supreme Court of Virginia noted that the ECOA's provision for awarding actual and punitive damages was not the exclusive remedy under the Act.⁹⁵ The defendant-wife made clear to the court that she was only seeking to have the guaranty she executed declared unenforceable as to her, as her guaranty was obtained illegally.⁹⁶ As in *Medmark*, the wife in *Eure* asserted the defense as a means of placing the entire liability on the primary debtors. More importantly, the argument against liability never attempted to void the underlying debt, but only to place the liability on those who received the benefits of the loan.⁹⁷ The court held that denying the defendant the "right to use the ECOA violation defensively would be to enforce conduct that is forbidden by the Act."⁹⁸

Despite the recent frequency of courts allowing the use of an ECOA claim as an affirmative defense, thereby dismissing the obligation of a guaranteeing spouse, the law remains unsettled in this area. Persuading a court to characterize an ECOA violation as an affirmative defense may only be half the battle in some cases. Some courts will not relieve a guaranteeing spouse from liability even if the affirmative defense is permitted. This is because courts differ in their definitions of recoupment. At least one court that allowed defendants to use an affirmative defense, even after the two-year statute of limitations had passed, described a successful recoupment action as merely a set-off to the damages sought by the creditor.⁹⁹ Courts are

Protection Act by encompassing all persons who regularly extend credit. See note 20 and accompanying text.

93. See, for example, *Douglas County National Bank v. Pfeiff*, 809 P.2d 1100 (Colo. Ct. App. 1991) (reversing a summary judgment order entered in favor of bank because defendants properly raised the ECOA as an affirmative defense); *Transamerica Commercial Finance Corp. v. Naef*, 842 P.2d 539 (Wyo. 1992) (holding that when a creditor misrepresented the legal impact of a wife's signature on her husband's promissory note, and likely committed an ECOA violation, the note could not be enforced against her).

94. 248 Va. 245, 448 S.E.2d 417 (1994).

95. 448 S.E.2d at 419-20. Once again, a court used the broad language of 15 U.S.C. § 1691e(c) to grant equitable relief. This equitable jurisdiction distinguishes the ECOA from the Truth-in-Lending Act. *Id.* at 419.

96. *Id.* at 419.

97. *Id.* Mrs. Eure argued that "a fundamental principle of contract law" requires courts to find contracts that were executed in violation of state or federal law to be unenforceable. Additionally, she argued that her guarantee was obtained illegally, resulting in a guaranty agreement contrary to public policy. *Id.* The court agreed with this argument. *Id.* at 420.

98. *Id.* at 421.

99. *FDIC v. Notis*, 602 A.2d 1164, 1166 (Me. 1992). The court noted that even though an affirmative claim under the ECOA would be time-barred, the defense in the nature of a recoupment is not. The court, however, stated in its justification for allowing a recoupment action that the recoupment was framed as a monetary reduction or offset of the plaintiff-creditor's claim. *Id.* See also *Brinson*, 806 F. Supp. at 95-96.

starting to void obligations of illegally obtained guaranteeing spouses with more frequency, however, and as a result, to move toward implementing Congress's goal of eliminating unjust discrimination in the credit industry.

IV. THE BETTER APPROACH

Courts continue to struggle to find a balance between the important competing issues at the heart of this controversy. On one hand, there is a need to provide credit to all persons who are individually creditworthy without discriminating on the basis of race, gender, or marital status. On the other hand, creditors need, and should be allowed, to protect their interests by whatever precautions are reasonably necessary. These competing interests, however, are not mutually exclusive, as evidenced by the *Silverman* decision, and all other decisions implementing the literal language of the ECOA. Until the Act is applied as it was intended by Congress and courts reject the line of reasoning in *Brinson*, discrimination in the credit industry will continue.

A. *Protecting Consumers' Interests*

The ability to obtain credit is an integral part of our economic system and is particularly crucial for small businesses and women. In fact, the Board of Governors of the Federal Reserve System indicated to Congress that women business owners comprise at least 3.2 million businesses in the country and that women start two out of every three new businesses each year.¹⁰⁰ Accordingly, the concern most articulated to the Board by women's groups and small business organizations is access to credit in order to establish these new enterprises and plan for their continued growth and survival.¹⁰¹ Because small business establishments that employ less than 100 employees comprise over fifty percent of net employment growth,¹⁰² the need for Congress to address this concern and to prevent discriminatory credit practices for all applicants through strict enforcement of the ECOA is unmistakable.

100. Statement by Martha R. Seger, Member, Board of Governors of the Federal Reserve System, before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance and Urban Affairs, U.S. House of Representatives, 72 Fed. Res. Bull. 697 (Aug. 12, 1986).

101. *Id.*

102. *Id.* (citing statistics obtained from the U.S. Small Business Administration (SBA)).

1. Deterring Discriminatory Credit Practices

Without consumer protection devices, the market is nearly powerless to correct discriminatory credit practices.¹⁰³ Therefore, Congress (and society) will only realize its goal of eliminating discrimination against married applicants if courts forcefully punish creditors who continue to violate the ECOA. When courts only allow debtors to assert compulsory counterclaims, they preclude guaranteeing spouses from contesting liability on the underlying obligations. Simply awarding damages to the guaranteeing spouse in response to an ECOA violation, while continuing to enforce the guarantee, does not produce an effective deterrent to this discriminatory practice. Especially in the context of a fifty million dollar commercial loan, the penalty of a few thousand dollars (or even a few hundred thousand dollars), as a result of a compulsory counterclaim is quite insignificant when compared to the benefits the creditor receives from collecting on the entire debt.

Even if the court awards an amount of damages equal to the amount of the underlying obligation, the guaranteeing spouse may still be in a worse financial position than he or she would have been in without the illegal act. Not only will the guaranteeing spouse have to sacrifice additional time and attorney's fees between the summary judgment action and the actual trial proving the ECOA violation, but the guaranteeing spouse also risks future difficulties when seeking credit individually. The creditor's initial motion for summary judgment will result in a default judgment against the guaranteeing spouse, which may remain on that person's credit rating for years to come. Certain credit reporting bureaus may not draw the connection between the default judgment on the guarantor's report and the court's efforts to award enough damages to effectively void the obligation.

Creditors will continue to violate the law unless courts order remedies that command the attention of creditors and force them to take notice of the financial consequences of a violation. A creditor conducting a cost-benefit analysis recognizes that until the amount of damages, or the resulting cost of the guaranteeing spouse's dismissal exceeds the amount earned on the guaranty, economic and profit goals will prevail over compliance with ECOA requirements. The threat of

103. Page Malliard and Ken Anderson, *Women's Banks and Women's Access to Credit: Competition Between Marketplace and Regulatory Solutions to Gender Discrimination*, 20 *Loyola L.A. L. Rev.* 771, 774-75, 780 (1987).

courts' releasing guarantors from liability on the underlying debt supplies creditors with the necessary incentive to conform credit practices with the requirements of the law.

Some courts criticize the use of an affirmative defense, saying the remedy produces more of a deterrent than Congress intended.¹⁰⁴ These courts cite the literal language of the Act when arguing that Congress never authorized the "dramatic" remedy of courts dismissing guarantors from a creditor's motion of summary judgment.¹⁰⁵ As several other courts have noted, however, the broad equitable powers granted in section 1691e(c) provide courts with the ability to further the goals of the ECOA by using any necessary equitable action.¹⁰⁶ The argument that because Congress articulated a specific damages clause, it was therefore the only remedy contemplated, cannot stand. This argument would require courts to ignore section 1691e(c), a provision that explicitly acknowledges that Congress could not possibly foresee all potential remedies, and therefore leaves with the courts the authority to provide equitable remedies.

2. Enforcement of the ECOA Will Not Reduce Availability of Credit

The credit industry argues that the costs associated with compliance,¹⁰⁷ with provisions such as the ECOA, will be passed along to consumers through higher interest rates, higher fees, or tougher credit standards.¹⁰⁸ Lenders may contend that if courts consistently release guarantors from their obligations, financial institutions will be forced to raise their standards for a creditworthy applicant. The result of this action, creditors will argue, may actually be to reduce the overall supply of credit and hurt the people the regulations were designed to benefit.¹⁰⁹ One possible inference from this argu-

104. See, for example, *Brinson*, 806 F. Supp. at 95; *Diamond*, 776 F. Supp. at 544; *Joseph Hirsch Sportswear Co., Inc.*, 1989 WL 20604 at *1, aff'd, 923 F.2d 842 (2d Cir. 1990); *32 Edwardsville, Inc.*, 873 F. Supp. at 1480; *Linch*, 829 F. Supp. at 169.

105. *Brinson*, 806 F. Supp. at 95; *Diamond*, 776 F. Supp. at 544; *32 Edwardsville, Inc.*, 873 F. Supp. at 1480.

106. 15 U.S.C. § 1691e(c). See note 12 and accompanying text.

107. The American Bankers Association estimated that the costs of bank regulation were \$10.7 billion annually. John P. Danforth, *Who Pays for the High Cost of Excessive Bank Regulation?*, 12 Banking Policy Rep. 1 (May 3-17, 1993).

108. *Id.* See also George J. Benston, ed., *Financial Services, The Regulation of Financial Services* at 52-53 (Prentice Hall, 1983). Benston argues that the costs of lawsuits, compliance audits, and training credit officers to comply with regulations "must be borne essentially by borrowers." *Id.*

109. Jack M. Guttentag and Susan M. Wachter, *Redlining and Public Policy* 43-44 (New York U., 1980). See also Benston, ed., *Financial Services* at 53 (cited in note 108) (stating that it

ment—that creditors perform a great service to consumers when they discriminate against certain credit applicants—hardly seems logical or accurate.

According to the ECOA, a creditor may assign any standard of creditworthiness so long as the standard is uniform and does not discriminate against any stated class.¹¹⁰ Consequently, the credit industry may argue that if creditors throughout the industry legally raise their own standards for extending credit, fewer people will receive credit because fewer applicants will satisfy the new and more stringent requirements of “creditworthiness” without guarantors. In fact, industry experts worry that financial institutions are already reevaluating their pricing standards in response to the recent anti-discrimination cases previously discussed.¹¹¹

Creditors similarly proclaimed the end of easily accessible credit when liberal bankruptcy reforms increased the availability of bankruptcy discharge to debtors.¹¹² Some economists refuted the contention that increased bankruptcy would result in increased credit costs passed along to borrowers by examining the elasticity of the supply of funds available for lending. These economists suggested that only if supply were perfectly elastic would increased costs be placed completely on borrowers.¹¹³ Fortunately for consumers, review of empirical evidence indicates that the supply is not perfectly elastic, and therefore increased lending costs are not necessarily passed along to consumers.¹¹⁴

is “questionable whether consumers are net beneficiaries” of regulations preventing credit discrimination).

110. Official Staff Commentaries, 12 C.F.R., Part 202, Supp. I, § 202.7(d)(5) (1996).

111. *Discrimination Allegations: A Dangerous Trend for '94*, 4 Credit Risk Mgmt. Rep. (Sept. 12, 1994). The article quoted one banking consultant who stated, “[u]nderneath all of this is that there is a changing definition and changing enforcement of creditworthiness.” *Id.* The article stated that some bankers feel “[t]he dominant regulatory challenge the industry is going to face, probably for the rest of this decade, concerns discrimination.” *Id.*

112. A. Charles Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 Wis. L. Rev. 1069, 1071-72. When the Bankruptcy Code was revised in 1981, numerous heated debates surfaced as to the effect this change would have on the banking industry. In particular, discussion centered on the change in the number of bankruptcy filings. For excellent written debates on the issue, see Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091. See generally, Sullivan, 1984 Wis. L. Rev. at 1071-72; Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 Am. Bankr. L. J. 121 (1994).

113. John H. Moore, *Foreword: The Economics of Bankruptcy Reform*, 41 L. & Contemp. Probs. 1, 5 (1977).

114. Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L. J. 1047, 1066 (1987). Professor Howard states that “if the supply is not perfectly elastic, creditors will bear part of these increased costs.” *Id.* Additionally, creditors will bear the entire cost of increases in bad-debt losses only if the elasticity of supply is zero. *Id.* Proof that the supply of

Additionally, the multiplicity of factors involved in credit decisions and the wide variety of regulations affecting the credit industry make it less likely that enforcement of a singular regulatory act will have the devastating results predicted by creditors. For instance, states with large exemption laws do not experience higher costs or decreased availability of consumer credit.¹¹⁵ Similarly, a review of states that prohibit wage garnishment reveals no cognizable difference in the availability and cost of consumer credit.¹¹⁶ It appears that creditors are unable to attach financial significance to any one regulatory provision.

Credit transactions occur within a competitive market. If a huge pool of credit-seeking applicants are left without the ability to obtain credit, the market will compensate for this deficiency either by introducing alternative means of obtaining credit, or by the incursion of less "established" financial institutions profiting from a readily available group of customers. In either case, the possibility of creditors raising the standards for creditworthiness to the point of pricing themselves out of the market is remote.

B. Protecting Creditors' Interests

Lenders are extremely selective in who will receive credit, leaving first-time borrowers in need of establishing credit with the toughest hurdles to cross. However, Congress can hardly expect lenders to feel a moral obligation to extend credit to all who apply. Lenders are not investors and have business obligations to their own depositors to ensure that loans extended will be repaid. As a result, lenders reasonably want to protect their interests by requiring as many signatures as necessary to secure the assets provided in a credit assessment.

1. What the ECOA Actually Prohibits

Protection does not unavoidably require discrimination. Congress maintained the ability to obtain additional guarantees on obligations—a creditor's best form of protection against the risk of default—when it enacted the ECOA. If the applicant fails to satisfy the lender's creditworthiness standards, the ECOA authorizes the

credit funds is not perfectly elastic can be seen through tax deductions taken as a result of bad-debt losses, because these deductions pass costs along to all taxpayers. *Id.*

115. *Id.*

116. *Id.*

lenders to require a co-guarantor's signature on the guaranty. The ECOA merely states that a lender may not discriminate against married applicants by requiring the *spouse* to sign as that additional party,¹¹⁷ except under certain circumstances.¹¹⁸

Even though the law clearly prohibits this unlawful practice, financial institutions have a long history of requiring the spouse's signature automatically,¹¹⁹ and they continue this practice today.¹²⁰ It seems strange that creditors worry about losing protective measures when in fact, asking for an additional signature from a non-spouse demands no more additional effort or cost than asking for the spouse to co-sign. Perhaps what creditors are really trying to attain is additional leverage over the original applicant, by forcing a family member to co-sign the guaranty. If this is the real complaint of the credit industry, creditors will have to find some other lawful way of achieving this end.

If, however, the true reason for creditors' desire to obtain the additional signature of a family member is the concern that one spouse will transfer all the assets of the family to the other spouse, then creditors need look no further than the law of fraudulent conveyances for their protection. Even though an individual generally has the right to dispose of personal property at any time, the owner may not do so if the intent is to infringe the right of another person.¹²¹ For instance, if a debtor ignores the right or equity of its creditors, and disposes of his property with the intent to delay or defraud his creditors, "a court will void the conveyance of property and set it aside."¹²² This is the classic definition of fraudulent transfer or conveyance.

For instance, a guarantor who realizes that the debt cannot be repaid may attempt to transfer the entire deed to his spouse in the hope that the creditor will not be able to reach the property in the creditor's collection action. Due to the laws of fraudulent conveyance, however, the court will rule the transfer invalid and the property will

117. 12 C.F.R. § 202.7(d)(5) (stating that an "applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party").

118. 12 C.F.R. § 202.7(d)(1). The exceptions to the general rule include joint applicants and unsecured credit requests in community property states. *Id.*

119. Geary, 31 *Bus. Law.* at 1641 (cited in note 5).

120. See *Tripping Over Reg B Cosigner Rules*, 4 *Reg. Compliance Watch* (Mar. 7, 1994) ("The Equal Credit Opportunity Act has been a law for 19 years, but the record shows that bankers continue to find themselves violating the spousal signature provision of the statute. . . . 151 banks of all sizes [were] in violation of Section 202.7(d) . . . during the period from July 1, 1992, to June 30, 1993.").

121. 37 *Am. Jur. 2d Fraudulent Conveyances* § 1 at 691 (1968).

122. *Id.*

remain as an asset of the guarantor. This law protects a creditor's interest and eliminates the need to bind any and all family members to the credit agreement. Therefore, creditors should not ask Congress or courts to apply the ECOA in a manner that prevents the risk of illegal transfers from one spouse to the other when other laws already exist to protect against such action.

2. The Effect of the Affirmative Defense on Creditors

As discussed above, when a guaranteeing spouse asserts an affirmative defense based upon an ECOA violation, that person's obligation on the guaranty should be nullified. It may not seem plausible at first, but this remedy leaves the creditor in the same economic position as if the creditor had initially followed the requirements of the Act. If the applicant had met the standards for creditworthiness and had not been married, then the creditor would not have required an additional signature. Therefore, releasing a spouse from liability on the underlying obligations puts the creditor in the same position as if the creditor had extended credit to a single applicant. As stated by the Third Circuit in *Silverman*, "a creditor may not claim legal reliance on a signature that was illegally required in the first instance."¹²³ This is the most effective articulation of why courts should consistently allow a guaranteeing spouse, who was illegally forced to co-sign a guaranty, to seek summary judgment and release from liability on the obligation. By doing so, courts not only realize the purposes of the ECOA, but also apply the law as drafted by Congress.

Courts that have allowed a debtor-defendant to assert an ECOA violation as an affirmative defense cite strong policy arguments, in conjunction with the underlying purpose of the ECOA, for that decision. Cases such as *Integra* contend that any remedy imposed due to a violation should not allow creditors who disregard the requirements of the ECOA to reap the benefits of such a practice.¹²⁴

123. *Silverman*, 54 F.3d at 329. The court in *Integra* similarly stated that:

[W]hile an ECOA violation should not void the underlying credit transaction an offending creditor should not be permitted to look for payment to parties who, but for the ECOA violation, would not have incurred personal liability on the underlying debt in the first instance. This rule places a creditor in no worse position than if it had adhered to the law when the credit transaction occurred.

Integra, 839 F. Supp. at 329.

124. *Integra*, 839 F. Supp. at 329 ("To permit creditors—especially sophisticated credit institutions—to affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the Congressional intent to eradicate gender and marital status based discrimination.").

Without a potent remedy for these unlawful and extremely common practices, creditors will simply ignore the Act, hoping that the couple will not discover the law until after the spouse has already signed. By then, the creditor only risks that damages may be assessed as a set-off to the enormous obligation remaining intact. Congress did not intend for courts to perpetuate gender-based and marital-based discrimination in this manner when it enacted the Equal Credit Opportunity Act.

V. CONCLUSION

When a creditor requires a creditworthy married applicant to obtain a spousal guaranty of an obligation, that creditor has discriminated against the applicant with respect to marital status, a protected class under the Equal Credit Opportunity Act. More importantly, when the creditor violated the ECOA, the creditor obligated a spouse to a guaranty who would not have incurred personal liability but for this violation. Congress enacted the ECOA to eliminate discriminatory credit practices, not to provide creditors with huge rewards for disregarding the requirements of the Act. Courts that permit a spousal guarantor to assert an affirmative defense to a creditor's motion for summary judgment, thereby releasing the spouse from any obligation on the underlying debt, apply the ECOA as Congress intended and move closer to the goal of eradicating discrimination in the credit industry.

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