Client Alert

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Supreme Court Affirmation of *Hawkins* Case Raises More Questions Than It Answers

By Oliver Ireland, Leonard Chanin, and Amanda Mollo

On March 22, 2016, the Supreme Court of the United States issued an order in *Hawkins v. Community Bank of Raymore*.[1] An evenly divided Court affirmed the Eighth Circuit decision without issuing an opinion, thereby resolving the *Hawkins* case but leaving open the proper interpretation of the Equal Credit Opportunity Act (ECOA), failing to resolve a circuit split between the Sixth and Eighth Circuits, and raising questions as to how the Court will approach future cases involving statutory interpretation.

At issue in the case is whether the Board of Governors of the Federal Reserve System ("Board") interpretation of the ECOA, stating that a guarantor is an "applicant," is consistent with the ECOA. The Eighth Circuit held that the Board's definition was contrary to the ECOA statutory definition of "applicant."

AN "APPLICANT" UNDER THE ECOA

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction" on a number of bases, including marital status.[2] The ECOA defines "applicant," in relevant part, as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit."[3] As originally enacted, the statute aimed to protect women from being denied loans on the basis of their marital status, or being required to add their husbands as guarantors to their loans, among other things. Early on, by regulation, the Board prohibited a creditor from denying credit to a married woman if her husband did not guarantee the loan. In 1985, the Board expanded the ECOA definition of "applicant" in Regulation B to include "guarantors, sureties, endorsers, and similar parties."[4] The effect of the expansion was to enable a guarantor to bring a private action if a creditor illegally requires the guarantor to be the spouse of an applicant.

HAWKINS FACTS AND DISTRICT COURT RULING

In *Hawkins*, Community Bank made over $2 million in loans to a limited liability company with two members: Mr. Hawkins and Mr. Patterson. As a condition of making the loan, the bank required Hawkins and Patterson, as well as their wives Valerie Hawkins and Janice Patterson, to execute personal guarantees. The company eventually stopped making its loan payments, and the bank declared the company to be in default and sought payment from the guarantors.

[1] 761 F.3d 937 (8th Cir. 2014), cert. granted, No. 14- 520, 2015 U.S. LEXIS 1635 (Mar. 2, 2015).

[2] 15 U.S.C. § 1691(a)(1).

[3] 15 U.S.C. § 1691a(b).

[4] Previously 12 C.F.R. § 202.2(e); now 12 C.F.R. § 1002.2(e) under CFPB authority.

The women then sued Community Bank, seeking an order declaring that their guaranties were void and unenforceable. They alleged that Community Bank had required them to execute the guaranties solely because they were married to their respective husbands, and argued that this requirement constituted discrimination on the basis of their marital status, in violation of the ECOA. The district court granted Community Bank's motion for summary judgment, concluding that Hawkins and Patterson were not "applicants" within the meaning of the statute, and thus the provisions in the ECOA that prohibit discrimination against "applicants" on the basis of marital status could not be asserted by guarantors, because guarantors are not applicants.

EIGHTH CIRCUIT RULING AND CIRCUIT SPLIT

The Eighth Circuit affirmed the district court's holding that the ECOA did not provide a cause of action to the plaintiffs because 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."[5] The Eighth Circuit reasoned that a person does not request credit by "executing a guaranty" because executing a guaranty is not a request for credit. As a result, the court held that the definition of applicant in ECOA is "unambiguous" and that a guarantor cannot bring an action under the ECOA. Because only applicants have a right under the ECOA to bring an action, the court held that the district court had properly granted summary judgment in favor of Community Bank.[6]

The Eighth Circuit decision created a circuit court split because it is inconsistent with the Sixth Circuit's decision in *RL BB Acquisition LLC v. Bridgemill Commons Dev. Grp. LLC*.[7] The Sixth Circuit held that the ECOA's definition of "applicant" is ambiguous and "could be construed to cover a guarantor" because the term "applies" could include "all those who offer promises in support of an application — including guarantors" and the definition of the term "credit" suggests that an applicant and a debtor are "not always the same person" and, thus, "the applicant could be a third party, such as a guarantor." Holding that the ECOA's definition is ambiguous, the court deferred to the Board's definition of "applicant." As a result, in the Sixth Circuit, guarantors can bring an action under the ECOA.

CFPB AMICUS BRIEF AND CHEVRON DEFERENCE IN SIMILAR CASES

The Solicitor General, on behalf of the United States, submitted an amicus brief in June 2015 supporting the petitioners. The Consumer Financial Protection Bureau (CFPB or "Bureau"), which now has rulemaking and enforcement authority under the ECOA, appeared on the brief. The U.S. Brief argued that the Regulation B definition of "applicant" is entitled to "great deference"[8] under *Chevron U.S.A. Inc. v. NRDC, Inc*.[9] The brief argued that deference in this case was "especially appropriate" because "Congress has repeatedly amended the [ECOA] without disturbing the Board's longstanding interpretation of 'applicant.'"[10] The brief further argued that

[5] *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014).

[6] 15 U.S.C. § 1691(a), (d), (e).

[7] 754 F.3d 380 (6th Cir. 2014).

[8] Amicus brief at 11.

[9] 467 U.S. 837 (1984).

[10] Amicus brief at 11; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions. But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.").

Regulation B's definition of "applicant" is consistent with the ECOA definition because guarantors request an extension of credit to the primary borrower and "are often extensively involved in the application process," and that the Regulation B definition furthers the ECOA's purposes by ensuring that a creditor cannot ask a person to sign a guarantee for a loan solely because of he or she is married to an applicant.[11] The amicus brief suggests that, even for creditors located in the Eighth Circuit, the CFPB may interpret the term applicant to include guarantors for purposes of supervisory actions.

Historically, in cases under the Truth in Lending Act (TILA), which includes a broad grant of rule writing authority and was the basis for the similar provision in the ECOA,[12] the Supreme Court has deferred to Board rules that interpret TILA. For example, when interpreting the TILA grant of authority, the Supreme Court in *Ford Motor Credit Co. v. Milhollin*[13] stated unanimously that courts should be "attentive[] to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting [TILA] and Regulation Z. Unless demonstrably irrational, [] Board staff opinions construing the Act or Regulation should be dispositive for several reasons." Chief among those reasons is an agency's expertise in the statute being interpreted: "The Court has often repeated the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration'" because "[a]n agency's construction of its own regulations has been regarded as especially due that respect."[14] The Court went on to state that "[t]his traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion. . . .'"[15] and "Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder."[16]

More recently, in *Household Credit Servs., Inc., et al. v. Pfennig*,[17] the Supreme Court was once again unanimous in its decision that the broad statutory grant in TILA authorized the Board to use its discretion and expertise to prescribe regulations that are meaningful to consumers and uniform across the industry.

[11] Amicus brief at 12.

[12] "The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 of this title that apply to a mortgage referred to in section 1602(aa)[1] of this title, such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a).

[13] 444 U.S. 555, 565 (1980).

[14] *Id.* (citing *Zenith Radio Corp. v. United States*, 437 U. S. 443, 437 U. S. 450 (1978), quoting Udall v. Tallman, 380 U. S. 1, 380 U. S. 16 (1965); *see, e.g., Power Reactor Co. v. Electricians*, 367 U. S. 396, 367 U. S. 408 (1961) and *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 325 U. S. 413-414 (1945)).

[15] *Id.* (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 288 U. S. 315 (1933)).

[16] *Id.* (citing *Mourning v. Family Publications Service, Inc.*, 411 U. S. 356 (1973)).

[17] 541 U.S. 232, 243-44 (2004).

THE SUPREME COURT ORDER

Because the Court was equally divided and issued its order in *Hawkins* without an opinion, the decision does not resolve the circuit split between the Sixth and Eighth Circuits. Notably, *Hawkins* is the first decision since the death of Justice Scalia that the Court has affirmed in a 4-4 split. The fact that the Court split evenly where it has previously been unanimous regarding an agency's interpretation of a consumer financial services statute is open to a number of different inferences. Is the statutory language at issue in *Hawkins* so clear that some Justices believe the deference granted in prior cases is not warranted? Is the change in agencies authorized to implement the ECOA from the Board to the Bureau an issue for some Justices? Only time will tell.

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