Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Silent On Deference To Agency Rule-Making

Law360, New York (March 24, 2016, 6:07 PM ET) --


Valerie L. Hletko


Caroline M. Stapleton

On March 22, 2016, the U.S. Supreme Court issued a split decision (4-4) in Hawkins v. Community Bank of Raymore.[1] The court's one-sentence affirmance was a notable anti-climax in a case that had been viewed as likely to elicit guidance regarding limitations on deference to agency statutory interpretations. At issue in the case was the viability of a Board of Governors of the Federal Reserve System rule extending the protections of the Equal Credit Opportunity Act (ECOA) to spousal guarantors, in addition to traditional applicants for credit. While the court's decision affirms the Eighth Circuit's holding that the board's spousal guarantor rule is not entitled to deference within that jurisdiction, affirmance by an equally divided court does not resolve the issue with respect to other circuits that already have considered, or have not yet confronted, the validity of the board's rule. Moreover, in the absence of a substantive rationale, creditors operating outside of the Eighth Circuit are left with continued uncertainty regarding whether they may be subject to discrimination claims under ECOA by spousal guarantors.

ECOA and the Spousal Guarantor Rule

ECOA states that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction — (1) on the basis of [...] sex or marital status."[2] Congress broadly defined the term "applicant" to encompass:

any person who applies to a creditor directly for an extension, renewal or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.[3]

Regulation B, which implements ECOA, was originally drafted and administered by the Federal Reserve Board.[4] Initially, the board defined "applicant" under Regulation B to expressly exclude guarantors.[5] However, the board later amended its definition to include guarantors and other similar parties,[6] explaining that a spouse who is required to serve as a guarantor simply because he or she is married to a party to the debt "has suffered discrimination based on marital status" within the meaning of ECOA.[7] The board's expansion of the scope of ECOA to encompass spousal guarantors is often referred to as the spousal guarantor rule.

Circuit Court Split on Spousal Guarantor Rule

Even prior to the Eighth Circuit's decision in Hawkins, federal circuit courts had already split on the permissibility of the Federal Reserve Board's definition of "applicant" in Regulation B to include spousal guarantors.[8] In particular, the Sixth and Seventh Circuits issued opinions specifically analyzing whether the board's interpretation should receive judicial deference, and reached opposing conclusions. In RL BB Acquisition v. Bridgemill Commons,[9] the Sixth Circuit determined that the statutory text of ECOA with respect to who constitutes an "applicant" for credit was ambiguous, and could reasonably be interpreted to include "all those who offer promises in support of an application — including guarantors."[10] By contrast, the Seventh Circuit in Moran Foods v. Mid-Atlantic held that the board's definition of "applicant" was inconsistent with the plain language of ECOA, as "there is nothing ambiguous about [the statute's use of the term] 'applicant' and no way to confuse an applicant with a guarantor."[11]

No Deference: The Eighth Circuit's Decision in Hawkins

In deciding Hawkins, the Eighth Circuit faced the same question that the Sixth and Seventh Circuits had confronted in RL BB and Moran Foods: can spousal guarantors rely on the board's definition of "applicant" in Regulation B to bring discrimination claims under ECOA?[12] The plaintiffs in Hawkins alleged that a bank had engaged in prohibited discrimination against them based on their marital status when it required the plaintiffs to personally guarantee loans to a company owned by their husbands, based solely on the fact that the plaintiffs were married to the company's owners.[13] The district court found that the bank had not violated ECOA by requiring spousal guaranties because the plaintiffs were not "applicants" within the meaning set forth in the statute.[14]

On Aug. 5, 2014, the Eighth Circuit, following the Seventh Circuit's lead, affirmed the lower court's decision and held that the board's inclusion of spousal guarantors in its definition of "applicant" was not entitled to judicial deference. In its opinion, the court explained that under ECOA, "a person is an applicant only if she *requests credit*," and the assumption of "secondary, contingent liability," such as the execution of a guaranty, does not constitute a "request" for credit.[15] Consequently, the court found that the plain language of ECOA unambiguously excludes spousal guarantors from the scope of the statute.[16] Moreover, the court noted that the Sixth Circuit's statement in RL BB that "a guarantor is a third party to the larger application process" actually supported the Eighth Circuit's conclusion that guarantors are not "applicants" under ECOA.[17]

The Supreme Court (Almost) Weighs In

On March 2, 2015, the Supreme Court granted certiorari in Hawkins. The case received significant attention from the legal and financial services communities in view of the potential for a final determination regarding the viability of the spousal guarantor rule in Regulation B — which would better enable creditors operating in different jurisdictions to place consistent valuations on commercial debtors' assets. The case was also viewed as an opportunity for the court to provide more generalized guidance about the extent to which agency interpretations should be given deference in the context of administrative rule-making.[18] The questions at oral argument suggested that the justices were inclined to invalidate the regulation, principally because the term "applicant" is commonly understood to refer to people asking for something for themselves.[19]

Unfortunately, clarification by the Supreme Court with respect to these concerns will have to wait until a future case. On March 22, 2016, an eight-member court issued a one-sentence decision stating that the

Eighth Circuit's ruling was affirmed by an equally divided court.[20] In declining to order reargument notwithstanding the split in the wake of Justice Antonin Scalia's death in February, the court failed to provide jurisdictions outside of the Eighth Circuit with certainty regarding the status of the spousal guarantor rule. Moreover, the court left open the broader question of to what extent the judiciary will serve as a meaningful check on expansive agency interpretations of federal law going forward.

Impact of the Supreme Court's Decision on Creditors and Other Institutions

The court's affirmance of the Eighth Circuit's judgment in Hawkins is helpful for creditors who operate within the jurisdiction of the Eighth Circuit, as they can continue to require spousal guaranties without subjecting themselves to the risk of a discrimination claim under ECOA. The precedential value outside of the Eighth Circuit, however, is uncertain. The court's decision only affirmed the Eighth Circuit's judgment, and did not necessarily adopt the Eighth Circuit's underlying reasoning — so creditors in other jurisdictions may remain subject to the law established by those circuits. For example, a creditor operating in the Sixth Circuit may still face an ECOA claim if the creditor requires a business owner's spouse to serve as a guarantor on a commercial loan, as the analysis set forth in RL BB remains applicable in that circuit post-Hawkins. Still, it is likely that other courts will follow Hawkins, and likely that the Supreme Court will follow its own decision in any future case arising under similar facts.

More generally, the court's affirmance indicates that, at the very least, some limitations continue to exist on the authority of agencies to broadly interpret federal statutes. Given the Consumer Financial Protection Bureau's rule-making productivity and liberality in statutory construction, we may see certiorari granted in future cases involving circuit splits regarding the appropriate level of deference to regulatory interpretations of federal law. In the meantime, Hawkins may provide a hint of caution to regulators that aggressive statutory interpretations in the rule-making context will not receive axiomatic deference.

—By Valerie L. Hletko and Caroline M. Stapleton, BuckleySandler LLP

Valerie Hletko is a partner in the Washington, D.C., office of BuckleySandler. She is chairwoman of the retail banking and consumer law subcommittee of the American Bar Association's banking law committee.

Caroline Stapleton is an associate in the Washington office.

[1] Hawkins v. Cmty. Bank of Raymore, No. 14-520, 2016 WL 1092416 (U.S. Mar. 22, 2016).

[2] 15 U.S.C. § 1691(a)(1).

[3] 15 U.S.C. § 1691a(b).

[4] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred ECOA rule-making and enforcement authority from the Federal Reserve Board to the Consumer Financial Protection Bureau. 12 U.S.C. § 5581(b). The CFPB inherited the board's implementing regulations, including Regulation B, and accompanying administrative interpretations.

[5] 12 C.F.R. § 202.0(e) (1977) (defining "applicant" as "any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than a guarantor*, surety, endorser, or similar party") (emphasis added).

[6] 12 C.F.R. § 202.0(e) (1985).

[7] Revision of the Board's Equal Credit Regulation: An Overview, Federal Reserve Bulletin Vol. 71, No. 12, at 918–19 (Dec. 1985).

[8] The First, Third and Fourth Circuits have deferred to the board's definition of "applicant" without express analysis. Mayes v. Chrysler Credit Corp., 167 F.3d 675, 677 (1st Cir. 1999); Silverman v. Eastrich Multiple Investor Fund LP, 51 F.3d 28, 30–331 (3rd Cir. 1995); Ballard v. Bank of America, 734 F.3d 308, 310 n. 1 (4th Cir. 2013).

[9] 754 F.3d 380 (6th Cir. 2014).

[10] Id. at 385.

[11] 476 F.3d 436 (7th Cir. 2007).

[12] 761 F.3d 937 (8th Cir. 2014).

[13] Id. at 939.

[14] Id. at 940.

[15] Id. at 941–42 (emphasis added).

[16] Id. at 942.

[17] Id. (quoting RL BB, 754 F.3d at 385).

[18] See Valerie L. Hletko and Caroline M. Stapleton, Deference in Decline: ECOA's Regulation B and Agency Discretion Might Not Be Broad Enough to Include Spousal Guarantors, 104 BBR 117 (Jan. 20, 2015).

[19] Transcript of Oral Argument, Hawkins, Case No. 14-520 (Oct. 5, 2015).

[20] 577 U.S. __ (2016).