

## Financial Institutions

### Justices Weigh Potential for Bias Claims By Guarantors Under Equal Credit Law

**T**he U.S. Supreme Court Oct. 5 heard arguments on whether a loan guarantor may allege marital-status discrimination as an “applicant” under the Equal Credit Opportunity Act (ECOA) (*Hawkins v. Community Bank of Raymore*, U.S., No. 14-cv-00520, argued, 10/5/15).

The case, an appeal from an August 2014 ruling by the U.S. Court of Appeals for the Eighth Circuit that said they can’t, could vindicate a 30-year-old regulatory interpretation that says they can.

ECOA, at 15 U.S.C. 1691, makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction.”

Since 1985, Regulation B—as crafted by the Federal Reserve Board and now administered by the Consumer Financial Protection Bureau—has included guarantors as “applicants” protected from discrimination under ECOA.

Brian H. Fletcher, assistant to the Solicitor General, said the court should adopt that long-standing reading of ECOA.

He said it reflects a reasonable interpretation of the statute, especially in light of language in ECOA that gives regulators an unusually wide grant of interpretive freedom.

**Pushing the Edge?** At several points, the justices asked how the statute could be given such a reading, saying a natural interpretation of the statute understands an applicant to be someone seeking a loan for themselves.

“It seems to me maybe you’re pushing the edge of the word ‘applicant’ as they didn’t intend it in the statute,” Justice Stephen Breyer told Fletcher. “That’s a problem,” Breyer said.

But at other times, Breyer and other members of the court asked whether “applicant” can also mean someone who submits an application for someone else’s benefit.

“An applicant means a person who applies for something, so why can’t you apply for the thing, and give some money to this other person?” Breyer asked Stephen R. McAlister, a partner with Thompson Ramsdell Qualseth & Warner in Lawrence, Kan., who urged the

court to affirm the Eighth Circuit’s ruling in favor of his client, Community Bank of Raymore in Raymore, Mo. (152 DER EE-5, 8/7/14).

Justice Sonia Sotomayor posed the same question to McAlister. “So I don’t know why ‘applicant’ can’t mean, in common parlance, that you’re asking for credit to be extended to anyone, whether it’s you or another person,” she said.

McAlister at several points said that misunderstands the case. The government, he said, is trying to rewrite the statute.

“The government takes the view that the statute has to unambiguously exclude guarantors,” he said. “That’s the wrong starting point.”

He added that the government’s reading of ECOA would expose creditors to much more liability and litigation from guarantors—a new reality he said would mean a more restrictive level of scrutiny for credit decisions.

**A Tough Call.** Valerie L. Hletko, a partner with Buckley Sandler in Washington, D.C., who represents institutions and individual clients in litigation, regulatory matters and enforcement actions, Oct. 5 said that discussion shows that the case may not be decided on a theory that ECOA’s language is one-dimensional.

According to Hletko, the case may turn on how the justices view ECOA’s statement of purpose, the way lending operations work in practice, and whether those factors are consistent with a reading that says a guarantor is an “applicant” even if they are not the recipient of credit.

“These three factors should hang together in the decision, and based on the argument it probably does not get resolved as a straightforward question of statutory language,” she said.

The case was brought by Valerie J. Hawkins and Janice A. Peterson, the guarantors. They were represented during the argument by John M. Duggan, a partner with Duggan Shadwick Doerr & Kurlbaum in Overland, Park, Kan. Fletcher represented the United States, which filed a brief supporting the plaintiffs.

**Guarantees At Risk.** The dispute is important for guarantors, who according to Fletcher could be injured without a remedy under the Eighth Circuit’s ruling.

The case also is a major item for lenders. If the court reverses the Eighth Circuit and says ECOA allows claims by guarantors, guarantees on affected loans

could be unenforceable, raising the possibility that millions in loan proceeds might be unrecoverable.

The case also marks the court's second recent foray into the fair lending arena. It comes on the heels of a June 25 decision involving The Inclusive Communities Project, a Texas nonprofit, that said the Fair Housing Act allows plaintiffs in protected classes to allege disparate impact discrimination—also known as effects-based bias claims (123 DER, 6/26/15).

**The Latest Signal.** Now that the Fair Housing Act question is settled, many say the next question is whether ECOA also allows disparate impact claims, even though disparate impact is not at issue in this case.

Angela Kleine, a partner in Morrison & Foerster's financial services litigation group in San Francisco, said the case argued Oct. 5 is a signal on how the court understands ECOA.

"This is important because the *Inclusive Communities* case related to the Fair Housing Act," Kleine told Bloomberg BNA Oct. 5. "There are separate arguments that the disparate impact doctrine shouldn't apply to the ECOA, despite regulators' interpretations. Because

the ECOA applies to a much broader range of consumer transactions than does the FHA, the industry and consumer advocates are closely watching what courts are doing with fair lending ECOA cases," she said.

Kleine added that defining "applicant" under ECOA to include guarantors could complicate fair lending analysis for lenders.

"They don't necessarily collect information about the race and ethnicity of guarantors," she said. "It would change your fair lending analysis if you had to include guarantors. It's also tricky from a compliance standpoint because guarantors are not your primary point of contact."

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*The argument transcript is on the court's website at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcript.aspx](http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx).*

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