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The Equal Credit Opportunity Act, Regulation B, and Spousal Guarantees: The Missouri Court of Appeals for the Eastern District's Incorrect Decision to Uphold the Validity of Regulation B's Expanded Definition of "Applicant" in *Frontenac Bank v. T.R. Hughes, Inc.*

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**THE EQUAL CREDIT OPPORTUNITY ACT, REGULATION B, AND
SPOUSAL GUARANTEES: THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT'S INCORRECT DECISION TO
UPHOLD THE VALIDITY OF REGULATION B'S EXPANDED
DEFINITION OF "APPLICANT" IN *FRONTENAC BANK v. T.R.
HUGHES, INC.***

INTRODUCTION

Congress passed the Equal Credit Opportunity Act (ECOA) in 1974 to ensure that financial institutions and businesses make credit available on a fair and impartial basis without discrimination on the basis of sex or marital status.¹ Prior to the passage of the ECOA, women faced difficulties in gaining access to credit. For instance, single women had more trouble getting credit than single men, creditors were often unwilling to extend credit to a married woman in her own name, and women who were divorced or widowed had trouble reestablishing credit.² To eliminate these difficulties and help women gain access to credit, the ECOA makes it "unlawful for any creditor to discriminate against any *applicant* on the basis of sex or marital status"³ If a creditor is found to have violated the ECOA, the ECOA provides that "[a]ny creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant"⁴

1. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974).

2. Gail R. Reizenstein, *A Fresh Look at the Equal Credit Opportunity Act*, 14 AKRON L. REV. 215, 216 (1980).

3. Equal Credit Opportunity Act § 701(a), 88 Stat. at 1521 (emphasis added) (The 1976 amendment to the ECOA broadened its coverage by making it unlawful for any creditor to discriminate against any applicant "on the basis of race, color, religion, national origin, sex or marital status, or age"). The ECOA is currently codified at 15 U.S.C. § 1691 (2012).

4. 15 U.S.C. § 1691e(a). Section 1691e(c) further provides: "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 subchapter." *Id.* § 1691e(c). In *Boone National Savings & Loan Ass'n v. Crouch*, the Missouri Supreme Court discussed § 1691e(c) and stated that "[m]any cases have utilized this provision as authority for allowing a debtor to assert violations . . . as a counterclaim for recoupment or as an affirmative defense to collection actions even after the running of the two year statute of limitations." *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 374-76 (Mo. 2001) (en banc) (internal citations and quotes omitted). While Missouri allows for an ECOA violation to be asserted as a counterclaim or as an affirmative defense, other

“Congress mandated that the agency charged with overseeing [the] ECOA—first the Federal Reserve [Board], now the Consumer Financial Protection Bureau—promulgate regulations to carry out the statute’s purposes.”⁵ Pursuant to this authority, the Federal Reserve Board (“the Board”) issued Regulation B (“Reg. B”) to prohibit creditors from discriminating against creditworthy applicants on the basis of sex or marital status.⁶ In particular, Reg. B was designed “to curtail the practice of creditors who refused to grant a wife’s credit application without a guaranty from her husband.”⁷ Accordingly, Reg. B provides that “a creditor shall not require the signature of an applicant’s spouse or other person . . . if the applicant qualifies under the creditor’s standards of creditworthiness”⁸ Reg. B further provides that “[i]f, under a creditor’s standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a . . . guarantor . . . [and] [t]he applicant’s spouse may serve as [the guarantor], but the creditor shall not *require* that the spouse be the [guarantor].”⁹

At first glance, the ECOA and Reg. B appear to be consistent in that they both prohibit creditors from discriminating against credit applicants on the basis of sex or marital status. However, the ECOA and Reg. B are inconsistent

courts have held that an alleged ECOA violation cannot be asserted as an affirmative defense. The ability, or lack thereof, to assert the ECOA as an affirmative defense has significant implications. See Ami L. diLorenzo, *Regulation B: How Lenders Can Fight Back Against the Affirmative Use of Regulation B*, 8 U. MIAMI BUS. L. REV. 215, 217–18 (2000) (“The question courts find themselves facing is precisely what form the remedy [for an ECOA violation] should take. Debtors attempt to utilize the purported violation as an affirmative defense to payment. The reason debtors seek to have the Equal Credit Opportunity Act claim treated as an affirmative defense is because this will likely preclude the entry of summary judgment. If the Equal Credit Opportunity Act claim is treated as an affirmative defense and there is supporting evidence, the court is faced with a factual dispute to be resolved at trial. As a result, the guarantor will continue to obtain a delay in facing judgment. Lenders, on the other hand, seek to have the Equal Credit Opportunity Act claim treated as a compulsory counterclaim, thereby permitting the guarantor to pursue its claim separately from the lender’s motion for judgment. Treating the Equal Credit Opportunity Act claim as a counterclaim is strategically significant because the court can grant the lender summary judgment on the defaulted obligations despite the potential Equal Credit Opportunity Act violation. Moreover, if treated as a counterclaim, the Equal Credit Opportunity Act cannot be used to declare the underlying obligation void.”).

5. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 383 (6th Cir. 2014) (internal quotes omitted).

6. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202.1(b) (2013).

7. Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014) (internal quotes omitted).

8. 12 C.F.R. § 202.7(d)(1). This provision further provides that “[a] creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.” *Id.*

9. *Id.* § 202.7(d)(5) (emphasis added).

in how they define the term “applicant.” Under the ECOA, the term “applicant” does not include guarantors and is defined as “any person who *applies* to a creditor directly for 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.”¹⁰ Reg. B, however, alters the ECOA’s definition of “applicant” to explicitly include guarantors. Specifically, Reg. B provides that “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 reliable regarding an extension of credit . . . [including] guarantors”¹¹

Reg. B’s broad definition of “applicant” has had significant implications for Missouri creditors making loans to commercial enterprises, which are not creditworthy.¹² In these situations, the personal guaranty of the business owner *and* the business owner’s spouse are part of the transaction. This is because, under Missouri law, “co-ownership of property by a husband and wife creates a presumption of tenancy by the entirety,” and, as a result, “[a]n execution arising from a judgment against one spouse alone cannot affect property held by a husband and wife as tenants by the entireties.”¹³ Therefore, the execution of the guaranties allows the creditor to reach marital property in the event of default and is “sound commercial practice unrelated to any stereotypical view of a wife’s role.”¹⁴

But how can creditors lawfully obtain a spouse’s guaranty without requiring it? In most cases, creditors sidestep Reg. B by having the applicant “offer” the spousal guaranty, which creditors then “accept” instead of “require.” This scenario has become commonly referred to as the “Reg. B Dance.” But, despite creditors’ deliberate efforts to avoid violating Reg. B’s spousal signature provisions, creditors continuously face resistance to their efforts to enforce spousal guarantees after husband-business owners default on their loans. Specifically, because Reg. B gives applicants *and* guarantors the authority to sue under the ECOA, wife-guarantors are using the ECOA as a means to render their spousal guarantees invalid and unenforceable.

10. 15 U.S.C. § 1691a(b) (2012) (emphasis added). The ECOA’s definition of “applicant” has remained unchanged since its enactment in 1974. *See* Equal Credit Opportunity Act, Pub. L. No. 93-495, § 702(b), 88 Stat. 1521, 1522 (1974).

11. 12 C.F.R. § 202.2(e) (emphasis added).

12. Under the ECOA and Reg. B, business entities are considered “persons” and, therefore, qualify as applicants. *See* 15 U.S.C. § 1691a(f) (“The term ‘person’ means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.”); 12 C.F.R. § 202.2(g) (“Business credit refers to extensions of credit primarily for business or commercial . . . purposes”) (emphasis omitted).

13. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 n.6 (8th Cir. 2014) (internal quotes omitted).

14. *Id.* at 942–43 n.6.

In 2012, the Missouri Court of Appeals for the Eastern District decided *Frontenac Bank v. T.R. Hughes, Inc.*¹⁵ The issue presented there was whether the Board exceeded the regulatory authority granted to it under the ECOA when it changed the ECOA's definition of "applicant" to include guarantors.¹⁶ Although the Federal District Court for the Eastern District of Missouri had previously held Reg. B's expanded definition of "applicant" to be invalid and thereby excluded guarantors from the ECOA's protections,¹⁷ the *Frontenac Bank* court upheld the validity of Reg. B's definition of "applicant," and created a conflict between Missouri state and federal law.¹⁸ In reaching its conclusion, the *Frontenac Bank* court relied primarily on the Missouri Supreme Court's 2001 decision in *Boone National Savings & Loan Ass'n v. Crouch*.¹⁹ The court interpreted *Boone* as holding that "the ECOA could be asserted as an affirmative defense by a wife in a creditor's claim to enforce a guaranty."²⁰ As a result, the court stated that "[w]ithout reason why this Court should abandon the doctrine of *stare decisis*, we follow the binding Missouri precedent in *Boone*," and it further held that a guarantor is protected by the ECOA.²¹

In this Note, I argue that the *Frontenac Bank* court misinterpreted the Missouri Supreme Court's decision in *Boone* because the validity of Reg. B's definition of "applicant" was never raised as an issue in *Boone*. Consequently, the validity of Reg. B's definition of "applicant" was an open question in Missouri when *Frontenac Bank* was decided by the Missouri Court of Appeals for the Eastern District. And, rather than erroneously relying on *Boone*, the *Frontenac Bank* court should have conducted a *Chevron* analysis to determine (1) whether the ECOA was clear and unambiguous and, if it is not, (2) whether the Board's interpretation of the ECOA was reasonable. This Note conducts the analysis that should have been conducted by the *Frontenac Bank* court, and demonstrates that Reg. B's definition of "applicant" fails under both prongs of *Chevron* (1) because Congress clearly and unambiguously expressed that a guarantor does not qualify as an "applicant," and (2) because the Board's interpretation of the ECOA is unreasonable and "leads to circular and illogical results."²²

Under the first prong of *Chevron*, Reg. B fails because the term "applicant" is unambiguously limited to a person who applies for or requests

15. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272 (Mo. Ct. App. 2012).

16. *Id.* at 290–91.

17. *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009).

18. *Frontenac Bank*, 404 S.W.3d at 291.

19. *Id.*; *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001) (en banc).

20. *Frontenac Bank*, 404 S.W.3d at 291.

21. *Id.*

22. *See Champion Bank*, 2009 WL 1351122, at *3.

credit—i.e. a borrower—and does not include a person who simply gives security for a borrower’s debt—i.e. a guarantor. Indeed, because guarantors base their ECOA claims on allegations that the creditor improperly *required* their guarantee, they are admittedly conceding that they are not applicants because they did not apply for or request anything. Under the second prong of *Chevron*, Reg. B fails because it unreasonably impedes the purpose of the ECOA, which is to encourage creditors to include, rather than exclude, women (especially wives) from credit transactions. Instead, Reg. B discourages creditors from considering a wife’s creditworthiness when extending credit to the wife’s husband because of the potential risk that the wife’s guarantee will be deemed void and unenforceable. Reg. B’s definition of “applicant” also leads to circular and illogical results because it allows a guarantor-wife to assert that she should not be a member of the class of people Reg. B is designed to protect—i.e. guarantors—and simultaneously allows the wife to claim rights under the ECOA as a guarantor.²³

Part I of this Note details the background of the ECOA and Reg. B, and provides an in-depth analysis of the *Frontenac Bank* court’s decision. Part II examines state and federal case law addressing the validity of Reg. B’s definition of “applicant.” Part III explores the legislative history of the ECOA in order to shed light on Congress’s purpose in passing the ECOA. Part IV asserts that the *Frontenac Bank* court misinterpreted the Missouri Supreme Court’s decision in *Boone* and should have followed the line of cases which have held Reg. B’s definition of “applicant” to be invalid. Specifically, Part IV demonstrates that the Board’s expansion of the term “applicant” fails under both prongs of the *Chevron* analysis. Part V concludes that the United States Supreme Court should correctly determine that Reg. B’s definition of “applicant” is an invalid exercise of the Board’s regulatory authority.

I. BACKGROUND

A. *The Equal Credit Opportunity Act and Regulation B*

The ECOA was enacted on October 28, 1974, in response to Congress’s finding “that there [was] a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise[d] their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.”²⁴ Accordingly, the ECOA provides that its purpose is “to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.”²⁵

23. *Id.*

24. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974).

25. *Id.*

Ultimately, Congress believed that the ECOA would enhance economic stabilization and strengthen competition among financial institutions engaged in the extension of credit.²⁶

To achieve the ECOA's purpose, Congress made it "unlawful for any creditor to discriminate against any *applicant* on the basis of sex or marital status with respect to any aspect of a credit transaction."²⁷ The ECOA defined "applicant" as "any person who *applies* to a creditor directly for 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."²⁸ In order to ensure the implementation of the ECOA, Congress authorized the Board of Governors of the Federal Reserve System the authority to "prescribe regulations to carry out the purposes" of the ECOA.²⁹

Pursuant to the authority granted to it under the ECOA, the Board promulgated Reg. B.³⁰ In accordance with the ECOA, Reg. B provides that its purpose "is to promote the availability of credit to all creditworthy *applicants* without regard to . . . sex . . . [or] . . . marital status[.]"³¹ Under Reg. B, "[a] creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis."³²

To further the ECOA's purpose and prevent creditors from forcing married women to obtain their husbands' guarantees when applying for credit, Reg. B further provides that "a creditor shall not require the signature of an applicant's spouse or other person . . . if the applicant qualifies under the creditor's

26. *Id.*

27. *Id.* § 701(a), 88 Stat. at 1521 (emphasis added).

28. 15 U.S.C. § 1691a(b) (2012) (emphasis added). The ECOA's definition of "applicant" has remained unchanged since its enactment in 1974. *See* Equal Credit Opportunity Act § 702(b), 88 Stat. at 1522.

29. Equal Credit Opportunity Act § 703, 88 Stat. at 1522. The 2010 amendment delegated the power to prescribe regulations to implement the ECOA to the Bureau of Consumer Financial Protection. *See* 15 U.S.C. § 1691b(a). Besides the 2010 amendment, the language in this section of the ECOA has remained virtually unchanged and provides that the Bureau's regulations

May contain but are not limited to such classifications . . . and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [the ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

Id.

30. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202.1(a) (2013) ("This regulation is issued by the Board of Governors of the Federal Reserve System pursuant to title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act . . .").

31. *Id.* § 202.1(b) (emphasis added). In its entirety, Reg. B provides that its purpose is to "promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age." *Id.*

32. *Id.* § 202.7(a).

standards of creditworthiness.”³³ Reg. B further provides that “[i]f, under a creditor’s standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a . . . guarantor . . . [and] [t]he applicant’s spouse may serve as [the guarantor], but the creditor shall not *require* that the spouse be the [guarantor].”³⁴

In the context of loans to commercial enterprises, the Official Staff Commentary of Reg. B provides that:

[A] creditor may not take [a] business applicant’s marital status into account, and may not request information about a married applicant’s spouse except when the spouse has some connection to the business . . . [and] [a] creditor must comply with the rules that prohibit *requiring* the spouse to guarantee the loan.³⁵

Additionally, the Official Staff Interpretations of Reg. B provide that:

[Reg. B] bar[s] a creditor from requiring the signature of a guarantor’s spouse just as [it] bar[s] the creditor from requiring the signature of an applicant’s spouse. For example, although a creditor may require all officers of a closely held corporation to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign the guarantee. If an evaluation of the financial circumstances of an officer indicates that an additional signature is necessary, however, the creditor may require the signature of another person in appropriate circumstances . . .³⁶

As originally adopted, Reg. B was consistent with the ECOA and defined “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.”³⁷ However, in 1986, the Board amended Reg. B and redefined an “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 become contractually reliable regarding an extension of credit . . . [including] *guarantors*, sureties, endorsers, and similar parties.”³⁸

The Board proposed to expand the definition of “applicant” to cover guarantors “in order to give legal standing to persons who have certain rights

33. *Id.* § 202.7(d)(1). This provision further states, “A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.” *Id.*

34. *Id.* § 202.7(d)(5) (emphasis added).

35. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,019 (Nov. 20, 1985) (to be codified at 12 C.F.R. pts. 202 and 202a) (emphasis added).

36. 12 C.F.R. pt. 202, supp. I, para. 7(d)(6).

37. 12 C.F.R. § 202.2(e) (1985) (emphasis added). *See* *Marine Am. State Bank of Bloomington, Ill. v. Lincoln*, 433 N.W.2d 709, 712 (Iowa 1988).

38. 12 C.F.R. § 202.2(e) (2013) (emphasis added).

under [Reg. B] but who do not . . . have a legal remedy when there is a violation of those rights.”³⁹ According to the Board, “[t]he principal effect of [the amendment was] to give guarantors . . . standing under the act to seek legal remedies when a violation occurs.”⁴⁰ The Board further explained, “The existing regulation prohibits creditors, in certain situations, from requiring an applicant to obtain a guarantor . . . [but] [if] a creditor violates this provision . . . a guarantor whose signature has been illegally required currently has no legal remedy *because . . . the act confers standing to sue only upon an ‘aggrieved applicant.’*”⁴¹ The Board’s proposal also stated, “The Board believes that no operational problems [will] be created by the proposed change.”⁴² The Board justified its proposal to include guarantors within the definition of “applicant” on the basis that “[t]he new provisions may increase creditor’s costs by increasing their exposure to litigation . . . [but] this situation [will likely] arise infrequently [because] [a]pplicants would normally bring suit in their own right; and guarantors . . . would merely join in the lawsuit.”⁴³ In the final rule revising Reg. B, the Board stated, “Litigation would increase to the extent guarantors sue regarding alleged [Reg. B] signature rule violations, and the alleged violations would not have been litigated by applicants themselves.”⁴⁴ The Board also emphasized that the amendment “impose[d] no new requirements on creditors.”⁴⁵

As a result of Reg. B’s spousal signature provisions and Reg. B’s amended definition of “applicant,” creditors have continuously been forced to litigate claims made by wife-guarantors. Specifically, Reg. B’s broad definition of “applicant” has had significant implications for Missouri creditors making loans to commercial enterprises, which are not creditworthy.⁴⁶ In these situations, the personal guaranty of the business owner *and* the business owner’s spouse are part of the transaction. This is because, under Missouri law, “co-ownership of property by a husband and wife creates a presumption of

39. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 10,890, 10,890 (proposed Mar. 18, 1985).

40. *Id.* at 10,891.

41. *Id.* (emphasis added). By acknowledging that the ECOA confers standing to sue only upon an “aggrieved applicant,” the Board seemingly admitted it was changing, rather than interpreting, the ECOA.

42. *Id.*

43. *Id.* at 10,896.

44. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,025 (Nov. 20, 1985) (to be codified at 12 C.F.R. pts. 202 and 202a).

45. *Id.* at 48,018.

46. Under the ECOA and Reg. B, business entities are considered “persons” and, therefore, qualify as applicants. *See* 15 U.S.C. § 1691a(f) (2012) (“The term ‘person’ means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.”); 12 C.F.R. § 202.2(g) (2013) (“Business credit refers to extensions of credit primarily for business or commercial . . . purposes . . .”) (emphasis omitted).

tenancy by the entirety,” and, as a result, “[a]n execution arising from a judgment against one spouse alone cannot affect property held by a husband and wife as tenants by the entirety.”⁴⁷ Therefore, the execution of the guaranties allows the creditor to reach marital property in the event of default and is “sound commercial practice unrelated to any stereotypical view of a wife’s role.”⁴⁸ But how can creditors lawfully obtain a spouse’s guaranty without requiring it? In most cases, creditors sidestep Reg. B by having the applicant “offer” the spousal guaranty, which creditors then “accept” instead of “require.” This scenario has become commonly referred to as the “Reg. B Dance.”

In the following case, *Frontenac Bank v. T.R. Hughes, Inc.*,⁴⁹ the creditor, Frontenac Bank (“Frontenac”), faced that exact scenario. Before extending credit to a husband-business owner, Frontenac required the husband to personally guarantee the loan. Additionally, Frontenac “accepted” spousal guarantees from the husband’s wife. Despite Frontenac’s efforts to comply with Reg. B, the wife-guarantor sought to invalidate her guarantees after the husband-business owner defaulted on his loans. The wife-guarantor alleged that Frontenac “required” her guarantee in violation of the ECOA. As a result, the Missouri Court of Appeals for the Eastern District was confronted with an issue of first impression in Missouri state courts: whether the Board’s expansion of the term “applicant” to include guarantors was a valid exercise of the Board’s regulatory authority.

B. Frontenac Bank v. T.R. Hughes, Inc.

T.R. Hughes, Inc. (“Homebuilder”) and Summit Point, L.C. (“Summit”) obtained financing from Frontenac in 2003.⁵⁰ In connection with the financing, Homebuilder and Summit entered into loan agreements, which included seven promissory notes (“the Notes”).⁵¹ Homebuilder and Summit secured the loans by executing deeds of trust.⁵² Additionally, Thomas R. Hughes (“Mr. Hughes”) and his wife, Carolyn Hughes (“Ms. Hughes”), personally guaranteed the Notes.⁵³ In 2009, Frontenac declared the Notes in default, foreclosed upon the real estate,⁵⁴ and sued Summit, Homebuilder, Mr. Hughes (collectively,

47. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 n.6 (8th Cir. 2014) (internal quotes omitted).

48. *Id.* at 942–43 n.6.

49. *See Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 276–78, 290 (Mo. Ct. App. 2012).

50. *Id.* at 276.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Frontenac Bank*, 404 S.W.3d at 276.

“Defendants”), and Ms. Hughes to recover the deficiency balance.⁵⁵ Defendants and Ms. Hughes responded by filing several affirmative defenses, including the defense that the guarantees were void, invalid, and/or otherwise unenforceable because Frontenac violated the ECOA.⁵⁶

The circuit court entered summary judgment in favor of Frontenac and against Defendants on Frontenac’s claims relating to the Notes.⁵⁷ The circuit court also entered partial summary judgment in favor of Frontenac and against Ms. Hughes, but the court sustained her affirmative defense that Frontenac violated the ECOA when Frontenac obtained her personal guarantees.⁵⁸ At trial, the court ruled in favor of Ms. Hughes and concluded her guarantees were obtained in violation of the ECOA.⁵⁹ Specifically, the circuit court found that the guarantees “were invalid and unenforceable [and] constituted discrimination based on marital status” because Frontenac “wrongfully demanded that [Ms. Hughes] execute the guarantees [even though Homebuilder and Summit] were independently creditworthy under Frontenac’s own standards of creditworthiness.”⁶⁰

On review, the Missouri Court of Appeals for the Eastern District rejected Frontenac’s contention that the ECOA does not extend to spousal guarantees and affirmed the circuit court’s determination as to Ms. Hughes’s guarantees.⁶¹ The Missouri Supreme Court subsequently declined Frontenac Bank’s motion for transfer from the Missouri Court of Appeals.⁶²

1. Legal Background in Missouri Before *Frontenac Bank*

Prior to *Frontenac Bank*, the Missouri Supreme Court decided *Boone National Savings & Loan Ass’n v. Crouch* in 2001, and addressed the issue of whether alleged ECOA violations can be asserted as both a counterclaim and affirmative defense after the statute of limitations has run.⁶³ In *Boone*, Boone

55. *Id.* at 276–77.

56. *Id.* at 277.

57. *Id.*

58. *Id.*

59. *Frontenac Bank*, 404 S.W.3d at 277.

60. *Id.*

61. *Id.* at 291. The court determined that Frontenac violated the ECOA (1) when Frontenac required Ms. Hughes to execute an unlimited personal guaranty because such a guaranty exceeded Reg. B’s exception to the rule against requiring an applicant’s spouse to sign a credit instrument if the applicant is independently creditworthy; and (2) when Frontenac deemed Mr. Hughes’s submission of joint financial statements as an application for joint credit because the ECOA specifically prohibits creditors from deeming the submission of joint statements as an application for joint credit. *Id.* at 289–91.

62. *Bank v. T.R. Hughes, Inc.*, SC92989, 2013 Mo. LEXIS 106, at *1 (Mo. Jan. 29, 2013).

63. *Boone Nat’l Sav. & Loan Ass’n v. Crouch*, 47 S.W.3d 371, 374–76 (Mo. 2001) (en banc). Initially, the trial court granted summary judgment in favor of Boone National on Ms. Crouch’s counterclaim and affirmative defenses on the grounds that the counterclaim was barred

National Savings and Loan Association (“Boone National”) sued Laura Crouch (“Ms. Crouch”) on her guaranty for the business debts of her husband, John A. Crouch, M.D. (“Mr. Crouch”).⁶⁴ In response, Ms. Crouch asserted Boone National’s alleged violations of the ECOA as an affirmative defense and a counterclaim.⁶⁵ The *Boone* court determined that Ms. Crouch’s counterclaim was time barred because it was “‘an action’ that was required to be brought within the two-year period specified in the [ECOA].”⁶⁶ Nonetheless, the court found that Ms. Crouch could assert the alleged ECOA violations as affirmative defenses because the affirmative defenses were “not ‘an action’ that [was] being ‘brought.’”⁶⁷

Aside from the Missouri Supreme Court’s decision in *Boone*, there were no reported Missouri cases between 2001 and 2012 where a spousal guaranty was invalidated under the ECOA.⁶⁸ During that time span, however, several federal cases found that the Board exceeded its regulatory authority by changing Reg. B’s definition of “applicant” to include guarantors and held that the ECOA did not apply to spousal guarantees.⁶⁹ Thus, at the time *Frontenac Bank* came before the Missouri Court of Appeals for the Eastern District, the federal courts’ interpretation of ECOA created a potential conflict on the issue of whether the Board exceeded the regulatory authority granted to it under the ECOA when it changed the ECOA’s definition of “applicant” to include guarantors.⁷⁰

2. *Frontenac Bank* Court’s Analysis

To determine whether the Board exceeded the regulatory authority granted to it under the ECOA when it changed the ECOA’s definition of “applicant” to

under the statute of limitations and the ECOA could not be asserted as an affirmative defense. *Id.* at 372. After opinion, the Missouri Court of Appeals for the Western District ordered the case transferred to the Missouri Supreme Court. *Id.*

64. *Id.* at 372.

65. *Id.*

66. *Id.* at 374.

67. *Id.* at 375. The court explained that “[u]nder Missouri law, even though a claim may be barred by the applicable statute of limitations, the essence of the claim may be raised as a defense.” *Id.* The court justified its conclusion by reasoning:

It would be inconsistent with the equitable relief recognized in the [ECOA] to allow a violator to enforce its guaranty claim simply because the victim of the violation had not brought an action within the two-year period. In this case, for instance, Ms. Crouch would have had to bring an action for violation of the Equal Credit Opportunity Act by 1994, which was . . . three years before there was any effort to impose liability upon her for her husband’s debts.

Id.

68. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. Ct. App. 2012).

69. *Id.* at 290–91.

70. *Id.* at 290.

include guarantors, the *Frontenac Bank* court began its analysis by reviewing the Missouri Supreme Court's decision in *Boone*.⁷¹ The court interpreted *Boone* as holding that "the ECOA could be asserted as an affirmative defense by a wife in a creditor's claim to enforce a guaranty."⁷² Despite the *Frontenac Bank* court's determination that the Missouri Supreme Court had already answered the precise issue presented, the court continued its analysis and addressed Frontenac's argument that the court should abandon *Boone* and follow various federal cases decided since *Boone* that held the ECOA did not apply to spousal guarantees.⁷³ Specifically, Frontenac argued that the federal cases "rejected the extension of the ECOA and its governing regulations to spousal guarantees as being in excess of regulatory authority based on the express language in the [ECOA]."⁷⁴ In response to Frontenac's argument, the court reviewed the definition of "applicant" under the ECOA and Reg. B, and emphasized that Reg. B's definition of "applicant" explicitly includes "guarantors."⁷⁵ Based on *Boone* and Reg. B's definition of "applicant," the court reasoned that there was no reason why it should abandon the doctrine of *stare decisis*, and it concluded that Ms. Hughes was protected by the ECOA as a guarantor.⁷⁶

II. STATE AND FEDERAL CASE LAW ADDRESSING THE VALIDITY OF REGULATION B

A. State and Federal Courts Initially Assumed the Validity of Regulation B

After the Board amended Reg. B's definition of "applicant" to include guarantors, state and federal courts assumed that the amendment was a valid exercise of the regulatory authority granted to the Board under the ECOA.⁷⁷

For instance, in 1988, the Iowa Supreme Court decided *Marine American State Bank of Bloomington, Ill. v. Lincoln*, and implied that the amendment was a valid exercise of the Board's authority.⁷⁸ Although the court there held that the plaintiff did not have standing under the ECOA as a "guarantor, surety, endorser, or similar party" since the amendment did not apply retroactively, the court explained that the amendment represented a "*substantive change*" in the

71. *Id.* at 291.

72. *Id.*

73. *Frontenac Bank*, 404 S.W.3d at 291.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995); *FDIC v. Medmark, Inc.*, 897 F. Supp. 511, 514 (D. Kan. 1995); *Douglas Cty. Nat'l Bank v. Pfeiff*, 809 P.2d 1100, 1102-03 (Colo. App. 1991); *Marine Am. State Bank of Bloomington, Ill. v. Lincoln*, 433 N.W.2d 709, 712 (Iowa 1988).

78. *Lincoln*, 433 N.W.2d at 713.

definition of “applicant” under the ECOA, and it suggested that a similarly situated plaintiff would have authority to sue under the ECOA for violations occurring after the amendment took effect in 1986.⁷⁹ Likewise, in 1991, the Colorado Court of Appeals decided *Douglas County National Bank v. Pfeiff* and rejected the defendant bank’s argument that a guarantor was not an “applicant” under the ECOA.⁸⁰ Instead, the court held that guarantors do have authority to sue under the ECOA.⁸¹ In determining that the bank’s argument had “no merit,” the court explained that the principal purpose of the amendment was to give guarantors authority to seek legal remedies when an ECOA violation occurs.⁸²

In accordance with these state courts, federal courts similarly deferred to the Board’s amendment and assumed Reg. B’s definition of “applicant” was valid.⁸³ In 1995, the United States Court of Appeals for the Third Circuit decided *Silverman v. Eastrich Multiple Investor Fund, L.P.* and rejected a creditor’s contention that a guarantor-wife lacked the authority to sue under the ECOA.⁸⁴ Like the state courts, the Third Circuit did not explicitly address the validity of the Board’s amendment to the definition of “applicant.”⁸⁵ Nonetheless, the Third Circuit implied that the amendment was valid.⁸⁶ Specifically, the Third Circuit relied on the district court’s conclusions that “the ECOA has from its inception prohibited requiring spousal guaranties” and, therefore, “conferring standing upon guarantors places no additional requirements upon creditors”⁸⁷ Similarly, in *FDIC v. Medmark, Inc.*, the United States District Court for the District of Kansas held that a guarantor-wife could “use [an] alleged ECOA violation defensively to obtain relief from her obligation under [a] guaranty”⁸⁸ Although the defendant-bank did not argue that a guarantor lacks the authority to assert a violation of the ECOA, the court implicitly gave deference to the Board’s expanded definition of “applicant” and assumed it was a valid exercise of the Board’s regulatory authority.⁸⁹ Specifically, the court noted that the ECOA provides an “aggrieved applicant” the authority to recover damages for a violation and explained that

79. *Id.* at 712–13 (emphasis added).

80. *Pfeiff*, 809 P.2d at 1102.

81. *Id.* at 1102–03.

82. *Id.*

83. *Silverman v. Eastrich Multiple Inv’r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995); *FDIC v. Medmark, Inc.*, 897 F. Supp. 511, 514 (D. Kan. 1995).

84. *Silverman*, 51 F.3d at 31.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Medmark*, 897 F. Supp. at 514.

89. *Id.*

“[t]he term applicant encompasses any person who is or may become contractually liable regarding an extension of credit, *including guarantors*.”⁹⁰

B. Courts Begin to Split Over the Validity of Regulation B’s Definition of “Applicant”

Notwithstanding the deference state and federal courts initially gave to the Board’s amended definition of “applicant,” the United States Court of Appeals for the Seventh Circuit questioned the validity of Reg. B’s definition of “applicant” and the applicability of the ECOA to spousal guarantees in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*.⁹¹ Similar to *Frontenac Bank*, *Moran Foods* involved a scenario where a wife guaranteed her husband’s debt so that his business could obtain credit.⁹² After the business defaulted on its loans, the creditor sought to enforce the wife’s personal guarantee.⁹³ In response, the wife counterclaimed and asserted that her guarantee was unenforceable because it was obtained in violation of the ECOA.⁹⁴ The Seventh Circuit ultimately found the wife’s counterclaim failed because she could not prove discrimination on the basis of sex or marital status.⁹⁵ However, before reaching that conclusion, the Seventh Circuit expressed concerns about the legitimacy of a guarantor’s ECOA claim stemming from an alleged Reg. B violation.⁹⁶ In assessing the validity of such a claim, the Seventh Circuit noted, “At first blush, the [ECOA] has no relevance to this case” because the wife “was not an applicant for credit, and neither received credit nor was denied it.”⁹⁷ The Seventh Circuit explained that the ECOA was intended to forbid creditors from “deny[ing] credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility.”⁹⁸ The Seventh Circuit reasoned that:

The Federal Reserve Board, however, has defined “applicant” for credit (the term in the statute) to include a guarantor. We doubt that the statute can be stretched far enough to allow this interpretation. It is true that courts defer to administrative interpretations of statutes when a statute is ambiguous, and that this precept applies to the Federal Reserve Board’s interpretation of ambiguous provisions of the Equal Credit Opportunity Act. But there is nothing

90. *Id.* (emphasis added).

91. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007).

92. *Id.*

93. *Id.* at 437.

94. *Id.* The district court granted summary judgment in favor of the creditor, Moran, but the jury found in favor of the wife on her counterclaim. *Id.*

95. *Id.* at 442.

96. *Moran Foods*, 476 F.3d at 441.

97. *Id.*

98. *Id.*

ambiguous about “applicant” and no way to confuse an applicant with a guarantor. What is more, to interpret “applicant” as embracing “guarantor” opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept.⁹⁹

Two years after the Seventh Circuit questioned the validity of Reg. B’s definition of “applicant,” the Federal District Court for the Eastern District of Missouri, a lower court within the United States Court of Appeals for the Eighth Circuit, decided *Champion Bank v. Regional Development, LLC* and became the first court to explicitly hold that the ECOA does not apply to spousal guarantees.¹⁰⁰ The factual scenario presented in *Champion Bank* was identical to *Moran Foods* and *Frontenac Bank*.¹⁰¹ Relying on the reasoning articulated by the Seventh Circuit, the *Champion Bank* court explained that a “guarantor is not an applicant because a guarantor does not, by definition, apply for anything.”¹⁰² The court reasoned that extending the protections of the ECOA to spousal guarantees is unreasonable because it “expands the ECOA beyond its intended purpose and leads to circular and illogical results.”¹⁰³ The court further reasoned that Reg. B’s definition of “applicant” “leads to circular and illogical results” because it is difficult to conceive how a guarantor can claim to have been discriminated against because “a guarantor cannot be denied credit for which he or she did not apply.”¹⁰⁴ Finally, the court explained that extending the ECOA’s protections to a guarantor “leads to circular and illogical results” because it allows a guarantor to claim rights under the ECOA while simultaneously allowing a guarantor to assert that she should not be a member of the class of people the ECOA is designed to protect.¹⁰⁵

Thereafter, in January 2013, the Federal District Court for the Western District of Missouri, also a lower court within the Eighth Circuit, decided *Arvest Bank v. Uppalapati* and explicitly declined to follow *Frontenac Bank*.¹⁰⁶ Instead, the *Arvest Bank* court adopted the reasoning articulated by the Seventh Circuit and the Federal District Court for the Eastern District of Missouri, and held that guarantors do not have authority to sue under the ECOA.¹⁰⁷ In its analysis, the *Arvest Bank* court explained that when a court

99. *Id.* (internal citations omitted).

100. *Champion Bank v. Reg’l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009).

101. *Id.*; cf. *Moran Foods*, 476 F.3d at 437; *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272 (Mo. Ct. App. 2012).

102. *Champion Bank*, 2009 WL 1351122, at *2.

103. *Id.* at *3.

104. *Id.* at *2–3.

105. *Id.* at *3.

106. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at *4 (W.D. Mo. Jan. 7, 2013).

107. *Id.*

assesses the validity of an administrative regulation, the court must (1) determine whether the intent of Congress is clear and, if it is not, (2) determine whether the contested regulation is based on a permissible construction of the statute.¹⁰⁸ After determining the Eighth Circuit had not addressed the validity of Reg. B, the *Arvest Bank* court looked to the rationale provided in *Moran Foods* and *Champion Bank*, and concluded that the Board exceeded its authority because (1) there was nothing ambiguous about the ECOA's definition of "applicant" and (2) interpreting "applicant" to include guarantors was an impermissible expansion of the ECOA.¹⁰⁹ Shortly after the *Arvest Bank* decision, the Federal District Court for the Western District of Missouri reaffirmed its position in *Smithville 169 v. Citizens Bank & Trust Co.* and again held that the ECOA does not extend to spousal guarantees.¹¹⁰

Despite the decisions by the Seventh Circuit and the federal district courts in Missouri that rejected the validity of Reg. B, federal courts in other jurisdictions determined that Reg. B was valid¹¹¹ and deferred to the Board's expanded definition of "applicant."¹¹² For example, in *LOL Finance Co. v. F.J. Faison, Jr. Revocable Trust*, the Federal District Court for the District of Minnesota, another lower federal court within the Eighth Circuit, explicitly declined to follow *Moran Foods* and *Champion Bank*.¹¹³ Without providing any analysis, the court simply explained that it was "wary of categorically discounting the Federal Reserve Board's Regulations."¹¹⁴ Likewise, in *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, the Federal District Court for the Northern District of Oklahoma, a lower federal court within the Tenth Circuit,

108. *Id.* at *3; see *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 n.9 (1984).

109. *Arvest Bank*, 2013 WL 85336, at *3–4. Before deciding to follow *Moran Foods* and *Champion Bank*, the court reviewed several cases, including *Frontenac Bank*, which explicitly rejected *Moran Foods* and *Champion Bank*. *Id.* at *4; see, e.g., *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3931496, at *9 (N.D. Okla. Oct. 5, 2010) ("This Court declines to follow *Moran* and adher[ing] to Regulation B" because "[t]he court's holding in *Moran* eliminates entire aspects of the Federal Reserve Board's implementation scheme" that "consumers have come to rely on" and that "creditors have been trained to follow.").

110. *Smithville 169 v. Citizens Bank & Trust Co.*, No. 4:11-CV-0872-DGK, 2013 WL 434044, at *3 (W.D. Mo. Feb. 5, 2013).

111. *Res-Mo Springfield, LLC v. Tuscany Props., LLC*, No. 13-2169-EFM-DJW, 2013 WL 3991794, at *3 (D. Kan. Aug. 5, 2013); *Citgo Petroleum*, 2010 WL 3931496, at *9; *LOL Fin. Co. v. F.J. Faison, Jr. Revocable Trust*, No. 09-741 (JRT/RLE), 2010 WL 3118630, at *7 (D. Minn. July 13, 2010).

112. *Res-Mo Springfield*, 2013 WL 3991794, at *3; *Citgo Petroleum*, 2010 WL 3931496, at *8; *LOL Fin.*, 2010 WL 3118630, at *7.

113. *LOL Fin.*, 2010 WL 3118630, at *7.

114. *Id.*

“decline[d] to follow *Moran [Foods]* and adhere[d] to Regulation B”¹¹⁵ In doing so, the *Citgo Petroleum* court concluded that “guarantors who are required to sign a guaranty in connection with an extension of credit covered by the ECOA will continue to receive protection.”¹¹⁶ The court also justified its decision not to follow *Moran Foods* by explaining that *Moran Foods* “eliminates entire aspects of the Federal Reserve Board’s implementation scheme” that “[c]onsumers have come to rely upon” and that “creditors have been trained to follow.”¹¹⁷ The court concluded its analysis by stating that “[u]nless and until the Tenth Circuit mandates that the Federal Reserve Board’s definitions and implementation scheme indeed run afoul of congressional intent, this Court adheres to Regulation B, *Silverman*, and other similar cases extending the ECOA’s protections to guarantors.”¹¹⁸

C. *The Circuit Split*

In 2014, the Sixth and Eighth Circuits became the first Federal Courts of Appeals to explicitly address the issue of whether the Board exceeded the regulatory authority granted to it under the ECOA when it changed the ECOA’s definition of “applicant” to include guarantors. The courts ultimately reached different conclusions, thereby creating a circuit split and setting the stage for the Supreme Court of the United States to resolve the issue.

1. The Sixth Circuit Upholds the Validity of Regulation B

First, in June 2014, the Sixth Circuit decided *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*. In *Bridgemill*, the Sixth Circuit was presented with the same factual scenario that was presented in *Frontenac Bank*: a wife guaranteed her husband’s debt so that his business could obtain credit, and, after the business defaulted on its loans and the creditor sought to enforce the wife’s personal guarantee, the wife asserted that her guarantee was unenforceable because it was obtained in violation of the ECOA.¹¹⁹ To resolve the case, the court had to conduct a *Chevron* analysis to determine the validity of the Board’s amended definition of “applicant.”

First, the court explained that the proper inquiry under step one of *Chevron* is “whether [the] ECOA’s definition of ‘applicant’ unambiguously excludes

115. *Citgo Petroleum*, 2010 WL 3931496, at *9.

116. *Id.*

117. *Id.*

118. *Id.*; see also *Res-Mo Springfield, LLC v. Tuscany Props., LLC*, No. 13-2169-EFM-DJW, 2013 WL 3991794, at *3 n.21 (D. Kan. Aug. 5, 2013) (citing *Moran Foods* and *Citgo Petroleum* to demonstrate that there is “dispute as to whether a guarantor qualifies as an ‘applicant’ for the purposes of the ECOA” but declining to resolve the issue).

119. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 382–83 (6th Cir. 2014).

guarantors, or whether the [ECOA] is ambiguous on this issue.” In conducting step one, the court focused on what it referred to as “two broad terms” in the ECOA’s definition of “applicant”—“applies” and “credit.”¹²⁰ First, the court defined “applies” to mean “to make an appeal or a request esp. formally and often in writing and usu. for something to benefit oneself,” or “[t]o make an approach to (a person) for information or aid; to have recourse or make application *to*, to appeal *to*; to make a (formal) request for.”¹²¹ The court reasoned that although “[a] guarantor does not traditionally approach a creditor herself asking for credit[,] . . . a guarantor does formally approach a creditor in the sense that the guarantor offers up her own personal liability to the creditor if the borrower defaults.”¹²² According to the court, although the ECOA could permissibly be read to mean that only the initial applicant can be deemed to “apply” for credit, “the text could just as easily encompass all those who offer promises in support of an application—including guarantors, who make formal requests for aid in the form of credit for a third party.”¹²³ Second, the court honed in on the term “credit” and noted that the ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt”¹²⁴ The court reasoned that this definition demonstrated that “an ‘applicant’ requests credit, but a ‘debtor’ reaps the benefit.”¹²⁵ According to the court, “[t]he use of these two different terms suggests that the applicant and the debtor are not always the same person[] . . . [and therefore] . . . it would be reasonable to conclude that the applicant could be a third party, such as a guarantor.”¹²⁶ Accordingly, the court concluded “that the statutory definition [of ‘applicant’] is ambiguous because it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves—a category that includes guarantors.”¹²⁷

The court then moved on to step two of *Chevron* and noted that “[its] task at *Chevron* step two [was] to determine whether [Reg. B] stems from a permissible construction of the [ECOA].”¹²⁸ Ultimately, the court found that “[s]ince ‘at least one of the natural meanings’ of applicant includes guarantors, we conclude that ‘the agency’s interpretation [] represents a permissible one entitled to deference.’”¹²⁹ The court supported its conclusion by explaining that

120. *Id.* at 385; *see also* 15 U.S.C. § 1691a(b) (2012).

121. *Bridgemill*, 754 F.3d at 385 (internal citations omitted) (emphasis in original).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Bridgemill*, 754 F.3d at 385.

127. *Id.* at 384–85.

128. *Id.* at 385.

129. *Id.* (quoting *Harris v. Olszewski*, 442 F.3d 456, 467 (6th Cir. 2006)).

the Board acted with caution in amending Reg. B's definition of "applicant."¹³⁰ The court also dismissed the *Moran Foods* court's rationale and explained:

[W]e are not troubled by the prospect of guarantors being made whole after a creditor violates the [ECOA] . . . [because] [a] creditor will only lose its entire debt if the borrower immediately defaults and the pledged collateral turns out to be worthless [and, therefore,] [w]e will not strike down a valid regulation to salvage bad underwriting.¹³¹

The court further supported its decision by emphasizing that "[the] ECOA has undergone several amendments since the Federal Reserve included guarantors within the definition of 'applicant'—including an extensive amendment to the statute after *Moran [Foods]* was decided—and none has clarified that the term 'applicant' cannot include guarantors."¹³²

Therefore, the court held that "[Reg.] B's definition of 'applicant' constitutes a valid construction of the statutory definition of that term[] [and] [a] guarantor may therefore seek relief for violations of the spouse-guarantor rule."¹³³

2. The Eighth Circuit Rejects *Bridgemill* and Holds Regulation B Invalid

Shortly after *Bridgemill*, in August 2014, the Eighth Circuit decided *Hawkins v. Community Bank of Raymore*.¹³⁴ The factual scenario in *Hawkins* was identical to *Bridgemill*.¹³⁵ Thus, like *Bridgemill*, the court conducted a *Chevron* analysis.¹³⁶ Ultimately, the court rejected the *Bridgemill* decision and resolved the case under step one of *Chevron* by holding that "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."¹³⁷

Like the *Bridgemill* court, the *Hawkins* court's analysis under *Chevron* step one focused on the ECOA's definition of "applicant" and its use of the term "appl[y]."¹³⁸ Essentially, the *Hawkins* court agreed with the *Bridgemill* court that "apply" means "to make an appeal or request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself."¹³⁹ However, the *Hawkins* court reasoned:

130. *Id.* at 386.

131. *Bridgemill*, 754 F.3d at 386.

132. *Id.*

133. *Id.*

134. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 939 (8th Cir. 2014).

135. *Id.*

136. *Id.* at 940.

137. *Id.* at 941.

138. *Id.*

139. *Hawkins*, 761 F.3d at 941 (internal quotes omitted).

[T]he plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit. But a person does not, by executing a guaranty, request credit. A “guaranty” . . . [is] a promise to answer for another person’s debt, default, or failure to perform. More specifically, a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, of another person in the event of default. A guaranty is collateral and secondary to the underlying loan transaction between the lender and the borrower. While a guarantor no doubt desires for a lender to extend credit to a borrower, it does not follow from the execution of a guaranty that a guarantor has requested credit or otherwise been involved in applying for credit. *Thus, a guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA.*¹⁴⁰

The court then acknowledged that the Sixth Circuit had reached a contrary conclusion in *Bridgemill*.¹⁴¹ The court explained that it agreed with the Sixth Circuit that a guarantor does not approach a creditor herself for credit and that a guarantor is a third party to the larger application process.¹⁴² But, contrary to the Sixth Circuit, the court explained:

[T]his ends the inquiry [for us] because it demonstrates that a guarantor unambiguously does not request credit. “Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent” We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for credit. A guarantor engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant. “[T]here is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.”¹⁴³

To conclude, the court emphasized that its interpretation of the ECOA “comport[ed] with the purposes and policies underlying the ECOA.”¹⁴⁴ The court noted that the ECOA’s focus was to ensure “fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers’ marital status.”¹⁴⁵ The court then explained that this concern is not raised by the execution of a spousal guaranty because, “[b]y requesting . . . a guaranty, a lender does not thereby exclude the guarantor from the lending process or deny the guarantor access to credit.”¹⁴⁶

140. *Id.* (emphasis added).

141. *Id.*

142. *Id.*

143. *Id.* at 941–42 (internal citations omitted).

144. *Hawkins*, 761 F.3d at 942.

145. *Id.*

146. *Id.* Judge Colloton wrote a concurring opinion that provides additional analysis to support Judge Gruender’s majority opinion. *Id.* at 943. The concurrence noted that the ordinary meaning of an “applicant” is one who requests something for her own benefit, not for the benefit

3. The Supreme Court Grants Writ of Certiorari for *Hawkins*

After *Hawkins* created a circuit split on the issue of whether the Board exceeded the regulatory authority granted to it under the ECOA when it changed the ECOA's definition of "applicant" to include guarantors, the Supreme Court of the United States granted certiorari on March 2, 2015 and heard oral arguments in October 2015.¹⁴⁷

III. THE ECOA'S LEGISLATIVE HISTORY

While the ECOA, as finally enacted, only prevented creditors from discriminating against "applicants"—those who "*appl[y]* to a creditor directly for an extension, renewal, or continuation of credit, or *appl[y]* to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit"—earlier proposals of the ECOA were more expansive and sought to prevent creditors from discriminating against more than just "applicants."¹⁴⁸

For example, on May 23, 1972, the House of Representatives proposed a bill that sought to make it "unlawful for any creditor to discriminate against *any person in any extension of credit* or in connection with *any application for credit* on the basis of sex or marital status."¹⁴⁹ In that bill, "application for credit" was broadly defined as "any communication, either oral, written, or otherwise, by a person to a creditor requesting an extension of credit *to that person or any other person*."¹⁵⁰ Between 1972 and 1974, the House and Senate continuously proposed new versions of the ECOA, with some proposals seeking to narrow the ECOA's scope and other proposals seeking to expand its scope. In a bill introduced on January 3, 1973, the House proposed to narrow the scope of the ECOA by making it "unlawful for any creditor to discriminate on the basis of sex or marital status against *any consumer* in connection with the approval or denial of *any extension of credit*."¹⁵¹ In contrast, in a

of a third party. *Id.* Furthermore, the statute "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but it distinguishes between the third-party requestor and the 'applicant.'" *Id.* at 944. Thus, because the ordinary meaning of "applicant" comports with the natural reading of the statute, "there is no ambiguity that gives an agency license to adopt an alternative definition." *Id.*

147. *Hawkins v. Cmty. Bank of Raymore*, 135 S. Ct. 1492 (2015); *Hawkins v. Community Bank of Raymore*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/hawkins-v-community-bank-of-raymore/> [<http://perma.cc/YWS6-A2Y8>] (last visited Apr. 10, 2016). On March 22, 2016, the judgment was affirmed by an equally divided Court in a per curiam opinion. *Id.*

148. 15 U.S.C. § 1691a(b) (2012) (emphasis added).

149. H.R. 15116, 92d Cong. (2d Sess. May 23, 1972) (emphasis added).

150. *Id.* (emphasis added).

151. H.R. 247, 93d Cong. (1st Sess. Jan. 3, 1973) (emphasis added); *see also* S. 867, 93d Cong. (1st Sess. Feb. 15, 1973) (proposing to prevent creditors from discriminating against "*any person* on the basis of sex or marital status in connection with the approval or denial of any

subsequent bill introduced on May 29, 1973, the House expanded the scope of the ECOA further than it had in earlier proposals and sought to make it “unlawful for any creditor, card issuer, or other person to discriminate against *any person* on account of sex or marital status in connection with the approval or denial of *any extension of credit*, or with respect to the issuance, renewal, denial, or terms of any credit card.”¹⁵²

Despite Congress’s initial inability to agree on the scope of the ECOA, the House and Senate reached agreement in May 1974. On May 9, 1974, the House introduced a bill that proposed to make it “unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.”¹⁵³ Five days later on May 14, 1974, the Senate introduced a bill that adopted the House’s ECOA provisions.¹⁵⁴ Then, on October 28, 1974, Congress enacted the final version of the ECOA, which included the ECOA provisions agreed to in May 1974.¹⁵⁵ Although amendments that have subsequently been proposed have sought to expand the ECOA’s scope, the scope has remained unchanged and has continued to protect only “applicants” from discrimination on the basis of sex or marital status.¹⁵⁶

As new versions of the ECOA were proposed from 1972 to 1974, reports issued by Congress shed light on the scenarios that the ECOA was intended to prevent. In a report from June 1973, the Senate identified discriminatory acts taken by creditors against women that “established a clear pattern of discrimination across the country and on an institutionalized level” and demonstrated a need for legislation.¹⁵⁷ These acts included:

- (1) [s]ingle women hav[ing] more trouble obtaining credit . . . than single men;
- (2) [c]reditors generally requir[ing] a woman who has credit to reapply for credit when she marries, usually in her husband’s name . . . ;
- (3) [c]reditors [being] unwilling to extend credit to a married woman in her own name;
- (4) [w]omen who are divorced or widowed hav[ing] trouble reestablishing credit . . . ; and
- (5) [c]reditors [being] unwilling to count a wife’s income when a married couple applies for credit.¹⁵⁸

The report then listed “examples of practices that constitut[ed] discrimination on the basis of sex or marital status if applied to an applicant who [was]

extension of credit”) (emphasis added). The House introduced a provision exactly identical to the Senate on February 27, 1973. *See* H.R. 4734, 93d Cong. (1st Sess. Feb. 27, 1973).

152. H.R. 8163, 93d Cong. (1st Sess. May 29, 1973) (emphasis added).

153. H.R. 14720, 93d Cong. (2d Sess. May 9, 1974).

154. S. 3492, 93d Cong. (2d Sess. May 14, 1974).

155. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974).

156. *See* H.R. 14720, 93d Cong. (2d Sess. May 9, 1974).

157. S. REP. NO. 93-278, at 16 (1973).

158. *Id.*

otherwise creditworthy.”¹⁵⁹ Some of those examples included: (1) “[r]equiring a newly married woman whose creditworthiness has otherwise remained the same to reapply for credit as a new applicant;” (2) “[r]efusing to extend credit to a married woman in her own name, even though she would be deemed creditworthy if unmarried;” (3) “[r]efusing to count a wife’s income when a married couple applies for credit;” (4) “[r]efusing to extend credit to a newly separated or divorced woman solely because of her change in marital status;” and (5) “[a]pplying stricter standards in the case of married applicants where the wife rather than the husband is the primary family supporter.”¹⁶⁰ The report also included a particular example about “a woman in her forties who as head of her household wanted to buy a house for herself and her children and could not get a mortgage without the signature of her 70 year old father.”¹⁶¹ As the report put it, this demonstrated just another instance where a single woman was “flatly informed that mortgage loans were not granted to single persons without cosigners.”¹⁶²

Remarks by congressmen also shed light on the purpose of the ECOA. For example, in May 1974, Congressman Bingham identified specific instances of discrimination that women had encountered and provided the following example:

An unmarried Minneapolis woman in her early 30’s applied to a bank for a loan to purchase a summer home. She had enough cash to make a substantial down payment and was steadily employed, but her loan application was turned down. Yet her fiancé, who had gone through bankruptcy, had no trouble in securing a loan to purchase the very same property with a smaller down payment.¹⁶³

Bingham further explained that women were “the victims of the illogical view . . . that women are of marginal economic value.”¹⁶⁴ In accordance with Bingham’s comments, Congressman Brock remarked that “[c]reditworthy women are excluded from transactions because of convention[al] and medieval ideas of those who believe women are not as financially reliable as are men.”¹⁶⁵ To support his position, Brock stated, “Too many credit companies do not mind if women pay the bills,” and that “[t]hey object only if the woman *applies* for the credit rating herself.”¹⁶⁶ Brock then provided the following example:

159. *Id.*

160. *Id.* at 17.

161. *Id.*

162. S. REP NO. 93-278, at 17 (1973).

163. H.R. 14660, 93d Cong. (2d Sess. May 7, 1974).

164. *Id.*

165. S. 3492, 93d Cong. (2d Sess. May 14, 1974).

166. *Id.* (emphasis added).

One married couple applied for a charge card at a department store. The wife was earning \$6,000 and the husband, being a student, earned only \$2,700 a year. When they applied for the charge, they stated correctly on the application that the wife was their main source of income. They were refused the charge account, told that company policy prohibited the granting of credit either in a woman's name or to couples where the wife carried the main financial responsibility. Thus, although together they earned \$8,700, because the wife earned most of it, they were considered credit risks. This same couple at the same time applied for another charge card—this time at another store and in the husband's name only—and received a charge card shortly thereafter.¹⁶⁷

Similar to Bingham and Brock's views that Congress needed to protect female credit applicants, Congressman Sullivan stated, "Our objective is to require creditors . . . to make their decisions on the granting or withholding of credit on the basis of the individual applicant's creditworthiness . . ." ¹⁶⁸

IV. TESTING THE VALIDITY OF REGULATION B

A. *The Frontenac Bank Court Misinterpreted Boone*

The *Frontenac Bank* court's rejection of the Seventh Circuit's reasoning in *Moran Foods* was based primarily on its misinterpretation of the Missouri Supreme Court's decision in *Boone*.¹⁶⁹ The *Frontenac Bank* court construed *Boone* as holding that "the ECOA could be asserted as an affirmative defense by a wife in a creditor's claim to enforce a guaranty."¹⁷⁰ Based on its determination that guarantors were protected by the ECOA under *Boone*, the *Frontenac Bank* court mistakenly assumed that the *Boone* court had addressed the issue of whether Reg. B's expanded definition of "applicant" was a valid exercise of the Board's regulatory authority.¹⁷¹ However, according to the author of the *Boone* opinion, the Honorable Michael A. Wolff,¹⁷² the validity of Reg. B's definition of "applicant" was never raised as an issue at the summary judgment hearing in the trial court or on appeal before the *Boone* court.¹⁷³ Rather, the issue before the *Boone* court was whether alleged ECOA violations could be asserted as a counterclaim or affirmative defense after the

167. *Id.*

168. H.R. 14856, 93d Cong. (2d Sess. May 16, 1974).

169. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. Ct. App. 2012).

170. *Id.*

171. *Id.*

172. Interview with Michael A. Wolff, Dean, St. Louis Univ. Sch. of Law, in St. Louis, Mo. (Dec. 4, 2013). Judge Wolff served on the Missouri Supreme Court from 1998 to 2011, and he served as the Chief Justice from 2005 to 2007. *Michael Wolff*, ST. LOUIS U. SCH. L., <http://law.slu.edu/people/michael-wolff> [<http://perma.cc/5A7M-JJ5U>] (last visited Jan. 26, 2016).

173. *Id.*

statute of limitations had run.¹⁷⁴ Consequently, the *Boone* court was prohibited from addressing the validity of Reg. B's definition of "applicant," either on its own motion or on a motion by the parties.¹⁷⁵ Thus, the *Boone* court was obligated to apply Reg. B.¹⁷⁶

Had the *Frontenac Bank* court correctly construed *Boone*, the *Frontenac Bank* court would have understood that it had the authority to invalidate Reg. B's definition of "applicant" since the United States Supreme Court had not addressed the issue.¹⁷⁷ Under Missouri law, courts of Missouri "are bound to follow only [the United States] Supreme Court's decisions interpreting the federal Constitution and federal statutes."¹⁷⁸ In the absence of any controlling authority from either the United States Supreme Court or the Missouri Supreme Court, the *Frontenac Bank* court should have "look[ed] respectfully to [lower federal court] opinions for such aid and guidance as may be found therein."¹⁷⁹ Instead, the *Frontenac Bank* court quickly dismissed Frontenac's contention that the court should follow *Moran Foods* and the other lower federal court cases that invalidated Reg. B's definition of "applicant" without providing a thoughtful analysis.¹⁸⁰

Instead of relying solely on *Boone*, the *Frontenac Bank* court should have conducted a *Chevron* analysis. The United States Supreme Court has explained that the *Chevron* doctrine applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."¹⁸¹ In regards to determining the validity of Reg. B's definition of "applicant," the *Chevron* doctrine applies (1) because the ECOA explicitly delegates authority to the Board to make rules carrying the force of law since the ECOA provides that the Board "shall prescribe regulations to

174. *Id.*

175. *Id.*; see *Miller v. Pool & Canfield, Inc.*, 800 S.W.2d 120, 124 (Mo. Ct. App. 1990) (refusing to consider issues not raised during summary judgment hearing because an appellate court may not address issues not raised at trial) (citing *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. 1982) (en banc)).

176. Interview with Michael A. Wolff, *supra* note 172. State courts are obligated to apply federal laws, including administrative regulations, pursuant to the Supremacy Clause. See U.S. CONST. art. VI, cl. 2.

177. Interview with Michael A. Wolff, *supra* note 172.

178. *Wimberly v. Labor & Indus. Relations Comm'n of Missouri*, 688 S.W.2d 344, 347-49 (Mo. 1985) (en banc) (deferring "to the interpretation rendered by the agency Congress entrusted with administration of the statute").

179. *Id.* at 347.

180. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. Ct. App. 2012).

181. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

carry out the purposes of [the ECOA]”¹⁸² and (2) because Reg. B was promulgated by the Board in the exercise of the regulatory authority granted to it under the ECOA.¹⁸³

B. Chevron Analysis

Under the test articulated by the United States Supreme Court in *Chevron*:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.¹⁸⁴

Thus, the *Frontenac Bank* court should have conducted a *Chevron* analysis to determine (1) whether the ECOA is clear and unambiguous and, if it is not, (2) whether the Board’s interpretation of the ECOA is reasonable.¹⁸⁵

1. Step 1: Is the ECOA Clear and Unambiguous?

The first step of the *Chevron* analysis would have required the *Frontenac Bank* court to determine whether Congress has directly spoken to the precise issue of whether a guarantor is an “applicant.”¹⁸⁶ To make this determination, courts are expected to employ “traditional tools of statutory construction,” including the statute’s literal language, legislative history, and purpose.¹⁸⁷ Based on the ECOA’s language, history, and purpose, the *Frontenac Bank* court should have concluded that Congress clearly and unambiguously expressed that a guarantor does not qualify as an “applicant.”

182. 15 U.S.C. § 1691b(a) (2012).

183. 12 C.F.R. § 202.1(a) (2013) (“This regulation is issued by the Board of Governors of the Federal Reserve System pursuant to title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act . . .”).

184. *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

185. *Id.*

186. *Id.*

187. *Id.* at 843 n. 9; see *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 90–95 (2007) (looking to the technicality of the matter, the history and purpose of the statute, and the language); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (looking to the plain language of the Act and the Act’s legislative history).

a. The Language of the ECOA

The plain language of the statute is the most important consideration in determining whether Congress clearly and unambiguously indicated the scope of the ECOA's protections because, if the intent of Congress is clearly and unambiguously expressed by the statutory language at issue, that is the end of the analysis.¹⁸⁸

The plain language of the ECOA only protects an "applicant" ("any person who *applies* to a creditor *directly* for 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") from discrimination on the basis of sex or marital status.¹⁸⁹ While the ECOA's definition of "applicant" is specific to credit applicants, the ECOA's definition is consistent with general dictionary definitions of "applicant" in that they all require an individual to personally or formally "request" something.¹⁹⁰ In contrast, the general dictionary definitions for "guarantor," a term which is not defined (or even mentioned for that matter) in the ECOA, is someone who "gives security for a debt."¹⁹¹ Based on the significant differences in the definitions of "applicant" and "guarantor," it is clear and unambiguous that a guarantor does not qualify as an "applicant" under the ECOA because a guarantor does not ask for anything but merely promises to assume liability for a loan that an "applicant"—i.e. a borrower—requests. Therefore, "[when] taken with absolute literalness,"¹⁹² the ECOA's definition of "applicant" does not include guarantors because "a guarantor does not, by definition, apply for anything."¹⁹³ Indeed, because guarantors like Ms. Hughes in *Frontenac Bank* base their ECOA claims on allegations that the creditor improperly *required* their guarantee, they are admittedly conceding that they did not apply for or request anything. Thus, it is hard to imagine how a guarantor can be considered an

188. *Chevron*, 467 U.S. at 842–43.

189. 15 U.S.C. §1691a(b) (2012) (emphasis added).

190. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (3d ed. 1993) (defining an "applicant" as "one who applies for something" or "makes a usu. formal request . . . for something of benefit to himself"); BLACK'S LAW DICTIONARY 115 (9th ed. 2009) (defining an "applicant" as "[o]ne who requests something").

191. See WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 190, at 1007 (defining a "guarantor" as "one that makes or gives a guaranty or surety," and defining "guaranty" as "an undertaking to answer for the payment of some debt or the performance of some duty of another in case of the failure of such other to pay or perform"); BLACK'S LAW DICTIONARY 833 (4th ed. 1996) (defining "guarantor" as "[one] who makes a guaranty").

192. *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 94.

193. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007); *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV-1807 CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009).

“applicant” for purposes of the ECOA since a guarantor suing under the ECOA alleges that she did not *apply* or *request* to be a guarantor.

b. The Legislative History and Purpose of the ECOA

The legislative history of the ECOA cuts strongly in favor of finding that Congress did not intend the protections of the ECOA to extend to guarantors. Initial proposals of the ECOA contained language that indicated the ECOA might extend to guarantors. Specifically, a bill proposed by the House in June 1972 sought to make it unlawful for creditors to discriminate against “any person” in connection with “any application for credit.”¹⁹⁴ Importantly, “application for credit” was defined as “any communication, either oral, written, or otherwise, by a person to a creditor requesting an extension of credit *to that person or any other person.*”¹⁹⁵ Because the proposal sought to protect a person who requested credit for any other person, one could reasonably argue that the proposal sought to protect guarantors, as well as applicants, from credit discrimination on the basis of sex or marital status. However, by the time the ECOA was officially enacted in October 1974, the language used by Congress significantly narrowed the scope of the ECOA to protect only “applicants”—or those who actually applied for credit themselves.¹⁹⁶

Additionally, one particular scenario of discrimination identified by Congress prior to the enactment of the ECOA demonstrates that the ECOA was not intended to protect guarantors. In a report from June 1973, the Senate provided an example of a situation that it hoped to prevent by enacting the ECOA.¹⁹⁷ That example involved “a woman in her forties who as head of her household wanted to buy a house for herself and her children but could not get a mortgage without the signature of her 70 year old father.”¹⁹⁸ In the words of the Senate, this demonstrated just another instance where a single woman was “flatly informed that mortgage loans were not granted to single persons without cosigners.”¹⁹⁹ Tellingly, while the Senate deemed this as an unacceptable example of discrimination against a female credit applicant, the Senate never once indicated that the woman’s father was being discriminated against as a result of his being required to co-sign for, or guarantee, his daughter’s loan.²⁰⁰

Furthermore, remarks made by various congressmen clearly demonstrate that the primary purpose of the ECOA was to require creditors to willingly

194. H.R. 15391, 92d Cong. (2d Sess. June 8, 1972).

195. *Id.* (emphasis added).

196. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 703, 88 Stat. 1521, 1522 (1974).

197. S. REP. NO. 93-278, at 17–18 (June 28, 1973).

198. *Id.* at 17.

199. *Id.*

200. *Id.* at 17–18.

include, rather than exclude, women from credit transactions.²⁰¹ For instance, Congressman Brock's remark that "[c]reditworthy women are excluded from transactions because of convention[al] and medieval ideas of those who believe women are not as financially reliable as are men" supports the inference that women were not only deemed to be unworthy credit applicants but also that they were deemed to be unworthy credit guarantors.²⁰² From this remark, it can further be inferred that one of the purposes of the ECOA was to increase the involvement of women in credit transactions not only as applicants but also as guarantors for their husbands. Prior to the enactment of the ECOA, it would have been nearly unheard of for a creditor to extend credit to a male applicant based on his wife's willingness to guarantee the loan because creditors were reluctant to involve women in any aspect of a credit transaction. Thus, while the Congress that enacted the ECOA sought to encourage creditors to allow wives to be guarantors, the Board's current version of Reg. B is doing the exact opposite and is discouraging creditors from considering wives as potential guarantors for their husbands' loans because of the possibility that the wife will later allege her guarantee was obtained in violation of the ECOA.

Therefore, based on the ECOA's plain language, legislative history, and purpose, it is evident that Congress clearly and unambiguously expressed that a guarantor does not qualify as an "applicant" under the ECOA. Thus, had the *Frontenac Bank* court conducted a *Chevron* analysis, it should have concluded that Reg. B failed the first step because "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor."²⁰³

2. Step 2: Is the Board's Interpretation of the ECOA Reasonable?

Assuming *arguendo* that *Frontenac Bank* court found the ECOA's definition of "applicant" was not clear and unambiguous, the second step of the *Chevron* analysis would have required the court to determine whether the Board's interpretation of the ECOA was reasonable.²⁰⁴ As was explained by the District Court for the Eastern District of Missouri in *Champion Bank*, the Board's interpretation of the ECOA and the term "applicant" is unreasonable because "it leads to circular and illogical results."²⁰⁵

Specifically, the Board's expansive definition of the term "applicant" is unreasonable because, by including guarantors in its definition of "applicant," Reg. B allows a guarantor to claim rights under the ECOA while

201. S. 3492, 93d Cong. (2d Sess. May 14, 1974).

202. *Id.*

203. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 941 (8th Cir. 2014).

204. *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

205. *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV-1807 CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009).

simultaneously allowing a guarantor to assert that she should not be a member of the class of people the ECOA is designed to protect.²⁰⁶ In addition to leading to circular and illogical results, the Board's amendment to the definition of "applicant" is unreasonable because it was not based on the Board's determination that such an amendment would further the purposes of the ECOA. Rather, it was based on the Board's determination that such an expansion would not impose any new burdens on creditors.²⁰⁷ Certainly, such a reason does not justify the Board's decision to impermissibly expand the protections of the ECOA. Indeed, the Board seemingly acknowledged that it was changing, rather than interpreting, the ECOA when it amended Reg. B's definition of "applicant" to include guarantors by stating:

The existing regulation prohibits creditors, in certain situations, from requiring an applicant to obtain a guarantor . . . [but] [if] a creditor violates this provision . . . a guarantor whose signature has been illegally required currently has no legal remedy *because . . . the [ECOA] confers standing to sue only upon an "aggrieved applicant."*²⁰⁸

As the analysis above demonstrates, Reg. B's expansion of the term "applicant" to include guarantors flouts common sense and is an unreasonable interpretation of the ECOA. Consequently, Reg. B fails under the second step of the *Chevron* analysis as well.²⁰⁹

C. *Practical Effects and Consequences of Frontenac Bank*

Although the validity of Reg. B will soon be resolved by the United States Supreme Court,²¹⁰ the Missouri Court of Appeals for the Eastern District's improper interpretation of the ECOA and Reg. B in *Frontenac Bank* has had a negative effect on local creditors since 2012. As a result of *Frontenac Bank*, between 2012 and 2015, state and federal courts in Missouri interpreted the ECOA and Reg. B differently. Thus, a creditor's ability to enforce a spousal guaranty depended solely on whether the creditor's claim was heard in state or federal court.²¹¹ This was detrimental to local creditors because, oftentimes,

206. *Id.*

207. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 10,890, 10,890 (Mar. 18, 1985).

208. *Id.* (emphasis added).

209. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at *4 (W.D. Mo. Jan. 7, 2013).

210. On March 22, 2016, the judgment was affirmed by an equally divided Court in a per curiam opinion. *Hawkins v. Community Bank of Raymore*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/hawkins-v-community-bank-of-raymore/> [<http://perma.cc/YWS6-A2Y8>] (last visited Apr. 10, 2016).

211. See Jeffrey R. Fink, *Consider Litigating Spousal Guaranties in Federal Court to Avoid the Equal Credit Opportunity Act*, LEXOLOGY.COM (Apr. 30, 2013), <http://www.lexology.com/library/detail.aspx?g=88121940-4cd1-4446-8ce9-b493980a4a94> [<http://perma.cc/4AV3-3W6A>];

their only recourse was to sue in state court, where it was unlikely a spousal guaranty would be held enforceable. Meanwhile, national creditors doing business in Missouri could pursue their claims in federal court, where it was likely a spousal guarantee would be held enforceable. Therefore, local and national creditors who required spousal guarantees under similar circumstances achieved different results based simply on the forum in which their claims were heard.

Additionally, the practical consequences of the Missouri Court of Appeals for the Eastern District's decision in *Frontenac Bank* were frequently observed by a prominent local attorney, Joseph J. Trad.²¹² One of Mr. Trad's client's creditors reacted to the *Frontenac Bank* case by informing the client that his spouse's guarantee would no longer be required.²¹³ According to Mr. Trad, the creditor's decision to no longer require the client's wife's guarantee likely indicated that creditors were unsure of whether or not they were in compliance with Reg. B's spousal signature provisions and, as a result, were reluctant to assume the added business risk entailed in obtaining spousal guarantees.²¹⁴ Consequently, it is likely that *Frontenac Bank* prevented commercial enterprises which were not creditworthy from being able to obtain financing that would have been available prior to the Missouri Court of Appeals for the Eastern District's decision *Frontenac Bank*.²¹⁵

CONCLUSION

In conclusion, the Missouri Court of Appeals for the Eastern District wrongly decided *Frontenac Bank* and should not have upheld the validity of Reg. B's expanded definition of "applicant." Specifically, the *Frontenac Bank* court erred by misinterpreting the Missouri Supreme Court's decision in *Boone* and by failing to conduct a *Chevron* analysis to determine the validity of Reg. B. Had the *Frontenac Bank* court correctly interpreted *Boone* and conducted a *Chevron* analysis, the court would have concluded that Reg. B's definition of "applicant" is invalid (1) because Congress clearly and unambiguously expressed that a guarantor does not qualify as an "applicant," and (2) because

Denyse L. Jones, *Missouri Guarantors' Protection Under the ECOA Was Short-Lived*, LEXOLOGY.COM (Feb. 5, 2013), <http://www.lexology.com/library/detail.aspx?g=ffa2eb5e-4beb-449d-9e9d-2960cffe85e3> [<http://perma.cc/999W-6ELX>].

212. Telephone Interview with Joseph J. Trad, Member, Lewis Rice LLC (Jan. 27, 2014). Mr. Trad's "practice includes representation of both financial institutions and private and publicly held businesses in the area of loan work-outs, restructurings, foreclosures and the prosecution of recovery from borrowers and guarantors." *Joseph J. Trad*, LEWIS RICE LLC, <http://www.lewisrice.com/joseph-j-trad/> [<http://perma.cc/TE82-M6Y6>] (last visited Apr. 15, 2016).

213. Telephone Interview with Joseph J. Trad, *supra* note 212.

214. *Id.*

215. *Id.*

the Board's interpretation of the ECOA and the term "applicant" is unreasonable and "leads to circular and illogical results."

Under the first prong of *Chevron*, Reg. B fails because the term "applicant" is unambiguously limited to a person who applies for or requests credit—i.e. a borrower—and does not include a person who simply gives security for a borrower's debt—i.e. a guarantor. Indeed, because guarantors base their ECOA claims on allegations that the creditor improperly *required* their guarantee, they are admittedly conceding that they are not applicants because they did not apply for or request anything. Under the second prong of *Chevron*, Reg. B fails because it unreasonably impedes the purpose of the ECOA, which is to encourage creditors to include, rather than exclude, women (especially wives) from credit transactions. Instead, Reg. B discourages creditors from considering a wife's creditworthiness when extending credit to the wife's husband because of the potential risk that the wife's guarantee will be deemed void and unenforceable. Reg. B's definition of "applicant" also leads to circular and illogical results because it allows a guarantor-wife to assert that she should not be a member of the class of people Reg. B is designed to protect—i.e. guarantors—and simultaneously allows the wife to claim rights under the ECOA as a guarantor.

Based on the analysis provided by many federal courts and the analysis provided by this Note, the Supreme Court of the United States should hold Reg. B's definition of "applicant" to be invalid.²¹⁶

JUSTIN LADENDORF*

216. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015).

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