

## **BENCH BRIEF**

This year's problem (the "Problem") involves a dispute over the extent to which various obligors of a commercial debt may bring claims for violation of the Equal Credit Opportunity Act, set forth at 15 U.S.C. § 1691(a) (the "ECOA"). The dispute arose in a federal district court. The Problem poses two issues:

Issue #1: Can a credit applicant that is a corporate or unincorporated entity state a claim for violation of the ECOA based on marital status discrimination allegedly suborned by one of its several principles?

Issue #2: Does an individual loan guarantor possess standing to sue for violation of the ECOA?

The Problem has been written to eliminate, to the greatest extent possible, various issues that would likely arise in real life, such as whether the loan applicant(s) satisfied the lender's creditworthiness requirements without resort to an additional guaranty. In both the district court and the court of appeals, the issues were framed and decided as matters of law.

## **FACTS**

This case arose in the fictional States of Avalon and Atlantis, in the imagined Fifteenth Circuit Court of Appeals. All of the persons, entities, and events in the Problem are fictional.

Petitioner Metropolis Bank ("Metropolis") is an Atlantis state-chartered bank that maintains its principal place of business in the State of Atlantis. Respondents, Stonefield Bakery, LLC ("Stonefield"), Janet A. Stone ("Ms. Stone"), Jonathan H. Stone ("Mr. Stone"), and Mary L. Field ("Ms. Field") are citizens of the State of Avalon.

Mss. Stone and Field are longtime friends, business partners, and equal co-owners of Stonefield Bakery in downtown Camelot, in the State of Avalon. Ms. Stone's husband, Jonathan Stone, is a successful certified public accountant in private practice at the firm of Stone & Steel, P.A., also located in downtown Camelot. Mss. Stone and Field met in 2010 while attending the nationally-renowned Avalon Culinary Institute, from which both women graduated with honors. Upon graduation, Ms. Stone took a position managing a local bakery in the suburb of Camelot Lakes. For her part, Ms. Field traveled abroad to France, where she spent several years as a pâtissière learning to master the art of fine French pastry. Though continents apart, the two women kept in close contact. Upon Ms. Field's return to the United States in late 2015, Ms. Field approached Ms. Stone about opening their own bakery.

By February of 2016, the women had formulated a business plan, scouted potential locations and facilities with adequate space and pre-existing structure for a bakery, gathered a modest amount of initial investment capital between themselves, and explored various options for obtaining the additional financing they felt would be required to launch their new venture. The following month, they formed Stonefield, a limited liability company formed

under the laws of the State of Avalon. Mss. Stone and Field have been the sole members and co-managers of Stonefield since its formation. Each woman holds 500 of the company's 1,000 membership units, mirroring their equal initial capital investments of \$25,000 each.

In early March 2016, Mss. Stone and Field jointly met with a business loan officer ("Loan Officer") at the Camelot branch of Metropolis Bank to discuss financing options for the acquisition and operation of the new bakery. In the days that followed the initial meeting, Stonefield submitted a business loan application to Metropolis. Ms. Stone personally completed the application, with some limited input from Ms. Field and minor assistance from Mr. Stone, and delivered the same to the Loan Officer. Metropolis processed the application, underwrote the loan request, and issued a commitment letter indicating the terms on which Metropolis was prepared to make a loan of \$1,000,000 to Stonefield as principal borrower. In addition to a first mortgage in the real property that Stonefield had contracted to purchase for the bakery and a security interest in the bakery's personalty, the commitment letter recited the parties' understanding that Ms. Stone, Ms. Field, and Mr. Stone would offer their personal guaranties of the debt as additional collateral. On March 15, 2016, Mss. Stone and Field executed the commitment letter and promptly returned it to Metropolis. The loan closed 30 days later and was evidenced by a promissory note, mortgage, business loan agreement, commercial security agreement, and individual guaranties of Ms. Field, Ms. Stone, and Mr. Stone.

It is undisputed that Stonefield was not independently creditworthy of a million-dollar loan, and the district court specifically found that the guaranties of Ms. Stone and Ms. Field, without more, would have been insufficient to satisfy the bank's credit and underwriting guidelines for the loan requested. The absence of a genuine factual dispute on this point was necessary to deter competitors from exploring certain elements of ECOA discrimination claims which, while often the subject of dispute in real cases, are not within the scope of the Problem.

The parties dispute whether Metropolis affirmatively requested the three (3) individual defendants provide personal guaranties as a condition of extending credit to Stonefield, or alternatively, the individual defendants willingly volunteered to provide guaranties to induce the bank to make the loan. Mss. Stone and Field claim that during their initial meeting at Metropolis, the Loan Officer insisted that the bank would not make the loan without a further offer of collateral in addition to the guaranties of Ms. Stone and Ms. Field, and inquired as to whether the women would be able to procure additional security in the form of another guaranty. Ms. Stone claims she offered to ask her husband to provide a guaranty, and the Loan Officer seemed receptive to that suggestion, though she also believed the bank was well aware that Mr. Stone had no ownership interest in and was not otherwise involved in the management or operations of the bakery. For its part, Metropolis contends that the guarantors offered their personal guaranties willingly as an inducement to the bank to loan such a sizeable sum of money to a fledgling bakery. As discussed in greater detail, *infra*, this factual dispute is ultimately immaterial to the resolution of the issues presented.

In May of 2016, Hurricane Arthur struck a large swath of eastern Avalon causing many small retail businesses and restaurants in downtown Camelot to sustain significant

losses, both from property damage and loss of revenue resulting from decreased foot traffic. Stonefield's nascent business was no exception, and with a lack of clientele in Camelot's downtown district, it struggled to get off the ground. By the fall of 2016, Stonefield defaulted on its payment of the Metropolis loan.

Metropolis and Stonefield briefly, albeit unsuccessfully, explored avenues to restructure the lending relationship. In January of 2017, Metropolis declared the loan in default, accelerated payment of the balance due on the note, and made demand to Stonefield and the guarantors for payment. When payment was not forthcoming, Metropolis filed a five-count Verified Complaint, seeking foreclosure of the lien of its mortgage on the Stonefield real property and damages for breach of the promissory note and guaranties.

## **PROCEDURAL HISTORY**

### **A. District Court**

After the district court denied the Defendants' motion to dismiss Metropolis's verified complaint, the Defendants filed an answer accompanied by two counterclaims. The first counterclaim, brought in the right of Stonefield, alleged that Metropolis required the personal guaranty of Mr. Stone simply because Mr. Stone was married to one of its co-owners (i.e., Ms. Stone). Thus, Stonefield claimed, Metropolis discriminated against Stonefield on the basis of the marital status imputed to the company by virtue of the marriage of one of its owners to Mr. Stone. Stonefield claims this was a violation of the Equal Credit Opportunity Act, set forth at 15 U.S.C. § 1691(a) (the "ECOA"), as well as certain provisions of the ECOA's implementing regulation, known as Regulation B, found at 12 C.F.R. § 202.7. In a similar vein, the second counterclaim, brought in the right of Mr. Stone individually, averred that Metropolis discriminated against Mr. Stone, in violation of the ECOA and Regulation B, by requiring him to sign a guaranty of a business loan made to his wife's company for no other reason than his status as spouse of Ms. Stone, one of the company's two principals.

At the close of discovery, Metropolis filed a motion seeking summary judgment in its favor and against the Defendants, jointly and severally, as to all counts of the Verified Complaint. The district court granted the motion.

As to Stonefield's counterclaim, Metropolis argued that it could not possibly have discriminated against Stonefield on the basis of Stonefield's marital status because Stonefield is an unincorporated entity and thus incapable of possessing a marital status. The Defendants argued that Metropolis discriminated against Stonefield on the basis of Ms. Stone's marital status, thereby giving rise to an ECOA discrimination claim in the right of Stonefield. The Defendants reasoned that the ECOA defines "applicant" to include any person who applies to a creditor directly for an extension, renewal, or continuation of credit, and "person" to include corporate and unincorporated entities like Stonefield. Thus, the Defendants argued, Congress specifically envisioned that a company like Stonefield could bring a claim for ECOA discrimination in its own right based upon alleged marital status discrimination against the person acting on the company's behalf in the context of a commercial loan transaction – in

this case, Ms. Stone. The Defendants also argued that adopting Metropolis’s narrow view of the ECOA would vitiate Congress’s clear intent to permit small businesses to bring discrimination claims.

The district court rejected the Defendants’ arguments regarding Stonefield’s counterclaim, finding that it was illogical to suppose that Stonefield could vicariously possess the demographic characteristics of one of its two principals and noting that one of Stonefield’s two principals, Ms. Field, was not married. The court also opined that it might be possible for a company to make a colorable claim for ECOA discrimination if the company were owned by a single person who suffered discrimination in the context of a commercial loan application, though it was troubled by the implications of such an interpretation for the commercial lending industry. Ultimately, the court held that Stonefield could not possess a marital status and so could not state a claim for marital status discrimination. Implicit in the court’s holding was the conclusion that Stonefield was the only credit “applicant” for purposes of ECOA.

The district court also rejected the Defendants’ arguments regarding Mr. Stone’s counterclaim, finding that Mr. Stone was not an “applicant” with standing to sue under the ECOA. On this issue, Metropolis argued that Mr. Stone lacked standing to assert a claim for ECOA discrimination because the ECOA definition of “applicant” plainly does not include guarantors, and Mr. Stone’s only capacity in the lending transaction in this case was as a personal guarantor of the loan. Mr. Stone responded that he was indeed an “applicant” with standing to sue for violations of the ECOA because the definition of “applicant” set forth in the ECOA’s implementing regulation (Regulation B) expressly includes guarantors.

The district court framed the issue as whether it should defer to the FRB’s definition of “applicant” set forth in Regulation B and proceeded to engage in a *Chevron*<sup>1</sup> analysis, whereby it first examined whether Congress directly addressed the precise question at issue and, if not, whether the regulators’ answer to the question was based on a permissible construction of the statute. The court discussed an ongoing split between the Sixth Circuit, on the one hand, and the Seventh and Eighth Circuits, on the other hand, and ultimately sided with the latter two courts, holding that guarantors do not possess standing to assert ECOA claims because they are not “applicants” based on the plain language of the statute. Because the court resolved the issue at the first step of the *Chevron* analysis, it did not address whether the FRB’s contrary definition of “applicant” in Regulation B was based on a permissible construction of the ECOA.

## B. Court of Appeals

The Defendants took a timely appeal to the United States Court of Appeals for the Fifteenth Circuit. The issues presented were (i) whether a credit applicant that is a corporate or unincorporated entity can state a claim for violation of the ECOA based on marital status discrimination allegedly suborned by one of its several principals, and (ii) whether an individual loan guarantor possesses standing to sue for violation of the ECOA.

---

<sup>1</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

A divided panel reversed. The panel issued a brief *per curiam* opinion, and each judge wrote separately. Judges Novis and Praeter agreed that Stonefield could state a claim for violation of the ECOA based upon marital status discrimination against Ms. Stone and, further, that Mr. Stone possessed standing to sue for violation of the ECOA in his capacity as a loan guarantor. On the first issue, Judges Novis and Praeter thought the ECOA's definition of "applicant" was broad enough to include more than one person – in this case, not only Stonefield, but also Ms. Stone. On the second issue, Judges Novis and Praeter found the Sixth Circuit's rationale in *RL BB Acquisition*<sup>2</sup> persuasive, holding that a guarantor such as Mr. Stone does apply to a creditor directly for credit, albeit for credit benefitting a third party. Judge Praeter emphasized that the Senate report on the first ECOA amendment seemed to indicate quite plainly that Congress specifically contemplated a private right of action under the ECOA for small businesses like Stonefield. Judge Praeter also provided a survey of cases from other jurisdictions in which courts had recognized the standing of loan guarantors to assert ECOA claims.

Judge Dissensio disagreed with his colleagues on both issues. Recognizing explicitly what the district court had implicitly held, Judge Dissensio stated that Stonefield was the only one of the parties that could properly be considered an "applicant" for ECOA purposes, and thus the only party that could possibly have standing to assert an ECOA claim. He agreed with the district court that Stonefield's claim must fail as a matter of law because Stonefield could not possibly possess a marital status. As to the second issue, Judge Dissensio took umbrage with the more expansive definition of "applicant" supplied by the majority, arguing that the many other instances of the term "applicant" in the ECOA statute evince Congress's intent to equate the term with "borrower." As such, Judge Dissensio concluded there could only be one "applicant" in this case, and that "applicant" was the borrower, Stonefield, not Mr. Stone or any of the other appellants.

## LEGAL ARGUMENTS

### A. Introduction

This year's Problem presents two distinct but closely related issues:

Issue #1: Can a credit applicant that is a corporate or unincorporated entity state a claim for violation of the ECOA based on marital status discrimination allegedly suborned by one of its several principles?

Issue #2: Does an individual loan guarantor possess standing to sue for violation of the ECOA?

The Problem juxtaposes an issue on which there is very scant authority with an issue on which there is an abundance of authority. This was done by design to test the ability of

---

<sup>2</sup> *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380 (6th Cir. 2014).

competitors not only to present established arguments skillfully, but also formulate novel arguments in the absence of directly relevant case law. As to the first issue, jurisprudential guidance is extremely sparse, and only a few courts have addressed the issue directly. By contrast, there is a significant body of case law addressing the second issue, and the Circuit Courts of Appeals remain split on its resolution after the United States Supreme Court affirmed the Eighth Circuit's decision in *Hawkins* by an equally divided Court.

## B. Background regarding the ECOA and Regulation B

As originally enacted in 1974, the ECOA's primary purpose was to combat credit discrimination against a married woman, to whom lenders traditionally refused to extend individual credit in the absence of a guaranty of the debt by her husband. *See Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994); *see also Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007) (discussing that the ECOA was originally enacted to forbid lenders from denying individual credit to a woman on the basis of the belief that she would not be an acceptable credit risk because she would necessarily be distracted by child care or some other stereotypically female responsibility). The ECOA was amended in 1976 to add race, religion, age, and other characteristics of credit applicants to the list of protected traits that Congress had determined "are, and must be, irrelevant to a credit judgment." S. REP. 94-589, 3, 1976 U.S.C.C.A.N. 403, 405.

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . sex or marital status . . ." 15 U.S.C. § 1691(a). Pertinent to the judicial construction of this statutory prohibition is the term "applicant," which the ECOA defines as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). The ECOA also supplies its own definition for the term "person," which means "a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). The statute's remedial provisions create a private right of action in the right of an "aggrieved applicant" against a creditor who, by reason of its failure to comply with any requirement imposed by the statute, including the prohibitions against discriminatory lending practices, shall be liable to the aggrieved applicant for any actual damages sustained, as well as attorneys' fees, costs, and punitive damages of up to \$10,000. 15 U.S.C. § 1691e(a)-(d).

In fashioning the statute, Congress also declared that the agency charged with overseeing the ECOA – initially, the Board of Governors of the Federal Reserve System, and subsequently, the Consumer Financial Protection Bureau – must create regulations to carry out the statutory purpose of curbing credit discrimination. To such end, the Federal Reserve Board ("FRB") promulgated Regulation B, the stated goal of which mirrors the purpose of the ECOA: "to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract)." 12 C.F.R. § 202.1(a).

To further the specific aim of preventing discrimination on the basis of marital status, the FRB included in Regulation B a provision sometimes referred to as the “spouse-guarantor rule.” Specifically, the spouse-guarantor rule provides that “a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.” 12 C.F.R. § 202.7(d). The rule specifies several exceptions. For example, if the loan applicant requests secured credit, the lender may require the co-signature or guaranty of the applicant’s spouse if it would be necessary, under applicable state law, to subject the property offered as collateral to satisfaction of the debt in the event of default. 12 C.F.R. § 202.7(d)(4).

Regulation B provides its own definition of “applicant,” which is conspicuously at odds with the ECOA’s definition in one important aspect. Pursuant to Regulation B, an “applicant” includes “any person who requests or who has received an extension of credit from a creditor, *and includes any person who is or may become contractually liable regarding an extension of credit.*” 12 C.F.R. § 202.2(e) (emphasis supplied); *see also* 12 C.F.R. § 1002.2(e). Indeed, the rule further states that “[f]or purposes of § 202.7(d), the term [applicant] includes guarantors, sureties, endorsers, and similar parties.” 12 C.F.R. § 202.2(e).

### C. Discrimination Against a Commercial Credit Applicant

As noted above, the first issue is one on which there is very scant direct authority. Competitors will be required to craft creative arguments, borrowing from cases that tangentially address the issue at hand.

At first blush, the issue would appear to be fairly straightforward. The ECOA clearly protects “any applicant” that has suffered discrimination at the hands of a creditor in the context of a credit transaction. 15 U.S.C. § 1691(a). Nested within the term “applicant” is the term “person,” which the ECOA defines to include “a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.” 15 U.S.C. § 1691a(b), (f). Thus, it would appear that in the case of a commercial loan application, a corporate “applicant,” such as Stonefield Bakery, would be able to assert a claim for violation of the ECOA’s prohibitions against discrimination.

Indeed, it would seem that both Congress and the regulators envisioned that the ECOA would protect applicants for business credit. In conjunction with the first round of amendments to the ECOA in 1976, the Senate Committee on Banking, Housing and Urban Affairs issued a report specifying that business credit transactions should not be exempt from the protections of the ECOA, explaining in pertinent part,

The present Equal Credit Opportunity Act prohibits discrimination in any type of credit transaction, including all forms of business credit, on the basis of sex or marital status. Final regulations implementing that Act were issued by the Federal Reserve Board on October 16, 1975, and came into effect on October 28, 1975. The regulations make certain “adjustments

and exceptions” with respect to the treatment of different classes of business credit transactions, as authorized under section 703 of the Act.

The Committee considered an amendment to section 703 authorizing the Board, in prescribing regulations, to exempt from any of the provisions of the Act “any class of transactions not primarily for personal, family or household purposes.” This language, added onto the authority already provided in existing law, could have been interpreted as mandating a broad exemption of business credit transactions from the coverage of the Act.

In order to clarify the intent, the Committee approved an amended version of the proposed language which authorizes exemptions from “one or more” of the provisions of the Act, but only “if the Board makes an express finding that the application of such provision or provision would not contribute substantially to carrying out the purposes of this title.” The purpose of the amendment is to narrow the scope of the exemption authority granted to the Board and to make it clear that Congress does not intend to deny the antidiscrimination protections of the Act to minorities, women and others who encounter problems of discrimination in obtaining credit to establish businesses or conduct normal business operations.

S. REP. 94-589, 10-11, 1976 U.S.C.C.A.N. 403, 412. In short, it appears Congress specifically considered *and rejected* a wholesale exemption for commercial loan transactions from the antidiscrimination protections of the ECOA and specifically envisioned that the law’s protections would extend to people like Mss. Stone and Field. Similarly, while Regulation B exempts from the ambit of the ECOA certain limited classes of credit transactions, such as public utilities credit and securities credit, there is no exemption for business or commercial credit transactions generally. *See* 12 C.F.R. § 202.3.

Despite this seemingly clear guidance, there is a paucity of case law addressing the validity of ECOA claims made by persons other than natural individuals, and the few courts to address the question directly have taken very different views. For example, in *Regions Bank v. Legal Outsource PA*, 2017 WL 443371 (M.D. Fla. Feb. 1, 2017), the district court held, on very similar facts to the those presented in the Problem, that a limited liability company could not state a claim under the ECOA for alleged marital status discrimination against one of the principals of a closely-held concern. *Id.* at \*3. In dismissing the entity’s claim, the court succinctly explained,

Defendants' ECOA counterclaim as to Periwinkle Partners is frivolous. The ECOA prohibits a creditor from discriminating against an “applicant, with respect to any aspect of a credit

transaction ... on the basis of ... marital status.” 15 U.S.C. § 1691. Periwinkle Partners cannot avail itself of the protections of this Act because it is a company, not an individual, and it cannot have a marital status.

*Id.*

By contrast, the district court in *Bagley v. Lumbermens Mut. Cas. Co.*, 100 F. Supp. 2d 879 (N.D. Ill. 2000) held that a natural person who applied for commercial credit to open a bonding and insurance company directed towards small law firms qualified as an “applicant” for purposes of ECOA, even though the application was admittedly made to obtain credit for a prospective business entity rather than a natural person. *Id.* at 882. Passing upon the defendant creditor’s motion to dismiss the plaintiff’s ECOA claim, the court reasoned,

Finally, as to [the creditor’s] argument that Mr. Bagley was not an “applicant” because he sought the money for his prospective firm, not himself, is not supported by case law. If this were the law, a racist lender could refuse to lend to a business on the stated grounds that it was owned by an African–American applicant, and avoid liability. But the statute applies to commercial loans, and a creditor that refuses to lend to a business because of the race of the applicant, e.g., a prospective partner or incorporator, would be in violation. Mr. Bagley has stated a claim for a violation of ECOA.

*Id.* Panel judges should note that the Problem was intentionally designed to present competitors with a slightly different set of facts than those presented in *Bagley*. More specifically, the persons who asserted counterclaims in the Problem were Stonefield Bakery and Mr. Stone, but not Ms. Stone. In real life, it is highly likely Ms. Stone would have asserted a marital status discrimination claim as well. Had the Problem been written as such, it would have heavily favored the Respondents because there are many cases, in addition to *Bagley*, that recognize the ability of natural persons to bring ECOA discrimination claims.

In any event, the facts of *Bagley* are distinguishable from those presented in the Problem. Although *Bagley* similarly involved a business credit application, the claimant in that case was a natural person, not an entity, and the entity on whose behalf the credit application was prospectively made in *Bagley* did not exist at the time of the application. By contrast, Stonefield Bakery had been formed prior to the submission of its credit application, and the application was made in the name of the company.

The Petitioner will probably face an uphill battle on Issue #1. Judge Novis’s practical rationale and Judge Praeter’s legislative history argument, taken together, are compelling and serve to reinforce the point that the ECOA was designed to protect natural persons submitting credit applications to obtain credit for the business concerns on whose behalf such applications are made. Nonetheless, creative competitors arguing the Petitioner’s position

may note that such a construction would fly in the face of well-established principles of distinct corporate personage.

As noted by Judge Praeter, corporate entities may contract, own property, and incur debts and other liabilities separate and apart from their principal owners, and the law respects the corporation's distinct identity in such circumstances. The Petitioner should argue that the Court should respect the separate identity of the corporate person in the context of a commercial loan application. In other words, the Petitioner will need to convince the Court that the only "applicant" in the case at bar is Stonefield Bakery.

Respondents will do well to emphasize the lack of an exemption for business credit transactions in Regulation B, which was also discussed in the Senate report cited in the Problem. They should also focus intently on convincing the Court that Stonefield was not the only "applicant" for purposes of the ECOA, as that argument is necessary to their success on Issue #2.

#### D. Standing of a Personal Loan Guarantor to Assert an ECOA Claim

By comparison to Issue #1, Issue #2 is an issue on which there is a plethora of jurisprudential guidance. The seminal cases on this issue, all of which are discussed and cited in the Problem, are:

- i. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016), *reh'g denied*, 136 S. Ct. 2534 (2016);
- ii. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436 (7th Cir. 2007); and
- iii. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380 (6th Cir. 2014).

As noted by all of the appellate courts to address the issue, the question turns on whether the Court should defer to the regulatory interpretation of the ECOA (i.e., Regulation B), which specifically includes guarantors within its definition of "applicant."

In *Hawkins*, two women filed suit against a community bank seeking damages and a declaration that their personal guaranties of their husbands' business loan were void and unenforceable as having been procured in violation of the ECOA and Regulation B's spouse-guarantor rule. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014). The court noted the obvious contradiction between the definition of "applicant" supplied by the ECOA and the definition of that term supplied by Regulation B, and framed the issue as whether it should defer to the regulators' interpretation of the statute. To such end, the court engaged in the two-step analysis originally set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), whereby the court must first determine whether the language of the statute in question is plain and unambiguous, in which case the court is bound to enforce Congress' command without further investigation. If, and only if, the court finds that the statute is silent or ambiguous on the question at hand, then it must proceed to the second step

of *Chevron*, wherein it must determine whether the regulatory interpretation of the statute represents a permissible construction.

Applying the *Chevron* framework, the Eighth Circuit concluded that a guarantor is not an “applicant” with standing to sue for violation of the ECOA. *Hawkins*, 761 F.3d at 941. The court explained,

To qualify as an applicant under the ECOA, a person must “appl[y] to a creditor directly for ... credit, or ... indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.” 15 U.S.C. § 1691a(b). To “apply” means “to make an appeal or request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself.” Webster's Third New International Dictionary 105 (2002). Thus, the 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.” 38 Am.Jur.2d Guaranty § 1 (2014). 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.

*Id.*

The United States Supreme Court accepted certiorari to review the Eighth Circuit’s judgment in *Hawkins*, and the case was argued before nine justices. However, between the oral argument and the issuance of the Court’s *per curiam* affirmance, the Honorable Justice Antonin Scalia passed away. Based upon Justice Scalia’s commentary at oral argument, one could assume that the Court would have affirmed the Eighth Circuit’s judgment 5-4 if Justice Scalia had not passed in the interim between argument and issuance of the Court’s opinion. Nevertheless, the 4-4 decision left intact a split between the Sixth Circuit, on the one hand, and the Seventh and Eighth Circuits, on the other hand, as to the precise issue presented in Issue #2 of the Problem.

The Seventh Circuit in *Moran Foods* came to much the same conclusion as the Eighth Circuit in *Hawkins*. In *Moran Foods*, a husband and wife guaranteed the debt of the husband’s franchisee grocery store. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436 (7th Cir. 2007). When the franchisor sued to recover the debt, the wife counterclaimed, alleging

that her guaranty was procured in violation of the ECOA – i.e., solely because she was married to the business owner – and a jury awarded damages in her favor. On appeal, the Seventh Circuit reversed. Though the appellate court based its decision primarily upon a lack of sufficient evidence to support a finding of discrimination, it also addressed the wife’s argument that she was an “applicant” for purposes of stating an ECOA claim. With this, Judge Posner, writing for the three-judge panel, strongly disagreed. Though the court recognized the deference due to regulators’ interpretations of the statutes they are charged to enforce when a statute is ambiguous, it decidedly rejected the notion that the ECOA’s definition of “applicant” was anything less than clear and plain in meaning, opining, “there is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.” *Id.* at 441.

The *Moran Foods* court was also troubled by the possibility that a more expansive construction of the ECOA – one in which “applicant” encompassed guarantors – would “open vistas of liability that the Congress that enacted the Act would have been unlikely to accept.” *Id.* Specifically, the court was concerned that if guarantees, which often form the foundation of secured business debts, could so easily be rendered unenforceable, a creditor might lose the entire debt. The court refused to accept that a statute clearly intended for the particular purpose of protecting women from credit discrimination could be stretched so far as to endow all personal guarantors of any loan with standing to contest their liability as obligors. *Id.*

The Sixth Circuit reached the opposite conclusion in *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380 (6th Cir. 2014). In that case, a woman and her husband guaranteed a refinancing loan for one of the husband’s faltering business enterprises. When the loan came due and was not paid, the lender sued to recover the debt. The wife raised alleged violations of the ECOA and Regulation B as affirmative defenses. The district court granted summary judgment for the lender, and the wife appealed.

On *de novo* review, the Sixth Circuit reversed. The court framed the issue as whether Regulation B’s definition of “applicant” was entitled to deference and proceeded to engage in the two-step *Chevron* analysis. At the first stage, the court dissected the ECOA’s definition of “applicant,” focusing primarily on two other terms, “applies” and “credit,” found therein. As to the term “applies,” the court discussed that while a guarantor is generally a third party to the larger credit application process, a guarantor could also conceivably be thought of as approaching a lender seeking credit for the benefit of another, in consideration for which the guarantor offers up his or her own personal liability. On this front, the court concluded that “applicant” 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.” *Id.* at 385.

The *RL BB Acquisition* court also thought the meaning of the term “credit” supported its finding that the statutory definition of “applicant” was ambiguous. The court first noted that the ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” It went on to discuss that an “applicant” for credit might not always be the same person as the eventual “debtor,” and so concluded that “applicant” might encompass

third party obligors other than the principal debtor, such as guarantors. *Id.* Having gone to considerable lengths to find that the ECOA definition of “applicant” is ambiguous, the court easily found that the Federal Reserve Board’s definition of “applicant” in Regulation B was based upon a permissible construction of the statute.

The court in *RL BB Acquisition* went on to opine that its holding was in accord with “the vast majority of courts that have examined this issue,” citing *Empire Bank v. Dumond*, 2013 WL 6238605, at \*6 (N.D. Okla. Dec. 3, 2013) (surveying cases and concluding that the *Moran Foods* court appeared to espouse the minority view). It also issued a rather scathing indictment of the *Moran Foods* opinion, noting that a “paragraph of dicta in [the *Moran Foods*] decision” and the Seventh Circuit’s “offhanded dismissal of Regulation B’s definition [of applicant]” had upset a preexisting regime of “universal deference to Regulation B . . . .” *RL BB Acquisition*, 754 F.3d at 386.

Interestingly, the *Hawkins* case appears to have proceeded roughly in parallel with the *RL BB Acquisition* case, with the *Hawkins* opinion having been issued only a little more than a month after *RL BB Acquisition*. Indeed, it appears the Eighth Circuit viewed the Sixth Circuit’s decision in *RL BB Acquisition* with an equal measure of disdain. See *Hawkins*, 761 F.3d at 942, n. 5 (accusing the Sixth Circuit of “inject[ing] ambiguity” into the ECOA definition of “applicant”).

As noted by Judge Prater in this year’s Problem, *Hawkins*, *Moran Foods*, and *RL BB Acquisition* are not the only cases that have addressed Issue #2. However, those cases do provide the greatest depth of analysis of the issue and the strongest arguments on each side. One additional argument competitors espousing the Petitioner’s role would do well to include is the argument that the ECOA’s prolific use of the term “applicant” seems to preclude a construction that would encompass guarantors, because reading “applicant” to include guarantors would render many portions of the larger ECOA statute nonsensical. This contention was explored at length at oral argument in the *Hawkins* case and more briefly in Judge Dissensio’s dissent. Because the ECOA employs the term “applicant” in more than forty instances throughout the statutory text, parsing each and every instance (whether in oral argument or in the briefs) is impractical, but it would be a mistake for the Petitioner to ignore this compelling statutory construction argument.

Ultimately, both issues presented in this year’s Problem turn on the appropriate interpretation of the term “applicant.” The Problem provides competitors with the seminal cases, which will necessarily be explored in the briefs and at oral argument, but as the Supreme Court’s split decision in *Hawkins* suggests, there are many valid arguments on each side. To succeed, the Petitioner must convince the Court that there was only one “applicant” (i.e., Stonefield Bakery) in the fact pattern presented in the Problem. By the same token, the Respondents must convince the Court that there can be more than one “applicant” in a commercial loan transaction, and that one of those “applicants” could conceivably be a guarantor.