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## LAW SUMMARY

# Reg. B Is No Guaranty: Missouri Courts' Openly Divergent Views on the Enforceability of Coerced Spousal Guaranties in Commercial Lending

ALEXANDER HURST\*

### I. INTRODUCTION

It is a common narrative: a husband operates a business held by a limited liability entity and applies for a business loan on which the entity is made the primary borrower. Given the risk that the bank could lose the loan amount via discharge in corporate dissolution, the bank requires a personal guaranty from either the husband alone, or the husband and his wife.<sup>1</sup> It is in the second scenario in which there is a potential violation of law.<sup>2</sup>

A provision commonly known as Regulation B ("Reg. B"),<sup>3</sup> which expands upon the Equal Credit Opportunity Act ("ECOA"),<sup>4</sup> disallows the practice of requiring a husband or wife to co-sign or guaranty an application for credit whenever the primary spouse would independently meet the creditor's standards for creditworthiness.<sup>5</sup> The purpose of Reg. B and the ECOA is to protect married persons from what amounts to discrimination in lending based on marital status.<sup>6</sup> Congress passed the ECOA at a time when lenders

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1. This scenario is by no means the only context in which questions concerning spousal guaranties under Reg. B arise, but it is the most salient theme in the cases that address the validity of Reg. B's guarantor provision directly.

2. See 12 C.F.R. § 202.7(d)(1) (2013).

3. See Equal Credit Opportunity, 68 Fed. Reg. 13144 (Mar. 18, 2003) (to be codified at 12 C.F.R. pt. 202).

4. 12 C.F.R. § 202.1.

5. 12 C.F.R. § 202.7(d)(1).

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

often discriminated against married, and even divorced,<sup>7</sup> women based on outdated gender stereotypes.<sup>8</sup>

While outright gender-related discrimination has probably become a less common factor in lenders' underwriting decisions (likely thanks to a combination of the ECOA and shifting social mores), marital status is still encountered as an element in lenders' determinations of creditworthiness.<sup>9</sup> Banks and other lending institutions tend to be wary of lending to only one spouse,<sup>10</sup> which, depending on state property law, could prevent them from being able to foreclose against the couple's jointly-held assets.<sup>11</sup> Often in these situations, the non-applicant spouse has very few independent assets, whereas the applying spouse may be a wealthy investor who could easily meet the lender's credit standards individually if he or she were not married.<sup>12</sup> Relying on Reg. B's ostensible protection, married individuals can attempt to avoid liability for their spouse's default after having been forced to personally guarantee the obligation.<sup>13</sup> This is true even though the couple is often still married

7. See Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 41 (1994).

8. *Moran Foods, Inc.*, 476 F.3d at 441.

9. See generally Joel D. Stafford, *Consumer Protection: The Equal Credit Opportunity Act: Guarantors as Applicants – Did the Cost of a Violation Go Up?*, 40 OKLA. L. REV. 431 (1987).

10. See *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (“The purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit. . . . The rationale behind [Reg. B] is to insure that individual credit is, in reality, available to any credit-worthy married applicant.”).

11. Missouri is a separate property within marriage state, meaning that property acquired through the efforts of one spouse generally remains the property of the individual (as opposed to a community property system). MO. REV. STAT. § 451.250 (2000 & Supp. 2013). However, Missouri law does allow for tenancy by the entireties in real as well as personal property. See, e.g., *In re Estate of Morton*, 822 S.W.2d 456, 459 (Mo. App. E.D. 1991). “Where property is owned in tenancy by the entireties, each spouse is seized of the whole or entirety and not of a share or divisible part. Each spouse owns an undivided interest in the whole of the property and no separate interest.” *Wehrheim v. Brent*, 894 S.W.2d 227, 228-29 (Mo. App. E.D. 1995) (citing *Stafford v. McCarthy*, 825 S.W.2d 650, 656 (Mo. App. S.D. 1992)) (internal citations omitted). Most significantly, “[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.” *Id.* at 229 (citing *Edgar v. Ruma*, 823 S.W.2d 59, 61 (Mo. App. E.D. 1991)). Tenancy by the entireties applies to real property in those states that recognize it; the extent to which tenancy by the entireties will be recognized in personal property varies state by state. See 41 AM. JUR. 2D *Husband and Wife* § 23 (2014).

12. See, e.g., *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 372-73 (Mo. 2001) (en banc).

13. See Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 BANK. L. J. 444, 445 (1994) (“[Debtors will] seek, through an assertion of an ECOA claim, to declare the underlying note or guaranty obligation void and unenforceable.”).

at the time of default because the couple is attempting to limit the number of foreclosable assets and, in the most extreme circumstances, void the underlying obligation for illegality.<sup>14</sup>

While Reg. B has included guarantors under its blanket of ECOA protection since 1986,<sup>15</sup> it was not until recently that the validity of the Federal Reserve Board's extension of the ECOA to such indirect "applicants" for credit was called into question.<sup>16</sup> In the wake of a U.S. Court of Appeals for the Seventh Circuit decision declaring Reg. B as it applies to guarantors invalid largely based on a textualist argument concerning the definition of the term "applicant,"<sup>17</sup> some courts outside the Seventh Circuit have followed Judge Posner's persuasive authority, while others have not.<sup>18</sup> Because state and federal courts have concurrent jurisdiction to interpret the ECOA and Reg. B, the door has been opened for the possibility – and reality – that courts within the same physical realm of personal jurisdiction would reach opposing conclusions on the same issue.<sup>19</sup>

Nowhere is this more apparent than in the state of Missouri, where the state's two federal district courts have jointly decided to follow the Seventh Circuit's persuasive authority that Reg. B is invalid,<sup>20</sup> whereas Missouri's state courts have continued to follow Reg. B's language and presumed validity.<sup>21</sup> As a result, both potential guarantors for an applicant and the lending institutions from which the guaranteed applicant borrows are faced with a striking amount of uncertainty as to what their rights are vis-à-vis required spousal guaranties.<sup>22</sup> Specifically, potential litigants stand to see the enforceability of a spousal guaranty eligible for the supposed affirmative defense or

14. See *infra* note 139 and accompanying text.

15. Kevin A. Palmer & Michael H. Malin, Jr., *Ecoa, Regulation B, and the Spousal Guaranty: Recent Developments*, 115 BANKING L.J. 357, 359-60 (1998).

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

17. See *id.* at 441-42.

18. Compare *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*3-4 (W.D. Mo. Jan. 7, 2013) (following *Moran Foods*' holding and finding the guarantor of the loan at issue in the case was not covered by the ECOA's non-discrimination provision), and *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*2-3 (E.D. Mo. May 13, 2009) (finding *Moran Foods*' reasoning persuasive and refusing to extend the protections of the ECOA to a guarantor), with *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. App. E.D. 2012), *transfer denied* (Jan. 29, 2013) (declining to follow *Moran Foods* and holding that a wife was protected by the ECOA as a guarantor of the loans at issue).

19. Leslie A. Kulick, *Guaranteeing Credit for Others; the Federal Reserve Board's "Regulation B" Requires Amendment*, 67 J. MO. B. 224, 227-28 (2011); see also 15 U.S.C. § 1691e (2012).

20. See *Arvest Bank*, 2013 WL 85336, at \*4; *Champion Bank*, 2009 WL 1351122, at \*3.

21. See *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 376 (Mo. banc. 2001); *Frontenac*, 404 S.W.3d at 291.

22. See *supra* notes 20-21 and accompanying text.

compulsory counterclaim<sup>23</sup> of Reg. B turn entirely on whether the lawsuit is filed in state or federal court in Missouri.<sup>24</sup>

This Summary examines how this inconsistency of law came to be, the public policy arguments for and against protecting spouses from being required to sign guaranties, and the potential actions which could be taken to resolve the issue. First, this Summary will examine the legal background of the ECOA and Reg. B as well as the paradigm that developed under the assumption that Reg. B was valid law. The Summary will then turn to the recent diverging cases dealing with the regulation's validity in chronological order, starting with the federal cases that called the law's validity into question, then moving to the Missouri state appellate court case that declined to adhere to this holding, and finally ending with the remaining Missouri federal court cases that have since recognized the disagreement and followed the federal precedent. Lastly, this Summary will analyze whether the bar on spousal guaranties is sound policy and will ultimately address the larger issues that have allowed this quagmire to develop, thereby invoking questions of statutory construction, spousal property law, and the nexus of federal and state courts.

## II. LEGAL BACKGROUND

### A. *The Terms of the ECOA and Reg. B*

Before delving into the dispute of law at hand, it is important to understand the background underlying both the ECOA<sup>25</sup> and its implementing regulation, Reg. B,<sup>26</sup> as well as the rationales for their enactment. The ECOA, which was enacted by Congress in 1974 and first amended in 1976, prohibits discrimination in lending based on the traditionally protected classes: race, color, religion, national origin, sex, marital status, and age (absent any incapacity to contract).<sup>27</sup> The legislation also makes it illegal to discriminate based on the fact that the applicant is receiving some form of public assistance.<sup>28</sup> One of the main reasons for the ECOA's enactment was to prevent discrimination against married women,<sup>29</sup> a group against which many banks had discriminated under the notion that they "would not be a good credit risk because [they] would be distracted by child care or some other stereotypically

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23. See generally Andrea Michele Farley, *The Spousal Defense – A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?*, 49 VAND. L. REV. 1287, 1297-1304 (1996).

24. See Kulick, *supra* note 19, at 228.

25. 15 U.S.C. § 1691 (2012).

26. 12 C.F.R. §§ 202.1-17 (2013).

27. Kulick, *supra* note 19, at 224; see also 15 U.S.C. § 1691(a).

28. 15 U.S.C. § 1691(a)(2).

29. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*2 (W.D. Mo. Jan. 7, 2013) (citing *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007)).

female responsibility.”<sup>30</sup> Accordingly, many banks had maintained a policy of denying married women credit unless they obtained their husbands’ co-signatures.<sup>31</sup>

To further the goal of preventing discrimination against any of the protected classes, the ECOA authorized the Board of Governors of the Federal Reserve System (the “FRB”)<sup>32</sup> to adopt and promulgate regulations in agreement therewith.<sup>33</sup> Accordingly, the FRB adopted Reg. B, which further expanded the ECOA’s protections.<sup>34</sup> Reg. B enumerates what lending practices and acts are specifically required, allowed, and prohibited.<sup>35</sup> The main thrust of Reg. B in this context is to generally prohibit a creditor from requiring

the signature of an applicant’s spouse or other person, other than a joint applicant, on any credit instrument if the applicant [individually] qualifies under the creditor’s standards of creditworthiness for the amount and terms of the credit requested. 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.<sup>36</sup>

Essentially, the ECOA and Reg. B operate to prevent a creditor from forcing a spouse to be a joint obligor where the primary spouse is independently creditworthy. Some courts have held that the Reg. B protections

30. *Moran Foods*, 476 F.3d at 441 (citing *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982)); *see also* *Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir. 1979) (“[O]ne, perhaps even the main, purpose of the [ECOA] was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit.”).

31. *Arvest Bank*, 2013 WL 85336, at \*2 (citing *Anderson*, 666 F.2d at 1277). There is also some evidence that divorced or separated individuals, and especially divorced women, were being denied credit because they were seen as a bad credit risk. *See* Griffith, *supra* note 7, at 41 & n.17.

32. Note that the task of regulating consumer lending was eventually delegated away from the FRB to the Consumer Financial Protection Bureau simultaneously with the latter agency’s creation as a part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *See* CFPB Bulletin 2012-04 (Fair Lending) (Apr. 18, 2012), available at [http://files.consumerfinance.gov/f/201404\\_cfpb\\_bulletin\\_lending\\_discrimination.pdf](http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf).

33. 15 U.S.C. § 1691b(a) (2012). A number of other administrative agencies handle discrimination in lending issues as well, such as the Federal Trade Commission (FTC), the Federal Deposit Insurance Corporation (FDIC), the Department of Justice (DOJ), and the Department of Housing and Urban Development (HUD), among others. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01 (proposed Apr. 15, 1994).

34. 12 C.F.R. §§ 202.1-17 (2013).

35. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01 (proposed Apr. 15, 1994).

36. 12 C.F.R. § 202.7(d)(1).

must be applied not only during the initial extension of credit but also to reevaluate the need for a guarantor in any subsequent modifications.<sup>37</sup> It is an important distinction that the regulation was not intended to prevent spouses from signing as guarantors generally but rather to prevent a spouse from being required to sign *because* he or she is the spouse; the latter is the essence of discrimination based on marital status contemplated by the ECOA.<sup>38</sup>

Note, however, that it is not illegal to require a non-obligated spouse to sign a deed of trust, mortgage, or other instrument necessary to create an enforceable security interest to an item of collateral, or, in the case of an unsecured creditor, a similar instrument that would ensure the creditor could reach the jointly-held property upon default whenever such property materially affects whether the obligated spouse is creditworthy.<sup>39</sup> While the ECOA applies to extensions of credit, it does not encumber a creditor that is acting to create a valid lien, ensure the passage of clear title, or waive inchoate rights to property.<sup>40</sup> Reg. B makes exceptions for secured credit where the proffered collateral is jointly owned and thus would reasonably require the signature of both spouses in order to be foreclosable under state property law.<sup>41</sup> Unsecured creditors in community property states<sup>42</sup> are similarly permitted to obtain a spouse's signature on such instruments subject to some conditions<sup>43</sup> so

37. *See, e.g., Stern v. Espirito Santo Bank of Fla.*, 791 F. Supp. 865, 869 (S.D. Fla. 1992).

38. *See, e.g., United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985).

39. *See* 15 U.S.C. § 1691d(a) (2012).

40. *Id.* (“A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: *Provided, however*, that this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.”).

41. 12 C.F.R. § 202.7(d)(4) (2013) (“Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.”).

42. “Community property is property acquired through the efforts of a spouse, including income generated by that property, while married and living in a community property jurisdiction. Property brought into a marriage by a spouse and any property acquired by gift, devise, or inheritance by a spouse during the marriage is generally that spouse's separate property.” David Pratt & Lisa M. Stern, *Estate Planning Considerations for Migratory Clients*, 34 EST. PLAN. 16, 22 (2007). Missouri does not recognize community property as it applies to Missouri titles. John A. Borron, *Assets Co-owned with Others*, 5A MO. PRAC., PROB. L. & PRAC. 801 (3d ed. 2013). However, property acquired as community property in another state and then brought to Missouri will not lose its character as community property. *Id.*

43. 12 C.F.R. § 202.7(d)(3). The conditions are that “(i) Applicable state law denies the applicant power to manage or control sufficient community property to

that creditors might be able to reach the communal property in the event of default. So too are unsecured creditors in non-community property states in order to obtain a valid lien against jointly-held property in certain circumstances.<sup>44</sup> It is important to keep in mind the (at times subtle) distinction between requiring a spousal guaranty – that is to say making the disinterested spouse liable to the same extent as the primary spouse – and requiring that the disinterested spouse grant a lien on a specific piece of jointly-held property. The former is forbidden by Reg. B; the latter is not.

The FRB did elaborate upon the issue of guarantors in its official staff interpretations before it was supplanted in its tenure of jurisdiction over Reg. B.<sup>45</sup> For example, the FRB staff concluded that “although a creditor may require the personal guaranty of the partners, directors, or officers of a business, and the shareholders of a closely held corporation, it may not require the signature of a guarantor’s spouse just as they bar the creditor from requiring the signature of an applicant’s spouse.”<sup>46</sup> These official staff interpretations do not have the force of law like regulations but have been cited in case law, even when they ostensibly exceed the underlying statutory authority.<sup>47</sup>

### B. A Question of Statutory Construction

Crucially, both the ECOA and Reg. B provide definitions for the term “applicant,” and yet problematically, these definitions are not identical.<sup>48</sup> The ECOA defines an applicant 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.”<sup>49</sup> In contrast, Reg. B defines 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 liable regarding an extension of credit. For purposes of section 202.7(d), the term includes *guarantors, sureties, endorsers, and similar parties.*”<sup>50</sup> By including guarantors and sureties under the umbrella of ECOA protection in Reg. B, the FRB greatly expanded the scope of the law.

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qualify for the credit requested under the creditor’s standards of creditworthiness; and (ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.” *Id.*

44. 12 C.F.R. § 202.7(d)(2). The property must have been relied upon in making the underwriting decision. *Id.* Stated differently, without the lender’s ability to create a valid judgment lien against that specific item of property, the applying spouse would not have met the lender’s standards of creditworthiness.

45. *See, e.g.*, 12 C.F.R. § 202 (Supp. I 2007).

46. Kulick, *supra* note 19, at 226 (internal quotation marks omitted).

47. *Id.*

48. *See* Arvest Bank v. Uppalapati, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*2 (W.D. Mo. Jan. 7, 2013).

49. 15 U.S.C. § 1691a(b) (2012).

50. 12 C.F.R. 202.2(e) (2013) (emphasis added).



Interestingly, the original language of Reg. B's definitions did not include guarantors; the regulation was amended to make this inclusion.<sup>51</sup> Originally, guarantors lacked any standing to sue under Reg. B, meaning that even where the lender had violated Reg. B by requiring an independently credit-worthy husband to procure his wife's guaranty, the wife would not be able to bring an action.<sup>52</sup> Critics of the old exclusion of guarantors and sureties proposed several reasons for why guarantors should have such protection,<sup>53</sup> and in response, the FRB drafted what would become the current Reg. B in 1986.<sup>54</sup>

While federal agencies are permitted to elaborate on statutory definitions, this power is reserved for when the definition is ambiguous and the intent of Congress is not clear.<sup>55</sup> Even when there is an ambiguity, the expansion must be "based on a permissible construction of the statute."<sup>56</sup> The question, then, becomes whether the intent of Congress was unambiguous when it enacted the ECOA; if not, the FRB's inclusion of guarantors in Reg. B was an impermissible expansion that exceeded the Board's authority.<sup>57</sup> Courts across the country have split on this, although much of the debate expressly addressing the statutory authority issue has been seen in Midwestern states.<sup>58</sup> The Seventh Circuit,<sup>59</sup> followed by both of Missouri's federal

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51. Farley, *supra* note 23, at 1292.

52. Stafford, *supra* note 9, at 436.

53. *Id.* ("First, if the spouse were required to sign as a guarantor, the credit granted would be joint credit rather than individual credit. The denial of individual credit to a creditworthy married person violates Regulation B, section 202.7(d) and constitutes discrimination on the basis of marital status, actionable by either spouse. Second, the applicant spouse, having already received credit, has less incentive to bring suit than the cosigning spouse. Moreover, it is the cosigning spouse who may in fact become harmed if later forced to repay the debt of the defaulting applicant spouse. Third, prohibiting creditors from requiring spousal guarantees without providing a remedy weakens a link in the ECOA enforcement chain. Creditors are less likely to comply with Regulation B if there is no penalty for a violation. Also, a broader-based applicant pool might enhance enforcement of Regulation B.").

54. *Id.* at 454.

55. See *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*3 (W.D. Mo. Jan. 7, 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

56. *Id.* (internal quotation marks omitted).

57. *Id.* at \*4.

58. See *id.*

59. See *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007). Note that Seventh Circuit decisions are federal law in Illinois, Indiana, and Wisconsin, although those states' state courts are not obligated to follow such decisions. See M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RES. L. REV. 927, 927 (2007). Illinois' state courts have adopted a policy of following local federal precedent, however. *Id.* at 934.

district courts, has declared Reg. B to be invalid as it applies to guarantors.<sup>60</sup> In contrast, Reg. B's inclusion of guarantors is considered valid law in the state courts of Missouri<sup>61</sup> and Iowa,<sup>62</sup> as well as federal district courts in Minnesota<sup>63</sup> and Oklahoma.<sup>64</sup>

### C. *The Pitfalls of Concurrent Jurisdiction*

Complicating the matter is that state courts have concurrent jurisdiction over Reg. B.<sup>65</sup> In general, state courts enjoy a presumption of concurrent jurisdiction to decide federal questions, which may only be rebutted by “an explicit statutory directive, an unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests.”<sup>66</sup> Although it is tempting to think of federal district and circuit courts as being higher in authority than their state counterparts, with the exception of the Supreme Court of the United States, federal courts are not officially superior to state courts, and state courts are under no obligation to follow precedent from federal courts sitting within the same state when deciding a federal question.<sup>67</sup>

The approach taken by the vast majority of state courts is to consider federal decisions as merely persuasive.<sup>68</sup> Only a handful of states, namely Alabama, California, and Illinois, will adhere to the decisions of inferior federal courts on federal issues where the federal decisions are “numerous and consistent.”<sup>69</sup> Mississippi and New Hampshire similarly consider federal Circuit Court of Appeals decisions for the circuits in which they sit mandato-

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60. *Arvest Bank*, 2013 WL 85336, at \*4; *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*3 (E.D. Mo. May 13, 2009); see discussion *infra* Part III.

61. See *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 373, 376 (Mo. 2001) (en banc); *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. App. E.D. 2012), *transfer denied* (Jan. 29, 2013).

62. See *Bank of the W. v. Kline*, 782 N.W.2d 453, 464 (Iowa 2010) (making no mention of *Moran*).

63. *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).

64. *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3931496, at \*9 (N.D. Okla. Oct. 5, 2010) (expressly declining to follow *Moran*); see also *Empire Bank v. Dumond*, No. 13-CV-0388-CVE-PJC, 2013 WL 6238605, at \*6 (N.D. Okla. Dec. 3, 2013) (reaffirming the *Citgo Petroleum* decision).

65. Kulick, *supra* note 19, at 228.

66. *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

67. Hale, *supra* note 59, at 927.

68. *Id.*

69. *Hall v. Pa. Bd. of Prob. & Parole*, 578 Pa. 245, 253 (2004) (quoting *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000)).

ry.<sup>70</sup> The combination of a contested federal regulation, concurrent jurisdiction with state courts, and the absence of any requirement for cooperation between federal and state courts in most states creates the possibility – and current reality – that federal and state trial courts within the exact same ambit of jurisdiction will reach opposite conclusions about the enforceability of spousal guaranties, thus causing litigants to see their cases turn entirely upon whether the case is heard in federal or state court.<sup>71</sup>

#### D. *The Status Quo of Presumed Validity*

Although Reg. B is national in scope, the problems surrounding its inclusion of spousal guarantors are particularly apparent in Missouri.<sup>72</sup> Missouri courts' stance on the validity of Reg. B seemed all but certain when the Supreme Court of Missouri made its decision in *Boone National Savings & Loan Association v. Crouch* in 2001, in which the court implicitly endorsed Reg. B's set of definitions as controlling by allowing a guarantor to assert ECOA protection.<sup>73</sup> *Boone* involved a woman in Columbia, Missouri (Ms. Crouch) who had signed a personal guaranty on an unsecured loan to her husband (Dr. Crouch) and his business partner as individuals.<sup>74</sup> Ms. Crouch had been required to sign this guaranty in spite of the fact that her husband, a cardiovascular surgeon, had an income of over \$500,000 a year, while her own income was about \$16,000 a year.<sup>75</sup> When Dr. Crouch defaulted on his debt and Boone National brought an action against Ms. Crouch for allegedly breaching the guaranty, Ms. Crouch made a counterclaim and affirmative defense on the basis that, in requiring her to sign the guaranty when her husband would have independently qualified for the credit, Boone National had violated the ECOA.<sup>76</sup>

While the opinion in *Boone* primarily dealt with a limitation of actions issue,<sup>77</sup> that the court was tacit on the significance of Ms. Crouch asserting

70. *Id.* The supreme courts of Connecticut and Maine have also held that federal decisions within the same jurisdiction should be given a great deal of deference, a step above persuasive authority. *See id.*

71. *See* Kulick, *supra* note 19, at 227-28.

72. *See generally id.*

73. 47 S.W.3d 371, 372 (Mo. 2001) (en banc).

74. *Id.*

75. *Id.* at 372-73. It is worth noting that Dr. Crouch did not default on the loan for which his wife signed a personal guaranty; after the first loan was paid off, Dr. Crouch took out a second loan from Boone National, and this time Ms. Crouch refused to sign. *Id.* at 373. Nevertheless, Boone National asserted that the earlier guaranty would apply to the new loan. *Id.* It was on this second loan that Dr. Crouch defaulted and was forced into involuntary Chapter 11 bankruptcy. *Id.*

76. *Id.*

77. The court found that Ms. Crouch's counterclaim was barred by the statute of limitations, but that she could still raise the ECOA violation as an affirmative defense. *Id.* at 374, 376.

the ECOA as a guarantor is perhaps all the more indicative of the court's stance that personal guarantors are protected.<sup>78</sup> Five years later, this seemingly innocuous and unnoteworthy implicit holding would be called into question by a Seventh Circuit decision,<sup>79</sup> which, by its progeny, would escalate into a legal quagmire in Missouri raising questions of statutory construction, federalism, and sound public policy.

### III. RECENT DEVELOPMENTS

#### A. *A Turning of the Tide in Federal Precedent*

In 2007, the Seventh Circuit decided *Moran Foods, Inc. v. Mid-Atlantic Market Development Co.*, which, through an opinion by Judge Posner, made waves by declaring that the FRB had exceeded its statutory authority in drafting Reg. B by including guarantors under the umbrella of ECOA protection from discrimination on the basis of marital status.<sup>80</sup> Here, Moran Foods (d.b.a. Save-a-Lot grocery stores) had lent Mid-Atlantic a considerable sum of money to buy groceries on credit in the context of a franchise agreement, personally guaranteed by Mr. Camp (Mid-Atlantic's proprietor) and his wife.<sup>81</sup> As part of the agreement, Mid-Atlantic's owner and his wife had been required to guarantee the debts to Moran Foods.<sup>82</sup> Incidentally, the disputed guaranty recited that it was to be governed by Missouri law, and the court took Missouri substantive law into account in rendering its decision.<sup>83</sup>

The Seventh Circuit, while not questioning the validity of Reg. B in its entirety, found that the term "applicant" was not ambiguous and, therefore, that the FRB should not have broadened its meaning in the definitions section of Reg. B.<sup>84</sup> Beyond pure textualism, the court held that including guarantors in the umbrella of protection was likely inconsistent with the intent of Congress in enacting the ECOA.<sup>85</sup> The court reasoned that while an applicant's damages from discrimination in lending (e.g., in the form of being forced to pay higher interest rates at a different lender after being turned away) would

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78. See generally *Boone*, 47 S.W.3d 371.

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

80. *Id.* at 441. In contrast to *Boone*, here the wife of a guarantor had jointly guaranteed a loan, as opposed to a wife guaranteeing a loan to her husband. *Id.* at 437; *Boone*, 47 S.W.3d at 372.

81. *Moran*, 476 F.3d at 437.

82. *Id.*

83. *Id.* No doubt the reason for this choice of governing law is that Moran Foods, which drafted the contracts, is headquartered in St. Louis, Missouri. *Company Overview of Moran Foods, LLC*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4217194> (last visited Apr. 19, 2014).

84. *Moran*, 476 F.3d at 441.

85. *Id.*

usually be modest,<sup>86</sup> declaring a guaranty to be unlawful would make it unenforceable and could therefore cause the creditor to lose the entire debt on somewhat of a technicality.<sup>87</sup> Furthermore, because Moran Foods correctly assumed that many of the assets listed on Mr. Camp's credit application were owned at least in part by his wife, the court reasoned that Moran Foods had not committed discrimination by requiring the wife's guaranty, but rather that it was simply engaging in a "sound commercial practice unrelated to any stereotypical view of a wife's role."<sup>88</sup>

While the holding in *Moran* was not mandatory authority anywhere outside the Seventh Circuit, federal courts in Missouri have given it a considerable amount of deference.<sup>89</sup> The Eighth Circuit Court of Appeals, of which Missouri's federal courts are a part, has not (as of the time of this writing) made any decision regarding Reg. B and spousal guarantors,<sup>90</sup> in fact, among the other federal circuit courts only the Fourth<sup>91</sup> and Sixth<sup>92</sup> Circuits have

86. "One can imagine cases where for want of credit from a particular lender a tremendous business opportunity was lost, but such cases – another example of appeal to the want-of-a-nail adage – are rare and difficult to prove. Damages in other cases will be limited to the cost of the higher interest, or the inconvenience of arranging alternative credit or getting one's credit restored, or embarrassment at being thought not creditworthy, or emotional distress at being thought a deadbeat or at feeling oneself a victim of discrimination." *Id.* (emphasis omitted).

87. *Id.* The court also noted that even if the ECOA did protect guarantors, there was no discrimination in this particular case because when Moran Foods (the crediting institution) had asked Mr. Camp (the guaranteeing husband) to furnish a list of assets, "several residences were included and so it naturally and correctly assumed that [the guaranteeing wife] had an interest in those assets." *Id.* at 441-42. However, to some extent this ignores the option Moran Foods had to simply require Mrs. Camp to sign a deed of trust in the residences instead as a less onerous means of ensuring it could reach those assets on default. *See supra* notes 40-44 and accompanying text.

88. *Moran*, 476 F.3d at 442. The court extended this reasoning to include that any instance where the primary applicant co-inhabits a residence with another, such as a boyfriend or girlfriend, or even a sibling, is a red flag that the applicant may not entirely own the listed residence and that therefore the other co-inhabitant should have to sign as well. *Id.*

89. *See, e.g.*, *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*3-4 (W.D. Mo. Jan. 7, 2013); *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*2-3 (E.D. Mo. May 13, 2009).

90. *Arvest Bank*, 2013 WL 85336, at \*3.

91. *See Ballard v. Bank of Am., N.A.*, 734 F.3d 308, 312 (4th Cir. 2013). Here, the majority chose to presume, but not decide, in dicta (the issue was not determinative) that guarantors were protected, while Judge Shedd chose to follow the *Moran* conclusion of invalidity in his concurrence in judgment. *Id.*; *see also id.* at 314-15 (Shedd, J., concurring).

92. *See RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014). Here, the court held that Reg. B's definition of "applicant" was entitled to deference, applying the *Chevron* test and reaching the opposite conclusion from the *Moran* court. *Id.* at 384-86. The court explained, the "ECOA's definition of 'applicant' is not straightforward and is easily broad enough to capture a guarantor."

considered the issue since *Moran*. Both of Missouri's federal district courts have since adjudicated the issue, however.<sup>93</sup> The first case to do so in Missouri was *Champion Bank v. Regional Development, LLC*, decided by the U.S. District Court for the Eastern District of Missouri in 2009.<sup>94</sup> The facts in *Champion Bank* involve another instance where a lender (Champion Bank) made a loan to a business (Regional Development, LLC) and required a personal guaranty on the debt from the sole member and manager of the business and his wife (Mrs. Brauer), who had no involvement in the business apart from her signature on the guaranty.<sup>95</sup>

One of Mrs. Brauer's counterclaims was for marital discrimination under the ECOA and Reg. B.<sup>96</sup> In addressing Mrs. Brauer's ECOA counterclaim, the court noted the decision in *Moran* and found the Seventh Circuit's permissible statutory construction rationale persuasive in its decision not to recognize Reg. B as it applies to guarantors.<sup>97</sup> Specifically, the district court inferred that "[a] guarantor is not an applicant because a guarantor does not, by definition, apply for anything. Moreover, a guarantor cannot be denied credit for which he or she did not apply, and thus it is difficult to conceive how a guarantor can claim to have been discriminated against."<sup>98</sup> Thus, the court found that it would be illogical to suppose that Mrs. Brauer's guaranty on the loan constituted discrimination and that even if it did, no logical remedy would be available to her.<sup>99</sup> The court made no reference to the earlier decision in *Boone*,<sup>100</sup> prompting one commentator at the time to inquire whether that decision was ripe to be overturned.<sup>101</sup>

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*Id.* at 386. "We will not strike down a valid regulation to salvage bad underwriting."  
*Id.*

93. *See, e.g.*, *Smithville 169 v. Citizens Bank & Trust Co.*, No. 4:11-CV-0872-DGK, 2013 WL 434044, at \*3 (W.D. Mo. Feb. 5, 2013); *Arvest Bank*, 2013 WL 85336, at \*3-4; *Champion Bank*, 2009 WL 1351122, at \*2-3.

94. 2009 WL 1351122, at \*2-3.

95. *Id.* at \*1.

96. *Id.* The other counterclaim was based on alleged negligent misrepresentations by Champion Bank. *Id.*

97. *Id.* at \*2-3.

98. *Id.* at \*2.

99. *Id.* at \*3. Moreover, the court deduced that the basis of Mrs. Brauer's counterclaim was something of a logical paradox by protesting the fact that she was considered a guarantor even though, without that status, she would not be entitled to any ECOA protection even under Reg. B. *See id.* ("Mrs. Brauer cannot claim that she has rights under a statute while simultaneously asserting that she should not be a member of the class of people the statute is designed to protect.")

100. 47 S.W.3d 371 (Mo. 2001) (en banc).

101. *See* Kulick, *supra* note 19, at 228.

*B. Stare Decisis: Reg. B Stays in Effect in Missouri State Courts*

A Missouri appellate court had the opportunity to address whether the previous holding in *Boone* and the language of Reg. B was still good law three years after *Champion Bank in Frontenac Bank v. T.R. Hughes, Inc.*<sup>102</sup> Again, the factual background here involves the now-familiar scenario where the owner of a business, T.R. Hughes, Inc. (“Homebuilder”), made personal guaranties on loans granted to his business (for which of course he eventually defaulted) and where the bank (Frontenac) required his wife to give her guaranty as well.<sup>103</sup> The Homebuilder had been partnering with another company, Summit Point, L.C. (also named as a defendant, collectively “Defendants”) on two real estate projects in the greater St. Louis area.<sup>104</sup> The trial court had followed the precedent in *Boone* that Reg. B was valid in that a bank could not require a spouse’s co-suretyship and had therefore granted the wife equitable relief based on her affirmative defense that Frontenac violated the ECOA.<sup>105</sup> Frontenac appealed, and Defendants cross-appealed.<sup>106</sup>

On appeal to the Court of Appeals for the Eastern District of Missouri, Frontenac raised three issues of law under the ECOA, namely: whether state property law provides an exception to ECOA violations, whether the Defendants were independently creditworthy, and whether the Supreme Court of Missouri’s decision in *Boone* had been overturned by more recent federal court decisions.<sup>107</sup> Even if Reg. B was valid in its entirety, Frontenac argued that,

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102. 404 S.W.3d 272 (Mo. App. E.D. 2012), *transfer denied* (Jan. 29, 2013).

103. *Id.* at 276.

104. *Id.*

105. *Id.* at 276-77.

106. *Id.* at 278. Defendants’ appeal involved a *de novo* review of the lower court’s grant of summary judgment, arguing that there was a genuine issue of material fact as to their affirmative defenses “(A) that Frontenac previously committed a material breach of the promissory notes sued upon, which breach(es) precluded Frontenac from enforcing the promissory notes against Defendants as a matter of law; and (B) that Frontenac breached the duty of good faith and fair dealing, and thus, Frontenac is not entitled to a deficiency judgment against Defendants.” *Id.* Because this half of the appeal is not germane to this discussion, it will not be addressed here.

107. *Id.* at 288-91. The decision to which the court was primarily referring was presumably the one in *Champion Bank*. See *id.* at 290-91. Frontenac also raised three points of appeal as to the trial court’s findings of fact, which were discussed separately. *Id.* at 285-88. Frontenac argued that the trial court had erred with respect to (1) its finding that the Defendants were independently creditworthy; (2) its holding that Wife was not an officer, director, or owner of the businesses; and (3) its conclusion that Wife had not voluntarily offered a personal guaranty on the loans to Frontenac. *Id.* As to the first point on appeal, the court found that T.R. Hughes and the other named defendant, Summit Point, were each independently creditworthy. *Id.* at 286. In so holding, the court looked to Frontenac’s written standards for creditworthiness, while acknowledging that Frontenac’s loan officers may have been given liberty to take other factors into account in their discretion. *Id.* The only written standard that

[T]he ECOA and its regulations recognize that in a “tenants by the entirety” state like Missouri, a lender may require the personal guaranty of a spouse jointly owning property with his or her spouse as tenants by the entirety since the joint owner spouse’s signature is necessary for the creditor to reach the joint property and joint assets being relied upon by the borrower/guarantor spouse.<sup>108</sup>

In addressing the merits of this point, the court delved into the exceptions as provided in Reg. B.<sup>109</sup> The relevant (and sole) exception read:

Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant’s spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, *under applicable state law* to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.<sup>110</sup>

In interpreting this language, the court recognized a Tennessee bankruptcy court’s holding that a limited personal guaranty could fall under the exception under the Florida tenancy by the entirety law being applied,<sup>111</sup> yet the court distinguished the Tennessee decision from the facts at bar on the grounds that the wife’s guaranty in the present case was *unlimited*, determining that to include it within the exception would be too broad a “relinquishment of rights.”<sup>112</sup> This finding highlights the general distinction that while a lender can require a spouse’s signature on an instrument making the collateral or relied upon property for the loan available upon death or default,<sup>113</sup> it does not mean the lender can coerce the spouse into signing an unlimited personal guaranty on the primary debt.<sup>114</sup>

Moving on, the court swiftly denied Frontenac’s point of law on appeal as to whether the defendants were independently creditworthy, referring to Frontenac’s failure to prove certain prerequisite factual issues, namely the assertion that the wife’s spouse was not independently creditworthy.<sup>115</sup> Last-

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Frontenac employed to determine creditworthiness was a “loan-to-value” ratio, a standard by which Defendants were each individually creditworthy. *Id.* The other two factual points of appeal were denied as well. *Id.* at 286-88.

108. *Id.* at 288. Frontenac also noted evidence that, in this case, it had actual knowledge of joint assets of the guaranteeing husband and wife. *Id.*

109. *Id.* at 289.

110. *Id.* (emphasis added) (quoting 12 C.F.R. § 202.7(d)(4) (2013)).

111. *Id.* (citing *In re Huston*, No. 09-17846, 2010 WL 4607823, at \*1, \*3 (Bankr. E.D. Tenn. Nov. 5, 2010)).

112. *Id.* at 289-90.

113. 12 C.F.R. § 202.7(d)(4).

114. *See supra* note 110 and accompanying text.

115. *Frontenac Bank*, 404 S.W.3d at 290. The would-be relevant portion of Reg. B states:



ly, the court addressed Frontenac's most compelling question on appeal: whether *Boone* had been overruled.<sup>116</sup> Frontenac raised the defense that *Moran* and other cases had recognized that the FRB had exceeded its authority in including guarantors within the umbrella of protection of Reg. B.<sup>117</sup> The court acknowledged the argument but nevertheless deferred to Reg. B's definitions, reasoning that it had no reason to abandon the doctrine of *stare decisis* and must follow the binding precedent in *Boone*.<sup>118</sup> Accordingly, the court affirmed the trial court's decision.<sup>119</sup>

As an epilogue, the Supreme Court of Missouri would have been in a position to overturn *Boone* in light of recent developments, yet for whatever reason it twice denied transfer of the case (in November 2012 and January 2013).<sup>120</sup> A denial of transfer by the Supreme Court of Missouri, much like a denial of certiorari by the Supreme Court of the United States, is ambiguous but arguably could imply a tacit affirmation of the decision in *Boone*<sup>121</sup> and the elaboration thereof in *Frontenac*.<sup>122</sup> A federal case heard several months later, *Greater Midwest Builders, Ltd. v. Federal Deposit Insurance Corporation*, had the opportunity to address the issue of whether *Frontenac* represented a significant change in Missouri law, which was relevant because it was the crux of whether a third-party defendant would be able to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e).<sup>123</sup> The court in *Midwest Builders* held that although *Frontenac* may have clarified application of an exception under the ECOA, that decision was adhering to the earlier decision in *Boone* and was therefore not a "significant change" of law.<sup>124</sup>

While *Frontenac* was notable for its continued validation of Reg. B, it was not the first case to reject or ignore the Seventh Circuit's decision in *Moran*. In 2010, courts in fellow Eighth Circuit states Iowa and Minnesota similarly considered Reg. B cases and either declined to follow or ignored the *Moran* decision.<sup>125</sup> In *Bank of the West v. Kline*, the Iowa Supreme Court

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If, 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 cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

12 C.F.R. § 202.7(d)(5).

116. *Frontenac Bank*, 404 S.W.3d at 290-91.

117. *See id.* at 291.

118. *Id.*

119. *Id.*

120. *Id.* at 272.

121. *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 372 (Mo. banc 2001).

122. *Frontenac Bank*, 404 S.W.3d at 290-91.

123. No. 2:11-CV-4225-FJG, 2013 WL 1969647, at \*3 (W.D. Mo. May 13, 2013).

124. *Id.* at \*4.

125. *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) (declining to follow *Moran*); *Bank*

recognized the validity of Reg. B in finding that the bank in question had violated the ECOA by requiring unlimited commercial guaranties from the wives of two guarantors who were personally guaranteeing an LLC's debt and who otherwise would have been considered creditworthy as individuals.<sup>126</sup> Likewise, the federal district court in Minnesota expressly declined to follow both *Moran* and *Champion* and articulated a weariness to "categorically discount[] the Federal Reserve Board's Regulations."<sup>127</sup>

*C. A Schism in Missouri's Courts: the Western District Follows Moran*

Very shortly after *Frontenac* was decided, the federal Western District of Missouri would respond with a pair of decisions involving spousal guaranties under the ECOA. The first, *Arvest Bank v. Uppalapati*, was a case factually analogous to *Moran* and other cases cited herein.<sup>128</sup> In *Arvest*, the court cited *Frontenac* and cases with similar holdings from other states in weighing whether to give deference to Reg. B's definitions and allow guarantors protection under the ECOA.<sup>129</sup> Nevertheless, the *Arvest* court found the holding and rationale in *Moran* (as adopted by the Eastern District of Missouri in *Champion Bank*) to be more persuasive.<sup>130</sup> The second case, *Smithville 169 v. Citizens Bank & Trust Co.*, merely applied the same holding and adopted rationale from a month earlier in *Arvest*.<sup>131</sup> These two cases served to complete the divide between Missouri's federal and state courts on the issue of spousal guaranties on commercial loans, a schism that seems judicially irreconcilable except by a ruling of the Supreme Court of the United States.<sup>132</sup>

Absent statutory amendment of the ECOA by Congress or amendment of Reg. B by the Consumer Financial Protection Bureau, the enforceability of coerced spousal guaranties may remain in a state of obfuscated limbo in Missouri, where plaintiffs will have an easy forum-shopping choice providing predictable results that turn entirely on the plaintiff's decision to file in state or federal court, yet defendants will have no such advantage. More troubling still is the implication this schism has for the commercial lending industry in Missouri, which has arguably legitimate interests in requiring spousal guaran-

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of the W. v. Kline, 782 N.W.2d 453, 462 (Iowa 2010) (omitting any mention of *Moran*).

126. *Kline*, 782 N.W.2d, at 464. Notably, the court held that although the statute of limitations for bringing an offensive action under the ECOA (two years) had passed, the wives could use the ECOA defensively as an affirmative defense. *Id.* at 463.

127. *LOL Fin. Co.*, 2010 WL 3118630, at \*7.

128. *See* No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*1 (W.D. Mo. Jan. 7, 2013).

129. *Id.* at \*4.

130. *Id.*

131. *See* 4:11-CV-0872-DGJ, 2013 WL 434044, at \*3 (W.D. Mo. Feb. 5, 2013).

132. *See infra* note 207 and accompanying text.

ties yet will now be hesitant to do so for fear that the guaranty will be thrown out for illegality if it is decided in state court.<sup>133</sup> The next section addresses these concerns.

#### IV. ANALYSIS

##### *A. The Invalidity of Reg. B's Guarantors Provision as a Matter of Law*

Before delving into whether guarantors *should* be included under the ECOA and Reg. B, one must first consider that as a matter of technical law and statutory construction, it seems fairly certain that the FRB exceeded its authority under the ECOA when it amended Reg. B in 1985 to include guarantors and the like.<sup>134</sup> There is no evidence that Congress intended to include guarantors under the blanket of ECOA protection; spousal guaranties were never mentioned in the Act or the committee reports.<sup>135</sup> Moreover, the ECOA provided its own set of definitions as to what, exactly, constituted an “applicant” for credit.<sup>136</sup> These definitions were adopted by the FRB in drafting the original Reg. B yet were expanded at the urging of some critics to include guarantors in 1985.<sup>137</sup>

As Judge Posner pointed out in *Moran*, the term “applicant” as it appears in the language of the ECOA is not ambiguous, and absent an ambiguity in the statutory language, the FRB had no right to extend protection under the ECOA to guarantors.<sup>138</sup> Similarly, as another court observed, “A guarantor is not an applicant because a guarantor does not, by definition, apply for anything. Moreover, a guarantor cannot be denied credit for which he or she did not apply . . . .”<sup>139</sup> Therefore, the FRB was probably wrong to extend the ECOA’s protection to guarantors, and accordingly, as a matter of law and statutory construction, Reg. B’s spousal guaranties provision should be considered invalid on this technicality. Even so, a better question remains as to whether spousal guaranties *should* be covered by the ECOA.

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133. As will be explored in the next section, if the document lacked a severability clause, Reg. B could cause the guaranty to be invalid for not just the non-applicant spouse, but both spouses. *See infra* Part IV.B. Worse, if the violation occurred on the loan agreement itself, the entire agreement could be thrown out as being void for illegality. *See Lustigman & Serfaty, supra* note 13 at 445; *see also Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007).

134. *See Moran* at 441.

135. Stafford, *supra* note 9, at 442 & n.64.

136. *See* 15 U.S.C. § 1691a(b) (2012).

137. Stafford, *supra* note 9, at 433.

138. *Moran*, 476 F.3d at 441.

139. *Champion Bank v. Reg’l Dev., LLC*, No. CV1807 CDP, 2009 WL 1351122, at \*2 (E.D. Mo. May 13, 2009).

*B. Argument Against Reg. B's Guarantors Provision  
as a Matter of Public Policy*

There is strong evidence that with or without the inclusion of guarantors, Reg. B is being used to apply the ECOA in ways unintended by Congress.<sup>140</sup> Note that in the cases discussed above, the scenario almost invariably involves a husband who owns a business being forced to obtain his wife's signature.<sup>141</sup> The original intent by the drafters of the ECOA was that similarly situated married and unmarried adults who were each creditworthy would be treated the same way.<sup>142</sup> As already discussed, there was a fear among members of Congress – and some evidence to support the notion – that married women were being denied credit in situations where men, and even married men, would have been able to obtain to the same credit.<sup>143</sup> Furthermore, there does not seem to be any “relevance or nexus between the ECOA's prohibition against discrimination on the basis of marriage prohibiting a creditor from denying a woman credit because she has female responsibilities and a guaranty of spousal debt for business purposes.”<sup>144</sup>

Although the original intent of the ECOA and Reg. B was to protect married women, the literal language of the law allows husbands to bring actions as well.<sup>145</sup> In the decades since the legislation and accompanying regulation was passed, the law has become a popular means by which a defaulting debtor<sup>146</sup> can attempt to have one spouse dismissed from the lawsuit (thus protecting the couple's joint assets in many states) or, better yet, delay or escape payment altogether by asserting that the coerced spousal guaranty rendered the agreement illegal.<sup>147</sup> The latter scenario – more troubling but

140. See Lustigman & Serfaty, *supra* note 13 at 447.

141. See *supra* Parts II.C.-III.C. It could just as easily be a wife that owns the business and a husband that has been forced to personally guarantee a debt, but is not the scenario in the aforementioned cases.

142. Stafford, *supra* note 9, at 431.

143. See *id.*

144. Kulick, *supra* note 19, at 227 (quoting *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007)) (internal quotations marks omitted).

145. *Bank of the W. v. Kline*, 782 N.W.2d 453, 462 (Iowa 2010) (“[C]ongress chose to protect any applicant, regardless of gender, from discrimination by requiring that creditors treat all credit applicants in an identical manner.”) (citing *Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir. 1979)).

146. Note that this does not foreclose the possibility that lenders too (or instead, depending on one's perspective) are short-circuiting the intent and requirements of the ECOA.

147. See Lustigman & Serfaty, *supra* note 13 at 444. Missouri is a tenancy by the entirety state, which is defined in Missouri as “a form of ownership in property created by marriage in which each spouse owns the entire property rather than a share or divisible part, and thus at the death of a spouse, the surviving spouse continues to hold title to the property.” *Rinehart v. Anderson*, 985 S.W.2d 363, 367 (Mo. App. W.D. 1998) (citing *State ex rel. State Hwy. Comm'n v. Morganstein*, 649 S.W.2d 485, 488 (Mo. App. W.D. 1983)). “An execution arising from a judgment against one

less likely – may arise where no severability clause was included in the agreement, thus potentially allowing the entire guaranty or underlying obligation to be declared void for illegality simply because demanding a spousal guaranty on the loan was illegal.<sup>148</sup> Taking this into consideration, are there still compelling reasons to allow guarantors of defaulting debtors to assert the Reg. B defense where there may not have been any discrimination in the traditional sense?

On the one hand, creditors “should be allowed[] to protect their interests by whatever precautions are reasonably necessary.”<sup>149</sup> Creditors in tenancy by the entireties states such as Missouri<sup>150</sup> may have legitimate interests in ensuring they are personally guaranteed for *all* of an applicant’s or guarantor’s recoverable assets, not just those held independently from the spouse or those for which the spouse signed an instrument allowing collection upon default. In many cases, the most valuable asset(s) of a personal guarantor will be a residence or residences, and usually residences of a married debtor enumerated in the debtor’s required financial statements are not held solely by that spouse but rather are held jointly by both spouses or even solely by the other spouse.<sup>151</sup>

While Reg. B provides exceptions to prevent the prohibition on spousal guaranties from being fatal to collection of jointly held assets in a tenancy by the entireties (or community property) state, this may not be adequate protection in all cases.<sup>152</sup> For a secured transaction, a non-obligated spouse can be asked to sign an instrument necessary to allow jointly-owned collateral to be repossessed after the default of the obligated spouse.<sup>153</sup> Similarly, an unsecured creditor can obtain signatures allowing them to create a valid judgment lien against property when they rely, in part, on that property in making the determination of creditworthiness.<sup>154</sup> However, obtaining such spousal releases for all relevant pieces of property<sup>155</sup> – so as to make all jointly held

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spouse alone cannot affect property held by a husband and wife as tenants by the entireties.” *Wehrheim v. Brent*, 894 S.W.2d 227, 229 (Mo. App. E.D. 1995) (citing *Edgar v. Ruma*, 823 S.W.2d 59, 61 (Mo. App. E.D. 1991)).

148. *See, e.g.*, Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 48-49 (1995) (discussing generally how severability clauses are used to prevent an illegal provision of a contract from rendering the entire agreement void for illegality).

149. Farley, *supra* note 23, at 1305.

150. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 283 (Mo. App. E.D. 2012), *transfer denied* (Jan. 29, 2013).

151. *See, e.g.*, *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 442 (7th Cir. 2007).

152. *See* 12 C.F.R. § 202.7(d) (2013).

153. 12 C.F.R. § 202.7(d)(4).

154. 12 C.F.R. § 202.7(d)(2).

155. Depending on the state, only real property may be eligible for tenancy by the entireties protection, whereas in some states, items of personal property may qualify

assets as readily available upon death or default as the obligor's individually held assets would be – may not be feasible.<sup>156</sup> Likewise, in the case of secured credit where the non-obligated spouse grants a security interest on the collateral, a collection problem would still exist as to any deficiency judgment the creditor attempts to gain after a foreclosure sale. The end result is that creditors in tenancy by the entireties states still find themselves at a disadvantage without an all-encompassing spousal guaranty.

The preceding problem may be exacerbated by the fact that married couples are frequently not even aware of the precise allocation of assets between the two of them, in part because it may have been made “by their lawyer in order to minimize estate tax or to make it harder for creditors to seize property in the event of a default.”<sup>157</sup> The Seventh Circuit in *Moran* went as far as to say that not only did the creditor not commit discrimination when it required the wife's signature, it affirmatively should require the signature of any other potential owner of real estate when it finds out the primary applicant or guarantor co-inhabits a property with another person.<sup>158</sup> In such situations where the creditor is requiring a guaranty from the spouse because it knows or correctly assumes that some of the assets listed in the application to bolster the primary spouse's creditworthiness are owned jointly or entirely by the other spouse, there has not been any discrimination of the kind contemplated by the ECOA.<sup>159</sup> Because the creditor will often not be informed of the exact distribution of title to property between spouses, a blanket guaranty arguably helps combat what would otherwise be what economists would characterize as an adverse selection problem.

Lastly, as to the joint assets and tenants by the entirety state law issue, the ECOA does specifically permit consideration of state property laws in the determination of creditworthiness.<sup>160</sup> The ECOA provides, in relevant part, that “[c]onsideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this subchapter.”<sup>161</sup> It is not unreasonable to infer that, when a state's

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for this status as well. RESTATEMENT (THIRD) OF PROP.: GIFT OF DONOR'S OWNERSHIP IN PERS. PROP. § 31.1 (1992).

156. I.e., if the items of personal property for which the spouse was signing releases were too numerous to practically provide an individual release for all of them.

157. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 442 (7th Cir. 2007). Indeed, in *Moran*, of the \$8.2 million in assets listed in the husband's credit application, \$2.5 million were actually owned by the wife. *Id.*

158. *Id.* The court listed several other examples where creditor might validly require a second guaranty from a co-inhabitant, such as an unmarried couple, siblings living together, or mere roommates. *Id.*

159. *Id.*

160. See 15 U.S.C. § 1691d(b) (2012).

161. *Id.* The statute goes on to provide that “[a]ny provision of State law which prohibits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: *Provided*, that in any case where such a State law is so

property laws might preclude foreclosure on assets jointly held by spouses where only one spouse was a party to the debt or a guaranty on such debt, the married status of the potential obligor can be a legitimate material factor.<sup>162</sup> By that reasoning, a creditor would not be committing discrimination against a borrower or guarantor in requiring a spousal guaranty where the financial statements show joint assets, without which the applicant or primary guarantor would not be creditworthy.<sup>163</sup> However, the exceptions in Reg. B do specifically allow a creditor to request the disinterested spouse waive his or her marital rights to a specific piece of property upon default where that item of property is crucial to the underwriting decision.<sup>164</sup>

It is true that the ECOA was intended and designed to prevent discrimination in the determination of whether an applying spouse is creditworthy and not to prevent joint assets of spouses from being targeted in foreclosure.<sup>165</sup> However, is the limitation from being able to collect on joint assets in many states – or potential limitation in the face of uncertainty of how title is allocated between spouses for various pieces of property – not a factor in whether an applicant is creditworthy? It is likely that in many cases state property law causing assets to be held inseparably by both spouses is precisely what causes the applicant or guarantor to lack independent creditworthiness. Also, it is worth noting that even where a spouse is not directly connected to the business for which his or her wife or husband is seeking a loan, the spouse is never truly disinterested because he or she probably stands to jointly reap the benefits of the business's income.<sup>166</sup> Although Missouri is not a community property state,<sup>167</sup> there is still a communal aspect inherent to the nature of marriage. So goes the adage, "what's mine is yours." Accordingly, it is not necessarily unfair to bring the spouse in as a guarantor, particularly where joint assets are actually listed in the financial statements used to obtain credit.<sup>168</sup>

As a side note, Reg. B does not provide as much of a barrier to some lenders as it does to the small business lenders seen in the facts of so many of

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preempted, each party to the marriage shall be solely responsible for the debt so contracted." 15 U.S.C. § 1691d(c).

162. Recall that Reg. B still allows a creditor in a tenancy by the entireties state to get the non-obligated spouse to sign away his or her spousal property rights as to specific pieces of jointly owned collateral, however. *See supra* note 41. Likewise, the extent to which non-real estate assets can even be held in tenancy by the entireties varies by state, and even then may be ill-defined. *See supra* note 155.

163. *See Moran*, 476 F.3d at 442.

164. 12 C.F.R. § 202.7(d) (2013); *see supra* notes 152-154 and accompanying text. This may have practicability issues in some cases however. *See supra* note 155 and accompanying text.

165. *See Kulick, supra* note 19, at 224.

166. *Id.* at 227.

167. *See supra* note 11.

168. *See Kulick, supra* note 19, at 227.

the cases addressed in this Summary.<sup>169</sup> For example, in the mortgage industry the procedures and results are drastically different because of the secured credit distinction included in the ECOA.<sup>170</sup> An executive of a mortgage lender interviewed for this Summary, Shawn Von Talge, indicated that it is “uncommon, but not rare” for one spouse to try to obtain a home loan without the participation of the other, usually where the couple is in the process of or planning to get a divorce.<sup>171</sup> In these situations, a mortgage lender will typically refuse to make the loan without the other spouse’s signature on the mortgage or deed of trust, thus assuring the lender’s ability to foreclose on the property, even if the other spouse is not technically obligated under the loan.<sup>172</sup> This will often result in the lender simply waiting for a couple’s divorce to be finalized before issuing the loan.<sup>173</sup>

On the surface, such a practice would appear to be a Reg. B violation, yet it is permissible because a home loan, by its very nature, is a purchase money transaction where the collateral is a house, the payment for which is the reason the debtor needs a loan in the first place.<sup>174</sup> In a community property or tenancy by the entireties state like Missouri, a mortgage using the house as collateral would be essentially worthless without both spouses’ signatures on the deed of trust, and thus the ECOA accounted for this.<sup>175</sup> Therefore, Reg. B does not stop mortgage lenders from requiring spousal signatures.<sup>176</sup>

### *C. Arguments for Reg. B’s Guarantors Provision as a Matter of Public Policy*

On the other hand, even if this particular harm was not contemplated by Congress in enacting the ECOA, married individuals who become parties to a credit agreement should not have to endure disparate treatment simply by virtue of being married.<sup>177</sup> Also, by “not deferring to the FRB’s regulations[, a court] would undermine the FRB’s administrative scheme upon which con-

169. See *supra* Parts II.C-III.C.

170. 12 C.F.R. § 202.7 (2013).

171. Interview with Shawn Von Talge, Vice-President, Flat Branch Home Loans, in Columbia, Mo. (Oct. 17, 2013) (on file with author).

172. *Id.*

173. *Id.*

174. See 12 C.F.R. § 202.7(d)(4).

175. See *id.*

176. See Von Talge, *supra* note 171. Mr. Von Talge also took care to express his dissatisfaction with the current regulatory environment in general. *Id.* Then again, it is hardly surprising that someone in the lending industry holds this view. Mr. Von Talge raised the interesting argument that consumer protection laws are raising the costs of doing business, costs that in turn are passed on to consumers, thus causing more harm in the market than good. *Id.* This argument is compelling from an economic standpoint, but it is outside the scope of this Summary.

177. See Farley, *supra* note 23, at 1305.



sumers and creditors have come to rely.”<sup>178</sup> Furthermore, under Reg. B, creditors would not necessarily be left without further assurance of repayment were they not permitted to require a spouse to sign a guaranty under the potential joint ownership problem theory.<sup>179</sup>

Reg. B does not proscribe a lender from requiring additional guaranties if it establishes that the primary applicant or guarantor spouse is not independently creditworthy.<sup>180</sup> The creditor could always just insist on a guaranty by someone other than the disinterested spouse to avoid the reality or appearance of an ECOA violation.<sup>181</sup> By that means, the other spouse still *could* be brought in when the creditor insists on a guarantor generally; the creditor simply could not require that the guarantor be the spouse.<sup>182</sup> This is a potential loophole for creditors, although those that attempt to circumvent Reg. B by technically only requiring *a* guaranty rather than the spouse’s guaranty may be doing so at their own peril, given that the end result will still have the appearance of a violation.

Additionally, Reg. B’s exceptions ensure that a creditor may still require a spouse’s signature for extensions of secured credit in the context of a security agreement to ensure clear passage of title of collateral.<sup>183</sup> Likewise, an unsecured creditor in a tenancy by the entireties state may require the same towards property the creditor relies on in making the creditworthiness distinction and separate protection is given for creditors in community property states.<sup>184</sup> Taking this ability into account, lenders may be “short-circuiting” the ECOA by simply requiring a spousal guaranty instead of just obtaining a spouse’s signature on security agreements for only the jointly-held property necessary to raise the primary spouse’s creditworthiness status to an acceptable level. A guaranty makes the other spouse liable for everything the primary spouse would be on default. It is a far different proposition to ask a wife to grant a lien on her interest in jointly-held property than it is to ask her to sign

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178. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*4 (W.D. Mo. Jan. 7, 2013) (citing *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3931496, at \*9 (N.D. Okla. Oct. 5, 2010)) (comparing its holding to other courts’ contrary reasoning on whether or not to defer to the FRB’s regulations). The contrasting court cited by *Arvest (Citgo)* had not thought it was in a place to declare the relevant portions of Reg. B invalid and stated that it would continue to apply Reg. B as written unless and until the Tenth Circuit made a holding otherwise. *Id.*

179. *See Kulick, supra* note 19, at 227.

180. *Id.*

181. *See id.*

182. *See, e.g., United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985) (“[E]ven when the creditor does require the signature of any creditworthy additional party, and the spouse accordingly elects to sign as such an additional party, he or she cannot later raise the ECOA as a defense, since such a signature is valid according to the Regulations promulgated under the act.”).

183. 12 C.F.R. § 202.7(d)(4) (2013).

184. *Id.* § 202.7(d)(2)-(3).

an unlimited guaranty. The ECOA thus affords a reasonably necessary protection in this sense.

*D. Ameliorating Reg. B by Eliminating  
the Disproportional Remedies Problem*

The complete invalidation of a guaranty – that is to say a personal guaranty where both spouses signed the guaranty agreement – on the basis that a spouse’s signature was obtained illegally under Reg. B as written may be too harsh a punishment.<sup>185</sup> Many courts have found that where a spousal guaranty is obtained illegally, the guaranty is void; therefore, in the context of a business loan, if the borrowing entity is liquidated in bankruptcy, the creditor could lose the entire debt.<sup>186</sup> Furthermore, due to the complexity of Reg. B’s application dictating how and when additional guaranties can be demanded, there is a high risk that a creditor might inadvertently violate Reg. B with potentially dire consequences.<sup>187</sup> As the court in *Champion Bank* postulated, “invalidation of the debt itself is a remedy too drastic for the Court to implement simply by reading between the lines of the ECOA.”<sup>188</sup>

Moreover, asserting Reg. B as an affirmative defense puts disinterested spouses in the peculiar position of having to protest being made guarantors, even though had they not been made guarantors, they would have no standing to bring an action under the ECOA (as expanded by Reg. B) in the first place.<sup>189</sup> Describing what the court in *Champion Bank* would characterize as a circular argument, the court observed that a wife “cannot claim that she has rights under [the ECOA] while simultaneously asserting that she should not be a member of the class of people the [ECOA] is designed to protect.”<sup>190</sup>

The fear that creditors could see collection of the entire debt forfeited on the technicality of a purported Reg. B violation can be greatly mitigated where Reg. B is interpreted to be a compulsory counterclaim rather than an affirmative defense, as many courts have held.<sup>191</sup> Characterizing the purported ECOA violation as a compulsory counterclaim leaves the underlying obligation intact despite the violation and simply ensures that the counterclaim will be heard after the default judgment or later in a separate court.<sup>192</sup> In con-

185. See Kulick, *supra* note 19, at 227.

186. See *id.* The author here points out that this practice of throwing out spousal guaranties found to have been obtained in violation of Reg. B is done “even though the ECOA does not contain language that permits voiding the underlying guaranty obligation as a remedy for an ECOA violation.” *Id.*

187. *Id.*

188. *Champion Bank v. Reg’l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*3 (E.D. Mo. May 13, 2009) (quoting *CMF Va. Land, L.P. v. Brinson*, 806 F.Supp. 90, 95 (E.D.Va.1992)).

189. See *id.*

190. *Id.*

191. See Farley, *supra* note 23, at 1297.

192. *Id.*

trast, characterizing the violation as an affirmative defense opens to the door to the possibility that the entire agreement could be declared void.<sup>193</sup> Thus, one of the main problems set forth as a reason not to include guarantors within the protection of the ECOA<sup>194</sup> is not a problem with the language of Reg. B itself but rather with how some courts have interpreted the ECOA's open-ended language governing enforcement<sup>195</sup> to include potential forfeiture of the underlying agreement when the ECOA is asserted as an affirmative defense in a foreclosure action.<sup>196</sup>

That said, some commentators have concluded that simply allowing a separate action while continuing to enforce the guaranty does not have a significant enough deterrence effect on creditors that would violate Reg. B and thus would argue that Reg. B's use as an affirmative defense is appropriate.<sup>197</sup> One reason for this could be that, as of 2010, the ECOA sets a five-year statute of limitations.<sup>198</sup> Because debtors and guarantors probably will not consult an attorney until there has been a default, and because a default may not occur until more than five years after the note and guaranty are signed, some debtors and guarantors will find themselves without recourse.<sup>199</sup> Therefore, "a creditor may take its chances and hope the debtor does not realize a violation has occurred until the [five]-year statute of limitations has run."<sup>200</sup> Conversely, the ECOA does allow for counterclaims for actual damages, as well as punitive damages up to \$10,000 and reasonable costs and attorneys' fees,<sup>201</sup> which would seem like an effective deterrence measure, particularly when a lender contemplates the sobering possibility of a class action suit based on the lender's standard practices.<sup>202</sup>

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193. *See id.* at 1297-1305.

194. *See, e.g.,* Kulick, *supra* note 19, at 226-27.

195. In addition to providing for actual and punitive damages for an aggrieved party under the ECOA, the ECOA also allows for "such *equitable* and declaratory relief as is necessary to enforce the requirements imposed under this subchapter." 15 U.S.C. § 1691e(c) (2012) (emphasis added).

196. *See* Farley, *supra* note 23, at 1296.

197. *See, e.g., id.* at 1306.

198. 15 U.S.C. § 1691e(f). The ECOA originally provided for a two-year statute of limitations, however this was extended to five years in 2010 by enacted legislation. Pub. L. 111-203, Title X, §§ 1085(7), 1100H, 124 Stat. 2085, 2113 (2010).

199. *Bank of the W. v. Kline*, 782 N.W.2d 453, 463 (Iowa 2010).

200. *Id.* The court was referring to the two-year statute of limitations then in effect. *Id.* The ECOA was amended just two months later (*Kline* was decided on May 14, 2010 and the statute was amended July 21, 2010) to extend the limitations period to five years. *See supra* note 198 and accompanying text. This extension accordingly weakens the argument against relying solely on offensive claims for ECOA violations made by the Iowa Supreme Court in *Kline*. *See* 782 N.W.2d at 463.

201. 15 U.S.C. § 1691e(a), (b), (d).

202. An attempt to bring a class action under the ECOA and Reg. B is not unprecedented. *See, e.g.,* *Nevarez v. O'Conner Chevrolet, Inc.*, 303 F. Supp. 927 (N.D. Ill. 2004).

*E. Addressing the Real Problem and the Necessary Solution*

Regardless of the public policy arguments for and against granting spousal guarantors ECOA protection, or even whether one finds the relevant provision of Reg. B to be a valid application of the ECOA or not, the real problem that creditors and borrowers alike currently face is the uncertainty from the discordant and convoluted state of affairs regarding the common law interpretation of Reg. B in Missouri courts.<sup>203</sup> Borrowers and guarantors of borrowers will be understandably confused as to what their rights are if and when they are told they must provide a spouse's personal guaranty. Likewise, creditors who have dutifully followed the amended Reg. B all these years will now be left to determine whether or not they want to risk asking for a spousal guaranty to help ensure repayment of a debt, knowing full well that what is now legal according to Missouri federal courts is still very much illegal according to Missouri state courts.<sup>204</sup> Although this Summary does little to explore how this issue has affected parties in states other than Missouri, because the ECOA specifically grants concurrent jurisdiction to state courts to hear private actions for alleged violations,<sup>205</sup> this same inconsistency problem could arise in any state where federal courts and states courts happen to reach divergent conclusions on the matter.

This leaves two rational options: The Consumer Financial Protection Bureau can amend Reg. B back to its original definitions, therefore affording no protection to spousal guaranties, or Congress can amend the ECOA to expressly include guarantors and expand the protective intent of the statute beyond the dated goal of protecting married women in particular from being denied credit. It appears that Congress has no interest in amending ECOA to expressly include or not include guarantors in response to *Moran*, however.<sup>206</sup> Alternatively, the issue could be resolved if the Supreme Court of the United States were to hear it,<sup>207</sup> an almost *deus ex machina* ending that seems unlikely unless the issue becomes as prominent in a substantial number of states as it has become in Missouri.<sup>208</sup> Anything short of a Supreme Court decision

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203. See *supra* Parts II.C-III.C.

204. *Id.*

205. 15 U.S.C. § 1691e(c) (“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.”) (emphasis added).

206. See *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380, 386 (6th Cir. 2014) (“[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* was decided – and none has clarified that the term ‘applicant’ cannot include guarantors.”).

207. See Kulick, *supra* note 19, at 228.

208. See *supra* Parts II.C-III.C. Note that the Supreme Court already declined to hear the appeal of *Moran* from the Seventh Circuit. *Mid-Atl. Mkt. Dev. Co., LLC v. Moran Foods, Inc.*, 552 U.S. 821 (2007).

would not resolve the issue in Missouri at common law, because Missouri's federal district courts would be under no obligation to follow a renewed decision on Reg. B by the Supreme Court of Missouri because it is an issue of federal, rather than state, law.<sup>209</sup> Likewise, Missouri state courts would be under no direct obligation to follow a decision on the matter by the Eighth Circuit Court of Appeals, although it would no doubt be taken into consideration as persuasive authority.<sup>210</sup>

## V. CONCLUSION

Congress should amend the ECOA to include guarantors under its blanket of protection, but perhaps with the caveat that actions for the violation of such requirements be brought as a compulsory counterclaim rather than as an affirmative defense. This effectively removes the possibility that the underlying obligation will be invalidated, a remedy that in most cases is not proportional to the Reg. B violation. To end Reg. B's inclusion of guarantors altogether could lead to unnecessary injustice; in cases where obtaining a spousal guaranty to an application for credit truly bears no weight on creditworthiness, such spouses should be protected from being forced to sign guaranties and face the risk that they might have to defend their personal assets.

Nothing about Reg. B's language itself is indefensible so long as the authority behind it is actually valid. Reg. B as it applies to guarantors is no longer law in the federal courts of Illinois, Indiana, and Wisconsin (via the Seventh Circuit decision in *Moran*),<sup>211</sup> the federal courts of Missouri by their own judgments,<sup>212</sup> and probably the state courts of Illinois by extension because they follow federal precedent as quasi-mandatory authority.<sup>213</sup> Courts in the rest of the country have presumed the regulation to be valid where the issue has been addressed.<sup>214</sup> Therefore, notwithstanding the arguments

209. Although federal courts are bound by state court interpretations when interpreting state law, there is no such requirement binding them to follow state precedent interpreting federal law. See *In re Allard*, 198 B.R. 715, 720 (Bankr. N.D. Ill. 1996) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

210. See *Hale*, *supra* note 59, at 927 ("State courts have adopted the doctrine that if presented with a federal question, they are not bound by the decisions of any federal court interpreting that law except the United States Supreme Court.") The article also discusses how federal decisions are most commonly treated as persuasive authority by state courts. *Id.*

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

212. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*3-4 (W.D. Mo. Jan. 7, 2013); *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*2-3 (E.D. Mo. May 13, 2009).

213. See *supra* note 69 and accompanying text. State courts in Indiana and Wisconsin are not bound to follow federal precedent. See *Ind. Dep't. of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993); *Elections Bd. of State of Wis. v. Wis. Mfrs. & Commerce*, 227 Wis. 2d 650, 670 n.19 (1999).

214. See *supra* notes 61-64 and accompanying text.

against including guarantors within the umbrella of ECOA protection or even against allowing the ECOA to be applied in ways not contemplated by Congress at the time of its enactment,<sup>215</sup> the greatest good would probably be served by merely legitimizing the status quo.

Finally, although the assertion stretches the scope of this Summary, it seems that it is also bad policy that such disagreement between courts within the same jurisdiction is even permissible in the first place. It is a bizarre result indeed that courts not just within the same state, but within a few blocks of each other,<sup>216</sup> have taken hard opposing stances on this question (or any question for that matter). Although such severe inconsistency has not yet arisen elsewhere,<sup>217</sup> in the future other states may face the same predicament as Missouri on this issue. Transcending the public policy arguments, what is most important is that action be taken one way or the other. To allow such openly-acknowledged inconsistency<sup>218</sup> between state and federal courts within the same jurisdiction to go unaddressed would portray this country's system of federalism and concurrent jurisdiction at its worst.

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215. *See supra* Part IV.B.

216. The U.S. District Court for the Eastern District of Missouri, which decided the *Champion Bank* case, is just five blocks from the Missouri Court of Appeals, Eastern District, which decided the *Frontenac* case, in St. Louis, MO. *See* Google Maps, Directions from Missouri Court of Appeals to U.S. District Court Clerk, <https://www.google.com/maps/dir/> (enter "Missouri Court of Appeals, 815 Olive St., St. Louis, MO 63101" as starting point and "U.S. District Court, 111 S. 10th St., St. Louis, MO 63102" as ending point) (last visited June 22, 2014).

217. That is to say openly recognized inconsistency between federal and state courts within the same state does not exist elsewhere.

218. *See supra* Parts II.C-III.C. The district court in *Arvest* considered the earlier state court opinion in *Frontenac*, yet declined to follow. *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*4 (W.D. Mo. Jan. 7, 2013).

**Appendix of Notable Jurisdictions with Precedent Considering Reg. B's  
Validity Since *Moran*<sup>219</sup>**

| <b>Jurisdictions Upholding Reg. B's<br/>Inclusion of Guarantors as "Applicants"</b> | <b>Jurisdictions Rejecting Reg. B's<br/>Inclusion of Guarantors as "Applicants"</b> |
|---|---|
| Missouri State Courts <sup>220</sup>  | Missouri Federal Courts <sup>221</sup>  |
| Federal Fourth Circuit (Dicta): <sup>222</sup>                                      | Federal Seventh Circuit: <sup>223</sup>   |
| Maryland Federal Court  | Indiana Federal Courts  |
| North Carolina Federal Courts   | Illinois Federal and State <sup>224</sup> Courts                                    |
| South Carolina Federal Court  | Wisconsin Federal Courts  |
| Virginia Federal Courts   |   |
| West Virginia Federal Courts  |   |
| Federal Sixth Circuit: <sup>225</sup>   |   |
| Kentucky Federal Courts   |   |
| Michigan Federal Courts   |   |
| Ohio Federal Courts   |   |
| Tennessee Federal Courts  |   |
| Iowa State Courts <sup>226</sup>  |   |
| Minnesota Federal Court <sup>227</sup>  |   |
| Federal Northern District of Oklahoma <sup>228</sup>                                |   |
| Florida's First District Court of Appeals <sup>229</sup>                            |   |

219. Many jurisdictions presumed Reg. B's validity prior to *Moran*. See, e.g., *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995).

220. *Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. App. E.D. 2012), *transfer denied* (Jan. 29, 2013).

221. *Smithville 169 v. Citizens Bank & Trust Co.*, No. 4:11-CV-0872-DGK, 2013 WL 434044, at \*3 (W.D. Mo. Feb. 5, 2013); *Arvest Bank v. Uppalapati*, No. 11-03175-CV-S-DGK, 2013 WL 85336, at \*4 (W.D. Mo. Jan. 7, 2013); *Champion Bank v. Reg'l Dev., LLC*, No. 4:08CV1807 CDP, 2009 WL 1351122, at \*3 (E.D. Mo. May 13, 2009).

222. See *Ballard v. Bank of Am., N.A.*, 734 F.3d 308, 312 (4th Cir. 2013).

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

224. Illinois' state courts have adopted a policy of following federal precedent as quasi-mandatory authority. *Hale*, *supra* note 59, at 934.

225. *RL BB Acquisition, LLC v. Bridgmill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014).

226. *Bank of the W. v. Kline*, 782 N.W.2d 453, 464 (Iowa 2010).

227. *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).

228. *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3931496, at \*9 (N.D. Okla. Oct. 5, 2010); see also *Empire Bank v. Dumond*, No. 13-CV-0388-CVE-PJC, 2013 WL 6238605 at \*6 (N.D. Okla. Dec. 3, 2013).

229. *Chen v. Whitney Nat'l Bank*, 65 So.3d 1170 (Fla. 1st Dist. Ct. App. 2011).