

# REGULATION B: HOW LENDERS CAN FIGHT BACK AGAINST THE AFFIRMATIVE USE OF REGULATION B

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## I. INTRODUCTION

The Equal Credit Opportunity Act was implemented in 1976<sup>1</sup> to prevent the discriminatory practice of forcing married women to obtain their spouse's guarantee on any loan that they wished to receive. Prior to the enactment of the Equal Credit Opportunity Act, it was a common practice for creditors to refuse to consider married women for individual credit. Indeed, despite the woman's credit history or income, she was not extended credit without her husband's signature on the note. As a result, married women were unable to purchase the most essential items. The purchase of an automobile, a refrigerator, or even something as simple as a dress was often impossible without the consent and cooperation of her husband. In order to eradicate this type of discrimination, Congress enacted 12 C.F.R. § 202 (hereinafter "Regulation B"). Regulation B provides that a creditor may not require the

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<sup>1</sup> 12 C.F.R. § 202 (1999).

signature of an applicant's spouse if the applicant individually qualifies for the amount of credit requested.<sup>2</sup>

Presently, it appears that Congress is realizing its goal of eradicating discrimination against married women who wish to obtain individual credit. Creditor's nationwide are aware of Regulation B and the practice of requiring a woman's husband to co-sign regardless of her individual credit rating is quickly diminishing. However, something curious has happened in recent years. An increasing number of cases brought under Regulation B are filed on behalf of husbands. These men are claiming that their wives were required to co-sign on loan documents and, as a result, the underlying credit transaction ought to be rendered void. Of course, this defense is most commonly used in bankruptcy proceedings where the creditor is attempting to collect on a debt. The debtors claim that because the wife was forced to co-sign the documents in violation of Regulation B, the creditor is estopped from collecting any money from her. As a result, if the husband is successfully discharged from any outstanding debt and the Regulation B defense to payment is allowed the lender is left to suffer the loss.

## II. A HYPOTHETICAL

An area of practice in which the Equal Credit Opportunity Act and Regulation B are often triggered is commercial litigation. Frequently, the owner of a business requests a significant extension of credit. If a lending institution (hereinafter "the Bank") finds that the husband and/or the business are not sufficiently creditworthy on their own, the Bank will request a personal guaranty from the owner's spouse. The guaranty ensures that if the business and/or husband default on the loan the Bank will be entitled to look elsewhere (i.e. the guarantor) for payment. In those cases where the husband defaults on the note and is successful in getting his debt discharged creditors are left with no choice but to go after the guarantor. It is at this stage of the game that Regulation B is pulled out of the bag in the form of an affirmative defense in an attempt to escape all financial liability.

While many courts have held that a purported violation of Regulation B may not be raised as an affirmative defense, other courts have allowed it. This split among courts and the ongoing debate concerning the proper use of Regulation B as a weapon against gender discrimination is the topic of this article.

The first section of this article presents and analyzes Regulation B as well as the statutes that accompany it and provide for sanctions. The second section

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<sup>2</sup> See 12 C.F.R. § 202.7(d)(1) (1999).

of this article discusses case law interpreting Regulation B. In doing so, rationales behind disallowing the affirmative use of 12 C.F.R. § 202 are presented. In addition, a number of precautions lenders may take in order to avoid any potential Equal Credit Opportunity Act violations are suggested. The article concludes with a discussion of alternative defenses to payment of a debt obtained in violation of Regulation B and the hurdles debtors must overcome in order to prevail.

### III. REGULATION B

Regulation B states that a creditor shall not require the signature of an applicant's spouse on any credit instrument as long as the applicant is independently creditworthy.<sup>3</sup> When and if it is determined that the applicant is not independently creditworthy, the creditor may still be prohibited from requiring that the additional signature is that of the applicant's spouse.<sup>4</sup> If a creditor violates the provision, the applicant may attempt to recover civil damages under 15 U.S.C. § 1691e.<sup>5</sup>

The question courts find themselves facing is precisely what form the remedy should take. Debtors attempt to utilize the purported violation as an affirmative defense to payment. The reason debtors seek to have the Equal Credit Opportunity Act claim treated as an affirmative defense is because this will likely preclude the entry of summary judgment. If the Equal Credit Opportunity Act claim is treated as an affirmative defense and there is supporting evidence, the court is faced with a factual dispute to be resolved at trial. As a result, the guarantor will continue to obtain a delay in facing judgment.

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.* Regulation B provides, in part:

d. Signature of spouse or other person.

- (1) Rule for a qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standard of credit worthiness for the amount and terms of the credit requested . . . .

....

- (5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor *may not require that the spouse be the additional party.*

*Id.* (emphasis added).

<sup>5</sup> See generally 15 U.S.C. § 1691e (1999) (providing for actual damages, punitive damages, equitable and deceleratory relief, and costs and attorneys fees in specific situations).

Lenders, on the other hand, seek to have the Equal Credit Opportunity Act claim treated as a compulsory counterclaim, thereby permitting the guarantor to pursue its claim separately from the lender's motion for judgment. Treating the Equal Credit Opportunity Act claim as a counterclaim is strategically significant because the court can grant the lender summary judgment on the defaulted obligations despite the potential Equal Credit Opportunity Act violation. Moreover, if treated as a counterclaim, the Equal Credit Opportunity Act cannot be used to declare the underlying obligation void.<sup>6</sup>

#### IV. THE AFFIRMATIVE USE IS "TOO DRASTIC A REMEDY"

There is an abundance of case law where courts denied the use of a violation of the Equal Credit Opportunity Act as an affirmative defense. In *FDIC v. 32 Edwardsville, Inc.*<sup>7</sup> a bank brought an action in Kansas state court against borrowers and guarantors seeking a money judgment for nonpayment of promissory notes as well as enforcement of personal guarantees.<sup>8</sup> One of the guarantors argued that the bank had violated Regulation B by requiring that she guarantee a corporate loan wherein the sole shareholder was her husband and therefore, she should not be liable on the guaranty.<sup>9</sup> The court held that the affirmative use of Regulation B would have the practical effect of invalidating the entire obligation and declined to entertain her cause of action.<sup>10</sup>

In *Diamond v. United Bank & Trust*,<sup>11</sup> a borrower and his wife claimed that their lender had violated the Equal Credit Opportunity Act by requiring the wife's signature on a note.<sup>12</sup> After the husband defaulted, the FDIC attempted to recover.<sup>13</sup> The couple attempted to utilize the FDIC's purported violation of Regulation B as an affirmative defense to payment. In granting

<sup>6</sup> See Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 BANKING L.J. 444, 447-48 (1994).

<sup>7</sup> 873 F. Supp. 1474 (D. Kan. 1995).

<sup>8</sup> See *id.* at 1475.

<sup>9</sup> See *id.* at 1476-77.

<sup>10</sup> The District Court wrote that:

[Defendant] cannot assert a violation of the ECOA as an affirmative defense. Although defendant describes her affirmative defense as recoupment, in reality she is attempting to use the alleged violation as a basis of negating or denying her potential liability on the guaranty. The ECOA does not provide for the invalidation of a guaranty as a remedy for an ECOA violation, and defensive use of the ECOA in this case is therefore impermissible.

*Id.* at 1480.

<sup>11</sup> 776 F. Supp. 542 (N.D. Okla. 1991).

<sup>12</sup> See *id.* at 543.

<sup>13</sup> See *id.*

judgment for FDIC the court held that "there is no authority, in statutory language or case law, for the proposition that a violation of the ECOA renders an instrument void."<sup>14</sup>

In 1992, the court in *CMF Virginia Land, L.P. v. Brinson*<sup>15</sup> agreed.<sup>16</sup> The defendants in *Brinson* claimed that their lender violated the Equal Credit Opportunity Act by requiring the wife's signature on a guaranty. The court, in discussing that the policy behind the implementation of the Equal Credit Opportunity Act was to eradicate discrimination against married women whom creditors refused to consider for individual credit, denied the affirmative use of Regulation B.<sup>17</sup> The *Brinson* court also set forth the policy considerations contemplated by Congress when enacting the statute.<sup>18</sup>

In *United States v. Joseph Hirsch Sportswear Co.*,<sup>19</sup> the court in discussing whether a violation of the Equal Credit Opportunity Act could be used by the debtors as a defense of payment to a promissory note utilized a textualist approach to statutory interpretation.<sup>20</sup>

<sup>14</sup> *Id.* at 544.

<sup>15</sup> 806 F. Supp. 90 (E.D. Va. 1992).

<sup>16</sup> *See id.* In discussing the Equal Credit Opportunity Act (ECOA) the court stated:

The ECOA, by its own terms, sets forth the contemplated remedy under the statute--a federal civil action for actual damages, punitive damages not to exceed \$10,000, attorneys' fees or injunctive relief. Nowhere does it afford relief by way of an affirmative defense. A counterclaim certainly can be premised upon a violation of the ECOA, but such a violation cannot be alleged to avoid basic liability on the underlying debt.

*Id.* at 95.

<sup>17</sup> *See id.* at 96-97.

<sup>18</sup> *See id.* at 96. Specifically, the *Brinson* court wrote:

The ECOA was implemented to prevent this discriminatory practice of forcing women to have their spouses guarantee any loan they wished to receive. In this case, however, as in many recent cases brought under the ECOA, male borrowers attempt to invoke the ECOA when a lender requires their wives' signatures as co-guarantors on a loan instrument. While the Court agrees that the plain language of the ECOA forbids discrimination "against any applicant with respect to any aspect of a credit transaction, which is based on marital status," the Court is especially adverse to rendering void a Guaranty whose execution violated the ECOA in a manner not expressly targeted by the statute. The Court believes its approach is appropriate in all cases where the ECOA is improperly interposed as an affirmative defense, but simply notes that the Defendants' argument that the debt instrument should be entirely nullified is especially untenable where, as here, the type of ECOA violation alleged was not even contemplated by the statute when it was enacted.

*Id.* at 96 (citations omitted).

<sup>19</sup> No. 85-CV-1546, 1989 WL 20604 (E.D.N.Y. Feb. 28, 1989), *aff'd*, 923 F.2d 842 (2d Cir. 1990).

<sup>20</sup> *See id.* at \*1. The court wrote:

Defendants have failed to cite any authority for this position. The ECOA on its face provides only for a civil action in federal court for actual damages as a remedy for violations thereof. It thus appears that the defendants may be entitled to employ the ECOA only to assert a counterclaim, not a defense.

*Id.* (citations omitted).

The effect of allowing a violation of Regulation B to be used as an affirmative defense is one many courts find to be "too drastic a remedy" for a purported violation of Regulation B. If successfully plead and proved the entire obligation is rendered void.<sup>21</sup> This means, in short, that the debt is released in full. While there is no doubt that discrimination in any context should not be allowed, the punishment ought to fit the crime.

The rationale behind not allowing Regulation B as an affirmative defense is the fact that while the Equal Credit Opportunity Act provides for civil remedies "there is no authority, in statutory language or case law, for the proposition that a violation of the ECOA renders an instrument void."<sup>22</sup> The court in *Riggs Nat'l Bank of Washington, D.C. v. Linch*<sup>23</sup> agreed.<sup>24</sup> In what appears to be the correct analysis and subsequent decision, the *Riggs* court went even further when it found that the bank's request for a spouse's signature as a guarantor was well within the confines of permissible behavior under the Equal Credit Opportunity Act.<sup>25</sup>

After considering the Equal Credit Opportunity Act Regulations<sup>26</sup> the court held that "because *Riggs* did not require the wife's signature until after it determined that the husband was not independently creditworthy for the loan, the bank did not discriminate against either of the borrowers on the basis of their marital status."<sup>27</sup>

Similarly, in a controversial decision by the First Circuit the court held that where a husband-applicant is not independently creditworthy the lender

<sup>21</sup> *Brinson*, 806 F. Supp. at 95.

<sup>22</sup> *Diamond v. United Bank & Trust*, 776 F. Supp. 542, 544 (N.D. Okla. 1991).

<sup>23</sup> 829 F. Supp. 163 (E.D. Va. 1993) *aff'd*, 36 F.3d 370 (4th Cir. 1994).

<sup>24</sup> *See id.* at 169. The *Riggs* court held: "There is no express or implicit language in the ECOA that grants this court the 'sweeping power' to invalidate the underlying guaranty in this case. 'Invalidation of the debt is a remedy too drastic for the Court to implement simply by reading between the lines of the ECOA.'" *Id.* at 169 (citing *CMF Virginia Land, L.P. v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992)).

<sup>25</sup> *See Riggs*, 829 F. Supp. at 168. In doing so, the court set forth the policy behind the ECOA: Prior to the enactment of the ECOA, it was customary for lenders to require guarantee signatures of husbands whose wives sought credit, even when a credit check revealed that the wife was independently creditworthy. The ECOA was implemented to prevent this discriminatory practice of forcing women to have their husbands guarantee any loan they wished to receive.

*Id.*

<sup>26</sup> *See id.* The Regulations accompanying the ECOA provide, in pertinent part: Qualified applicant. The signature rules assure that qualified applicants are able to obtain credit in their own names. Thus, when an applicant requests individual credit, a creditor may generally not require the signature of another person unless the creditor has first determined that the applicant alone does not qualify for the credit requested.

*Id.*

<sup>27</sup> *Riggs*, 829 F. Supp. at 168.

may require the wife to sign the loan documents and guaranty.<sup>28</sup> In *Ramsdell v. Bowles*,<sup>29</sup> the borrower sued the lender alleging a violation of the Equal Credit Opportunity Act where the bank required the wife to sign as guarantor of a loan for her husband's construction company.<sup>30</sup> Mrs. Ramsdell had no connection to the company but was required to personally guarantee the loan after it was determined that her husband was not individually creditworthy.<sup>31</sup> The plaintiff-guarantor argued that the burden of proving lack of creditworthiness under § 202.7(d)(1) was on the bank.<sup>32</sup> The court, however, disagreed, and stated, "[w]e do not read that section as creating an affirmative defense for banks premised on their proving lack of creditworthiness. Thus, the burden was on Mrs. Ramsdell to come forward with proof that [the construction company] and Mr. Ramsdell were creditworthy."<sup>33</sup> In finding that the construction company and Mr. Ramsdell were not creditworthy, the court relied on several factors including the fact that the bank had issued notices of default on prior loans; the bank had insisted that a portion of the new loan being funded be applied to the prior loans in default; and that there was no evidence to the contrary.<sup>34</sup> In the end, the *Ramsdell* case turned on the issue of creditworthiness. Simply put, because Mr. Ramsdell was not independently creditworthy the bank was allowed to require the signature of his spouse without violating the Equal Credit Opportunity Act and Regulation B.<sup>35</sup>

While many courts have found that an Equal Credit Opportunity Act violation, if proved, does not render the offending instrument void, some courts have chosen to limit this holding, allowing only the impermissibly bound debtor to escape liability, and still imposing liability on the permissibly

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<sup>28</sup> See *Ramsdell v. Bowles*, 64 F.3d 5, 9 (1st Cir. 1995).

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 6.

<sup>31</sup> See *id.* at 6-7.

<sup>32</sup> See *id.* at 9.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> See *id.* at 8.

<sup>35</sup> See *id.* A useful interpretive guide to both lenders and practitioners is the Federal Reserve Board's Official Commentary to Regulation B. The Staff Commentary addresses directly the issue of a commercial creditor seeking a spousal guaranty and no doubt lends credence to the holding in *Ramsdell*: Spousal guaranties. The rules in § 202.7(d) bar a creditor from requiring a signature of a guarantor's spouse just as they bar the creditor from requiring the signature of an applicant's spouse. For example, although a creditor may require all officer's of a closely held corporation to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign the guarantee. *If an evaluation of the financial circumstances of an officer indicates that an additional signature is necessary, however, the creditor may require the signature of a spouse in appropriate circumstances in accordance with § 202.7(d)(2).*

12 C.F.R. Pt. 202, Supp. 1 ¶ 7(d)(6) (2000) (emphasis added).

bound debtor. For instance, in *Integra Bank/Pittsburgh v. Freeman*,<sup>36</sup> the court held:

[w]hile an ECOA violation should not void the underlying credit transaction an offending creditor should not be permitted to look for payment to parties who, but for the ECOA violation, would not have incurred personal liability on the underlying debt in the first instance . . . [f]urther, a creditor may not claim legal reliance on a signature that was illegally obtained in the first instance.<sup>37</sup>

The Third Circuit Court of Appeals in *Silverman v. Eastrich Multiple Investor Fund, L.P.*<sup>38</sup> followed the decision in *Integra*.<sup>39</sup> The Third Circuit held that the debtor could raise the alleged violation as an affirmative defense even though the statute of limitations would preclude a cause of action.<sup>40</sup> Quoting *Integra*, the court recognized that allowing the affirmative defense places the creditor in no worse a position than if it had adhered to the law when the credit transaction occurred.<sup>41</sup>

Because some courts are indeed willing to allow the use of Regulation B as an affirmative defense, creditors would be well advised to take precautions designed to avoid any possible liability under the Act.

## V. PRECAUTIONS DESIGNED TO AVOID VIOLATING THE ECOA

In the context of a commercial loan to a business entity which is to be backed by a personal guaranty, such as that set forth in the above hypothetical,<sup>42</sup> the following steps ought to be taken in order to insure compliance and to avoid an unintended violation:

\*The creditworthiness of the business, standing alone, must be evaluated. A business with sufficient collateral and cash flow to service the debt will not require guarantors or sureties.

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<sup>36</sup> 839 F. Supp 326 (E.D. Pa. 1993).

<sup>37</sup> *Id.* at 329.

<sup>38</sup> 51 F.3d 28 (3d Cir. 1995).

<sup>39</sup> 839 F. Supp 326, 329 (E.D. Pa. 1993). The court in *Integra* concluded that if the wife could prove that her required signature was an impermissible violation of the Equal Credit Opportunity Act, she would not be held liable. However, the husband could not escape liability as a permissibly bound party because of an Equal Credit Opportunity Act violation to his wife. *See id.* at 331.

<sup>40</sup> *See Silverman*, 51 F.3d at 32.

<sup>41</sup> *See id.* at 33.

<sup>42</sup> *See discussion supra* Part II.

\*Assuming that the business has insufficient collateral to secure the debt and the creditor desires further security, the creditor should perform a separate creditworthiness analysis of each potential guarantor standing alone, looking at separately owned assets and income; if the officer/spouse alone sufficiently enhances the creditworthiness of the borrower, either through separate income, assets, or both, the creditor is well advised to stop here.

\*Where the individual officer/spouse does not add sufficient creditworthiness to the borrower, the creditor may lawfully inquire whether additional guarantors are available; in any event, the creditor may never *require* the disinterested spouse to be a guarantor.

\*A creditor may always accept a spousal guaranty that is voluntarily offered by the proposed guarantors. If such is the case, the voluntariness should be documented in writing.

\*Where the creditor obtains a security interest in specific property owned by a married officer of the business/borrower, the signature of the disinterested spouse may be required on the document creating the lien (i.e. mortgage, security agreement, etc.) if, under state law, the signature of both spouses is required to create a valid lien in the secured property.

\*Where state law forces a creditor to obtain both spousal signatures on any instrument creating a lien in specific property, care should be taken to insure that the instrument does not impose personal liability upon the disinterested spouse for the underlying debt of the borrower (unless the spouse has voluntarily assumed such liability).<sup>43</sup>

In order to evidence compliance with the Equal Credit Opportunity Act and Regulation B, creditors would be well advised to have spousal guarantors sign written acknowledgments evidencing that the spousal guaranty was provided voluntarily, was not required by the lender, and that the guarantors were advised by the lender of the protections afforded by the Equal Credit Opportunity Act. Such evidence is cheap insurance against future claims in the event the guarantor is ever called on to perform.<sup>44</sup>

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<sup>43</sup> Kevin A. Palmer, *ECOA, Regulation B, and the Spousal Guaranty*, 110 BANKING L.J. 342, 350 (1993).

<sup>44</sup> See generally *id.*

## VI. ALTERNATIVE CAUSES OF ACTION

The Equal Credit Opportunity Act is a remedial statute and as such, courts are given broad powers in order to effectuate its purpose. Therefore, one might question the reasoning behind a great number of courts disallowing the use of a purported violation of Regulation B as an affirmative defense. The answer lies in the statute itself.<sup>45</sup> Courts interpreting the statute have allowed debtors to utilize two sufficiently effective remedies when attempting to escape liability under a guaranty allegedly obtained in violation of Regulation B. One is to file a civil action (i.e. a compulsory counterclaim) under the Equal Credit Opportunity Act for damages and the second is the defensive claim of recoupment.

### A. A Civil Action

The proper course of action for a debtor who was forced to sign a note in violation of Regulation B is to file a counter-claim in civil court. Assuming the factual scenario set forth above, the debtor would file an action for damages and injunctive relief under 15 U.S.C.A. § 1691e.<sup>46</sup> If the court found that the debtor-spouse was in fact required to sign the loan documents in violation of Regulation B, damages would be awarded. Depending upon the severity of the violation and the discretion of the trial court, the award could completely offset or even exceed the outstanding debt. The only potential obstacle facing those who wish to file a civil action under the Equal Credit Opportunity Act is the two-year statute of limitations.<sup>47</sup> However, even when the statute of limitations has passed, courts have allowed an alternative defense to the payment of a note obtained in violation of Regulation B.

### B. Recoupment

The Equal Credit Opportunity Act limitation period is not applicable to claims of recoupment. The claim of recoupment [which essentially functions as a "defensive claim"] arises out of the same contractual transaction as the plaintiff's claim and survives as long as the claim itself survives.<sup>48</sup> In *In re*

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<sup>45</sup> See *id.*

<sup>46</sup> It should be noted that the term "applicant" includes guarantors. See, e.g., *Stern v. Espirito Santo Bank of Florida*, 791 F. Supp. 865, 867 (S.D. Fla. 1992).

<sup>47</sup> See 15 U.S.C. § 1691(e) (1988); see also *Stern*, 791 F. Supp. at 868 (noting the statute of limitations begins to toll the date a note is signed).

<sup>48</sup> See *Bull v. United States*, 295 U.S. 247 (1935).

*Remington*,<sup>49</sup> the court allowed the debtor to employ the defense of recoupment even after the statute of limitations had run.<sup>50</sup> Simply put, recoupment is the keeping back of something that is due because there is an equitable reason to withhold it. Recoupment can be distinguished from a set-off in that it is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction.<sup>51</sup> So, in theory, a debtor-spouse could utilize the defensive use of recoupment at any time in order to escape liability under a personal guaranty. Again, depending upon the gravity of the violation the court in its discretion could award damages equal to the outstanding debt. However, as is discussed below the debtor-spouse must first prove by preponderance of the evidence that the financial institution in question discriminated against her on account of her marital status and in violation of the Equal Credit Opportunity Act.

### C. *Burden of Proof*

Like other types of discrimination, the burden of proof in demonstrating an Equal Credit Opportunity Act violation shifts back and forth.<sup>52</sup> A party alleging a violation of the Equal Credit Opportunity Act may attempt to proffer evidence of discrimination in one of the three approaches established in the employment discrimination field: (1) direct evidence of discrimination; (2) the "effects test" or disparate impact analysis; or (3) the disparate treatment analysis.<sup>53</sup> First, the aggrieved party must present a prima facie case of discrimination by the creditor.<sup>54</sup> Therefore, the wife in the hypothetical set forth above would have to come forward with proof that the lender required her signature on the guarantee because she was her husband's spouse. The burden would then shift to the Bank to offer a non-discriminatory reason(s) for the challenged action. Perhaps the bank could offer proof that the husband was not independently creditworthy and/or that the Bank suggested that the wife be the guarantor and nothing more. The burden would then shift back to the debtor-wife to demonstrate that the Bank's reasons were pretextual.<sup>55</sup>

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<sup>49</sup> 19 B.R. 718 (Bankr. D. Colo. 1982).

<sup>50</sup> See *id.* at 720. The *Remington* court held:

[I]f a debtor is not allowed to use the ECOA defense, there will be little incentive for a creditor to obey the statute's mandates. It is very likely that most debtors will know nothing about the provisions of the ECOA until they consult an attorney after the statute of limitations has passed.

*Id.*

<sup>51</sup> See BLACKS LAW DICTIONARY 712 (6th ed. 1990).

<sup>52</sup> See *Crestar Bank v. Driggs*, No. 93-1036, 1993 WL 198187, at \*1 (4th Cir. June 11, 1993).

<sup>53</sup> See generally *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

Thus, if at any point the debtor-wife were unable to satisfy her burden by a preponderance of the evidence, her claim would fail.

For instance, in *Vietinghoff v. Miami Beach Federal Credit Union*,<sup>56</sup> the court found that a husband and wife's uncontradicted testimony that the wife had been required to co-sign the application established a substantive violation of Equal Credit Opportunity Act.<sup>57</sup> The couple based their entire cause of action on 12 C.F.R. § 202.7(d)(5)<sup>58</sup> and at trial they both testified that they were told by an employee that the wife must sign in order for the husband to get the loan.<sup>59</sup> It is important to note that "[t]his testimony was uncontradicted and unrebutted by the Credit Union . . ."<sup>60</sup> As a result, the court was obliged to find for the plaintiffs.<sup>61</sup>

## VII. CONCLUSION

A purported violation of the Equal Credit Opportunity Act should not be allowed to be asserted as an affirmative defense by couples attempting to escape financial liability for loans they have defaulted on. The Equal Credit Opportunity Act and the accompanying Regulation B were enacted to eradicate discrimination against women. Creative lawyering and clever statutory interpretation should not be allowed to manipulate the stated purpose of an important act of Congress. While discrimination on the basis of marital status should not be allowed or ignored, one would be hard pressed to argue that married men have at any point in history been discriminated against on that basis. Regulation B ought to be utilized in the way in which it was intended and not as an ingenious device to escape financial responsibility. Furthermore, the invalidation of the entire debt was a remedy not contemplated by the statute. The statute allows for two sufficiently effective remedies. A debtor who wishes to escape liability under a guaranty may file a separate civil action for money damages within two years of the signing of said guaranty. If the statute of limitations has expired the debtor may utilize the defense of recoupment at any time in an effort to reduce the amount of the

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<sup>56</sup> 657 So.2d 1208 (Fla. 3d DCA 1995)

<sup>57</sup> See *id.* at 1209.

<sup>58</sup> This provision specifically states in pertinent part that "[t]he 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) (1999).

<sup>59</sup> See *Vietinghoff*, 657 So.2d at 1208-09.

<sup>60</sup> *Id.* at 1208-09.

<sup>61</sup> See *id.* at 1209 (stating "[u]ncontradicted testimony must be accepted as proof of a contested issue."). Cf. *Cragin v. First Fed. Sav. & Loan Ass'n*, 498 F. Supp. 379, 384 (D. Nev. 1980) (holding that where there is no credible evidence that a wife's signature was demanded on a husband's loan application there was no proof of a violation of Regulation B).

lender's claim. Congress enacted the Equal Credit Opportunity Act to fight discrimination against married women who wished to obtain individual credit. It is an important piece of legislation for women past and present. The affirmative use of Regulation B as a creative device to escape financial liability was not Congress' intention and should not be allowed.

