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Potential Problems with the LLP Structure for Professional Firms

Thomas E. Rutledge

A case pending before the New Jersey Supreme Court, along with some earlier decisions in other jurisdictions, identifies some significant problems with using the LLP format for professional firms. Members of professional firms – and the transactional attorneys who advise those individuals and firms – need to be aware of these problems.

By way of background, an LLP is a general partnership that makes a special election for LLP status, thereby achieving limited liability for the partners. Most states require that, in order for a law firm to elect LLP status, it must have in place malpractice insurance or some similar protection for clients.[1] These rules are, however, generally silent as to the effect of a subsequent loss or failure to maintain that insurance.

Currently pending before the New Jersey Supreme Court is *Mortgage Grader Inc. v. Ward & Olivo*, a case squarely presenting the question of what happens when malpractice insurance is not maintained. Oral argument was held on February 1.

This dispute involves an allegation by Mortgage Grader of malpractice arising out of allegedly deficient advice delivered by Olivo; there is no allegation that Ward had any involvement with the file. After the allegedly deficient advice was rendered: (i) Ward withdrew from the firm; (ii) the firm proceeded to wind up its affairs; and (iii) the firm then allowed its malpractice coverage to lapse.[2] Thereafter, Mortgage Grader filed its complaint.[3]

Ward, in addition to defending on a procedural basis, sought dismissal on the basis that he was a partner in an LLP and thereby shielded from personal exposure on partnership obligations.[4] The trial court rejected that assertion, finding that Ward & Olivo had continued collecting fees even as it allowed its malpractice coverage to lapse. From there, applying Rule of Court 1:21-1C(a)(3), the trial court observed that "[t]he condition precedent to attorneys operating as an LLP is [maintaining] malpractice insurance."[5] Because the firm still operated by collecting fees after allowing its malpractice coverage to lapse, the trial court held that Ward & Olivo reverted to a general partnership and that Ward lost the benefit of an LLP election.

The Appellate Division reversed that determination, concluding that neither the N.J. Partnership Act nor Rule 1:21-1C imposed the loss of limited liability as a consequence of the failure to have insurance:

> [I]f attorneys practice as an LLP, and the LLP fails to maintain malpractice insurance as required by the court rules, then the Supreme Court may terminate or suspend the LLP's right to practice law or otherwise discipline it. As currently written, however, the court rules do not authorize a trial court to sanction a partner of an LLP for practicing law as an LLP without the required professional liability insurance by converting an otherwise properly organized LLP into a GP.[6]

The case is on appeal to the New Jersey Supreme Court. Based upon published summaries of the oral argument, counsel for Ward argued that the LLP had insurance in place while it was practicing law, and that a change in the law requiring tail coverage while the firm was winding up its financial affairs could be applied only prospectively. Counsel for Mortgage Grader asserted that failure to have insurance in place affects the loss of the benefits of LLP statutes.

One potentially disturbing aspect of the language used by the Appellate Division and in the oral argument is the notion that the loss of LLP status and the treatment of the firm as a general partnership is some sort of "conversion." That characterization is at least a misnomer. An LLP is a general partnership that has

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elected into a special status – it is still a general partnership but for the rule of partner limited liability.[7]

The issue in this case follows at least three other cases in which courts have had to consider the effect of a loss of LLP status.

In *Apcar Inv. Partners VI, Ltd. v. Gaus*,[8] a partner was held personally liable on a lease executed by the partnership in its LLP name three years after failure to renew its initial LLP registration. The court rejected a "substantial compliance" argument based on the clear language of the LLP statute.

Evanston Ins. Co. v. Dillard Department Stores, Inc.[9] involved a claim for trademark infringement against a law firm that had been an LLP. After the firm dissolved and allowed its LLP election to terminate, the judgment against the firm was entered. In response to the argument that the operative conduct took place while the firm was an LLP, and therefore that limited liability should apply, the court ruled that the debt was not incurred until the judgment against the partnership was entered, at which time the LLP registration had expired, and the partners thus were not protected from liability.[10] While some states, including Delaware,[11] Kentucky,[12] and Texas,[13] have amended their respective statutes to minimize the impact of the *Evanston* decision by defining when a liability is deemed to have accrued, it seems likely that facts might arise in the future that will not be addressed by those amendments. Further, if an LLP is organized in a state that has not enacted a similar amendment, the *Evanston* rule could be applied.

In *Edward B. Elmer, M.D., P.A. v. Santa Fe Properties, Inc.*,[14] the court concluded that an LLP's failure to carry the required insurance rendered the liability shield ineffective even though the liability in issue stemmed from breach of a lease and thus was not the type of liability that would have been covered by the insurance. The plaintiff had sued the partnership and its two partners for breach of a commercial lease. The plaintiff obtained a judgment against the partnership, and that judgment was severed and became final. After the plaintiff was not able to collect the judgment from the partnership, the plaintiff obtained a summary judgment against one of the partners. The partner appealed. The court held that the partner was not protected from individual liability because the partnership was not a properly registered limited liability partnership under the Texas Revised Partnership Act at the time it incurred the lease obligations. The Texas LLP provisions required that an LLP carry insurance or meet certain financial responsibility requirements. The court noted that, unlike the limited partnership statute, the LLP provisions contain no substantial compliance language. Therefore, the court concluded that strict compliance with the statute is required. Although the partner itself carried errors and omissions insurance, the court pointed out that the policy did not appear to cover the partnership or the other partner. Because the partnership did not have the required insurance or other forms of financial responsibility designated by the statute, it was not a properly registered LLP, and the partner was not protected from liability.[15]

In a broad sense, the *Mortgage Grader* case, like the other cases discussed above, requires some reconciliation of the law relating to business organizations and rules regulating professionals. This necessitates balancing the legitimate concerns of both those who leave a firm (irrespective of whether the firm will continue) and the clients of the firm. A partner leaving a firm, particularly a firm that is continuing, has little bargaining power with respect to the firm's ongoing operations, including its maintenance of a valid LLP election and the maintenance of required insurance. Depriving such a partner, post departure, of the benefits of the LLP election seems unfair.

That said, the rules that require malpractice insurance as a condition to an LLP election are intended to preclude attorneys from practicing through an entity shell that would in effect be abandoned in the case of a malpractice claim, leaving the client with recourse against only the firm's few assets and the attorney who was directly engaged in the malpractice. When that outcome does come to pass – that is, when the loss of malpractice insurance has left one or more clients without an adequate source of recovery – the benefits of the LLP election should be lost.

The maintenance of insurance coverage can be expensive, and there is a legitimate question as to how long any firm should have to bear that burden. While, with respect to a personal injury firm that cycles its clients in and out relatively quickly, and there is a short statute of limitations/statute of repose with respect to the bringing of the malpractice claim, tail coverage may be affordable. But what about a law firm that engages in sophisticated estate planning? The problems with the documents the firm creates might not be discovered for decades. Can, and more importantly, should the rules with respect to the maintenance of malpractice coverage apply conceivably 20 or 30 years after the dissolution of the firm at which the lawyer who drafted that will was practicing?

Regardless of the outcome of this policy question, there are at least two lessons from these cases for the professionals involved in or contemplating the use of LLP structure and the transactional attorneys who advise them:

- the "contingent" nature of the limited liability shield provided by the LLP election should be a factor in the initial choice of what type of entity to adopt; and
- persons departing from a professional firm organized as an LLP need to consider the potential lingering exposure should the firm either:

  (i) continue but fail to maintain both a valid LLP election and required insurance; or

  (ii) dissolve and not maintain in place both an LLP election and tail insurance for a period sufficient to address potential claims that arguably accrued during their tenure at the firm.

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Notes

1. In New Jersey, that is Rule of Court 1:21-1C, *Limited Liability Partnerships for the Practice of Law*. The Kentucky rule is set forth at SCR 3.022, *Forms of Practice of Law*, and SCR 3.024, *Requirements of Practicing Law in Limited Liability Entities*.

2. *See* Mortgage Grader, Inc. v. Ward & Olivo, LLP, 102 A.3d 1226, 1228 (N.J. Super. Ct. 2014).

3. *Id.*

4. *Id.*

5. *Id.* 1229.

6. *Id.* at 1231 (citation omitted).

7. *See, e.g.*, RUPA § 201(b).

8. 161 S.W.3d 137 (Tex. Ct. App. 2005).

9. 602 F.3d 610, 616 (5th Cir. 2010).

10. *See also generally* Elizabeth S. Miller, T*he Perils and Pitfalls of Practicing Law in a Texas Limited Liability Partnership*, 42 TEXAS TECH. L. REV. 570, 571-75 (2011).

11. DEL. CODE ANN. tit. 6, § 15-306(c).

12. KY. REV. STAT. ANN. § 362.1-306(3) was in 2012 amended to read as follows:

> (3) An obligation of a partnership ***arising out of or related to circumstances or events occurring or incurred*** while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership.

13. TEX. BUS. ORGS. CODE § 152.801(c).

14. 2006 WL 3612359 (Tex. Ct. App. 2006).

15. The summary of this case is taken from Elizabeth S. Miller, *Owner Liability Protection and Piercing the Veil of Texas Business Entities* 33 (2012), *available at* http://www.baylor.edu/content/services/document.php/187922.pdf.

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Federal Circuit Decision Might Obstruct Secured Transactions

Stephen L. Sepinuck

A few weeks ago, the U.S. Court of Appeals for the Federal Circuit issued an opinion in *Lexmark International, Inc. v. Impression Products, Inc.*[1] The decision narrows the first-sale doctrine with respect to patents in ways that appear to have some important and distressing implications for secured lenders who finance distributors of goods.

The Lexmark Opinion

The case involved printer cartridges manufactured and sold by Lexmark. Lexmark sells "regular cartridges" at full price, in which case the buyer is not subject to any terms restricting reuse or resale of the cartridge. Lexmark also sells "return program cartridges" at a discount but subject to a restriction on reuse and resale. Return program cartridges have a microchip that effectively prevents use of a refilled cartridge. However, third parties have circumvented this restriction by creating and installing their own replacement microchips. Impression Products, Inc. acquired used return program cartridges that had been altered by chip replacement and refilled with toner, and it then resold the cartridges in the United States. Lexmark sued Impression for patent infringement.

The district court, relying on the Supreme Court's decision in *Quanta Computer, Inc. v. LG Electronics, Inc.*,[2] ruled that Lexmark's initial sale exhausted its patent

rights and granted Impression's motion to dismiss. Lexmark appealed to the Federal Circuit, which took as a given that both the first purchaser and Impression as a re-purchaser had actual knowledge of the restrictions on reuse and resale before they made their purchases. The Federal Circuit, which *sua sponte* took the case en banc, reversed.

The court began its analysis by noting that the Patent Act provides that "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a). It characterized the provision's "without authority" language as a codification of the long-recognized meaning of infringement.[3] The court acknowledged the existence of the first-sale doctrine, which addresses the circumstances when the a sale of a patented good by the patentee authorizes the buyer to engage in acts involving the good, such as resale, that would infringe on the patent in the absence of such authority.[4] However, the court regarded the first-sale doctrine as merely an "interpretation" of the "without authority" language in § 271(a), and hence subject to the supremacy of the statute itself. It then concluded that a sale made under a clearly communicated, otherwise-lawful restriction as to post-sale use or resale does not confer on the buyer or a subsequent purchaser the authority to engage in the use or resale that the restriction precludes.[5]

A complete analysis of the court's decision is beyond the scope of this article. The court spent much of its opinion trying to explain why its conclusion was not inconsistent with Supreme Court precedent, in particular the Supreme Court's decision in *Quanta Computer*, which held that an "authorized sale of an article . . . exhausts the patent holder's rights and prevents the patent holder from invoking patent law to control postsale use of the article."[6] In this respect, the *Lexmark* opinion is far from persuasive.[7] In fact, strong arguments can be made that the decision is wrong and might be reversed if the Supreme Court accepts review of it. For now, however, the decision must be respected and transactional lawyers who represent secured lenders should consider its implications.

Implications of Decision

Consider a distributor that purchases and resells electronic goods from several manufacturers. Each of the manufacturers has one or more patents on the goods and by contract limits the geographic area in which the distributor may resell, to whom distributor may resell, or both. Distributor seeks funding from a lender and plans to use inventory as collateral to secure the loan. As part of its due diligence, the lender reviews the distributor's agreements with the manufacturers, and thus is aware of the restrictions on resale.

If lender makes the loan, obtains the security interest, and the distributor later defaults, will lender be able to conduct a disposition of the goods without violating the manufacturers' patent rights? More specifically, will lender be liable for patent infringement if it fails to comply with the contractual restrictions on resale to which the distributor was bound? Or worse, if the distributor's contracts with the manufacturers are terminated, will the lender be prohibited from selling the goods at all?

The *Lexmark* decision suggests that, absent the consent of the manufacturers, the lender will be subject to the restrictions on resale that limited the distributor, not as a matter of contract law, but pursuant to the unexhausted patent rights of the manufacturer. The case further suggests that if, under the agreements with the manufacturers, the distributor loses all rights to resell the goods after termination of the agreements, and the agreements are terminated, *any disposition* sale by the lender would violate the manufacturer's patent rights.

Of course, the lender could, prior to making the loan, seek the manufacturers' consent to an orderly disposition. Alternatively, the lender might by agreement with the manufacturers obtain a right to sell the goods back to the manufacturers, presumably at some discount from the initial purchase price. But without the cooperation of the manufacturers, the collateral might simply be of no value to the lender.[8] This might significantly impair the distributor's ability to obtain financing.

Possible Escape

The lender might have one argument to avoid these conclusions, but the argument is weak. Section 271(a) of the Patent Act provides that a person infringes on a patent by "sell[ing]" or "offer[ing] to sell" the goods without the patentee's authority. Arguably, a disposition under U.C.C. Article 9 is not a sale or offer to sell within the meaning the Patent Act. After all, U.C.C. Article 2 defines a sale of goods as "the passing of title from the seller to the buyer for a price."[9] And, so the argument continues, a secured party does not have title, merely a security interest, and thus does not seem to qualify as a "seller."

The retort to this line of reasoning is that an Article 9 disposition does transfer all of the debtor's rights in the collateral[10] – which rights include title – and thus involves a sale even if the secured party is not the "seller." The situation is analogous to an auction, which Article 2

expressly regards as a sale even though the auctioneer is typically not the seller, merely an agent for the seller.[11] What is more, Article 9 expressly gives a secured party the right to "sell" the collateral after default.[12] In short, a secured party conducting a disposition is *selling*, even if it not a *seller*, and that – along with "offering to sell" – is what the Patent Act prohibits without the patentee's consent.[13]

In fact, there is some suggestion that a secured party conducting a disposition is a seller. Section 9-610(d) indicates that a contract for sale gives rise to the normal warranties associated with such a transaction. Comment 11 then elaborates by saying that "a foreclosure sale of a car by a car dealer would give rise to an implied warranty of merchantability unless effectively disclaimed or modified." Because the implied warranty of merchantability arises only when the seller is a merchant with respect to goods of that kind,[14] by focusing on the secured party's status as a merchant with respect to the goods, rather than the debtor's, the comment implies that it is the secured party who is the seller.

Conclusion

Transactional attorneys who represent secured lenders should take notice of the *Lexmark* decision and be cognizant of how it might interfere with their client's ability to conduct a disposition of goods after default. A secured party is not normally bound by the debtor's contractual promises to third parties. The decision in *Lexmark* does not alter that rule; it does not impose *contractual duties* on the secured party. However, it does preserve and extend a patentee's *patent rights* in goods sold to the debtor and which constitute all or part of the collateral. This is potentially more serious than the imposition of contractual duties because it subjects a secured party that knows of and violates those patent rights to statutory damages and injunctive relief, even if the patentee had no provable damages under contract law.

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Notes:

1. 2016 WL 559042 (Fed. Cir. 2016).
2. 553 U.S. 617 (2008).
3. 2016 WL 559042 at *8.
4. *Id.* at *9.

This doctrine is judicially created. In that respect, the Patent Act differs from the Copyright Act, whose rules on infringement and exclusivity are subject to another statutory provision that grants owners of certain copyrighted articles a right to sell those articles without the permission of the copyright holder. *See* 17 U.S.C. § 109(a).

5. 2016 WL 559042 at *10.
6. 553 U.S. at 638.
7. Several lower courts have expressly ruled that the Supreme Court in Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617 (2008) overruled, *sub silentio,* the precedent on which the Federal Circuit in *Lexmark* relied. *See, e.g.,* Lexmark Int'l, Inc. v. Ink Techs. Printer Supplies, LLC, 2014 WL 1276133 at *5-7 (S.D. Ohio 2014), *rev'd*, 2016 WL 559042 (Fed. Cir. 2016); Ergowerx Int'l, LLC v. Maxell Corp. of Am., 18 F. Supp. 3d 430, 448-49 (S.D.N.Y. 2014); Static Control Components, Inc. v. Lexmark Int'l, Inc., 615 F. Supp. 2d 575, 585 (E.D. Ky. 2009).
8. This article does not address the extent to which the restrictions on resale would apply if the distributor were to seek bankruptcy protection.
9. U.C.C. § 2-106(1). *See also* Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co., 169 F. Supp. 146, 148-49 (W.D. Pa. 1958) (looking to U.C.C. Article 2 to interpret where a sale occurs for the purposes of determining venue for an action under § 271(a) of the Patent Act).
10. U.C.C. § 9-617(a)(1).
11. *See* U.C.C. § 2-328.
12. *See* U.C.C. § 9-610(a).
13. Alternatively, the secured party might be "induc[ing] infringement" under 35 U.S.C. § 271(b).

Nothing in the Patent Act expressly defines or explains what § 271 means by the phrase "offers to sell or sells," but what little case law exists suggests that the terms are to be interpreted broadly. *See, e.g.*, Scaramucci v. FMC Corp., 258 F. Supp. 598, 600-01 (W.D. Okla. 1966) (for the purposes of determining the proper venue for an action under § 271(a) for infringement, "sells" is not limited to a commercial sale, which is deemed to be made in the state of acceptance but should be given a broader application to include the successful solicitations of sales of the allegedly infringing item in a judicial district, even though the offers are accepted in another state).

14. *See* U.C.C. § 2-314(1).

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Recent Cases

SECURED TRANSACTIONS

In re Byrd,
2016 WL 617421 (Bankr. D. Id. 2016)
A credit buyer who, when signing an agreement to purchase a motor vehicle and grant a security interest to the seller, also signed a document purporting to make the transaction null and void if third-party financing were not obtained, was the owner of the car even though the financing was not approved.

Factor King, LLC v. Block Builders, LLC,
2016 WL 804115 (M.D. La. 2016)
The factor that purchased accounts of a subcontractor was subrogated to the rights of the subcontractor, but because the subcontractor's agreement with the general contractor expressly provided that the subcontractor was to hold payments received from the general contractor in a trust fund for the benefit of unpaid suppliers, and the general contractor and subcontractor subsequently entered into an agreement providing for the general contractor to pay the suppliers directly – which agreement was binding on the factor – the factor had no cause of action against the general contractor for the amounts it paid to the suppliers.

In re Marriage of Shannahan,
2016 WL 944307 (Cal. Ct. App. 2016)
The assignment and security interest in a client's interest in insurance proceeds purportedly granted to a law firm violated the automatic temporary restraining order in the client's divorce proceedings and was, therefore, invalid. Although the restraining order does not prevent a party from using property to pay reasonable attorney's fees in order to "retain legal counsel" in the proceeding, this exception deals only with the cost of initially hiring counsel, not the fees and costs incurred thereafter to maintain counsel in the action.

Charge Injection Tech., Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400 (Del. Super. Ct. 2016)
A corporation being sued for wrongful use and disclosure of proprietary information had no champerty defense after a litigation financier provided financing for the plaintiff's claim in exchange for a percentage of future proceeds of and a security interest in the claim. The financier did not acquire the claim itself or the right to control its prosecution, merely a share of the proceeds. Similarly, the financing arrangement did not constitute impermissible maintenance; the financier was not an officious intermeddler because the litigation preceded the financing arrangement and the financier had no right to control the litigation or the settlement of it.

BANKRUPTCY

In re Energy Future Holdings Corp.,
2016 WL 944608 (Bankr. D. Del. 2016)
The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions on the debt allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies. Neither the adequate protection payments nor the plan distributions constitute proceeds of collateral. Moreover, neither amounts resulted from the exercise of remedies under the loan documents. As a result, the intercreditor agreement did not speak to the allocation of payments and the payments were to be allocated pursuant to the Bankruptcy Code.

LENDING & CONTRACTING

MVB Bank, Inc. v. Stifel Bank & Trust,
2016 WL 379715 (E.D. Va. 2016)
A seller of loans containing cross-default clauses and guaranties breached a representation that the loans were cross-collateralized because there was no common collateral. The guarantor's pledge of his stock in one borrower to secure the debt of the other borrower was also not cross-collateralization. Moreover, the misrepresentation was material – entitling the buyer to exercise its contractual right to make the seller repurchase the loans – because the cross-default provision and the stock pledge do not provide the buyer with post-default rights functionally equivalent to the rights that cross-collateralization would have.

Capefirst Funding, LLC v. Botanical Skin Works, LLC,
2016 WL 901259 (E.D. Va. 2016)
Viewing as a whole the mutual release agreement executed by, among others, a factor and the person who guaranteed the validity of the borrower's representations, the clause terminating the factoring agreement and all obligations and rights related thereto was conditioned on payment of the Settlement Amount, even though the clause lacked such an express condition and another clause releasing the borrower and guarantors of liability contained such a condition.

FdG Logistics LLC v. A & R Logistics Holdings, Inc., 2016 WL 703887 (Del. Ch. Ct. 2016)

The choice-of-law clause in a merger agreement, which provided that "all disputes . . . be resolved according to Delaware law," did not subject the transaction to the Delaware Securities Act even though the target was a Delaware corporation. There was no allegation that the buyer was solicited to purchase the securities in Delaware or that any of the negotiations occurred in Delaware. The contractual choice of law covers matters of contract formation and interpretation, but does not subject the transaction to Delaware statutory law or taxation that would otherwise not apply. The integration clause in the agreement, by which the seller disclaimed the existence of representations or warranties outside the written agreement did not bar a claim based on fraud; to do that the buyer must have represented that the buyer was not relying on any statements outside the agreement.

Gordian Group, LLC v. Syringa Exploration, Inc., 2016 WL 1047392 (S.D.N.Y. 2016)

A contractual clause in which one party "consents to venue and jurisdiction in any court in which [the counter-party] is sued or otherwise found or brought" was unenforceable because it does not identify an ascertainable forum.

McDonald Data Servs., Inc. v. Secure One Data Solutions, LLC, 2016 WL 866731 (E.D. Tex. 2016)

A subordination agreement that provided in one provision that "[t]he Junior Lender shall not (i) exercise any of the remedies with respect to the Junior Debt, or (ii) take any action to enforce any of its liens on the Junior Lender's Collateral," but in another provision provided that "[o]nce the Blockage Period has expired, Junior Lender may, at its option, during any time period that Junior Debt is in default, take any enforcement action it dee[m]s appropriate with respect to all or any part of the Junior Debt" was ambiguous, creating a factual issue as to the agreement's meaning. Accordingly, summary judgment was not appropriate on claim for breach of the agreement.

Schwartz-Earp v. Advanced Call Center Techs., LLC, 2016 WL 899149 (N.D. Cal. 2016)

By providing her cell phone number in an application for a store credit card, the applicant consented to being contacted on her cell phone about matters related to her credit card, including by third-party debtor collectors. Therefore, the debt collector who called her cell phone using an automated dialing system did not violate the Telephone Consumer Protection Act.

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Update on Equal Credit Opportunity Act

In the February 2015 issue of THE TRANSACTIONAL LAWYER, an article titled *Does the ECOA Apply to Guarantors?* reported on a split among the circuit courts on whether the Federal Reserve was empowered to promulgate a rule that prohibited a creditor from requiring a spouse to guarantee a credit instrument. Specifically, The Eighth Circuit in *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), disagreeing with an earlier Sixth Circuit case, held that the Federal Reserve had exceeded its rule-making authority in treating a guarantor as an "applicant" protected by Act.

The Supreme Court granted *certiorari* and, on March 21, 2016, the Court issued a one-sentence, *per curiam* opinion stating that the decision of the Eighth Circuit was affirmed by a 4-4 vote. *See* 2016 WL 1092416.

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