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THE EQUAL CREDIT OPPORTUNITY ACT'S SPOUSAL CO-SIGNATURE RULES: SURETYSHIP CONTRACTS IN SEPARATE PROPERTY STATES

Winnie F. Taylor*

The Equal Credit Opportunity Act¹ (ECOA) was passed in 1974 to eradicate discrimination against credit applicants resulting from consideration of factors other than creditworthiness.² Although the ECOA has a broad scope,³ perhaps the most common inquiry regarding its applicability is: When may a lender require the signatures of both husband and wife?⁴ The answer to this question is complex, and therefore, it is not surprising that there are conflicting views regarding the appropriate response. Despite these conflicts, however, each view is premised on common factors: where the couple lives, what type of credit is being requested, and what documents are required to be signed.

Although no ECOA provision specifically addresses the question of

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¹ Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1697 (Supp. VI 1976). For an excellent summary of the ECOA's legislative history, see Baer, *The Equal Credit Opportunity Act and the "Effects Test,"* 95 BANKING L.J. 241, 245-51 (1978).

² See S. REP. No. 589, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 403, 404.

³ For a general overview of the broad applicability of the ECOA, see Taylor, *Meeting The Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFFALO L. REV. 73, 76-79 (1980). Before 1974 the credit evaluation process was virtually unregulated by federal law. Denial of credit on the basis of sex and marital status precipitated congressional support for legislation "to insure that the various financial institutions . . . exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex and marital status." 15 U.S.C. § 1691e. Although the ECOA was originally passed to eliminate discrimination towards female credit applicants, the ECOA was amended in 1976 to expand its coverage to discrimination on the basis of race, color, religion, national origin, age, receipt of public assistance income, and the exercise of rights guaranteed under the Consumer Credit Protection Act. *Id.* §§ 1691, 1691a.-1691f. (amending 15 U.S.C. § 1691 (1976)).

⁴ The ECOA has been described as fostering an unusual amount of litigation because of the broad range of possible litigants (anyone who is turned down for credit); promising civil remedies; potential class actions based on retrospective reviews of lending practices which disclose discrimination against a particular group; and new defenses in collection cases based on the ECOA's spousal co-signature rules. However, it is the rules on spousal co-signatures which raise the most questions of applicability to a particular situation. See Schiller, *The Equal Credit Opportunity Act: A Wellspring of Litigation*, 32 J. Mo. B. 407, 409 (1976).

when a creditor may require the signatures of both spouses,⁵ section 202.7(d)⁶ of Regulation B,⁷ the regulation implementing the Act, directly addresses the spousal co-signature question. The ECOA regulatory provisions, however, have often been criticized for their failure

⁵ According to the ECOA:

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.

15 U.S.C. § 1691d(a) (Supp. VI 1976) (emphasis in original).

⁶ 12 C.F.R. § 202.7(d) (1977) states in pertinent part:

(d) Signature of spouse or other person.

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

(2) If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, the 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 relied upon available to satisfy the debt in the event of default.

(3) If a married applicant requests unsecured credit and resides in a community property State or if the property upon which the applicant is relying is located in such a State, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable State law denied the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

(4) 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, any instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) 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 that the applicant obtain a co-signer, guarantor, or the like. The applicant's spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party. For the purposes of paragraph (d) of this section, a creditor shall not impose requirements upon an additional party that the creditor may not impose upon an applicant.

Id. (footnote omitted).

⁷ Regulation B is composed of 12 C.F.R. Part 202.

to provide clear and meaningful guidelines⁹ to creditors. Section 202.7(d) has been dubbed "the most controversial provision of Regulation B."⁹

The controversy surrounding Regulation B section 202.7(d) primarily stems from two of its requirements. The first involves circumstances under which a creditor may require one spouse to co-sign for the other in separate property states.¹⁰ The second concerns the general applicability of Regulation B spousal co-signature rules to community property states.¹¹

This Article will examine the ECOA spousal co-signature question as it relates to separate property states and will analyze the diverse approaches to its resolution. This examination will include a discussion of the controversial aspects of Regulation B section 202.7(d), followed by a discussion of proposals for an equitable resolution of the spousal co-signature problem.

I. MANDATORY SPOUSAL CO-SIGNATURE RULES

A. *Individual, Unsecured Credit*

The suretyship contract has been in existence since antiquity.¹² The participation of the surety or cosigner served the dual purpose of providing security to the creditor while allowing the debtor to obtain credit unsupported by collateral security arrangements. Consequently, debtors were able to establish credit reputations without encumbering their property or business operations.¹³

In separate property states, lending institutions traditionally required spouses to co-sign for each other when one or both of them applied for credit.¹⁴ If spouses apply jointly for credit, there is no

⁹ See, e.g., Comment, *The Equal Credit Opportunity Act Amendments of 1976: A Meaningful Step Toward The Elimination of Credit Discrimination*, 26 CATH. U.L. REV. 149, 161 (1976).

⁹ See Jacobs, *An Introduction to the Equal Credit Opportunity Act for the Commercial Creditor*, 83 COM. L.J. 338 (1978).

¹⁰ 12 C.F.R. § 202.7(d)(1), (2), (5) (1977). See *supra* note 6.

¹¹ 12 C.F.R. § 202.7(d)(3), (4) (1977). See *supra* note 6. The "community property" spousal co-signature problem is beyond the scope of this Article.

¹² See Loyd, *The Surety*, 66 U. PA. L. REV. 40 (1917).

¹³ See generally Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 834 (1968).

¹⁴ See Geary, *Equal Credit Opportunity - An Analysis of Regulation B*, 31 BUS. LAW. 1641, 1652 (1976). Testimony and statements made to Congress during the ECOA congressional hearings also revealed that the practice of automatically requiring spousal co-signatures was wide-

problem in requiring the signature of each. As a "co-maker"¹⁵ or "joint applicant,"¹⁶ each spouse voluntarily agrees to be primarily lia-

spread, particularly in regard to the female spouse. The following cases emphasized this point:

A married doctor who had an American Express card of her own when she was single was asked to have her husband sign a reapplication when she requested a simple name change. Sonia Fuentes, a lawyer who had been practicing for 15 years, was refused having a new credit card issued after she notified various stores that she had changed her name. She was told that she had to submit another application with information about her husband's income accompanied with his signature.

See *Hearings on H.R. 14856 & H.R. 14908, Part 2, Before the Subcomm. on Consumer Affairs of the House Comm. on Banking & Currency*, 93rd Cong., 2nd Sess. (1974) (submitted draft of research on Women and Credit by Sylvia L. Beckey, Legislative Attorney, American Law Division, Congressional Research Service, 633, 668 n.3) [hereinafter cited as *ECOA Hearings*].

In another case involving a lawyer, a financially independent female attorney earning in excess of \$25,000 annually could not get a one-year \$3,000 car loan without her husband's signature. *N.Y. Times*, Mar. 29, 1973, at 99, col. 8.

Moreover, it is not just spouses who are required to vouch for a woman's creditworthiness. Often single women cannot get a loan without a male co-signer. In one case, a woman in her 40's who, as head of the household, wanted to buy a house for herself and her children, could not get a mortgage without the signature of her 70 year old father who was living on a pension. See Note, *Equal Credit: You Can Get There From Here — The Equal Credit Opportunity Act*, 52 N.D.L. REV. 380, 383 (1975) (citing S. REP. No. 278, 93d Cong., 1st Sess. 17 (1973)).

Additionally, the spousal co-signature requirement has dominated commercial as well as consumer lending. "[I]t is generally the practice of banks to require the personal guarantees of the principals of close corporations and similar small business borrowers. Further, it has been the practice of many banks to require the spouses of these principals to join in such guaranties." Jacobs, *supra* note 9, at 334. For example, a woman who was the sole supporter of her husband and who earned \$16,000 a year, was denied a small business loan because she did not have her husband's authorization. See *ECOA Hearings, supra* at 637.

In discussing the economic problems of women entrepreneurs, one spokeswoman identified "discriminatory laws which in some states require a woman to obtain her husband's or father's signature . . ." as a major problem facing American businesswomen. See *Economic Problems of Women: Hearings Before the Joint Economic Comm., Part 3*, 93rd Cong., 1st Sess. 443, 571 (1973) (statement of N. Jeanne Wertz) [hereinafter cited as *Hearings on the Economic Problems of Women*]. See also *ECOA Hearings, supra* note 13, at 472 (statement of the Hon. Barbara Jordan, D. Texas, commenting that women entrepreneurs do not have equal access to bank loans, investment capital or venture capital partially because of state laws requiring the signature of husbands for business loans).

Several state statutes which formerly required the signature of both spouses if one spouse wanted to use his or her wages as collateral for a debt include: ARK. STAT. ANN. §§ 381-17 (1947); IND. CODE §§ 40-208 (1965); MASS. ANN. LAWS ch. 154, §§ 2 & 3 (Michie/Law. Co-op. 1970); MINN. STAT. ANN. § 181.07 (West 1966); MONT. CODE ANN. § 41-1506 (1947); PA. STAT. ANN. tit. 43, § 274 (Purdon 1964); WYO. STAT. § 27-202 (1957).

¹⁵ BLACK'S LAW DICTIONARY 32 (rev. 4th ed. 1968) defines "co-makers" as persons who put their names to a note without any intention of lending their credit to the accommodated party. It is important to distinguish "co-maker" from "co-signer." In this article "co-signer" refers to persons who act as surety for others. A "surety" is one who undertakes to pay money or to do any other act in the event that the principal fails in his obligation. Essentially, the surety incurs liability for the benefit of another without sharing in the consideration. *Id.* at 1611. "Surety" and "co-signer" will be used interchangeably throughout this article.

¹⁶ "Joint applicants" are persons who undertake primary responsibility to repay a debt. Joint accounts involve the pooling of the married couple's resources in determining creditworthiness.

ble for repayment of the debt.¹⁷ The problem arises when only one spouse is interested in obtaining unsecured credit.¹⁸ When the borrower is single, the creditor seeks the borrower's signature alone, assuming the borrower is individually creditworthy. But if the borrower is married, the creditor requires the signature of both spouses¹⁹ notwithstanding the fact of individual creditworthiness. The non-borrowing spouse is required to co-sign as a surety for the borrower. By requiring suretyship of the non-borrowing spouse as a condition to the borrowing spouse's ability to obtain unsecured credit, lenders place themselves in the optimal position for successful repayment. Having two persons personally responsible to repay a debt is obviously better than having one.²⁰

B. Unnecessary Spousal Co-Signature and the ECOA

One major problem inherent in the mandatory spousal co-signer rule is that it permits creditors to require a co-signer even though the applicant spouse is independently creditworthy. Thus, the rule contradicts the Regulation B directive that creditors must focus on an

See ECOA Hearings, supra note 14, at 487 (statement of Wallis G. Hocker, Vice-President & General Credit Manager, J.C. Penney).

¹⁷ In *Cragin v. First Fed. Sav. & Loan Ass'n*, 498 F. Supp. 379 (D. Nev. 1980), the court held that requiring both joint applicants to sign loan documents did not violate the signature requirements of the ECOA and Regulation B. Similarly, the United States District Court for the Northern District of Ohio held that where both parties are joint obligors on the original agreement, the creditor may require both spouses' signatures. *Sutliff v. County Sav. & Loan Co.*, 533 F. Supp. 1307 (N.D. Ohio 1982).

¹⁸ If credit is secured, a creditor may obtain the signature of the non-applicant spouse 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, any instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.
12 C.F.R. § 202.7(d)(4) (1977).

¹⁹ An unusual case of a creditor's refusal to consider a married borrower's individual creditworthiness was brought to the Senate's attention by Senator William Brock (Rep. Tennessee). Senator Brock told his colleagues about a 41-year-old female mayor of Davenport, Iowa who had been denied credit because her husband had not signed the loan documents. Mayor Kirschbaum's story is told in the following excerpt from the Knoxville News-Sentinel:

Kathryn Kirschbaum can be mayor of Davenport, Iowa, a city of about 103,000 but she can't get a credit card from Bank-Americard on her own.

The reason, she says, is that the signature of her husband, Raymond, has to be on the application. She doesn't feel his signature is necessary. She feels her own credentials are enough.

119 CONG. REC. 24,061 (1973).

²⁰ In this regard, the creditor is requiring the signature of the spouse as "insurance, which is useful 'just in case' the principal obligor attempts to transfer his assets to another person, or dies or defaults . . ." Geary, *supra* note 14, at 1652.

applicant's individual creditworthiness.²¹ To ensure that creditors maintain a proper focus, Regulation B section 202.7(d)(1) states: "A creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."²² Generally, Regulation B section 202.7(d)(1) prohibits a creditor from routinely requiring a co-signer. It unequivocally vitiates the historical practice by creditors of requiring the signature of both spouses when one of them applies for individual, unsecured credit.

*Anderson v. United Finance Co.*²³ is illustrative of one court's intent to rigorously uphold the Regulation B section 202.7(d)(1) mandate against unnecessary spousal co-signatures. In *Anderson*, a wife independently applied for credit and was found to be creditworthy. Nevertheless, she was told by the creditor that her husband's signature was required on the promissory note.²⁴ The Ninth Circuit held that the creditor violated Regulation B by requiring the non-applicant spouse's signature.²⁵ The court declared that Regulation B will not permit creditors to obtain additional signatures when the applicant individually qualifies for the credit requested.²⁶ *Anderson* is significant in that it judicially sanctions the Federal Reserve Board's authority under Regulation B to proscribe spousal co-signature rules that consider factors other than the applicant spouse's individual creditworthiness.²⁷

²¹ In stating the purpose of the ECOA, Congress boldly declared that: "It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all *creditworthy* customers without regard to sex or marital status." 15 U.S.C. § 1691 (1974) (emphasis added).

²² 12 C.F.R. § 202.7(d)(1) (1977).

²³ 666 F.2d 1274 (9th Cir. 1982).

²⁴ *Id.* at 1275.

²⁵ *Id.* at 1276. Earlier the trial court had held that the creditor only "technically violated" the ECOA by requiring the non-applicant spouse's signature. *Id.* According to that court, such a violation did not result in discrimination. The Ninth Circuit disagreed. First, the court noted that requiring a spouse's signature when it is not needed is "just the type of discrimination which" the ECOA "was created to prohibit." *Id.* Second, the court cited precedent from the Federal Reserve Board and the Comptroller of the Currency supporting its conclusion that credit discrimination results when an applicant who individually qualifies for a loan is forced to obtain his or her spouse's signature. *Id.* at 1277. Finally, the court concluded that by violating Regulation B § 202.7(d)(1), the creditor violated the ECOA. *Id.*

Anderson also illustrates the potential absurdity of the mandatory spousal signature rule. Despite the fact that Mrs. Anderson was independently creditworthy, her husband was required to co-sign, even though he was on welfare and disabled at the time the loan was requested. *Id.* at 1276.

²⁶ *Id.*

²⁷ *Anderson* is also significant in several other respects. First, it sanctions the validity of

C. Enforcement of ECOA Co-Signature Rules

Although it is clearly illegal for creditors to uniformly require spousal co-signatures, the consequences for violating Regulation B are unclear. Assume that a creditor wrongfully obtains a spouse's co-signature; then the principal spouse defaults and the creditor sues the co-signing spouse. The co-signing spouse will defend by arguing that Regulation B prohibits mandatory spousal co-signatures. Whether, however, the co-signer's argument will defeat the creditor's claim for payment and, moreover, whether the spouse who was forced to co-sign may sue the creditor for violating Regulation B are questions not adequately resolved by the ECOA. With regard to the latter question, the ECOA allows aggrieved credit "applicants" to recover damages for credit discrimination against them.²⁸ Neither the Act nor Regulation B, however, gives co-signers a statutory right to recover damages. This inability to recover damages may lead a spouse who has been illegally required to co-sign to think that he or she may simply refuse to repay the debt.

Whether the co-signing spouse has a right to refuse payment under the ECOA is also unclear. Normally, a creditor's breach of a federal regulatory provision does not relieve the debtor of his or her obligation to the creditor.²⁹ Here, however, the case is unique because the spouse would not be a debtor but for the creditor's breach of the ECOA.³⁰ Thus, a persuasive argument can be made for releasing the co-signer. The argument would be even more forceful if the ECOA's legislative history indicated that Congress or the Federal Reserve Board intended this result. There is, however, no evidence of congres-

Regulation B § 202.7(d)(1) and clarifies its purpose. In the Ninth Circuit court's opinion, "[t]he rationale behind § 202.7(d)(1) is to insure that individual credit is, in reality, available to any credit-worthy married applicant." *Id.* at 1277. Second, it gives an excellent analysis and discussion of the ECOA damages provision. *Id.* at 1277-78.

²⁸ 15 U.S.C. § 1691e (1974). The provision states in pertinent part:

Civil liability

- (a) Individual or class action for actual damages. Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

See also *id.* § 1691e(b)-(j) (prescribing other elements of the cause of action including other remedies, jurisdiction, costs of suit, etc.).

²⁹ See, e.g., *Schuyler Nat'l Bank v. Gadsden*, 191 U.S. 451 (1903) (holding that violations of federal statutes governing bank's acquisition of security do not operate to make the obligation unenforceable); *Langham's Estate v. American Nat'l Bank*, 165 F.2d 968, 969-70 (1948) (actions by bank beyond restrictions imposed by federal banking law in obtaining leases furnishes no basis for cancellation of contracts by lessor).

³⁰ See 15 U.C.C. LAW LETTER 8 (Jan. 1982).

sional or regulatory intent regarding release of illegally obtained co-signers. This lack of evidence indicates a serious oversight. Prohibiting creditors from requiring spousal co-signatures without providing a remedy for one whose signature has been wrongfully obtained obviously weakens a link in the ECOA enforcement chain. Creditors are less likely to comply with a regulatory provision that can be violated with impunity.

The Federal Reserve Board, however, attempts to resolve the issue of whether a co-signer spouse has a duty to repay. In 1981, the Board adopted an ECOA enforcement guide³¹ which addresses the question of illegally obtained spousal co-signatures. The guide permits a regulatory agency either to order the release of an illegally required co-signer or to order the creditor to let the applicant name a substitute co-signer.³²

If the agency affirmatively releases the co-signer, then it is unquestionable that the co-signer may refuse to repay. The problem, however, is that the guide apparently assumes that the co-signer is bound to pay until the agency acts. If agency intervention never occurs, then the co-signing spouse remains liable. Because there is no uniformity among the enforcement agencies³³ as to the frequency or comprehensiveness of their examinations,³⁴ it would be overly presumptuous to

³¹ *Id.*

³² *Id.*

³³ The following federal agencies enforce Regulation B for the particular classes of creditors stated: national banks (Comptroller of the Currency); state member banks (Federal Reserve Bank serving the district in which the state member bank is located); nonmember insured banks (Federal Deposit Insurance Corporation Regional Director for the region in which the nonmember insured bank is located); savings institutions insured by the FSLIC and members of the FHLB System (except for savings banks insured by FDIC) (The Federal Home Loan Bank Board Supervisory Agent in the district in which the institution is located); federal credit unions (National Credit Union Administration); creditors subject to Civil Aeronautics Board (Civil Aeronautics Board); creditors subject to Interstate Commerce Commission (Interstate Commerce Commission); creditors subject to Packers and Stockyards Act (Packers and Stockyard Administration); small business investment companies (U.S. Small Business Administration); brokers and dealers (Securities and Exchange Commission); federal land banks, federal land bank associations, federal intermediate credit banks and production credit associations (Farm Credit Administration); retail, department stores, consumer finance companies, all other creditors, and all nonbank credit card issuers (Federal Trade Commission).

³⁴ For example, the Federal Reserve Board's Annual Report to Congress indicates that the Federal Reserve System examined 400 banks in 1977, 1978 FED. RES. BD. ANN. REP. 347, and 800 in 1978. *Id.* at 284. No figure was given for the number of banks examined in 1979, yet the 1980 annual report stated that 10% more banks were examined that year than those examined in 1979. 1980 FED. RES. BD. ANN. REP. 77. Without making specific reference to the number of compliance examinations, the 1981 annual report states that there was a 10% increase in overall ECOA compliance. 1981 FED. RES. BD. REP. 154.

The Comptroller of the Currency is another case in point. The Federal Reserve Board's Annual Report to Congress indicates that this agency reported 2,859 bank examinations in 1977,

conclude that they will ferret out all situations involving wrongfully obtained spousal co-signatures. Thus, agency intervention cannot be relied upon to resolve this problem, and the co-signing spouse should be released with or without agency intervention if forced to co-sign for a creditworthy spouse.

Several other observations are in order regarding the ECOA enforcement guide. Although Regulation B allows the creditor to require a co-signer for an uncreditworthy applicant, the applicant has the right to select this person.³⁵ A spouse may serve as the co-signer only if the applicant indicates this preference. The ECOA enforcement guide appears to be consistent with Regulation B in that it gives the applicant spouse an opportunity to find a substitute co-signer.³⁶ The guide does not go far enough, however, because it implies that the co-signing spouse remains liable until the substitution is made. The ultimate harshness of this result is evident in the instance where a substitute co-signer is never found.

The shortcomings of the ECOA enforcement guide suggest that the question regarding the right of an illegally required co-signer to refuse to pay deserves more in-depth regulatory attention. While it is significant that the Federal Reserve Board has identified the rights of spousal co-signers as an ECOA problem area, the Board should devote more time to resolving the problems arising from violation of those rights.

D. Jointly Owned Property

The Regulation B rule allowing one spouse to obtain individual unsecured credit without the co-signature of the other spouse is premised on the assumption that the applicant spouse's creditworthiness be established without reliance on property jointly owned by both

1977 FED. RES. BD. ANN. REP. 350, but none were listed for 1978. The 1979 report showed 1,779 bank examinations for that year, 1979 FED. RES. BD. ANN. REP. 236, while the 1980 report did not comment on the number of examinations made. Neither the 1981 nor the 1982 annual report discussed the extent of agency examination for those years.

The extent and frequency of compliance examinations conducted by the Federal Home Loan Board is also illustrative. Out of the six annual reports submitted to Congress by the Federal Reserve Board for the years 1977-1982, the number of bank examinations was reflected in only one. In 1979, there were 3,350 examinations. *Id.* While failure to include the number of compliance examinations in the Federal Reserve Board Annual Reports does not mean that no agency examinations were made, this haphazard account permits only hesitant reliance upon agency intervention as an effective mechanism for releasing spouses whose co-signatures were wrongfully obtained.

³⁵ 12 C.F.R. § 202.7(d)(5).

³⁶ See *supra* note 24.

spouses. When jointly owned property is relied on to meet creditworthiness standards, the general rule may vary, depending upon the form of co-ownership. Regulation B requires creditors to consider factors such as attachment, execution, severance and partition which may affect the value to the creditor of the applicant's interest in the property.³⁷

Thus, if the applicant is requesting individual, unsecured credit and is relying upon jointly held property to establish creditworthiness, creditors must determine what portion of the property the applicant is able, under state law, to transfer without the signature of the spouse.³⁸ If the portion is great enough so that the applicant's financial position meets the creditor's standards of creditworthiness, no further signature may be required.³⁹

An example illustrates this point. Assume that a married female applicant with a \$15,000 annual gross income requests a \$20,000 loan; she lists property valued at \$10,000 as co-owned with her spouse; and that a showing of \$15,000 gross income and/or property is sufficient in this case to establish creditworthiness. Clearly, the applicant's interest in the jointly owned property combined with her salary is sufficient to establish her creditworthiness. Nevertheless, in such a case, the creditor may still require the signature of her spouse if the property relied upon is co-owned as tenants by the entirety.⁴⁰ This is because state law would usually not permit the judgment-creditor of only one of the owners to subject the property to severance or parti-

³⁷ More specifically, Regulation B § 202.7(d)(2) provides that:

If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, the 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 relied upon available to satisfy the debt in the event of default.

³⁸ See *Signature on Debt Instruments*, Comptroller of the Currency Interpretive Letter, October 27, 1977, reproduced at 5 CONSUMER CRED. GUIDE (CCH) ¶ 42,100 (1977) [hereinafter cited as *Signature on Debt Instruments Interpretive Letter*].

³⁹ *Id.*

⁴⁰ When property is transferred to a husband and wife, a tenancy by the entirety is created, unless a contrary intention is clearly expressed. The parties hold title to the whole estate with a right of survivorship. Upon the death of either spouse, the other spouse takes the whole interest to the exclusion of the deceased's heirs. The foundation of the tenancy by entirety is the joint tenancy, adapted to the common law concept that parties to a marriage are legally only one person. BLACK'S LAW DICTIONARY 1635 (4th ed. 1968) (citing *Raptes v. Cheros*, 259 Mass. 37, 155 N.E. 787 (1927); *Smith v. Russell*, 172 A.D. 793, 159 N.Y.S. 169 (1916); *Dutton v. Buckley*, 116 Or. 661, 242 P. 626 (1926)).

tion, and thus the creditor would be unable to execute absent the spouse's signature.⁴¹ On the other hand, notwithstanding the fact that the applicant's interest in the property is sufficient to establish creditworthiness, if the creditor concludes that the form of ownership (i.e., joint tenancy⁴² or tenancy in common⁴³) permits severance, partition, and subsequent execution by the creditor upon the interest of the applicant without the signature of the spouse on any document, a spousal co-signature could not be legally required.⁴⁴

If, in the above hypothetical, the applicant spouse's interest in the co-owned property was only \$2,000 and therefore insufficient to meet creditworthiness standards, the creditor could require the signature of the other joint owner. In this situation, the additional signature is allowed to protect the creditor's ability to reach the non-applicant's assets upon which the credit decision was made.⁴⁵ Thus, the non-applicant spouse's signature may be obtained only on the documents necessary, under state law, to make the property available to the creditor in the event of default. This does not mean, however, that the creditor may routinely require the non-applicant spouse's signature on the note, thus subjecting the non-applicant to personal liability on the loan.⁴⁶ It may well be necessary to have that party sign only a valid security instrument to make the property available. If so, Regulation B would prohibit a creditor's request that the non-applicant co-owner sign the note. This distinction between a promissory note and any accompanying security agreement is crucial to compliance with Regulation B.⁴⁷

⁴¹ See Md. Op. Att'y Gen. No. 82-009 (Feb. 18, 1982) [hereinafter cited as Op. Att'y Gen. No. 82-009]. Maryland is typical of most jurisdictions.

⁴² A joint tenancy is created by one conveyance to two or more persons who share an equal, undivided interest in the property, each having the right of survivorship upon the death of any joint tenant. BLACK'S LAW DICTIONARY 1634 (4th ed. 1968) (citing *Thornburg v. Wiggins*, 135 Ind. 178, 34 N.E. 999 (1893); *Simons v. McLain*, 51 Kan. 153, 32 P. 919 (1893); *Van Ausdall v. Van Ausdall*, 48 R.I. 106, 135 A. 850 (1927)).

⁴³ A tenancy in common is a form of ownership whereby each tenant owns an undivided interest in property, with no right of survivorship. Upon a tenant's death, his interest passes to his estate or heirs. During the tenancy, each owner is entitled to equal use and possession. BLACK'S LAW DICTIONARY 1635 (rev. 4th ed. 1968) (citing *Fullerton v. Storthz Bros. Inv. Co.*, 190 Ark. 198, 77 S.W.2d 966, 968 (1935); *Fry v. Dewees*, 151 Kan. 488, 99 P.2d 844, 847 (1940)).

⁴⁴ As for unsecured loans, joint tenants and tenants in common can make their interests in the property available to satisfy the debt in the case of default without the signature or consent of any other co-tenant. Op. Att'y Gen. No. 82-009, *supra* note 41, at 6.

⁴⁵ See *Jacobs*, *supra* note 9, at 344.

⁴⁶ See *Schiller*, *supra* note 4, at 410.

⁴⁷ See *Signature on Debt Instruments Interpretive Letter*, *supra* note 38, at 2.

It is important to understand the difference between the note and the security agreement. The note represents the promise to repay the debt. The security agreement per-

Furthermore, if the creditor determines that the jointly held property adds to the applicant's creditworthiness but does not make the applicant creditworthy, then, while the creditor may request that the applicant obtain a co-signer, the creditor may not require that the spouse be that signatory.⁴⁸ Thus, if the applicant and the co-signer together meet the creditworthiness standards without a consideration of the value of the jointly held property, the creditor may not impose any signature requirements on the applicant's spouse.⁴⁹

Similarly, if the co-owned property listed does not add to the applicant's creditworthiness, then it could be contended that a request for the signature of the non-applicant spouse would constitute a violation of Regulation B.⁵⁰ For example, assume that both the applicant's income and loan requested are \$20,000, but the applicant nevertheless lists property valued at \$10,000 as co-owned with her spouse. On these facts, the form of co-ownership (i.e., tenancy in common or tenancy by the entirety) does not matter. The creditor cannot require the signature of the non-applicant spouse on any document because it is not necessary for the creditor to consider the co-owned property to establish the applicant's creditworthiness.

The foregoing hypotheticals suggest that neither routinely requesting the signature of the non-applicant spouse who co-owns property with the applicant nor disregarding jointly held property without regard to its bearing on the creditworthiness of the applicant is acceptable. Both practices are inconsistent with the purpose of the ECOA and violate Regulation B.⁵¹

II. UNEVEN APPLICATION OF MANDATORY SPOUSAL CO-SIGNATURE RULES

On its face, the mandatory spousal co-signature rule has the poten-

mits you to possess certain property to satisfy the debt if there is a default. A person who signs a note and a security agreement agrees to repay the debt from other property or funds if the property covered by the security agreement is insufficient. A person who signs the security agreement alone agrees to give up his or her rights to the property if it must be used to satisfy the debt. This is the only thing agreed to.

Id. See also W. TAYLOR, *THE EQUAL CREDIT OPPORTUNITY ACT: WHAT CREDIT UNIONS SHOULD KNOW* 44 (1981).

⁴⁸ 12 C.F.R. § 202.7(d)(5) (1977).

⁴⁹ For a thorough analysis of this situation, see Mitchell & Hudson, *Equal Credit Quandary*, 1973 Md. BANKING Q. 3 (Fall).

⁵⁰ *Id.*

⁵¹ See Federal Reserve Board Letter No. 5, Mar. 1, 1977, reproduced at 5 CONSUMER CRED. GUIDE (CCH) ¶ 42,084 (1977).

tial to create major difficulty for all married persons. If one spouse fails to convince the other to co-sign for a debt, then the spouse interested in borrowing cannot obtain credit even though he or she is independently creditworthy. As applied, however, the spousal co-signature requirement has imposed greater hardship on married women than on married men, primarily because creditors have applied the requirement unevenly.⁵² In most instances, the husband has been required to co-sign for his wife's debts while the wife has not been required to sign for her husband's debts.⁵³ This one-sided application of the rule stems from the common law proposition that women could not obligate themselves to repay the debts of third persons.⁵⁴

⁵² The following excerpt illustrates the common practice of uneven application of the spousal co-signer rule:

A man and a woman with virtually identical qualifications applied for a \$600 loan to finance a used car without the signature of the other spouse. Each applicant was the wage earner, and the spouse was in school. Eleven of the banks visited by the women either strictly required the husband's signature or stated it was their preference, although they would accept an application and possibly make an exception to the general policy. When the same banks, plus two additional banks that would make no commitment to the female applicant, were visited by the male interviewer, six said that they would prefer both signatures but would make an exception for him; one insisted on both signatures; and six told the male interviewer that he, as a married man, could obtain the loan without his wife's signature.

NATIONAL COMM'N ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 153 (1972). The Commission's findings resulted from a survey of 23 commercial banks, conducted by the St. Paul Department of Human Rights.

⁵³ Male dominance in the marital relationship has often been cited as the historical justification for allowing married men to obtain credit without their wife's signature. *Wakefield v. Wakefield*, 149 Pa. Super. 9, 25 A.2d 841 (1942). One court held that its state statute prohibiting married women co-signer contracts is justifiable, because: "[U]nder the common law the husband is presumed to be the dominant of the two parties to the marriage and it is assumed that it [the statute] was necessary to protect the wife's interest in connection with her property" *Barnett v. Barnett*, 262 Ala. 655, 659, 80 So. 2d 626, 630 (1955).

⁵⁴ *Bradbury v. Howard*, 31 F.2d 222 (D.C. Cir. 1929); *Schwartz v. Sacks*, 2 F.2d 188 (D.C. Cir. 1924); *Cragford Bank v. Cummings*, 216 Ala. 377, 113 So. 243 (1927) (married woman may not be surety for her husband); *Baker v. Owensboro Sav. Bank & Trust Co.'s Receiver*, 140 Ky. 121, 130 S.W. 969 (1910) (married woman cannot become personally liable as surety for anyone).

New York has traditionally enforced a married woman co-signer contract only if the wife expressly stated in the contract her intent to bind her separate estate to repay the obligation incurred. See *Nash v. Mitchell*, 71 N.Y. 199 (1877); *Gosman v. Cruger*, 69 N.Y. 87 (1877); *Manhattan Brass & Mfg. Co. v. Thompson*, 58 N.Y. 80 (1874); *Trecking v. Rolland*, 53 N.Y. 422 (1873); *Corn Exch. Ins. Co. v. Babcock*, 42 N.Y. 613 (1870); *Yale v. Dederer*, 18 N.Y. 265 (1858). Nebraska courts held similarly. See, e.g., *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N.W. 82 (1898).

Florida enforced married women co-signer contracts only if the husband gave written consent that the wife could obligate her separate property. See, e.g., Fla. Op. Att'y Gen., 061-182, Nov. 13, 1961.

In Missouri and West Virginia, where the husband incurred the debt and the wife merely co-signed thereby consenting to a security interest in property owned jointly by both of them, the court required that all of the husband's portion of property be exhausted before selling his

Ancient Rome was the birthplace of this concept. Under Roman law, the inability to act as surety was not unique to married women; it applied to all women.⁵⁵ American common law, on the other hand, limited the disability to married women, because at common law a married woman was incapable of acting as a legal person.⁵⁶ By marrying, the husband and wife became one, with the husband maintaining his continuous capacity to contract and the wife losing, in large part, her own contractual capacity.⁵⁷

A. Married Women Co-Signature Contracts and State Coverture Laws

The laws prohibiting married women from becoming sureties were embodied in a set of protective common law rules known as "coverture" laws.⁵⁸ These rules placed married women under the "disability of coverture" which limited their contractual freedom.⁵⁹ Several theo-

wife's property. *See, e.g.* *Wilcox v. Todd*, 64 Mo. 388 (1877); *Jones v. Thorn*, 45 W. Va. 186, 32 S.E. 173 (1898).

Illinois' common law held a wife possessed no capacity to contract. *See, e.g.*, *Forsyth v. Barnes*, 228 Ill. 326, 81 N.E. 1028 (1907). All contracts of married women were absolutely void. *McLean v. Griswald*, 22 Ill. 218 (1859).

⁵⁵ In Rome, circa A.D. 46, all women were forbidden by law from entering into suretyship contracts. A special Senate decree, "Senatus-consultum Velleianum," prohibited married women from making contracts of any kind, including suretyship contracts. *See generally* Comment, *Women Sureties*, 76 S. AFR'N L.J. 322 (1959). *See also* Loyd, *supra* note 12, at 45.

⁵⁶ *See, e.g.*, *Thompson v. Thompson*, 218 U.S. 611 (1910); *Tony v. Marvin*, 15 Mich. 60, 66 (1866); *Burdeno v. Amperse*, 14 Mich. 90, 92 (1866); *Wynn v. Southan*, 86 Va. 946, 11 S.E. 878 (1890).

One commentator has noted that requiring the signatures of both parties to a marriage tends to perpetuate the legal position of women as non-persons. *See ECOA Hearings, supra* note 14, at 396 (Statement of Carol Burris, President, Women's Lobby, Inc.).

⁵⁷ *See* Bysiewicz & MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 601 (1973). *See also* *Goldberg v. Zellner*, 218 Ark. 239, 235 S.W. 870 (1921); *Love v. Moynehan*, 16 Ill. 277, 280 (1855); *In Re Opinion of the Justices*, 303 Mass. 631, 22 N.E.2d 49 (1939); *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

⁵⁸ "Coverture" refers to the period of time during a woman's marriage. Under the English common law, a single woman or a "feme sole" became known to the law upon her marriage as a "feme covert." Note, *The Impact of Michigan's Common-Law Disabilities of Coverture on Married Women's Access to Credit*, 74 MICH. L. REV. 76, 78 (1975). "Covert" means protected or sheltered. BLACK'S LAW DICTIONARY 439 (rev. 4th ed. 1968).

⁵⁹ At common law women labored under the disability of coverture and could not become a surety for another. *Duran v. Judson*, 128 Ga. App. 459, 197 S.E.2d 163, *aff'd*, 231 Ga. 206, 200 S.E.2d 872 (1973). In fact, under the coverture doctrine, married women had no contractual capacity. *See* Knowles, *The Legal Status of Women In Alabama, II: A Crazy Quilt Restitched*, 33 ALA. L. REV. 375, 378 (1982). Alabama and Georgia are typical of most jurisdictions. *See generally* Cameron, *Coverture's Last Stand: The Married Woman's Lack of Contractual Capacity in Michigan*, 8 MICH. REAL PROP. REV. 75 (1981).

ries have been espoused to explain why married women needed protection from entering into suretyship contracts. One theory is that the coverture laws were needed to protect married women from the temptation of interceding on behalf of third persons, thereby risking the loss of all their private property.⁶⁰ This theory apparently regards the married woman as one who possesses an uncontrollable urge to assist others, even to her own personal detriment. Another theory views the laws as necessary to protect married women from the importunities of their husbands.⁶¹ This theory is based on the assumption that most husbands are overbearing and unscrupulous and that married women cannot be trusted to resist their husband's solicitations. Still a third theory perceives the laws against married women suretyship contracts as premised on the assumption that married women lack the intelligence to understand and competently handle contractual matters. Thus, under this theory, the laws are needed to protect married women from their own ignorance.⁶²

Although all states had some form of coverture law⁶³ to protect married women, there was not total agreement that the coverture laws regarding suretyship contracts were actually protective. The Wisconsin Supreme Court believed these laws crippled rather than benefitted married women. In *First Wisconsin National Bank of Milwaukee v. Milwaukee Patent Leather Co.*,⁶⁴ the court held that the inability of a married woman to contract as a surety for the debts of another was not a special protection she enjoyed. The court concluded that in reality the rule was for her husband's benefit,⁶⁵ and noted the irony in a law that protected a married woman by placing her under contractual "disabilities."⁶⁶

⁶⁰ Comment, *supra* note 55, at 323.

⁶¹ An Alabama court declared that its statute prohibiting married women co-signer contracts "is founded upon public policy, which is to protect the wife's estate against the influence of her husband . . ." *Sims v. Hester*, 228 Ala. 321, 322, 153 So. 281, 282 (1934). See also *Noel v. Tucker*, 233 Ala. 349, 171 So. 640 (1936). A Georgia court also believed that married women should be protected partially because of: "[T]he husband's influence over the wife, and the necessity of protecting the wife's right to contract and to own property against his persuasion of the natural tendency of a wife to sacrifice her separate estate to save her husband from financial disaster." *Gross v. Whiteley*, 128 Ga. 79, 79, 57 S.E. 94, 96 (1907).

⁶² See *Loomis v. Gray*, 60 Idaho 193, 90 P.2d 529 (1939).

⁶³ See Note, *supra* note 58, at 78 (1975).

⁶⁴ 179 Wis. 117, 190 N.W. 822 (1922).

⁶⁵ *Id.* at 123, 190 N.W. at 824.

⁶⁶ *Id.* The court first cited Blackstone's observations of a woman's legal status merging with her husband's upon marriage, and then noted: "'We may observe that even the disabilities which the wife lies under [upon marriage] are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England.'" *Id.* The court then made the following statement regarding the disabilities under which a married woman labored at

Careful examination of coverture laws caused many states to question their efficacy. Eventually, state legislatures began to systematically remove coverture disabilities by enacting Married Women's Property Acts.⁶⁷ Generally, the Married Women's Property Acts re-

common law:

It is to be noted, however, that in this very phrase, as in the discussion of related subjects, Blackstone referred to the limitations imposed on the wife by marriage as 'disabilities,' and while in the closing sentence he says they are intended for her protection and benefit, nevertheless the theory of the law as stated by Blackstone as well as other common-law writers clearly shows that as to the wife they were considered disabilities and as to the husband as an assertion of a right which he enjoyed for his personal benefit and protection.

Id.

The Kentucky high court agreed that the coverture laws barring married women co-signer contracts were for the husband's benefit. Voicing this opinion, that court said: "[W]e apprehend that at the common law the so-called protection of the feme covert from liability, on her executory contracts, so as to relieve her general estate pledged to secure their execution, was in reality out of consideration of the husband's marital rights . . ." *Daviess County Bank & Trust Co. v. Wright*, 129 Ky. 21, 18, 110 S.W. 361, 362 (1908).

⁶⁷ See Note, *supra* note 58, at 79. Mississippi was the first state to enact a married women's statute. *Id.* at n.28. Nearly every state adopted a married women's property act or a constitutional provision which changed the old common law rule barring married women from contracting so as to give the married woman substantially the same contractual capacity as her husband. Cameron, *Michigan's New Statute On Married Women's Contractual Capacity: The End of Coverture*, 9 MICH. REAL PROP. REV. 22 (1982).

All separate property states and the District of Columbia have statutory provisions which can be labeled as "Married Women's Property Acts." See ALA. CODE §§ 65-76 (1959); ALASKA STAT. §§ 25.15.010-.110 (1962); ARK. STAT. ANN. §§ 55-401 to -402, -404, -406 to -415 (1971); COLO. REV. STAT. §§ 90-2-1 to -11 (1963); CONN. GEN. STAT. § 46-9 (1958); DEL. CODE ANN. tit. 13, §§ 311-14 (1953); D.C. CODE ANN. §§ 30-201 to -215 (1967); FLA. STAT. §§ 708.08-.10 (1971); GA. CODE ANN. §§ 53-501 to -503, 53-505 to -508, -510 & -512 (1961 & Supp. 1970); HAWAII REV. STAT. §§ 573-1 to -2, 573-6 to -7, 574-1 to -3 & -5 (1968); ILL. ANN. STAT. ch. 68, §§ 1-16 (Smith-Hurd 1959); IND. CODE ANN. § 38-101 (Burns 1969); IOWA CODE ANN. §§ 597.1-.5, 597.16-.19 (West 1950); KAN. STAT. ANN. §§ 23-201, -207 (1964); KY. REV. STAT. ANN. §§ 404.010-.060 (Baldwin 1971); ME. REV. STAT. ANN. tit. 19, §§ 161-65 (1964); MD. ANN. CODE art. 45, §§ 1-5, 11, 14-20 (1957 & Supp. 1973); MASS. GEN. LAWS ANN. ch. 209, §§ 1-2, 7-13 (West 1958 & Supp. 1973); MICH. COMP. LAWS §§ 557.1-.2, .4, .11, .51, .52, 557.201-.209 (1948); MINN. STAT. ANN. §§ 519.01-.03 (West 1945); MISS. CODE ANN. §§ 451-56 (1942); MO. REV. STAT. § 451.250 (1949); MONT. CODE ANN. §§ 36-101 to -105 (1961); NEB. REV. STAT. §§ 42-201 to -207 (1968); N.H. REV. STAT. ANN. §§ 460:1, :2, :5 (1968); N.J. STAT. ANN. § 37:2-16 (West Supp. 1973-1974); N.Y. GEN. OBLIG. LAW §§ 3-301 to -315 (McKinney 1964); N.C. GEN. STAT. §§ 52-1 to -6 (1966); N.D. CENT. CODE §§ 14-07-04 to -08 (1960); OHIO REV. CODE ANN. §§ 3103.04-.07 (Page 1980); OKLA. STAT. ANN. tit. 32, §§ 4-5, 8-9, 12-13 (West 1971); OR. REV. STAT. § 108.010-.080 (1973); PA. STAT. ANN. tit. 48, §§ 32.1 to .26 (Purdon 1936); R.I. GEN. LAWS §§ 15-4-1 to -3, -9, -12, -14 (1969); S.C. CODE ANN. §§ 10-216, 20-203 to -204, 20-206 to -207 (Law. Co-op. 1962); S.D. CODIFIED LAWS §§ 25-2-4 to -8, -10, -12, -14 to -15 (1967); TENN. CODE ANN. §§ 36-601 to -605 (1955); UTAH CODE ANN. §§ 30-2-1 to -8 (1953); VT. STAT. ANN. tit. 15, §§ 61-69 (1974); VA. CODE §§ 55-35 to -47 (1969); W. VA. CODE §§ 48-3-1 to -22 (1966); WIS. STAT. ANN. § 246.01-.11 (West 1957); WYO. STAT. §§ 20-22 to -29, -31 (1959).

The eight community property states also have statutory provisions that can most appropriately be grouped under the heading of "Married Women's Property Acts." See ARIZ. REV. STAT. ANN. §§ 25-211, -213 to -215 (Supp. 1973); CAL. CIV. CODE §§ 5103-04 (West 1970); IDAHO CODE

move a married woman's common law disability to contract. They do not, however, confer full contractual freedom.⁶⁸ Several Married Women's Property Acts impliedly provide for married women suretyship contracts in that they contain general language removing all contractual disabilities of married women.⁶⁹ In many jurisdictions courts have interpreted provisions of Married Women's Property Acts as allowing for such contracts.⁷⁰

Hawaii is the only state which expressly sanctions the validity of married women suretyship contracts.⁷¹ In contrast, a New York statute merely implies this result.⁷² That statute provides that, in respect to property, a married woman has the right to contract and is liable on such contracts, "as if she were unmarried."⁷³ Although the New York statutory language does not specifically say that married women may enter into suretyship contracts, the statute's legislative history and case law support this interpretation.⁷⁴ For example, in *Gates v.*

§§ 4-1830, 32-903 to -913 (1947); LA. REV. STAT. ANN. §§ 9-51, 9-101 to -105 (West 1965); NEV. REV. STAT. §§ 123.030-.070 (1971); N.M. STAT. ANN. §§ 57-3-1 to -8, 57-4-1 to -9 (1962); TEX. FAM. CODE ANN. §§ 4.03, 5.01 to .03, .21 -.22 (1975); WASH. REV. CODE ANN. §§ 26.16.01.0 to .100, 26.16.140 to .205 (1964).

⁶⁸ See Note, *supra* note 58, at 87.

⁶⁹ States granting married women co-signer rights by enactment of statutes removing all common law coverture disabilities: ALASKA STAT. § 25.15.110 (1962); ARK. STAT. ANN. § 55-401 (1947); IND. CODE § 31-1-9-14 (1923); MINN. STAT. § 93-3-1 (1973); OR. REV. STAT. § 108.010 (1979).

⁷⁰ In *Mayo v. Hutchinson*, 57 Me. 546, 547 (1870), it was held that a married woman may be a co-signer and that she will be bound by the suretyship obligation. See also *Blake v. Blake*, 64 Me. 177 (1874). Other courts have held similarly by construing state statutes to allow married women co-signers. See, e.g., *Stone v. Billings*, 167 Ill. 170, 47 N.E. 372 (1897), *overruling Williams v. Hugunin*, 69 Ill. 214 (1873); *Wolf v. Van Metre*, 23 Iowa 397 (1867); *Deering v. Boyle*, 8 Kan. 351 (1871); *Gilbert v. Brown*, 123 Ky. 703, 97 S.W. 40 (1906); *Frederick-Town Sav. Inst. v. Michael*, 81 Md. 487, 32 A. 189 (1895); *Major v. Holmes*, 124 Mass. 108 (1878); *Wolf v. Banning*, 3 Minn. 202 (1859); *Gates v. Williams*, 10 Misc. 403, 29 N.Y.S. 712 (C.P. 1894); *Bristol Grocery v. Bails*, 177 N.C. 298, 98 S.E. 768 (1919); *Temple v. State*, 74 Okla. 215, 178 P. 113 (1919); *Pelzer v. Campbell*, 15 S.C. 581 (1850); *Sparks v. Taylor*, 99 Tex. 411, 90 S.W. 485 (1906); *First Wisconsin Nat'l Bank v. Milwaukee Patent Leather Co.*, 197 Wis. 117, 190 N.W. 822 (1922), *overruling Merrell v. Purdy*, 129 Wis. 331, 109 N.W. 82 (1906).

⁷¹ HAWAII REV. STAT. § 573-4 (1955) states: "All women, upon attaining their majority and having the necessary property qualifications as by law required, may act, serve, and be sureties on all bonds and undertakings required under the laws of the State." That a wife may lawfully become surety for her husband is also settled by case law in Hawaii. See *In re Estate of Manuel Pinheiro*, 33 Haw. 266, 230-231 (1934).

⁷² This New York statute reads in pertinent part: "A married woman has all the rights in respect to property . . . to make contracts in respect thereto with any person . . . and be liable on such contracts, as if she were unmarried." N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1978).

⁷³ *Id.*

⁷⁴ N.Y. GEN. OBLIG. LAW § 3-301 replaced L. 1884, c. 381, which had amplified the powers of a married woman so that she could enter into general contracts with third persons with like effect and in the same form as if unmarried, whether such contracts related to her separate

Williams,⁷⁵ a New York court upheld the validity of a wife's suretyship contract although the note evidencing the agreement was endorsed by her husband. The court concluded that by endorsing the promissory note, the husband acted as the wife's agent and thereby obligated her on the note.⁷⁶ Other New York cases supporting married women suretyship contracts have held that such contracts must be supported by consideration equal to that required on the contract of any other surety.⁷⁷

The Married Women's Property Acts represented a turning point because their enactment greatly expanded the contractual rights of married women. Nevertheless, married women did not universally achieve contractual equality with respect to suretyship contracts.⁷⁸ For example, unlike the New York courts, other state courts construing similar statutes refused to construe the "contract as if unmar-

estate or not. See *Blaechinska v. Howard Mission*, 130 N.Y. 497, 29 N.E. 755 (1892). See also *Amberg v. Manhattan Life Ins.*, 171 N.Y. 314, 63 N.E. 1111 (1902); *Busch v. Klein*, 38 A.D. 624, 55 N.Y.S. 917 (1899); *Bowery Nat'l Bank v. Sniffen*, 54 Hun. 394, 7 N.Y.S. 520 (Sup. Ct. 1887).

⁷⁵ 9 Misc. 176, 29 N.Y.S. 712 (C.P. 1894)

⁷⁶ *Id.*

⁷⁷ See, e.g., *Harlem River Bank v. Meyer*, 16 N.Y.S. 872, 873 (C.P. 1892); *Bauer v. Ambs*, 144 A.D. 274, 128 N.Y.S. 1024 (1911). Like New York, twenty states and the District of Columbia allow married women to have the same contractual rights as unmarried women: ALA. CODE § 30-4-8 (1975); ALASKA STAT. § 25.15.110 (1962); COLO. REV. STAT. § 14-2-208 (1973); DEL. CODE ANN. tit. 13, § 311 (1953); FLA. STAT. § 708.08 (1971); KY. REV. STAT. ANN. § 404.020 (Baldwin 1971); ME. REV. STAT. ANN. tit. 19, § 164 (1964); MD. ANN. CODE art. 45, §§ 1-2 (1975); MASS. GEN. LAWS ANN. ch. 209, § 2 (West 1969); N.H. REV. STAT. ANN. § 460:2 (1968); N.J. STAT. ANN. § 37:2-1 (West Supp. 1973-1974); N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1964); N.D. CENT. CODE § 14-97-05 (1981); R.I. GEN. LAWS § 15-4-3 (1969); S.C. CODE ANN. § 20-5-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-2-7 (1976); UTAH CODE ANN. § 30-2-2 (1953); UTAH STAT. ANN. tit. 15, § 61 (1974); VA. CODE § 55-36 (1981); D.C. CODE ENCYCL. § 30-208 (West 1968).

Also, like New York, many of the above states have interpreted the "contract as if she were unmarried" language as impliedly allowing married women suretyship contracts. For example, in *Savings Bank of Manchester v. Kane*, 35 Conn. Supp. 82, 396 A.2d 952 (C.P. 1978), a Connecticut court held that a wife may be a surety for her husband. A Montana court implied the validity of a wife as a surety in *Ott v. Fidelity Finance Co.*, 158 Mont. 91, 95, 488 P.2d 1148 (1971). In several cases, a wife acted as surety for her husband without objection by the court. These cases also impliedly sanction the validity of married women suretyship contracts. See *Eisenberg v. Albert*, 40 Ohio St. 631 (1884); *Fugate v. Allen*, 158 Va. 143, 147, 149 S.E. 501 (1929); *Wyoming Discount Corp. v. Lamar*, 444 P.2d 620, 622 (Wyo. 1968). Other states have been more specific in allowing married women suretyship contracts. An Ohio court declared that a wife may pledge her separate property for her husband's debt and become a surety or guarantor. *People's Ins. Co. v. McDonnell*, 41 Ohio St. 650, 659 (1885). More generally, ALASKA STAT. § 25.15.10, provides that "all common law disabilities not also imposed upon the husband are removed [from the wife]." A Utah court held that "in this state by constitutional provision and statutory enactments the common law disabilities of married women have been abrogated, and married women are in all respects, with reference to their separate property and power to contract on the same footing with men." *Williams v. Peterson*, 86 Utah 526, 536, 46 P.2d 674, 679 (1935).

⁷⁸ See *Bysiewicz & MacDonnell*, *supra* note 57, at 601.

ried" language to allow married women suretyship contracts.⁷⁹ An early Pennsylvania statute, for instance, provided that a married woman may contract as if she were unmarried but "may not become accomodation endorser, maker, guarantor or surety for another."⁸⁰ Similarly, an Alabama statute allowing a married woman to contract as if she were unmarried, also stated that "the wife shall not, directly or indirectly, become the surety for her husband."⁸¹ The tendency of most state courts, however, was to allow married women suretyship contracts.⁸² Despite this judicial trend, a few state statutes prohibiting married women suretyship contracts remained for a considerable number of years.⁸³ By 1975, however, the year the ECOA became ef-

⁷⁹ See *Hanchey v. Powell*, 171 Ala. 597, 55 So. 97 (1911); *Gross v. Whiteley*, 128 Ga. 79, 57 S.E. 94 (1907); *Bank of Commerce v. Baldwin*, 14 Idaho 75, 93 P. 504 (1908); *Williams v. Hugunin*, 69 Ill. 214 (1873); *Field v. Campbell*, 164 Ind. 389, 72 N.E. 260 (1904); *Third Bank of Louisville v. Tierney*, 128 Ky. 836 (1880); *West v. Laraway*, 28 Mich. 464 (1874); *Sears v. Birbeck*, 321 Pa. 375, 184 A. 6 (1936); *First Nat'l Bank v. Bertoli*, 87 Vt. 297, 89 A. 359 (1913).

⁸⁰ 1893 Pa. Laws 344, § 2 (codified in 48 PA. STAT. ANN. § 32 (Purdon)). Georgia had a similar provision. It provided in part: "[W]hile the wife may contract, she may not bind her separate estate by any contract of suretyship nor by the assumption of the debts of her husband" GA. CODE § 53-503 (1935).

⁸¹ ALA. CODE § 4497 (1907). Although Alabama courts recognized that a married woman's general disability to contract had been statutorily removed, they noted that her original disability as to co-signer contracts still existed. See *Huntsville Bank & Co. v. Thompson*, 212 Ala. 511, 103 So. 477 (1925). A similar Indiana statute provided: "[A] married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract as to her shall be void." IND. CODE ANN. § 6964 (Burns 1901). See also *Russell v. Rice*, 430 Ky. 1613, 44 S.W. 110 (1898).

⁸² See *Jett v. Montague Mfg. Co.*, 61 F.2d 918, 920 (D.C. Cir. 1932); *Industrial Trust Co. v. Cantera*, 35 Del. 365, 370, 165 A. 338, 341 (1933); *In Re Estate of Pinheiro*, 33 Hawaii 226, 231 (1934); *Stone v. Billings*, 167 Ill. 170, 180, 47 N.E. 372, 374 (1897); *Hinman v. Treinan*, 196 Iowa 701, 706, 195 N.W. 345, 348 (1923); *Deering v. Boyle*, 8 Kan. 351 (1871); *Mayo v. Hutchinson*, 57 Me. 546, 547 (1870); *Frederick-Town Sav. Inst. v. Michael*, 81 Md. 487, 502, 32 A. 189, 191 (1895); *Browne v. Bixby*, 190 Mass. 69, 70, 76 N.E. 454, 456 (1906); *Wolf v. Banning*, 3 Minn. 202 (1859); *Gates v. Williams*, 29 N.Y.S. 712, 714 (C.P. 1894); *Royal v. Sutherland*, 168 N.C. 405, 406, 84 S.E. 708, 709 (1915); *Colonial & U.S. Mortgage Co. v. Stevens*, 3 N.D. 265, 268, 55 N.W. 578, 579 (1893); *Temple v. State*, 74 Okla. 215, 216, 178 P. 113, 114 (1919); *Phoenix Nat'l Bank v. Raia*, 68 R.I. 348, 352, 28 A.2d 20, 22 (1942); *Colonial & U.S. Mortgage Co. v. Bradley*, 4 S.D. 158, 163, 55 N.W. 1108, 1110 (1893); *First Wisconsin Nat'l Bank of Milwaukee v. Milwaukee Patent Leather Co.*, 179 Wis. 117, 190 N.W. 822, 826 (1922).

Other states permit married women co-signatures, but their statutory language does not equate a married woman's rights with those of an unmarried woman: Missouri (married woman has sole control of her separate property), MO. ANN. STAT. § 451.250 (Vernon 1977); see generally *Barrett v. Davis*, 104 Mo. 546, 549, 165 S.W. 377, 378 (1891); Nebraska (married women have the same rights as married men), NEB. REV. STAT. § 42-202 (1978); *Spatz v. Martin*, 46 Neb. 917, 918, 65 N.W. 1063, 1064 (1896).

⁸³ See *Skokall v. Kimball*, 59 N.H. 13, 13 (1879) (citing N.H. GEN. LAWS ch. 1835 § 12 ["no contract or conveyance by a married woman as surety or guarantor for her husband, nor any undertaking by her for him on his behalf, shall be binding on her."]); ALA. CODE § 74 (1940); KY. REV. STAT. ANN. § 4.010(2) (Baldwin 1963); GA. CODE ANN. § 53-503 (1935) (prohibiting married woman suretyship), amended by GA. CODE ANN. § 53-503 (1969) (limiting married wo-

fective, virtually all of these statutes had been repealed or overruled.⁸⁴

B. Spousal Co-Signatures: The Pre-1981 Michigan Problem

By 1981, all but five states, Florida, New Jersey, West Virginia, Colorado and South Carolina, had completely abrogated the common law rules prohibiting married women suretyship contracts. Court interpretation of Regulation B and the ECOA, however, creates the opportunity for state courts to maintain the common law perception of married women suretyship incapacity whenever a state statute stops short of complete abrogation of the common law rule. Aside from the obvious affront to progressive sensibilities, these laws create a breeding ground for inconsistency and uncertainty. The Michigan experience is illustrative.

In 1975, a married woman in Michigan could contract generally but she was unable to become a surety.⁸⁵ The precedent for this rule was established fifty years earlier by the Michigan Supreme Court in *Monroe State Savings Banks v. Orloff*.⁸⁶ In *Monroe Savings*, the court declared that the coverture prohibition against married women suretyship contracts remained, even though the legislature had abolished most limitations on the ability of married women to contract. Consequently, the court held that a married woman "could not bind her estate by any obligation in the nature of suretyship or by a promise to pay the debt of another."⁸⁷ The court reached its conclusion by interpreting Michigan's Married Woman's Property Act of 1855⁸⁸ which permitted a married woman's individual property to be "contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with like effect as if she were unmarried."⁸⁹ In 1963, Michigan incorporated a similar provi-

man suretyship).

⁸⁴ See ALA. CODE § 30.4.8 (1957) (surety provision deleted); GA. CODE ANN. § 53-505 (repealed by Acts of 1979 p. 466, 490); 1951 N.H. LAWS § 78:2 (eliminating § 340:2 retroactively to May 12, 1949); KY. REV. STAT. ANN. § 404.010 (Baldwin 1981), amended by S. 111 § 1, eff. June 2, 1974, (eliminating suretyship provision). See also *Cooke v. Louisville Trust Co.*, 380 S.W.2d 255, 257 (Ky. 1964), which states "KRS 404.010 (2), as amended in 1954, has removed all former disabilities of a married woman to act as surety for her husband."

⁸⁵ See *United States v. Interlakes Mach. & Tool Co.*, 400 F. Supp. 59 (E.D. Mich. 1975).

⁸⁶ 232 Mich. 486, 205 N.W. 596 (1925).

⁸⁷ *Id.* at 490, 205 N.W. at 597.

⁸⁸ No. 168, Mich. Acts 420 (1855).

⁸⁹ MICH. COMP. LAWS § 11485 (1915).

sion into its constitution;⁹⁰ the courts interpreted this provision as prohibiting married women co-signature contracts.⁹¹

Michigan's Married Women's Property Act and article 10 of the state's constitution were interpreted to prohibit married women co-signature contracts despite the fact that in 1974 the state enacted its own equal credit act.⁹² Like the federal act, Michigan's equal credit law prohibits discrimination on the basis of sex and marital status.⁹³ Notwithstanding this prohibition, however, Michigan courts continuously barred married women suretyship contracts.⁹⁴ Apparently the courts were unpersuaded that Michigan's credit law removed the common law limitations on a married woman's capacity to contract.⁹⁵ An examination of the history of coverture in Michigan gives some insight into the courts' belief that these coverture disabilities still existed.

1. Coverture in Michigan

The first attempt to abrogate Michigan's coverture law was in 1855 when Michigan passed its first married women's statute.⁹⁶ Although broad in scope,⁹⁷ this act did not grant contractual equality to mar-

⁹⁰ Article 10 of the Michigan Constitution states:

The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled to, shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations and engagement of her husband and may be *dealt with* and disposed of by her *as if she were unmarried*.

MICH. CONST. art. X, § 1 (1963) (emphasis added).

⁹¹ See, e.g., *City Fin. Co. v. Kloostra*, 47 Mich. App. 276, 209 N.W.2d 498 (1973).

⁹² MICH. COMP. LAWS ANN. § 750.147a (West Supp. 1975).

⁹³ *Id.*

⁹⁴ See *United States v. Interlakes Mach. & Tool Co.*, 400 F. Supp. 59 (E.D. Mich. 1975); *National Bank of Rochester v. Meadowbrook Heights, Inc.*, 80 Mich. App. 777, 265 N.W.2d 43 (1978).

⁹⁵ Act No. 168 of the Public Acts of 1855, MICH. COMP. LAWS ANN. §§ 557.1-5 (West 1970).

⁹⁶ The 1855 Married Women's Act provided that:

[T]he real and personal estate of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with like effect as if she were married.

Id.

⁹⁷ The 1855 Act's concern was to prevent married women's husbands from getting control over their wives' property. One Michigan court noted that the Act was passed "to protect married women from the improvidence or predations of their husbands and from their husband's creditors." *National Bank of Rochester v. Meadowbrook Heights, Inc.*, 80 Mich. App. 777, 782,

ried women. It did, however, change their legal status by permitting them to contract with respect to their separate estates independently of their husbands.⁹⁸ A second married women's act was passed in 1911.⁹⁹ This act dealt primarily with the right of a married woman to obtain and control all earnings resulting from her personal efforts.¹⁰⁰ In 1917, Michigan passed yet another act affecting the rights of married women.¹⁰¹ This act expanded the wife's power to contract jointly with her husband.¹⁰² It reversed prior law by allowing a married woman to become liable on joint contracts to the same extent that her husband became liable. Before this law, a married woman was liable only if the consideration for the contract ran solely to her separate estate.¹⁰³ The overall effect of these three Married Women's Acts was to protect the separate estates of married women. These acts were not designed to abolish all disabilities of coverture.¹⁰⁴

At first glance it appears that article 10 of the 1963 Michigan Constitution was designed for this purpose. Article 10 begins with resounding clarity: "The disabilities of coverture as to property are abolished."¹⁰⁵ Although this statement appears unambiguous, article 10's legislative history¹⁰⁶ indicates that its sole purpose is to constitutionalize the rights granted married women by the three Married Women Property Acts,¹⁰⁷ not to grant additional rights. Thus, instead of removing the remaining disabilities of coverture, article 10 merely preserved the status quo.

In 1974 when the legislature enacted Michigan's Equal Credit Act,¹⁰⁸ it had yet another opportunity to remove all remaining disabilities of coverture and grant complete contractual freedom to married women. The legislature, however, failed to take such a bold step. Without making any specific reference to the married women surety-

265 N.W.2d 43, 46 (1978).

⁹⁸ See Note, *supra* note 58, at 80.

⁹⁹ Act No. 196 of the Public Acts of 1911, MICH. COMP. LAWS ANN. § 557.11 (West 1970).

¹⁰⁰ *Id.*

¹⁰¹ Act No. 158 of the Public Acts of 1917, MICH. COMP. LAWS ANN. §§ 557.51-.55 (West 1970).

¹⁰² The 1917 Act provided in pertinent part: "Hereinafter, married women shall be possessed with the power and capacity, and it shall be competent for them to bind and make themselves jointly liable with their husbands upon any written instrument hereinafter provided." *Id.*

¹⁰³ See *Kies v. Walworth*, 250 Mich. 34, 229 N.W. 519 (1930); *Jarzembinski v. Plodowski*, 225 Mich. 104, 195 N.W. 681 (1923); *Fisk v. Mills*, 104 Mich. 433, 62 N.W. 559 (1895).

¹⁰⁴ See Note, *supra* note 58, at 87.

¹⁰⁵ MICH. CONST. art. X, § 1 (1963).

¹⁰⁶ For an excellent account of the legislative debate over article 10, see Peisner, *Gone But Not Forgotten*, 47 MICH. ST. B.J. 43 (1968).

¹⁰⁷ See Note, *supra* note 58, at 96.

¹⁰⁸ See *supra* note 92.

ship question, the Act generally prohibited discrimination on the basis of sex and marital status.¹⁰⁹

Consequently, the legal position of married women in Michigan with respect to suretyship contracts, remained virtually unchanged. A married woman could not obligate herself by co-signing for another person; she could bind herself only if the obligation related to her separate property.¹¹⁰ Since the benefit of the suretyship contract inures to the principal debtor and not the co-signer, married women were precluded from being sureties.

The Michigan Married Women's Act and article 10 contain provisions similar to the New York statute.¹¹¹ Both states permit a married woman to contract as if she were unmarried; the New York and Michigan courts, however, have construed this language differently with respect to suretyship contracts. In New York, the married woman who contracts "as if she were unmarried" can become a surety while in Michigan she cannot.¹¹² Yet, in both states an unmarried woman can become a surety.¹¹³ This difference in judicial construction raised certain important questions: Did Michigan's interpretation of its Married Women's Act and article 10 of its constitution violate the ECOA spousal co-signature rules; and if so, did this violation constitute credit discrimination?

C. ECOA Spousal Co-Signature Rules and Credit Discrimination

The primary objective of the ECOA is to combat congressional findings¹¹⁴ of unfairness and bias against female credit applicants. Among other prohibitions, the Act prohibits discrimination on the basis of sex and marital status¹¹⁵ with respect to any aspect of a credit transaction.¹¹⁶ One important aspect involves creditor co-signature rules. In many instances applicants who do not qualify for credit

¹⁰⁹ *Id.*

¹¹⁰ See Note, *supra* note 58, at 96.

¹¹¹ See *supra* note 72 and accompanying text.

¹¹² See *supra* notes 72-76 & 85 and accompanying text.

¹¹³ Coverture only creates legal disabilities for a woman when she marries. By implication, an unmarried woman remains unaffected by the disabilities of coverture and can therefore properly be a surety.

¹¹⁴ See generally *Credit Discrimination: Hearings on H.R. 14856 & H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking & Currency*, 93rd Cong., 2d Sess. (1974). See also *Hearings on the Economic Problems of Women*, *supra* note 14.

¹¹⁵ 15 U.S.C. § 1691e. (Supp. V 1975). Other prohibited bases of discrimination include race, color, religion, national origin, age, receipt of public assistance income and good faith exercise of rights under the Consumer Credit Protection Act. *Id.*

¹¹⁶ Equal Credit Opportunity Act, 15 U.S.C. § 1691a. (1976).

may nevertheless receive it if they produce acceptable co-signers. Regulation B section 202.7(d)(1), (2) and (5) delineate circumstances under which creditors may require spousal co-signatures.¹¹⁷ These Regulation B provisions, along with collateral ECOA rules,¹¹⁸ must be carefully analyzed to determine whether Michigan's failure to allow married women suretyship contracts was credit discrimination.

Michigan's construction of article 10 of its constitution and its Married Women's Act conflicted with the general ECOA and Regulation B mandate against sex and marital status discrimination. As construed by the Michigan courts, these provisions made it always impractical and usually impossible for married women to become co-signers.¹¹⁹

If married women could use coverture defensively to bar enforcement of their suretyship contracts, then creditors could justifiably refuse to allow them to co-sign for repayment of another person's debts.¹²⁰ By disallowing married women suretyship contracts, the Michigan provisions failed to give married women the same contractual freedom as others. Indeed, judicial interpretation of these provisions allowed married women to be treated less favorably with respect to suretyship contracts.¹²¹ Finding credit discrimination¹²²

¹¹⁷ Regulation B § 202.7(d)(3) also relates to spousal co-signature requirements. This provision will be fully discussed later in this Article. See *supra* note 18 for reference to Regulation B § 202.7(d)(4).

¹¹⁸ 15 U.S.C. § 1691d.(a)-(b) (1976).

¹¹⁹ It was in the best business interest of a creditor to deny co-signer privileges to married women because they could not be forced to repay the obligation should the principal default. Thus married women sureties were a high risk proposition in Michigan and it was generally left to the creditor's discretion to decide whether married women would be permitted as co-signers.

¹²⁰ Many creditors claim that discriminatory practices are due not to outmoded assumptions about women, but to the existence of state property laws. Note, *Equal Credit: You Can Get There From Here - The Equal Credit Opportunity Acts*, 52 N.D.L. Rev. 381, 391 (1975). See also *ECOA Hearings*, *supra* note 14, at 348. Michigan creditors could make this argument in reference to the statutory prohibition against married women co-signer contracts. It is unreasonable to think that creditors would permit married women to co-sign contracts that were unenforceable against them under state law.

¹²¹ A blatant example of unequal treatment of married women is illustrated in *Monroe State Sav. Bank v. Orloff*, 232 Mich. 486, 205 N.W. 596 (1925). In that case a Michigan court held that a creditor could not reach a married woman's separate assets to satisfy a debt obligation, even though she co-signed with her husband as a joint applicant. Yet, the court acknowledged the creditor's right to satisfy the debt from the husband's separate property. Other Michigan courts have held similarly. See *National Bank of Rochester v. Meadowbrook Heights, Inc.*, 80 Mich. App. 777, 265 N.W.2d 43 (1978); *Isabella Bank & Trust v. Pappas*, 79 Mich. App. 274, 261 N.W.2d 558 (1977).

¹²² Regulation B says that to discriminate against an applicant means to treat an applicant less favorably than other applicants. 12 C.F.R. § 202.2(n). See *Miller v. American Express*, 688 F.2d 1235 (9th Cir. 1982). Credit discrimination occurs when an applicant is not evaluated individually by a creditor's ordinary standards, but rather is judged by his membership in a class.

depends on whether a creditor has complied with the requirements of the ECOA and/or Regulation B. Both the Act and Regulation B define the legal parameters of a creditor's conduct.

1. The ECOA and the Pre-1981 Michigan Problem

In 1978, the Michigan Attorney General ruled that Michigan creditors may refuse to allow married women sureties without violating the ECOA mandate against sex and marital status discrimination. Attorney General Frank J. Kelly unequivocally stated that there is no marital status discrimination when a creditor denies credit to one who relies on a married woman's signature to repay the debt.¹²³ According to Attorney General Kelly, "[t]he refusal of a person to extend credit to a husband because the co-signature of his wife is unenforceable is not, in my opinion, refusal to extend credit based upon the marital status of the husband or wife"¹²⁴

There is no ECOA provision which expressly addresses the question of whether failure to allow married women co-signers constitutes sex or marital status discrimination. Nevertheless, an ECOA provision, section 1691d.(b), explains the relationship between the Act and state law and gives an insight into how this question should be resolved. This provision states that, when evaluating a credit applicant, a creditor does not engage in credit discrimination by considering state property laws affecting creditworthiness.¹²⁵

See Comment, *Equal Credit For All - An Analysis of the 1976 Amendments to the Equal Credit Opportunity Act*, 22 St. Louis U.L.J. 326, 327 n.12 (1978). In *Smith v. Lakeside Foods, Inc.*, 449 F. Supp. 171, 172 (N.D. Ill. 1978), it was held that a creditor's failure to comply with Regulation B entitled the applicant to relief under the ECOA.

¹²³ Mich. Op. Att'y Gen. No. 5370 (1978).

¹²⁴ *Id.* at 3.

¹²⁵ According to ECOA § 1691d.(b): "Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title." Section 1691d.(b) has been recognized as a troublesome provision. According to one commentator:

One obvious difficulty is to decide what is or is not a "state property law." The potential breadth of the term "property" creates the possibility that a myriad of state statutes fall within the statutory exception. Moreover, this definitional problem is compounded by the addition of the words "directly or indirectly affecting creditworthiness." First, this presents the possibility that whether a law is indeed a property law will be decided simply by reference to whether it has an effect on creditworthiness. Second, the term "creditworthiness" is itself elusive, both because the statute and regulations do not define it, and because there is no agreement in the industry concerning its meaning.

Hume, *A Suggested Analysis For Regulation of Equal Credit Opportunity*, 52 WASH. L. REV. 335, 356 (1977) (footnote omitted).

Section 1691d.(b) of the ECOA seems to support the Michigan Attorney General's position that there is no marital status discrimination if a creditor refuses credit to one who relies on a married woman's co-signature to obtain credit. First, article 10 of the Michigan Constitution and the state's Married Women's Act appear to be within the ECOA state property rights of married women.¹²⁶ Like most states, Michigan has the "contract as if she were unmarried" language embodied in its Married Women's Property Act.¹²⁷ Michigan's statutes may therefore be accurately described as state property laws. This is especially true in view of the fact that neither the ECOA nor Regulation B defines "state property law." Second, Michigan's statutes directly affect an applicant's creditworthiness. Creditworthiness includes not only a determination of the applicant's intention to repay, but also his or her ability to repay.¹²⁸ While a person who *needs* a co-signer to obtain credit may have the intention to repay the debt, he or she clearly lacks the ability to repay without the additional signature. In this instance, the additional signature directly affects the applicant's creditworthiness because without it the applicant is unable to repay. Article 10 of the Michigan Constitution and the Married Women's Act have been judicially construed to forbid married women from supplying this additional signature.¹²⁹ But for that statutory construction, a married man who wants to rely on his wife as a co-signer would receive credit. Thus, Michigan's statute "affects" his creditworthiness¹³⁰ by disallowing his spouse to act as his co-signer.

Case law provides little guidance regarding the scope of the state property law exemption. In *Markham v. Colonial Mortgage Service*

¹²⁶ Indeed, article 10 begins by making specific reference to a married woman's real and personal property. See *supra* note 90 and accompanying text.

¹²⁷ Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 413 (1974).

¹²⁸ See Dreyer & Rice, *Equal Credit Opportunity*, 36 BUS. LAW 1203, 1216 (1981); Reizenstein, *A Fresh Look at the Equal Credit Opportunity Act*, 14 AKRON L. REV. 215, 216 n.3 (1980).

¹²⁹ See *Wendland v. Citizens Commercial & Sav. Bank*, 92 Mich. App. 250, 284 N.W.2d 776 (1979); *Traverse City State Bank v. Conaway*, 37 Mich. App. 647, 195 N.W.2d 288 (1972); *Detroit Newspaper Indus. Credit Union v. McDonald*, 9 Mich. App. 146, 156 N.W.2d 62 (1967).

¹³⁰ Michigan Attorney General, Frank J. Kelly, analyzed the situation differently. According to Kelly, a creditor's refusal to extend credit to a husband because the co-signature of his wife is unenforceable does not affect the husband's creditworthiness. "In such a case, the eligibility for credit of each spouse is dependent upon the individual's own credit standing without regard to marital status, there being no legal requirement that a creditor grant credit to a person whose financial status does not warrant the extension of the credit." Mich. Op. Att'y Gen., *supra* note 123, at 3.

Co.,¹³¹ the only ECOA case on the subject, the exemption was denied. In *Markham* an unmarried couple filed a joint application for a mortgage loan. The application was denied because they were not married.¹³² The plaintiffs claimed they had been discriminated against on the basis of their marital status. The defendants argued that they should be allowed to consider marital status because state law provides creditors greater legal remedies against married joint applicants than it does against unmarried ones.¹³³ The federal district court agreed with the defendants and granted summary judgment on the ground that the ECOA did not prevent creditors from considering the special legal ties between two married people created under state law.¹³⁴

The court of appeals rejected the defendant's contention that their actions were sanctioned by the ECOA provision allowing a creditor to consider state property laws affecting creditworthiness. The court reasoned that the state laws concerning marriage were irrelevant for the purpose of determining creditworthiness because joint applicants, whether married or not, were jointly and severally liable on their debts.¹³⁵ Consequently, the court of appeals disagreed with the lower court's assessment that creditors had greater remedies against married joint applicants.

It is significant to note that the appellate court neither confirmed nor denied whether the state laws concerning marriage were "property" laws affecting creditworthiness which would come within the ECOA exemption. By finding that the underlying premise upon which the lower court based its decision was faulty, since no greater rights were created by the marital bond, the court of appeals was not compelled to directly address the exemption question. The *Markham* district court decision, however, indirectly addressed this question. That decision implied that state laws concerning marriage are within the exemption. The defendants, however, did not get the benefit of the exemption because the court found that their actions were beyond its scope.

Article 10 of the Michigan Constitution, the Married Women's Act, and the law involved in *Markham* are all state marital laws. If state

¹³¹ 605 F.2d 566 (D.C. Cir. 1979).

¹³² For an excellent analysis of the *Markham* case, see Comment, *Protection of Unmarried Couples Against Discrimination in Lending Under The Equal Credit Opportunity Act: Markham v. Colonial Mortgage Service Co.*, 93 HARV. L. REV. 430 (1979).

¹³³ 605 F.2d at 568.

¹³⁴ *Id.*

¹³⁵ *Id.* at 569.

laws concerning a creditor's right to collect against a married couple in the event of default are deemed "state property laws," then a stronger argument can be made for the proposition that state laws governing the contractual capacity of married women are state property laws within the purview of the ECOA exemption. A contrary finding would be irrational.¹³⁶

In short, because the Married Women's Act and article 10 of the Michigan Constitution are state property laws affecting the applicant's creditworthiness, ECOA section 1691d.(b) exempts their "consideration" or "application" from resulting in illegal discrimination. This position is consistent with that of the Michigan Attorney General. Thus, under the ECOA, there is no sex or marital status discrimination resulting from Michigan's prohibition against married women sureties.

2. Regulation B and the Pre-1981 Michigan Problem

A different conclusion may be reached under an analysis of Regulation B. Regulation B allows a married credit applicant who is uncreditworthy without a co-signer, to use his or her spouse as the additional party.¹³⁷ Additionally, Regulation B states that creditors shall not impose requirements upon co-signers that cannot be imposed upon credit applicants.¹³⁸ Thus, if creditors cannot require applicants to be persons other than married women, then it seems they likewise cannot require co-signers to be persons other than married women. These two Regulation B provisions strongly suggest that credit discrimination results when a married woman is prohibited from becoming a surety.

Although Regulation B section 202.7(d)(5) expressly allows married women suretyship contracts, section 202.6 restates that the ECOA provision exempts consideration or application of state property laws affecting creditworthiness from resulting in credit discrimination.¹³⁹ These two Regulation B provisions appear to be contradictory. If Regulation B allows married women suretyship contracts, then the

¹³⁶ In its most literal sense, article 10 of the Michigan Constitution, which is patterned after a Michigan Married Women's Property Act provision, is, in effect, a state law concerning marriage. Under the *Markham* rationale, it is within the state property law exemption.

¹³⁷ 12 C.F.R. § 202.7(d)(5) (1977). The creditor however, cannot *require* that the spouse be the co-signer. *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at § 202.7(6)(c).

Michigan law prohibiting such contracts is credit discrimination. If however, Michigan's law prohibiting married women suretyship contracts is a state property law,¹⁴⁰ then under Regulation B's exemption, its application cannot result in credit discrimination.

It is unclear whether the Federal Reserve Board intended the Regulation B state property law exemption and the provision allowing married women sureties to operate independently of each other. Section 202.6 sets out rules concerning evaluation of applications and includes the exemption for state property laws, while section 202.7 states rules concerning extension of credit, including the spousal co-signature provision. Facially, section 202.6 and 202.7 appear to be mutually exclusive. The two sections do not relate directly to each other, and there is no indication that the Federal Reserve Board intended them to be read together.¹⁴¹ By placing each provision in a separate Regulation B section, the Board may have intended for the state property law exemption and the spousal co-signature rule to operate independently of each other.

Statutory rules of construction regarding inconsistent provisions in the same statute support this position. For example, one rule of construction says that a general provision which might embrace certain matters is superseded by a provision which specifically addresses these matters.¹⁴²

The above rule appears particularly applicable to the inconsistency between Regulation B sections 202.6 and 202.7. The provision concerning the state property law exemption applies only incidentally to the situation of a state property law prohibiting married women spousal co-signatures, whereas the provision allowing spousal co-signatures specifically addresses that situation. Applying this rationale, Regulation B section 202.7, which specifically allows married women to co-sign for their husbands, would prevail over section 202.6 which generally exempts application of state property laws by creditors from being labelled credit discrimination.

Another applicable rule of construction involves the principle that courts should give effect to every part of a statute, if reasonably pos-

¹⁴⁰ See *supra* notes 126 & 127 and accompanying text.

¹⁴¹ While congressional silence is not always determinative of congressional intent, it has on many occasions been regarded as a significant factor.

¹⁴² The United States Supreme Court stated the rule in this way: "[G]eneral language of a statutory provision although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). *Ginsberg* involved a conflict between a general and specific provision of the bankruptcy act.

sible.¹⁴³ If Regulation B section 202.6 superseded section 202.7, then the provision relating to spousal co-signatures (202.7) would be ineffective. If however, the regulations were construed to allow section 202.7 to operate as an exception to section 202.6, then both parts of the statute would be given effect.¹⁴⁴

Logic suggests that the Board would have clarified its meaning had it intended that the spousal co-signature provision be pre-empted by state property laws. Absent more elucidation¹⁴⁵ the Board's actual intent can only be surmised. The apparent intent, however, is that the spousal co-signature rule is not pre-empted by the state property law exemption.

3. The ECOA/Regulation B Conflict

If Regulation B permits married women suretyship contracts, notwithstanding its state property law exemption provision, then there exists an obvious conflict with the ECOA. As previously stated, the ECOA, unlike Regulation B, does not have a provision allowing married women suretyship contracts. Nevertheless, like Regulation B, it does have the state property law exemption.

Under the ECOA, a state's prohibition against married women sureties is not credit discrimination; such a prohibition does constitute credit discrimination under Regulation B. This conflict raises yet another important question: Should Regulation B or the ECOA be followed in determining whether creditors can prohibit married women suretyship contracts?

On a number of occasions courts have been faced with similar questions.¹⁴⁶ These courts first seek to determine whether the Act ex-

¹⁴³ *Rath v. Rath Packing Co.*, 257 Iowa 1277, 1288-89, 136 N.W.2d 410, 416 (1965). In *Remus v. City of Grand Rapids*, 274 Mich. 577, 586, 265 N.W. 755, 758 (1936), the Michigan Supreme Court noted that: "A provision in the statute is not to be construed so as to render nugatory any other provision if by any reasonable construction it may be unnecessary to do so."

¹⁴⁴ *Lumpkin v. Department of Social Servs.*, 59 A.D.2d 485, 400 N.Y.S.2d 220 (1977), supports this proposition. In that case the court said "[w]hen two statutory or regulatory provisions are potentially in conflict, they should be construed in such a manner that the overriding purposes of both can be preserved." *Id.* at 490, 400 N.Y.S.2d at 222 (citation omitted).

¹⁴⁵ There are no Board comments, published opinions or statements regarding whether the Board intended Regulation B §§ 202.6 and 202.7 to be read separately or together.

¹⁴⁶ Questions regarding regulatory conflicts usually arise when a claim is made that the Federal Reserve Board exceeded its authority by drafting a particular regulatory provision. For example, in *Mourning v. Family Publications Servs., Inc.*, 411 U.S. 356 (1973), it was alleged that the Board went beyond its congressional mandate to implement the Truth in Lending Act, 15 U.S.C. § 1604 (1968), by drafting § 226.2(k) of Regulation Z. Regulation Z § 226.2(k) requires creditors who grant credit in more than four installments to comply with the Truth in Lending

pressly delegates regulatory authority to the agency.¹⁴⁷ The ECOA contains such an empowering provision, which gives the Federal Reserve Board the authority to promulgate regulations to effectuate the purposes of the Act.¹⁴⁸ The focus then shifts to determining whether the regulatory provision in question is "reasonably related" to the purposes of the enabling legislation.¹⁴⁹ If such a relationship exists, the courts will sustain its validity.¹⁵⁰ But validation occurs only if the regulatory provision is not inconsistent with the enabling statute.¹⁵¹ An inconsistent regulatory provision generally exceeds the broad rulemaking authority vested in the administrative agency.

Regulation B section 202.7(d)(5), allowing married women sureties, is unquestionably related to the overall ECOA objective of eliminating credit discrimination. In essence, this provision finds sex and marital status to be irrelevant in establishing co-signature criteria. It recognizes that a significant number of applicants, many of whom are

Act even if no finance charge is imposed. The Supreme Court held that the Board was well within its regulatory bounds by promulgating the "more than four installment" rule. *Id.* at 371.

Other questions regarding regulatory conflicts involve claims that the Federal Reserve Board has incorrectly interpreted a federal act or regulation. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Gantt v. Commonwealth Loan Co.*, 573 F.2d 520 (8th Cir. 1978); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3rd Cir. 1975); *Brown v. Providence Gas Co.*, 445 F.Supp. 459 (D.R.I. 1976); *St. Germain v. Bank of Hawaii*, 413 F. Supp. 587 (D. Hawaii 1976), *rev'd on other grounds*, 573 F.2d 572 (9th Cir. 1977).

¹⁴⁷ See *Mourning v. Family Publications Servs., Inc.*, 411 U.S. at 387.

¹⁴⁸ 15 U.S.C. § 1691b(a) (1974) states in pertinent part:

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. In particular, such regulations may exempt from one or more of the provisions of this subchapter any class of transactions not primarily for personal, family, or household purposes, if the Board makes an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purposes of this subchapter. Such regulations shall be prescribed as soon as possible after the date of enactment of this Act, but in no event later than the effective date of this Act.

¹⁴⁹ See *Mourning v. Family Publications Servs., Inc.*, 411 U.S. at 369.

¹⁵⁰ *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1968). See also *American Trucking Ass'n v. United States*, 344 U.S. 298 (1953).

¹⁵¹ The Ninth Circuit has stated that a district court should confer great deference upon formal interpretations of the Federal Reserve Board that point to reasonable and consistent interpretations of regulations. See *St. Germain v. Bank of Hawaii*, 413 F. Supp. 587 (D. Hawaii 1976), *rev'd on other grounds*, 573 F.2d 572 (9th Cir. 1977).

In *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981), the Supreme Court declared that: "[A]bsent some obvious repugnance to [this] statute [Truth in Lending], the [Federal Reserve] Board's regulation implementing this legislation should be accepted by the courts. . . ."

protected under the ECOA, would not receive credit without a co-signer.¹⁵² Therefore, Regulation B requires co-signature standards to be imposed in a non-discriminatory manner. The Regulation B provision expressly stating that a creditor cannot impose requirements on the co-signer that cannot legally be imposed on the applicant,¹⁵³ evidences a strong regulatory commitment to implement the ECOA goal of eliminating discrimination in all aspects of the credit process.¹⁵⁴

Meeting the ECOA objectives, however, is not the ultimate test of whether Regulation B will be followed. Although the Regulation B co-signature provisions are reasonably related to ECOA objectives, they conflict with the Act. Generally, conflicting regulatory provisions will not supersede the Act.¹⁵⁵ If the ECOA sustains the validity of a state property law prohibition against married women suretyship contracts, Regulation B cannot declare a creditor's activity to be credit discrimination. To do so would clearly be to take a position inconsistent with the Act.

Inconsistency is allowed only in limited circumstances. Section 1691(f) of the ECOA describes these circumstances. Although that section refers solely to inconsistent state law provisions, its implications are clear: state credit discrimination laws will be followed except to the extent they are inconsistent with the ECOA.¹⁵⁶ By analogy, an inconsistent regulatory provision cannot be followed if it conflicts with the ECOA. There is one caveat: a state law is not considered inconsistent if it gives greater protection to the credit applicant.¹⁵⁷ It appears that this caveat applies to a regulatory provision

¹⁵² It should be noted that Regulation B does not require creditors to accept co-signers to establish an applicant's creditworthiness. However, if a creditor's policy is to accept co-signers, Regulation B requires that a spouse be allowed to supply the additional signature. 12 C.F.R. § 202.7(d)(5) (1977).

¹⁵³ 12 C.F.R. § 202.7(d)(5) (1977).

¹⁵⁴ 15 U.S.C. § 1691(a) (1974).

¹⁵⁵ See *supra* note 151 and accompanying text.

¹⁵⁶ The inference is that any provision, including a regulatory one, that is inconsistent with the ECOA must be disregarded. Where a state law is alleged to be inconsistent with the ECOA, the Federal Reserve Board must decide if an inconsistency in fact exists. 15 U.S.C. § 1691d.(f) (1974). Nevertheless, this probably does not imply that the Board may also decide if its regulation is "inconsistent" with the Act. Such a position would undermine the authority of the courts to effectively check regulatory abuse of authority.

¹⁵⁷ *Id.* Section 1691(f) states as follows:

(f) Compliance with inconsistent State laws; determination of inconsistency.

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not deter-

which is inconsistent with the Act. Therefore, if Regulation B gives greater protection to the credit applicant, it, instead of the ECOA, should be followed.

The ECOA rule that allows states to bar married women co-signature contracts does not afford greater protection to the credit applicant than Regulation B. The avowed purpose of state rules, like article 10 of the Michigan Constitution and the Married Women's Act, is to protect the co-signing married woman.¹⁵⁸ On the other hand, Regulation B gives more opportunities to the applicant to obtain credit by allowing married women sureties when the applicant fails to meet the creditor's standards of creditworthiness. In this respect, the Regulation B co-signature rules are more protective of credit applicants.

At least one federal court has held that the Regulation B co-signature rules are for the benefit and protection of the credit applicant and not the co-signer. In *Morse v. Mutual Federal Savings & Loan Association*,¹⁵⁹ a federal district court noted that a wife's allegation that her rights had been infringed by a creditor's policy requiring her to co-sign for her husband's debt, did not state a Regulation B cause of action for marital status discrimination. The court concluded that the wife, as co-signer, was not the "aggrieved applicant"¹⁶⁰ and therefore could not recover.¹⁶¹ Because the debt involved belonged solely to her husband, and because he was the only credit applicant, the court reasoned that only he could bring suit for Regulation B violations.¹⁶² This case makes clear that the benefit and protection derived from enforcement of the Regulation B spousal co-signature rules are given only to the applicant spouse. Ultimately, it appears that Regulation B, not the ECOA, should be followed because Regulation B affords greater credit applicant protection.

Despite Regulation B's enhanced protection for credit applicants, it is doubtful that a court will allow the Regulation to pre-empt the ECOA state property law exemption. This is primarily because Con-

mine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

¹⁵⁸ See *supra* notes 60-62 and accompanying text. It may be argued that when a married woman seeks joint credit with her husband, the Michigan law barring her co-signature protects her as a credit "applicant." There is, however, a subtle irony in this protection. In this instance, the law which allegedly protects the wife applicant actually results in denial of credit to her or to the married couple as a unit. See *ECOA Hearings*, *supra* note 14, at 362.

¹⁵⁹ 536 F. Supp. 1271 (D. Mass. 1982).

¹⁶⁰ *Id.* at 1278.

¹⁶¹ *Id.*

¹⁶² *Id.*

gress did not intend for the ECOA to disturb state property laws.¹⁶³ During the ECOA congressional hearings, Congress was told that Michigan law did not allow married women to become sureties. Attorney Margaret J. Gates, co-director of the Center for Women Policy Studies, argued that the ECOA should invalidate this Michigan provision because it discriminates against married women.¹⁶⁴ Attorney Gates acknowledged historical congressional reluctance¹⁶⁵ "to pass legislation which will interfere with those laws governing property and family which are considered to be within the province of the states."¹⁶⁶ Nevertheless, she contended that "[w]hat is at issue in cases such as the one in Michigan is a law enacted for the economic protection of married women which is now being used to deny

¹⁶³ In drafting the ECOA, Congress was careful not to invade the dominion of the state in the area of property law, an area traditionally left to local control. Thornton, *The Not-So-Equal Credit Opportunity Act*, 5 ORANGE COUNTY B.J. 363, 369 (1978).

¹⁶⁴ Attorney Gates noted that Michigan's law not only creates problems for married women who want to become co-signers, but also for married women who want to apply for joint credit with their husbands. Gates prescribed the problem in the following manner:

This Michigan law might make it difficult for married couples to receive joint credit when both of their incomes are necessary in order for them to be sufficiently creditworthy. Thus, a bank or mortgage lender might claim that a wife's income must be discounted completely or partially because her separate property could not be recovered from in the event of divorce or the husband's death. According to Michigan's law, the only time a creditor could not maintain such a claim would be when the loan/credit obtained were for the benefit of the wife alone, that is, to buy her a car. In that case her separate property could be held liable.

See *ECOA Hearings*, *supra* note 14, at 361. Gates stressed further the unfairness of the Michigan law by admonishing Congress that it would be abetting and aiding credit discrimination against women if it allowed the ECOA to exempt state property law. Gates continued:

This decision could lead to a situation whereby a couple receives joint credit only if the husband would have received it on his own anyway. This classic case of discrimination would not be eliminated by [the proposed state property law exemption provision] because the very law resulting in the discrimination would be incorporated by reference into the Federal credit law.

Id. Gates' concluding argument on this point was that the federal government should make its commitment to end credit discrimination as strong as its commitment to end employment discrimination. She emphasized the fact that federal law preempts protective state labor laws:

In the case of title VII, Federal courts have found that State laws designed to protect women workers must give way to the mandate of equal employment opportunity. If the Congress is committed to equal credit opportunity, it ought not close the door to it by enacting a provision exempting all state property laws from the Federal bill.

Id.

¹⁶⁵ The Supreme Court acknowledged the federal government's iron-clad reluctance to disturb state property laws in *United States v. Yazell*, 382 U.S. 341 (1966). The Court issued an unequivocal directive as to when state property laws should be preempted: "They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Id.* at 352.

¹⁶⁶ See *ECOA Hearings*, *supra* note 14, at 361.

financially independent married women the full protection of this economic position."¹⁶⁷

Normally, when an area of conduct which has been traditionally regulated under a state's power is also the subject of federal legislation, federal preemption will not occur unless that is the clear and manifest purpose of Congress.¹⁶⁸ Congressional retention of section 1691d.(b) in the ECOA is indicative of its desire to forego federal preemption of state property laws. Consequently, Michigan creditors may consider and apply state property laws barring married women suretyship contracts without violating the ECOA.¹⁶⁹

To say that the ECOA allows Michigan to have a law prohibiting married women suretyship contracts does not mean that Congress approves of such a law. As previously noted, the ECOA permits such laws because Congress has been reluctant to interfere with the right of the states to establish their own property laws.¹⁷⁰ Regulation B section 202.7(d)(5), which allows married women suretyship contracts, suggests that the Federal Reserve Board was unconvinced that the states should have this much latitude in establishing property rights. The Board, however, must implement the intent of Congress. Thus, even though Regulation B section 202.7(d)(5) offers greater protection to the credit applicant, it must yield to the obvious intent of Congress to allow state property law preemption.

¹⁶⁷ *Id.*

¹⁶⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁶⁹ There is, however, one final argument supporting the view that the Regulation B provision, allowing spousal co-signatures, should be followed rather than the ECOA state property law provision. It can be argued that ECOA deference to state property laws refers to "real property" laws. In its most literal sense, article 20 is not a real property law because there is generally no real property component attached to co-signature rules. One could therefore conclude that the Michigan spousal co-signature rule falls outside the state property law exemption.

This argument is seriously flawed, however, since it lacks substantive support. There is no indication from the ECOA's legislative history that "state property law" was intended to embrace realty only. Without concrete support, the real property argument is too tenuous to be seriously entertained. One commentator has suggested that Congress probably had in mind community property when it formulated ECOA § 1691d.(b). This suggestion, however, is also mere speculation. See Maltz & Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 15 (1978). Given the flaw in the real property argument, Michigan's law barring married women sureties will probably preempt Regulation B on the spousal co-signature question. This means that Michigan's interpretation of its Married Women's Act and article 10 of its constitution is not credit discrimination.

¹⁷⁰ See *supra* notes 163-68 and accompanying text.

4. The Post-1981 Michigan Problem

Whether a Michigan creditor engages in credit discrimination by prohibiting married women suretyship contracts has been rendered moot by legislative action. The Regulation B/ECOA conflict over the validity of Michigan's law can now be resolved without fanfare or heated debate. In 1981 the Michigan legislature expressly declared that married women may enter into suretyship contracts.¹⁷¹ This legislative amendment first repeats that part of article 10 of the Michigan Constitution and its Married Women's Act which allows a married woman to contract as if she were unmarried.¹⁷² It then declares that all limitations on a married woman's ability to contract are removed.¹⁷³ Finally, the new amendment provides that "[a] married woman may act as a surety for the debt or obligation of another person, including the debt of her husband, by signing a written instrument providing for her suretyship."¹⁷⁴ The amendment makes Michigan law consistent with the mandate of Regulation B. By amending its Married Women's Act in this manner, the Michigan legislature ratified *sub silentio*, the belief that Regulation B correctly defines credit discrimination to include a creditor's barring of married women suretyship contracts.¹⁷⁵

Although Michigan's problem is eradicated, the five separate property states¹⁷⁶ with pre-1981 Michigan-like statutes keep the controversy alive and concrete.¹⁷⁷ Like Michigan, these states have statutes which permit a married woman to contract as if she were unmarried.¹⁷⁸ Whether these state courts will follow the pre-1981 Michigan approach and prohibit such contracts, or take a more progressive view rendering further legislation unnecessary, is unsettled.

It is feasible that the courts of the five undecided jurisdictions will

¹⁷¹ MICH. COMP. LAWS ANN. § 557.25, P.A. 216 (West 1981).

¹⁷² *Id.* at § 557.21.

¹⁷³ *Id.* at § 557.23.

¹⁷⁴ See *supra* note 171.

¹⁷⁵ The Michigan legislature was well aware of the married women suretyship problem. A group of Michigan women lawyers requested the legislature to change the law so that married women could contract as fully as others. This request for change, plus a law review note, see Note, *supra* note 58, prompted State Representative Mary Brown to introduce P.A. 216 containing the married women suretyship provision. (Conversation with Mary Kay Scullion, House Democratic Research Staff, Office of Rep. Mary Brown, (May 26, 1983)) [hereinafter cited as Scullion Conversation].

¹⁷⁶ These states are Florida, New Jersey, Colorado, West Virginia and South Carolina.

¹⁷⁷ See *supra* notes 69 & 74 and accompanying text.

¹⁷⁸ COLO. REV. STAT. § 14-2-208 (1973); FLA. STAT. § 708.08 (1971); N.J. STAT. ANN. § 37:2-16 (West 1968); W. VA. CODE § 48-3-1 (1980); S.C. CODE ANN. § 20-5-10 (Law. Co-op 1962).

be induced to follow Michigan's pre-1981 approach. There are several reasons why a state might follow this approach and deny married women suretyship contracts despite Michigan's 1981 amendment. First, the amendment seems to reflect a change of legislative opinion, not a clarification of legislative intent. Nothing in the amendment's history suggests that the legislature was concerned that the judiciary had incorrectly construed the "contract as if she were unmarried" language.¹⁷⁹ In view of this, it is highly probable that the Michigan courts had been correctly following the intent of its legislature by construing the pre-1981 statute to bar married women suretyship contracts. Other state courts may similarly conclude that they are correctly effectuating their legislature's objectives by deciding to bar such contracts. Second, other states may be inclined to follow Michigan's court decisions denying married women suretyship contracts because these decisions were made at a time when there was no statute expressly providing for a contrary result. A state court may conclude that if its legislature intends for married women to become sureties, then, like Michigan, it will enact legislation unequivocally saying so. These reasons suggest that the "Michigan problem," while resolved in that state, is still an actual controversy in the jurisdictions that have not yet decided the married woman suretyship question.

D. Perspectives on the Post-1981 Michigan Problem

Because the "Michigan problem" is likely to reappear, it is important to consider alternative resolutions. It seems that the ECOA state property law exemption will permit states to bar married women suretyship contracts. As previously noted, Regulation B must yield to the Act because it is inconsistent with the Act.¹⁸⁰ This does not mean, however, that states have no option. Many states have recognized the unfairness of treating married women differently and have

¹⁷⁹ A spokesperson from Michigan State Representative Mary Brown's office stated that incorrect judicial interpretation was never an issue. Simply stated, the time had come for the legislature to remove the uncertainty surrounding married women suretyship contracts. Cases highlighting the expediency for change were brought to the legislature's attention. For example, a married woman in Oakland, Michigan's second largest county, could not sign as surety to get her husband out of jail. Additionally, at the time the Michigan legislature was considering P.A. 216 and debating whether married women should possess the right to co-sign, the Michigan Supreme Court was simultaneously pondering the same question. See Scullion Conversation, *supra* note 175.

¹⁸⁰ See *supra* notes 155-57 and accompanying text.

opted to allow them complete contractual freedom.¹⁸¹ This approach is the most sound and least discriminatory. It is directly attuned to the ECOA and Regulation B mandate against sex and marital status discrimination.

Those states undecided on the spousal co-signature question can benefit significantly from the Michigan experience. Before the 1981 amendment, there was chaos in Michigan over the extent to which married women coverture disabilities had been removed.¹⁸² Thus, there was no certainty regarding circumstances under which married women could be bound in suretyship contracts. The confusion escalated when one court held in *City Finance Co. v. Kloostra*,¹⁸³ that article 10 of the Michigan Constitution, expressly abolishing the disability of coverture¹⁸⁴ and allowing the married woman to deal with her property as if she were unmarried, did not supersede the state's Married Women's Property Act. This Act restricted a married woman's liability on a contract co-signed with her husband to her joint holdings, and protected her separate property from liability.¹⁸⁵ The husband, however, was liable to the extent of both his separate and joint property. The court distinguished coverture defenses from disabilities and held that while the disabilities of covertures were abolished by article 10, the defenses of coverture were not.¹⁸⁶ The court

¹⁸¹ The following six state statutes give married women the same contractual rights as married men: IDAHO CODE § 32-904 (1949); ILL. REV. STAT. ch. 68, § 1-21 (1969); KAN. STAT. ANN. § 23-202 (1981); MINN. STAT. ANN. § 519.01 (West 1969); NEB. REV. STAT. § 42-202 (1978); PA. STAT. ANN. tit. 48, § 32.1 (Purdon 1936). Twelve state statutes allow husband and wife the same contractual rights as if they were unmarried: CAL. CIV. CODE § 5103 (West 1969); CONN. GEN. STAT. ANN. § 46-9 (West 1958); MO. REV. STAT. § 36-105 (1947); NEV. REV. STAT. § 123.070 (1979); N.M. STAT. ANN. § 57-2-6 (1953); N.C. GEN. STAT. § 52-2 (1976); OHIO REV. CODE § 3103.05 (Page 1980); OKLA. STAT. ANN. tit. 32, § 5 (West 1976); TEX. FAM. CODE ANN. § 4.03 (1975); W. VA. CODE § 48-3-8 (1980); WIS. STAT. ANN. § 766.15 (West 1981); WYO. STAT. § 20-1-202 (1977). Twenty states and the District of Columbia allow married women to have the same contractual rights as unmarried women: ALA. CODE § 30-4-8 (1975); ALASKA STAT. § 25.15.100 (1962); COLO. REV. STAT. § 14-2-208 (1973); DEL. CODE ANN. tit. 13, § 311 (1953); FLA. STAT. § 708.08 (1971); KY. REV. STAT. ANN. § 404.020 (Baldwin 1971); ME. REV. STAT. ANN. tit. 19, § 164 (1964); MD. ANN. CODE art. 45, §§ 1-2 (1975); MASS. GEN. LAWS ANN. ch. 209, § 2 (West 1969); N.H. REV. STAT. ANN. § 460:2 (1968); N.J. STAT. ANN. § 37:2:16 (West Supp. 1973-1974); N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1964); N.D. CENT. CODE § 14-07-05 (1981); R.I. GEN. LAWS § 15-4-3 (1969); S.C. CODE ANN. § 20-5-10 (Law Co-op. 1976); S.D. CODIFIED LAWS § 25-2-7 (1976); UTAH CODE ANN. § 30-2-2 (1953); UTAH STAT. ANN. tit. 15, § 61 (1974); VA. CODE ANN. § 55-136 (1981); D.C. CODE ENCYCL. § 30-201 (West 1968).

¹⁸² See generally Peisner, *supra* note 106.

¹⁸³ 47 Mich. App. 276, 209 N.W. 2d 498 (1973).

¹⁸⁴ The first sentence of article 10, § 1 of the 1963 Michigan Constitution reads: "The disabilities of coverture as to property are abolished."

¹⁸⁵ See *supra* note 88.

¹⁸⁶ 47 Mich. App. at 288-89, 209 N.W.2d at 505. It is difficult to articulate the difference between coverture defenses and disabilities. One commentator explained it in this way:

found that the provision of the Married Women's Property Act limiting the wife's liability, was a defense of coverture and therefore, still applicable. Consequently, her separate assets and income could not be seized by a creditor unless she received the consideration from the contract herself.¹⁸⁷ When a married woman co-signs as a surety, she binds herself to pay a debt owed by another. The court's decision in *Kloostera* requiring the debt to go to a married woman's estate before she can be held liable, precludes her, in most instances, from entering into suretyship contracts.

The married woman suretyship problem became exacerbated eight years after *Kloostera* when a different panel of the Michigan appeals court found in *Michigan National Leasing Corp. v. Cardillo*,¹⁸⁸ that the same constitutional provision, article 10, was intended to supersede the Married Women's Property Act. Consequently, the court held that article 10 abolished the disabilities as well as the defenses of coverture.

Significantly, the *Cardillo* decision expressly rejects the *Kloostera* court's distinction between disabilities and defenses of coverture.¹⁸⁹ The court in *Kloostera* adhered to the traditional idea that the wife needed protection from her husband¹⁹⁰ and, therefore, her separate property could not be seized for debts for which she co-signed with him. The court's opinion was based on its interpretation of the constitutional convention delegates' intent in supporting article 10.¹⁹¹ According to the *Kloostera* court, "the 'defense of coverture' which insulated a married woman's separate estate from the debts of the marriage seems to be just the type of 'protection' the quoted delegates were attempting to provide."¹⁹²

The court in *Cardillo* rejected the *Kloostera* court's notion of

The terms "disability of coverture" and "defense of coverture" are somewhat confusing. For example, the modern definition of a disability of coverture is a disability that the Michigan legislature imposed upon a married woman vis-a-vis her estate, once having allowed her to retain a separate estate in the first instance. This is conceptually distinct from the old common law disabilities of coverture. The only definition of a defense of coverture is a defense that obtains by operation of a statutory disability, since the married woman legally possessed no property during her coverture (marriage) under the old common law.

Vihtolic, *New Status of Married Women's Property Rights in Michigan*, 5 MICH. CORP. FIN. B.L.J. 15 (1981).

¹⁸⁷ See Note, *supra* note 58, at 87.

¹⁸⁸ 103 Mich. App. 427, 302 N.W.2d 888 (1981).

¹⁸⁹ *Id.* at 433, 302 N.W.2d at 891.

¹⁹⁰ See *supra* notes 60-62 and accompanying text.

¹⁹¹ The court derived the intent of the delegates from the debate which preceded the provision's adoption. 47 Mich. App. at 277, 209 N.W.2d at 501-02.

¹⁹² *Id.* at 278, 209 N.W.2d at 505.

women "having their cake and eating it, too," saying it was "highly inequitable to allow a married women to rely on the abolishment of the disability aspect in one instance while allowing her to implore it as a defense in another."¹⁹³ The court concluded that the plain meaning of article 10 indicated that there was no legitimate basis for distinguishing between the disabilities and defenses of coverture.

Thus, following *Kloostera* and *Cardillo*, Michigan had two conflicting resolutions to the same question. Because these two decisions could not be reconciled, it became imperative for either the Michigan Supreme Court or the state legislature to ultimately decide whether coverture disabilities and defenses had been abolished.¹⁹⁴ The coverture question is inextricably bound to the married women suretyship question. If all remaining coverture defenses and disabilities had been removed, then married women in Michigan would have complete contractual equality. Thus, they could act as sureties and would be held liable to the same extent as any other co-signer. On the other hand, if coverture disabilities had been removed but coverture defenses remained, then married women in Michigan would have limited contractual freedom and could use coverture defensively to bar enforcement of their suretyship contracts.

The Michigan Supreme Court and the legislature both realized the importance of resolving the coverture disability/defense problem. The court immediately granted leave for the defendants to appeal the *Cardillo* result; however, due to swift legislative action, the court reconsidered and reversed its order.¹⁹⁵ After carefully examining the question, the legislature removed all doubt regarding the appropriate interpretation of the "contract as if she were unmarried" language. The 1981 amendment is unequivocal in its pronouncement that married women may enter into suretyship contracts.¹⁹⁶ Thus, the legislature approved the *Cardillo* result and apparently obviated the need to distinguish between coverture defenses and disabilities. The net

¹⁹³ 103 Mich. App. at 434, 302 N.W.2d at 891.

¹⁹⁴ For a thorough and critical analysis of *Kloostera* and *Cardillo* and the discord among Michigan courts regarding the removal of common law coverture disabilities in Michigan, see generally Comment, *Michigan's Law of Coverture*, 1982 DET. C.L. REV. 649.

¹⁹⁵ On November 4, 1981, the Michigan Supreme Court granted leave to appeal. The reversed order came on May 18, 1982. The court stated:

It appearing that this case is not jurisprudentially significant in view of the enactment of 1981 PA 216, we VACATE the order of November 4, 1981, and DENY the application for leave to appeal because the Court is not persuaded that the questions presented should be reviewed by this Court.

See Cameron, *Michigan's New Statute On Married Women's Contractual Capacity: The End of Coverture?*, 61 MICH. STAT B.J. 22 n.17 (1982).

¹⁹⁶ See *supra* note 171.

result of the amendment is to abolish coverture defenses as well as disabilities.

Although the 1981 Michigan amendment is not flawless,¹⁹⁷ it can be heralded in several respects. First, the legislature's immediate response to the spousal co-signature/coverture problem following *Cardillo*,¹⁹⁸ suggests that it believed that a legislative resolution to the problem was superior to a judicial response. While courts clearly possess the authority to interpret ambiguous statutory language and extrapolate its meaning,¹⁹⁹ there exists a risk of misconstruing legislative intent. Misconstruction in the instant case would mean curtailment of a married woman's contractual freedom. Because contractual freedom is a highly valued, basic right,²⁰⁰ judicial speculation of legislative intent to curtail such freedom should be avoided whenever possible.²⁰¹

III. CONCLUSION

The undecided state legislatures should follow the Michigan Legislature and take a bold step toward clarifying the "contract as if she were unmarried" language. These undecided states have an advantage over Michigan in that they have the opportunity to avoid the pandemonium which existed in Michigan over the proper interpretation of the three Married Women's Property Acts, article 10 of the Michigan Constitution, the state's Equal Credit Act, and *Kloostra* and *Cardillo*. It may be well worth the legislatures' time to by-pass the Michigan thicket and unequivocally resolve the married women suretyship question. Married women and creditors would benefit from a concise legislative pronouncement. Moreover, their attorneys would benefit from a cogent declaration of legislative intent regarding the validity of married women suretyship contracts.²⁰²

¹⁹⁷ See Cameron, *supra* note 67, for a critical examination of Michigan P.A. 216.

¹⁹⁸ *Cardillo* was decided February 3, 1981. In less than one year, the Michigan legislature amended its Married Women's Property Act to coincide with the *Cardillo* result.

¹⁹⁹ It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

²⁰⁰ See generally Punke, *Freedom To Contract, as Basic American Democracy*, 81 CONN. L.J. 246 (1976).

²⁰¹ It has been noted that legislative silence is a "dubious indicium of legislative intent." See *St. Germain v. Bank of Hawaii*, 413 F. Supp. 587 (D. Hawaii 1976), *rev'd on other grounds*, 573 F.2d 572, 574 (9th Cir. 1977). It has been further noted that while judges must decide unanticipated cases in the absence of clear legislative directives, they must temper judicial creativity in the face of legislative silence. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

²⁰² The following excerpts from a legal department release of the Michigan Credit Union

The Michigan Legislature faced the married women suretyship question squarely and resolved the question in favor of such contracts. Michigan is now in agreement with most states in declaring that the historical justification for protecting married women from entering into suretyship²⁰³ contracts no longer exists. Unanimity of sister jurisdictions on the spousal co-signature question may provide an incentive for the undecided state legislatures to vote in favor of such contracts.

Notwithstanding Michigan's 1981 amendment, the undecided states may opt to deny married women suretyship contracts under the ECOA state property law exemption. If these states so decide, they should consider tempering the harshness of an absolute ban on married women suretyship contracts whenever possible. For example, even though a state may be permitted to bar married women suretyship contracts, it should not do so if married women waive their defenses to enforcement of such contracts. Should a dispute regarding enforcement arise later, a court could determine whether the waiver was voluntarily given and intelligently made.²⁰⁴ A signed, notarized

League is indicative of the difficulties Michigan lawyers faced in explaining the coverture restrictions to creditors:

A loan cannot be enforced against a married woman in Michigan under certain circumstances. An explanation of these types of circumstances is set forth below. "Married" means married at the time the woman signed the loan documents. Marital status at other times is irrelevant. Michigan's law on coverture creates some exceptions to the usual requirements of the Equal Credit Opportunity Act (ECOA), according to the Federal Reserve Board. A credit union may ask any woman offered as a co-maker whether she is married, the credit union can refuse to accept her as a co-maker because of the coverture laws. If a credit union tells a woman loan applicant that she must have a co-maker, it may refuse to accept her husband. This is because accepting the husband as co-maker may cause the credit union to lose rights against the wife. Because of this, if a woman offers a man as a co-maker, he may be asked whether he is married to her. The above restrictions on enforceability of loans against married women are unique to Michigan, and certainly out of step with the ideas of women's equality. Hopefully, the legislature or the Michigan Supreme Court will abolish these restrictions. However, the courts now are still enforcing the restrictions described above, and you will want to consider them in your credit granting decision.

Michigan Credit Union League, Legal Dep't Release (Mar. 1982).

²⁰³ See *supra* notes 60-62 and accompanying text.

²⁰⁴ The standard used for determining the validity of a waiver in criminal cases can be used in married women suretyship cases. This standard requires the waiver to be "an intentional relinquishment . . . of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The waiver must not only be intentional, "but must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

In the case of a married woman surety, a creditor should inform her of the coverture defense and explain the ramification of waiver. If the married woman co-signs after receiving this information, her signature should create a valid suretyship contract.

waiver gives some evidence of voluntariness. If the court determines that the waiver is valid, then it should enforce the suretyship contract, notwithstanding the state property law defense. Although the waiver approach involves some dangers,²⁰⁵ a state electing to bar married women suretyship contracts should seriously consider adopting it. This practical approach balances the state's desire to protect married women from coercive and improvident co-signature decisions with Regulation B's desire to insure that credit decisions are made without sex or marital status discrimination.

A court might also invoke the estoppel doctrine to balance the right of married women to enter into suretyship contracts with the state's right or duty to protect these women.²⁰⁶ For example, a court should hold that state property law is no defense to a married woman who intentionally co-signs for another with knowledge that her signature is not binding. Married women co-signers should not be allowed to defraud creditors.²⁰⁷

While the Michigan experience regarding married women suretyship contracts will undoubtedly provide guidance to courts and legislatures, further guidance from the Federal Reserve Board is also needed. The Board should examine the spouse who is illegally required to co-sign. Moreover, the Board should clarify the ambiguities regarding the right of this co-signing spouse to simply refuse to repay the debt. Finally, the Board should review the question of whether Regulation B section 202.7(d)(5) allowing spousal co-signatures is superseded by the Regulation B section 202.6 state property law exemption and resolve the apparent conflict between the two sections.

²⁰⁵ An obvious danger of waiver is that many married women who are coerced to co-sign by their husbands or creditors may incur substantial difficulty proving coercion. For a general discussion of the dangers of waiver, see Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478 (1981).

²⁰⁶ The doctrine of estoppel is founded on the broad and just rule that one shall not defend his or her voluntary act, or even deny its validity, to the prejudice of another. *Lockhart v. Kentland Coal & Coke Co.*, 182 Ky. 673, 679, 207 S.W. 18, 20 (1918).

²⁰⁷ Several courts have held that the disability of coverture should not be used to allow married women to perpetrate fraud. See, e.g., *Anderson v. Citizens' Nat'l Bank*, 38 Ind. App. 190, 76 N.E. 811 (1906); *Overcast v. Lawrence*, 141 Ky. 25, 131 S.W. 1029 (1910); *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S.W. 365 (1888). However, false statements made by married women to persons who know of their falsity will not work as estoppel. See *Field v. Campbell*, 164 Ind. 389, 72 N.E. 260 (1904).

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