

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the Law Offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esquire. We welcome and appreciate your suggestions for future article topics.

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THE EQUAL CREDIT OPPORTUNITY ACT AND COMMERCIAL CREDIT APPLICATIONS

Many material suppliers these days request that the spouse of a contractor also sign their commercial credit application as a guarantor of the business accrued debt. However, depending on the process that a supplier uses to obtain the spouse's signature, a supplier may be in violation of the federal Equal Credit Opportunity Act. ("Act") Many reading this article may not even know what the Act concerns. Below will be a brief discussion of the Act and its effect upon suppliers in the construction trade. The Equal Credit Opportunity Act ("ECOA") codified at 15 U.S.C. §1691 (a) (i) (1988) states the following: It is "...unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction - - (1) on the basis of...marital status." The original intent of the legislation was to protect woman whereby a lending institution could not discriminate against a woman because of her marital status in procuring a loan from any lending institution. As lawyers will do, the statute has now been interpreted to protect spouses who are placed upon a material man's credit application as a guarantor of the underlying debt and the only nexus to the construction company is that they are the spouse of a principal.

Any purported violation of ECOA allows a spouse to use the statutory provisions as a defense in the nature of avoidance or rescission of the underlying debt. The legislative intent of ECOA was to provide not only affirmative relief to a spouse that was required by a lender to sign a guaranty based upon the marital status of that person. 15 U.S.C. §§ 1691-1693 (1988) but also may be used as a defense when a supplier intends to enforce the guaranty upon the credit application.

A violation of ECOA is deemed to occur when the lender makes a demand for the spouse's signature. Ramsdell v. Bowles et al., 64 F.3d 5 (1st Cir. 1995); Farrell v Bank of New Hampshire, 929 F.2d 871,873 (1st Cir. 1991). The limitation period for asserting an affirmative claim, which can result in damages against the supplier, is two (2) years from the date of the violation. ECOA provides that "no...action shall **be brought** more than two years from the date of the purported violation. See 15 U.S.C. §1691e (f) (1988); 12 C.F.R. § 202.7 (d) (i) The violation is deemed to have occurred upon demand for spouse's signature and of course the spouse signs the guaranty.

There are caveats to protect a supplier that does receive the signature of the spouse as a guarantor. If the spouse is a principal, officer, director, shareholder, member (LLC), or even employee of the underlying contractor, the nexus is enough to hold the spouse liable for the debt. The courts will hold that the spouse has a perceived benefit from the company and will not be left off the hook for the obligation.

Also, even if the spouse had no pecuniary nexus to the company that spouse may still be held liable. It depends on what steps the supplier took before asking for the signature of the spouse. Normally a supplier will review the credit application without the spouse's signature to determine the creditworthiness of that company. If the business decision is made, based upon reasonable prudent business practices of that industry, that the company standing alone and/or with its principals is not credit worthy of the supplier extending credit, the supplier is perfectly justified in demanding the signatures of each principal's spouse.

Usually, when the company is unable to pay the debt, the supplier then sues the company, its principals and the spouses. A spouse that will assert a violation of ECOA, carries the "burden of coming forward" to demonstrate to the court that the supplier's business decision was not prudent and pursuant to industry standard. This is a difficult burden to meet and if the supplier has documented its decision as to why it requested the spouse's signature, it should be successful in defending its position or setting aside a claim by the spouse on a purported ECOA violation. Make sure, as a supplier, that you have a business policy as to how you determine a company to be credit worthy. If you have a list of criteria that you follow for extending credit to companies, you should carry the day.

If you should have any questions on this topic or any other related topic, please contact Mr. Sissman at his website at www.contractoralert.com or by phone at 703) 903-9646 or (301) 762-0402.