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Gail R. Reizenstein

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A FRESH LOOK AT THE EQUAL CREDIT OPPORTUNITY ACT

GAIL R. REIZENSTEIN*

I. INTRODUCTION

CREDIT has without question become the American way of life.¹ It should stand to reason, therefore, since credit partially determines access to such matters as home ownership, education and consumer goods, that all who apply for credit should be accorded an equal opportunity.² For some, however, the inability to obtain credit is not based on any lack of individual creditworthiness,³ but rather on their membership in a particular class.⁴ Denying credit on the basis of an immutable characteristic impedes an individual's ability to function fully within the stream of commerce. This inability may be accompanied by a sense of personal humiliation and frustration, the implication of which may extend far beyond the economic sphere.⁵

While credit is considered a privilege rather than a right, those who cannot obtain credit may be on their way to becoming second-class citizens. The availability of credit may have a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution.⁶

Moreover, discriminatory practices in the credit industry may have consequences for the economy as a whole inasmuch as the credit industry plays such an integral role in big business.⁷

The subsequent material will illustrate that despite the fact that women have been required to meet both a different and a higher standard for

*B.A., University of Michigan; J.D., Temple University School of Law. The author wishes to thank Donald R. Price, Associate Professor, Temple University School of Law for his encouragement and guidance.

¹ Comment, *Equal Credit For All—An Analysis of the 1976 Amendments to the Equal Credit Opportunity Act*, 22 ST. LOUIS U.L.J. 326 (1978) [hereinafter cited as *Equal Credit For All*]; Note, *Equal Credit: You Can Get There From Here—The Equal Opportunity Act*, 52 N.D.L. REV. 381, 385 (1975) [hereinafter cited as *You Can Get There From Here*].

² Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 960-61 (1976) [hereinafter cited as *Credit Equality Comes to Women*].

³ Creditworthiness is generally agreed to be a function of the ability and willingness to pay debts. Judging such characteristics is a subjective process heavily based on personal characteristics of the credit applicant.

⁴ Hume, *A Suggested Analysis for Regulation of Equal Credit Opportunity*, 52 WASH. L. REV. 335 (1977) [hereinafter cited as *A Suggested Analysis*]; Comment, *Equal Credit Opportunity Act Amendment of 1976*, 12 U. RICH. L. REV. 203 (1977). [hereinafter cited as *ECOA Amendments*].

⁵ *You Can Get There From Here*, *supra* note 1, at 386.

⁶ *Equal Credit For All*, *supra* note 1 at 327.

⁷ *You Can Get There From Here*, *supra* note 1, at 386.

them to be deemed creditworthy, studies have shown that they (especially single women) are in fact better credit risks than men.⁸ Nevertheless, in an investigation of special problems concerning the availability of credit, the National Commission on Consumer Finance identified difficulties that women in particular faced in obtaining consumer, as well as mortgage, credit.⁹ It discovered that credit discrimination primarily manifested itself in five ways:

- (1) Single women have more trouble obtaining credit than single men.
- (2) Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name. Similar reapplication is not asked of men when they marry.
- (3) Creditors are unwilling to extend credit to a married woman in her own name.
- (4) Creditors are usually unwilling to count the wife's income when a married couple applies for credit.
- (5) Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in the husband's name.¹⁰

The magnitude and seriousness of these problems become more acute in view of a present, and ostensibly future, trend. With the increasing number of working women, the traditional notions of the male head of the household and the male primary breadwinner are no longer as pervasive as they once were.¹¹

Before the enactment of the Equal Credit Opportunity Act¹² (hereinafter cited as ECOA), it seemed as though the "women who had the greatest difficulty obtaining credit were those of childbearing age or who

⁸ Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 413 (1974) [hereinafter cited as *Causes and Solutions*]; *Credit Equality Comes to Women*, *supra* note 2, at 965 n.26.

In 1964, Paul Smith did a study which examined the possible correlation between consumer credit risk and sex. He found that out of 8795 credit accounts established for single men, 176 defaulted (2%); while among 4337 accounts established for single women, only 33 defaulted (0.75%). See Note, *The Not-So-Equal Credit Opportunity Act*, 5 ORANGE COUNTY B.J. 363, 366 (1978) [hereinafter cited as *Not-So-Equal*].

⁹ *A Suggested Analysis*, *supra* note 4, at 335.

¹⁰ NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 152-53 (1972), quoted in *Causes and Solutions*, *supra* note 8 at 411; Note, *Consumer Protection: The Equal Credit Opportunity Act*, 28 OKLA. L. REV. 186, 188 (1976) [hereinafter cited as *Consumer Protection*]; Comment, *Equal Credit: Promise or Reality?*, 11 HARV. CIV. RIGHTS CIVIL LIB. L. REV. 186, 187-88 (1976) [hereinafter cited as *Promise or Reality*]; *Not-So-Equal*, *supra* note 8, at 363. The Commission's report provided the impetus, pressure and statistical groundwork which led to the enactment of the Act in 1974 aimed specifically at discrimination based on sex and marital status in credit transactions.

¹¹ *Consumer Protection*, *supra* note 10, at 578.

¹² 15 U.S.C. §§ 1691-1691f (1976).

were separated or divorced. . . . [T]hose who were most in need of credit for survival were least likely to receive it."¹³

"The decision to grant or deny credit . . . is a discerning evaluative process . . . [in which] the subjective element invariably plays a major role Discrimination in the extension of credit occurs when an applicant is not evaluated pursuant to a creditor's ordinary criteria, but is judged, and frequently denied credit, not on an individual basis but because of membership in a particular class."¹⁴ Interestingly enough, the ECOA does not specifically define discrimination nor does it enumerate what acts would constitute a violation of its provisions. Instead, it delegates its substantive rule-making authority along with the power to promulgate compliance guidelines to the Federal Reserve Board.¹⁵ Investigations of the credit industry indicate that gender discrimination is premised on two overall factors: (1) outmoded assumptions about the creditworthiness of women, and (2) creditors' concern about state property laws which limit, or seem to limit, the ability of women to incur debt.¹⁶

In the face of convincing evidence to the contrary, many creditors retained doubts about women's job continuity and proceeded on the assumption that virtually all women will marry, have children, leave the work force and, ultimately, fail to meet their financial obligations.¹⁷ In conjunction with these inconclusive and unsound stereotyped (pre-ECOA) suppositions, many creditors sought information regarding women's choice of birth control methods and their future plans with respect to having and raising children. Some would even demand that the women sign an affidavit "swearing not to endanger their ability to repay their debts by having children."¹⁸ The "anti-stereotyping principle" under the ECOA prohibits the use of aggregate statistics regarding childbearing.¹⁹ Previously even married women with no intention of having children at the time of their application for credit, and women whose employers provided income maintenance during the period of disability were penalized as members of a class likely to leave the work force. Creditors can no longer translate the fact of being a married woman to increased statistical probability of default by any female applicant.²⁰

¹³ *You Can Get There From Here*, *supra* note 1, at 383.

¹⁴ *Id.* at 387.

¹⁵ *Id.* at 399.

¹⁶ *Id.* at 387.

¹⁷ *Causes and Solutions*, *supra* note 8, at 409; *You Can Get There From Here*, *supra* note 1, at 388.

¹⁸ *Credit Equality Comes To Women*, *supra* note 2, at 965 nn.28 & 29. Both of these requests are expressly forbidden under the regulations promulgated by the Federal Reserve Board. 12 C.F.R. § 202.5(d)(3) (1980).

¹⁹ Maltz & Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 30 (1978) [hereinafter cited as *Credit and Regulation B*].

²⁰ *Id.*

Recent information tends to show that creditors have a greater stake in discrimination free practices than merely the desire to comply with a statute or maintain good public relations. Some are realizing that it is not profitable to lock all female applicants into a stereotyped role which defines them as less creditworthy than men. While the denial of appropriate wages to women may act as a boon to the employer because he can save money, the credit grantor who similarly discriminates on the basis of sex ostensibly eliminates a portion of the market which otherwise has the potential to increase his profits.²¹ Obviously it is in the economic interest of a creditor to do business with the most reliable borrowers or purchasers whether they are men or women.²²

Not only was the "centuries-old belief as to the status of women"²³ a source of credit discrimination, but equally culpable were, and to some extent still are, state "domestic relations laws requiring husbands to support their wives, [along with] property laws, community property laws, and multiple agreements laws, all of which . . . adversely affect the creditworthiness of married women."²⁴

Women as a class are economically disadvantaged, having greater difficulty finding work, getting paid less for equivalent work, and generally being relegated to jobs with little opportunity for advancement. While this may explain why fewer women than men obtain loans and credit, this does not justify the denial of credit to a woman who, by all objective criteria, is as qualified as a man who obtains credit.²⁵

Ultimately, these discriminatory practices stem from "erroneous or outmoded notions of women's role in society."²⁶ Some have suggested that revising state domestic relations or property laws would not serve to effectively guard against the perpetuation of discriminatory treatment since the "offensive practices are not, as has been suggested, dictated by *the law*."²⁷ Such a conclusion was drawn before the ECOA was enacted. The

²¹ Littlefield, *Current Comment on Women's Unequal Access to Credit*, 80 Com. L.J. 111, 112 (1975) [hereinafter cited as *Unequal Access*].

²² *You Can Get There From Here*, *supra* note 1, at 386.

²³ Comment, *Women and Credit*, 12 DUQ. L. REV. 863 (1974) [hereinafter cited as *Women and Credit*].

²⁴ *Causes and Solutions*, *supra* note 8, at 413. Domestic relations laws now seek to minimize the antediluvian effect of support laws on both parties (e.g., Married Women's Property Acts, Family Expense Statutes, and State Equal Rights Amendments). In all community property jurisdictions except Texas and Louisiana "equal management provisions have been added which enable a woman to obligate her own property and earnings. Thus a wife who has no income and who is, therefore, not credit-worthy in the usual sense, may incur an unsecured debt, thereby subjecting the community on an equal basis with her husband. Multiple agreement laws prevent women from opening accounts or obtaining loans from creditors with whom their husbands have already established credit.

²⁵ *Id.*, *Credit Equality Comes to Women*, *supra* note 2, at 964 nn.23, 24 & 25.

²⁶ *Causes and Solutions*, *supra* note 8, at 430.

²⁷ *Id.* (emphasis added).

only solution envisioned at that time was "a strong, well-enforced federal law, accompanied by efforts to educate both consumers and the credit industry . . . to overcome a tradition of discrimination and guarantee that women get the credit they deserve."²⁸ Ms. Gates (the author of that statement) saw her vision become a theoretical, if not an actual, reality when the Equal Credit Opportunity Act was created. Moreover, the 1976 Amendments to the Act²⁹ gave her somewhat limited view of the victimized class a necessary boost by expanding the original scope (beyond merely sex and marital status) to include discrimination based on age, race, color, religion, national origin, receipt of public assistance benefits, and the exercise of rights under the Consumer Credit Protection Act.³⁰

II. LEGISLATIVE HISTORY

The five major patterns of credit discrimination against women identified by the 1972 report of the National Commission on Consumer Finance³¹ evolved out of the widely-held presumptions directed at the probability of pregnancy, the subsequent termination of employment upon childbirth, and the general instability and inability of women to control their personal affairs (especially single and divorced women).³² Although studies have found no economic justification for perpetuating these stereotypes, the result of such assumptions has been marked inequality of opportunity for women.³³

At both the federal and state level, evidence has been consistently produced documenting the creditors' use of different standards for evaluating similarly situated men and women. Particularly victimized by such a double standard are married women who try to obtain, keep, or re-establish credit during a transition from one marital status to another.³⁴ Was it the case that the Commission's hearings and report sparked the long-awaited action into an area which had previously been devoid of congressional attention? Or, was the enactment of the ECOA rather a piece of "hardly impressive" legislation, "passed as a non-germane Senate rider on an unrelated House bill [that] . . . was pushed through in the waning days of the 93rd Congress in a last ditch effort to get some kind of legislation on the books before the close of the legislative session," as one author, Geck, characterized its origin.³⁵ Most likely the former reflects a more accurate portrayal of what actually transpired. Even Ms. Geck

²⁸ *Id.* (emphasis added).

²⁹ Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C. 1641, 1691b-1691f (1976)).

³⁰ 15 U.S.C. §§ 1601-1681 (1976).

³¹ See note 10 and accompanying text, *supra*.

³² *Promise or Reality*, *supra* note 10, at 188; *Women and Credit*, *supra* note 23, at 863.

³³ *Promise or Reality*, *supra* note 10, at 188.

³⁴ *A Suggested Analysis*, *supra* note 4, at 336.

³⁵ *You Can Get There From Here*, *supra* note 1, at 381.

should concede that, no matter how unimpressive the Act's genesis may have been, the ECOA was a significant breakthrough for women's, consumer, and civil rights activists who had worked so diligently for its passage.

The legislation that ultimately became the Act originated in the Senate Committee on Banking, Housing and Urban Affairs.

Hearings in the House of Representatives in 1974 produced testimony of discrimination against credit applicants on account of their sex and marital status, as well as on account of other characteristics unrelated to creditworthiness. The resulting legislation . . . dealt only with discrimination . . . [based on] sex or marital status.³⁶

Subsequently, as credit "ceased to be a luxury item either for consumers or business entrepreneurs,"³⁷ and as an increasingly diverse population was being strangled by its omnipotence, the evidence convincingly pointed to the pressing need for expanding the Act's coverage. Further hearings and reports indicated the strong possibility of other types of discrimination in mortgage credit. "Discrimination against the elderly was the most often cited abuse, despite the fact" that many creditors considered their older customers their best customers.³⁸

Within five months of its effective date, the Act was amended to encompass other categories of discriminatory practices. As amended, the Act "identifies characteristics of applicants which the [congressional] Committee believes are, and must be, irrelevant to a credit judgment, and prohibits or curtails their use."³⁹

The original ECOA was designed to: "[1] inform consumers of their credit rights . . . [2] enlist their aid in obtaining enforcement . . . [3] compel compliance by creditors through consumer actions . . . [4] punish creditors who violate its provisions, and [5] compensate injured parties."⁴⁰

After the original bill was signed into law on October 28, 1974, "responsibility . . . passed to the Board to promulgate the regulations [Regulation B] necessary to effectuate the purposes of the Act before its effective date on October 28, 1975."⁴¹ With the passage of the 1976 Amendments, the Board updated and refined its prior Regulation B in order to ensure compliance with the Act as revised. If the balance struck by the Board was

³⁶ S. REP. NO. 589, 94th Cong., 2nd Sess. 3, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 403 [hereinafter cited as *Senate Report*].

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Credit Equality Comes to Women*, *supra* note 2, at 974-75.

⁴¹ *Promise or Reality*, *supra* note 10, at 190.

in favor of the creditor as some allege, then the regulations should be given a broad interpretation to further the congressional intent of the Act.⁴²

Since it is this intent which should be the controlling standard, the provisions promulgated by the Board should be the floor, not ceiling, of protection. A broader interpretation would not infringe the rational determination of creditworthiness which is the center of the credit-granting process but will only force creditors to exclude irrational considerations from the decision.⁴³

The consensus espouses a less demanding position — that the Board regulations attempt to compel creditors to design and evaluate applications as neutrally as possible.⁴⁴ Although this presupposes neutrality with respect to sex, marital status, and the other prohibited groups as amended, the creditor is nevertheless accorded certain liberties under particular circumstances. For example, depending upon the type of credit being sought, a creditor may consider marital status, number of dependents and related financial obligations, age (one of the prohibited bases under the Amendments), and income derived from public assistance (also included in the amended version) in determining an applicant's creditworthiness.⁴⁵ While the information obtained from such inquiries may not be utilized as the exclusive basis for denial of credit, the regulations do not provide adequate safeguards or guidelines for drastically minimizing the inference-drawing which may give rise to issues unrelated to creditworthiness. Therefore, although the regulations are intended to be strictly neutral, some creditors may be tempted to resort to such information in borderline situations.⁴⁶

Three policies were proposed to avoid any temptation to misuse information: (1) restricting the creditor's access to certain information in order to reduce discrimination (because the creditor cannot use what it does not know); (2) forbidding the asking of some questions so as to break down traditional discriminatory practices and assumptions; and (3) depriving creditors of information they cannot legally use in order to protect themselves from allegations of discrimination (based on the consideration of prohibited information in determining whether to grant credit).⁴⁷ It is not clear why these policies were never incorporated into Regulation B. If they were intentionally excluded, this would buttress the prior contention that an inherent creditor preference lies within the regulations.

The controversy over whether such a bias exists stems from a basic "tension between the two [legitimate] policies of the legislation: . . . [1] credit ap-

⁴² *Id.* at 214.

⁴³ *Id.*

⁴⁴ *Not-So-Equal*, *supra* note 8, at 364.

⁴⁵ 12 C.F.R. § 202.7(3) (1980).

⁴⁶ *Equal Credit For All*, *supra* note 1, at 345.

⁴⁷ *Credit and Regulation B*, *supra* note 19, at 21.

plications should be evaluated without undue or unjustified emphasis on the group membership of the applicant for credit while [2] still permitting the creditor to give maximum attention to factors that demonstrably affect credit risk."⁴⁸ The regulations attempt to further both goals and recognize the "dual statutory policies inherent in the Act: to limit the acquisition of certain types of information, and to restrict the uses that can be made of the acquired information."⁴⁹

The recurring theme throughout Regulation B is that a "creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction."⁵⁰ It does not purport to prohibit *all* discrimination, however. Even with respect to the prohibited bases, both Congress and the Federal Reserve Board determined that good social policy dictated that some discrimination be allowed (*e.g.*, using an elderly person's age to favor him or her over other applicants).⁵¹ Moreover, under certain conditions ECOA authorizes creditors to implement special purpose credit programs to aid underprivileged groups.⁵²

Although the situations are not precisely analogous, the legislative intent was that the judicial construction of federal employment discrimination legislation (*i.e.*, that a violation of the statute could be established by merely showing that an employment practice had a discriminatory effect) given in *Griggs v. Duke Power Co.*⁵³ and *Albemarle Paper Co. v. Moody*⁵⁴ serve as a general guide in applying the ECOA.⁵⁵ Only one attempt has been made to raise the applicability of the "effects test" to the credit industry.⁵⁶ Although that attempt was unsuccessful, future cases may provide more appropriate situations for applying this test.

⁴⁸ *A Suggested Analysis, supra* note 4, at 342.

⁴⁹ *Equal Credit For All, supra* note 1, at 341. Attention should be paid to the following "guidelines" in reference to the two-fold intended effect of the regulations on the credit-granting process:

"When the information might lead to an unreliable assumption as with sex or race, the creditor is precluded from acquiring it at all. When the information may facilitate an evaluation of creditworthiness. . . the creditor may acquire it, although the nature and extent of the inquiry is strictly circumscribed. When the information may in fact be genuinely related to some factor of creditworthiness (such as with age or source of income), the creditor is precluded from directly considering it and must look instead to the factor that it is related to creditworthiness." *Id.*

⁵⁰ 12 C.F.R. § 202.4 (1980).

⁵¹ *Credit and Regulation B, supra* note 19, at 46.

⁵² 15 U.S.C. § 1691(c) (1976).

⁵³ 401 U.S. 424, 432 (1971): "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."

⁵⁴ 422 U.S. 405 (1975). Both *Griggs* and *Albemarle* indicate that once a *prima facie* case of discrimination is presented, the defendant must meet the burden of disproving it.

⁵⁵ *Senate Report, supra* note 36, at 4.

⁵⁶ *Carroll v. Exxon Co. U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977). The "effects test" is intended to be especially helpful with respect to the allocation of burdens of proof.

III. THE ORIGINAL AND AMENDED EQUAL CREDIT OPPORTUNITY ACT

In 1974, the Equal Credit Opportunity Act was appended to the Consumer Credit Protection Act in an effort to ensure that all consumers, regardless of sex or marital status, had credit available to them by regulating those engaged in the extension of credit.⁵⁷ By restricting the scope to sex and marital status, Congress presumably intended to avoid subjecting the credit industry to a barrage of changes by introducing the legislation a little at a time. Not only was credit discrimination based on sex and marital status the most researched area, but also the limitation may have provided Congress with the opportunity to oversee its initial success, before subsequently proposing to expand its coverage.⁵⁸

While the ECOA does not create a legal right to credit, it does create a legal right of equal access to credit.⁵⁹

[I]t is the first [Act] with the underlying philosophy that consumer credit is good, and, therefore, should be made available equally to everyone or at least not be held back because of any of the prohibited bases. . . . [I]t is very important that the Congress of the United States has recognized consumer credit as a positive aspect of our culture. . . . [Other credit-related acts, in contrast,] seem to say that credit is an unpleasant necessity.⁶⁰

Inasmuch as the original Act failed to both recognize other groups historically denied credit and promulgate additional significant protection and enforcement provisions considered crucial by consumer advocates, it became apparent that considerable revision was needed.⁶¹ The Amendments of 1976 were subsequently passed to extend the prohibitions against discrimination in the granting of credit to include race, color, religion, national origin, age (provided the applicant has the ability to contract), receipt of public assistance benefits, and the exercise of rights under the Consumer Credit Protection Act.⁶² The Amendments substantially strengthened the enforcement mechanisms in the Act by: (1) requiring, for the first time in any federal legislation, that the creditor provide a statement of reasons to a rejected credit applicant upon request; (2) extending the statute of limitation period from one year to two; (3) enabling the United States Attorney General to bring enforcement actions by way of an administrative procedure; and, (4) "increasing the level of damages attain-

⁵⁷ Note, *Consumer Credit Protection—The Equal Credit Opportunity Act Amendments of 1976*, 50 TEMP. L.Q. 388 (1977) [hereinafter cited as *Consumer Credit Protection*].

⁵⁸ *Equal Credit For All*, *supra* note 1, at 332.

⁵⁹ *ECOA Amendments*, *supra* note 4, at 219.

⁶⁰ Butler, *Equal Credit Opportunity Act*, 33 BUS. L. 1073, 1074 (1968) [hereinafter cited as *ECOA*].

⁶¹ Note, *Equal Credit Opportunity Act Amendments of 1976 - An Overview of the New Law*, 55 N.C.L. REV. 267, 269 (1977) [hereinafter cited as *An Overview of the New Law*].

able in class action suits."⁶³ As amended, ECOA also recognizes both the utility and desirability of affirmative action type credit programs (government or privately sponsored), and the necessity of knowing the applicant's age and source of income to facilitate a determination of creditworthiness. Additionally, it clarifies the relationship between the Act and existing and future state laws dealing with credit discrimination, an area left unclear by the original Act. Finally, the amended version permits the Board to exempt certain classes of business credit transactions where the Act's prohibitions and remedies prove unnecessary.⁶⁴

The amended ECOA and Regulation B, referred to by some as "three-pronged consumer protection vehicles,"⁶⁵ focus primarily on the importance of disclosure, incentive for private actions as well as regulatory enforcement, and civil rights (introduced in ECOA for the first time in the consumer credit area).

A. *Scope and Prohibited Discrimination*

The original version of the Act provided:

It shall be unlawful for any creditor to discriminate against any applicant (on the basis of sex or marital status) with respect to any aspect of a credit transaction.⁶⁶

As amended, the prohibited class was enlarged to include discrimination: "(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act]."⁶⁷ The Act applies to any "creditor," including those who extend credit, those who arrange for the extension of credit, and the assignees of the original creditor where that assignee "participates in the decision to extend, continue or renew credit."⁶⁸ The creditor is responsible to an "applicant" who applies directly for an extension of credit or who applies indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.⁶⁹ Creditors are prohibited from discriminating throughout any aspect of the credit transaction⁷⁰ "including solicitations of prospective applicants, information requirements, standards of creditworthiness, terms of credit, and

⁶³ *Consumer Credit Protection*, *supra* note 58, at 388-89.

⁶⁴ *Senate Report*, *supra* note 36, at 2.

⁶⁵ *ECOA*, *supra* note 60, at 1085.

⁶⁶ 15 U.S.C. § 1691(a) (1976).

⁶⁷ *Id.*

⁶⁸ 15 U.S.C. § 1691a(e) (1976).

⁶⁹ 15 U.S.C. § 1691a(b) (1976).

collection practices."⁷¹ The Federal Reserve Board is charged with responsibility for providing more specific sanctions.⁷² The Board may exempt any transaction which is "not primarily for personal, family or household purposes [if it decides] that the application of such [provision(s)] would not contribute substantially to carrying out the purposes of [the statute]."⁷³

B. Sex and Marital Status

1. Pre-ECOA

Before the ECOA was enacted, those problems which plagued married women's creditworthiness were compounded by local credit bureaus that filed information regarding these women under their husbands' names.⁷⁴ Once married, a woman's credit accounts were ordinarily discontinued, thereby causing her to lose any standing she may have once had. The only option open to her was to reapply in her husband's name.⁷⁵ As time went on, even if her earnings constituted the family income, she still built no credit standing. Similarly, even if the woman regularly paid those debts for which she individually was responsible, her husband's credit delinquency record became *her* credit record. This lack of credit identity became more pronounced if she were to suddenly find herself widowed or with large medical expenses. Such a loss of credit status is expressly forbidden by the ECOA.⁷⁶

Creditors who argue that a sudden change in marital status creates temporary unreliability encourage marital status discrimination. Before the ECOA, newly separated and divorced women frequently had to wait six to twelve months for consideration of their credit applications to begin.⁷⁷ "The divorced, separated or widowed woman was considered a bad credit risk because she was *without male support, financial or otherwise*."⁷⁸ Unlike a similarly situated woman, a man's name remained constant regardless of marital status; he did not have a duty to notify the creditor of a change in status and his credit identity remained intact.

Although information concerning alimony and support payments may now be requested only after the applicant is advised that such information is optional, before 1974, when a divorced woman disclosed receiving them, such payments were deemed an unstable source of income and were seldom taken into account.⁷⁹ Even if she was otherwise creditworthy and her es-

⁷¹ Comment, *The 1976 Amendments to the Equal Credit Opportunity Act*, 28 BAYLOR L. REV. 633-34 (1976) [hereinafter cited as *1976 Amendments*].

⁷² 15 U.S.C. § 1691b (1976).

⁷³ *Id.* § 1691b(a).

⁷⁴ *Women and Credit*, *supra* note 23, at 866.

⁷⁵ *Credit Equality Comes to Women*, *supra* note 2, at 968.

⁷⁶ 15 U.S.C. § 1691(a)(1) (1976).

⁷⁷ *Women and Credit*, *supra* note 23, at 866.

⁷⁸ *You Can Get There From Here*, *supra* note 1, at 388 (emphasis added).

⁷⁹ *Women and Credit*, *supra* note 23, at 867; *Credit Equality Comes to Women*, *supra* note 2, at 973.

tranged husband was reliable, she was often denied credit because creditors deemed this source of income invalid. The Act presently prohibits excluding such income from consideration merely because it is labelled support payment.⁸⁰

Before ECOA, a single woman, although statistically more credit-worthy than a similarly situated man, was considered a poor risk because she was "inherently unstable and incapable of handling her own affairs . . . and likely to change her marital status;"⁸¹ this notion triggered the presumption that the applicant will become pregnant resulting in permanent job termination. A deeply-rooted but frequently unsound economic and social assumption. Whether, with the enactment of the ECOA, an effective enforcement vehicle will be realized is still indeterminate; what is certain, however, is that the antediluvian myths and their disastrous impacts must succumb to the reality of an individualistic society that defies stereotyping.

2. Post-ECOA

The ban against discrimination on the basis of race, color, religion, national origin and sex is absolute. However, inquiries into the applicant's marital status, age and receipt of public assistance benefits are permissible for limited purposes. (Some perceive that these exceptions tend to weaken the efficacy of the Act.)⁸² Under certain circumstances, inquiries into marital status may be requested, so long as they are justified by legitimate concern for either the creditor's rights on default or for its compliance with state statutes. Considerations of this nature are particularly significant in community property states.⁸³ Where one spouse applies for credit in his or her own name, a creditor may only request information concerning the other spouse if the latter will be permitted to use the account,⁸⁴ will be contractually liable for the account,⁸⁵ or will have his or her income as the basis for repayment.⁸⁶ Spousal information may be required when the applicant either resides in a community property state (or when the property relied upon for repayment is located there)⁸⁷ or relies on alimony, child support or separate maintenance payments as a basis for repayment (with the inquiry directed to the probability that such payments will continue).⁸⁸

⁸⁰ Regulation B permits the creditor to consider information about the party obligated to pay support only if the applicant indicates reliance upon such payments as a basis for repayment. 12 C.F.R. § 202.6(b)(5) (1980).

⁸¹ *Women and Credit*, *supra* note 23, at 875.

⁸² *Not-So-Equal*, *Supra* note 8, at 366.

⁸³ 1976 *Amendments*, *supra* note 71, at 635; see 12 C.F.R. § 202 (1980).

⁸⁴ 12 C.F.R. § 202.5(c)(2)(i) (1980).

⁸⁵ *Id.* § 202.5(c)(2)(ii).

⁸⁶ *Id.* § 202.5(c)(2)(iii).

⁸⁷ *Id.* § 202.5(c)(2)(iv).

⁸⁸ *Id.* § 202.5(c)(2)(v).

When seeking such information, only the terms "married," "unmarried" (to include single, divorced and widowed) and "separated" may be used.⁸⁰

A creditor may not ask whether any income is derived from alimony, child support, or separate maintenance payments without first notifying the applicant that such information is optional unless the applicant wishes such information to be considered in determining creditworthiness.⁸⁰ At no time may the applicant's sex be requested. If the application form offers a choice of titles (*e.g.*, Mr., Mrs., Miss or Ms.), it must readily disclose that such a designation is optional; otherwise, the form must only include sex-neutral terms.⁸¹

There is an absolute prohibition against any inquiry which delves into the birth control practices or childbearing intentions of an applicant in the evaluation of creditworthiness.⁸² The Board accepts the gathering of information regarding "dependent-related financial obligations or expenditures" provided that it is accomplished in a neutral manner.⁸³

Where an individual has an existing account and undergoes a change in name or marital status, the creditor is proscribed from requiring that she reapply and from changing the terms or terminating the account, unless there is evidence of an inability or unwillingness to repay.⁸⁴ No guidance for such a determination is provided by the regulations.⁸⁵ Regulation B also fails to say whether similar rules would apply if, subsequent to establishing an existing account, an applicant accepted public assistance or retirement benefits. Assuming the legislative intent were fully effectuated, the same prohibitions should apply as when a change in name or marital status occurs. It should be borne in mind, however, that the danger of discrimination is intensified by such a standardless regulation.⁸⁶

The Act prohibits the practice of discounting an applicant's income on the basis of any of the protected classes.⁸⁷ When determining a married couple's eligibility for a loan or mortgage, creditors in the past frequently discounted or totally ignored the wife's income if it was derived from part-time employment. Under Regulation B, the creditor may only con-

⁸⁰ *Id.* § 202.5(d)(1).

⁸⁰ *Id.* § 202.5(d)(2).

⁸¹ *Id.* § 202.5(d)(3).

⁸² *Id.* § 202.5(d)(4).

⁸³ 1967 *Amendments*, *supra* note 71, at 639. An example of a neutral question would be: "how many dependents are in the household or what are the family's total living expenses?" Federal Reserve Board Letter No. 41 (February 10, 1976); Federal Reserve Board Letter No. 48 (February 17, 1976).

⁸⁴ 12 C.F.R. § 202.7(c) (1980).

⁸⁵ *Promise or Reality*, *supra* note 10, at 197.

⁸⁶ *Id.* at 198.

⁸⁷ 12 C.F.R. § 202.6(b)(5) (1980).

sider the amount and the "probable continuance" of such income.⁹⁸ Creditors often assume that part-time income is less likely to continue. Since women comprise a greater proportion of the part-time work force than men do, that assumption results in a discriminatory effect upon women which is contrary to the legislative intent.⁹⁹

The existence or lack of a telephone listing in the applicant's name can no longer be taken into account by the creditor. The presence of a telephone in the residence may however be considered among the many factors contributing to a successful credit application.¹⁰⁰

C. Age

With the addition of the 1976 Amendments, "sex and marital status" were joined by an amorphous group, all of which have been similarly subjected to a history of credit discrimination. Although utilizing any of the protected classes as sole determinate of creditworthiness is proscribed, the ban as to inquiries aimed at the applicant's age and receipt of public assistance income (as well as marital status) is subject to several exceptions and therefore is not absolute as is the case for the remaining classes.

"The inclusion of a prohibition on age has proved to be the most controversial."¹⁰¹ It was particularly intended to protect the elderly (defined in Regulation B as 62 or older); discrimination against the elderly was the abuse most frequently documented in hearings held to amend the 1974 Act.¹⁰² Their need to establish credit is largely due to the difficulty one on a fixed income has managing his affairs without some kind of budgeting assistance.¹⁰³ If an elderly person has spent a lifetime paying cash, he or she would experience credit discrimination when trying to establish credit for the first time. The use of age as a variable in credit scoring systems contributed to the high incidence of credit decisions unfavorable to the elderly.¹⁰⁴ This was ostensibly due to the fact that many elements of creditworthiness normally considered in a credit determination are generally absent in the elderly. For instance, elderly persons are often on fixed incomes traceable to public sources, unemployed or working only part-time, and prone to changing their residences after retirement.

By making age per se a negative factor, and then going on to consider these other factors that coincide with age, a double case of dis-

⁹⁸ *Id.* To the extent that the creditor considers credit history, it is required to consider the history of all joint accounts of the applicant and his or her spouse. *Id.* § 202.6(b)(6).

⁹⁹ *Promise or Reality*, *supra* note 10, at 197.

¹⁰⁰ 12 C.F.R. § 202.6(b)(4) (1980).

¹⁰¹ *An Overview of the New Law*, *supra* note 61, at 272.

¹⁰² *Senate Report*, *supra* note 36, at 3.

¹⁰³ *Equal Credit For All*, *supra* note 1, at 336.

¹⁰⁴ *Id.* at 337.

crimination results.¹⁰⁵ The amended Act bans only the arbitrary use of age when making credit decisions.¹⁰⁶ The creditor is allowed to base the decision upon relevant statistical characteristics of a given age group, provided the age of an elderly applicant is not assigned a negative value.¹⁰⁷ The age of an elderly applicant may in fact be used to favor the applicant in extending credit because of evidence which suggests that older debtors are more likely to repay than similarly situated younger ones.¹⁰⁸ "[T]he young person having difficulty obtaining a loan because [he lacks a credit history] may find this legislation of little help."¹⁰⁹ Whether a creditor will be permitted to turn down a young applicant merely because he or she has not established a credit history is an issue which is as yet unanswered, but which is certain to be contested by young aggrieved credit applicants.

D. Receipt of Public Assistance Income

Like age, the fact that an applicant's income derives from a public assistance program may be considered only for purposes of determining a pertinent element of creditworthiness.¹¹⁰ Public assistance programs include Aid to Families with Dependent Children, food stamps, rent and mortgage supplement or assistance programs, Social Security, Supplemental Security Income, and unemployment compensation.¹¹¹ A recipient of public assistance, not qualifying for a loan because of a low or marginal income, should not be given the same consideration as a recipient who, with the public assistance in conjunction with other income, meets the creditor's usual standards. The latter applicant may not be denied credit merely because of the source of the income.¹¹² Unlike age, the applicant's receipt of public assistance income may not be utilized in any empirically derived credit system.

Operating under the constraints of this provision is not an easy task for the creditor. In contrast to the other proscribed questions, an inquiry about public assistance would furnish the creditor with information on the source and amount of the applicant's income. Such information has "a direct bearing on the applicant's ability to repay."¹¹³ Clearly it would be unfair as well as illegal to disqualify a credit applicant solely on the basis of receiving such income. The problem becomes one of how to control the use of such information so as to avoid exposing the applicant to discriminatory treatment. Should a creditor assume that all sources of income are equally probable to continue during the term of the agreement?

¹⁰⁵ *Id.*

¹⁰⁶ 15 U.S.C. § 1691(b)(2) (1976).

¹⁰⁷ 12 C.F.R. § 202.6(b)(2)(ii) (1980).

¹⁰⁸ *Id.* § 202.6(b)(2)(iv) (1980).

¹⁰⁹ *An Overview of the New Law, supra* note 61, at 273.

¹¹⁰ 12 C.F.R. § 202.6(b)(2)(iii), 23 n.9 (1980).

¹¹¹ 12 C.F.R. § 202.2(aa) (1980).

¹¹² *ECOA Amendments, supra* note 4, at 208.

¹¹³ *Consumer Credit Protection, supra* note 57, at 395.

If it must be left to the creditor to evaluate the reliability and probable continuation of the income, is discrimination and misuse encouraged? Do the studies that show that low-income consumers are more delinquent and default more often than other consumers, and the fact that "many types of public assistance benefits are subject to termination on short notice,"¹¹⁴ generate legitimate concerns for the lending institution as to the likelihood of obtaining repayment? With regard to the prohibition against using receipt of public assistance income as conclusory evidence of uncreditworthiness it has been pointed out that:

A creditor may feel compelled to extend credit to an individual receiving public assistance benefits, and thereby create a situation in which the creditor could be challenged in court for negotiating an unconscionable contract if the terms of the contract were considered too steep for someone receiving public assistance. . . . Too often creditors who extend credit to marginal income consumers are accused of overburdening them with debt and forcing an unconscionable contract on the consumer.¹¹⁵

While such ironic situations are not likely to occur often, the fact that they could is representative of the numerous difficulties that can occur when attempting to protect the consumer credit opportunities of a class of persons receiving public assistance.

The present expanded version of the Act protects those historically denied equal opportunity in many social and economic spheres. This suggests that Congress favored broad judicial construction of the equal credit opportunity legislation. However, by protecting only specified target classes, rather than making a more generalized and absolute prohibition against all discrimination based on immaterial grounds, other historically victimized groups such as the physically handicapped are left unprotected.¹¹⁶ The legislature should act to correct this problem if it truly desires to insure equal credit opportunity.

E. *Notice and Statement of Reasons*

"All of the foregoing rules and regulations enacted by the Federal Reserve Board pursuant to ECOA are of little consequence unless they can be effectively enforced upon creditors who fail to abide thereby."¹¹⁷ Within thirty days after receipt of a completed application for credit, a creditor is required to notify the applicant of its action on the application.¹¹⁸ There was no such affirmative act required in the original Act, but the original Regulation B did impose such a duty to be carried out within

¹¹⁴ *Id.* at 397.

¹¹⁵ *Id.* at 398.

¹¹⁶ *An Overview of the New Law, supra* note 61, at 273-74 n.30.

¹¹⁷ *Not-So-Equal, supra* note 8, at 371.

¹¹⁸ 15 U.S.C. § 1691(d)(1) (1976).

a reasonable time after receipt of the application by the creditor. The thirty day notification requirement applies equally to approved and rejected applications as well as to adverse actions taken in regard to existing accounts.¹¹⁹

Any notification given to an applicant against whom adverse action is taken must be in writing. It must also inform the person of the prescriptions of the Act and the appropriate agency charged with enforcement under section 1691c.¹²⁰ A more effective approach would be to require that notice of the Act's requirements and appropriate enforcement agency appear on the initial credit application. Since disclosure of such vital information is not required until the rejection letter, one notified within the requisite period would not know what agency to contact for relief or what provision controls such a violation. Such a problem would arise long before any opportunity to challenge a denial of credit on the basis of discrimination. The thirty day notice requirement ensures that the applicant learns of his or her credit status without undue delay. However, if not advised at the outset of the basic rights under the Act, how can one be expected to seek remedial enforcement for any of the numerous violations which can occur throughout the credit-granting process? The regulations assume that an applicant "knows and understands not only the ECOA, but also the type of remedies available thereunder."¹²¹

An integral part of the notification is the inclusion of a "statement of specific reasons for the action taken, or . . . a disclosure of the applicant's right to a statement of . . . [the same] within thirty days after receipt by the creditor of [an applicant's] . . . request made within sixty days of [the initial] notification."¹²² The disclosure must include the name, address and phone number of the person or office from which the statement can be obtained.¹²³ The Amendments were the first federal legislation to establish "the right of a rejected credit applicant to obtain a statement of reasons for the action taken against him."¹²⁴

In the original Act, the applicant had the right to know the reasons for denial, but the creditor owed no duty to inform the applicant of this right.¹²⁵ Presently, if the creditor chooses not to disclose the specific reasons automatically upon notifying the applicant of its decision, it is obligated to inform the denied applicant of the right to obtain the specific reasons; the burden then shifts to the applicant to exercise this right.¹²⁶

¹¹⁹ 12 C.F.R. §§ 202.9(a)(1)(i), (ii), (iii) (1980).

¹²⁰ 12 C.F.R. § 202.9(a)(2) (1980).

¹²¹ *Not-So-Equal*, *supra* note 8, at 371.

¹²² 12 C.F.R. §§ 202.9(a)(2)(i), (ii) (1980).

¹²³ *Id.*

¹²⁴ *ECOA Amendments*, *supra* note 4, at 211.

¹²⁵ *Equal Credit For All*, *supra* note 1, at 346.

¹²⁶ 15 U.S.C. § 1691(d)(2)(B) (1976).

While some feel this requirement imposes too great an economic burden on the creditor,¹²⁷ others have praised it for serving an overall dual function.¹²⁸ "[U]nder the theory that persons armed with accurate and adequate information will act in their own best interests and seek the best buy available, . . . [the disclosure requirements tend to promote] rational behavior on the part of credit consumers."¹²⁹ Congress, by compelling creditors to articulate the bases for denial of credit, hoped to facilitate compliance with the law by discouraging the use of discriminatory criteria:¹³⁰

This legislation should therefore rebound to the benefit of both creditors and applicants, by producing a more informed and competitive marketplace, where credit applicants can be assured of even-handed treatment in their quest for what has become a virtual necessity of life.¹³¹

In response to the criticism that the notice requirements are too burdensome for the creditor, it should be noted that: (1) an individualized statement of reasons is not required and a prepared checklist may suffice; and (2) if the creditor automatically includes the "statement with the first letter of notification, the lender will save the time, effort and expense of preparing a second response."¹³²

F. State Laws

The Act sets forth the relation which this federal statute bears to state laws.¹³³ Congress was careful not to invade the state's traditional dominion in the area of property law.¹³⁴ The general rule, therefore, asserts that the provisions of ECOA do not "annul, alter, or affect, or exempt any person subject to [them 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 title, and then only to the extent of the inconsistency."¹³⁵ Whether such inconsistencies exist is to be determined by the Board. There is no inconsistency, however, where the state law gives greater protection to the applicant than does the ECOA.¹³⁶

If the state law is deemed inconsistent with the requirements of the Act and is less protective of an applicant in that it requires or permits a practice or affirmative act prohibited by the federal law, the state law is preempted.¹³⁷ While the amended form has been praised for its clarification

¹²⁷ *Consumer Credit Protection*, *supra* note 57, at 402.

¹²⁸ *ECOA Amendments*, *supra* note 4, at 211; *Equal Credit For All*, *supra* note 1, at 346.

¹²⁹ *Equal Credit For All*, *supra* note 1, at 346.

¹³⁰ *Id.*

¹³¹ *Senate Report*, *supra* note 36, at 12.

¹³² *An Overview of the New Law*, *supra* note 61, at 271.

¹³³ 15 U.S.C. § 1691d (1976).

¹³⁴ *Not-So-Equal*, *supra* note 8, at 369.

¹³⁵ 15 U.S.C. § 1691d(f) (1976).

¹³⁶ *Id.*

of the preemption problems so pervasive in the original Act, certain ambiguities remain. If a state forbids a creditor to ask an applicant's age believing that without such knowledge there can be no age discrimination, is that state law more or less protective than the federal law which does not prohibit asking an applicant's age? Those who deem it less protective assert that age can be used as a positive factor in determining creditworthiness.¹³⁸ However, if the applicant is not 62 or older, it seems more realistic to characterize the state law as *more* protective, since there is no assurance that the age of the "non-elderly" applicant will likewise be deemed a positive factor.

Where both state and federal laws are violated, the aggrieved party, bringing an action for *monetary* damages, must elect the law under which he or she seeks recovery.¹³⁹ Under the original Act the party had to choose between pursuing the federal remedies and *any remedies* which might be available under state law. As amended, there is no bar against seeking administrative, injunctive or declaratory relief concurrent with recovery of monetary damages which may have been awarded under state or federal law.¹⁴⁰ If, however, the person is injured by a violation of both the ECOA and the Civil Rights Act of 1968¹⁴¹ in the same transaction, he or she may not recover under both statutes.¹⁴²

States with similar or substantially stronger laws may be exempted from the Act provided such laws include adequate provision for enforcement; they must enable a party to seek remedies at least equal to what the applicant is entitled to under ECOA.¹⁴³

G. Remedies:

Among the many functions which this legislation serves, its remedial provisions are of considerable significance. Along with self help remedies,¹⁴⁴ an applicant subjected to an ECOA violation has three outstanding remedial alternatives: administrative enforcement, private enforcement, or class action. However, neither the Act nor Regulation B indicates at which point an administrative appeal should be raised in relation to instituting a civil action; consequently, the choice is left up to the disgruntled consumer who is probably unfamiliar with complicated administrative proced-

¹³⁸ Regulation B, *supra* note 19, at 11.

¹³⁹ 15 U.S.C. § 1691d(e) (1976).

¹⁴⁰ ECOA Amendments, *supra* note 4, at 213.

¹⁴¹ 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341; 28 U.S.C. §§ 1973j, 3533, 3601-3619, 3631 (1976).

¹⁴² 15 U.S.C. § 1691e(i) (1976).

¹⁴³ 15 U.S.C. § 1691d(g) (1976).

¹⁴⁴ "Self-help remedies include deliberate planning and preparation of the women's [sic] credit record, and persistent insistence upon federal credit disclosure rights." *Women and Credit*, *supra* note 23, at 869, 1981.

ures.¹⁴⁵ A brief outline of some of the frequently followed administrative channels would, at a minimum, provide those aggrieved with a more focused, albeit rudimentary, understanding with which to proceed.

Insofar as the Federal Trade Commission (FTC) is charged with ECOA's overall enforcement responsibilities, a violation of the ECOA is deemed a violation of the FTC Act.¹⁴⁶ The appropriate administrative agency (under section 1691c) is charged with regulating discrimination for those transactions involving institutions under its jurisdiction. By dividing responsibility for enforcement among the ten to fifteen agencies, there is an increased likelihood that the Act will be unevenly enforced, since each agency is permitted to develop its own interpretation of what constitutes an ECOA violation. Assuming that this is the case, a more practical solution would be to assign sole enforcement responsibility to one federal agency.¹⁴⁷

An aggrieved applicant alleging that the discriminatory practices violate existing statutory or constitutional rights may sue for equitable or declaratory relief or monetary damages, individually or as a member of a class, in any United States district court (or other court of competent jurisdiction) regardless of the amount in controversy.¹⁴⁸ A culpable creditor may be liable for both actual and punitive damages.¹⁴⁹ The maximum recovery an individual can collect for punitive damages¹⁵⁰ is \$10,000;¹⁵¹ however, the injured party may also be entitled to equitable relief against the creditor.

Class actions may protect similarly affected consumers' interests better than do conventional law suits: "the mere threat of a class action is sometimes effective in enforcing compliance with a statute."¹⁵² The total recovery from a class action brought under the amended Act was raised from the lesser of \$100,000 or 1% of the creditor's net worth, to the lesser of \$500,000 or 1% of the creditor's net worth,¹⁵³ thereby significantly increasing the risk to the creditor. The justification for raising the punitive damage ceiling was to "insure justice by allowing the larger offending creditors to be penalized more severely, and by providing that a smaller creditor was

¹⁴⁵ *Equal Credit For All*, *supra* note 1, at 353.

¹⁴⁶ 15 U.S.C. § 1691c(c) (1976).

¹⁴⁷ *Not-So-Equal*, *supra* note 8, at 373.

¹⁴⁸ 15 U.S.C. §§ 1691e(a), (c), (f) (1976).

¹⁴⁹ *Id.* § 1691e(b). "Any act or practice done or omitted in good faith in conformity with any official rule, regulation or [Board] interpretation" of the Act will not result in any imposition of liability against the actor. *Id.* § 1691e(e).

¹⁵⁰ As to whether actual damages must be proven before recovering punitive damages, *see* note 210 *infra* and accompanying text.

¹⁵¹ 15 U.S.C. § 1691e(b) (1976).

¹⁵² *Credit Equality Comes to Women*, *supra* note 2, at 977.

¹⁵³ 15 U.S.C. § 1691e(b) (1976).

not unduly punished by the imposition of punitive damages.”¹⁵⁴ For “those creditors who are determined to continue violating the letter and spirit of the law . . . only severe financial penalties will provide an effective deterrent.”¹⁵⁵ Increasing the maximum recovery was meant to be an incentive for class actions while retaining the one percent ceiling was designed to discourage frivolous litigation.¹⁵⁶ Logic dictates that the prospect of confronting a \$500,000 penalty would serve a greater deterrent value for a repeated ECOA violator than would a \$10,000 penalty (the maximum individual recovery) for the same offense. “While imperfect, and vulnerable to attorney abuse, the class action remains the most significant private tool available for challenging a discriminatory credit practice that violates numerous persons’ rights under the law but does not result in actual damages.”¹⁵⁷

In determining the amount of the class action award, “the court shall consider . . . the amount of actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor’s failure or compliance was intentional.”¹⁵⁸

Before passage of the ECOA, an Equal Rights Amendment to the Constitution guaranteeing that “equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex” was seen as a prospective constitutional basis on which to attack credit discrimination. One of the difficulties, however, would be in making the required showing of sufficient state action in the creditor’s discrimination. Another difficulty would be in proving that credit is a right rather than a privilege.¹⁵⁹ Passage of the ERA would help to “establish a strong national policy against sex discrimination [by invalidating certain antiquated state laws] . . . The net effect would be to strengthen the power of the Act as an antidiscrimination tool.”¹⁶⁰

The statute of limitations was raised from one year in the original, to two years in the amended version.¹⁶¹ “The one year limitation was criticized for its failure to take into account certain realities: 1) consumers

¹⁵⁴ *Consumer Credit Protection*, *supra* note 57, at 404, citing *Hearings on S. 483, S. 1900, S. 1927, S. 1961, and H.R. 5616 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 37 (1975)* (statement of Rep. Bella S. Abzug).

¹⁵⁵ *An Overview of the New Law*, *supra* note 61, at 274.

¹⁵⁶ *Id.* at 275.

¹⁵⁷ *Id.*

¹⁵⁸ 15 U.S.C. § 1691e(b) (1976). This failure to comply standard indicates that both negligent and willful acts of discrimination would be viewed as equally violative of the Act. *Consumer Credit Protection*, *supra* note 57, at 404.

¹⁵⁹ *You Can Get There From Here*, *supra* note 1, at 396.

¹⁶⁰ *Promise or Reality*, *supra* note 10, at 215.

¹⁶¹ 15 U.S.C. § 1691e(f) (1976)

might not comprehend the Act's true import or their rights thereunder; 2) discriminatory practices are not apparent on the surface of a transaction; and, 3) consumers probably would not seek relief immediately upon discovery."¹⁶² It has been suggested that the present two year limitation be amended so that the statutory period commences with the *discovery* of the violation, rather than the date the violation *occurred*. Proponents of such a change feel that it would improve the consumer's position and effectuate a more equitable solution without imposing any hardship on the creditor.¹⁶³

H. *Special Treatment for Certain Classes of Transactions*

Among the several exemptions explicitly left unprotected by the ECOA are the "special purpose credit programs"¹⁶⁴ which are "conducted in the affirmative action vein."¹⁶⁵ Creditors feared that such programs would be prohibited by the Act because they confer preferential treatment on one class of individuals over another. Favoring a particular group would seem to inhibit equal opportunity but Congress saw these remedial programs as furthering the Act's purposes by promoting the availability of credit, and so provided an exemption for them.¹⁶⁶ Provided these special purpose credit programs meet certain requirements¹⁶⁷ and are designed to accomplish specific social needs, they will escape scrutiny under the ECOA. Hence, the Act is "not violated if a creditor refuses to extend credit to the applicant solely because the applicant does not qualify under the special requirements that define eligibility [for one of several types of special purpose credit programs, such as] a credit assistance program expressly authorized by Federal or State law for the benefit of an economically disadvantaged class of persons."¹⁶⁸

The Act also allows the Board to prescribe regulations that would exempt from certain procedural requirements of the Act, any class of transactions not primarily entered into for personal, family, or household purposes.¹⁶⁹ That provision allows the Board to exclude any such class of credit transactions if it makes an express finding that the application of a particular provision in the Act "would not contribute substantially to carrying out the purposes of [the Act]."¹⁷⁰ Pursuant to such power the Board made

¹⁶² *Consumer Credit Protection*, *supra* note 57, at 406.

¹⁶³ *Not-So-Equal*, *supra* note 8, at 374-75.

¹⁶⁴ 15 U.S.C. § 1691(c)(3) (1976).

¹⁶⁵ *Consumer Credit Protection*, *supra* note 57, at 395.

¹⁶⁶ *Equal Credit For All*, *supra* note 1, at 334.

¹⁶⁷ Special purpose programs must be "established and administered pursuant to a written plan that (A) identifies the class or classes of persons that the program is designed to benefit and (B) sets forth the procedures and standards for extending credit pursuant to that program. . . ." 12 C.F.R. § 202.8(a)(3)(i) (1980).

¹⁶⁸ *Id.*

¹⁶⁹ 15 U.S.C. § 1691b(a) (1976).

¹⁷⁰ *Id.*
<https://ideexchange.uakron.edu/akronlawreview/vol14/iss2/3>

certain exemptions for extensions of credit relating to public utilities, securities, incidental consumer credit, business, and government agencies.¹⁷¹

One commentator criticized the exemption of business credit as constituting "a serious denial of protection in light of the increasing numbers of women active in the work force and business world."¹⁷² Noting that the demand for business credit will increase, that writer argued that lenders should be obligated to ensure the availability of such credit in a non-discriminatory fashion.¹⁷³ Although the five exempted areas are not required to follow most of the procedural requirements, they are nonetheless "subject to the general rule against sex and marital status discrimination and most of the other substantive requirements of the regulation."¹⁷⁴

I. Credit Scoring

Basic to any discussion of the granting of credit is the concept of credit risk, its relation to creditworthiness, and the contribution of both to the statistical framework of the objective process known as credit scoring. In analyzing an applicant's credit, creditors concentrate on three "ipso facto" determinations: "character" (the individual's desire to pay), "capacity" (the individual's ability to pay), and "capital" (the individual's financial strength).¹⁷⁵ The applicant's "income, employment, payment (or credit) record, residence (generally length of), marital status, age,¹⁷⁶ reputation, and assets and collateral"¹⁷⁷ are some of the elements which are part and parcel of the decision to grant or deny credit. If the determination of credit risk includes non-risk factors (e.g., sex, race, religion, marital status), the applicant's assessment will become distorted.¹⁷⁸ Based upon the totality of the legitimate risk factors rather than on any one in a vacuum, being adjudged a good credit risk will reflect positively on the determination of an individual's creditworthiness.¹⁷⁹ The determination of creditworthiness is singularly the most significant aspect of the credit extension process.

Although lauded by some and criticized by others, credit scoring systems persist as the most common method of analyzing credit information.¹⁸⁰ Viewed as a "two-tiered process," the systems are designed to screen out

¹⁷¹ 12 C.F.R. §§ 202.3(b), (c), (d), (e), (f) (1980).

¹⁷² *Promise or Reality*, *supra* note 10, at 202-03.

¹⁷³ *Id.* at 203.

¹⁷⁴ Geary, *Equal Credit Opportunity - An Analysis of Regulation B*, 31 BUS. LAW. 1641, 1644 (1976 [hereinafter cited as *An Analysis of Reg. B*]).

¹⁷⁵ *Unequal Access*, *supra* note 21, at 112; *Women and Credit*, *supra* note 23, at 864.

¹⁷⁶ Inquiries regarding age and marital status are subject to the limitations provided in the ECOA and Regulation B.

¹⁷⁷ *Unequal Access*, *supra* note 21, at 112.

¹⁷⁸ 1976 Amendments, *supra* note 71, at 634.

¹⁷⁹ *Id.* at 663-64, citing E. Fieldler, MEASURES OF CREDIT RISK AND EXPERIENCE, NATIONAL BUREAU OF ECONOMIC RESEARCH 10-11 (1971).

¹⁸⁰ *Women and Credit*, *supra* note 23, at 864.

bad risks and make projections on the varied debtors' likelihood of repayment, to be considered with the creditor's desired risk level or cutoff point.¹⁸¹ The relevant aspects of an individual's life are assembled mathematically, assigning a particular numerical value to each factor. This information is stored in computer banks and used to project probabilities as to the creditworthiness associated with each factor. Consequently, the projections formulate the basis for the point system and are used to evaluate the information supplied.¹⁸² If the total number of points which an application receives is less than the predetermined minimum, the request for credit is denied.¹⁸³ Under such a system, assigning lower scores to certain characteristics on the basis of prejudiced beliefs rather than facts could effectuate an automatic and discriminatory (intentional or otherwise) denial of credit.¹⁸⁴

Theoretically, the credit scoring predictors result from a statistical analysis of a sample of the creditor's "good, bad, and previously rejected applicants."¹⁸⁵ In fact, however, the information used for projection purposes comes only from successful applicants and that sample, not being truly representative, may be statistically inaccurate and thus could perpetuate discriminatory practices.¹⁸⁶ The reliability of a sample most likely composed predominately of white, male credit recipients is questionable. Using such an unrepresentative group can only penalize non-male, non-white applicants who may lack the positive predictors that many white males share but which are not normally attained by women or minorities.¹⁸⁷ Illustrative of this is home ownership. While it may be a reliable predictor of creditworthiness, the truth is that more white married men have purchased homes than have women, regardless of marital status, or minorities.¹⁸⁸ Using such an attribute as a positive factor may identify *white males* as positive credit risks, while because fewer of their kind are homeowners, many financially responsible women and minority persons are overlooked.¹⁸⁹ This shows how certain criteria, seemingly objective, can effect a discriminatory result when applied to a group of applicants outside the class from which the criteria was derived.

Assigning fewer points to women than to men because women earn less than men, is prohibited by the Act. Since income is always a factor in

¹⁸¹ Note, *Credit Scoring and the ECOA: Applying the Effects Test*, 88 YALE L.J. 1450, 1453 (1979) [hereinafter cited as *Credit Scoring*].

¹⁸² 1976 Amendments, *supra* note 71, at 641.

¹⁸³ *Equal Credit For All*, *supra* note 1, at 327.

¹⁸⁴ *Id.* at 326.

¹⁸⁵ *ECOA*, *supra* note 60, at 1086.

¹⁸⁶ 1976 Amendments, *supra* note 71, at 641.

¹⁸⁷ *Credit Scoring*, *supra* note 181, at 1457-58.

¹⁸⁸ *Id.* at 1457.

¹⁸⁹ *Id.* <https://ideaexchange.uakron.edu/akronlawreview/vol14/iss2/3>

credit determinations the practice doubly penalizes a woman with a low income and is totally irrelevant as to a woman with an average or higher income.¹⁹⁰ Less blatant, yet just as unfair, is the discrimination experienced by a woman whose changed marital status results in a diminution of her credit standing because her prior credit history is dissolved and her new history becomes dependent upon her husband's record.¹⁹¹ The woman's individual credit worth is thereafter deemed inconsequential. These practices were abated, at least in theory, and expressly prohibited under Regulation B.¹⁹² The only protected class permitted to be used in a "demonstrably and statistically sound," empirically derived credit system is age, provided that an elderly person receives at least as many points on the age characteristic as does a younger person.¹⁹³

There are two basic methods to screen credit applicants: either by subjectively evaluating individuals or by utilizing standardized screening devices.¹⁹⁴ The proponents of the credit scoring system advocate its superiority because it is able to handle larger volume of applications,¹⁹⁵ is more efficient, facilitates compliance with the ECOA¹⁹⁶ and gives consistent and unbiased treatment.¹⁹⁷

Opponents of credit scoring criticize its failure to consider individual qualifications. They question how true equality can be achieved by using a statistical prediction based on a myriad of elements (some of which are not germane to all applicants), derived from a dubious sample of individuals.¹⁹⁸ Besides the questionable accuracy of the system the critics are also concerned with the overall ramifications such a significant aspect of the credit granting process could have for the average person seeking credit. Inasmuch as "credit scoring does not properly evaluate all types of applications," the critics conclude that it should not, therefore, supplant the creditor's consideration of certain beneficial subjective factors in all cases.¹⁹⁹

Since both the proponents and critics have some meritorious claims, a basic tension persists between those who maintain that principles of equality require no less than subjective analysis of individual applicants and those who emphasize the validity and superiority of an objective system uncontaminated subjectivity.

¹⁹⁰ *Women and Credit*, *supra* note 23, at 866.

¹⁹¹ *Id.*

¹⁹² 12 C.F.R. § 202.5(c) (1980).

¹⁹³ 15 U.S.C. § 1691(b)(3) (1976); 12 C.F.R. § 202.6(b)(2)(ii) (1980).

¹⁹⁴ *Credit Scoring*, *supra* note 181 at 1453.

¹⁹⁵ "Credit Scoring can be done by one with little training, whereas a good loan officer is a very unique asset." *ECOA*, *supra* note 60, at 1088.

¹⁹⁶ "[I]f your scoring system does not contain any of the prohibited characteristics . . . [the creditor is] pretty much immune from a frontal attack." *Id.* at 1089.

¹⁹⁷ *Id.* at 1088-89.

¹⁹⁸ *Credit Scoring*, *supra* note 181, at 1451.

¹⁹⁹ *ECOA*, *supra* note 60, at 1089.

J. The "Effects Test"

The following is probably the most significant footnote in the amended version of Regulation B:

The legislative history of the Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.* . . . and *Albemarle Paper Co. v. Moody* . . . to be applicable to a creditor's determination of creditworthiness.²⁰⁰

The coverage provided by the Act is to include not only discriminatory motivation but also the discriminatory effect of facially neutral actions.²⁰¹ According to the two employment cases cited as guides, once the injured party proves a disproportionate impact on a protected class (*i.e.* discriminatory effect), the burden shifts to the employer to show that the practice has a "manifest relationship" to the job in question. This analogy can be extended to the credit area as follows: if a protected class is denied credit "at a substantially higher rate" than those outside that class, the creditor could be in violation of the ECOA, unless it can establish that such a practice has a "manifest relationship" to creditworthiness.²⁰² If the employer (or creditor) satisfies the "manifest relationship" test, the burden of proof then shifts back to the employee (or credit applicant) to show that the perpetrator could have as effectively used a less discriminatory means to achieve the same legitimate purpose.²⁰³ Where the employer (or creditor) is unable to rebut the allegation that its reasons are merely pretextual, a violation of Title VII of the Civil Rights Act of 1964 (or the ECOA) will be found to exist.

As a judicial creation the effects test could be reinterpreted or modified by the courts at any time. As such, the Federal Reserve Board refrained from explicating it thoroughly, and thereby left many unanswered questions concerning its applicability to the credit industry.²⁰⁴ "If the enforcement pattern of Title VII is any indication, then private enforcement rather than administrative handling of complaints will be the characteristic enforcement feature of the Equal Credit Opportunity Act."²⁰⁵

Assuming that the analogy is apt, no serious difficulties would be raised by applying the effects test to a credit granting procedure that was inherently discriminatory. An instance was reported where a married couple who had applied for a home loan found that several loan officials would

²⁰⁰ 12 C.F.R. § 202.6(a) n.7 (1980); See *Senate Report, supra* note 36, at 4-5.

²⁰¹ *Credit Scoring, supra* note 181, at 1459.

²⁰² *ECOA Amendments, supra* note 4, at 209.

²⁰³ 422 U.S. 405 (1974).

²⁰⁴ *ECOA Amendments, supra* note 4, at 209-10.

²⁰⁵ *Equal Credit For All, supra* note 1, at 359.

discount "the wife's income unless she had had a hysterectomy."²⁰⁶ This incident occurred prior to the passage of the Act. Theoretically, similar examples of such invidious practices should no longer occur. The difficulty with the test arises when the more likely "fair in form, discriminatory in operation" situation occurs. For example, when a creditor discounts a mortgage applicant's part-time income as unreliable, this practice necessarily has an adverse effect on women (and the elderly) who comprise a large percentage of the part-time work force.²⁰⁷

Among the additional illustrations evincing the appropriateness of applying the effects test to the credit context is the use of zip codes. A person's zip code is considered to be a good predictor of creditworthiness. The argument can be made, however, that a zip code, though neutral on its face, "has the effect of discriminating against a protected class."²⁰⁸ Take the case where, for whatever socio-economic reasons, one zip code area is predominantly inhabited by affluent, white people, and another by less affluent black people. In a credit scoring system, the first zip code would automatically be given a higher score than the second. Although a creditor could claim that zip codes are in fact credit related, if *Albemarle* were extended to the credit context, an aggrieved credit applicant might demonstrate that the creditor could have chosen an equally effective indicator with a less discriminatory impact, and thereby succeed in an action against the creditor.²⁰⁹ Similarly, both the format of the application and use of length of time on the job have the potential for producing facially-neutral but effectively-discriminatory results. Insofar as lengthy application forms discourage persons with lower intelligence from applying, the use of such forms is an instance of "fair in form and discriminatory in operation."²¹⁰ Moreover, asking how long an applicant has held a job necessarily discriminates against younger people and unskilled workers (a disproportion number of whom are members of protected classes) whose time on the job is by the very nature of the work, sporadic and temporary.²¹¹

In contrast to those advocating the use of the same test for employment discrimination and credit discrimination are those who find the analogy inapt. They note the "lack of specific guidance from either Congress or the Federal Reserve Board, and the general lack of clarity in the law in the employment field."²¹² This "wait and see" attitude "leaves both the creditor and consumer somewhat uncertain as to their respective rights

²⁰⁶ *An Overview of the New Law*, *supra* note 61, at 268 n.5.

²⁰⁷ *Promise or Reality*, *supra* note 10, at 196-97.

²⁰⁸ *ECO A*, *supra* note 60, at 1082.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1083.

²¹¹ *Id.*

²¹² *Regulation B*, *supra* note 19, at 45.

and remedies" under the Act.²¹³ Furthermore, because a creditor is precluded from asking the applicant's sex, race, marital status (this preclusion, however, is not absolute) or national origin,²¹⁴ it will be difficult for a disgruntled party to show disparate impact on a particular protected class.²¹⁵ Similarly difficult is the requirement that the aggrieved be able to "distinguish between genuinely valid prediction and the inherent bias" which flows from the nature of the scoring system and the variables being measured thereby.²¹⁶ As to the controversy over whether to extend a Title VII test to an ECOA situation, one author stated:

It would be disastrous if it became the effect of this act to equalize the disparate buying power within the community through the use of mandatory injunctions compelling all creditors to bring their credit granting policies in line with the demographic makeup of the community. For this reason, the courts must not follow the employment discrimination cases in such a way as to ignore the great differences between the employment area and the credit area. To do so would have the ultimate effect of restricting the availability of credit; an effect which runs completely counter to the intent of the legislation.²¹⁷

As the Amendments do not limit recovery of punitive damages to instances of willful violations, the effects test may be helpful in deciding whether to award such damages. Inasmuch as intent is one of the factors to be considered in determining the amount of punitive damages, if a violation of the Act can only be traced to the effect of a credit practice, the effects test could assist the injured party in establishing damages.²¹⁸ Thus, the aggressiveness and persistence with which "consumers pursue their rights (particularly in the form of class actions)" and the breadth with which the courts apply the effects test, "as outlined in race discrimination and employment cases," will affect the number of suits ultimately brought under the Act.²¹⁹

IV. CASE HISTORY

Thus far, this paper has sought to examine the Act, its legislative history, its regulations and several of its more significant provisions. At this point, an examination of the case law interpreting the Act will put it in a more tangible perspective.

To date, there have been only eleven district level and two appellate level cases in which alleged ECOA violations have been fully adjudicated.

²¹³ *Equal Credit For All*, *supra* note 1, at 360.

²¹⁴ 15 U.S.C. § 1691(e) (1976).

²¹⁵ *Equal Credit For All*, *supra* note 1, at 360.

²¹⁶ *Credit Scoring*, *supra* note 181, at 1460.

²¹⁷ *1976 Amendments*, *supra* note 71, at 647.

²¹⁸ *ECOA Amendments*, *supra* note 4, at 210.

²¹⁹ *The New Law*, *supra* note 61, at 276.

Not all of the cases stand for equally significant principles. In *Carroll v. Exxon Co., USA*²²⁰ a single woman who had applied for a gasoline credit card was turned down. She requested a statement of specific reasons for the denial but was not satisfied with the response she finally received. Instead of the legitimate factors which would have justified the adverse decision, Exxon chose to list, as its reason for denial of credit, that the Credit Bureau could furnish little or no definitive information on her established credit. By failing to properly inform the plaintiff of the actual reasons for her denial, Exxon violated § 1691(d)(3) of the Act.²²¹ By so concluding, the court seems to have set an important precedent by calling for "literal compliance with the statement of reasons requirement," as well as by suggesting that a closer look be given to the substance of the statement in order to ensure that the reasons given are in fact those relied upon.²²²

In another count, Carroll alleged that she was discriminated against on the basis of marital status in the evaluation of her credit application because she was asked about the number of dependents for whom she was responsible. In the only credit challenge involving the effects test, Carroll tried to convince the court that she was effectively discriminated against on the basis of marital status as a result of her answer to this question. Because she failed to establish a prima facie case of discrimination under the ECOA, the court rejected her claim and refused to require Exxon to prove any manifest relationship (the next step in the test).²²³ Under the *Carroll* holding, an inquiry into the number of dependents is not, as a matter of law, conclusive proof of discrimination against married people.

In *Smith v. Lakeside Foods, Inc.*,²²⁴ a grocery store credit application form failed to disclose, among other things, that courtesy titles (*e.g.*, Ms., Mrs., Miss, Mr.) are optional as required by Regulation B.²²⁵ Although the plaintiff alleged no injury in fact proximately caused by the defective credit application, the court nevertheless granted her motion for judgment on the pleadings. In dicta, the court took notice of her potential entitlement to either declaratory or injunctive relief, or punitive damages and costs, in spite of the fact that she was unable to prove actual damages.²²⁶

In the first (and to date, only) ECOA class action suit, *Shuman v. Standard Oil Co. of California*,²²⁷ the court granted recovery for embarrassment, humiliation and mental distress occasioned by an unlawful denial of credit. It likened the ECOA to Title VIII of the Civil Rights Act of

²²⁰ 434 F. Supp. 557 (E.D. La. 1977).

²²¹ *Id.*

²²² *Equal Credit For All*, *supra* note 1, at 352.

²²³ 434 F. Supp. 557.

²²⁴ 449 F. Supp. 171 (N.D. Ill. 1978).

²²⁵ 12 C.F.R. § 202.4(a)(3) (1980).

²²⁶ 449 F. Supp. 171.

²²⁷ 453 F. Supp. 150 (N.D. Cal. 1978).

1968 because both provide statutory remedies for denial of civil rights. Since Title VIII had been interpreted as providing compensation for emotional harm the court felt such a recovery was justified under ECOA as well.²²⁸ The court resolved the uncertainty as to the type of recovery available to one whose reputation for creditworthiness has been harmed by allowing such a recovery as an element of actual damages. The amount of actual damages must be proved and the court recognized that many factors enter into that determination:

[C]ertain wrongful denials of credit will have far more onerous consequences than others, and, therefore, will generate far more substantial damages. In rudimentary terms, a home mortgage is more valuable than a gasoline credit card. However, the court is not prepared to rule the value of a gasoline credit card is de minimis as a matter of law. Convenience has some value as does increased purchasing power and protection for emergencies.²²⁹

The court also sustained the allegations charging that Standard Oil's credit scoring system failed the requisite test of objectivity. Under the system 25% of the applications triggered an automatic decision. This part of the system survived the court's scrutiny; the procedure used to administer the remaining 75% was unable to endure a similar test. The latter ostensibly sanctioned illegal references to sex and/or marital status which permeated the system. By so adversely affecting the credit score, the result was necessarily a denial of credit.

An ECOA violation, denial of credit based on the applicant's good faith exercise of rights under the Consumer Credit Protection Act,²³⁰ was demonstrated by a preponderance of the evidence in *Owens v. Magee Finance Service of Bogalusa, Inc.*²³¹ In evaluating the plaintiff's creditworthiness, the fact that the plaintiff/applicant had a pending claim against the defendant finance company under the Truth-in-Lending Act was taken into account by the defendant. The carrot and stick approach employed by the company's agent (*i.e.*, urging that the applicant sign a document releasing the company from liability on the Truth-in-Lending claim) was deemed "sufficiently coercive that a reasonable person would believe that unless the settlement documents were executed . . . the application would not be accepted."²³² The court held that the plaintiff was not only entitled to a \$1,000 award for actual damages (mental anguish and humiliation) and \$1,000 for punitive damages, but also for damages resulting from the Truth-in-Lending violations.

²²⁸ *Id.* at 1153-54.

²²⁹ *Id.* at 1153.

²³⁰ 15 U.S.C. § 1691(a)(3) (1976).

²³¹ 476 F. Supp. 758 (E.D. La. 1979).

²³² *Id.* at 768.

A disgruntled credit applicant who files an action under the ECOA has been held to be entitled to a trial by jury, under the seventh amendment to the United States Constitution. The legislative history is silent regarding the question of jury trial, but *Vander Missen v. Kellogg-Citizens National Bank of Green Bay*,²³³ a case of first impression, interpreted the Act's authorization of "the Court to determine the award of punitive damages" in a successful ECOA suit to fall within the constitutional guarantee.

In *Desselles v. J.C. Penney Co., Inc.*,²³⁴ a retail merchant was held liable for failing to comply with the notification requirements compelling a written statement of reasons within thirty days of a request by a denied applicant. The court refused to accept the excuse offered under the "inadvertent error" exception of Regulation B²³⁵ because the noncompliance was due to the inability of the two Penney's employees to handle the volume of requests received, a human error of judgment rather than a mechanical, electronic, or clerical error.²³⁶

In the only appellate level case concerning a significant ECOA issue, *Markham v. Colonial Mortgage Service Co. Associates, Inc.*,²³⁷ an engaged couple (married by the time the case was appealed) who had unsuccessfully applied for a mortgage loan, brought an action under ECOA against the various creditors involved. The claim was that the defendants had refused to aggregate the incomes of this couple when determining their creditworthiness, but that they would have aggregated the incomes of two similarly situated *married* joint mortgage applicants. Their real estate agent had told them, after they had already been turned down once, that approval would be contingent upon their submission of a marriage certificate. The district court granted the defendants' motion for summary judgment based on the "special legal ties created between two people of the marital bond."²³⁸ That court never reached the question of whether the plaintiffs were otherwise eligible for the loan. On appeal, the court of appeals reversed the lower court, saying, "[W]hile it may be true that judicially enforceable rights . . . are legal consequences of married status, they are irrelevancies as far as the creditworthiness of joint applicants is concerned."²³⁹ The lender clearly treated the applicants differently because of their marital status; this is "precisely the sort of discrimination prohibited by § 1691(a)(1) on its face."²⁴⁰ Although the holding requires a lender to treat an unmarried

²³³ 83 F.R.D. 206 (E.D. Wis. 1979).

²³⁴ 48 U.S.L.W. 2390 (E.D. La., Nov. 26, 1979).

²³⁵ 12 C.F.R. § 202.9(e) (1980).

²³⁶ 48 U.S.L.W. at 2391.

²³⁷ 605 F.2d 566 (D.C. Cir. 1979).

²³⁸ *Id.* at 568, quoting *Markham v. Colonial Mortgage Service Co.*, No. 77-0232 (D.D.C. 1977).

²³⁹ *Id.*

couple jointly applying for credit the same as they would be treated if married, it does not deal with what effect the Act would have had had the plaintiffs not applied for credit jointly.²⁴¹

Several reasons have been advanced in attempts to explain the relative dearth of ECOA litigation (past, present, and future) in contrast to that involving the Truth-in-Lending Act. Included among these are the contentions that: (1) the Board has detailed the kinds of information which could and could not be asked and used; (2) the Board has published so-called approved model application forms which creditors may adopt with less fear of committing technical violations; (3) the ECOA, unlike the Truth-in-Lending Act, provides for no minimum recovery; and (4) the instances of flagrant discrimination are less likely and thus there will be increasing reliance on the often difficult task of generating a successful effects test challenge.²⁴² As to the first explanation, this writer is unpersuaded that the regulations emit clear and adequately detailed provisions; rather Regulation B lacks the degree of specificity needed by those who turn to it for guidance; indeed its pervasive ambiguity will increase litigation. The most basic criticism which can be leveled at the fourth explanation is that it offers an exaggerated premise which is idealistic and unattainable; regrettably, society is either unwilling or incapable of promoting a stigma-free existence. Glaring instances of discrimination will persist indefinitely along with the less invidious "effects test" type cases. A better explanation of the dearth of cases adjudged under the ECOA is that many factors combine. These factors include its relative newness, its unprecedented scope, and its complicated and ambiguous guidelines. The Act's relative obscurity may also contribute to the sparse case history. As modifications are made, however, the Act should engender its share of litigation, although it is unlikely to open any floodgates.

V. POTENTIAL PROBLEMS AND CRITICISMS

Inherent in most of the controversy surrounding ECOA is the troublesome conflict between consumers' rights and creditors' interests. On the one hand, the Act seeks "to maximize the availability of credit to applicants without undue emphasis on their membership in protected groups"; on the other, it must balance the creditor's prerogative to "evaluate effectively the risk of extending credit to such group members."²⁴³ Some see Regulation B as creating an imbalance by favoring the creditor, while others criticize it as tipping the scales toward the consumer. The allegation of creditor preference is closer to the mark. The credit industry, while not necessarily more vocal, has a disproportionately greater impact on the legislature than does the consumer lobby. Without the availability of credit,

²⁴¹ *Id.* at 570.

²⁴² Rohner, *Equal Credit Opportunity Act*, 34 BUS. LAW. 1423, 1424 (1979).

²⁴³ *A Suggested Analysis*, *supra* note 4 at 366/3

the argument goes, the business community would experience a momentous void, the effect of which would be disastrous both to the national economy and to the individual's standard of living. Notwithstanding the immeasurable value of credit to society, the regulations should be modified so that the burden falls more heavily on the creditor through strict enforcement of ECOA.

As noted previously, there is a lack of specific criteria in many of the regulations. Because of the limited guidance, credit decisions are left largely to the creditor's discretion. Insofar as the regulations are meant to carry the purpose of the Act into effect, the primary focus should be on them. The danger of sustaining them in their presently ambiguous form is that the potential for discretionary abuse will remain.

Another of the Act's purported weaknesses lies in its deference to state laws.²⁴⁴ The Act "superimposes a federal standard on the states while retaining the effect of state laws."²⁴⁵ Only if the law is inconsistent with any provision of the Act, as determined by the Federal Reserve Board, is it preempted. What this means is that the protection afforded an applicant for credit could vary depending upon the particular jurisdiction in which the credit is sought.²⁴⁶ The ramifications of such a variant run counter to the Act's goal of affording equal credit treatment. Such a result will occur where an applicant in State X (whose laws are not inconsistent with the ECOA) applies to the same national credit company as another applicant in State Y (whose laws are less protective than those of State X, but not inconsistent with the ECOA), and where the latter applicant is denied access to credit. It will be interesting to see whether such problems will be addressed in future equal credit legislation.

Another problem with the Act is the requirement that actual damages be proved before recovering for an ECOA violation. Practically speaking, a consumer is more likely to prove a violation than to prove actual damages. A recommendation for improving this situation is to amend the provisions to guarantee a minimum recovery for a successful ECOA litigant.²⁴⁷ For instance, in addition to the codified amount of actual damages which may be recovered (a maximum of \$10,000 for a private suit and \$500,000 for a class action suit), the aggrieved applicant would recover for punitive damages an amount not less than \$500. "[U]nless creditors are threatened with the type of sanctions that will make it economically dangerous for them to violate the Act, it is not likely that they will be restrained from further violations."²⁴⁸

²⁴⁴ *You Can Get There From Here*, *supra* note 1, at 404.

²⁴⁵ *Id.* at 408.

²⁴⁶ *Not-So-Equal*, *supra* note 8, at 369.

²⁴⁷ *Id.* at 374.

The message pervading the literature is that the inevitable consequence of the rigidly-drawn Equal Credit Opportunity Act will be to increase the cost of credit to consumers. Such a result is predicted to hurt consumers in terms of both out-of-pocket expense and an overall decrease in credit availability. An ironic consequence of the Act may be that credit will become less, rather than more, obtainable.²⁴⁹ Critics predict, among other things, that the notice requirements and the additional paperwork which these requirements necessitate, will increase the creditor's costs and be passed on to the consumer. Consequently, credit standards may be raised making credit unattainable for many, especially the low income consumers, who need credit the most.²⁵⁰ The adverse effects could fall on the creditor as well as the consumer. Especially susceptible are the smaller creditors not able to adequately pass on additional expenses to debtors or absorb the remainder. Incapable of adhering to the legislative demands, such creditors would gradually disappear.²⁵¹ One author offered a less than favorable appraisal of the value which ECOA has conferred upon the credit industry:

Action of this sort can only be viewed as an overzealous attempt by legislators to approve legislation which on its face appears beneficial to the consumer, but in the long run could prove to be economically burdensome to the credit industry and consumers alike.²⁵²

If the credit industry consisted exclusively of large national creditors and finance companies, credit policies would probably be more stringent and less flexible than those of local creditors engaged in extending credit to local residents.²⁵³ In theory, fewer competitors in the credit field would mean "less competition to keep down the price of money."²⁵⁴

Equal credit advocates refute the criticism that the Act will precipitate economic disaster by characterizing the "increased costs as a justifiable consequence of consumer protection" and civil rights. "Society should be willing to pay the price for equality in credit transactions."²⁵⁵

Generally in accord with the pragmatic sentiment expressed above, one author suggests that all may not be lost so long as a balance is achieved between blind support for anti-discriminatory gains and realizing the frequently burdensome effects such gains place on the creditor. He continues:

Any regulation or ruling which could command a creditor to take risks he is unwilling to take will drive him from the market and restrict the very commodity recognized as essential given today's economic

²⁴⁹ *ECOA Amendments*, *supra* note 4, at 220.

²⁵⁰ *Equal Credit For All*, *supra* note 1, at 363.

²⁵¹ *Consumer Credit Protection*, *supra* note 57, at 408.

²⁵² *Id.* at 409.

²⁵³ *An Overview of the New Law*, *supra* note 61, at 277-78.

²⁵⁴ *Id.* at 278.

²⁵⁵ *Equal Credit For All*, *supra* note 1, at 363-64.

realities. Therefore, both the legislative bodies and the courts must be willing to accept the fact that they cannot totally stamp out discriminatory attitudes. The legal system must realize that, although forest fires can be prevented by eliminating trees, such a policy shows little understanding of the vast collateral impact such tunnel vision may produce.²⁵⁶

Given the inherently inequitable nature of credit discrimination, its unprofitable effect on creditors, and the overall detriment it imposes on the economy,²⁵⁷ why does it persist? Our ethnically diverse population often appears to be committed to an ongoing though not necessarily conscious search for unwitting classes at whom the brunt of its transgressions can be foisted. While this neither justifies nor fully explains *why* such discrimination persists, the fact remains that we are not now, nor likely to ever become, a society in which all peoples are treated equally.

A third consequence of increased costs on the market could be to "force consumers to become more credit-wise and to encourage comparison shopping, thereby influencing the level of competition among creditors."²⁵⁸

While some of the effects indicated appear to be ominously accurate, this writer is unpersuaded by the allegations of a casual link between the Act and injury to the market. Are the predicted results entirely attributable to this singular (ECOA) legislation, or are they attributable to the omnipotent and oppressive economic reality of inflation? This writer suggests that the latter proposes a more realistic explanation than those which point the fatal finger exclusively at ECOA; as culprit, it unwittingly takes the blame for any deleterious effect experienced by the market. Since there is no "correct" response to this rhetorical query, it would be sheer conjecture to predict what the effect will be of the upcoming institution of more stringent controls on consumer credit. While they will both increase costs and restrict access to credit, these consequences should not, realistically, be blamed solely on the existence of the ECOA. In fact, the controls should not have any measurable effect on the Act as the proposals contemplate that they be issued "across-the-board." Will any discrimination which flows from this imposition of controls therefore be "even-handed"? Can *any* discriminatory practice be "even-handed"?

It has been asserted that women are basically in the same position as they were prior to the enactment of the Act²⁵⁹ because marital status may still become an issue depending upon the type of loan applied for. However, the Act should be lauded as at least a step in the right direction in an area previously devoid of legislative coverage, even though it is in need

²⁵⁶ 1976 Amendments, *supra* note 71, at 653.

²⁵⁷ *You Can Get There From Here*, *supra* note 1, at 387.

²⁵⁸ *Equal Credit For All*, *supra* note 1, at 364.

²⁵⁹ *Nor So Equal*, *supra* note 8, at 369.

of modification, publicity, and stricter administrative and judicial enforcement.²⁶⁰ Uninformed consumers require the most protection; in its present form, Regulation B inadequately protects them.²⁶¹ A person, lacking a basic understanding of rights granted by the ECOA, is unlikely to understand or take advantage of the option to request specific reasons for a denial of credit. This compounded with the inherent bias of the regulations in favor of the creditor erodes the effect of the Act. Since there is a good chance that the creditor will not be called upon to explain many of the credit denials, the pressure to comply with particular provisions of the Act will be greatly reduced.²⁶² A requirement mandating that the creditor *automatically* provide a statement of the reasons for denial would both avoid confronting the ramifications of such a serious charge and educate consumers as to the provisions of the Act.²⁶³ "[T]he legislation's precise language does not go far enough toward encouraging the growth of an informed class of credit consumers."²⁶⁴ This requirement would ultimately serve as a check on the creditor and undoubtedly improve the policies and practices used in assessing creditworthiness.²⁶⁵

VI. CONCLUSION

The importance of consumer credit in modern society cannot be overstated, particularly when considering our current rate of inflation. The ECOA, though not a panacea, will not be a failure if it marks the beginning of a continuing effort to bring about equal access to credit. Necessary to this effort is a realization that a proper balance must be struck between the ideal of equal access to credit and the reality of everyday business transactions.

One unavoidable dilemma in this respect is the problem of first-time credit applicants. Will such applicants find it more difficult to obtain a first charge card as a result of these new consumer credit controls? The Act will in all likelihood provide little or no solace for these first-time applicants. If the demand for credit continues to grow at the same rate that its availability diminishes, it will become increasingly difficult to convince a judge (by a preponderance of the evidence) that the reason for denial rests upon the applicant's membership in one of the protected classes instead of the lending institution's standards being raised in a good faith effort to comply with the national goal of reducing dependence on credit. Such

²⁶⁰ *Equal Credit For All*, *supra* note 1, at 365; *An Overview of the New Law*, *supra* note 61, at 279; *You Can Get There From Here*, *supra* note 1, at 408; *Credit Equality Comes to Women*, *supra* note 2, at 977; *Promise or Reality*, *supra* note 10, at 215.

²⁶¹ *Not-So-Equal*, *supra* note 8, at 371.

²⁶² *Id.* at 371-72.

²⁶³ *Id.* at 371-73; *An Overview of the New Law*, *supra* note 61, at 272.

²⁶⁴ *An Overview of the New Law*, *supra* note 61, at 272.

a situation could frustrate the Act's purposes by providing a tacit invitation to creditors to pursue a course of invidious discrimination.

As the Amendments have been in effect in their entirety only since March 23, 1977, their full impact remains to be seen. In time the effectiveness of the Act and its use as a tool for ameliorating discrimination and facilitating access to credit will be determined.

