

Journal of Legislation

Volume 8 | Issue 1

Article 8

1-1-1981

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Recommended Citation

Cuomo, Andrew A. (1981) "Equal Credit Opportunity Act: How Much Can Women Expect; Note," *Journal of Legislation*: Vol. 8: Iss. 1, Article 8.

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EQUAL CREDIT OPPORTUNITY ACT: HOW MUCH CAN WOMEN EXPECT?

INTRODUCTION

Congress enacted the Equal Credit Opportunity Act¹ (ECOA) in 1974 to eliminate discrimination based upon sex or marital status in credit transactions.² Although the legislation addresses problems that women face in obtaining credit, many discriminatory credit procedures continue unabated. The ECOA's limitations include low-damage ceilings, difficulties in proving actual damages, an election of remedies clause that may preclude effective action in federal courts, and restrictive class action requirements. State property laws and family necessity statutes also pose problems for divorced single women. Women often are not aware of their rights under the new law or lack the financial resources to obtain credit.

The ECOA amended the Consumer Credit Protection Act of 1968. In both the original and amended versions, Congress gave the Federal Reserve Board of Governors³ power to prescribe regulations. This note evaluates the impact of both the statute and the regulations on those who utilize discriminatory credit procedures.

THE EQUAL CREDIT OPPORTUNITY ACT

1. Background

Since its enactment in 1974, the Act has been subject to interpretation by the judiciary and the executive branch, both of which are responsible for enforcing it. The statute, as amended, specifically prohibits discrimination by creditors with respect to sex, marital status,⁴ race, religion, and national origin.⁵ Regulations promulgated pursuant to the Act have aided in its interpretation. In 1977 the Board implemented the Act with Regulation B, which became effective in March of 1978.⁶

2. The ECOA and Regulation B

Regulation B forbids discrimination by creditors on the basis of sex

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1. 15 U.S.C. § 1691 (1976).
 2. H.R. CONF. REP. NO. 93-1429, 93rd Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6148. The 1976 amendment to the ECOA included prohibitions against discrimination on the basis of race, religion, or national origin in the credit area. The amended act became effective March 23, 1977. 15 U.S.C. § 1691(a) (1976).
 3. 15 U.S.C. § 1691(b) (1976).
 4. 12 C.F.R. § 202.5(d) (1980).
 5. 15 U.S.C. § 1691(a) (1976).
 6. 12 C.F.R. § 202 (1980).

or marital status and prohibits creditors from making any statement that would discourage a person's application on account of sex or marital status.⁷ Other regulations prohibit a creditor's inquiry into an applicant's birth control practices⁸ and marital status.⁹ They also prevent a creditor from refusing a married woman an individual account in her own name because of sex or marital status.¹⁰ The creditor cannot close a woman's account or request a reapplication after a change in her marital status, unless the husband's income supported the prior credit and the woman's income no longer supports the credit extended.¹¹ If a married woman needs a cosigner to support credit, the creditor may request a cosigner but cannot suggest or require her spouse's signature.¹² The law also requires creditors who furnish credit information to determine which spouse maintains liability on a credit account and to label the account accordingly. Thereafter, the creditor may provide access or may furnish information to credit agencies in that spouse's name only.¹³

*Special Purpose Programs.*¹⁴ In many instances, sex and marital status information on an application will increase a woman's opportunities to receive credit. The ECOA's special purpose program allows creditors to request this information in certain circumstances without violating the law.

Women generally have less income and lower-status jobs. Creditor's studies, however, often establish women as better credit risks than men.¹⁵ Professors Chandler¹⁶ and Ewert of Georgia State University conclude that creditors and credit scoring systems should consider the applicant's sex. In their study, conducted for the Credit Research Center for Purdue University,¹⁷ they conclude that a system designed to measure women as a group, apart from men, will provide greater credit opportunities for women.¹⁸ In light of women's economic posi-

7. 12 C.F.R. § 202.5(a) (1980).

8. 12 C.F.R. § 202.5(d)(4) (1980).

9. 12 C.F.R. § 202.5 (1980).

10. 12 C.F.R. § 202.7 (1980).

11. 12 C.F.R. § 202.7(c) (1980).

12. 12 C.F.R. § 202.7(d)(5) (1980).

13. 12 C.F.R. § 202.10 (1980).

14. 12 C.F.R. § 202.8(a) (1980).

15. G. CHANDLER & D. EWERT, DISCRIMINATION ON THE BASIS OF SEX UNDER THE EQUAL CREDIT OPPORTUNITY ACT (1976) (Working Paper No. 8 of the Credit Research Center at the Krannert Graduate School of Management—Purdue University) [hereinafter cited as CHANDLER & EWERT].

16. In 1976 Professor Chandler was also President of Management Decision Systems, Inc.

17. CHANDLER & EWERT, *supra* note 15.

18. *Id.* at 8.

The basic problem stems from pooling the data for male and female applicants to estimate regression coefficients (estimates of 'average' weights) when they possess different characteristic distributions or their characteristics relate differently to credit performance. For example, if men typically handle financial matters, only one or two bank references may be an indicator of risk, while for women, the establishment of even one such relationship may be indicative of good credit performance. Such average weight systems tend to be male dominated because the majority of credit appli-

tion in society, creditors should not compare a woman's credit indices to those of a man. Women often have fewer creditworthy qualifications, such as banking contacts, references, and home ownership than men.¹⁹ Yet, some women's qualifications, compared to equivalent qualifications for men, may indicate that women are better credit risks given the greater credit opportunities available to men.

Under ECOA regulations, creditors normally cannot identify women applicants. Credit applications must be reviewed on objective data only. The ECOA's special purpose program provision allows creditors to recognize sex discrimination's effects and use credit programs that identify applicants. Relaxation of normal restrictions allows a creditor to acknowledge that identical information on a man and a woman's application does not always reflect equal creditworthiness. To penetrate these particular credit markets, the creditors' programs must follow regulation procedures and standards to identify group members' applications and ask ordinarily prohibited questions. Special purpose credit programs enable creditors to consider special circumstances and their effect on credit qualifications. This program benefits economically disadvantaged women.

cants are male. Pooling the data assumes that the relationships between risk indicators and credit performance are identical for males and females . . . [yet] the relationship between the predictors and credit performance may well not be the same.

19. *Id.* at 8 & 10.

TABLE 2
Sample Characteristics of Applicants

Characteristic	Percent of Females with Characteristics	Percent of Males with Characteristics
Low income	58.8%	23.6%
Homeownership	15.7%	24.3%

TABLE 3
Creditworthiness in Females
and Males with the Same Characteristics

Actual Account Status	Characteristic: Low Income	
	Percent of Females	Percent of Males
Bad	40%	51%
Good	60%	49%
	Characteristic: Home Ownership	
	Percent of Females	Percent of males
Bad	11%	26%
Good	89%	74%

3. Congress' Rationale for Enacting the ECOA

Testimony before the Committee on Banking and Urban Affairs²⁰ described thirteen situations²¹ in which women encountered credit discrimination. One frequently recurring practice was the use of higher standards to determine women's creditworthiness than those used for their male counterparts. To obtain credit women needed higher salary levels, fewer obligations, and more stable employment than men. Credit scoring systems²² applied different values for sex and marital status, and creditors commonly inquired into a woman's birth control practices. Many creditors presumed that a married woman was solely dependent on her husband. Creditors often closed a woman's account when she married or refused to include her income when a married couple applied for credit. When a woman applied for credit, many creditors inquired into her spouse's credit history and altered her credit rating based on her spouse's rating. Creditworthy women were required to have their husbands cosign credit applications in situations in which married men would not need a cosigner to obtain credit. Many creditors would simply not issue separate accounts to married women.

20. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, S. REP. NO. 93-278, 93rd Cong., 1st Sess. 16-17 (1973).

21. *Id.* at 17.

- (1) Creditors held men and women to different standards in determining creditworthiness—that is, salary level, obligations, employment, length of residence, and age.
 - (2) Creditors required newly married women to reapply for credit as a new applicant; men needed only to give their signature to satisfy a truth in lending disclosure statement.
 - (3) Creditors refused credit to financially sound married women who would have received credit as single women.
 - (4) Creditors refused to include a wife's income when a married couple applied for credit (credit cards or accounts, secured or unsecured loans, mortgage loans) or would arbitrarily discount the wife's income.
 - (5) Divorced or widowed women could not establish credit in their own names based upon a deceased or former spouse's credit accounts. Separated women had a particularly difficult time since their accounts usually remained in their husband's name.
 - (6) Creditors arbitrarily refused to consider alimony and child support as a source of income.
 - (7) Creditor inquired into a young married woman's birth control practices to evaluate credit applications.
 - (8) Creditors requested financial information on a spouse despite the applicant's personal creditworthy background.
 - (9) Creditors often refused to issue separate accounts to married persons.
 - (10) Creditors considered employed spouses as dependents despite their earnings.
 - (11) Creditors often used credit scoring systems which applied different values for sex and marital status.
 - (12) Creditors would alter an individual's credit rating based on the spouse's credit rating.
 - (13) Employed women with good credit ratings would need to obtain their husband's signature; banks would often refuse loans to single women without a cosigner in situations in which male applicants would not need a cosigner.
22. Credit scoring systems are rapidly replacing the personal judgment system of evaluating credit applicants among financial institutions. In a personal judgment system, a loan officer makes decisions to determine an applicant's creditworthiness. The credit scoring systems attach certain weights and numerical values to an applicant's characteristics. The applicant's total points contrast that person to a control group of recent, previous borrowers who were both creditworthy and uncreditworthy to determine the applicant's creditworthiness.

Once divorced or widowed, women could not benefit from contributions made to their credit under a spouse's name. Conversely, they could not separate themselves from a former spouse's poor credit rating. Creditors also refused to consider alimony or child support as a source of income for women seeking to obtain credit. Credit problems which existed for the married and formerly married women multiplied for the female, single-parent family.

DISCUSSION

1. Societal Attitudes

Economic discrimination against women persists, despite statistics which demonstrate that women are better credit risks, when the credit systems judge the financial status of men and women with similar economic criteria.²³ Women, however, often do not have the economic credentials needed to obtain credit; economic discrimination in the job market exists as a major reason for women's low credit ratings. As recognized by the Women's Bureau of the United States Department of Labor and noted by the United States Supreme Court in *Kahn v. Shevin*,²⁴ since 1960 women have received approximately sixty percent of the average income for men. In addition, women do not advance as quickly as men in their jobs.²⁵

The credit industry cannot assume full responsibility for women's economic status and cannot grant credit to women with insufficient income or excessive debt. Nevertheless, the Act should protect women who have sufficient economic resources against credit discrimination. Credit availability, along with equal employment opportunity,

23. CHANDLER & EWERT, *supra* note 15, at 8 & 10. The study concluded that men and women had different credit characteristics. In a credit scoring system developed for a major bank, Professors Chandler and Ewert surveyed a sample of one-half bad accounts and one-half good accounts. Fifty-nine percent of the females and 24 percent of the males appeared as low income persons. Sixteen percent of females and 24 percent of males own their own homes. Low-income women receive less credit, yet only 40 percent of the females did not pay as compared to 51 percent of low-income men. Among those who own their own home, 11 percent of females did not pay while 26 percent of the males in a similar category did not pay. Based on these and other statistics, the professors concluded that this study and others establish women as better credit risks than men, even though women are more often denied credit than men.

24. 416 U.S. 351 (1975).

25. *The Coming Decade: American Women and Human Resources, Policies and Programs, 1979: Hearings before the Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 273-363 (1975) (appendix to statement of Alexis Harman) [hereinafter cited as *The Coming Decade*]. The earnings gap ratio between fulltime female and male workers fluctuates around .60. A female concentration in the lower status occupations exists as the major reason for the persistent male-female earning differential. In 1977, women comprised 32 percent of all year-round fulltime workers. Females comprised 62 percent of workers earning 3,000-5,000 dollars; 63 percent of workers earning 5,000-7,000 dollars. Yet, females comprised only 12 percent of workers earning over 15,000 dollars. The labor study concluded that women received less pay for doing the same job in certain instances and had difficulty achieving higher level jobs and promotions. The earnings gap resulted from women's tendencies to seek job requiring fewer skills, to work less overtime, and to remain in the work force for fewer years, despite virtually the same length of education.

equivalent salary levels, and societal attitudes, will play a vital role in women's economic progress.

Secondary Effects of Discrimination. The common law established woman's inferior position. It categorized the unemployed married woman as her husband's dependent and imposed on the husband the duty to support his wife. For many women, the common law and credit discrimination confirm a belief in their inferior role. Economic discrimination leads to lower self-esteem.²⁶ Credit denial and other forms of credit discrimination cause personal humiliation and frustration.

Congress, in the ECOA, recognizes women's frustrations and acknowledges that these feelings occur partially from credit denials that place women at a substantial economic disadvantage. Lack of credit narrows choices for women in such basic matters as housing and occupation. Avenues open to men close abruptly for women. Congress realized the importance of credit availability and found that credit today does not exist as a luxury for the rich, but a necessity for all.²⁷

2. Enforcement

A. In General. The Attorney General and numerous administrative agencies provide administrative enforcement within a two-year statute of limitations.²⁸ A similar statute of limitations exists for the private plaintiff who may bring an action in a federal district court.²⁹ The law also allows the award of court costs and attorneys' fees to the successful plaintiff.³⁰ In *Vander Missen v. Kellogg-Citizens National Bank of Green Bay*,³¹ the court afforded the plaintiff a right to a jury trial under the ECOA. A plaintiff may sue for actual and punitive damages under 10,000 dollars in any individual action. In a class action, plaintiffs can recover one percent of a creditor's net worth up to a 500,000 dollar limit.³² The Senate intended that these substantial penalties deter large companies without having ruinous effects upon small companies.³³

B. Enforcement Weakness: The Class Action Suit. The statute's damage ceiling and judicially imposed notice requirements discourage potential plaintiffs and dilute the effect of sanctions against large corpo-

26. Judith Younger, in her article *Not Equal Yet*, 13 IDAHO L. REV. 227 (1977), addresses discrimination's impact upon a woman's life and describes the frustration with a quote from S. Ashton-Warner: "I don't mean to go down under marriage and babies . . . down at heel, straggly hair and nothing important to say . . . I'm not one of those people who was born for nothing."

27. S. REP. NO. 94-589, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 403-405.

28. 15 U.S.C. § 1691(c) (1976).

29. *Id.*

30. 15 U.S.C. § 1691e(c) (1976); 12 C.F.R. § 202.1(c)(3) (1980).

31. No. 78-C-671 (E.D. Wisc., filed Aug. 10, 1979).

32. 15 U.S.C. § 1691(b) (1976).

33. S. REP. NO. 94-589, *supra* note 27, at 415.

rations. The legislatively imposed ceiling on penalties takes away from the jury the power to determine relative penalties in each case.

In addition, inflation erodes the 500,000 dollar limit, and a low-damage ceiling provides insufficient incentive for large class action suits. The ceiling also fails to provide a sufficient deterrent for large corporations. Should the jury impose the maximum penalties upon two corporations of different sizes for similar violations, the ceiling results in unequal punishment.

Congress should abolish the damage ceiling. With a damage ceiling, the class action's effectiveness as a remedy diminishes under burdensome and costly notice requirements³⁴ imposed by recent United States Supreme Court cases.³⁵ The plaintiff's best possibility for relief is an individual lawsuit.

C. Enforcement Weaknesses: The Individual Plaintiff. Plaintiffs are likely to have difficulty proving actual damages from an unlawful credit denial. Recovery will often depend upon punitive damages, a fact which further limits the ECOA's effectiveness. Recently, however, the District Court for the Northern District of California in *Schuman v. Standard Oil Co. of California*³⁶ suggested an expanded definition of actual damages to include harm to one's credit reputation. The court mentioned in dicta that the ECOA provided for actual and punitive damages, including compensation for "embarrassment, humiliation, and mental distress."³⁷ In each instance, the plaintiff must prove these damages.

The *Schuman* court would grant punitive damages to "the extent to which the creditor's failure of compliance was intentional,"³⁸ but in order for the court to find liability, plaintiffs need not prove that the creditor's actions are "wanton, malicious, or oppressive"³⁹ The threshold requirement for damages exists if the defendant has acted in reckless disregard to deny women the same credit opportunities as men.⁴⁰ Neither the courts nor Congress have subjected the creditor to a strict liability standard. The ECOA does not impose liability for acts done in good faith, which were intended to conform to a Federal Reserve Board rule, regulation, or interpretation.⁴¹

Schuman expands the concept of actual damages and lowers the threshold to prove punitive damages, thus lessening the plaintiff's burden of proof and making it less difficult for the plaintiff to obtain a monetary judgment.

34. *E.g.*, Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974).

35. S. REP. NO. 94-589, *supra* note 27, at 416.

36. 453 F. Supp. 1150 (N.D. Cal. 1978).

37. *Id.* at 1154.

38. *Id.*

39. *Id.* at 1159.

40. *Id.* at 1156.

41. 12 C.F.R. § 202.1(c)(2) (1980).

3. Judicial Interpretation of the Act

A. Effects Test Analysis. Regulation B allows the creditor to use any information he obtains, as long as the data does not violate specific provisions against discrimination. Regulation B prohibits credit practices that allow subtle discrimination in which either the applicant's sex or marital status has a negative effect on a credit application. The legislative history of the ECOA indicates that Congress intended the judiciary to employ an effects test analysis, similar to that in civil rights legislation, to ferret out superficially obscure discrimination.⁴²

The effects test is an enormous aid to women in credit litigation. Analysis under the test requires a woman to establish a *prima facie* case of discrimination: that a creditor's practices or inquiries produce sexually disparate credit results. The burden then shifts to the creditor to show that this policy or inquiry relates to valid credit requirements.⁴³ If the creditor establishes a valid relationship between the controverted credit practice and permissible credit criteria, the burden of proof probably⁴⁴ shifts back to the plaintiff to show that the creditor could have used a less restrictive alternative, free from the alleged discrimination.⁴⁵

Congress moved boldly in offering the effects test analysis as an addition to the Act. The effects test will do much to protect women from covert credit discrimination.

42. S. REP. No. 94-589, *supra* note 27, mentions two United States Supreme Court cases used to interpret the civil rights legislation, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), which set out the effects test analysis and the burden of proof between the complainant and the defendant. The report stated that "in determining the existence of discrimination . . . courts or agencies are free to look at the effects of a creditor's practices as well as the motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in such cases as *Griggs* and *Albemarle*, are intended to serve as guides in the application of this Act, especially with respect to the allocations of proof." The Court in *Albemarle* cites *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), to establish the respective parties' burden of proof.

43. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Once the plaintiff established that the controverted practice caused disqualification for more Negroes than whites the burden shifted to the employer to show that the requirement had a "manifest relationship to the practice in question." *Id.* at 432.

44. Regulations have not made clear which party must prove that the creditor could have used a less discriminatory practice or inquiry and this question has not yet appeared before the courts. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). After plaintiff has made a *prima facie* case against the employer by showing that the controverted test or qualifications select applicants in a racial pattern which is significantly different from the whole pool of applicants, the burden shifts to the employer to show a manifest relation between the test or qualification and the employment in question. If the employer meets this burden of proof, plaintiff may show that other tests or selection devices exist without an undesirable racial effect to serve the employer's interest and thus show the employer's tests as mere pretexts for discrimination. *Id.* at 425.

This added burden of proof principle in *Albemarle* was unnecessary to decide the case as the employer's tests did not pass the job relatedness test. The Court cites the holding in *McDonnell v. Douglas Corp. v. Green*, 411 U.S. at 802.

45. 12 C.F.R. § 202.2(p) (1980). Regulation B requires that the system be periodically revalidated as to its predictive ability by use of appropriate statistical principles and adjusted as necessary to maintain its predictive ability.

B. Credit Scoring Systems. The ECOA requires a creditor to respond to an application within thirty days of its receipt. Upon denying credit, the creditor either must provide the applicant with the specific reasons for denial in writing (orally, in specified situations) or must inform the applicant that she remains entitled to a list of specific reasons within ninety days.⁴⁶

The required specificity creates problems for creditors who use a standardized, objective credit scoring system that grades different criteria, for example, occupation, income, home ownership and compare scores to past creditworthy and uncreditworthy customers. Under Regulation B, a creditor is required to identify the specific reasons for credit denial, even though no one identifiable reason exists.⁴⁷ The regulation prohibits statements which indicate that an applicant failed to achieve a sufficient score.⁴⁸ The creditor must identify reasons for the credit denial when, perhaps, no one reason exists.

C. Creditor Scoring Systems and the Effects Test Analysis. Credit scoring systems may prove particularly susceptible to the effects test evaluation, a susceptibility that may foster lawsuits based upon discrimination against a protected class. The credit scoring systems attach certain weights and values to the applicant's characteristics. The applicant's total points allow a creditor to compare that applicant to a control group of recent borrowers who were both creditworthy and uncreditworthy, to determine the applicant's creditworthiness.⁴⁹ Under the effects test analysis,⁵⁰ the creditor must examine his credit scoring system to ensure that a less prejudicial alternative does not exist. Whether a single question in a credit scoring system may fail the effects test and render the system discriminatory and invalid under the ECOA remains unanswered by legislative history and the courts. Conceivably, the courts could extend the effects test to its outer limit and find overt discrimination in a question that places a weighted value upon income-debt ratio, a factor that always influences creditworthiness. Given wo-

46. 12 C.F.R. § 202.9 (1980).

47. Creditors who use credit scoring systems encounter a problem when the applicant's score falls below the creditor's acceptable level; the applicant's score does not suggest any specific reason with which the creditor may refuse the applicant credit.

48. S. REP. NO. 94-589, *supra* note 27, at 409; 12 C.F.R. § 202.9(b)(2) (1980). The bill's supporters contended that the required specific reasons for credit denial would provide a "beneficial educational effect" to the applicant and guide the uncreditworthy towards successful credit applications while they encouraged the creditor to make decisions upon proper, nondiscriminatory grounds.

49. At a creditor symposium on the new ECOA, Mr. Robert F. Getzer, a New York attorney, in charge of Consumer Credit Legislation and Regulatory Activities, informed the business community to its potential liabilities regarding credit scoring systems and the need to relate each weighted value to valid credit criteria. *Equal Credit Opportunity Act*, 33 BUS. LAW. 1073, 1078 (1978).

50. *Id.* at 1082; see discussion in text at *A. Effects Test Analysis, supra*. Mr. Getzer makes the argument that the effects test should apply against the total credit scoring system. Plaintiffs, on the other hand, will argue that a creditor's ECOA violation occurs with a single discriminatory question within a credit system.

men's economic status in society, this question produces disparate credit results between men and women.

Such an interpretation by the courts appears unlikely. Although the use of income-debt ratios in credit scoring systems overtly discriminates against women, the courts should hesitate to rule that this criterion is inherently discriminatory. Such a ruling would place the entire burden for credit equality upon the credit industry and ignore other causes for women's low economic position and their credit problems.

In *Schuman*,⁵¹ the plaintiff argued that the credit scoring system was inherently discriminatory against women in light of their low economic status. Mrs. Schuman alleged the credit scoring computer system discriminated on the basis of sex because it assigned values to characteristics such as employment and income, which had significant association to sex. The court noted the lack of case law and legislative interpretation but did not address plaintiff's argument. As a result, creditors and applicants do not know how the court will apply the effects test to credit scoring systems that reflect societal discrimination against women.

4. The ECOA's Exemptions

A. State Property Laws. Two major exemptions in the ECOA leave discriminatory property laws intact and permit creditors to require the spouse's signature to create a valid lien, pass title, waive inchoate rights (dower and courtesy), and assign earnings.⁵² As a result, the Act does not benefit women who have limited power to commit their own resources under state law.

In most states, a state property law exemption in the ECOA leaves a majority of women⁵³ powerless to obtain credit in their own names: In forty-three separate property jurisdictions,⁵⁴ property laws vest ownership in the income-producing spouse. In those jurisdictions, fifty-four percent⁵⁵ of all women remain unemployed and have no power to bind their husbands' income to obtain credit without their husbands' approval. In separate property jurisdictions, many employed, married women earn less income than men. This is due, in part, to societal discrimination that results in low pay, less advancement, and career interruptions due to child-rearing.⁵⁶ As a result, many employed mar-

51. 453 F. Supp. 1150 (N.D. Cal. 1978).

52. 15 U.S.C. § 1691d (1976).

53. In addition to 54.7 percent of married women who are unemployed, many women work at various stages of less-than-fulltime employment. Many women are underemployed and thus uncreditworthy.

54. Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Individual Rights*, 3 PEPPERDINE L. REV. 26, 27 (1975).

55. U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, SPECIAL LABOR FORCE REPORT: MARITAL AND FAMILY CHARACTERISTICS OF WORKERS, 1970 TO 1978 at 219 (1979). In March of 1978, 47.6 percent of all married women were seeking employment compared to 40.8 percent in March of 1970.

56. See note 10 *supra*.

ried women can not achieve a creditworthy income level. Community property states give each spouse one-half ownership in property accumulated during the marriage.⁵⁷ Individual community property states, however, may vest control in three ways: in the husband, in either spouse, or in both spouses jointly (joint management). In joint management, community property states, the wife may commit community assets, whether or not she is employed. Her credit status is contingent upon the couple's joint creditworthiness.

In Louisiana, Nevada, and Texas, state law gives husbands exclusive control over community property and requires married women who apply for credit to obtain their husbands' consent. Because many unemployed and underemployed women do not receive any economic recognition for household and child care work, they cannot achieve substantial economic independence and independent credit. Only those women, who are fully employed outside the home and whose income warrants credit, receive protection under the ECOA.

The second major exemption allows the creditor to require a spouse's signature. This provision also permits the creditor to request information on an applicant's spouse, if the applicant relies on the spouse's income for repayment, if the spouse remains contractually liable for the credit, or if the couple lives in a community property state in which creditors must rely on jointly held community property.⁵⁸ Although the legislators indicated that "this shall not constitute discrimination,"⁵⁹ the exemption allows creditors to require the spouse's signature to obtain clear title to security under applicable state law. As mentioned previously, state property law vests either exclusive ownership in the income-producing spouse or common ownership in both spouses in community property states. Women, therefore, must depend upon their husbands and their signatures (if they choose to give them) to obtain their own credit.

Both exemptions leave intact discriminatory state laws that reflect outmoded notions of a woman's role. The ECOA's goal of equal credit treatment will not guarantee equal credit results, if the law permits the discriminatory state property law exemptions to exist. Equal credit will only result from equal credit opportunity and from recognition of a spouse's work in the home, as in the joint management, community property states.

57. 1 R. POWELL, *POWELL ON REAL PROPERTY* 464 (1977). Eight states, Arizona, Idaho, Louisiana, New Mexico, Texas, Washington, Nevada, and California, have community property laws. Both spouses may own separate property, in addition to acquisitions during the marriage that constitute community property. Separate property includes those assets acquired before the marriage or gifts given to the spouse during the marriage. Five states grant joint management or control to either spouse. In two states, Louisiana and Nevada, husbands alone retain power to convey community property, and in Texas the wife can gain control over her earnings if she becomes employed.

58. 12 C.F.R. § 202.7(d)(3) (1980).

59. 15 U.S.C. § 1691d(a) (1976).

B. Divorced Women. Credit applications must contain a notice that a divorced woman need not disclose alimony or support, if she does not want that income to contribute towards her creditworthiness.⁶⁰ Nondisclosure allows the divorced applicant to avoid any stigma due to her marital status and any negative effect upon her credit rating that results from a previous spouse. However, one may reasonably conclude that the few women who receive support payments rely heavily upon that income to obtain credit.⁶¹ These divorced women should be allowed to report support and alimony income without identifying the source of this income.

This dilemma cannot be solved solely through the ECOA. Studies show that the courts award alimony in less than ten percent of divorce cases. Unenforced support and alimony orders may leave the majority of those women empty-handed.⁶² One cannot expect creditors to extend credit based on support or alimony income with such an enforcement record in the courts. Fault does not lie solely with the credit industry but stems from a combination of problems in the legal system, its enforcement procedures, and women's low economic status.

A woman may elect to include alimony and support payments on an application for credit, but Regulation B provides that a creditor need only consider these payments "to the extent they are likely to be made."⁶³ To determine whether a former spouse will pay consistently, the creditor may consider a couple's written agreement or the court decree, the time period within which the divorced woman received payments, payment regularity, procedures available to compel payments, and the spouse's credit history to the extent allowed under the Fair Credit Reporting Act.⁶⁴ This regulation results in credit denials to di-

60. 12 C.F.R. § 202.2(d)(2) (1980).

61. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 189-191 (1971). As mentioned previously, most women remain unemployed during marriage (54.7 percent). As former homemakers, mothers, or underemployed workers, these women often lack the marketable skills necessary for economic security after their marriages have ended. Most often, divorced and separated mothers also face child care problems and related costs that require additional dependence on support or alimony payments.

62. *Id.* at 189-91. Within one year after divorce decrees, only 35 percent of fathers were in full compliance with the support orders, 20 percent partially complied, and 42 percent made no payment at all. By the tenth year, 13 percent were in full compliance. Seventy-nine percent made no attempt to comply with the court orders. *The Coming Decade*, *supra* note 25, at 1343, 1360-75.

The number of divorced people increased during the period, 1960-1977, from 35 per 1,000 married persons to 84 per 1,000 married persons in 1977. Households maintained by women without a husband present increased from 8.7 percent in 1970 to 10.6 percent in 1978. More than 30 percent of these households fell below the poverty line, while only 5.5 percent of male-headed households were in the same situation. These single mothers in the labor force bear the burdens of both working and assuming full responsibility for housework and child care. *Id.* at 273-363 (appendix to statement of Alexis Harman).

Families headed by women, especially if headed by black women, are more likely to live in poverty than families with both spouses present. Also, families headed by women earned on the average 10,000 dollars less than families with both spouses present. The incomes of black women were lowest among all groups.

63. 12 C.F.R. § 202.6(b)(5) (1980).

64. *Id.*

vorced women based on the former spouse's credit history, even if the former spouse continues regular alimony or support payments. This result contravenes the ECOA's stated goals, as a woman who is a divorced homemaker or mother suffers credit discrimination on account of her marital status or her former husband's credit history. The present support and alimony record, however, causes creditors' legitimate concern when they grant credit based upon income from these sources.⁶⁵ The ECOA cannot solve this problem without cooperation from the courts in the enforcement of support decrees and without changes in existing property law with respect to marital relationships.

C. Necessities Statutes. Another state law exemption⁶⁶ diminishes the ECOA's strength and contributes to hardships for the low-income, female-headed household. State family expense or necessities statutes diminish the divorced or separated woman's credit. The state statutes allow either spouse to purchase family necessities and imposes full, joint liability that continues past the marriage.⁶⁷ Often, however, the husband was the sole income producer in the marriage and the cause of delinquent payments. Yet, these debts burden divorced or separated women, including an increasing number of women who oversee a low-income family,⁶⁸ frequently without support from the former spouse, and suffer from the state law exemption.

The family statutes include hospital care and public utility costs. Creditors who deal in these necessities can deny a separated or divorced woman an account, if a previous account, under a former spouse's name, has an outstanding balance. The separated or divorced woman cannot rebut the negative inference on her credit and cannot submit evidence that shows she had no involvement in the delinquent payments or outstanding account. Plaintiff's lawyers may argue that the family expense statutes are *ultra vires* and a due process violation. Nevertheless, until these arguments gain acceptance, the statutory ex-

65. Nagel & Weitzman, *supra* note 61, at 189-91. Despite sanctions like contempt of court, civil action, criminal prosecutions, and the state's incentive to avoid unnecessary welfare payments, the state rarely initiates legal action. Only 19 percent of noncompliant fathers at the end of the first year were subjected to legal action and only 1 percent at the end of the tenth year. The authors discuss causes and remedies of the phenomenon.

66. 12 C.F.R. § 202.6(c) (1980).

67. Baker & Taubman, *The Equal Credit Opportunity Act: The Effect of the Regulation on the Poor*, 9 CLEARINGHOUSE REV. 543, 545-46 (1975).

68. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Ser. 60 No. 119 CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1977 (1979). One of the most significant changes in the poverty population between 1969 and 1977 was the increase in the number of poor families headed by a female with no husband present (1.8 million to 2.6 million). This rise, combined with the decline in the number of families with a male householder, resulted in an increase in the percentage of poor families with a female householder from 36 percent in 1969 to 49 percent in 1977. Thirty-two percent of families with a female householder fell below the poverty level, while that rate remained at 6 percent for all other families. This number jumped to 71 percent for poor, female-headed, black families, up from 54 percent in 1969. *Id.* at 3.

emption will impose liability for outstanding accounts on a spouse who had no income or financial influence during a marriage.

One provision may benefit the divorced or separated applicant. Regulation B requires a creditor to consider accounts for which the applicant's spouse or former spouse shares liability in order to establish the applicant's creditworthiness. The creditor, however, must also discount those accounts under the applicant's name that do not accurately reflect that person's creditworthiness.⁶⁹ The applicant must produce evidence to show the creditor that she either maintained good standing on a credit account in someone else's name, or was not responsible for a delinquent account. This provision increases the divorced woman's chances to obtain credit by giving the creditor the opportunity to analyze the individual applicant apart from her spouse's credit standing.

5. Preemption and Election of Remedies

The ECOA preempts inconsistent state law that contravenes the federal act. Regulation B, however, permits similar state legislation that provides equal or greater protection to the applicant to continue to exist.

Despite the preemption provision, state equal credit laws often fail to have either the force or scope of the ECOA. State human rights commissions enforce the state's credit laws, and these administrative agencies rarely enforce the law through lawsuits or interpretative regulations. As a result, few private lawsuits arise. Administrative agencies or plaintiff's lawyers frequently handle violations privately without lawsuits which are essential to encourage future plaintiffs, to provide useful precedent, and to deter creditors. Few states provide court costs for the plaintiff. State laws frequently place a low ceiling on punitive damages. They fail to provide either incentive for plaintiffs or deterrence for creditors.⁷⁰

The election of remedies clause could penalize less sophisticated plaintiffs who choose the least burdensome state procedure and receive little or no remedy under a state provision. Once the plaintiff has brought suit against a creditor in the state court, the election clause bars any future action under the ECOA in federal court. It leaves the plaintiff with little or no remedy. State violations, therefore, constitute a federal ECOA violation,⁷¹ and a plaintiff can bring an action under

69. 12 C.F.R. § 202.6(b)(6)(iii) (1980).

70. The description, analysis, and classification involved in state credit discrimination laws are beyond the scope of this note. For a discussion and analysis of problems involving state credit laws, see Polikott, *Legislative Solutions to Sex Discrimination in Credit: An Appraisal*, 2 WOMAN'S L. REP. 26 (1955). For in-depth analysis of each state's credit discrimination statute and its particular loopholes, see *Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Cong., 2nd Sess. 633, 638-53 (1975); Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409 (1974).

71. 15 U.S.C. § 1691d(e), (g) (1976).

either the ECOA or state law. An election-of-remedies clause, however, precludes a plaintiff from an action in court based upon a previous suit in either a state or federal court.⁷²

6. The Legislative and Judicial Response

A. History. The 1960-70 Civil Rights legislation had a major impact on women's rights and helped to create laws that, in theory, guaranteed equal rights, equal pay, and an increase in women's chances for equal credit. The Equal Pay Act of 1963,⁷³ Title VII of the Civil Rights Act of 1964,⁷⁴ the Equal Employment Opportunity Act of 1972,⁷⁵ and subsequent judicial decisions established the principle that women should receive equal treatment on the job with regard to pay and fringe benefits.

The Equal Pay Act of 1963 prohibited discrimination on the basis of sex and required equal pay for work on jobs that required equal skill, effort, and responsibility.⁷⁶ Subsequently, the Fair Labor Standards Amendment of 1974⁷⁷ extended this principle to additional occupations. The Equal Pay Act, however, exempts differences in salaries due to a seniority or merit system.⁷⁸

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in hiring, firing, salaries, or other conditions of employment based on a worker's sex.⁷⁹ The Equal Employment Act of 1972 extended Title VII and the 1964 Civil Rights Act to businesses with fifteen or more employees⁸⁰ and empowered the Equal Employment Opportunity Commission to file suit against employers in non-compliance after informal attempts to remedy the problem.⁸¹ Federal employees could bring suit for discrimination by the federal government.⁸²

Subsequent United States Supreme Court decisions strengthened equal employment opportunities for women. In *Phillips v. Martin Marietta Corp.*,⁸³ the Court held that a company that refused to hire a woman with school age children and did not apply the same standard to male applicants failed to comply with the Civil Rights Act of 1964. Company rules that differentiated between the sexes had to be based upon a bona fide occupational qualification, reasonably necessary to the normal operation of the business. In *Weinberger v. Wisenfeld*⁸⁴ and

72. 15 U.S.C. § 1691d(e) (1976).

73. 29 U.S.C. § 206 (1976).

74. 42 U.S.C. § 2000e-2 (1976).

75. *Id.*

76. 29 U.S.C. § 206(d)(1) (1976).

77. 29 U.S.C. §§ 202-208 (1976).

78. See note 76 *supra*.

79. 42 U.S.C. § 2000e-2(a)(1) (1976).

80. 42 U.S.C. § 2000e(e)(B) (1976).

81. 42 U.S.C. § 2000e-5(F) (1976).

82. 42 U.S.C. § 2000e-16(c) (1976).

83. 400 U.S. 542, 544 (1971).

84. 420 U.S. 636, 653 (1975).

Califano v. Goldfarb,⁸⁵ the Court held that both men and women would have to prove economic dependency on the other spouse in the same way and struck down all contrary assumptions. In *Los Angeles Department of Power and Water v. Manhart*,⁸⁶ the majority stated that Title VII and the Civil Rights Act focused on fairness to individuals rather than classes. The Court disallowed treatment of an individual as a member of a sexual class. Employers, therefore, can not apply sexual generalizations to an individual.

The Supreme Court, however, has not yet fully recognized the value of a spouse's homemaker and child care services. *Hisquierdo v. Hisquierdo*⁸⁷ ruled that a wife in a community property state did not have any rights in her husband's Railroad Retirement pension and that therefore she would not receive one-half in a property division.

B. Social Security. Apart from judicially imposed changes in the Social Security System, the law still makes significant differentiations between the sexes. Almost a half-century old, the system evolved from assumptions current at the time Congress enacted the law: that protection stems from paid employment; that benefits reflect a family's needs over those of a single individual; that the husband is the source of income while the wife is the homemaker; and that marriages are lifelong. These assumptions may not be as widely shared today as they were a half century ago.⁸⁸ The number of women in the labor force has risen dramatically, and one in every three marriages ends in divorce. These facts challenge the assumptions of the Social Security System and create disparities.

A homemaker, as well as a wage-earning spouse who leaves the work force for a long period of time to raise children, receives no social security benefits in her own right for her services. She may suffer financial hardship at the time of a subsequent divorce or her husband's death. A homemaker, aged sixty-five, cannot receive social security until her husband reaches age sixty-two and only then if he elects to receive benefits paid upon early retirement. A homemaker's family will not receive disability or survivor's benefits, if the homemaker dies or becomes disabled. Homemakers may also lose their own disability coverage, if they are unable to meet a recent employment test that requires them to be in the labor force five out of the previous ten years before becoming disabled. A spouse's benefit is set at fifty percent of the worker's benefit. This is frequently inadequate and unjust to a divorced spouse.⁸⁹

85. 430 U.S. 199, 216-217 (1977).

86. 435 U.S. 702, 708 (1977).

87. 439 U.S. 572, 585 (1979).

88. HOUSE SELECT COMM. ON AGING, 96TH CONG., 1ST SESS., WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY CHAPTER III SOCIAL SECURITY (Comm. Print 1979).

89. *Id.* at 30-32.

Past proposals addressed the homemaker's and underemployed spouse's problems. One proposal sought to average a couple's earnings. Benefits to each member would have been equal to the average of both earners' salaries. In homes with one wage earner, the couple would have been treated as if both worked in order to allocate income to each person. This proposal would have, however, reduced aggregate benefits to couples with one wage earner.⁹⁰

A second proposal would have divided a couple's earnings equally. The couple's earnings would have been split on a year-to-year basis only for the years of marriage. Each spouse would have received credit for earnings, regardless of which member received monetary remuneration for their work. The credit would have been the greater of fifty percent of the couple's total earnings or seventy-five percent of the earnings of the highest paid spouse. This plan would have allowed homemakers and underemployed spouses to acquire Social Security protection in their own right. In addition, women who move in and out of the work force would have maintained a continuous employment record.⁹¹ Other proposals suggest that Social Security provide credit for homemaker services to those homemakers between the ages of eighteen and sixty-five who are not employed fulltime.⁹²

Despite flaws and budgetary restraints, these and other proposals should be improved and studied. The failure to recognize the value of a homemaker's services and the inadequate provisions made under the Social Security System for homemakers of employed spouses is a great injustice.

C. Displaced Homemaker Legislation. In 1978 legislation⁹³ passed Congress that would benefit displaced homemakers—those who had made it their career to maintain a family and who later became widowed or divorced. These women often lack financial security, suffer sex and age discrimination, lack marketable skills, and fail to qualify for Social Security, welfare, or unemployment benefits. The legislation acknowledges this group's special employment problems and provides grants to community-based and private, non-profit organizations to establish fifty multi-purpose service centers. The centers identify community needs and offer counseling services in health, education, and

90. *Id.*

91. This proposal, however, would also increase the agency's administrative duties and add to the costs of the Social Security program.

92. See note 88 *supra*, at 34-39. Critics complain that this departs from the nature of Social Security as an earnings replacement program and creates an income-maintenance welfare program. The plan would also have to rely on those persons who claim to be homemakers.

93. H.R. 10718, 95th Cong., 2d Sess. (1978); H.R. 11128, 95th Cong., 2d Sess. (1978); H.R. 10270, 95th Cong., 1st Sess. (1977); and S. 418, 94th Cong., 2d Sess. (1977). The major sponsors of these bills included former Senator Birch Bayh of Indiana, Congresswoman Burke of California, and Congressman Flenzel of Minnesota. These bills merged with other proposals to amend the Comprehensive Employment and Training Act (CETA), and the President signed these into law in 1978. 18 U.S.C. § 665 (Supp. II 1978).

financial management.⁹⁴ These services promote the displaced homemaker's marketability, improve her financial status, and improve her credit qualifications. Under the Reagan Administration, however, the program may suffer severe budgetary cuts or even abolition. If this occurs, the displaced homemaker would lose one of the few opportunities available to propel herself from her unmarketable and uncreditworthy status.

D. Day Care Centers. Single, female parents and homemakers who desire outside employment lack the necessary financial basis for credit, unless they are able to work. In 1979 proposed day care legislation⁹⁵ sought to address this employment problem. The bill recognized the dramatic increase in the number of single-parent households and the lack of adequate, affordable day care. This deficiency denies a child proper care or forces the single parent to stay at home and rely on welfare.⁹⁶

The unsuccessful legislation⁹⁷ would have assessed child care needs, coordinated state and federal child care programs, and provided funds for day care through contract or grant. The bill would have given priority to services for those in financial need and children from single-parent households. The program also would have provided funds for informational and referral services to assist parents in finding child care services.⁹⁸ The legislation had two goals: (1) to provide child care for the children of mothers who wished to work and (2) to improve existing day-care services.

Prospects for a similar bill in a Republican Senate and a Reagan Administration appear dim. The need for day care, however, remains. Without adequate day-care facilities, the single, female parent's opportunities for equal credit decrease.

CONCLUSION

Neither economic discrimination nor credit denial result from any one particular factor. Discrimination in employment,⁹⁹ occupational discrimination,¹⁰⁰ wage discrimination,¹⁰¹ and restricted entry into economic activities¹⁰² are, in part, the cause of women's inferior economic

94. H.R. 10270 § 305A, 95th Cong., 1st Sess. (1977).

95. Senator Cranston introduced S. 4, 94th Cong., 1st Sess. (1979), reprinted in *Child Care Act of 1979: Hearings on S. 4 Before the Subcomm. on Child and Human Development*, 96th Cong., 1st Sess. 6-31 (1979) [hereinafter cited as *Hearings on S.4*].

96. *Id.* at 6-7.

97. Senator Cranston's bill died in the Subcommittee on Child and Human Development.

98. *Hearings on S. 4*, *supra* note 95, at 9-11.

99. Discrimination in employment refers to the high number of women unemployed. See note 10 *supra*.

100. Occupational discrimination refers to women relegated to low-wage and female-intensive occupations. See note 10 *supra*.

101. See note 10 *supra*.

102. Brown, *Discrimination and Pay Disparities Between White Men and Women*, 101 MONTHLY

position. No single legislative enactment will solve the problem. The problem does not exist in a vacuum; various factors interact to aggravate women's credit problems. The ECOA, by itself, cannot ensure fair credit for women; implementations of its goals, however, will provide equal opportunity.

Additional legislation must address the component parts of sexually based economic discrimination. The ECOA addresses women's credit opportunity problems. Its effectiveness, however, is diminished by discriminatory state property laws, necessity and family expense statutes, and problems that concern divorced and separated women. Congress and the Courts must be committed to strict enforcement of the statutes and must address the problems that aggravate credit inequality. Both the legal profession and women's groups must educate women in their rights, assist them in enforcing these rights, and work toward correcting problems in existing legislation. The ECOA cannot, and does not, force the credit industry to bear the entire burden for raising women's economic status or to grant credit to people with insufficient resources. Rather, the ECOA attempts to provide credit to women in accordance with their economic position. The effort is not always successful. The ECOA does not achieve equal credit opportunity. It lays an incomplete framework for economic parity between men and women, parity that translates into equal credit opportunities.

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LABOR REV. 17, 17-22 (1978). Mr. Brown discusses the fundamental factors of economic discrimination and broad solutions to each.

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