"THE JUDGMENT IS AFFIRMED BY AN EQUALLY DIVIDED COURT"

With a one sentence opinion, the United States Supreme Court issued its first deadlocked ruling following the death of Justice Antonin Scalia. The ruling came in a creditors' rights case that languished before the Court for some time, hinting of a divided Court on the issue prior to Scalia's death.

In *Hawkins v. Community Bank of Raymore*, the United States Court of Appeals for the Eighth Circuit addressed a dispute between a bank and a developer that defaulted on its loans from the bank. The two members of the developer and their spouses guarantied the loans. The spouses of the guarantors of the loan sued the bank, alleging they were required to guaranty the loan only because of their spousal status and, therefore, were discriminated against pursuant to the Equal Credit Opportunity Act ("ECOA"). The district court granted summary judgment to the bank, holding that the spouses were not "applicants" who gained protections of the ECOA. The Eighth Circuit affirmed, reasoning the plain language of the ECOA provides that a person is an "applicant" only if he or she requests credit, but a guarantor does not, simply by executing a guaranty, request credit, and, therefore, the marital status protections of the ECOA did not apply. Conflicting authority exists in the Sixth Circuit.

The Supreme Court granted the petition for writ of certiorari in March of 2015, and oral argument was held in October of 2015. The Court had not issued a decision as of Scalia's death on February 13, 2016, indicating a potentially close decision.

The one sentence decision indicating the deadlock was issued on March 22, 2016. When the Supreme Court is deadlocked at 4–4, the decision of the lower court stands, but it does not have precedential value. Therefore, the bank remained victorious over the spouses, and the circuit split remains unresolved.

Although certainly short and sweet, the Court's first deadlocked decision following the death of Justice Scalia speaks volumes on what future United States Supreme Court decisions hold.

STUDENT LOANS: RECENT FEDERAL WARNING SHOTS TO FINANCIAL INSTITUTIONS

You can hardly throw a textbook today without hitting a media story about student loans. From the debt burden that graduates face to the actual loans that students have access to

and how they're structured, our country is taking a hard look at college costs and financing. Now the landscape is shifting.

Students, who used to hold little power in the loan process, are gaining a voice. Financial institutions should take note and adjust their loan-making processes or face more regulation and potential losses down the road.

This article shares information about recent federal announcements and their implications to the banking industry.

Recent Federal "Guidance"

There are, essentially, two types of student loans: 1) standard payment plans with established payment amounts and timelines from the moment a student graduates, and 2) graduated repayment plans under which the student's initial payments are lower and then increase approximately every two years. Most graduated repayment plans require monthly payments over ten years.

The problem with graduated payment plans (and, let's face it, many other student loans) is that some students don't end up making as much money as they expected upon graduation and they struggle to pay their debt. A deeper look into some of the loan structures themselves led federal regulators to make a recent announcement to financial institutions that originate private student loans.

On January 29, 2015, federal financial regulatory agencies issued guidance for financial institutions that originate private student loans with graduated repayment terms. Some of the guidance may seem common sense, but clearly the regulators saw practices in the private banking industry that made them take note.

Financial institutions should see these guidelines as a warning shot: you've got to study your private student loan-making process and even your student loan culture or face more federal attention down the road.

The federal agencies issued the following principles for financial institutions that make private student loans with graduated repayment terms to ensure that they "prudently underwrite the loans in a manner consistent with safe and sound lending practices":

- Ensure orderly repayment by calibrating repayment terms to reasonable standards based on debt;
- Avoid payment shock by including repayment terms that a borrower can meet over the life of the loan;
- Align payment terms with income and do not structure repayment terms to mask delinquencies or defer losses;
- Provide clear disclosures to the borrower as required by applicable laws and

regulations, including the Truth in Lending Act;
- Comply with all consumer laws, regulations, and reporting standards; and
- Contact borrowers before reset dates to help establish student debt as a priority and aid borrowers in responding to any challenges.

More Power to the Students Coming

Further proof of a shifting landscape: The White House is studying whether it should be easier to wipe out student loans in the bankruptcy process. Currently, federal law prohibits student loans from being discharged in bankruptcy, except in rare cases. In a nutshell, banks need to work with students to arrive at fair repayment plans, or they may risk losing their assets in that student's bankruptcy process.

The takeaway from this recent "guidance"? Students are gaining power in the loan process and banks need to be much more careful about how they structure loans and how they communicate with students throughout the life of a loan.

What Should You Do?

Financial institutions need to take a hard look at their private student loan-making process, their relationships with students throughout the life of a loan, and their very culture around student loans. You have received a warning: "Do this right, and do it fairly, or face consequences."

If you have any questions, please contact Attorney Melissa S. Blair at O'Neil, Cannon, Hollman, DeJong and Laing S.C. at 414-276-5000.