IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 34378

LOIS ARNOLD,

Plaintiff Below, Appellee

v.

DAVID G. PALMER, Trustee, CHRISTINA J. PALMER, Trustee, ADVANTAGE BANK, an Ohio Corporation, and JEFFREY SCOTT ARNOLD, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased,

Defendants Below

ADVANTAGE BANK,

Third-Party Plaintiff Below, Appellant

v.

JEFFREY SCOTT ARNOLD, Individually, SAMANTHA NICOLE FOGGIN, MELISSA ANN DAILEY, and KELLI BETH ARNOLD, Beneficiaries of the Estate of Jeffrey A. Arnold, Deceased,

Third-Party Defendants Below, Appellees

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

Civil Action No. 07-C-699
Circuit Court of Wood County
Beane, J., Judge

AMICI CURIAE BRIEF ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION, INC. AND THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC.

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I. STATEMENT OF INTEREST

The West Virginia Bankers Association, Inc. ("WVBA") is an association of seventy (70) bank members and seventy-seven (77) associate members that represents the banking industry in West Virginia before the West Virginia State Legislature, the United States Congress, and many other state and federal regulatory agencies. Similarly, the West Virginia Association of Community Bankers, Inc. ("WVACB") is an association of community banks in West Virginia whose membership consists of forty-seven (47) bank members and sixty-three (63) associate members throughout the State that represents community banks before the West Virginia Legislature, the United States Congress, and many other state and federal regulatory agencies. All of the members of the WVBA and the WVACB provide mortgage lending services that involve the use of deeds of trust.

As the major representatives of the banking industry in West Virginia, the WVBA and the WVACB have a substantial interest in whether a West Virginia lender may enforce a lien where a joint tenant cosigning the deed of trust does not sign the underlying promissory note. Further, based on their extensive experience with and knowledge of the banking industry in West Virginia, these associations can offer a germane and informed perspective to this Court regarding the legal merits of the issues and, just as importantly, the far-reaching public policy implications of this Court's decision.

A. The Issues Presented in This Appeal Significantly Affect All of the Member Banks of the WVBA and the WVACB

In preparation for this brief, both the WVBA and the WVACB distributed a questionnaire to member banks. The questionnaire included the following question:

> Please identify whether (and if possible the total number of loans) your institution currently has loans secured by a deed of trust that is signed by both spouses or joint tenants, but where only one spouse or joint tenant signs the promissory note.

Of the twenty-two banks which responded to the survey, twenty-one (95%) stated that it had at least one loan which would be negatively impacted if this Court were to uphold the Trial Court's ruling.

Clearly, the issues in this case have a broad applicability to West Virginia banks. The issues presented to the Court in this appeal are not limited to a unique set of facts. Rather, the interests are very broad, and the Court's decision could have a dramatic impact on compliance by West Virginia banks with the provisions of federal law, and on the terms and availability of credit to West Virginia.

B. The Ruling of the Trial Court, if Upheld, Would Place West Virginia Banks Out of Compliance with Federal Law.

In 1974, the United States Congress adopted the Equal Credit Opportunity Act ("ECOA").[1] ECOA makes it unlawful for any creditor to discriminate against any applicant for credit on prohibited bases, including the sex of the applicant. 15 U.S.C. § 1691a. ECOA directs the Federal Reserve Board to prescribe regulations for carrying out the purposes of the Act. 15 U.S.C. § 1691b.

These regulations, which apply to all lenders in West Virginia, are set forth in Federal Reserve Board Regulation B, 12 C.F.R., Part 202. As will be discussed later in this brief, both Regulation B and Financial Institution Letters issued by the Federal Deposit Insurance Corporation *prohibit* lenders from requiring spousal signatures on promissory notes, unless the

[1] ECOA is codified at 15 U.S.C. §§ 1691 – 1691f.

signature of the spouse is required by underwriting standards, or unless state law requires the signature of the spouse on the note to perfect a security interest.

West Virginia banks, in good faith reliance on these federal laws, have refrained from requiring spousal signatures on notes in order to comply with West Virginia law. If this Court were to uphold the Trial Court's ruling, there would be substantial damage to banks, other lenders and to borrowers.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent and her husband owned real property in Wood County, West Virginia as joint tenants with rights of survivorship. On November 5, 2003, Respondent and her husband executed a Purchase Money Deed of Trust in favor of Petitioner's Trustee which secured the real property at issue as collateral for repayment of a Promissory Note that was executed solely by Respondent's husband. Respondent's husband then died, and pursuant to her right of survivorship, Respondent became the sole owner of the property. Third-Party Petitioner Advantage Bank, the lender that secured the Promissory Note, did not file a claim against the deceased's estate, but when the estate defaulted on the loan, attempted to foreclose on Respondent's Deed of Trust.

In response to Respondent's Complaint for injunctive relief, Petitioner filed a Motion for Summary Judgment seeking permission to foreclose on the property. The Circuit Court denied Petitioner's Motion for Summary Judgment because it determined that "it appears that the [Respondent] would have a defense to the Note in that she is not liable for the debt of the Note . . . As such, it follows that the [Respondent] has a defense to the Deed of Trust securing the Note."

III. ARGUMENT

A. The Trial Court's Holding Represents a Conflict with Federal Law.

1. Under the Circumstances, Federal Law Prohibits the Requirement of Spousal Signature on a Note Secured by a Deed of Trust.

As noted above, lenders are subject to the federal Equal Credit Opportunity Act, which makes it unlawful for any creditor to discriminate against any applicant for credit on a number of prohibited bases, including the sex of the applicant. 15 U.S.C. § 1691a. ECOA directs the Federal Reserve Board to prescribe regulations for carrying out the purposes of the Act.

The Federal Reserve has promulgated Regulation B, 12 C.F.R., Part 202. The Federal Reserve Board, in Regulation B, specifically addresses the requirement of signatures of spouses:

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

12 C.F.R. § 202.7(d)(1).

There is only one exception to the prohibition on spousal signatures:

> If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

12 C.F.R. § 202.7(d)(4).

The Federal Reserve has elaborated on this exception in its commentary to Regulation B:

> 1. *Creation of enforceable lien.* Some state laws require that both spouses join in executing any instrument by which real property is encumbered. If an applicant offers such property as security for credit, a creditor may require the applicant's spouse to sign the instruments necessary to create a valid security interest in the property. *The creditor may not require the spouse to sign the note evidencing the credit obligation if signing only the mortgage or other security agreement is sufficient to make the property available to satisfy the debt in the event of default.* However, if under state law both spouses must sign the note to create an enforceable lien, the creditor may require the signatures.
>
> 2. *Need for signature – reasonable belief. Generally, a signature to make the secured property available will only be needed on a security agreement.* A creditor's reasonable belief that, to ensure access to the property, the spouse's signature is needed on an instrument that imposes personal liability *should be supported by a thorough review of pertinent statutory and decisional law or an opinion of the state attorney general.*

Comment 7(d)(4) to Regulation B, 12 C.F.R., Part 202, Supp I (emphasis added).

The Petitioner could have avoided the entire matter by merely *requiring* that the Respondent sign the Promissory Note. Given the Respondent's willingness to sign the Deed of Trust in question, it does not appear to be unreasonable to believe that she would have signed the Note as well. However, under federal law, the Petitioner was prohibited from requiring the signature on the Note in question. As the Trial Court itself correctly noted, this Court has not ruled on this issue. As a result, the Petitioner would have no reasonable basis to require that the Respondent sign the original Note, and doing so would cause it to be in violation of federal law. Usually, as the Federal Reserve noted, as a general rule, signature by a spouse on a Deed of Trust is sufficient to provide a lien to secure a debt.

The Federal Deposit Insurance Corporation concurs with the Federal Reserve position. The Federal Deposit Insurance Corporation has issued two Financial Institution Letters with

respect to spousal signature provisions on credit, FIL-9-2002 (February 4, 2002) and FIL-6-2004 (January 13, 2004), which are attached as Exhibits 2 and 3, respectively. In FIL-9-2002, the FDIC defined the "reasonable belief" which would be necessary to have a spouse sign a Note, as well as a Deed of Trust:

> In most states that do not follow community property principles, the co-owner does not have to sign the note to grant the creditor access to the property, but only the security documents, such as a mortgage or a lien. If the creditor believes that the co-owner's signature is needed on an instrument that imposes personal liability to assure access to jointly own property securing the debt, such belief should be supported by a thorough review of pertinent statutory or decisional law or an opinion of the state attorney general obtained prior to requiring the signature.

FIL-9-2002, p. 2, § II(c)(1).

2. The Trial Court's Order, if Affirmed, Would Have a Severe Negative Impact on Lenders in West Virginia.

As noted above, the Petitioner could have avoided this entire problem, had it merely *required* signature of the Respondent on the Note, as well as the Deed of Trust. However, because of the ECOA and Regulation B, it was constrained in its ability to do so. These federal laws apply generally to lenders across the State of West Virginia. As previously noted, 95% of the Respondents to a recent survey by the WVBA and the WVACB indicated that they had loans which would be affected negatively by an adverse ruling by this Court. This would, in effect, change the rules in the middle of the game. In fact, not only would lenders be harmed by the Trial Court's ruling, but also borrowers would be harmed as well.

B. The Ruling of the Circuit Court is Not Consistent with West Virginia Law.

1. The Reliance by the Respondent and the Trial Court on *Dobbins v. Cunningham* is misplaced.

The Trial Court, in its Order dated August 18, 2008, and the Respondent, in her brief (Respondent's Brief, pp. 7, 12-14) relied heavily on Dobbins v. Cunningham, 217 W.Va. 580, 618 S.E.2d 589 (2005). Facially, the facts of *Dobbins* appear to be similar to those in the present case. In *Dobbins*, an ex-husband and wife jointly owned a tract of land which was used to secure a loan. The promissory note for the loan was signed only by the ex-husband. The property which secured the loan was sold as part of a partition action, and this Court ruled that the wife's portion of the proceeds of the partition sale did not have to be used to pay the underlying debt.

However, *Dobbins* does not stand for the proposition that signature on a Promissory Note is necessary to enforce a person's interest in the deed of trust. In fact, the Court specifically pointed out that:

> [t]he bank – which is not a party to this case and had not declared the promissory note to be in default – *continues as before and its interest in securing the loan with a tract of land continues to be preserved.*

Dobbins, 618 S.E.2d at 591 (emphasis added).

As a result, in *Dobbins*, the bank had not foreclosed or attempted to foreclose on a loan. The ex-husband merely asserted that the notes were secured by a deed of trust on real estate sold and that the proceeds of sale should be applied to those notes. As a result, the lender's interest was never in jeopardy, as the lien remained both enforceable and intact.

Therefore, *Dobbins* does not stand for the proposition that signature on a note is necessary to enforce a deed of trust by a lender which loaned money and secured the loan in good faith.

2. The Trial Court's Reliance on *Miller v. Diversified Loan Services Co* and a Law Review Article by John Fisher Were Misplaced and in Error.

In its opinion of August 18, 2008, at pp. 4-5, the Trial Court stated as follows:

> First, it should be noted that '[i]n a suit to enforce a lien securing a negotiable note, the same defenses are generally available as would be in a suit on the note itself.' *Syl. pp. 3, Miller v. Diversified Loan Service Co*, 382 S.E.2d 514 (1989).
>
> In this case, it appears that the plaintiff would have a defense to the note in that she is not liable for the debt of the Note for the reasons stated above. As such, it follows that plaintiff has a defense to the Deed of Trust securing the Note.

While the quotation by the Trial Court is accurate, the facts of *Miller* are not applicable to this case. Furthermore, *Miller* does not stand for the proposition that defenses to a note are *absolutely* or *universally* applicable to a Deed of Trust. Rather, this Court in *Miller* used the word "generally."

The facts in *Miller* are also distinguishable from this case. In *Miller*, the debtors owed money to State-Wide Supply, Inc., which transferred the loans to Kanawha City Savings and Loan Company. Kanawha City filed for bankruptcy, and State-Wide ceased doing business. Diversified Loan Service Company purchased the loans from the bankruptcy estate. *Harris* dealt with a number of issues, including whether laches operates as a defense to a foreclosure on a Deed of Trust which was otherwise timely made. In addition, *Harris* dealt with such issues as whether a purchaser from a bankruptcy estate may be a holder in due course and thus not subject to defenses which could be brought against the original lender. These defenses included: (i) that the lender would be subject to claims of the borrower against the seller, (ii) usury, and (iii) forgery. *Harris* did not, in any way, provide a universal defense for any signatory of a deed of trust for a note which was not signed by that person.

Similarly, the Trial Court relied heavily on a Law Review article, *Creditors of a Joint Tenant: Is There a Lien After Death?*, Fisher, John W., II, 99 W.Va. L.Rev. 637 (1997). While Professor Fisher's article did conclude that judgment lien creditors lose their liens against a joint tenant on the death of the joint tenant, he did *not* conclude that a person who voluntarily signs a deed of trust is not subject to the deed of trust signed by that person. Professor Fisher addressed a completely different circumstance, and the analysis in his article does not apply in this case.

3. The Trial Court Ignored the Language of the Deed of Trust.

The Trial Court, in its Order, acknowledged that the Respondent signed the Deed of Trust and:

> Finally, Advantage Bank appears to assert that the Plaintiff signed the Deed of Trust and by the language of paragraph 13 thereof has mortgaged, granted, and conveyed her interest in the property so that Advantage Bank through the Trustees may foreclose on the Deed of Trust. *Based on this language it may be true that Advantage Bank has the power to foreclose and sell the subject property. However, it appears that upon such a sale, the Plaintiff would be entitled to the proceeds of such sale with no obligation to pay the debt secured by the Note.* In essence, Advantage Bank would sell the property and then hand the proceeds over to the Plaintiff. This would be an absurd result and the Court finds no reason to allow this to occur . . . .

Trial Court Order, p. 7 (emphasis added).

In this instance, the Trial Court has engaged in selective reading of the Deed of Trust. The Trial Court is correct that the Respondent granted the right to Advantage Bank to foreclose on the Deed of Trust. However, the Trial Court ignored the following language in the Deed of Trust:

> Trustee shall apply the proceeds of the sale in the following order: (a) To all expenses of the sale, including, but not limited to, reasonable trustee's fees as permitted by Applicable Law; (b) *to all sums secured by this security instrument;* and (c) any excess to the person or persons legally entitled to it.

Deed of Trust, Paragraph 22 (Exhibit 1) (emphasis added.)

The Deed of Trust specifically secures the Note in question. The definitions, on page 1 of the Deed of Trust, include:

> (G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

Page 2 of the Deed of Trust provides that:

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of the Borrower's covenants and agreements under this Security Instrument and the Note.

Deed of Trust, Exhibit 1, pp. 1, 2.

Accordingly, the Respondent not only agreed to allow the foreclosure on the property, but also the Respondent agreed to the use of proceeds to repay the debt.

4. The Trial Court Acknowledged that the West Virginia Supreme Court has not Ruled on This Issue.

The Trial Court noted in its Order, that "it appears that the Supreme Court of Appeals has never directly addressed this issue . . . ." Order of August 18, 2008, p. 6. The Trial Court is correct in this regard. Because of this circumstance, the signature of a joint owner of real estate pledged to secure a debt is, under the current state of the law, not required on the note for which the property is pledged. For this reason and as discussed below, lenders **may not**, under federal law, require the signature of a spouse on a note under the circumstances presented in this case.

C. The Trial Court's Ruling, if Upheld, Would Have Adverse Effects on Both Banks and Borrowers in West Virginia.

1. The Trial Court's Ruling, if Upheld, Would Punish Banks for Compliance With Federal Law and Would Require Write-Downs of Assets.

As noted above, absent a clear indication that signature on a note is necessary to perfect a lien in West Virginia, West Virginia banks and other lenders have been barred by federal law from requiring spousal signatures on notes. Changing the rules at this point would have an adverse impact on financial institutions in West Virginia. Calling the collateral into doubt would cause banks to re-evaluate these loans for purposes of their allowance for loan and lease losses. This would necessitate a direct reduction to earnings of banks and other lenders in West Virginia. It would, in effect, punish banks for complying with federal law.

Prospective application of any ruling would solve the problem, at least in large part, for banks and lenders. However, such a ruling would have adverse effects on borrowers in West Virginia.

2. Upholding the Trial Court's Ruling, Even Prospectively, Would Adversely Affect Borrowers in West Virginia.

While some borrowers would benefit from this Court's upholding the Trial Court's ruling, many, many others would not. Faced with a ruling that a deed of trust, under these circumstances, is unenforceable, in the future banks would be required to adjust and take a number of steps, such as:

- Requiring spouse's signatures. If this Court holds that deeds of trust are not enforceable against spouses who have not signed the underlying note, then banks will merely rely on the exception to Regulation B and ECOA and require spousal signatures. This step would remove an entire class of West Virginia beneficiaries of ECOA and Regulation B and would thwart the purposes of both.

- Increase costs. Next, banks would likely require increased costs, such as credit life insurance premiums on all loans.

- Restrict credit. A third alternative would be for banks simply not to make loans under these circumstances, thus decreasing available credit in an era when government at all levels are encouraging banks to lend money. This would have an extreme adverse effect on applicants for credit.

In addition, if this Court upheld the Trial Court's ruling, many banks would rely on provisions in notes and commercial deeds of trust which would provide for restatements of terms of deeds of trust to satisfy changes in existing law. Such a step would mean that credit terms for certain borrowers with existing loans would also be adversely impacted.

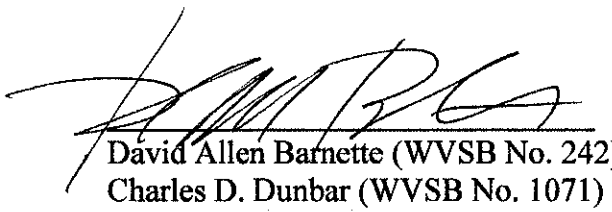
IV. CONCLUSION

For the foregoing reasons, the WVBA and the WVACB respectfully request that this Court overturn the Trial Court's Opinion based on legal grounds, grounds of fairness and the far-reaching adverse effects of letting the Trial Court's decision stand.

Respectfully Submitted,

WEST VIRGINIA BANKERS' ASSOCIATION, INC.
and
WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC.

By Counsel



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BOOK 1067 PAGE 384

LOAN # 3545057590

After Recording Return To:
Title Wise Agency
515 Market Street
Parkersburg, WVa. 26101

[Space Above This Line For Recording Data]

DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated November 5, 2002 together with all Riders to this document.
(B) "Borrower" is JEFFREY A. ARNOLD and Lisa L. Arnold, husband and wife. Borrower's mailing address is 108 HAPPY VALLEY ,PARKERSBURG,WV 26101 . Borrower is the trustor under this Security Instrument.
(C) "Lender" is ADVANTAGE BANK . Lender is a CORPORATION organized and existing under the laws of State of Ohio . Lender's address is 510 GRAND CENTRAL AVE, VIENNA, WV 26105 . Lender is the beneficiary under this Security Instrument.
(D) "Trustee" is DEBORA K MARTIN LEE . The Trustee resides at Wood County, West Virginia.
(E) "Note" means the promissory note signed by Borrower and dated November 5, 2002 . The Note states that Borrower owes Lender One Hundred Twenty Eight Thousand and no/100 Dollars (U.S. $ 128,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than December 1, 2017
(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

Title Insr.

EXHIBIT 1

Clerk's Office,
Wood County, WV.

BOOK 1067 PAGE 385

4. Legal description of the land:

Situated in the State of WV, County of Wood and in the District of Clay.

BEING all that certain lot, tract or parcel of land situate in the District of Clay, County of Wood, and State of West Virginia, more particularly bounded and described as follows:

BEING all of Lot No. 9 of Happy Valley Ridge and Evans Addition No. 1, a plat of which said addition may be found recorded in the Office of the Clerk of the County Commission of Wood County, West Virginia, in Plat Book No. 11 at page 3, to which said plat book and page reference is hereby made and had for a more particular description.

Lawyers Title Insurance
Corporation

See Continuation Page

11-04-'02 13:08 FROM-TITLE FIRST-PKG 13044284966 T-636 P03/07 U-747

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check as applicable]:

[ ] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[ ] Planned Unit Development	[ ] VA Rider
[ ] 1-4 Family Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower hereby

rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and

Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts

disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement, and shall be payable, with such interest within thirty days after the date of the Notice of Placement of Insurance sent by Lender pursuant to W. Va. Code § 46A-3-109a(c).

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of

occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing

losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has – if any – with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss

in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall

mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and

Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any

private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable fees and costs of title evidence.

If Lender invokes the power of sale, Lender or Trustee shall give Borrower, in the manner provided in Section 15, notice of Lender's election to sell the Property. Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by Applicable Law. Borrower hereby waives personal service of notice of any sale made hereunder, upon Borrower, its devisees, agents, successors or assigns, and also waives the posting of notice of sale at the courthouse. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's fees as permitted by Applicable Law; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

In the event that foreclosure proceedings are instituted hereunder but are not completed, Trustee shall be reimbursed for all costs and expenses incurred by it in commencing such proceedings; and all costs and expenses so incurred by Trustee, together with interest thereon until paid at the Note default rate shall be and become a part of the obligations secured hereby and shall be collectible as such.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

24. Beneficiary's Address. The beneficial owner and holder of the Note at the time of execution and delivery hereof is Lender, whose residence address is stated on the first page of this Security Instrument.

25. Attorneys' Fees. The provisions in this Security Instrument for Borrower to pay "attorneys' fees" shall be void.

26. Notice of Trustee's Sale. Any notice of other liens which may be given to Lender pursuant to W. Va. Code § 38-1-4, shall be effective upon the receipt of such notice, in writing, through the regular United States mail, postage prepaid, addressed to Lender at its address set forth on the face of this Security Instrument.

A copy of any notice of Trustee's sale under this Security Instrument shall be served on Borrower by certified mail, return receipt requested, directed to Borrower at the address stated above or such other address given to Lender in writing by Borrower, subsequent to the execution and delivery of this Security Instrument.

27. Trustees and Substitution of Trustees. It is hereby expressly covenanted and agreed to all parties herein that Lender may, at any time and from time to time hereafter, without notice, appoint and substitute another Trustee or Trustees, corporations or person, in place of the Trustee herein named to execute the trust herein created. Upon such appointment, either with or without a conveyance to said substituted Trustee or Trustees by the Trustees herein named, or by any substituted Trustee in case the said right of appointment is exercised more than once, the new and substituted Trustee or Trustees in each instance shall be vested with all the rights, titles, interests, powers, duties and trusts in the premises which are vested in and conferred upon the Trustees herein named; and such new and substituted Trustee or Trustees shall be considered the successors and assigns of the Trustees who are named herein within the meaning of this Security Instrument, and substituted in their place and stead. Each such appointment and substitution shall be evidenced by an instrument in writing which shall recite the parties to, and the book and page of record of, this Security Instrument, and the description of the real property herein described, which instrument, executed and acknowledged by Lender and recorded in the office of the Clerk of the County Commission of the County wherein the Property is situate, shall be conclusive proof of the proper substitution and appointment of such successor Trustee or Trustees, and notice of such proper substitution and appointment to all parties in interest.

The Trustees, or either of them or the survivor thereof, may act in the execution of this trust and in the event either of the Trustees shall act alone, the authority and power of the Trustee so acting shall be as full and complete as if the powers and authority granted to the Trustees herein jointly had been granted to such Trustee alone. Either or both of the Trustees are hereby authorized to act by agent or attorney in the execution of this trust, and it shall not be necessary for any Trustee to be present in person at any foreclosure sale.

28. Waiver of Homestead Exemption. Borrower hereby waives all right of homestead exemption in the Property.

29. Lender's Purchase of Property Insurance. Unless Borrower provides Lender with evidence of the insurance coverage required and described above, Lender may purchase insurance at Borrower's expense to protect its interest in Borrower's Property. This insurance may, but need

not, protect Borrower's interests. The coverage that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the Property. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained insurance as required by this Security Instrument. If Lender purchases insurance for the Property, Borrower will be responsible for the costs of that insurance, including interest and any other charges Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to Borrower's total outstanding balance or obligation. The costs of the insurance may be more than the cost of insurance Borrower may be able to obtain on Borrower's own.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

_____(Seal)
JEFFREY A. ARNOLD - Borrower

_____(Seal)
Lois L. Arnold - Borrower

_____(Seal)
- Borrower

_____(Seal)
- Borrower

[Space Below This Line For Acknowledgment]

STATE OF WEST VIRGINIA, Wood **County, ss:**

The foregoing instrument was acknowledged before me this November 5, 2002
(date)
by JEFFREY A. ARNOLD and Lois L. Arnold, husband and wife
(person acknowledging)

My Commission Expires: May 15, 2006

Shirley R. Eckhart
Notary Public

This instrument was prepared by MERCANTILE ADVANTAGE BANK

WEST VIRGINIA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3049 1/01 (page 17 of 17 pages)

This instrument was presented to the Clerk of the County Commission of Wood County, West Virginia; and the same is admitted to record.
Teste: _____ Clerk
Wood County Commission

Financial Institution Letters

SPOUSAL SIGNATURE PROVISIONS OF REGULATION B

FIL-9-2002
February 4, 2002

TO: CHIEF EXECUTIVE OFFICER

SUBJECT: *Guidance on Avoiding Violations of the Spousal Signature Provisions of Regulation B*

The Federal Deposit Insurance Corporation (FDIC) is issuing the attached guidance to assist banks in complying with the spousal signature provisions of the Equal Credit Opportunity Act (ECOA) and Regulation B, 12 C.F.R. Part 202. Among other things, Regulation B prohibits lending policies and practices that discriminate on the basis of marital status.

This guidance summarizes the Regulation B rules governing spousal signatures as they relate to extensions of credit, including business loans, as well as important exceptions and other related requirements. It also outlines steps institutions should take to ensure compliance with the spousal signature requirements.

For more information, please contact your FDIC Division of Compliance and Consumer Affairs Regional Office on the attached list, or the following staff members: Russ Bailey, Senior Fair Lending Specialist, at (202) 942-3330 or Deirdre Foley, Fair Lending Specialist, at (202) 942-3042.

Stephen M. Cross
Director

Attachments: Guidance On The Spousal Signature Provisions Of Regulation B
FDIC Regional Offices - Division of Compliance and Consumer Affairs

Distribution: FDIC-Supervised Banks (Commercial and Savings)

NOTE: Paper copies of FDIC financial institution letters may be obtained through the FDIC's Public Information Center, 801 17th Street, NW, Room 100, Washington, DC 20434 (800-276-6003 or (703) 562-2200).

Last Updated 02/04/2002 communications@fdic.gov

EXHIBIT 2

Guidance on the Spousal Signature Provisions of Regulation B

I. Overview

Federal Reserve Regulation B, which implements the Equal Credit Opportunity Act (ECOA), specifically limits when a creditor may seek an applicant's spouse as a cosignor or guarantor. These rules vary depending on the circumstances, such as whether:

- the applicant's creditworthiness is supported or secured by property that is jointly owned,
- the application is for joint credit, or
- a community property state is involved.

II. Spousal Signatures: General Rules, Exceptions and Related Requirements

A. General Rules

A creditor cannot ask for or require the signature of an applicant's spouse or any other additional party on a credit instrument if the applicant:

- requests an individual credit account, and
- individually meets the creditor's standards for creditworthiness for the amount and terms of the credit requested.[1]

In summary, if the applicant applies for individual credit and meets the creditor's standards for creditworthiness, Regulation B prohibits a creditor from requiring either the additional signature of a cosignor on the credit instrument or a guarantor.2

If the applicant does not meet the creditor's credit standards, the creditor can require a co-signor or guarantor, but it cannot require that the cosignor or guarantor be the applicant's spouse.3

B. Exceptions

However, there are exceptions to the spousal signature rules:

1. Secured credit

If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person "on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default."4

2. Unsecured credit

If an applicant requests unsecured credit and relies on jointly owned property to establish creditworthiness, "the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant."5

3. Unsecured credit—community property states

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

a. applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and
b. the applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property."6

Note: What is Community Property?

Community property laws determine, among other things, which spouse has management and control over the marital property, and in turn, who has the legal power to commit the property to support a credit or secure a loan. Creditors making loans (a) to married borrowers who live in a community property state or (b) that are supported or secured by collateral located in a community property state should become familiar with the management and control provisions of the community property law in such states to assure that signatures on security and/or credit instruments are limited to those necessary to perfect their interest in the underlying collateral in the event of the borrower's death or default.

As of the date of this letter, Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin use some form of community property system. Since state laws are subject to amendment and repeal, creditors should confirm this list with counsel.

C. Related Requirements

1. Need for signature on note—definition of "reasonable belief"

In most states that do not follow community property principles, the co-owner does not have to sign the note to grant the creditor access to the property, but only the security documents, such as a mortgage or lien. If a creditor believes that the co-owner's signature is needed on an instrument that imposes personal liability to assure access to jointly owned property securing the debt, such belief should be supported by a thorough review of pertinent statutory or decisional law or an opinion of the state attorney general obtained prior to requiring the signature.7

2. Rules applicable to spousal signatures apply equally to guarantees

A guarantee on an extension of credit is part of a credit transaction and is subject to Regulation B's rules governing spousal signatures and other anti-discrimination provisions. Although a creditor may require that all partners, directors, officers or shareholders of a closely held corporation personally guarantee a loan, it cannot automatically require their spouses to also sign the guarantee, even if the

guarantee is supported or secured by jointly owned property. Obtaining the signature of a guarantor's spouse is subject to the same restrictions as obtaining the signature of an applicant's spouse.8

In cases where an individual has applied for a business loan, a creditor may require the guarantee of another partner, director, officer or shareholder, but this requirement must

be based on the guarantor's relationship with the business. For example, a creditor may require all partners, directors, officers or shareholders of a closely held corporation to guarantee a loan, or an additional partner, director, officer or shareholder to provide a guarantee, but it cannot single out a partner, director, officer or shareholder because he or she is the spouse of the applicant.9

3. Integrated note/security agreement

Where a creditor uses an integrated instrument that combines the note and the security agreement, a spouse can be asked to sign the instrument if it is clear, for example, by the use of a legend placed next to the spouse's signature that the spouse's signature is made only to grant the security interest and that signing the instrument does not impose personal liability on the spouse.10

4. Value of an applicant's interest in joint property

When determining the value of an applicant's interest in jointly owned property, a lender must look to the actual form of ownership of the property before or at consummation of the transaction. The possibility of subsequent changes in the form of ownership (for example, by transfer or divorce) may not be considered. 11

III. Ensuring Compliance with Regulation B's Spousal Signature Provisions

As more and more creditors expand the geographical reach of their lending activities through interstate mergers and acquisitions or by taking applications over the Internet, they need to ensure that all loan officers -- consumer and commercial -- are familiar with the restrictions on spousal signatures found in Regulation B. Additionally, creditors need to know the various requirements of state law with respect to joint and marital property, not only in the states in which they operate, but where their borrowers reside or where jointly owned assets supporting or securing a loan are located.

Creditors should consider a three-prong approach to ensuring compliance with the spousal signature rules:

A. Review and revise loan policies and procedures regarding spousal signatures

1. ***Eliminate loan policies or procedures that are inconsistent with Regulation B's spousal signature provisions.***

   Specifically, creditors should eliminate loan policies that require:

- the guarantee of a loan to a closely held corporation by the spouses of the partners, officers, directors or shareholders of the corporation;
- the signature of the spouse on the note when the applicant submits a joint financial statement; or
- the signature of the spouse on the note when jointly owned assets are offered as collateral.

2. ***Expand loan policies and procedures to provide loan staff with specific guidance on state law regarding necessary signatures, particularly in community property states.***

   Creditors should only obtain those signatures necessary to perfect their security interest. When handling an individual application from a married borrower supported or secured by jointly owned property, the creditor must look at the laws of the state where the borrower resides as well as those of the state where the jointly owned property supporting or securing the loan is located. These state laws will determine what documents must be signed by the co-owner of the

property in order to perfect the creditor's security interest in the collateral.

3. ***Create or amend checklists to address when spousal signatures may be obtained in connection with an individual application for credit.***

Creditors should consider creating or revising loan checklists to ask if an application is for individual credit and if so, whether the loan is supported or secured by jointly owned property and if a co-signor or guarantor is required in order to perfect the creditor's security interest in the jointly owned collateral.

Whenever a co-signor or guarantor is requested in connection with an individual application for credit, the lender should document the basis for requiring the co-signor or guarantor and the guarantor's relationship with the applicant or, in the case of a commercial loan, the company.

B. Provide Periodic Training to Both Consumer and Commercial Loan Staff

The Regulation B requirements regarding spousal signatures apply to all loans, consumer and commercial. Education on the spousal signature rules should be part of any training program for new loan staff. Creditors also should provide periodic refresher training, particularly in the event of any expansion of market reach (for example, the taking of credit applications over the Internet, or a change in product base, such as the introduction of a streamlined small business loan program).

C. Monitoring and Audits

Creditors should incorporate in their compliance program a check for spousal signature violations. Monitoring and audits should include reviews of all documents in a representative sample of loan files, particularly the application, financial statements, documents relating to collateral, as well as the credit instrument and any security documents. Special attention should be taken with respect to loans to closely held corporations and business loans supported by jointly owned residential or personal property or other personal assets, like stock or savings.

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[1] 12 C.F.R. § 202.7(d)(1).
[2] Id.
[3] Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, Paragraphs 202.7(d)(2) and (6).
[4] 12 C.F.R. § 202.7(d)(4).
[5] 12 C.F.R. § 202.7(d)(2).
[6] 12 C.F.R. § 202.7(d)(3)(emphasis added).
[7] Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, Parargraph 202.7(d)(4), note 2.
[8] Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, Paragraph 202.7(d)(6), note 2.
[9] Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, Paragraph 202.7(d)(6), note 1.
[10] Official Staff Interpretations, 12 C.F.R.Pt. 202, Supp. I, Paragraph 202.7(d)(4), note 3.
[11] Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, Paragraph 202.7(d)(2),note 1.

Financial Institution Letters

Equal Credit Opportunity (Regulation B)

FIL-6-2004
January 13, 2004

TO: CHIEF EXECUTIVE OFFICER (also of interest to Compliance Officer)

SUBJECT: Spousal Signature Provisions of Regulation B

Summary: *The FDIC is issuing guidance to assist financial institutions in complying with the complex marital status and spousal signature provisions of Regulation B. Those provisions significantly affect critical steps in the lending process, including underwriting, asset valuation, collateral selection and document preparation.*

The Federal Deposit Insurance Corporation (FDIC) is issuing the attached guidance to assist banks in complying with the spousal signature provisions of the Equal Credit Opportunity Act (ECOA) and Regulation B, 12 CFR Part 202. Among other things, Regulation B prohibits lending policies and practices that discriminate on the basis of marital status.

On February 4, 2002, the FDIC issued general guidance on the spousal signature provisions of Regulation B (see FIL-9-2002), which generated considerable interest among banks. As a result, the FDIC has developed more specific guidance to further assist banks in their compliance efforts.

On March 17, 2003, the Federal Reserve Board issued amendments to Regulation B, with an effective date of April 15, 2003, and a mandatory compliance date of April 15, 2004 (see FIL-5-2004, dated January 9, 2004). The spousal signature provisions of Regulation B were affected by those amendments. Today's FIL incorporates those amendments to Regulation B and augments FIL-9-2002.

For more information, please contact Russ Bailey, Senior Fair Lending Specialist, at (202) 898-6529; Andrea Winkler, Counsel, at (202) 898-3727; or Janet Norcom, Counsel, at (202) 898-8886.

For your reference, FDIC Financial Institution Letters may be accessed from the FDIC's Web site at www.fdic.gov/news/news/financial/2004/index.html.

Michael J. Zamorski
Director
Division of Supervision and Consumer Protection

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Attachment: Guidance On Regulation B Spousal Signature Requirements

Distribution: FDIC-Supervised Banks (Commercial and Savings)

NOTE: Paper copies of FDIC financial institution letters may be obtained through the FDIC's Public Information Center, 801 17th Street, NW, Room 100, Washington, DC 20434 (1-877-275-3342 or (703) 562-2200).

Last Updated 1/13/2004 communications@fdic.gov

EXHIBIT 3

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FDIC Office of Inspector General

Financial Institution Letters

Guidance On Regulation B Spousal Signature Requirements

This guidance provides information on the rules governing spousal signatures as they relate to extensions of credit, including business credit.[1] (For reference, see the attached chart depicting the regulatory requirements concerning spousal signatures.)

I. ECOA and Regulation B.
The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), or because an applicant receives income from a public assistance program or has in good faith exercised any right under the Consumer Credit Protection Act. The Federal Reserve Board's Regulation B at 12 C.F.R. Part 202 implements ECOA, and the staff's official interpretations are incorporated in Part 202, Supp. I.

II. General Rule.
Under Regulation B, § 202.7(d)(1), generally a creditor may not require the signature of an applicant's spouse or any other person (other than a joint applicant) on any *credit* instrument if the applicant qualifies for the amount and terms of the credit requested under the creditor's standards of creditworthiness.[2] This rule applies to all open-end and closed-end, secured and unsecured extensions of consumer credit and business credit.[3]

If an applicant does not meet the creditor's standards of creditworthiness, then the creditor may conditior approval of the credit application upon the applicant either (1) furnishing the signature of another person (cosigner, guarantor or similar person), but the creditor may not require that person to be the applicant's spouse,[4] or (2) securing the credit extension with sufficient collateral (or in the case of an application for secured credit, additional collateral) to satisfy the creditor's standards.[5] Therefore, if a creditor routinely requires spousal guarantees, for example, without first ascertaining whether an applicant is creditworthy, then the conditioning of the loan on the spousal guarantee violates § 202.7(d)(1).

III. Exceptions to the General Rule.
There are three exceptions to the general prohibition against requiring signatures of non-applicant spouses for creditworthy applicants under § 202.7(d)(1). A creditor is permitted to take into account state property laws that directly or indirectly affect an applicant's creditworthiness.[6]

1. **Unsecured credit-non-community property state:** If an applicant requests unsecured credit and relies in part on property the applicant owns jointly with the applicant's spouse to satisfy the creditor's standards of creditworthiness, the creditor may under § 202.7(d)(2) require the signature of the applicant's spouse only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary,[7] under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.[8]

   NOTE: Some states' property laws treat married applicants differently from unmarried applicants in a way that affects their creditworthiness. For example, several states provide that real property and/or personal property acquired by married persons jointly is owned as tenants by the entirety (i.e., where neither spouse would be able to commit any interest in the property without the signature of the other spouse on the promissory note), unless specified otherwise. In such states, if state law so provides, a creditor could require the signature of the non-applicant spouse on the promissory note where the creditor relies upon real property and/or personal property owned by the applicant and the applicant's spouse as tenants by the entirety in order to qualify the applicant for the loan.

2. **Unsecured credit-community property state:** If a married applicant requests unsecured credit

and resides in a community property state, *or* if the property upon which the applicant is relying is located in such a state, the creditor may under § 202.7(d)(3) require the signature of the applicant's spouse on any instrument necessary, or reasonably believed by the creditor to be necessary,[9] under applicable state law, to make the community property available to satisfy the debt in the event of default if:

(i) applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested; and

(ii) the applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.[10,11]

NOTE: Section 202.5(c)(2)(iv) permits a creditor to request any information concerning an applicant's spouse (or former spouse) that the creditor could request about the applicant under certain circumstances, including when the applicant requests unsecured credit affected by community property laws.

3. **Secured credit:** If an applicant requests secured credit, a creditor may under § 202.7(d)(4) require the signature of the applicant's spouse on any instrument necessary, or reasonably believed by the creditor to be necessary,[12] under applicable state law, to make the property being offered as security available to satisfy the debt in the event of default (*e.g.,* an instrument creating a valid lien).[13]

   NOTE: A signature is generally only needed on a security instrument. If applicable state law requires both spouses to sign the promissory note (or other credit instrument) in order to create an enforceable security interest, then the creditor may do so.[14]

IV. Asset Valuation.

Regulation B requires that when an applicant relies on his or her individual interest in property owned jointly with the applicant's spouse to satisfy the creditor's standards of creditworthiness, the creditor may not require the spouse's signature on any instrument as a condition of the approval of the credit extension, *unless* the applicant's interest in the property does not support the amount and the terms of the credit requested or one of the three exceptions set forth in Section III above applies.[15] The creditor must determine (and not presume) the actual form of ownership of the property prior to or at consummation of the credit transaction.[16] The possibility of subsequent changes in the form of ownership (*e.g.,* by transfer or divorce) may not be considered.[17]

The creditor is permitted in its evaluation of assets to determine whether the applicant's interests in the assets being offered are of sufficient value to protect the creditor in the event of death or default in the following way:

- If a person applies for individual credit, a decision about creditworthiness requires an institution to look at the individual's interests in the assets, including individually-owned assets, first in deciding whether it will extend credit. If the individual's interests in the assets are sufficient to satisfy the creditor's standards of creditworthiness, it is impermissible for the creditor to require any guarantor or any cosigner on the promissory note.[18] If property that an applicant offers the creditor is owned jointly with another person, the creditor may only look to the applicant's interest in the jointly owned property and, as a general rule, cannot require the signature of the non-applicant joint owner on the promissory note.
- If, however, the applicant's interest in the jointly owned property is insufficient to protect the creditor, the creditor may require the signature of an additional person on the promissory note (but may not require it to be the spouse's signature), or may require the credit to be secured with sufficient additional collateral to satisfy the creditor's standards.
- If the non-applicant joint owner's signature is necessary for the creditor to reach the property being relied upon or offered as security by the applicant (such as with tenants by the entirety), the creditor may require the signature of the non-applicant joint owner, but only on the document necessary or reasonably believed[19] necessary by the creditor to provide adequate protections to satisfy the debt in the event of the applicant's death or default.

A creditor has broad discretion in deciding what property, if any, is required to assist in a determination about creditworthiness. For example, assuming the creditor is looking to property as opposed to income, there is no requirement that the creditor look to a certain type of property (*e.g.*, personal property over real property). The decision whether to prefer personal or real property, however, must be made in a nondiscriminatory manner. For example, a creditor may prefer real property in cases involving a married applicant only if the creditor also prefers real property in instances in which the applicant is unmarried.

The same analysis is true regarding extensions of credit for a business as set forth in Section V below.

V. Significance in Business Lending.
ECOA and Regulation B can raise particular problems for the creditor in business lending. Regulation B does not require written applications for business credit.[20] Consequently, such "applications" are often the result of several conversations (including negotiations), the submission of a financial statement(s), and a business plan(s). It is not always clear who the applicants are, what signatures are actually voluntarily offered by the applicant, and what signatures are needed by the creditor. Regulation B, clarified by the amendments in 2003, prohibits a creditor from presuming that the submission of joint financial information constitutes an application for joint credit.[21] Thus, where the financial statement lists jointly held property of a husband and wife and is signed by both spouses (attesting to the accuracy of the data), there would be ECOA and Regulation B problems if a creditor treats the financial statement as an indication that the husband and wife are making a joint application. By doing so, a creditor may find itself requiring both property owners (husband and wife) to sign the promissory note when, in fact, only the property owner who is involved with the business intends to be obligated on the extension of credit.

A person's intent to be a joint applicant must be evidenced at the time of application. Although the mere presence of two signatures on a promissory note may not be used to show an intent to apply for joint credit, signatures or initials on a written application that affirm the applicants' intent to apply for joint credit, as opposed to merely affirming the veracity of data may be used to establish an intent to apply for joint credit.[22] Where there is no written application, the applicants' intent to apply for joint credit may be evidenced, for example, by the presence in the file of a written statement by the applicants that expresses such an intent.

Even if a corporation is creditworthy, a creditor may require the personal guarantees of the partners, directors or officers of a business, and the shareholders of a closely held corporation.[23] In accordance with Regulation B, a creditor is prohibited from requiring the signature of the guarantor's spouse in the same way that it is prohibited from obtaining the signature of an applicant's spouse and the Official Commentary to Regulation B states that the signature rules of § 202.7(d) apply equally to guarantors.[24] Thus, if a creditor first determines that the guarantor is not creditworthy based upon his or her individual assets, then, in accordance with the signature rules of § 202.7(d), the creditor may require an additional signature and that signature may be required to be the guarantor's spouse's in appropriate circumstances (i.e., in accordance with § 202.7(d)(2) (unsecured credit), § 202.7(d)(3) (unsecured credit involving community property) or § 202.7(d)(4) (secured credit)).[25] In any event, while a creditor may require officers of a business to personally guarantee the business loan, and may require the guarantee of another person in appropriate circumstances, the creditor may not automatically require that spouses of married officers also personally guarantee the loan.[26]

As previously indicated, the rules set forth in Section IV above, regarding what property a creditor may prefer, also apply to business credit. Regulation B does not require a creditor to limit its evaluation of the guarantor's creditworthiness to individually owned assets in the business lending context if (1) the guarantor's interest in individually owned assets is insufficient to protect the creditor or (2) if the joint owner's signature is necessary for the creditor to reach the property being relied upon or offered as security by the guarantor such as with tenants by the entirety. In such instances, the creditor may require the signature of the non-applicant joint owner, including a spouse, but only on the document necessary, or reasonably believed necessary by the creditor, to provide adequate protections to satisfy the debt in the event of the applicant's death or default.

Attachment: Chart of Spousal Signature Requirements

[1]This guidance augments that provided by FDIC FIL-9-2002, "Spousal Signature Provisions of Regulation B," dated February 4, 2002.

[2]The Official Staff Interpretations make it clear that, with the exception for closely held corporations, it is impermissible for a creditor to require any applicant who is individually creditworthy to provide a cosigner, even if the creditor applies the requirement without regard to any prohibited basis. Official Staff Interpretations, 12 C.F.R. pt. 202, Supp. I, Paragraph 202.7(d)(1), Comment 1, as *amended by* 68 Fed. Reg. 13,144, 13,191 (2003). All references in this guidance to Regulation B and its accompanying staff commentary take into account the Federal Reserve Board's amendments to those documents, made effective as of April 15, 2003, and with a mandatory compliance date of April 15, 2004.

[3]Although this guidance strictly relates to the requirements for "spousal" signatures, the requirements also apply to obtaining the signatures of other persons in addition to the applicant.

[4]12 C.F.R. § 202.7(d)(5) and Official Staff Interpretations at Paragraph 202.7(d), Comment 2. ECOA and Regulation B do not prohibit spouses from signing voluntarily. A creditor should leave it up to the applicant to name the additional party.

[5]Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1(ii).

[6]12 C.F.R. § 202.6(c).

[7]Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 2.

[8]If instead of jointly owned property, the applicant is relying on the spouse's income, the creditor may require the spouse's signature to make the income available to pay the debt. Official Staff Interpretations at Paragraph 202.7(d)(5), Comment 2.

[9]Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 2.

[10]Most community property laws specify how married couples own and control property and who has the legal power to commit the property to support a credit application or secure a loan. A creditor may assume an applicant who applies for credit in a community property state is a resident of that state, unless the applicant indicates otherwise. Official Staff Interpretations at Paragraph 202.7(d)(3), Comment 1.

[11]If the applicant is relying on the spouse's income (including future earnings), the creditor may require the spouse's signature to make the income available to pay the debt. Official Staff Interpretations at Paragraph 202.7(d)(5), Comment 2.

[12]Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 2.

[13]Regarding integrated notes and security agreements, see Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 3.

[14]*See* Official Staff Interpretations at Paragraph 202.7(d)(4), Comments 1 and 2.

[15]*See generally,* Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1.

[16]This would require considering not only applicable law, but also any documents evidencing and/or affecting the form of ownership (e.g., a trust instrument).

[17]Official Staff Interpretations at Paragraph 202.7(d)(2), Comment 1(i).

[18] Official Staff Interpretations at Paragraph 202.7(d)(1), Comment 1, *as amended by* 68 Fed. Reg. 13,144, 13,191 (2003). An exception to this prohibition is made for guarantors of closely held corporations. See Section V of this Guidance.

[19] Regulation B requires reasonable belief to be supported by a thorough review of pertinent statutory law and decisional law or an opinion of the state attorney general. Official Staff Interpretations at Paragraph 202.7(d)(4), Comment 2.

[20]Under Regulation B, written applications are only required for credit for the purchase or refinancing of a dwelling as a principal residence. 12 C.F.R. §§ 202.5(e) (recodified as 12 C.F.R. § 202.4 (c) by 68 Fed. Reg. 13,144 (2003)), and 202.13(a). Issues raised in this section of the guidance also may occur in the consumer credit context.

[21]68 Fed. Reg. 13,144, 13,165 (2003) (*to be codified at* 12 C.F.R. § 202.7(d)(1)).

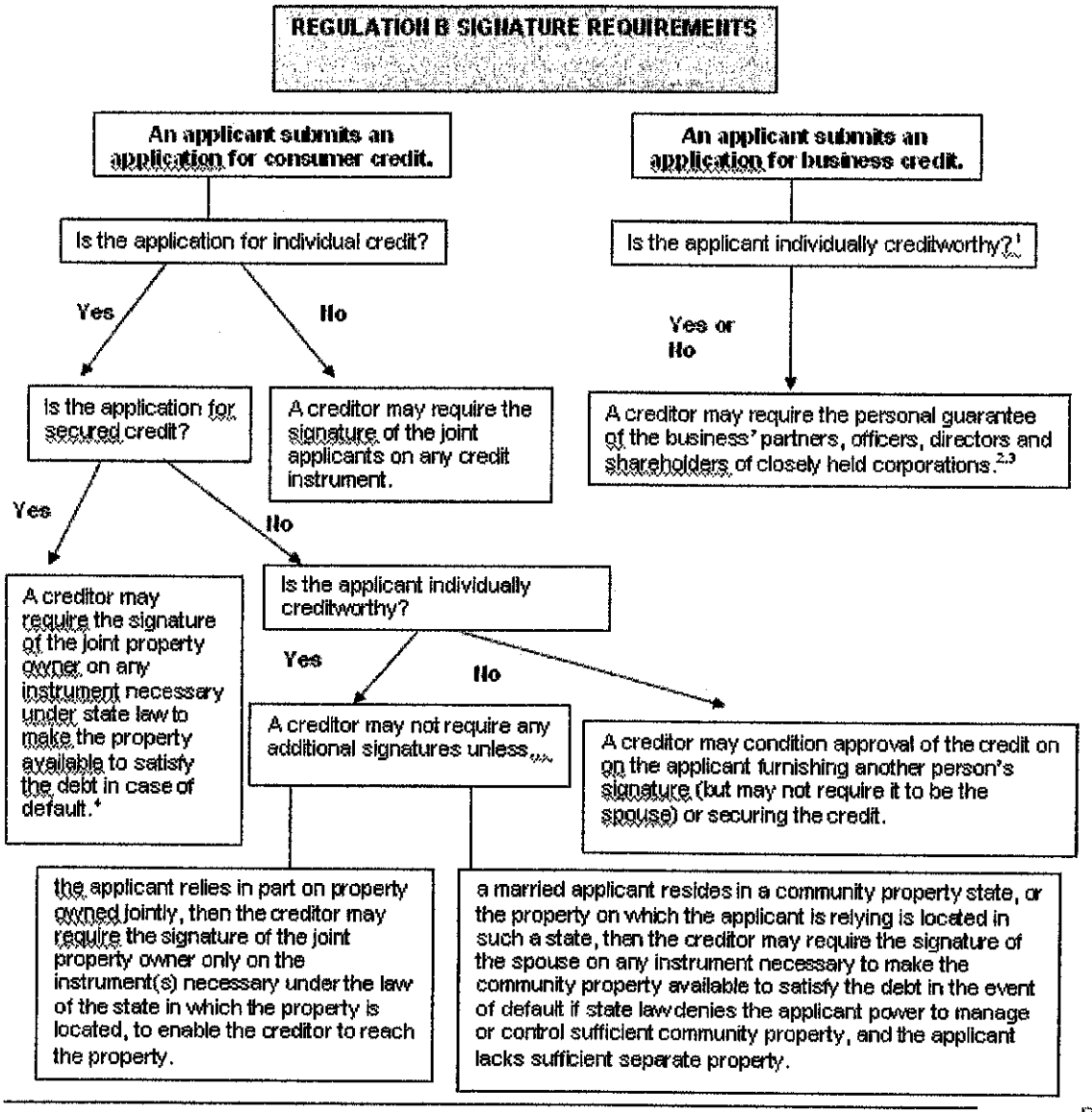
[22]68 Fed. Reg. 13,144, 13,165 (2003) (to be codified at 12 C.F.R. § 202.7(d)(1)).

[23]Official Staff Interpretations at Paragraph 202.7(d)(1), Comment 3, *as amended by* 68 Fed. Reg. 13,144, 13,191 (2003). Model Application Form 1-4, contained in the Appendix to Regulation B, provides for applicants to check an option and initial the application form so as to indicate whether joint credit is sought. *See id.* at 13,172. Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 1.

[24]Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 2.

[25]*Id.* The guarantor is treated as an "applicant" for such purposes. 12 C.F.R. § 202.2(e).

[26]Official Staff Interpretations at Paragraph 202.7(d)(6), Comment 2.



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1. If the applicant lacks sufficient separate property, a creditor must value applicant's interest in jointly owned property.

2. The requirement for the guarantee must be based on the guarantor's relationship with the business. A creditor must evaluate the financial circumstances of the partners, etc. before determining if the joint property owner's signature would be required.

3. Follow the chart regarding individual unsecured or secured credit.

4. For example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings. A creditor may require both property owners to sign the credit and security agreements, if required under state law.

Last Updated 1/13/2004

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 34378

LOIS ARNOLD,

Plaintiff Below, Appellee

v.

DAVID G. PALMER, Trustee, CHRISTINA J. PALMER, Trustee, ADVANTAGE BANK, an Ohio Corporation, and JEFFREY SCOTT ARNOLD, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased,

Defendants Below

Civil Action No. 07-C-699
Circuit Court of Wood County
Beane, J., Judge

ADVANTAGE BANK,

Third-Party Plaintiff Below, Appellant

v.

JEFFREY SCOTT ARNOLD, Individually, SAMANTHA NICOLE FOGGIN, MELISSA ANN DAILEY, and KELLI BETH ARNOLD, Beneficiaries of the Estate of Jeffrey A. Arnold, Deceased,

Third-Party Defendants Below, Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of April, 2008, he served the foregoing and hereto annexed Amicus Curaie Brief by mailing a true copy thereof, via the United States Postal Department, postage prepaid, to:

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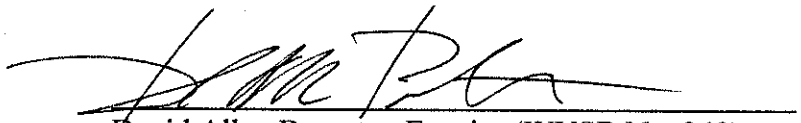

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