

Dion, 257 F. Supp.2d 316, 318 (D. Me. 2003). See also *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003) (same standard applicable to motion to dismiss affirmative defense).

A motion to strike a defense under Rule 12(f) is disfavored, *Nelson v. University of Me. Sys.*, 914 F. Supp. 643, 646-47 (D. Me. 1996), and should be granted only if the insufficiency of the defense is clearly apparent, 5C C. Wright & A. Miller, *Federal Practice and Procedure* § 1381 at 428 (3d ed. 2004). A defense is “legally insufficient” if it appears that the movant “would succeed despite any state of facts which could be proved in support of the defense.” *FDIC v. Eckert Seamans Cherin & Mellott*, 754 F. Supp. 22, 23 (E.D.N.Y. 1990) (citation and internal quotation marks omitted).

II. Factual Background

The plaintiff seeks to recover from the defendants, including Agnes Cabot, as guarantors of certain loans extended to Cabot Hosiery Mills, Inc. Complaint (attached to notice of removal (Docket No. 1)) ¶¶ 8-12. In the only counterclaim asserted in the defendants’ answer to the complaint, Agnes Cabot seeks declaratory and equitable relief under the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691 *et seq.* Defendants’ Answer, Affirmative Defenses, and Counterclaim Against Chittenden Trust Company (“Answer”) (Docket No. 3) at [10]-[12]. The affirmative defenses that are the subject of the pending motion assert that the plaintiff’s claims are barred by the doctrine of recoupment and by the ECOA. *Id.* at [9] (Fourth, Sixth and Seventh Defenses).¹

III. Discussion

¹ The defendants state that the seventh affirmative defense is asserted “only with respect to the claims against Agnes Cabot.” Defendants’ Opposition to Plaintiff’s Motion to Dismiss, etc. (“Opposition”) (Docket No. 12) at 15 n.8. This limitation on the scope of that affirmative defense is not apparent on the face of the answer. My discussion of the motion to dismiss this affirmative defense will correspond to the defendants’ representation concerning its scope.

The plaintiff contends, Motion at 4, that the counterclaim is barred by the two-year statute of limitations included in the ECOA, 15 U.S.C. § 1691e(f). Federal courts have differed on the question whether this statute of limitations bars counterclaims under the ECOA when the counterclaim would have been untimely if asserted directly. *Compare, e.g., Stern v. Espirito Santo Bank of Fla.*, 791 F. Supp. 865, 868-69 (S.D. Fla. 1992) (dismissing ECOA counterclaim as time-barred), *with Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 29 (3d Cir. 1995) (time-barred ECOA claim may be asserted as defense to attempt to collect on loan guarantee). However, the First Circuit has spoken to this issue. *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999) (spouse alleging that signature on loan guarantee violated ECOA would be allowed to assert that defense under recoupment doctrine if bank sued to collect on notes).²

The plaintiff suggests that this court should not follow *Bolduc* because the First Circuit addressed the issue only in *dicta* and “did not analyze the true nature of the claims at issue or whether the defendant had actually asserted claims that might serve to support a credit against the liability asserted.” Motion at 9 n.4. That is an argument best directed to the First Circuit. It does not provide a persuasive reason for this court to disregard the First Circuit’s clear statement on point. The First Circuit’s statement also governs the seventh affirmative defense, which explicitly invokes the ECOA.

Since the First Circuit’s statement is based on the “recoupment doctrine,” *Bolduc*, 167 F.3d at 667, it should apply to the affirmative defenses invoking that doctrine as well. *See FDIC v. Notis*, 602 A.2d 1164, 1165-66 (Me. 1992). Again, the plaintiff’s contention that the cited case law “does not recognize the[] inherent limitations on a recoupment defense, and is therefore not persuasive,” Plaintiff’s Reply

² The Maine Law Court agrees. *Mundaca Inv. Corp. v. Emery*, 674 A.3d 923, 925 (Me. 1996).

Memorandum in Support of Motion to Dismiss, etc. (Docket No. 14) at 3, would be more appropriately addressed to the First Circuit. It does not provide sufficient basis for this court to depart from the First Circuit's statement in *Bolduc*.

IV. Conclusion

For the foregoing reasons, I deny the motion to strike and recommend that the plaintiff's motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of October, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

**CHITTENDEN TRUST
COMPANY**

represented by **DANIEL L. CUMMINGS**
NORMAN, HANSON & DETROY
415 CONGRESS STREET
P. O. BOX 4600 DTS
PORTLAND, ME 4112
774-7000
Email: dcummings@nhdlaw.com

V.

Defendant

**MARC CABOT, as Trustee of the
AGNES VERRO CABOT
QUALIFIED PERSONAL
RESIDENCE TRUST**

represented by **ROBERT J. KEACH**
BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200
Email: rkeach@bssn.com

DANIEL J. MURPHY
BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-228-7120
Email: dmurphy@bssn.com