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Fifth Circuit Rejects Arguments to Expand Scope of Liability under the Equal Credit Opportunity Act

Thomas F. Loose, Robert T. Mowrey, and Alexandra LoCasto*

The U.S. Court of Appeals for the Fifth Circuit rejected arguments that would have expanded the scope of liability under the Equal Credit Opportunity Act for lenders, or other participants, in the secondary mortgage market. The authors of this article explain the court's ruling.

In a published opinion, the U.S. Court of Appeals for the Fifth Circuit rejected arguments that would have expanded the scope of liability under the Equal Credit Opportunity Act ("ECOA"),[1] for lenders, or other participants, in the secondary mortgage market. The case is *Alexander v. AmeriPro Funding, Inc*.[2] The appeal was from the dismissal of all of the plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

As relevant here, the ECOA makes it unlawful "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant's income derives from any public assistance program."[3] The court held that to state a claim under the ECOA, the plaintiffs must plausibly allege that:

(1) each plaintiff was an "applicant";

(2) the defendant was a "creditor"; and

(3) the defendant discriminated against the plaintiff with respect to any aspect of a credit transaction on the basis of the plaintiff's membership in a protected class.

BACKGROUND

Twelve individual plaintiffs alleged Wells Fargo was engaged in the business of investing in or buying mortgages originated by other financial institutions, including AmeriPro. AmeriPro, as an originator, interacted with borrowers and

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[1] 15 U.S.C. § 1691 et seq.

[2] ___ F.3d ___, No 15-20710 (5th Cir. Feb. 16, 2017).

[3] 15 U.S.C. § 1691(a)(2).

made credit decisions on loan applications. Plaintiffs alleged Wells Fargo, as a purchaser and investor in mortgages, promulgated guidelines for its secondary-market mortgage purchases, stating that it would only buy mortgages that are not based on Section 8 income (which is a public assistance program). The plaintiffs sued both AmeriPro and Wells Fargo claiming that each discriminated against them in violation of the ECOA on the basis of their receipt of public assistance income.

The court's treatment of the allegations of one group of plaintiffs—called the "AmeriPro Applicants" in the opinion—is significant. The AmeriPro Applicants alleged:

(1) they applied for loans with AmeriPro;

(2) AmeriPro processed their applications with the intention of selling their loans to Wells Fargo;

(3) AmeriPro processed their applications using Wells Fargo's lending guidelines under which their Section 8 income allegedly was not included for consideration; and

(4) as a result of their Section 8 income not being considered, they received loans on less favorable terms or in a lesser amount.

THE FIFTH CIRCUIT DECISION

The court held the AmeriPro Applicants stated a sufficient claim under the ECOA against AmeriPro—that they alleged facts, taken together, which were sufficient plausibly to show that they applied for a mortgage with AmeriPro, that AmeriPro refused to consider their Section 8 income in assessing their creditworthiness, and that, as a result, they received mortgage loans on less favorable terms and in lesser amounts than they would have received had their Section 8 income been considered.

Regarding Wells Fargo, the court reached a different conclusion. The court summarized the AmeriPro Applicants' argument:

> since Wells Fargo's *secondary-market* policy of refusing to purchase mortgages that rely on Section 8 income determined AmeriPro's *primary-market* policy of discriminating against applicants with Section 8 income, Wells Fargo should also be liable for violating the ECOA.[4]

The court determined the principal issue for this claim was whether Wells Fargo was a "creditor" as to the AmeriPro Applicants. "Creditor" is defined in

[4] Emphasis in original.

the statute as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[5] Because the AmeriPro Applicants did not apply for credit directly or indirectly from Wells Fargo, the court determined that Wells Fargo could be liable as a creditor as to the AmeriPro Applicants only if it was an "assignee of an original creditor who participates in the decision to extend, renew, or continue credit" under 15 U.S.C. § 1691a(e). The court concluded the AmeriPro Applicants failed to plausibly allege Wells Fargo "participate[d]" in the decision to extend credit and, therefore, failed to state a claim.

Significantly, the court rejected the argument that Wells Fargo could be liable because it "had a policy in the *secondary market* of not purchasing mortgages that were originated *by someone else in the primary market* based on Section 8 income."

The Consumer Financial Protection Bureau ("CFPB") supported plaintiffs as amicus and argued the ECOA's and Regulation B's definitions of "creditor" were broad enough to encompass Wells Fargo's conduct. The CFPB relied on two regulatory provisions defining the term—12 C.F.R. § 202.2(l) ("Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates."); and 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(l)(1), 76 Fed. Reg. 79,442, 79,473 (2011) ("The term creditor includes all persons participating in the credit decision. This may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated.").

The court rejected inclusion within the definition of "creditor" "those who have no direct involvement whatsoever in an individual credit decision." Thus, the court rejected "the broad expansion of ECOA liability urged by the AmeriPro Applicants and the amicus CFPB to include the conduct of Wells Fargo in the secondary market."

CONCLUSION

In summary, the court's opinion explicitly limits liability for financial institutions purchasing mortgages in the secondary market unless those institutions *participated* in the originating lender's decision with respect to the

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[5] 15 U.S.C. § 1691a(e).

loan application at issue. Based on the court's opinion, merely promulgating lending guidelines regarding what mortgages a financial institution will purchase in the secondary market, alone, does not rise to the level of participation to permit a borrower to state a plausible claim for violation of the ECOA against the institution in the secondary market.