Are Your Company's Debt Collection Practices or Policies Creating an Impermissible Disparate Impact?

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Your company is sued by a regulatory agency in a class-action lawsuit. The agency claims that your company's debt collection practices and policies cause minorities to be treated differently. Your company has no discriminatory intent. However, the agency contends that your company's practices and policies violate the Equal Credit Opportunity Act ("ECOA"). Your company then pays a six-figure civil penalty to resolve the claim of discriminatory conduct. This scenario is more common than you may believe.

Establishing a Disparate Impact Claim

The Consumer Financial Protection Bureau ("CFPB") is tasked with ensuring that financial institutions comply with fair lending laws, including addressing discrimination in the consumer credit industry. The ECOA was enacted to protect borrowers seeking credit. This legislation prohibits credit discrimination based on race, color, religion, national origin, sex, marital status, age, or because the consumer receives public assistance. 15 U.S.C. § 1691(a)(1) (2012); see 12 C.F.R. pt. 1002.2. There are two main theories of liability under the ECOA:

1. Disparate Treatment.

In cases of disparate treatment, the creditor treats an applicant differently based on protected class status. Proof of discriminatory intent is required in these cases.

2. Disparate Impact.

In cases of disparate impact, the creditor's facially neutral practices or policies have a disproportionate adverse effect on a member of a protected class. A disparate impact case does not require proof of discriminatory intent or proof that every member of the protected class was adversely impacted.

To establish a *prima facie* case under a disparate impact theory, a plaintiff must identify a specific facially neutral policy or practice that results in discrimination. The plaintiff must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group. There is no violation of the ECOA if a policy or practice can be justified by "business necessity" and there is no less discriminatory alternative.

Three Recent Enforcement Actions

- On July 15, 2020, the CFPB filed a lawsuit against Townstone Financial, Inc. in federal district court in the Northern District of Illinois. In the Complaint, the CFPB asserted that from 2014 through 2017, the creditor drew almost no applications for properties in African American neighborhoods and few applications from African Americans. In addition, the CFPB alleged that the creditor engaged in acts or practices that discouraged prospective applicants living in African American neighborhoods from applying for mortgage loans. The CFPB sought an injunction against the creditor, as well as damages, redress to consumers, and the imposition of a civil money penalty. The case is still pending.
- On August 23, 2017, the CFPB entered into a Consent Order with American Express Centurion Bank and American Express Bank, FSB (the "banks"), resulting from allegations of discrimination against consumers in Puerto Rico, the U.S. Virgin Islands, and other U.S. territories. The CFPB contended that the banks provided credit and charge card terms that were inferior to those available in the 50 U.S. states. Specifically, the banks assigned non-U.S. territory and U.S. territory delinquent accounts to different collection agencies. This resulted in less advantageous debt settlements for similarly situated non-U.S. territory customers. In addition, the CFPB asserted that the banks discriminated against certain consumers with Spanish-language preferences. The banks paid approximately $95 million in consumer redress during the review process and were required to pay an additional $1 million to compensate the harmed consumers.
- On February 2, 2016, the CFPB and Department of Justice ("DOJ") entered into a Consent Order with Toyota Motor Credit Corporation ("Toyota"), resulting from allegations that Toyota violated the ECOA. Specifically, the CFPB and DOJ asserted that Toyota adopted policies that resulted in African American and Asian and Pacific Islander borrowers paying higher interest rates for their auto loans than non-Hispanic white borrowers. As part of the resolution, Toyota was required to pay up to $21.9 million in restitution and ordered to change its pricing and compensation system.

Collection Agencies are Subject to the ECOA

Like lenders, the ECOA also applies to collection agencies. Inconsistent application of state specific debt collection practices could lead to claims of disparate impact. For example, the Colorado Fair Debt Collection Practices Act prohibits debt collectors from communicating credit information to a consumer reporting agency earlier than 30 days after an initial notice has been mailed to the consumer. Colo. Stat. § 5-16-108. To avoid this state-specific requirement, collection agencies attempting to collect debt from consumers in Colorado may decide against credit reporting, despite reporting in the other states in which they collect. The different collection practice in Colorado relative to other states could create a disproportionate adverse effect against members of a protected class.

Prepare for the Future

In a changing administration, there may be an increase in enforcement actions by the CFPB and DOJ relating to impermissible disparate impact. Thus, now is an ideal time for financial institutions to reevaluate the effect and unintended consequences of their policies and practices. Please reach out to your Moss & Barnett attorney for assistance.

Attorneys

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Practice Areas

Financial Services