

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

53037B #166

BETTY T. CASON and)
ROBERT F. CASON, on behalf of)
themselves and all others)
similarly situated,)
)
Plaintiffs,)
)
v.)
)
NISSAN MOTOR ACCEPTANCE)
CORPORATION,)
)
)
Defendant.)

No. 3-98-0223
JUDGE CAMPBELL
MAGISTRATE JUDGE GRIFFIN

MOTION OF THE UNITED STATES FOR LEAVE
TO FILE A BRIEF AS **AMICUS** CURIAE

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The United States of America hereby moves this Court for leave to file the attached brief as amicus curiae to assist the Court in ruling on the Motion for Summary Judgment filed by Defendant on May 31, 2000. In this case, Plaintiffs allege, inter alia, that defendant has violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691, et seq.

ECOA prohibits certain forms of discrimination with respect to all credit transactions. 15 U.S.C. § 1691(a). Through various federal agencies, the United States has responsibility for enforcing ECOA. In particular, the Attorney General has the authority to commence an action under ECOA. 15 U.S.C. § 1691(h). Accordingly, the United States has a substantial interest in ensuring that cases are decided in accordance with the congressional mandates of ECOA, and an interpretation of ECOA by the United States may assist this Court. The proposed brief addresses whether a creditor may immunize itself from liability under ECOA by delegating aspects of the credit transaction -- such as the setting of finance charges -- to a third party. The United States' amicus participation will not significantly delay the proceedings in this case and will not cause prejudice to any of the parties.

In general, an amicus brief "can contribute to [a] court's understanding" of the issues involved in a particular lawsuit. Harris v. Parnsley, 820 F.2d 592, 603 (3rd Cir.), cert. denied, 484 U.S. 947 (1987). An amicus filing from an agency charged with enforcement of the statute at issue can be particularly

useful. See Universal Oil Prods Co. v. Root Ref. Co., 328 U.S. 575, 581, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946) ("a federal court can always call on law officers of the United States to serve ^{ES} amici"); Ellsworth Assoc., Inc. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996) (granting amicus participation because movants "have a special interest in this litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of this case").

The United States has routinely filed amicus curiae briefs in both trial and appellate courts in cases involving federal civil rights laws. See Jurman v. Oakley Bldg & Loan Co., 404 F. Supp. 791, 792 (S.D. Ohio 1975); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 289 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993); Dunn v. Midwestern Indem., Mid-Am Fire & Gas Co., 472 F. Supp. 1136, 1107 n.2 (S.D. Ohio 1979); Pinchback v. Armistead Homes Corp., 907 F.2d 1447 (4th Cir.), cert. denied, 498 U.S. 983 (1990); Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. supp. 2d 661 (D. Md. 1998); Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179 (E.D.N.Y. 1993); Oxford House - Evergreen v. City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991).

CONCLUSION

For the foregoing reasons, the United States should be granted leave to file the attached brief as amicus curiae.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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A handwritten signature in cursive script, appearing to read "Carol A. Evans". The signature is written in black ink and is positioned above a horizontal line.

Carol A. Evans

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INTEREST OF THE UNITED STATES

Congress enacted the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, in 1974 to prohibit the denial of credit on the basis of gender or marital status. As a result of Congressional hearings that demonstrated the pervasiveness of lending discrimination, Congress amended the ECOA in 1976 to prohibit discrimination based upon race, national origin and age. See Pub. L. No. 94-239, 114 Stat. 246 (1976); S. Rep. 94-589, at 5-6 (1976), reprinted in 1976 U.S.C.C.A.N. 403. Congress also authorized the Attorney General to enforce ECOA by bringing civil actions whenever there is evidence of a "pattern of practice" of discrimination. 15 U.S.C. § 1691e(g) and (h). Accordingly, the United States has a significant interest in judicial interpretations of ECOA, and respectfully submits this amicus brief to the Court.

This case raises the question of whether a creditor may immunize itself from liability under ECOA by delegating aspects of the credit transaction -- such as the setting of finance charges -- to a third party. The United States believes that a creditor has a non-delegable duty to refrain from discriminating under ECOA; therefore, it is no answer under ECOA for a creditor to claim that it was not responsible for discriminatory pricing of loans that it approved and funded. Furthermore, the United States believes that acceptance of such an excuse for discriminatory pricing would significantly hinder the effectiveness of ECOA, as well as the United States' enforcement

efforts.

BACKGROUND

I. PLAINTIFFS' STATEMENT OF FACTS

Plaintiffs allege the following facts:

Nissan Motor Acceptance Corporation ("NMAC") makes automobile loans throughout the United States through Nissan dealers, who refer customers to NMAC and effectively serve as loan arrangers. See Plaintiffs' Response to NMAC's Statement of Undisputed Facts ("Pl. Res.") at 45-50, 59. Nissan dealers submit credit applications to NMAC, as well as other lenders, on behalf of customers. Id. at 50. NMAC, using a credit scoring system, assigns applicants to a credit risk category. Id. at 52. For each risk category, NMAC sets a range of acceptable interest rates. Id. The lowest acceptable rate is called the "buy rate." Id. A dealer may move a customer to a more expensive risk category (or "tier"), but not to a less expensive one. Id. at 25.

If the dealer charges only the buy rate, it receives a flat fee of approximately \$150 for its participation in the transaction. Id. at 19. If the dealer charges an interest rate above the buy rate (effectively an overage), NMAC and the dealer split the discretionary finance charge with approximately 3/4 going to the dealer. Id. at 16, 19. For certain promotional programs, a dealer may be permitted to charge customers only the buy rate. Id. at 25. Although NMAC contends that the dealers set the discretionary finance charge based on their own

II. DEFENDANT'S MOTION:

On May 31, 2000, NMAC filed a Motion for Summary Judgment. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The United States submits this brief in support of Plaintiffs' Memorandum in Opposition to NMAC's Motion for Summary Judgment.

In its motion, NMAC argues that plaintiffs' claims under ECOA must be rejected. See NMAC's Memorandum in Support of Summary Judgment ("Def. Mem."). First, NMAC contends that it bears no responsibility for the conduct of Nissan dealers and, thus, the only potentially liable party under ECOA is the dealer itself. Id. at 9, 29-30. NMAC argues that it could only be held liable for a dealer's discriminatory conduct under ECOA if it were aware of the discrimination before it participated in the credit transaction. Id. at 26. Second, NMAC argues that plaintiffs may not proceed under a disparate impact theory because they have not identified a neutral NM-AC policy that resulted in their alleged injuries. Id. at 28. NMAC contends that plaintiffs' alleged injuries stem from the dealers' disparate treatment, not from NMAC's financing policies.' Id. at 9, 32.

¹ NMAC also argues that plaintiffs' claims are time barred, that plaintiffs have failed to offer competent evidence regarding

LEGAL DISCUSSION

I. AS A CREDITOR, NMAC IS **SUBJECT** TO LIABILITY **UNDER** ECOA FOR RACIAL DISPARITIES IN FINANCE CHARGES IN LOANS THAT IT APPROVED AND FUNDED.

A. Both NMAC and the Dealers Are Creditors Under ECOA and Subject to **ECOA's** Broad Prohibition Against **Discrimination**

ECOA provides:

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction --

(1) on the basis of race, color, religion, national origin, sex or marital status, or age . . .

15 U.S.C. §1691(a). Regulation 3, promulgated pursuant to ECOA, defines creditor as "a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a creditor's assignee, transferee, or subrogee who so participates." 12 C.F.R.

202.2(1). For purposes of ECOA's general prohibitions against discrimination, the definition also includes a "person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made." Id.

Both NMAC and the dealers are thus creditors under ECOA and subject to its anti-discrimination provisions. Plaintiffs' alleged facts state an ECOA claim against both. By charging higher non-risk finance charges to African-Americans, the dealers

the alleged discrimination, and that the FTC Holder Language, 16 C.F.R. Ch. 1, Part 433, is inapplicable. This brief does not address those arguments.

violated ECCA. Likewise, by approving and funding loans in which African-Americans are charged a higher finance charge than similarly qualified whites, NMAC too violated ECOA.

- B. Because **NMAC** Has a Non-Delegable Duty to Comply with ECOA, NMAC May Not Expressly Permit Dealers to Set **Finance** Charges and Then Disclaim Responsibility for the Racial Disparities That Allegedly Resulted.

It is the position of the United States that ECOA, like the Fair Housing Act, imposes a non-delegable duty not to discriminate. See e.g., Marr v Rife, 503 F.2d 735, 741 (6th Cir. 1974) ("[T]he duty to obey the law is non-delegable.") (quoting United States v. Youritan Construction Co., 370 F. Supp. 643 (N.D. Cal. 1973), aff'd in part, remanded in part by, 509 F.2d 623 (9th Cir. 1975)). Both the Fair Housing Act and ECCA must be liberally construed to best effectuate the purpose of eradicating discrimination in credit transactions and to prevent creditors from profiting from invidious discrimination. See United States v. Landmark Financial Services Inc., 612 F. Supp. 623, 628 (D. Md. 1985) ("Congress believed 'that strong enforcement of [the ECOA] is essential to accomplish its purposes.'") (quoting S.Rep. 589, 94th Cong., 2d Sess.); Silverman v. Eastrich Multiplex Investor Fund, L.P., 51 F.3d 28, 32-33 (3d Cir. 1995) (ECOA should be interpreted so that creditors do not benefit from discrimination). Accordingly, courts regularly look to case law developed under the Fair Housing Act to interpret ECOA. se.22 Shuman v. Standard Oil Co. of Cal., 453 F. Supp. 1150, 1153-54 (N.D. Cal. 1978) (in absence of decisional law under ECCA, court

looked to Fair Housing Act); ~~United States v. Beneficial Corp.~~
492 F. Supp. 682, 686 (D. N.J. 1980), aff'd, 673 F.2d 1302 (3rd
Cir. 1981) ("Although there is at this time a paucity of
precedent with respect to ECOA, analysis of the enforcement
network of the analogous Fair Housing Act . . . has resulted in
similar conclusions."); ~~Emigrant Savings Bank v. Elan Management~~
Corp., 8 F.2d 671 n.3 (2d Cir. 1982) (stating that ECOA claim
does not require separate analysis from Fair Housing Act claim).
Thus, Fair Housing Act cases applying the non-delegable duty
doctrine should apply with equal force to plaintiffs' ECOA
claims.

In Marr, the Sixth Circuit held that the owner of a real
estate company was liable for the discrimination of the company's
agents under the Fair Housing Act, despite the fact that "[t]here
was no evidence that [he] had personally joined in any
discriminatory acts" 503 F.2d at 740. Similarly, in
Walker v. Cricler, 976 F.2d 900, 904 (4th Cir. 1992), the owner
of property was liable under the Fair Housing Act regarding the
discriminatory conduct of his manager, even though he
"specifically intended that [she] not discriminate." The Fourth
Circuit reasoned that the property owner "could not insulate
himself from liability for sex discrimination in regard to living
premises owned by him and managed for his benefit merely by
relinquishing the responsibility for preventing such

discrimination to another party." Id. at 904.

Although many of the cases applying the xx-delegable duty doctrine have involved the actions of employees, the doctrine is not limited by state law concepts of respondeat superior or agency. Marr v. Lee, 503 F.2d 735, 740 (6th Cir. 1974).

Rather, in order to give effect to Congress' "broad legislative plan to eliminate all traces of discrimination," a court must look to federal law to determine the appropriateness of imposing liability. Id. at 740-41; Cf. City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1097 (7th Cir. 1992) ("We note that whether an agency relationship exists for purposes of the Fair Housing Act is a question to be determined

² See also Anderson v. Dorris, 873 F.2d 938, 944 (6th Cir. 1989) ("Turning to the instant action, Chandler cannot escape liability by merely asserting that it instructed its agents not to discriminate against blacks."); Phiffer v. Proud Parrot Motel, 648 F.2d 548, 552 (9th Cir. 1980) ("The duty of the owner of such a facility to obey the laws relating to racial discrimination is non-delegable."); Walker v. Criales, 976 F.2d 900 (4th Cir. 1992) ("Here we adopt the general rule applied by other federal courts that the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable."); Alexander v. Rica 208 F.3d 419, 432-33 (3rd Cir. 2000) ("Here we adopt the general rule applied by other federal courts that the duty of a landlord under the Fair Housing Act not to discriminate . . . may not be delegated to the landlord's employee); Fair Housing Congress v. Weber, 993 F. Supp. 1286, 1294 (C.D. Cal. 1997) ("The direct evidence of discriminatory housing practices at Vista de Anza Apartments does not demonstrate the participation of defendants Charles Weber or 207 Anza Associates. However, the duty not to discriminate under the Fair Housing Act is nondelegable."); Saunders v. General Services Corporation, 659 F. Supp. 1042, 1059 (E.D. Va. 1987) ("Thus, in the instant case, while the Court finds credible Mr. Perel's testimony that he did not intend to discriminate and that he supports the goals of equal and open housing, as president of GSC, Mr. Perel had a non-delegable duty to ensure that GSC, through its employees, followed such goals and complied with the Act.").

Mortgage Service Co., 605 F.2d 566, 571 (D.C. Cir. 1979)

(finding no liability under ECSX where assignee neither participated in nor benefitted from discrimination); Whitfield v. Century 21 Real Estate Corp., 484 F. Supp. 984, 986 (S.D. Tex. 1979) (no liability under Fair Housing Act where elements of benefit and control were absent). Both of these factors are present in this case. According to facts set forth by plaintiffs, NMAC exercised complete control over the method of setting interest rates for its borrowers. See Plaintiffs' Response to NMAC's Statement of Undisputed Facts at 45-54. The dealers set rates in strict conformity to NMAC's policies. For every customer, NMAC set the permissible range of finance charges, and created an incentive for the dealer to charge as much as possible. NMAC approved every loan application and its terms individually, and, of course, NMAC shared in the profits from the dealers' allegedly discriminatory conduct.

In fact, NMAC allegedly is a far more active participant in the dealers' alleged discrimination than many of the defendants found liable in the above cases.' NMAC designed and implemented the very system that quite predictably resulted in the alleged discriminatory conduct by dealers. An NMAC senior executive, testifying on behalf of NMAC, admitted that judgmental pricing was antiquated and could lead to bias. See Plaintiffs' Memorandum in Opposition to NMAC'S Motion for Summary Judgment ("Pl. Opp.") at 19-20. Despite this awareness, NMAC nonetheless

¹ See also section II(B).

implemented a pricing policy that expressly authorized dealers to impose at their discretion finance charges not based on risk.

To carry out its obligations under ECOA, NMAC could have established guidelines for the imposition of finance charges that would prevent illegal bias. Alternatively, NMAC could have monitored racial disparities in its loans. Although NMAC may not collect racial information as part of the loan application process, ECOA expressly permits a creditor to assess its fair lending compliance. 15 U.S.C. § 1691c-1. ECOA even provides incentives for creditors to monitor their compliance by making the results of self-testing privileged so long as the creditor meets certain requirements. Id.; 12 C.F.R. 5202.15. NMAC has demonstrated that it is fully capable of obtaining information regarding the race of its customers through drivers' records and other methods of racial identification. Pl. Resp. at 27-28. Additionally, Nissan dealers were certainly aware of the race of NMAC borrowers. NMAC's argument that it is not possible for it to monitor racial disparities in its loans therefore is without merit. See Def. Mem. at 28 n. 14.

Accordingly, NMAC may be liable for the discriminatory pricing of its loans as a result of dealers' discrimination. A contrary interpretation would permit lenders to immunize themselves from ECOA liability by delegating parts of the credit transaction (such as the setting of overages) to third parties, while at the same time profiting from the resulting discriminatory conduct.

II. NMAC'S ARGUMENT THAT IT **CANNOT** BE LIABLE IN THIS CASE UNLESS IT WAS ON NOTICE REGARDING THE DEALERS' DISCRIMINATION IS FLATLY CONTRADICTED BY THE PLAIN LANGUAGE OF REGULATION B.

A. Regulation B Imposes a Notice Requirement Only As a Prerequisite to Holding a Creditor Liable for Another Creditor's Violation

NMAC contends that the dealer is the only potentially liable party under ECOA. In support of its position, NMAC cites 12 C.F.R. §202.2(1), which provides that:

[a] person is not a creditor regarding any violation of the [ECOA] or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction.

(emphasis supplied). This regulatory provision limits a creditor's liability for another creditor's ECOA violation. It does not save NMAC from liability for its own violation, that is, funding loans to African-Americans on less favorable terms than its loans to whites. This provision could come into play, for example, if NMAC quoted higher buy rates to dealers serving predominantly minority communities for no legitimate business reason. In such circumstances, the dealer would not be violating ECOA and would be liable for NMAC's violation only if it knew or was on notice of NMAC's discrimination. Accordingly, this provision of Regulation B does not require plaintiffs to prove knowledge in order to demonstrate NMAC's liability.

B. In Any Event, Whether **NMAC** Was on Notice of the Alleged Discrimination Is a **Disputed** Material Fact.

Even if this regulatory provision applied to NMAC, whether NMAC was on notice of the allegedly discriminatory conduct is a disputed material fact that precludes summary judgment. Indeed, NMAC has admitted that discretionary underwriting may lead to bias, and, thus, "the feds prefer credit scoring if it is non-biased." See Pl. Opp. at 19-20. Cf. Rosem. an.v. Premier Financial Services-East, L.P., 1998 WL 066064 (E.D. Pa. Sept.29, 1998) (defendant not entitled to summary judgment where "affidavits attesting to ECOA violations by [company from whom it bought loans] were a matter of public record. . .") (attached). Furthermore, courts have long recognized that subjective decision making may lead to illegal bias. See, e.g., Miles v. MNC Corp., 750 F.2d 867, 871 (11th Cir. 1985).

Despite this awareness of the risks of judgmental pricing, NMAC designed a policy that gave dealers unfettered discretion to set a non-risk based finance charge up to the rate ceiling for a given customer. Thus, NMAC necessarily knew — and indeed intended — that customers presenting identical risk profiles would pay different interest rates for their auto loans. It defies logic for NMAC, admittedly aware that discretion may lead to racial bias, to purposefully design and implement such a policy and then claim that it could not have known of the alleged discrimination that predictably resulted. Finally, NMAC admits that it sometimes knew the race of its borrowers because their

drivers licenses which were often sent to NMAC. See Def. Mem. at 8 n.8. Accordingly, plaintiffs have presented sufficient evidence from which a finder of fact could conclude that NMAC was on notice of the dealers' discriminatory conduct.

III. ECOA CLAIMS MAY BE PROVEN THROUGH EITHER DISPARATE TREATMENT OR DISPARATE IMPACT ANALYSIS.

As addressed above, plaintiffs' claims are easily analyzed under disparate treatment theory. Alternatively, plaintiffs may also proceed under disparate impact theory. The legislative history of ECOA and Regulation B make clear that both theories are available to plaintiffs. See 12 C.F.R. § 202.6(a) n. 2 ("The legislative history of the act indicates that the Congress intended an 'effects test' concept . . ."); 12 C.F.R. Pt. 202, supp. I., § 202.6(a), Official Staff Commentary on Regulation B. Furthermore, Congress intended that courts use disparate impact cases developed under Title VII of the Civil Rights Act of 1964 as a guide for ECOA claims. Id. Disparate impact and disparate treatment are not mutually exclusive claims, rather they are merely different theories of proof. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988) ("The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate issue is different than in cases where disparate treatment analysis is used.")

As NMAC concedes, disparate treatment analysis does not require any showing that the treatment was motivated by prejudice

or a conscious intention to discriminate. See Def. Mem. at 34; see also 12 C.F.R. Pt. 202, Supp. I., § 202.4, Official Staff Commentary on Regulation B ("Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate."); see also Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01, 18268 (April 15, 1994). Rather, "it is considered by courts to be intentional discrimination because no credible, nondiscriminatory reason explains the difference in treatment on a prohibited basis." Id. Courts generally have looked to standards developed under Title VII of the Civil Rights Act of 1964 when evaluating a disparate treatment claim. See Mercado-Garcia v. e era ank, 779 F. Supp. 620, 628 (P.Rico 1991), aff'd 979 F. 2d 890 (1st Cir. 1992) ("Courts which have interpreted ECOA have used the same analytical framework as that used in actions pursuant to Title VII of the Equal Employment Opportunity Act.").

To prove a disparate impact claim, plaintiffs must prove that NMAC applies a policy or practice equally to credit applicants, but the policy or practice has a disproportionate adverse impact on African-Americans and applicants from a group protected against discrimination. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01, 18259 (April 15, 1994). NMAC must then demonstrate that the policy meets a legitimate business need that cannot be accomplished by another means. Id.; 12 C.F.R. § 202.6(a) (2), Official Staff Commentary on Regulation B.

Plaintiffs have identified a neutral NMAC policy (that is, NMAC's policy of expressly permitting the dealers to charge non-risk based finance charges) that they allege disparately affects African-Americans, and offered evidence to support their claim. NMAC, however, contends that plaintiffs' disparate impact claim must fail because, at bottom, they are challenging disparate treatment by dealers. See Def. Mem at 28-34. A policy that permits subjective treatment, NMAC argues, is not a neutral policy for disparate impact purposes. Id.

This position has been squarely rejected by the Supreme Court. In Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988), a Title VII case, the court held that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests." Any other conclusion, the Court reasoned, would permit an employer to "insulate" itself from disparate impact analysis by "refrain[] from making standardized criteria absolutely determinative." Id. NMAC's attempt to distinguish Watson because it is an employment case is unpersuasive and, indeed, curious. See Def. Mem. at 33-34. The legislative history of ECOA makes clear that Congress expressly intended courts to look to Title VII when interpreting ECOA. See 12 C.F.R. § 202.6(a) n. 2; 12 C.F.R. Pt. 202, Supp. I., § 202.6(a), Official Staff Commentary on Regulation B. Thus, that Watson is an employment case makes it more applicable to an ECOA claim, not less.

NMAC's claim that it would be inappropriate to hold it liable under a disparate impact theory because of its good faith reliance on Regulation B is also without merit. See Def. Mem. at 36-37. Regulation B expressly states that disparate impact analysis is available under ECOA. 12 C.F.R. § 202.6(a) n.2 and Pt. 202, supp. I., § 202.6(a) (2), Official Staff Commentary on Regulation B ("The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis") (emphasis supplied). Although the Official Staff Commentary on Regulation B gives an example of a disparate impact claim, it does not purport to exhaustively list every factual circumstance in which the theory is appropriate. Accordingly, NMAC's contention that plaintiffs may not proceed under a disparate impact theory should be rejected.


CONCLUSION:

For the foregoing reasons, the United States believes that NMAC's motion for summary judgment should be denied.

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