Banking and Finance Law Daily Wrap Up, TOP STORY—5th Cir.: Secondary market mortgage buyer can ignore public assistance income, (Feb. 22, 2017)

Banking and Finance Law Daily Wrap Up

http://prod.resource.cch.com/resource/scion/document/default/blw01508bf80e7caa1000b5b490b11c18cbab02?cfu=Legal&cpid=WKUS-Legal-Cheetah&uAppCtx=cheetah

By Richard A. Roth, J.D.

A bank that refused to consider Section 8 housing aid when it decided which mortgage loans met its criteria for secondary market purchases did not violate the Equal Credit Opportunity Act, according to the U.S. Court of Appeals for the Fifth Circuit. Rejecting the Consumer Financial Protection Bureau's argument for a broader definition of "creditor" under the ECOA, the court said the bank did not participate in the lender's credit decisions (*Alexander v. AmeriPro Funding, Inc.*, Feb. 16, 2017, Jolly, E.).

Consumers who wanted to buy homes in the Houston, Texas, area sued Wells Fargo Bank and AmeriPro Funding for claimed ECOA violations. According to the consumers, Wells Fargo's secondary market purchase guidelines explicitly said the bank would not buy mortgages if the buyer's income came in part from Section 8 assistance. Since AmeriPro wanted to be able to sell mortgages it originated to Wells Fargo, it likewise refused to consider Section 8 assistance.

However, the ECOA makes it illegal for a creditor to discriminate against an applicant because some or all of the applicant's income is from a public assistance program (15 U.S.C. §1691(a)(2)). AmeriPro directly violated this ban, the consumers claimed, and Wells Fargo violated it as well because its guidelines amounted to participating in AmeriPro's credit decisions.

Consumers and claims. To analyze the claims, the court divided the 12 consumers into three separate groups:

1. four consumers who submitted applications to AmeriPro;
2. six consumers who made inquiries with AmeriPro but apparently were discouraged from making applications; and
3. two consumers who submitted applications directly to Wells Fargo as a loan originator.

AmeriPro applications. The court had little trouble deciding that the four consumers who submitted applications to AmeriPro had described an ECOA violation. They claimed to have been told the credit they wanted was unavailable because AmeriPro could not sell loans that were based on Section 8 income. That was enough to describe discrimination.

Loan buyer discrimination. Potentially the most significant discussion addressed the same four applicants' claims that Wells Fargo was a creditor under the ECOA and that it had discriminated against them. Despite the CFPB's arguments supporting the consumers, the theory was rejected.

Looking at the ECOA's definitions of "applicant" and "creditor," the court decided that Wells Fargo could be a creditor only if it participated in the decision to extend credit. The bank's secondary market purchasing guidelines did not constitute participation in the credit decision.

The CFPB argued for a broader view of participation, such as that included in Reg. B. However, even Reg. B would not include "those who have no direct involvement whatsoever in an individual credit decision," according to the court.

Other lending. This could be seen as bringing into question the CFPB's guidance on the ECOA, Reg. B—Equal Credit Opportunity (12 CFR Part 1002), and indirect auto lending. The bureau has, since issuing guidance in 2013, held and enforced the position that indirect auto lenders—companies that buy loans originated by

automobile dealers—are creditors and can be responsible for the dealers' discriminatory practices (see CFPB Bulletin 2013-02, *Banking and Finance Law Daily*, March 21, 2013).

However, the bureau's position in this case seems to have gone one step farther than its indirect auto lending guidance. The process described in the 2013 bulletin included the dealer forwarding the consumer's credit information to one or more potential loan borrowers, who then would make an individual decision as to whether to buy the loan. While mortgage loan originators may follow a similar practice in finding investors to fund a loan, the court opinion did not indicate that Wells Fargo, as a secondary market buyer, was consulted on individual loans before credit decisions were made. In fact, the court's reference to direct involvement in an individual credit decision could imply that there was no such prior consultation.

Wells Fargo applicants. The court swiftly dispensed with the claims of the two consumers who applied directly to Wells Fargo. The consumers were applicants under the ECOA, and Wells Fargo was a creditor, the court agreed. However, the consumers had offered nothing to show that the bank had discriminated against them as a lender. Rather, they relied only on the bank's secondary market purchase guidelines.

The ECOA applies only to loan originators, the court said, not to secondary market buyers. Moreover, what Wells Fargo did as a loan buyer was distinct from what it did as a loan originator. There was no showing that Wells Fargo refused to consider Section 8 income when it originated loans, the court noted.

Application requirement. The consumers who only made inquiries were not applicants under the ECOA and thus were not protected by the law, the court decided. The ECOA said that a creditor who violated the law was liable to an "aggrieved applicant," and to be an applicant one must actually request credit.

It was possible that the consumers were discouraged from making an application because they were told their Section 8 income would not be considered, the court conceded. Also, Reg. B banned creditors from discouraging applications on a prohibited basis, the court observed. However, the ECOA does not allow a suit by an "aggrieved prospective applicant."

The CFPB can enforce a regulatory ban on discouragement, the court said, but that did not mean there was a private right of action if the law did not provide one.

The case is No. 15-20710.

Attorneys: Joseph Y. Ahmad (Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C.) for Tina Alexander. Daniel J.T. McKenna (Ballard Spahr LLP) for Ameripro Funding, Inc. Jon Maxwell Beatty (Diamond McCarthy LLP) for Amegy Bank National Association. Robert Thompson Mowrey (Locke Lord LLP) for Wells Fargo Bank, N.A.

Companies: Amegy Bank National Association; AmeriPro Funding, Inc.; Wells Fargo Bank, N.A.

MainStory: TopStory CFPB ConsumerCredit EqualCreditOpportunity Loans LouisianaNews MississippiNews Mortgages TexasNews