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

BETTY T. CASON and ROBERT F. CASON, on behalf of themselves and all others similarly situated, Plaintiffs,	)	
v.	)	No. 3-98-0223 JUDGE CAMPBELL MAGISTRATE JUDGE GRIFFIN
NISSAN MOTOR ACCEPTANCE CORPORATION, Defendant.	)	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WENDY H. GOGGIN
United States Attorney

RACHEL WATERHOUSE
Assistant U.S. Attorney
110 9th Ave., Suite A-96
Nashville, TN 37203
(615) 736-5151

BILL LANN LEE
Acting Assistant Attorney General

JOAN A. MAGAGNA
Chief
ALEXANDER C. ROSS
Special Litigation Counsel
CAROL A. EVANS
Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
P.O. Box 65998
Washington, DC 20035-5998
(202) 514-9694

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 independent assessment of a customer's risk, the dealer does not bear any risk. Id. at 53. In fact, the dealer never owns the loan. Id. at 10. Rather, the dealer prepares a contract on an NMAC approved contract form, and each contract must be specifically approved by NMAC. Id. at 53-54. The contract is between the borrower and the dealer, but the contract is simultaneously assigned to NMAC. Id. at 4, 11-12.

Plaintiffs, Betty T. Cason and Robert F. Cason, purchased a Nissan vehicle in August, 1995 from Action Nissan in Nashville, Tennessee. Id. at 55-57. Plaintiffs applied for financing at the dealer by filling out an NMAC application. Id. The dealer faxed the application to NMAC, which determined that the Casons fell into the "SPL tier" credit risk category. Id. The dealers charged the Casons an interest rate of 19.49%, the maximum allowable rate for their credit tier. Id. Plaintiffs, who are African-American, claim that NMAC's rate-setting policy, which permits dealers to set the interest rate within an NMAC-approved range, results in dealers charging African-Americans higher interest rates than whites who present a comparable credit risk. Plaintiffs have offered evidence that African-Americans pay an average of $461.97 more in discretionary finance charges than whites, and that this difference cannot be explained by non-discriminatory factors. See Plaintiff's Response in Opposition to NMAC's Motion to Exclude the Report of Dr. Debby A. Lindsey at 4-5.

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 NMAC policy that resulted in their alleged injuries. Id. at 28. NMAC contends that plaintiffs' alleged injures stem from the dealers' disparate treatment, not from NMAC's financing policies.[1] Id. at 9, 32.

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 B, 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.

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

202.2(l). 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 violated ECOA. 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-delgable.") (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 ECOA must be liberally construed to best effectuate the purpose of eradicating discrimination in credit transactions and to prevent creditors form 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 Multiple 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. See Shuman v. Standard Oil Co. of Cal., 453 F. Supp. 1150, 1153-54 (N.D. Cal. 1978) (in absence of decisional law under ECOA, 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., 668 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. Crigler, 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.[2]

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[2]See also Sanders 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 Motor 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. Crigler, 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. Riga, 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,

Although many of the cases applying the non-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. Rife, 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 by federal law."); Northside Realty Assoc. Inc. v. United States, 605 F.2d 1348, 1354 n. 13 (5th Cir. 1979) (same).

Thus, NMAC's contention that the dealers are not its agents, even if true, is not dispositive of NMAC's liability.[3] Indeed, the arguments that NMAC makes against its liability are the identical arguments that were made -- and overwhelmingly rejected by courts -- in cases involving real estate agents under the Fair Housing Act. See Heights Community Congress v. Hilltop

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through its employees, followed such goals and complied with the Act.").

[3] Defendant's denial of an agency relationship is actually contradicted by the deposition testimony of the credit manager at Action Nissan, who stated that the dealer in fact did act as NMAC's agent. See Plaintiffs' Memorandum in Opposition NMAC's Motion for Summary Judgment at 18.

Realty, Inc., 774 F.2d 135, 141 (6th Cir. 1985) ("This argument [that real estate agents are independent contractors] has consistently been rejected in Fair Housing Act cases."). In those cases, owners of real estate agencies claimed that real estate agents were independent contractors and not subject to their control. Rejecting these disclaimers of an agency relationship, courts imposed liability based on the owners' practical ability to control the agents. See City of Chicago, 982 F.2d at 1096-97 (discussion of cases rejecting claims that real estate owners did not control agents).

Liability under the doctrine of non-delegable duty turns, therefore, not on a wooden application of vicarious liability doctrine, but more broadly on the principal's exercise of control over the discriminatory conduct and whether the principal benefitted from the discrimination. Cf. Markham v. Colonial Mortgage Service Co., 605 F.2d 566, 571 (D.C. Cir. 1979) (finding no liability under ECOA 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.[4] 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 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

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[4] See also section II(B).

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. §202.15. 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(l), 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, it is non-biased." See Pl. Opp. at 19-20. Cf. Roseman 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 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. Forth 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. Federal Bank, 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, 18269 (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[ing] 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.

Respectfully Submitted,

WENDY H. GOGGIN
United States Attorney
RACHEL WATERHOUSE
Assistant U.S. Attorney
110 9th Ave., Suite A-96
Nashville, TN 37203
(615) 736-5151

BILL LANN LEE
Acting Assistant Attorney General

JOAN A. MAGAGNA
Chief
ALEXANDER C. ROSS
Special Litigation Counsel
CAROL A. EVANS
Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
P.O. Box 65998
Washington, DC 20035-5998
(202) 514-9694

Date: July 31, 2000