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The Problem With The DOJ's Case Against GFI Mortgage

Alan S. Kaplinsky, Richard J. Andreano Jr., John L. Culhane Jr. and **Christopher J. Willis**

Law360, New York (April 10, 2012, 1:25 PM ET) -- In its latest fair lending lawsuit, the U.S. Department of Justice appears to be dodging an important legal question that the U.S. Supreme Court was poised to answer this term, but never did due to the dismissal of the case by the parties.

The question is whether disparate impact claims are allowed under the Fair Housing Act or the Equal Credit Opportunity Act. The remarkable thing about the complaint in United States v. GFI Mortgage Bankers Inc., filed in the Southern District of New York, is that the factual allegations appear to frame a disparate impact theory of liability, but the DOJ has characterized the case as a disparate treatment case, alleging that the defendant engaged in a "pattern and practice" of intentional discrimination.

This use of disparate impact evidence to support a claim of intentional discrimination illustrates two important points: (1) that the government is willing to "mix and match" these theories and characterize disparate impact claims as ones involving intentional discrimination, and (2) that, even if the Supreme Court ultimately holds that disparate impact claims are not available under the Fair Housing Act or the ECOA, the DOJ has a workaround already in place, in the form of bringing disparate impact cases under a "pattern and practice" rubric.

The allegations of the complaint essentially recite that there is a "statistically significant" disparity between the interest rates paid by various groups of borrowers — and that these disparities occurred because of a policy that allowed individual loan officers to exercise discretion in setting interest rates — and a compensation policy that rewarded the loan officers for making loans at higher interest rates.

All of these allegations look like a typical disparate impact case, fashioned after the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, in which the court recognized that a policy allowing managers to make discretionary employment decisions could be attacked under a disparate impact theory. Indeed, the GFI complaint even alleges, in two separate places, that the defendant's policies and procedures had a disparate impact on protected class members.

Why, then, does the complaint label itself as a "pattern and practice" case, and why did the DOJ trumpet it as such in its press release? The DOJ transformed its disparate impact claims into an assertion of intentional discrimination by simply alleging that the defendant "knew or had reason to know" that the statistical disparities existed.

To us, this assertion seems to fall far short of the standard of proof in a "pattern and practice" case decided by the Supreme Court in 1977 in Teamsters v. United States, which requires the government to prove that discrimination was so pervasive within the defendant's operations that "racial discrimination was the company's standard operating procedure."

Moreover, the DOJ's reliance on discretionary loan pricing by individual loan officers as evidence of intentional discrimination seems to be squarely contrary to the Supreme Court's observation in Wal-Mart Stores Inc. v. Dukes that the use of discretion is "a common and presumptively reasonable way of doing business — one that we have said 'should itself raise no inference of discriminatory conduct.'"

We suspect there is pressure to characterize disparate impact cases as "pattern and practice" because of the perception that the Supreme Court would likely have disallowed the use of disparate impact analysis under the Fair Housing Act in Magner v. Gallagher if not for the dismissal of that case by the parties, and that the same analysis would apply to claims under ECOA. After all, it is unknown when the Supreme Court may have another opportunity to address this issue, and it seems unwise to rely on a disparate impact theory when it could be undone by a Supreme Court case that could come about at any time.

Regardless, if pervasive intentional discrimination can be alleged based on the use of statistical evidence coupled with the assertion that the defendant "knew or should have known" of the disparity, then the standard of proof in "pattern and practice" cases has been significantly diluted. We are hopeful that the federal courts will recognize this, and reject claims like those asserted by the DOJ in this case.

--By Alan S. Kaplinsky, Richard J. Andreano Jr., John L. Culhane Jr. and Christopher J. Willis, Ballard Spahr LLP

Alan Kaplinsky is a partner in Ballard Spahr's Philadelphia office. Richard Andreano is a partner in the firm's Washington, D.C., office. John Culhane is a partner in the firm's Philadelphia office. Christopher Willis is a partner in the firm's Atlanta office.