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July 16, 2008

Congressman Mel Watt
2236 Rayburn HOB
Washington, DC
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Dear Congressman Watt:

On behalf of our low-income and elderly clients, the National Consumer Law Center ("NCLC") thanks the Oversight and Investigations (O & I") Subcommittee of the Financial Services Committee for scheduling a hearing on the topic of "GAO Report on Regulation B: Should Lenders Be Required to Collect Race and Gender Data of Borrowers for All Loans". Unfortunately, we are not able to send a representative to the July 17, 2008, hearing. Nonetheless, we would like to take this opportunity to provide the O & I Subcommittee with some background information from our advocacy and litigation experience that might be helpful in its deliberations.

The National Consumer Law Center is a nonprofit organization specializing in consumer credit issues on behalf of low-income and elderly individuals. We work with legal services, government and private attorneys around the country representing these vulnerable populations. As a result of our daily contact with these practicing attorneys and advocates we have seen examples of discriminatory lending to low-income and elderly people throughout the country. NCLC also is author of the widely praised eighteen-volume Consumer Credit and Sales Legal Practice Series, including *Credit Discrimination* (4th ed. 2005 with 2007 Supp.).

On March 16, 2005, Judge Aleta Trauger of the United States District Court for the Middle District of Tennessee ruled from the bench in the case of *Borlay v. Primus Automotive Financial Services*, Civil Action 3:02-0382, "that the plaintiffs have proved their case and that they will win in my decision." Thus ended a three week trial that resulted in what is believed to be the first, and to this date only, successful effort to obtain a judicial finding of disparate impact discrimination in a private, non-mortgage related, consumer credit case brought under the provisions of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§1691 *et seq* since its enactment in 1974. NCLC was proud to serve as one of the co-counsel in the *Borlay* case (which subsequently settled), as well as part of the litigation team that brought and ultimately settled 10 other similar cases against auto financers around the United States.

The first two of these cases were filed in 1998. All of the complaints alleged that the defendant automobile finance companies established specific identifiable and uniform credit pricing systems that authorized unchecked, subjective markup of objective risk-based financing rates. The complaints further alleged that the effect of this subjective finance charge markup had, in violation of the ECOA, a widespread discriminatory impact on African-American and Hispanic financing applicants.[1]

As you are aware, the ECOA prohibits discrimination in all stages of a credit transaction, from the initial request for credit through final payment or a collection action. 15 U.S.C. §1691(a) (making it unlawful for a creditor to discriminate in "any aspect of a credit transaction."); Reg. B, 12 C.F.R. §202.2(m). See also *Coleman v. General Motors Acceptance Corp.*, 196 F.R.D. 315 (M.D. TN 2000), *Jones v. Ford Motor Credit Company,* 2002 WL 133481 (S.D.N.Y. June 17, 2002). The ECOA relies on the fundamental and indisputable concept that equally creditworthy consumers should be treated similarly. See, Reg. B, 12 C.F.R. § 202.6 ("creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants"). The ECOA is intended to insure that "...no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness." S. Rep. No. 94-589, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 403, 405.

The ECOA discriminatory impact standard does not require an intent to discriminate. It is enough that the markup policies, although racially neutral on their face, result in a discriminatory effect. The ECOA mandates that equal access to credit is such a fundamental necessity in our society that creditors have a duty to insure that their lending practices do not intentionally <u>or</u> inadvertently lead to unequal access to credit for any protected group.[2] Simply put, the legislation does not permit creditors to stick their heads in the sand and ignore reality by failing to monitor the ultimate outcomes of their policies and procedures.

To the contrary, ECOA makes it clear that creditors have an affirmative obligation, after the financial transaction has been consummated, to check whether their policies and procedures have generated unintended outcomes. The ECOA specifically provides for self-testing in order to determine ECOA compliance, to find possible violations and to take appropriate corrective action.[3] The statute creates a self-testing privilege that protects the results of self-tests and provides that they may not be obtained or used in any civil action.[4]

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[1] For a more detailed history of this litigation and analysis of the theories propounded in these cases *see,* Stuart T. Rossman, *Financing Fair Driving: Race Discrimination in Retail Car Loans,* 36 CLEARINGHOUSE REV. 227 (2002); *see also, Jones v. Ford Motor Credit Company,* 2005 WL 743213 (S.D.N.Y. March 31, 2005)[granting motion for class certification]; *Coleman v. General Motors Acceptance Corp.,* 220 F.R.D. 64 (M.D. TN 2004)[granting motion for class certification]

[2] See, Congressional Findings and Statement of Purpose for ECOA, Pub. L. 93-495, §502, 88 Stat. 1525 (Oct. 28, 1974)

[3] 15 U.S.C. § 1691c-1.

[4] 15 U.S.C. § 1691c-1(a)(2); Regulation B, Section 202.15, further refines the scope of the self-testing privilege and provides that it does not apply to the fact of testing, including methodology, scope, time period or dates of test. Nor does it apply to loan files themselves (including aggregated or summarized information).

Given the broad requirements, protections, remedies and powers provided by the ECOA, it should be questioned why it took over 30 years for there to be the first successful private enforcement of rights under the disparate impact provisions of the statute. Based on our experience in the auto finance discrimination, it is our opinion that the answer for this phenomenon is twofold.

First, without access to empirical aggregate data concerning the race, age or sex of the consumer pursuing non-mortgage related credit it is impossible for anyone to know that a creditor's credit policies have resulted in a disparate impact on a protected category. An individual who has been the victim of intentional discriminatory treatment may be able to collect direct or circumstantial evidence of actual discriminatory acts, practices or patterns of behavior regarding their own circumstances. However, an individual cannot even be aware of the fact that they have been the victim of the disparate impact of a credit policy without knowledge of all of the other transactions involving that credit policy and the ability to distinguish the race, sex or age of the consumers involved in such transactions.

In 2001, looking back on 10 years of empirical data in the auto industry, Professor Ian Ayres of Yale Law School, an expert witness for the plaintiffs in the *Borlay* case as well as in a number of the other auto finance discrimination cases brought by NCLC, concluded:

> While the impulse for race and gender discrimination in car markets (for example, the search for high-markup sellers) may not be the same impulse driving discrimination in other markets, the car market probably shares with other markets an important structural aspect that creates an opportunity to discriminate. Just as the car buyer has trouble knowing how other consumers are treated, there are myriad aspects of service and accommodation in which it is difficult for a consumer to know how other consumers are treated. A seller's nondiscrimination along these dimensions of service are a "credence" good that consumers to a large degree must simply take on faith. And these are just the dimensions where discrimination is most likely to persist.[5]

Until the filing of the auto finance discrimination cases under the ECOA, African American consumers simply did not know that they had been "marked up" or treated any differently than other consumers financing automobile purchases. These consumers trusted this dimension of service "on faith" and took in "on credence" that they were not being discriminated against - - and they were misled.

Second, even if one had the anecdotal "sense" that a particular credit policy had a discriminatory impact on a protected group, it was impossible to "prove" the violation under the ECOA without the necessary admissible evidence of that discrimination. In 1991, Professor Ayres published his groundbreaking article entitled *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* in the Harvard Law Review.[6] The article examined whether the process of negotiating for a new car disadvantaged women and minorities. "Testers" of different races and genders entered new car dealerships in the Chicago area and bargained to buy a car, using a uniform negotiation strategy. The study tested whether automobile retailers

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[5] *Pervasive Prejudice*, (2001) p 161-2.

[6] 104 Harv. L. Rev. 817 (February, 1991).

reacted differently to the uniform strategy when potential buyers differed only by gender or race.[7]

The results were extremely disturbing.[8] The tests revealed that white males received significantly better prices than blacks and women. White women had to pay forty percent higher markups than white men; black men had to pay more than twice the markup, and black women had to pay more than three times the markup of white male testers.[9]

However, the size of the pool of credit applicants studied by Professor Ayres through his testers simply was too small to present a statistically significant data base sufficient to sustain a disparate impact burden of proof under ECOA in a court of law. Unfortunately, unlike the circumstances in the mortgage lending industry, where the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. § § 2801-2810 and Federal Reserve Board Regulation C, 12C.F.R. § 203.2-303.6 require that mortgage lenders collect certain data on loan applicants and that the Federal Financial Institutions Examination Council prepare statements and produce various public reports on the practices of these individual lenders, no comparable publicly available race coded data base exists for non-mortgage loans. To the contrary, except for the self testing scenario provided by the ECOA discussed above (an obligation that, to the best of NCLC's knowledge and experience, has rarely, if ever, been undertaken by non-mortgage lenders pursuant to the statutory authority), the applicable laws currently prohibit the consideration, let alone collection, of such race based data.

In the auto finance discrimination cases the plaintiffs' attorneys developed a novel approach to creating a race coded data base that was large enough to perform aggregate analyses that were statistically significant. There currently are 14 states in the United States that include race as an identifying characteristic on their state drivers' licenses (Florida is the only state that maintains a separate "Hispanic" category). The original suits were brought in Tennessee, one of the 14 states where race is identified on resident drivers' licenses. The plaintiffs subpoenaed the records of the Tennessee Registry of Motor Vehicles to get electronic copies of all of the current residential drivers' licenses and matched the licenses against an electronic file of all of the defendant auto finance companies' consumer debtors in the state during a defined period of time. The computer comparison created a large pool of race-coded transactions that facilitated a disparate impact analysis by the plaintiffs' experts for the state.

The success of the Tennessee state-based data compilation effort encouraged the plaintiffs' counsel to seek to expand their research to the other 13 states where race is identified on drivers' licenses. More important, the results of the preliminary Tennessee disparate impact analyses were relied upon to convince the Federal Court in Nashville to permit the national studies to take place and to order the defendant auto finance companies to produce their

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[7] *Id.* at 818.

[8] Ayres extrapolates the results of his 1991 study to conclude that a $500 overcharge per car means that blacks annually paid, at that time, over $150,000,000 more for new cars than they would have if they were white males. *Id.* at 872.

[9] *Id.* at 819; See also, Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause,* 94 Mich. L. Rev. 109 (Oct. 1995), in which Professor Ayres' study was expanded and retested. The results were similar, but this time, unlike the original study, the black male testers were charged higher prices than the black female testers.

electronic files for all of their consumer debtors throughout the country during a defined period of time.

The computer comparison permitted us to develop race coded data bases for millions of transactions. Furthermore, as a result of the mobility of the American population, during the period of study a sufficient number of individuals moved to a state where race was included on their new driver's license, after financing a car in another state that did not, that we were able to race code a statistically significant data base for a total of 33 states (the original 14 states with race on their drivers' licenses and 19 more where race was not included on licenses). What we discovered when we completed our disparate impact analyses confirmed the results of our earlier, Tennessee limited, study, and served as the eventual evidentiary basis for our on-going national class-action litigation against the auto finance lenders.

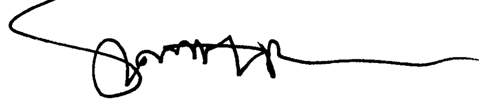
Needless to say, this innovative process, though ultimately successful, was extremely expensive and time consuming for the plaintiffs and their counsel. Discovery, computer analysis, expert review and presentation to the Court required an upfront expenditure of over $1 million. The litigation of the cases spanned from 1998 to 2006. It is highly unlikely that many groups (and this litigation involved at least 7 law firms working on behalf of the plaintiffs in the various cases over time) would have the wherewithal or resources to pursue and prove such a disparate impact claim under the ECOA.

NCLC believes that there are policies being applied by lenders at this very time in a wide range of non-mortgage related finance transactions that may result in disparate discriminatory impacts on various protected groups under the ECOA. The question is who will be able to uncover these cases of discrimination and actively pursue effective remedies as promised under the ECOA? The problem is that without access to data similar in nature and type to that made available through the HMDA for mortgage transactions, no one will have an easy time coding an aggregate pool of information sufficient to prove there has been disparate impact discrimination as a matter of law under the ECOA.

We therefore answer the question posed by the GAO as to whether lenders should be required to collect race and gender data of borrowers for all loans under Regulation B with an emphatic "yes". Only by adopting fair and reasonable procedures for collecting and disseminating such data, as already is the case through the HMDA, will there be public awareness of possible disparate discriminatory impacts caused by policies maintained by creditors in every area of the personal financial credit marketplace. Without this data, government enforcement agencies or private consumer advocates will not have the information they need to fully and adequately protect the rights of credit consumers guaranteed by the ECOA. It should not be another 30 years before there can be another successful civil rights enforcement action under the statute to eliminate a credit finance policy that results in racial or sexual discrimination.

Thank you for your consideration in this matter. We appreciate the opportunity to present this written testimony to you and the O & I Subcommittee of the Financial Services Committee on a civil rights and access to consumer credit issue of great importance. If you have any questions or would like additional information or assistance, please feel free to contact us.

Very truly yours,



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