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Business Litigation Update

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Seventh Circuit Confirms ECOA Applies to Prospective Applicants Post-*Loper Bright*

Key Notes:

- Federal Appeals Court finds that discouraging black loan applicants via podcasts is actionable under Reg B.
- CFPB retains authority for administrative findings.
- *Loper Bright* SCOTUS decision does not eliminate administrative authority.

Introduction

On July 11, 2024, the U.S. Court of Appeals for the Seventh Circuit addressed the Equal Credit Opportunity Act's ("ECOA") applicability to prospective credit applicants. In *Consumer Fin. Prot. Bureau v. Townstone Fin., Inc.*, the court held that considering ECOA's text, Congress authorized liability for discouraging prospective credit applicants, and thus Regulation B's ("Reg. B") prohibition on discouraging prospective applicants was, as a result, consistent with ECOA's text and purpose.

Background

Congress enacted ECOA to ensure that lenders make credit equally available regardless of an applicant's sex, marital status, race, color, religion, national origin or age. ECOA's definition of applicant does not include prospective applicants. The Federal Reserve Board first enacted Reg B. before transferring administrative responsibility for ECOA to the Consumer Financial Protection Bureau ("CFPB"). Reg B. prohibits creditors from making any oral or written statements to applicants or prospective applicants that would discourage a reasonable person from pursuing an application.

In 2020, the CFPB filed suit in the Northern District of Illinois alleging that a non-depository mortgage lender ("Lender") and its cofounder (with Lender, "Defendants") violated ECOA and Reg. B because they regularly made statements during a radio show and podcast that would discourage black prospective applicants from applying for mortgage loans.

To support its claims, the CFPB's complaint cited five examples of statements made during the radio show and podcast between 2014 and 2017, as well as statistical information showing that when compared to its peer institutions, Lender received fewer mortgage applications for properties in neighborhoods with a high-black population and fewer mortgage applications for properties in predominantly black neighborhoods.

The district court, relying on ECOA's definition of applicant, held that ECOA did not apply to prospective applicants and granted Defendants' motion to dismiss.

Decision

This decision comes in the immediate aftermath of the *Loper Bright* decision, where the Supreme Court overruled *Chevron*. The court acknowledged the holding in *Loper Bright*, stating that it "approach[ed] this case as presenting a question of statutory interpretation subject to [its] de novo review." Applying that *de novo* review, the court reversed and remanded the district court's decision.

The Seventh Circuit held although ECOA's definition of applicant does not include a prospective applicant, ECOA

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has long prohibited discrimination "with respect to any aspect of a credit transaction" and that "Congress well understood that 'any aspect of a credit transaction' had to include actions taken by a creditor before an applicant ultimately submits his or her credit application."

Relying on this language and reasoning, the Court held that Reg. B's prohibition against discouraging prospective applicants is consistent with the plain text of ECOA. The Court did not, however, express an opinion on the underlying merits of the CFPB's claim and reversed and remanded the matter back to the district court.

Conclusion

Prior to *Loper Bright*, creditors operated under the presumption that ECOA applied to prospective applicants, and this decision demonstrates, at least for the time being and in the Seventh Circuit, that remains true.

The case is also an example of why creditors should be cautious what they and their employees say in writing to applicants or prospective applicants and what they say in any outlet. In a landscape where social media and other forms of marketing are becoming increasingly prevalent, creditors must be vigilant about the potential impact of their statements. They should carefully consider whether their words could deter individuals who might otherwise consider applying for a loan. Since the interpretation of these messages depends on the audience, and the reach of that audience is often unpredictable, it is crucial to exercise caution.

FOR MORE INFORMATION

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