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ARTICLES

Lower Class-Certification Standards as Discrimination Suit Moves Forward

By Elizabeth E. McGinn, Benjamin P. Saul, and Sarah Betts Esterhay

What do 1.5 million current or former female employees of the world's largest retailer have in common? Courtesy of the Ninth Circuit, they are all potential class members in a lawsuit against Wal-Mart, alleging gender discrimination. In *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), an en banc court upheld the certification of the largest ever civil-rights lawsuit with a nationwide class of women who worked at Wal-Mart stores at any point since 1998.

In this case, the Ninth Circuit lowered the standard for class certification under Rule 23 of the Federal Rules of Civil Procedure. The court announced a more lenient standard of proof at the certification stage and eased restrictions on expert testimony and statistical evidence. In addition, the court allowed the lawsuit to proceed under the less restrictive standard in Rule 23(b) for cases seeking equitable relief, as opposed to the more stringent standard for cases where monetary relief predominates. Furthermore, the court held that a defendant's right to assert defenses against the individual claims can be satisfied by conducting a series of sample mini-trials and then using a formula to calculate damages.

This decision is significant not only for the parties in this case, but also for employers and class-action litigants generally. Courts, moreover, have already applied the decision outside the employment-discrimination context, including in fair-lending class-action cases.

Background

In 2001, a small group of women currently or formerly employed by Wal-Mart, the largest private employer in the world, brought a class action in a California district court for sex discrimination under Title VII of the 1964 Civil Rights Act. The plaintiffs asserted that Wal-Mart had engaged in company-wide discriminatory practices, resulting in female employees receiving less pay and fewer promotions than their male counterparts. They sought injunctive and declaratory relief, back pay, and punitive damages on behalf of a proposed class of an estimated 1.5 million female employees (current and former) who worked at any time since December 1998 in any of Wal-Mart's 3,400 U.S. stores.

In 2004, the district court certified two classes: one class of current and former female employees seeking injunctive and declaratory relief and back pay, and a separate class of the same employees seeking punitive damages. The district court declined to certify claims for back pay based on Wal-Mart's failure to promote.

Wal-Mart appealed the certification of both classes. In 2007, an appellate panel affirmed the district court's ruling, and the Ninth Circuit then granted en banc review. The en banc court affirmed the certification of the claims for injunctive and declaratory relief and back pay; affirmed the district court's refusal to certify a class of employees who were allegedly denied promotions; excluded the former employees and remanded for the district court to consider whether a subclass or separate class would be appropriate; and remanded the punitive-damages class for the district court to make further determinations. The en banc court was sharply divided (6–5), and both the majority and the dissent issued lengthy opinions. On August 25, 2010, Wal-Mart filed a petition for certiorari with the U.S. Supreme Court. *See* [Petition for Writ of Certiorari, *Dukes*, U.S. \(No. 10-277\)](#). The petition presents the following questions to the Court: (1) whether claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances; and (2) whether the certification order at issue conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Rule 23. On December 6, 2010, the Court agreed to hear the case, granting certiorari on both questions presented. The Court is likely to hear oral argument in the spring of 2011 with a full bench.

Ninth Circuit's Rulings

Overall Standard to Be Applied in Class Certification

After an extensive review of Ninth Circuit precedent and other circuits' case law, the court purportedly clarified the standard to be applied at the class-certification stage. The court determined that the district court must perform a "rigorous analysis" to ensure that the Rule 23 requirements are in fact satisfied, rather than merely presumed from the pleadings. The court explained that while this analysis will often require the district court to look beyond the pleadings, the district court may not analyze any portion of the merits that does not overlap with Rule 23 requirements. In addition, the district court must conduct separate inquiries for the different parts of Rule 23. Furthermore, the district court retains wide discretion in class certification decisions, and under certain circumstances, the district court may properly limit discovery to avoid a mini-trial on the merits.

In adopting this "rigorous analysis" standard, the court expressly rejected the dissent's "significant proof" approach. The dissent's standard would require a plaintiff to demonstrate a general policy of discrimination that was implemented through subjective decision-making processes in a way that affected all members of the class, rather than merely discrete instances of discrimination. However, the Ninth Circuit did not take this approach.

Rule 23(a)(2)—The “Commonality” Requirement

The court may certify a class only if it meets all the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Rule 23(a) requires that:

1. The class is so numerous that joinder of all members is impracticable.
2. There are questions of law or fact common to the class.
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class.
4. The representative parties will fairly and adequately protect the interests of the class.

In this case, the court focused its attention on the second of these requirements, that the class members have common issues of law or fact. The court held that test is “qualitative rather than quantitative,” and that the requirement is met if the evidence shown merely “raises” the common question of whether the plaintiffs were subjected to a single set of company-wide discriminating practices, versus independent discriminatory acts.

Daubert’s Role at the Class-Certification Stage

The *Dukes* court significantly limited the restrictions on expert opinion at the class-certification stage. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court announced the standard governing the admissibility of expert testimony, which requires the district judge to act as a “gatekeeper” and consider certain factors to ensure that the evidence is relevant and reliable.

Splitting with at least one other circuit, the Ninth Circuit in *Dukes* held that a full *Daubert* examination is not required at this stage of the proceedings, and that the district court did not abuse its discretion by denying Wal-Mart’s request for a *Daubert* hearing. With respect to both expert testimony and statistical evidence, the court emphasized that the persuasiveness of the evidence should not be evaluated at the certification stage, but rather is a determination on the merits, which should be made at a later time. This decision allows a defendant to seek a *Daubert* review at the merits stage, which could result in exclusion of this evidence and defeat the class action.

The dissent argued that the district court has a responsibility to use its “gatekeeping” function to establish that expert testimony is relevant and reliable before relying on it for a substantive decision. Likewise, the Seventh Circuit recently held that a full *Daubert* analysis is required where the expert opinion is critical to certification. In *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), the Seventh Circuit reached the opposite conclusion from the Ninth Circuit, and held that the district court must conduct a *Daubert* analysis at the class-certification stage for any key testimony.

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Standard for Whether Monetary Relief Predominates under Rule 23(B)

Once the district court finds that a class meets all of the requirements under Rule 23(a), the court must further find that the class satisfies one of 23(b)(1), (b)(2), or (b)(3). Rule 23(b)(2) allows certification for claims for injunctive and declaratory relief, while claims in which monetary relief “predominates” must be certified under Rule 23(b)(3). Because Rule 23(b)(3) imposes a more rigorous standard than Rule 23(b)(2), it is not surprising that the *Dukes* plaintiffs sought to certify their class under the latter.

The Ninth Circuit announced a new test for determining when monetary relief predominates such that certification under Rule 23(b)(2) is not appropriate: whether monetary damages are “superior [in] strength, influence, or authority” to injunctive and declaratory relief. Four factors must be considered: (1) “whether the monetary relief sought determines the key procedures that will be used,” (2) “whether it introduces new and significant legal and factual issues,” (3) “whether it requires individualized hearings,” and (4) “whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns.” *Dukes*, 603 F.3d at 617.

In *Dukes*, the court held that the claims for back pay did not predominate over the claims for injunctive and declaratory relief. However, the court concluded that the district court failed to consider whether certifying the punitive-damages claims caused monetary relief to predominate, and remanded for the district court to apply the four-factor test to those claims. The court also excluded former employees from the class, because they cannot claim injunctive or declaratory relief, and remanded to the district court for a determination of whether certification is appropriate under Rule 23(b)(3).

Other circuits have taken different approaches to determine when monetary relief predominates. The Fifth, Sixth, Seventh, and Eleventh Circuits hold that monetary relief predominates unless it is “incidental” to injunctive or declaratory relief. The Second Circuit focuses on the plaintiffs’ “subjective intent” in bringing the lawsuit. However, the Ninth Circuit “see[s] no need to employ either approach.”

Availability of Affirmative Defenses and Due-Process Concerns

In *Dukes*, Wal-Mart argued that it was entitled to present affirmative defenses on an individualized basis, pursuant to the Title VII and the Rules Enabling Act, as well as their due-process rights. The Ninth Circuit rejected this argument and held that Wal-Mart’s statutory and due-process rights would be protected by a “formula” method to calculate back pay on a class-wide basis. Under this approach, the district court would select “sample cases” and discount the award to the class by the proportion of meritless cases in the sample.

The dissent argued that Wal-Mart has the right to raise affirmative defenses as to each class member’s claim, and that the procedure suggested by the majority should not be used in a Title



VII case. Likewise, the Fifth Circuit rejected this formula approach in *Cimino v. Raymark Indus. Inc.*, 151 F.3d 297, 319 (5th Cir. 1998).

Looking Forward after *Dukes*

Implications for Class Actions Generally

Dukes is likely to increase the number of class actions filed and impact the evidence used to support certification. It is especially likely that there will be more actions targeting discretion in decision-making as the basis for a policy of discrimination. While discretion alone is not sufficient to meet the burden of proof, it is acceptable when considered with other evidence, such as statistics and anecdotal evidence. Discretion provides the “nexus” between subjective decision-making and statistically significant disparities. The result is paradoxical. Discretion implies that decision-making is not consistent across class members, which should be a basis for defeating certification, but after *Dukes*, a “policy of discretion” may form the basis for a claim of a pattern or practice of discrimination. Employers may want to consider reviewing corporate decision-making practices and evaluate the level of discretion given to employees.

In addition to lowering the standard for certification under Rule 23(a), the *Dukes* court also lowered the standard for expert opinion allowed at this stage. Accordingly, this decision encourages greater use of expert opinion and statistical evidence. The *Dukes* decision may also result in a decline in the quality of this expert opinion, because parties will not be required to undergo a full *Daubert* examination of their evidence. Where plaintiffs are seeking equitable relief along with back pay or some other form of monetary damages, it may be easier for them to achieve certification under Rule 23(b). The Ninth Circuit created a new rule for determining whether monetary relief predominates, and if the court finds it does not, then plaintiffs are not subject to the additional requirements of Rule 23(b)(3). Finally, courts may place greater reliance on formulas to determine damages as opposed to individual hearings. This raises a variety of due-process and case-management concerns.

Implications in the Fair-Lending Context

The impact of the *Dukes* decision will extend far beyond the employment context to other areas of law, including fair lending. Indeed, at least one court has already applied *Dukes* to grant class certification in a fair-lending case. In *Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. C08-0369, 2010 WL 2867068 (N.D. Cal. July 20, 2010), the U.S. District Court for the Northern District of California granted certification for a nationwide class of minority borrowers alleging that a wholesale mortgage lender violated the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) by giving its brokers discretion to mark up the price of wholesale loans, a policy that led to higher rates for minority borrowers.



In granting the motion for certification, the *Ramirez* court relied heavily on the *Dukes* decision. In particular, the court determined that the plaintiffs' reliance on statistical evidence to meet the commonality requirement was "well-founded in Ninth Circuit precedent." The court cited *Dukes* for the proposition that statistical disputes are part of the merits inquiry and need not be resolved at the certification stage.

The court followed the *Dukes* approach that a policy of discretion may form the basis for certification. The court stated that

[a]s in *Dukes*, Plaintiffs are challenging a subjective policy that applied to all of GreenPoint's authorized brokers and, hence, every member of the proposed class. . . . The claims of all class members hinge on a common question: whether GreenPoint's discretionary pricing policy had a disparate impact on minority borrowers.

Similarly, the court found that the typicality requirement was satisfied because like the named plaintiffs, all class members were subject to the discretionary pricing policy. *Ramirez*, 2010 WL 2867068, at *6-7.

Ramirez, thus, illustrates the way in which *Dukes* could operate to ease plaintiffs' class-certification and related burdens under Rule 23 in other fair-lending litigation. Given the increasing number of fair-lending lawsuits that have been brought against financial-services companies in the wake of the credit crisis, lenders should examine the *Dukes* decision and its emerging fair-lending progeny with care.

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Have You Heard of Electronic Discovery and Metadata?

By John T. Rouse

On December 1, 2006, after years of comments and modifications, the amendments to the Federal Rules of Civil Procedure regarding electronic discovery became effective. The amendments affecting electronic data include Federal Rules 16, 26, 33, 34, 37, and 45.

The amendments to Rule 16(b) require the parties to discuss electronic discovery at their initial Rule 16 "meet and confer" conference, and electronic discovery may now be included in the scheduling order. The amendments to Rule 26(b)(2)(B) limit the scope of electronic discovery when information is "not reasonably accessible" because of undue burden or cost. New Rule 26(b)(5)(B) recognizes the substantial cost of reviewing a high volume of electronically stored

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information (ESI) for privilege and relevancy, and loosens the prior rules on inadvertent production of privileged information to address the cost issues and promote quicker initial production. The amendments to Rule 26(f) provide that at the initial discovery conference, the parties should discuss the preservation of discoverable information, discovery, and form of production of ESI, and assertion of privilege post-production. The amendments to Rules 33 and 34 discuss the actual procedures for e-discovery. Rule 37(f) was amended to include a safe harbor when a party fails to provide ESI but has acted in good faith. The amendments to Federal Rule 45 incorporate the changes made to Rules 26 and 34 for subpoenas.

Of particular importance to the litigator are the amendments to Rules 16 and 26 regarding conferences. The attorney must immediately communicate with the client regarding the client's electronic data, and must gain at least a basic understanding of the client's systems, including where the ESI is or could be located and how it can be accessed, to be adequately prepared to discuss ESI with opposing counsel at the initial Rule 26(f) conference. The lawyers on both sides must be able to discuss and agree on e-discovery issues at the Rule 26(f) conference, including identification, collection, production, review, and clawback. The lawyers are then able to go to the court at the Rule 16 conference with fewer discovery disputes and less likelihood of subsequent spoliation accusations and sanctions requests.

What Type of ESI Is Discoverable?

Based on the amended rules and the recent case law, the question arises, "What is discoverable?" The short answer is "everything relevant." In the six opinions arising from the *Zubulake v. UBS Warburg, LLC* litigation, the principal ESI at issue was email. ESI can, however, include virtually any form of electronic communications, including emails, instant messages, text messages, and voicemails, and any electronically created or stored documents, including Word or WordPerfect documents, spreadsheets, databases, and any customized electronic information that may be used. No. 1:02cv1243 (S.D.N.Y. filed Feb. 15, 2002).

The e-discovery amendments to the Federal Rules place strong emphasis on the ability to review files in their "native format," which is the associated file structure as defined by the original application creating the ESI. For example, Microsoft Word documents in their native format are created as ".doc" files. The native format of a Microsoft Word document thus is not the printed or scanned document produced in printed format or electronically as a .pdf or .tiff image, but the original .doc format. While native file format may be unfamiliar territory for many litigators, some familiarity with the concept is important, because the native file format of ESI is where metadata is found.

What Is Metadata?

When a document is created on a computer, the particular computer program automatically creates certain information, such as who created the document, when it was created, how long the user worked on the document, how many words are in the document, who has edited it, when it was last edited, and much more. This computer-created information is called "metadata." The



simple definition of metadata is “information about information.” A more precise definition is provided by the Sedona Conference, a legal think tank consisting of judges, attorneys, and others experienced in electronic-discovery matters:

Metadata is information about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Can be extracted when native files are converted to image. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed.

[The Sedona Glossary for E-Discovery and Digital Information Management \(Second Edition\)](#), December 2007.

Although metadata is contained in most documents created on a computer, it is embedded in computer files and is invisible to most users. A technologically proficient user who knows what he or she is looking for and how to find it though can “mine” the metadata to discover a potential gold mine of useful information. The file containing the specific metadata is called an OLE (object linking and embedding storage) file. OLE files travel with a document wherever it goes (in native format), and generally contain information such as the user’s name and initials, the company name, the computer name, the server name, previous authors and revisers, the number of revisions or versions, hidden text, comments, and other file properties and summary information.

At first glance, this metadata might appear relatively harmless. In the litigation context, however, metadata can potentially provide the “smoking gun” in a mountain of documents. In the expert’s hands, metadata provides an electronic paper trail of each person that “touched” a particular document and what that particular person did to it. For example, a witness might testify that a document was created and sent on a particular date, or that he or she was the only person who worked on that particular document, while the metadata tied to the particular document would reveal the document’s true origin and edits, and possibly provide counsel with powerful cross-examination ammunition.

Specific Dangers

Two standard features in Microsoft Word create significant metadata risks: “Versions” and “Track Changes.” The “Versions” feature in Microsoft Word saves a new version of the document in the OLE automatically, without giving the user notice of the changes. The risk is that this feature, if activated, automatically records all of the user’s prior versions, including any revisions by any clients or other counsel, with the attendant risks of inadvertently disclosing confidences. This information, if simply linked to an email, would then be accessible by the receiving attorney, who may well be opposing counsel.

The “Track Changes” feature allows multiple parties to work in collaboration on documents, and permits a user to send drafts of documents, with edits and comments, to others, including co-counsel, the client, and opposing counsel. The receiving user can then review the specific changes made by each user, and either accept or reject them. The risk with using this feature is that changes may be hidden. If, for example, the “Hidden Text” option is turned on, the user editing the document may make changes without realizing that those changes are automatically being recorded in the background without any action by the editing user. This is but a single example of the metadata created by a single software application. Such a software package has its own way of recording and saving metadata, although industry experts agree that metadata is significantly more prevalent in Microsoft products than in those of its competitors.

Why Should Attorneys (and Their Clients) Be Concerned?

In the past several years, metadata has become a concern to anyone who transmits electronic documents. Given the pervasive role of technology in everyday life, an attorney must be at least moderately aware of metadata to effectively, competently, and zealously represent the client. An attorney’s concern with metadata primarily arises in two contexts: electronic discovery, and communications with opposing counsel and/or the client.

There are horror stories regarding metadata. In 2005, an anonymous, unsigned Microsoft Word document was circulated referring to the “anti-civil rights and anti-immigrant rulings” of Judge Samuel A. Alito Jr., shortly after his nomination to the Supreme Court by President Bush. A review of the document’s metadata disclosed that the memo was drafted by two authors who were, in actuality, members of the Democratic National Committee. The metadata revealed both the authors’ names and the date of creation of the document, which was, interestingly (but perhaps not coincidentally), prior to Judge Alito’s nomination.

In another example, the *New England Journal of Medicine* found metadata revealing that Merck & Company had deleted certain data in a study about Vioxx concerning heart attacks. Merck attempted to dismiss the finding, stating that the Vioxx data uncovered by the journal had been deleted because the heart attacks occurred after a cut-off date for information collection in the study.

Another example involves a large law firm partner who passed off an assignment for a corporate client to an associate. A memo was drafted, supposedly by the partner, and transmitted to the client via email without having the metadata scrubbed from the document. The client examined the memorandum’s metadata and determined that it was the associate, not the partner, who was the document’s author. The metadata also showed only minor edits by the partner. The principal embarrassment came, however, when the partner billed the client as if he had drafted the document, charging the client the partner’s rate. This example has not been confirmed, but if true, would likely destroy the attorney-client relationship as well as raise a myriad of ethical concerns.



Is It Ethical to Peek at Metadata?

As with any other facet of the law, counsel must exercise at least minimum competency in the representation of a client, which now involves being versed in electronic discovery. However, most attorneys involved in electronic discovery are under duties not listed in their state's rules of professional conduct—duties of which they may not even be aware. One of the *Zubulake* opinions warned that “parties and their counsel are fully on notice of their responsibilities to preserve and produce electronically stored information,” and recognized several duties incumbent on counsel engaged in e-discovery. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004). Similarly, another court ordered the parties to “continue to preserve data that they know, or should know, is relevant to the ongoing litigation, including preservation of all data compilations, computerized data and other electronically-recorded information”. *Kleiner v. Burns*, No. 00-2160 2000, WL 1909470 (D. Kan. Dec. 22, 2000). At least one court has held that a lawyer's duty of fundamental competence now encompasses that same level of competency as it relates to digital technology, especially the information-technology systems used by one's client. *GTFM, Inc. v. Fubutu Home & Educ. Media, Inc.*, No. 01 Civ. 6595VM, 2003 WL 22439791 (S.D.N.Y. Oct. 27, 2003).

On August 5, 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-442 regarding metadata, concluding that “the Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party.” ABA Standing Comm. on Ethics and Prof'l Responsibility, [Formal Op. 06-442](#) (2006). The committee pointed out in its opinion that Rule 4.4(b) is the only provision in the ABA Model Rules that addresses the lawyer's obligations regarding inadvertently received information. Rule 4.4(b), added in 2002, states that a lawyer who receives information that he or she knows or should know was sent inadvertently “shall promptly notify the sender.” The committee's notes to Rule 4.4 state, “Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information.”

The ABA Model Rules serve as a model for the rules of professional conduct in 47 states, but are not followed in California, Maine, or New York. The states considering the issue have split on whether it is permissible for counsel to examine metadata in documents transmitted by opposite counsel, with a distinction made by some as to whether the production was inadvertent.

Some states have decided that viewing metadata received by opposing counsel is generally not an ethical violation. Maryland, Colorado, Pennsylvania, and Vermont have taken variations of this view. *See* Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (Oct. 19, 2006); Colo. Bar Ass'n Ethics Comm., Formal Op. 119 (May 17, 2008); Pa. Bar Ass'n Comm. On Legal Ethics & Prof'l Responsibility, Formal Op. 2009-100; Vt. Bar Ass'n, Prof'l Responsibility Section, Ethics Op. 2009-1. Other states have determined that such conduct may indeed violate the ethical rules. New York, Florida, Alabama, Arizona, Maine, and New Hampshire generally take this approach. *See* N.Y. State Bar Ass'n, Op. 749 (Dec. 14, 2001); Opinion 782 (Dec. 8, 2004); Fla. Bar, Ethics



Op. 06-2 (Sept. 15, 2006); Ala. State Bar Office of Gen. Counsel, Ethics Op. 2007-02 (Mar. 14, 2007); Ariz. Bar Ass'n, Op. 07-03 (Nov. 2007); Me. Prof'l Ethics Comm'n, Op. 196 (Oct. 21, 2008); N.H. Bar Ass'n Ethics Comm., Op 2008-2009/4 (Apr. 16, 2009).

The District of Columbia and West Virginia have adopted a compromise position that a receiving lawyer is prohibited from reviewing metadata sent by an adversary only where the receiving lawyer has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer. D.C. Bar, Op. 314 (Sept. 2007); W. Va. Legal Ethics Op. 2009-01 (June 10, 2009).

Scrubbing Metadata

There is an important distinction to be drawn between the day-to-day transmission of electronic documents, both between attorneys, and with their clients, and the production of ESI pursuant to discovery requests. As to the former, the lawyer must always consider attorney-client privilege in communications, and when appropriate, “scrub” metadata from documents sent to opposing counsel to avoid potential liability for disclosure. Failure to remove metadata from documents created or revised by an attorney prior to transmission outside the firm will likely become a fertile source of future attorney-malpractice claims. Conversely, scrubbing metadata from documents produced in discovery, particularly when the metadata is requested to be produced and is potentially relevant, is probably a violation of the new Federal Rules, and according to the *Zubulake* opinions, will expose both the attorney and the client to potentially severe sanctions.

Once the distinction is made between scrubbing metadata contained in day-to-day communications between counsel and properly requested discoverable metadata, the issues can be more easily parsed. Many lawyers use scrubbing programs that eliminate metadata from electronic documents sent from their offices—in fact, some commentators posit that it may be malpractice *not* to routinely scrub such metadata.

It is important to note that whichever method is chosen, there should be a standard scrubbing procedure throughout the firm. Attorneys and staff should be trained on the standard protocol, and the process should be automated to the maximum extent possible to avoid the inadvertent transmission of “unscrubbed” documents, particularly by untrained or unaware lawyers.

Conclusion

Although e-discovery is still in its infancy, a body of law is rapidly developing, which requires the federal practitioner (and the state-court practitioner, as well, in those states that have adopted ESI discovery rules) to be familiar with both the concept of e-discovery and ESI production, and the client’s systems, practices, and procedures. Read the amendments to the Federal Rules of Civil Procedure. Read the decisions, including the *Zubulake* opinions. Talk to your clients, and become familiar with their technology platforms and protocols. The trend seems to be developing among the courts to place at least part of the burden of ensuring client compliance

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with litigation holds and discovery orders on the attorney, and the sanctions and penalties for a failure to do so can be extremely expensive. It behooves the wise practitioner to become familiar with at least the basics of e-discovery and, as with other specialty areas, to know when to bring in outside expert assistance. And watch the developing case law as the courts hand down their opinions on this topic to be able to more accurately predict the scope and outcome of future e-discovery battles. Talk to your own consultants regarding metadata in documents sent from your system, and make sure that you have adequately addressed any potential concerns in that regard.

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DOJ Settlement May Signal Expanded Liability and Aggressive Enforcement

By Benjamin P. Saul

On March 19, 2010, the U.S. District Court for the District of Delaware [approved](#) a settlement between the Department of Justice (DOJ) and two subsidiaries of American International Group Inc.—AIG Federal Savings Bank (AIG FSB) and Wilmington Finance, Inc. (WFI and, together with AIG FSB, AIG), an affiliated mortgage lending company—resolving allegations that the companies engaged in a pattern or practice of discrimination against African American borrowers. The settlement reflects the DOJ's increasingly aggressive enforcement of fair-lending laws and, to the extent it broadens lender liability for the actions of third parties, is especially significant.

Allegations in the Complaint

The DOJ's complaint, brought under the Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA), alleges that from approximately July 2003 to May 2006, African American borrowers nationwide were charged broker fees on wholesale mortgage loans^[1] that were, on average, 20 basis points higher than similarly situated non-Hispanic white borrowers. The matter was referred to the DOJ after an October 2007 examination of AIG FSB by its regulator, the Office of Thrift Supervision (OTS), which led the agency to believe that AIG FSB and WFI had engaged in a pattern or practice of discrimination on the basis of race after an analysis of their 2005 Home Mortgage Disclosure Act (HMDA) data.

During the relevant time period, AIG FSB funded mortgage loans that were originated by WFI pursuant to a mortgage loan services agreement. According to the DOJ's complaint, approximately 94 percent of the loans that WFI originated for AIG FSB were wholesale loans supplied by third-party mortgage brokers. These wholesale brokers were compensated through direct or "up-front" fees and/or yield-spread premiums.^[2] The direct fees were set by the brokers



in their full, independent discretion and paid by borrowers. The yield-spread premiums were subject to an upper limit and paid by WFI and AIG FSB to the brokers. The complaint includes allegations that WFI and AIG FSB did not (i) establish objective criteria for brokers to use in setting direct fees; (ii) oversee or supervise brokers in setting the amounts of direct fees; or (iii) monitor the amounts of direct fees for "racially discriminatory disparities." The complaint alleges that the higher broker fees charged to African American borrowers were based on at least some race-related factors as a result of WFI and AIG FSB's policy and practice of granting "unsupervised and subjective discretion" to brokers, which was "not justified by business necessity or legitimate business interests."

Terms of Settlement

Under the settlement, AIG FSB and WFI deny all allegations and will pay up to \$6.1 million to African American borrowers who were charged higher broker fees than similarly situated, non-minority borrowers, and will invest at least \$1 million in consumer financial-education efforts. The settlement also requires the entities to develop and implement direct broker-fee monitoring programs and to provide employee training. In addition, although neither AIG FSB nor WFI are currently engaged in lending activities, should either company choose to re-enter the wholesale mortgage business, it will also be prohibited from discriminating on the basis of race or color.

Expanded Lender Liability

Notably, the settlement underscores the persistence of the DOJ's efforts to hold lenders accountable for the conduct of third-party, independent mortgage brokers, who are neither employed by nor controlled by such lenders. This action against AIG FSB and WFI is the latest in the line of cases brought by the DOJ that alleges that lenders are liable for the actions of wholesale brokers, following the DOJ's actions against Long Beach Mortgage Company in 1996 and Delta Funding Corporation in 2000.

In the Long Beach action, the DOJ alleged that the lender was responsible for discrimination in the "entirety of its lending operations," including discretionary amounts charged by its wholesale brokers, because the lender ultimately "retained the right to determine whether to grant the loan." As part of that settlement, the DOJ required that Long Beach (i) offer fair-lending training to its wholesale brokers and (ii) obtain expanded documentation for loans that included price exceptions. However, the settlement only required the "periodic review" of wholesale brokerage operations for compliance with fair-lending laws, in contrast to the more stringent requirement that Long Beach implement a monitoring system for its retail mortgage loans.

Similarly, the Delta action alleged that the lender discriminated in "acceding to the discretionary prices that were charged by mortgage brokers for the loans made by Delta." However, the settlement went further than the Long Beach agreement, affirmatively requiring that with respect to wholesale lending operations, the lender "reject the broker's proposal or make a counteroffer when it believes the broker's proposed compensation and costs are not permitted under the fair lending laws." In a step closer to implicating a duty to monitor wholesale brokers, the Delta



settlement then also required the lender to implement a "detailed periodic monitoring" system of mortgage-origination pricing practices "to ensure that flexible pricing does not result in discrimination."

Now, in the case against AIG FSB and WFI, the DOJ has demonstrated a willingness to impose such a duty to monitor wholesale brokers by proceeding under a theory of liability that implicates the lender for failing to "supervise" third-party wholesale brokers and "monitor" the amount of direct fees charged by them to borrowers. Although the settlement is not binding precedent, this continued expansion of liability to lenders for the actions of third parties could herald a significant trend by government enforcement authorities to go after more visible, deep-pocketed entities where it may be impractical, if not impossible, to pursue the actual wrongdoer. Such secondary liability raises important compliance and due-diligence^[3] concerns for mortgage lenders offering wholesale loans.

The continued expansion of liability could also trigger similar private litigation against lenders to seek redress for third-party acts. Because mortgage brokers are relatively unattractive defendants given the difficulty in obtaining nationwide class certification in suits against them^[4] and their limited ability to satisfy large judgments, lenders may prove to be more appealing targets for private litigants. For example, in the 2006 case *In re First Alliance Mortgage Company*,^[5] the U.S. Court of Appeals for the Ninth Circuit held that a participant in the secondary mortgage market was liable for the predatory lending practices of a mortgage lender under an aiding-and-abetting theory.^[6] It is possible that we may see future aiding-and-abetting allegations, possibly under state-law theories, against secondary-market-loan purchasers.

Disparate Impact and Discretionary Pricing

The action against AIG FSB and WFI also shows the DOJ's more aggressive use of disparate impact theory,^[7] which may reveal statistical patterns that implicate race-based disparities, even where brokers may not have engaged in discriminatory conduct. Such "disparate impact" statistics have commonly been used in attempts to prove fair-lending-discrimination claims by applicants who are members of a protected class. Several of these cases are currently being litigated nationwide, and similar allegations that rely on statistical analysis to make a claim can be expected in future actions by the DOJ and private litigants.

Moreover, the action highlights the DOJ's continued scrutiny of discretionary-pricing models. In the complaint, the DOJ alleges that the discretion granted to brokers by WFI and AIG FSB in pricing direct fees resulted in discrimination on the basis of race or color, citing as evidence allegedly statistically significant disparities between the fees charged to African American borrowers versus white borrowers. Although no findings were made, the complaint alleges that there was no legitimate business justification for the discretionary pricing by brokers from whom the companies purchased wholesale loans.



Although not perfectly analogous, in the automobile-lending context, the DOJ implicitly recognized that competition can be an appropriate business justification for discretion in pricing. In 2007, the DOJ settled actions against Springfield Ford and Pacifico Ford, two automobile dealerships that allegedly discriminated against African American customers by charging them higher interest rates on car loans. The DOJ settlement provided for a disclosure form to document any exceptions to base rates, which allowed for interest rate mark-ups by dealers at their discretion. If the dealer varied from the pre-established interest rate, he or she had to select from the reasons set forth on the disclosure form, which included grounds such as competing offers or promotional financing campaigns. By now alleging that there is no legitimate business justification for discretion in pricing by wholesale brokers, the DOJ's complaint against AIG FSB and WFI seems to depart from its earlier position permitting pricing discretion on the basis of competition. Further scrutiny of the use of discretionary pricing models can be expected in future government examinations and enforcement actions.

Risk-Mitigation Strategies

The government's focus on limiting discretionary pricing in broker fees for residential mortgage loans is evident from the undertakings outlined in the settlement's [consent order](#). The measures that AIG FSB and WFI must implement should either of them choose to re-enter the wholesale home lending business suggest best practices that lenders should consider making part of their compliance efforts: (i) establishing a loan-pricing policy with limits on the amounts of fees that may be charged; (ii) disclosures regarding broker fees and compensation and notice of non-discrimination; (iii) improved documentation in loan files; (iv) enhanced compliance review, including implementing a monitoring program, equal-credit-opportunity training for employees and brokers, and robust borrower-complaint-resolution programs; and (v) consumer education, including credit counseling and financial literacy. Adoption of the above practices, in conjunction with other risk-mitigation strategies such as managing discretion exercised by employees and third parties and tracking exceptions to underwriting policies, should limit violations of fair-lending laws and potential lender liability for third-party actions.

Conclusion

The AIG FSB and WFI action and settlement sends a strong message that the DOJ intends to continue to enforce fair-lending laws aggressively. In the DOJ's press release, both the assistant attorney general in charge of the DOJ Civil Rights Division and the Financial Fraud Enforcement Task Force executive director used emphatic language to signal their intent to bring future actions, characterizing this case as a "warning shot," attributing discriminatory practices as partially causing the subprime mortgage crisis, and calling for accountability by lenders, brokers, and other parties. Thus, lenders should take proactive steps now to mitigate such litigation and enforcement risks.

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Endnotes

1. “Wholesale mortgage loans” are loans originated by independent third-party mortgage brokers to be funded by a lender, usually pursuant to a broker agreement. Such loans are differentiated from loans made directly to borrowers by a lender through, e.g., a retail branch.
2. “Yield-spread premium” refers to the fee a lender pays a broker for an interest rate on a loan to a borrower that is higher than the wholesale interest rate offered to the broker by the lender.
3. The DOJ settlement in its 2002 action against Fidelity Federal Bank may provide insight into the agency’s stance regarding a lender’s due-diligence burden with respect to third-party service providers, including possibly wholesale brokers. In this case, the DOJ brought an action against Fidelity Federal, alleging discrimination in the bank’s subprime-credit-card programs marketed by third-party service providers. The complaint further alleged that Fidelity Federal “failed to perform adequate due diligence on the service providers” prior to executing the marketing agreements and “failed to ensure that the service providers had policies in place which would ensure compliance with fair lending laws.” The settlement required the bank to implement a compliance and risk-management program that included due-diligence review. It is possible that the government may make similar allegations regarding adequate due diligence of third parties against lenders in future actions.
4. Several characteristics of the mortgage origination industry that pose difficulties to class certification include differing regulatory schemes and applicable law across the states; the diverse nature of brokerage operations, ranging from unaffiliated individuals to large corporate divisions; and the highly individualized facts and circumstances surrounding the origination of each loan to a borrower.
5. 471 F.3d 977 (9th Cir. 2006).
6. *Id.* In this case, Lehman Brothers was sued under California law by a class of mortgagors for the fraudulent conduct of subprime lender First Alliance Mortgage Company. During the relevant time period, Lehman eventually became First Alliance’s sole source of warehouse funding and underwriting. The court found that Lehman had direct knowledge of First Alliance’s fraudulent lending practices and substantially assisted those practices through its financing of First Alliance’s operations, and was therefore liable on aiding and abetting. The plaintiffs were awarded over \$5 million in damages.
7. Debate exists over the validity of claims brought under the FHA and ECOA that are premised upon disparate-impact theory because neither statute contains language that expressly authorizes such claims or includes “effects” language, as found in Title VII of the Civil Rights Act of 1964 and discussed by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). See Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words that Actually Are There*, 61 BUS. LAW 829 (2006).



The Continuing Violations Doctrine and Mortgage Payments under the FHA

By Kirk D. Jensen

In the wake of the turmoil in the housing market, some homeowners have sought to stave off foreclosure by alleging that the lender that originated the mortgage loan violated various provisions of federal and state law. Unfortunately for these homeowners, their claims are often brought after the applicable limitations period has lapsed. To avoid this result, homeowners and their attorneys have tried to apply various doctrines in an attempt to enlarge the applicable limitations period. One such doctrine is the “continuing violations doctrine,” under which a limitations period may be extended if one or more “continuing violations” occur within the limitations period.

Courts have recently struggled with the application of the continuing violations doctrine to claims brought under the Fair Housing Act (FHA). Under the FHA, private civil plaintiffs have two years after the occurrence or termination of an alleged discriminatory housing practice within which to pursue their claims.[1] In cases with nearly identical facts, courts have reached opposite conclusions regarding whether mortgage payments are themselves continuing violations, and therefore extend the FHA’s limitations period, or whether they are merely the continuing effects of the initial pricing decision that do not enlarge the limitations period.

Havens

The Supreme Court first applied the continuing violations doctrine to the FHA in *Havens Realty Corp. v. Coleman*.^[2] The case is instructive because the Court clearly laid out the doctrine’s applicability to claims based on actions occurring outside the statute of limitations, distinguishing those claims that ought to remain valid because they are continuing violations, from those claims that should remain time-barred.

In *Havens*, an equal-housing non-profit organization on different occasions sent “testers” (one white person and two black people) to inquire about the availability of apartments in a particular housing complex. The black testers were told that no apartments were available, while the white tester was told there were vacancies. One black tester—Coles—was lied to about vacancies within the limitations period, while the other black tester—Coleman—was turned away after the limitations had expired. In filing their discrimination claim, the plaintiffs claimed that they had been denied the right to rent real property and that the housing complex’s practices deprived them of the benefits associated with living in integrated neighborhoods free from discriminatory housing practices.

Distinguishing the former claim (the tester claim) from the latter claim (the neighborhood claim), the Court noted that “a ‘continuing violation’ of the Fair Housing Act should be treated differently from one discrete act of discrimination.”^[3] In analyzing the applicability of the continuing violations doctrine to Coleman’s two claims, the Court examined the nature of the injury suffered. The Court ruled that, while Coleman’s “neighborhood” claim was timely because it came under the continuing violations doctrine, her “tester” claim did not and was, therefore, time-barred. Because the discriminatory acts against Coleman took place outside of the limitations period, she was required to argue that her claims were timely because they were continuing violations of the claims made by Coles.

With respect to the neighborhood claim, Coleman sought to remedy the deprivation of the benefits of an integrated neighborhood. Inasmuch as the realty company engaged in discriminatory practices against others, the policy of discrimination would continue to prevent Coleman, as well as others, from achieving the benefits of living in an integrated neighborhood. Therefore, the very act of discrimination against Coles continued the injury against Coleman.

Conversely, Coleman in her “tester” claim sought only to challenge the single discriminatory incident wrought against her and sought only a personal remedy as a result of the act. The Court held that this claim was not a continuing violation because it was completely separate from the act that occurred within the limitations period—the discriminatory act against Coles. As the Court noted, “it is not alleged, nor could it be, that the incident of steering involving Coles on July 13, 1978, deprived Coleman of her Section 804(d) right to truthful housing information.”^[4] With respect to these distinct, personal discrimination claims, the plaintiff who fails to file within the statute of limitations cannot tack his or her claim onto the claim of another who timely filed his or her action.

Continuing Violation vs. Continuing Effect of a Violation

While continuing violations may enlarge a limitations period, the continuing effects of an alleged violation do not. The Ninth Circuit recently clarified this distinction under the FHA in *Garcia v. Brockaway*.^[5] In *Garcia*, the Ninth Circuit held that the FHA statute of limitations had run on an alleged discriminatory housing practice because the injury was the result of continuing effects of the discriminatory act, not a continuation of the violation itself. In 1994, Dennis Brockaway completed construction of an apartment complex that did not comply with FHA handicap accessibility requirements. A disabled man rented an apartment in the complex in 2001 and brought suit under the FHA in 2003. The question then was whether the claim was timely.

The Ninth Circuit held that it was not. The statute of limitations was triggered by the termination of the discriminatory housing practice, which in this case was the conclusion of the design-and-construction phase. The *Garcia* court explained that “a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.” The court went on to note that, “although the ill effects of a failure to properly design and construct may

continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct.”[6]

After concluding that the claim arose from the continuing effect of the violation and not from the violation itself, the Court then made a strong public policy point. Congress presumably put in place a two-year statute of limitation for private claims under the FHA to limit the liability of companies after a particular period of time had elapsed. To hold instead that developers remain liable until the violation is occasioned upon or cured would be to read the statute of limitations out of the U.S. Code.

Authority Split in Discretionary Pricing Policy Cases

The application of the continuing violations doctrine to mortgage payments has resulted in a split of authority among federal district courts—in some cases, on nearly identical facts. In particular, a split of authority has arisen within the Ninth Circuit in the interpretation of *Havens* and the continuing violations doctrine as it applies to mortgage payments resulting from loans made pursuant to allegedly discriminatory discretionary pricing policies. In these cases, the plaintiffs have alleged that discretionary pricing policies—policies that allowed originators some discretion in setting loan pricing—violated the FHA. Some district courts have held that each mortgage payment is a continuing violation that enlarges the limitations period to include the original pricing decision. Other courts have held that mortgage payments are merely continuing effects of the pricing decision, but are not continuing violations that justify the enlargement of the limitations period.

One case that closely tracks the *Havens* precedent is *Kimbrew v. Fremont Reorganization Corp.*[7] In *Kimbrew*, the lender defendants issued loans through mortgage brokers pursuant to a discretionary pricing policy that allegedly had a disparate impact on minority borrowers. Four of the seven plaintiffs received or refinanced their loans outside of the limitations period and would only be able to bring their claims if they were embraced by the continuing violations doctrine.

In its analysis of whether the doctrine applied, the court carefully applied the *Havens* neighborhood/tester framework to the facts at hand. In explaining the neighborhood claim, the court focused on the *Havens* analysis (where the neighborhood claim was allowed to proceed but the tester claim was denied). Regarding the neighborhood claim, each incident of racial steering, irrespective of against whom it was perpetrated, deprived each plaintiff of the benefits of an integrated neighborhood. However, each “tester” claim, and the remedies arising from that claim, were distinct to the person against whom the act was perpetrated. The act of discrimination aimed at Coleman was, in fact, unrelated to the act of discrimination aimed at the plaintiff who was steered during the limitations period.

Applying the framework to mortgage payments, the court arrived at two conclusions arising from the fact that the extension of a mortgage pursuant to discretionary pricing policies is an individual act. First, even if the discretionary pricing policy exists at the time the suit is filed, the act triggering the statute of limitations is the loan origination. Second, if the terms are discriminatory and they are set when the loan is originated, then the act of discrimination is the origination, with the mortgage payments merely “continuing effects” that flow from the initial act of discrimination.

The court in *Ramirez v. GreenPoint Mortgage Funding, Inc.*,^[8] reached a different conclusion. In *Ramirez*, minority consumers who received loans under GreenPoint’s discretionary pricing policy sued on the grounds that the fees they received were higher than those received by similarly situated white borrowers. However, the plaintiffs had received their mortgages from GreenPoint more than two years before filing the lawsuit.

In choosing to apply the “continuing violations doctrine” to the claims, the court focused on precedent addressing hostile work environments in interpreting *Havens*. The court analogized the discretionary pricing policy claims to hostile work environment claims, which the Supreme Court held in 2002 to be a “single unlawful employment practice.”^[9] Acknowledging that each loan origination could be seen as a separate violation, the court instead concluded that, just like hostile work environment claims, “the ongoing discrimination plaintiffs allege could only manifest itself after a critical mass of similarly situated people experienced it, so as to bring an over-arching pattern to light.”^[10]

Returning to *Havens*

Ultimately, the *Kimbrew* line of cases provides a more faithful interpretation of *Havens*. The borrowers challenging a discretionary pricing policy are in fact, using the terminology of *Havens*, bringing “tester” claims and not, as the court in *Ramirez* decided, “neighborhood” claims. The *Ramirez* court construes *Havens* as holding that the continuing violations doctrine will apply to claims brought as a result of an ongoing existence of an allegedly discriminatory policy. However, this construction ignores the critical distinction between “neighborhood” claims and “tester” claims. In a private action against the lender, the borrower claiming he is paying discriminatory fees and charges may claim to be challenging the broad discretionary policy, but what he really wants is relief from the discriminatory act that resulted in his paying more for a mortgage. The “tester” claim, where the plaintiff seeks relief for the specific act of discrimination carried out against him, is the better fit to mortgage payments.

The *Ledbetter* Coda

While *Havens* and its progeny provide a strong enough stand-alone argument to support the notion that mortgage payments are continuing effects, and not violations, of alleged discriminatory policies, it is nonetheless informative to look to employment discrimination jurisprudence given that much of the common law surrounding the FHA is derived from the same origins. In particular, congressional action to overturn *Ledbetter v. Goodyear Tire &*



Rubber Co.,^[11] provides an instructive analogy. In *Ledbetter*, the Supreme Court held wage payments are continuing effects of an allegedly discriminatory salary decision, not continuing violations in themselves.

Under the Lilly Ledbetter Fair Pay Act of 2009, every paycheck received as a result of a discriminatory pay decision or other practice constitutes an actionable violation of Title VII. The rationale for this decision is that with each paycheck, the employer has intentionally retained and carried out a discriminatory pay structure. However, the bill's findings state that Congress does not change the law with regard to pension distributions. Explaining the inclusion of this finding, the Committee Report from the U.S. House Committee on Education and Labor states that "[p]ension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application."^[12]

Like the pension distributions, a borrower's monthly mortgage payment flows from the initial pricing established at the origination of the loan. When a lender originates a loan, it disburses a lump sum payment to a borrower in accordance with terms contained in the mortgage loan note. The loan payments are not determined anew with every payment coupon that is sent to the borrower; instead they flow from the agreement set out in the note. Whereas an employer may change employment compensation practice at will, the terms of the mortgage are already set, and the mortgage payment is merely derived from the original agreement. For the same reasons a pension payment is a continuing effect of a pension decision rather than a continuing violation, mortgage payments are merely the continuing effects of loan pricing and not a continuing violation.

Conclusion

Like the "tester" claims in *Havens*, mortgage payments are specific to the individual borrower. One borrower does not sustain additional harm if another borrower is charged too much for a mortgage loan. And, like the pension payments in the Lilly Ledbetter Fair Pay Act, mortgage payments are established at the outset of a transaction. The mortgage note governs the amount of mortgage payments, and lenders generally are not free to unilaterally alter the terms of the note. For these reasons, mortgage payments are properly viewed as the continuing effects of an initial pricing decision, and, as a result, should not enlarge the limitations period under the continuing violations doctrine.

[Kirk D. Jensen](#) is a partner with BuckleySandler LLP. The author thanks [Joshua Kotin](#), an associate at BuckleySandler LLP, for his assistance with this article.

Endnotes

1. 42 U.S.C. § 3613(a)(1)(A).
2. 455 U.S. 363 (1982).

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3. *Id.* at 380.
4. *Id.* at 381.
5. 526 F.3d 456 (9th Cir. 2008).
6. *Id.* at 463.
7. 2008 U.S. Dist. LEXIS 108632 (C.D. Cal. 2008).
8. 633 F. Supp. 2d 922 (N.D. Cal. 2008).
9. *Ramirez*, 633 F. Supp. 2d at 930 citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
10. *Ramirez*, 633 F. Supp. 2d at 930 citing *Davis v. Gen. Motors Acceptance Corp.*, 406 F. Supp. 2d 698, 705 (N.D. Miss. 2005).
11. 550 U.S. 618 (2007).
12. H.R. Rep. 110-237, at 18 (2007).

NEWS & DEVELOPMENTS

DOJ Announces Settlement in Indiana Housing-Discrimination Suit

On October 22, 2010, the Department of Justice [announced](#) a settlement with the Autumn Ridge Condominium Association, located in Munster, Indiana, and three members of its board of directors. In the settlement, the defendants agreed to pay \$120,000 to resolve allegations that they violated the Fair Housing Act when they refused to approve the sale of a condominium to an African American couple because of their race and because they had children. The settlement funds will be split between the couple and their real-estate agents, and the United States. The proposed settlement (which is subject to court approval) also requires Autumn Ridge to revise its rules to remove any restrictions on occupancy by families with children, to obtain training regarding the Fair Housing Act for its board members, and requires the president of the board of directors, a named defendant, to resign permanently from the board. The defendants did not admit liability in the settlement.

— [Benjamin P. Saul](#), *Washington, D.C.*

President Signs Financial Regulatory Reform into Law

On July 21, 2010, President Obama [signed into law H.R. 4173](#), the Dodd-Frank Wall Street Reform and Consumer Protection Act. That passage completes the realization of a major overhaul of financial regulation, including a profound change to consumer financial-services

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Consumer & Civil Rights Litigation

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regulation. The final legislation includes all of the various pieces of the regulatory reform package initially presented to Congress by the Obama administration over a year ago. Two titles in particular, Title X, which creates the Bureau of Consumer Financial Protection (BCFP), and Title XIV, which implements the Mortgage Reform and Anti-Predatory Lending Act, will have far-reaching effects on institutions engaged in consumer financial services. Aside from these two titles, the act will enhance and overhaul the regulatory structure applicable to numerous different aspects of the financial system, including thrifts; industrial-loan companies and other non-bank banks; over-the-counter derivatives; securities brokers and dealers and other securities intermediaries; and rating agencies. The act also creates a new structure to monitor and regulate systemic risk issues, including entities considered “too big to fail.”

— [*Sarah Betts Esterhay*](#), *Washington, D.C.*

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