

HMDA, Fair Lending, and ECOA Developments

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Overview

- Major Issues
 - Disparate Impact vs. Disparate Treatment
 - Relief Available Under ECOA and FHA
 - Statistical Evidence
 - Recent DOJ Auto Lending Settlements
 - FRB Credit Scoring Study

Major Issues

- Disparate Treatment vs. Disparate Impact
 - Disparate Treatment
 - Under this theory, the focus is the defendant's **intent**.
 - The typical disparate treatment claim involves the defendant's refusal to make housing, or a home mortgage loan, available to the plaintiff because of the plaintiff's race or other prohibited characteristic.
 - Once the plaintiff has made his *prima facie* case, the key issue is whether the defendant can come forward with evidence of a legitimate, nondiscriminatory reason for the conduct.
 - See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Major Issues

- Disparate Treatment vs. Disparate Impact
 - Disparate Impact
 - “[P]ractices...neutral on their face, and even neutral in terms of intent” cannot be maintained if they result in discrimination. *Griggs v. Duke Power*, 401 U.S. 424 (1971).
 - For years after *Griggs*, disparate impact cases involved **objective** criteria. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977)(requirements that police officers be taller than 5’2” and weigh more than 120 lbs “would exclude 41.13% of the female population while excluding less than 1% of the male population”).

Major Issues

- Disparate Treatment vs. Disparate Impact
 - Disparate Impact
 - *Watson v. Fort Worth*, 487 U.S. 977, 987 (1988).

The Supreme Court noted for the first time that “disparate impact analysis is no less applicable to subjective...criteria than to objective” practices.
 - However, the Court cautioned that it is not “appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.” *Id.*

Major Issues

- Disparate Treatment v. Disparate Impact
 - Disparate Impact
 - The Court in *Watson v. Fort Worth* delineated the plaintiff's burden under a disparate impact theory.

**A Plaintiff must prove that
The specific practice identified...
...caused...
the alleged observed statistical disparity.**

- The defendant must then rebut the plaintiff's statistical showing by justifying the challenged practice in terms of "business necessity."

Major Issues

- Disparate Impact vs. Disparate Treatment
 - Disparate Impact
 - One year later, the Court clarified its divided holding in *Watson*: “**Especially** in cases where an employer combines **subjective criteria** with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” *Wards Cove v. Atonio*, 490 U.S. 642 (1989).
 - In other words, a plaintiff cannot show simply that “at the bottom line, there is racial imbalance in the work force” due to “the use of ‘subjective decision making.’” Instead, “a plaintiff must demonstrate that...a specific or particular employment practice...has created the disparate impact.” *Id.*

Major Issues

- Disparate Impact vs. Disparate Treatment
 - Disparate Impact
 - *Wards Cove v. Atonio*, 490 U.S. 642 (1989)(continued)
 - Further, the burden of persuasion remains with the plaintiff. The defendant need only produce evidence of a “business **justification**” or “business **consideration**” that serves the legitimate goals of the defendant.
 - However, the Interagency Task Force on Fair Lending Policy Statement issued in 1994 uses the “business necessity” language. 59 Fed. Reg. 18266.

Major Issues

- Disparate Impact vs. Disparate Treatment
 - Disparate Impact
 - *Wards Cove v. Atonio*, 490 U.S. 642 (1989)(continued)
 - The Supreme Court also emphasized that:

For disparate impact, “it is...a comparison – between the racial composition of the *qualified* persons in the labor market and the persons holding at-issue jobs – that generally forms the proper basis for the initial inquiry in a disparate-impact case.” *Wards Cove*, 490 U.S. at 650-51 (same emphasis elsewhere in original).

Major Issues

- Disparate Treatment v. Disparate Impact
 - Disparate Impact
 - Controversial *Wards Cove* holding led to 1991 Amendment to Title VII.

- “An unlawful employment practice based on disparate impact is established...when...a complaining party demonstrates that **a group** of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin.”
- “...and the respondent fails to demonstrate that such group of employment practices is required by **business necessity**.”

Further,

- “If a complaining party demonstrates that **a group** of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact.”

See §105 of the Civil Rights Act of 1991, amending § 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2).

- There has been no comparable amendment to the FHA.

Major Issues

- Disparate Treatment v. Disparate Impact
 - Disparate Impact
 - Recent decision – *Smith v. City of Jackson*, 544 U.S. 228 (2005).
 - Applying disparate impact analysis to § 4(a)2 of the ADEA.
 - But recognizing that the language of § 4(a)(1) of the ADEA, like the virtually “identical” to § 703(a)(1) of Title VII, “does not encompass disparate impact liability.”

Major Issues

- Disparate Impact
 - Summary of Plaintiff's Burden
 - A plaintiff must:
 - 1) Identify the specific policy or practice of the defendant;
 - 2) Establish a disparate impact (through the use of statistical evidence); and
 - 3) Prove causation

Pleading Standard - Rule 12(b)(6)

- Impact of *Bell Atlantic v. Twombly*
 - The Supreme Court recently concluded that “*Conley* [*v. Gibson*’s] ‘no set of facts’ language has been questioned, criticized, and explained away long enough.” 550 U.S. ____, 127 S. Ct. 1965, 1959-60 (May 21, 2007).
 - Fed. R. Civ. P. 8(a)(2) requires a “‘short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the...claim is and the grounds upon which it rests.’” *Id.* (citing *Conley*).
 - Thus, a complaint must allege “enough facts to state a claim for relief that is plausible on its face.” *Id.* at 1974. Thus, in the event that a plaintiff “ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] Complaint must be dismissed.” *Id.*

Major Issues

- Does Disparate Impact Apply in Lending?
 - FHA
 - While the majority of appellate courts have applied disparate impact under the FHA, these decisions have not involved § 805 of the FHA, which governs discrimination claims in mortgage transactions.
 - Further, the Supreme Court has yet to determine whether disparate impact can be applied to any provision of the FHA.
 - *Smith v. City of Jackson* offers some suggestion that disparate impact may not apply to the language of § 805, which is similar to the language of § 4(a)(1) of the ADEA.
 - Advocacy groups would strongly oppose such an interpretation.

Major Issues

- Does Disparate Impact Apply in Lending?
 - ECOA
 - Several appellate courts have applied disparate impact under the ECOA. The support for this is a Regulation B footnote, which states that “[t]he legislative history of the Act indicates that Congress intended an ‘effects test’ concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power* and *Albemarle Paper Co. v. Moody* to be applicable to a creditor’s determination of creditworthiness.” 12 C.F.R. § 202.6(a) n.2.
 - However, the Supreme Court has yet to reach the issue.

Major Issues

- Relief Available to Private Plaintiffs under ECOA & FHA
 - ECOA
 - Injunctive Relief
 - Actual damages
 - Punitive damages – in class action, up to lesser of \$500K or 1% of creditor's net worth
 - Equitable and declaratory relief
 - Fees and costs
 - FHA
 - Injunctive Relief
 - Actual damages
 - Punitive damages
 - Equitable relief
 - Fees and costs
- Impact on Right to Trial by Jury

Major Issues

- Statistical Evidence
 - Statistical differences are used to show presence of an impact
 - Data limitations can make it difficult or impossible to fully explain differences
 - Class action complaints cite to HMDA data and industry studies
 - Differences in HMDA rate spread are a potential red flag, but cannot be relied on to prove discrimination
 - Cases will require detailed analysis of lenders' loan data

Major Issues

- Recent DOJ Settlements
 - *U.S. v. Pacifico Ford*, Civ. Action No. 07-3470 and *U.S. v. Springfield Ford*, Civ. Action No. 07-3469 (E.D. Pa. Aug. 17, 2007).
 - The actions were brought against the car dealers, NOT the lenders.
 - The actions were based on disparate treatment, NOT disparate impact.
 - Settlements permitted dealers to change pricing as a result of negotiation, if documented.

Major Issues

■ FRB Credit Scoring Study

- Fair and Accurate Credit Transactions Act of 2003 requires the FRB to perform a study addressing the effects of credit scoring.
- In August 2007, the FRB released an 18-month study of the effects of its own “FRB base model” of credit scoring.
- While the model resulted in lower scores for Blacks and Hispanics, the FRB concluded that the model is **not** a proxy for race or national origin, but accurately predicts performance.
- In fact, the FRB suggested that, on average, Blacks are **advantaged** by the model, in that their performance is worse than their scores predict.
- Surprisingly, young borrowers and recent immigrants may have a better argument that the model does not properly measure their credit quality, due to the model’s use of time factors such as “length of credit history”).

See Paul F. Hancock and Melanie H. Brody, *Disparate Credit Scores Not a Proxy for Unlawful Discrimination Says FRB*, K&L Gates Mortgage Banking & Consumer Credit Alert, August 23, 2007.

Questions

