CONSUMER FINANCIAL SERVICES LAW REPORT

FOCUSING ON SIGNIFICANT CASELAW AND EMERGING TRENDS

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FAIR DEBT

FORECLOSURE COMPLAINT FORMS BASIS FOR FDCPA CLAIMS

A federal appellate panel has ruled that foreclosure actions can form the base for Fair Debt Collection Practices Act claims. Specifically, the appellate court held that a debtor had standing to sue a law firm seeking to collect on a mortgage debt for a bank under the FDCPA, as the relevant state-court foreclosure complaint listed several fees that had not actually been charged until later, at the time of the foreclosure. The panel reversed in part a district court's order largely in favor of the law firm on the FDCPA charges, invoking an expansive interpretation of appellate precedent. (*Kaymark v. Bank of America, N.A., et al.*, No. 14-1816, 2015 WL 1529120 (3d Cir. 04/07/15).)

"The parties dispute the relevance of our intervening decision in *McLaughlin v. Phelan Hallinan & Schmieg, LLP,* 756 F.3d 240 (3d Cir.2014) — decided by this court after the district court's order," wrote Judge D. Michael Fisher for a unanimous 3d U.S. Circuit Court of Appeals. "In *McLaughlin,* we held that nearly-indistinguishable conduct in a debt collection demand letter, rather than a foreclosure complaint, violated the FDCPA. We now conclude that *McLaughlin's* holding extends to foreclosure complaints, and we reverse the district court's order dismissing certain FDCPA claims against [the law firm]."

Dale Kaymark refinanced his home in December 2006, executing a note for $245,600 and granting Bank of America N.A. a mortgage insured by Fannie Mae, which included the following terms:

> Lender may charge Borrower fees for services *performed in connection with* Borrower's default and for the purpose of protecting Lender's interest in the Property and rights under this Security Agreement, including, but not limited to, attorneys' fees, property inspection and valuation fees. ... If the default is not cured as specified ... Lender shall be entitled to collect all expenses *incurred* in pursuing the

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dismissed allegations that JPMorgan abused the judicial process, saying the claims were barred by a one-year statute of limitations. *Neal DeYoung and H. Rajan Sharma at Sharma & DeYoung in New York represented Stikas. James Bernard and Julia Strickland of Stroock & Stroock & Lavan in Los Angeles represented JPMorgan.*

GUEST COMMENTARY

AUTO FINANCE AND DISPARATE IMPACT: SUBSTANTIVE LESSONS LEARNED FROM CLASS CERTIFICATION DECISIONS

By Peter N. Cubita, Christopher J. Willis and Jonathan E. Selkowitz

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The U.S. Supreme Court recently heard oral argument in a case presenting the question of whether disparate impact claims are cognizable under the Fair Housing Act. *See Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir.), *cert. granted in part*, 135 S. Ct. 46 (2014). The Supreme Court will decide this question later this year, and practitioners will consider the implications of its decision for the analogous issue of whether disparate impact claims are cognizable under the Equal Credit Opportunity Act. *See generally* P. Cubita & M. Hartmann, *The ECOA Discrimination Proscription and Disparate Impact — Interpreting the Meaning of the Words That Actually Are There*, 61 Bus. Law. 829 (2006).

With the FHA issue under review by the Supreme Court, these threshold questions of statutory interpretation have been the focus of attention. Practitioners involved in vehicle financing also should consider, however, the implications that class certification appellate decisions may have for disparate impact claims alleged against assignees of motor vehicle retail installment sale contracts. Specifically, seminal appellate decisions rendered in employment and mortgage finance class actions support compelling arguments against the certification of disparate impact class claims against assignees based upon the differences (the "finance charge rate spreads") between the APRs under RISCs entered into by automobile dealerships and their customers, and the wholesale "buy rates" set by assignees.

Moreover, potentially significant flaws in the underlying theory of liability itself can manifest themselves when courts rigorously analyze whether a putative class claim satisfies the requirements of Fed. R. Civ. P. 23. The class certification decisions discussed in this Article illustrate how this has occurred with respect to alleged disparate impact claims predicated upon an asserted "policy" of "allowing" discretionary decisionmaking. A careful analysis of these decisions reveals that the underlying merits of disparate impact "rate spread" claims against assignees are highly suspect, whether they are brought as private class actions or as governmental enforcement actions.

ECOA 'RATE SPREAD' CLASS ACTIONS

More than a decade ago, there was a series of automotive ECOA class actions predicated upon allegations that purchasers of RISCs may be held liable on a disparate impact theory for allegedly "allowing" independent, unaffiliated automobile dealers to negotiate the APRs under their RISCs with retail buyers. Their focal point was alleged statistical disparities in finance charge rate spreads, with the plaintiffs' central premise being that the difference between the wholesale buy rate established by a RISC purchaser and the retail APR agreed upon by the parties to the RISC constituted a discretionary "non-risk charge added to the buy rate by the dealer" pursuant to what they characterized as a "Finance Charge Markup Policy" of the assignee.

This asserted "policy" was described more concisely as one of "allowing" dealerships the discretion to "markup" wholesale buy rates when negotiating contract APRs with their customers. The plaintiffs in these cases further alleged that this asserted discretionary "markup policy" had a disparate impact on a prohibited basis.

Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443 (6th Cir. 2002), was one of these cases. The district court in *Coleman* initially certified a statewide class, pursuant to Fed. R. Civ. P. 23(b)(2), for both injunctive relief and compensatory damages. On appeal, GMAC argued that "the district court abused its discretion in certifying this class under Rule 23(b)(2) because plaintiff's claim for compensatory damages involves highly individualized determinations that are not appropriate for a Rule 23(b)(2) class."

A 6th U.S. Circuit Court of Appeals panel reversed the grant of class certification, holding that compensa-

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tory damages under the ECOA are not recoverable by a Rule 23(b)(2) class. This holding was predicated upon the court's conclusion that "the injunctive relief in this case does not predominate over the monetary damages due to the highly individualized determinations that would be required to determine those damages."

In the course of addressing the "critical factor [of] whether the compensatory relief requested requires individualized damages determination[s] or is susceptible to calculation on a classwide basis," the panel distinguished its precedents involving back pay and stated that "determining the damages of each class member in this case would involve investigation into multiple auto dealerships whereas a back pay claim typically involves the practices of a single employer."

The appellate panel therefore vacated the class certification order. On remand, the plaintiff amended her complaint to delete her classwide damages claim, and the district court certified a national class for injunctive and declaratory relief only. *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004), *petition for leave to appeal dismissed as moot*, No. 04-501 (6th Cir. 05/14/04). The case settled shortly thereafter, thereby depriving the 6th Circuit of an opportunity to explore the liability determination implications of its prior ruling regarding an ECOA compensatory damages class.

In particular, the settlement prevented the 6th Circuit from deciding whether putative class claims for injunctive and declaratory relief based upon a purported "policy" or "practice" of "allowing" thousands of independent dealerships to make allegedly subjective decisions regarding finance charge rate spreads satisfied the Rule 23(a)(2) requirement that there be "questions of law or fact common to the class."

WAL-MART V. DUKES AND THE RULE 23 COMMONALITY ISSUE

Approximately seven years later, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court addressed the analogous issue of whether there were "questions of law or fact common to" a putative class comprised of current and former female employees who "allege[d] that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women." In doing so, the Court noted initially that a party seeking class certification must affirmatively demonstrate his compliance with Rule 23 and that the rigorous analysis required to determine whether Rule 23 has been satisfied "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim. *This cannot be helped*." (*Emphasis added.*)

To satisfy the commonality requirement, class claims must "depend upon a common contention" the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." In this case, the Supreme Court noted that "proof of commonality necessarily overlaps with respondents' merits contention" that there had been an alleged pattern or practice of discrimination because "in resolving an individual's Title VII claim, the crux of the inquiry is 'the reason for a particular employment decision.' ... Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." (*Emphasis in original.*)

The Top Court further addressed how commonality must be examined with regard to disparate impact claims alleging a general policy of discrimination. Of specific import to the viability of disparate impact claims involving finance charge rate spreads, the Court highlighted the problem in establishing that a "policy of allowing discretion" can satisfy the commonality requirement. Specifically, the asserted "'policy' of *allowing discretion* by local supervisors over employment decisions ... is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." (*Emphasis in original.*) Indeed, the Court went on to say that it "is also a very common and presumptively reasonable way of doing business — one we have said 'should itself raise no inference of discriminatory conduct.'" (Citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).)

The Court noted it had previously recognized that, "in appropriate cases," permitting discretion in decisionmaking can provide a basis for disparate impact liability because an "undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination." It observed, however, that "the recognition that this type of Title VII claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common" because "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." For commonality to exist in this instance, the party seeking certification must show that all of the employees' Title VII claims "will in fact depend on the answers to common questions."

That burden was not satisfied in *Dukes* because the plaintiffs had not demonstrated that each deci-

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sion was the result of "a common mode of exercising discretion that pervades the entire company," the Court wrote. "In a company of [this] size and geographic scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.". The plaintiffs in *Dukes* failed to offer any reliable evidence of a common mode of exercising discretion that tied together all of the decisions impacting the 1.5 million putative class members. Quoting from the dissenting opinion below regarding plaintiffs' statistical evidence, the Court said: "Information about disparities at the regional or national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level."

More fundamentally, the Supreme Court observed that, even if the statistical evidence revealed an actual pattern of disparities (which it did not), the plaintiffs had failed to identify a "specific employment practice" other than "the bare existence of delegated discretion." The Supreme Court emphasized that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."

In this regard, the Supreme Court explained that its precedent holding that granting discretion to supervisors could be the basis for Title VII liability under a disparate impact theory "*conditioned* that holding on the corollary that merely proving that the discretionary system has produced a ... *disparity is not enough*. 'The plaintiff must begin by identifying the specific employment practice that is challenged.'" (*Emphasis in original,* quoting *Watson*, 487 U.S. at 994; *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k)).)

APPLYING *DUKES* TO AN ALLEGED DISCRETIONARY PRICING POLICY

A 3d Circuit appellate panel applied *Dukes* in a residential mortgage lending case that it stated "bears a striking resemblance to *Dukes*." *See Rodriguez v. Nat'l City Bank*, 726 F.3d 372 (3d Cir. 2013). *Rodriguez* involved a proposed settlement class comprised of African-American and Hispanic borrowers who had obtained a mortgage loan from the defendant bank during a specified time period. The plaintiffs alleged that an asserted "discretionary pricing policy" of the bank had the effect of charging African-American and Hispanic borrowers "a disproportionately greater amount in non-risk related charges than similarly situated Caucasian persons."

Specifically, the plaintiffs argued that the alleged "discretionary pricing policy" of the lender "allowed individual [mortgage] brokers and loan officers to add a subjective surcharge of additional points, fees, and credit costs to an otherwise objective, risk-based financing rate." This apparently included the alleged ability to of mortgage brokers and loan officers to deviate subjectively from the base rate of interest determined by the mortgage lender (sometimes referred to as the "par rate").

Relying on *Dukes* and reiterating many of its central themes, the 3d Circuit panel affirmed the rejection of a proposed classwide settlement because the plaintiffs had failed to identify a "common mode" of exercising the asserted discretion. ("[I]n order to demonstrate that they have suffered a common harm, the putative class here must show that [the mortgage lender's] grant of discretion to individual loan officers constitutes a 'specific practice' that affected all class members in the same general fashion."). The plaintiffs had attempted to demonstrate a common mode of exercising discretion by submitting statistical regression analyses purporting to control for every objective credit-related variable, arguing that, "by 'eliminat[ing] all objective credit and risk factors impacting loan pricing,' they have shown that the only function the discretionary policy served was to produce a discriminatory effect."

The appellate panel dismissed the regression analyses as evidence of a common mode of exercising discretion because, even if the plaintiffs actually had succeeded in controlling for all objective credit-related variables, "the[ir] regression analyses do not even purport to control for individual, subjective considerations" of a non-discriminatory nature. In this regard, the 3d Circuit noted that the possible existence of such considerations "undermine[s] the assertion that there was a common and unlawful mode by which the [loan] officers exercised their discretion." In response to the plaintiffs' argument that contemplating subjective, non-discriminatory reasons for individual loan pricing decisions was "speculation and conjecture," the appellate panel suggested that their "unsupported presumptions that a loan pricing determination is a purely objective matter and that an average racial disparity indicates that each minority experienced the ... policy in the same way" was "[f]ar more speculative."

The appellate court further held that, even if the plaintiffs had identified a specific policy that was sufficiently distinguishable from the alleged discretionary policy in *Dukes*, "they have not shown

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that it affected all class members in all regions and bank branches in a common way." In this regard, the court explained that another significant problem in *Dukes* was that "the statistical disparity was based on an average that was not representative of regional or store disparities" and that even a regional disparity "'cannot by itself establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depends.'" (Quoting *Dukes*).

The 3d Circuit panel also reiterated, in the context of this residential mortgage fair lending case, the "other, more fundamental, respect in which" the plaintiffs statistical proof had failed in *Dukes*: they had not identified a specific employment practice that was challenged "other than the bare existence of delegated discretion," let alone a practice that infused the class claims with the requisite commonality. Quoting *Dukes*, the 3d Circuit said: "'[M]erely showing that [a] policy of discretion has produced an ... overall disparity does not suffice.'" Accordingly, in ruling that the plaintiffs had not demonstrated the defendant's conduct was common as to all of the class members, the 3d Circuit concluded as follows:

> Here, as in *Dukes*, the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode.

IMPLICATIONS FOR DISPARATE IMPACT 'RATE-SPREAD' CLAIMS IN AUTO SALES CASES

The settlement of the *Coleman* litigation foreclosed potential appellate review of an order certifying a national class for injunctive and declaratory relief only. The 6th Circuit thus did not have an opportunity to review the determination that the plaintiffs had demonstrated commonality with respect to their alleged disparate impact claim based upon an asserted "Finance Charge Markup Policy" of the sales finance company.

Had it been called upon to review the commonality determination underlying the order certifying a national class, the 6th Circuit would have been urged to consider the liability determination implications of its prior statement that "determining the damages of each class member in this case would involve investigation into multiple auto dealerships whereas a back pay claim typically involves the practices of a single employer." This statement undoubtedly would have figured prominently in the appellate briefing and served as the segue into commonality arguments like those upon which the defendants ultimately prevailed in *Dukes* and *Rodriguez*.

From a class certification perspective, *Dukes* and *Rodriguez* are, respectively, employment and housing finance analogues to *Coleman* and the other automotive ECOA rate spread class actions in which national settlement classes were certified. Their significant implications with respect to putative class-wide claims against assignees based upon an alleged "policy" of "allowing" dealerships to "mark-up" wholesale buy rates are readily apparent. We submit, however, that their significance is not limited to the class certification arena.

As the Supreme Court noted in *Dukes*, the rigorous analysis required to determine whether the proponent of class certification has demonstrated compliance with Rule 23 "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim. *This cannot be helped*." 131 S. Ct. at 2551 (*Emphasis added.*) The following statement by the Court is particularly noteworthy given that the Title VII claim alleged in *Dukes* was based upon the same type of subjective decision-making theory of disparate impact liability that spawned the analogous theory of liability in the automotive ECOA rate spread class actions:

> [T]he "proof of commonality necessarily overlaps with respondents' merits contention" because "in resolving an individual's Title VII claim, the crux of the inquiry is 'the reason for a particular employment decision. ... Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.'" (*Emphasis in original.*)

Because *Dukes* and *Rodriguez* delve into the merits contentions associated with directly analogous claims, they also suggest noteworthy flaws with respect to the underlying disparate impact theory of liability as applied to RISC assignees and alleged finance charge rate-spread claims. The flaws in the legal theory that manifested themselves at the crossroad between class certification and disparate impact liability include the following observations in *Dukes* and *Rodriguez* that we submit are relevant, by way of analogy, to disparate impact finance charge rate spread claims like those alleged in the automotive ECOA rate spread class actions.

The Supreme Court in *Dukes* stated that a corporate "'policy' of *allowing discretion* by local supervisors over employment matters ... is just the opposite of a uniform employment practice that

would provide the commonality needed for a class action. It is a policy *against having* uniform employment practices." Practitioners should consider the implications of this statement with respect to the assertion that an assignee of RISCs has uniform "policy" of "allowing" independent dealerships the asserted discretion to negotiate contract APRs that are greater than wholesale buy rates.

The *Dukes* Court stated further that, even if statistical evidence were to reveal an actual pattern of disparities (which it did not), the plaintiffs failed to identify a "specific employment practice" other than "the bare existence of delegated discretion." The Court emphasized that "[m]erely showing that [a] policy of discretion has produced an overall … disparity does not suffice."

These points were reiterated by the 3d Circuit in *Rodriguez*. Practitioners should consider the implications of these statements given that: (1) the asserted "Finance Charge Markup Policy" upon which the automotive ECOA rate spread class actions were based is essentially nothing more than engaging in the sales finance business of purchasing RISCs from dealerships at a discount; and (2) unlike the supervisors in *Dukes* and the loan officers in *Rodriguez*, dealership sales personnel are employees of independent entities (automobile dealerships) that are not affiliated with the sales finance companies, banks or credit unions to whom they sell their RISCs.

"The court emphasized that [m]erely showing that [a] policy of discretion has produced an overall … disparity does not suffice."

The Supreme Court also said in *Dukes* that its prior precedent holding that granting discretion to supervisors could be the basis for Title VII liability under a disparate impact theory "*conditioned* that holding on the corollary that merely proving that the discretionary system has produced a . . . *disparity is not enough*. 'The plaintiff must begin by identifying the specific employment practice that is challenged.'" This point was reiterated by the 3d Circuit in Rodriguez. Practitioners should consider the implications of this clarification given that the prior Supreme Court precedent referred to in *Dukes* — *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) — is the Supreme Court decision that was relied upon, by way of analogy, in the first automotive ECOA rate spread cases. *See, e.g., Coleman v. General Motors Acceptance Corp.*, 196 F.R.D. 315 (M.D. Tenn. 2000).

The Supreme Court stated that "the recognition that this type of Title VII [subjective decision-making] claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common" because "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." Relatedly, the Supreme Court quoted with approval the following observation in the dissenting opinion in the court below:"'[i]nformation about disparities at the regional or national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." Practitioners should consider the implications of these observations in relation to the so-called "portfolio imbalance" theory of liability, which focuses on alleged disparities in an assignee's portfolio of RISCs (as opposed to inquiring individually into the practices of the thousands of independent dealerships from whom an assignee acquired its RISCs).

In *Rodriguez*, the 3d Circuit stated that, even if the plaintiffs actually had succeeded in controlling for all objective credit-related variables, "the[ir] regression analyses do not even purport to control for individual, subjective considerations" of a non-discriminatory nature. The possible existence of such considerations "undermine[s] the assertion that there was a common and unlawful mode by which the [loan] officers exercised their discretion." Relatedly, in response to the plaintiffs' argument that contemplating subjective, non-discriminatory reasons for individual loan pricing decisions was "speculation and conjecture," the 3d Circuit suggested that their "unsupported presumptions that a loan pricing determination is a purely objective matter and that an average racial disparity indicates that each minority experienced the ... policy in the same way" was "[f]ar more speculative." Practitioners should consider the implications of these observations in relation to consumer advocacy assertions that non-discriminatory individual, subjective considerations are speculative and need not be examined.

The 3d Circuit stated that, even if the plaintiffs had identified a specific policy that was sufficiently distinguishable from the alleged discretionary policy in *Dukes*, "they have not shown that it affected all class members in all regions and bank branches in a common way." It emphasized that one of the significant problems in *Dukes* was that "the statistical disparity was based on an average that was not representative of regional or store disparities" and that even a regional disparity "'cannot by itself establish the uniform, store-by-store disparity upon which plaintiffs' theory of commonality depends.'" (Quoting

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Dukes.) Practitioners should consider this focus on how the asserted discretion was exercised at the store or branch level in relation to the 6th Circuit's suggestion that one should inquire into the practices of the dealerships from who the RISCs were purchased, which suggestion might be said to have foreshadowed these observations by the Supreme Court and the 3d Circuit. (*See Coleman*.)

At the end, the 3d Circuit decision observed that "the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode." Practitioners should ask themselves, "How is this concluding observation distinguishable from attempts to claim, on the basis of statistics alone, that individual decisions of dealership employees too numerous to count 'are bound together by a common discretionary mode' when all that is alleged is 'the bare existence of delegated discretion'" that is the product of dealerships negotiating contract APRs with their customers and assignees engaging in the sales finance business of purchasing RISCs from motor vehicle dealerships at a discount?"

MORE LESSONS TO BE LEARNED

Dukes and *Rodriquez* are a treasure trove for auto sales finance company and bank defense counsel confronted with private or governmental disparate impact claims based upon an asserted "policy" of "allowing" dealerships to negotiate the APRs under the RISCs with retail buyers. While their implications for putative ECOA rate spread class actions are readily apparent, there are other important lessons to be learned from these appellate decisions.

Specifically, we submit that these decisions illuminate fundamental flaws with respect to the application of the disparate impact theory of liability to an assignee of RISCs and finance charge rate spread claims that are based, ultimately, upon the pricing of RISCs by thousands of independent dealerships.

CASEWATCH

RECENT EVENTS IN CASES OF INTEREST TO CONSUMER FINANCIAL SERVICES LITIGATORS

Property tax lending. *Billings v. Propel Financial Services, LLC*, No. 14-51326 (5th Cir., *amicus brief filed* 04/09/15). The Consumer Financial Protection Bureau is arguing in an *amicus* brief before the 5th U.S. Circuit Court of Appeals that a Texas lender that makes loans to homeowners to pay property tax bills extends consumer credit under the Truth in Lending Act. The CFPB asserts that a district court erred in deciding that the lender was not subject to TILA and its implementing Regulation Z.

Property owners under the Texas Tax Code can authorize any one of 80 state-licensed third party to pay taxes that are due. The taxing unit's lien is transferred to the third party, which succeeds to the state's tax-collection rights, including the right to foreclose, in order to recover both the taxes it paid and any finance charges the property owner agreed to pay. Here, David and Theresa Billings made a Property Tax Payment Agreement with Propel Financial Services LLC to pay $3,245 in taxes they owed, plus $499 in closing costs, and 13.5 percent annual interest. The 10-year loan would have cost them $3,405 in finance charges.

The Billings filed a putative class action in federal district court asserting that the loan constituted consumer credit governed by TILA and Reg. Z, and that Propel had not complied with the law or regulation. The district court rejected the homeowners' claims, finding that property taxes are not debts under Texas law, and transferring a tax lien to a third party does not change the nature of the obligation so that it becomes a debt. Since the tax obligation is not a debt, a loan to pay the obligation cannot be consumer credit, the district court reasoned — adding that, while TILA and Reg. Z apply only to consumer credit "primarily for personal, family, or household purposes," property taxes are for the benefit of the public and thus are not consumer credit. The Billings appealed.

The CFPB's *amicus* in support of the Billings argues that there is a distinction between the homeowners' obligation to pay property taxes and their obligation to repay Propel. The loan from the property tax lender was consumer credit because it was credit to be repaid in installments, subject to a finance charge, and for personal, family, or household purposes. The loan was not itself a tax; rather, it advanced money for the payment of a tax imposed by the government. The court below misinterpreted the Reg. Z staff comments, the CFPB said, although it is true that the Federal Reserve Board, and later the CFPB, never interpreted TILA as applying to taxes. However, it is equally true that both agencies always have interpreted TILA as applying to loans from third parties incurred to pay taxes. The difference is that homeowners make a voluntary decision to borrow from the third party, while tax obligations are not voluntary.