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Like a Dog with a Bone

February 1, 2017 | Michael A. Benoit

On January 18, 2017, the Republican Staff of the House Committee on Financial Services issued "Unsafe at Any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders," its third in a series of reports addressing the CFPB's attempts to hold auto finance companies responsible for racial and ethnic disparities in portfolios made up of installment sale contracts purchased from thousands of dealers across the country. According to the press release,

> "The report . . . demonstrates that under recent Supreme Court precedent, the CFPB's use of the "disparate impact" legal theory in enforcement actions against auto financers would not survive judicial scrutiny.
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> "Fuzzy logic and false comparisons are unfortunately prevalent in the CFPB's auto-lending actions," the report states. "In every aspect of the CFPB's auto-lending actions, the CFPB's lack of rigor leads to unsupported and unreliable conclusions."

This report follows Patrice Ficklin's CFPB blog post on December 16, 2016 regarding the CFPB's fair lending priorities going forward, i.e., that it will focus on redlining, mortgage and student loan servicing, and small business lending. With respect to auto finance, Ficklin wrote:

> "Because the Consumer Bureau is responsible for overseeing so many products and so many lenders, we re-prioritize our work from time to time, to make sure that we are focused on the areas of greatest risk to consumers. *For example, we have examined over a dozen of the nation's largest auto lenders and achieved important market awareness and movement, and we believe that a wide range of supervisory compliance solutions tailored to each lender will work to secure and advance our progress in protecting consumers*."

In other words, the CFPB does not plan to pursue auto finance disparate impact claims through enforcement. It will favor pursuing disparate treatment claims that are easier to prove. However, it is clear the CFPB will continue to seek resolutions with auto finance companies through the confidential supervisory process. What might that look like?

I'd hope at this point the CFPB has realized that they are creating solutions in search of a problem. Its BISG proxy method has been shown to be a poor tool for predicting race and ethnicity, and the CFPB has been wildly unsuccessful in its attempts to drive the industry to a "tipping point" where the entire industry will move to flat fees or adopt lower rate caps. This is no surprise - every settlement the CFPB has reached has left the subject finance company in a less competitive position than its peers, so no finance company is eager to voluntarily put itself in this position. Further, consumers are not paying less money for credit, nor are dealers making less money (which the cynic in me fears has been the point of this exercise all along), so what has it really accomplished? It would seem that backing off of enforcement in favor of supervisory action is a fool's errand without enforcement as a tool and without any case law to support the CFPB's position.

Given the current political environment and judicial analyses, auto finance companies may be much more likely to push back on disparate impact claims during supervision. They may even be more likely to push back on dealer monitoring as a compliance management tool on the ground that it monitors for behavior that is not actionable against the finance company.

History is not on the CFPB's side either. The CFPB lauded the Supreme Court's decision in June 2015 involving Inclusive Communities and a Texas agency. That case found that the Fair Housing Act's (FHA) "results oriented" language was sufficient to support a disparate impact cause of action. You'd have thought by the CFPB's public reaction that the case dispositively put to rest any contention that disparate impact was not a viable claim under the Equal Credit Opportunity Act (ECOA). Unfortunately for the CFPB, the ECOA contains no results oriented language, so the case did nothing at all to prop up the CFPB's position. In fact, it undermined it.

If we assume for a moment that the CFPB is right, i.e., the ECOA supports a disparate impact claim, the Court made these claims very difficult to prove. Fearing abuse by plaintiff's attorneys and the government, the Court made clear that a robust causation analysis is required to support a disparate impact claim. Further, the Court made clear that statistical analysis alone is insufficient to support a prima facie case of disparate impact.

To date, it appears the CFPB has relied solely on its statistical analysis to support its disparate impact claims. The Court rightly understood that statistics are only as good as the data available, and the methodology and controls employed in a regression analysis. In other words, one can slice and dice data to make it say pretty much whatever you want it to say. Ergo, the Court wanted something more to support a claim.

It is no surprise the CFPB has been noticeably silent about is what happened to the plaintiffs in the Inclusive Communities case after it was remanded to the appeals court. That court further remanded it back to the district court to reconsider in light of the Supreme Court's ruling. Predictably, the case was dismissed because it was based solely on statistical analysis. And, at least one other district court has dismissed a disparate impact case for the same reason.

I think it's reasonable to assume that the last thing the CFPB or the Justice Department want to do is litigate an auto finance disparate impact case, given their heavy reliance on questionable statistical analysis and a lack of further evidence of discrimination. It would be only a matter of time for a case to make its way through the courts resulting in what would very likely be a defeat for the agencies.

Where does that leave the CFPB? It could continue to try to prosecute these cases as unfair, deceptive or abusive practices (UDAAP). However, its claim is based on finance companies' "practice" of allowing dealers discretion to set rates. There is sufficient case law to show that discretion is not an actionable practice; rather, it is the absence of a practice.

The CFPB is really left to do what it should have done in the first place if it really thought disparate impact was such a pervasive problem. Write a rule and put it through the full notice and comment process. Had the CFPB done this in the first instance, it would have likely achieved its goal of changing the way the industry does business. Doing it now will be close to impossible given the unfavorable political environment it faces. Absent a successful rulemaking, I expect auto finance will continue to operate as it always has.

Perhaps it's just time for the CFPB to swallow its pride and let go of this auto finance bone. It could do a lot of good focusing on real and actionable harm.

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