No Class, No Problem: Discriminatory Lending Actions in the Wake of Wal-Mart v. Dukes

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On October 13, 2011, the United States District Court for the Western District of Kentucky denied class certification to plaintiffs seeking to bring a class action against various units of Countrywide Financial Corporation for alleged discriminatory mortgage lending practices in violation of the Equal Credit Opportunity Act ("ECOA") and the Fair Housing Act ("FHA"). *See In re Countrywide Financial Mortgage Lending Practices Litigation, M.F.*, No. 08-MD-1974, MDL No. 1974 (W.D. Ky. 2011). The *Countrywide* decision came on the heels of two prior federal district court class certification decisions against plaintiffs pursuing similar claims against National City Bank and Wells Fargo Bank, respectively. *See Rodriguez v. National City Bank, C.A.*, No. 08-2059 (E.D. Penn. 2011); *In re Wells Fargo Residential Mortgage Lending Discrimination Litigation*, M: 08-md-01930 MMC (N.D. Cal. 2011).

Despite this trend of victories in the class certification context, however, retail lending institutions took notice on December 21, 2011, when Bank of America, the 2008 acquirer of Countrywide, announced that it would nonetheless pay out $335 million as part of a settlement with the United States, which resolved nearly identical, non-class claims against Countrywide. The agreement arose out of an enforcement action filed by the Department of Justice in the Central District of California, in which the United States — like the putative class plaintiffs in Kentucky — asserted that Countrywide had committed violations of the ECOA and FHA based on allegations that the lender's discretionary home loan pricing policy had an unlawful discriminatory impact on minority consumers. *See United States v. Countrywide Financial Corporation*, CV11 10540, Doc. #1 (C.D. Cal. 2011).

The Countrywide story, and in particular Countrywide's seemingly paradoxical class certification success and virtually simultaneous large settlement payout, is instructive. Of course, on the one hand it reinforces the lesson from *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), that statistical significance is not a substitute for demonstrating commonality when evaluating the appropriateness of the use of Rule 23 procedures. However, it also illustrates that *Dukes* is not a panacea for lending institutions concerned about the growing wave of discriminatory lending litigation. Commonality is not necessary for statistical significance to operate effectively in non-class, disparate impact enforcement actions, even where a policy of discretion forms the basis for the claim.

Statistical Significance Is Not Commonality

Countrywide, National City and Wells Fargo were all alleged to have violated the ECOA and the FHA as a result of what has been described as a "Discretionary Pricing Policy," which the respective plaintiffs asserted resulted in home mortgage loans to minority borrowers that contained "higher rates and other costs…than loans provided to similarly-situated non-minority consumers." *Countrywide* at 1-2. *See also Wells Fargo* at 2; *National City* at 1-2.

The plaintiffs claimed that the respective lender's discretionary policy permitted loan officers and independent brokers to add to the price of a loan various fee and rate increases (pricing elements to which their compensation was directly tied) on grounds "unrelated to credit risk and other objective factors," and that the disparate impact statistics show that this discretion was exercised in a racially discriminatory manner. *Wells Fargo* at 2.

The problem for all of the plaintiffs at the class certification stage was that they, like the *Dukes* plaintiffs, could not show that there was "a common mode of exercising [such] discretion" among all of the thousands of officers and brokers who priced the loans in question. *See Countrywide* at 7; *Wells Fargo* at 5-6; *National City* at 16-17. All three district courts agreed that, even assuming that the regression analyses proved that race was statistically significant in the aggregate, there was still no evidence that all (or even any) of the putative class members shared a common injury. *Id*.

In fact, in Wells Fargo's case, at least one broker testified that he increased the interest rate on loans "depending on how hard the file is or how long it takes to work on it," (*Wells Fargo* at 6) thereby illustrating the truth of the *National City Court*'s observation that "even if the Court assumes the regression analysis removes all credit related reasoning, there may be non-credit related reasoning that individual loan officers contemplated that is not based on race." *National City* at 17. In the class action context, such possibilities — indeed, such realities — are fatal. "Although [the statistical model is based] on classwide data, that fact alone does not support the conclusion that every member of the class suffered the same injury, or any injury at all." *Countrywide* at 6-7.

While not groundbreaking in their own right, the *Countrywide*, *National City*, and *Wells Fargo* cases illustrate the real impact that *Dukes* is having, and in particular the practical significance of the *Dukes* decision on putative disparate impact class actions, and specifically those based on allegations that a policy of discretionary decision-making produced a discriminatory result. In such cases, it seems clear that "[c]lass certification will not obtain where the only commonality among members is their race and their relation to the defendant." *Countrywide* at 6.

But Statistical Significance Can Still Be Costly

Nonetheless, Countrywide's $335 million payout also shows that lenders are not out of the woods. While statistical significance may not demonstrate commonality across a class of potential plaintiffs, it can create a substantial risk of liability, particularly in the context of an enforcement action brought by the Attorney General of the United States on behalf of the very same "class" of allegedly injured consumers.

The complaint filed by the United States against Countrywide was brought pursuant to sections of the FHA and ECOA that allow for enforcement actions to be maintained by the Attorney General on behalf of "aggrieved" persons or credit applicants. *See* 42 U.S.C. § 3614; 15 U.S.C. § 1691e. The FHA further provides that in such enforcement actions a court my grant the relief that it deems appropriate, including "monetary damages to *persons aggrieved*," (emphasis added), who are defined as persons who "[claim] to have been injured by a discriminatory housing practice . . . ." 42 U.S.C. § 3614(d)(1)(B); 42 U.S.C. § 3602(i). The ECOA also provides that "the Attorney General may bring a civil action...for such relief as may be appropriate, including actual and punitive damages and injunctive relief." 15 U.S.C. § 1691e(h).

As a result, while *Dukes* may throw a wrench in the procedural machinery of Rule 23 discriminatory lending actions under the FHA and ECOA, it is of little use to lenders who are faced with defending what amount to claims for class-wide recovery but where the "class plaintiff" is the Attorney General himself. In such cases, the United States does not have to show any "common mode" in which loan officers and brokers exercised their discretion or produce any evidence that there is a common injury among all of the "aggrieved persons" on whose behalf the Attorney General brings the action.

For this reason, then, when analyses of Countrywide retail loan originations between 2004 and 2008 allegedly "demonstrate[d] statistically significant discriminatory pricing disparities...," it is understandable why Bank of America may have seen fit to ink "the largest fair housing accord in U.S. history." [Bruce, R. Christian, *BNA Class Action Litigation Report*, "$335M Settlement on Countrywide Mortgages Signals Long-Term Litigation Risk for Banks," 2012.]

Whether the Attorney General (and his state counterparts, like Illinois Attorney General Lisa Madigan, who sued Wells Fargo in 2009 under state fair lending and civil rights laws) will remain the driver behind large-scale lending discrimination lawsuits for the foreseeable future remains to be seen. In particular, the issue of whether the FHA actually allows for disparate impact claims is an open question to be decided by the Supreme Court in *Magner v. Gallagher*, U.S., No. 10-1032, cert. granted 11/7/11, which is set for oral argument on February 29, 2012. Not surprisingly, the United States has filed an *amicus* brief in support of the legal cognizability of such claims under the FHA.

And so, even if *Dukes* spells the beginning of the end for this particular brand of discriminatory lending class actions, it may be just the beginning for Uncle Sam . . . at least until *Magner* is decided or the Attorney General decides to change course.

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