

## **DEALER RATE PARTICIPATION CLASS ACTIONS UNDER THE ECOA: HAVE WE REACHED THE END OF THE ROAD?**

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### **INTRODUCTION**

Articles in the two previous Surveys<sup>3</sup> reported on the settlement of several class actions asserting that dealer participation programs offered by a variety of auto finance companies had a disparate impact on protected racial minorities in violation of the Equal Credit Opportunity Act (ECOA).<sup>4</sup> The trend continued in 2006. As discussed below, additional class action settlements closely followed the model of previous settlements. As of this writing, there may only be one pending class action left pursuing such a theory where a settlement has not been negotiated.

To date, no ECOA class action claiming that a finance company's dealer participation program had a prohibited disparate impact on a racial minority has ever reached an adjudication on the merits, except for four cases where courts granted summary judgment dismissing certain class representatives' claims on grounds unique to those representatives.<sup>5</sup> This has left many unresolved questions concerning what is or is not permissible conduct by finance companies. The few court rulings which have come down in these cases merely define the minimum necessary to state a claim upon

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<sup>3</sup> Nicole F. Munro, Jean L. Noonan and Elizabeth R. Topoluk, *Recent Developments in Fair Lending and the ECOA: A Look at Housing Finance and Motor Vehicle Dealer Participation*, 60 Bus. Law. 67 (2005); Kenneth J. Rojc and Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Auto Financing*, 61 Bus. Law. 819 (2006).

<sup>4</sup> 15 U.S.C. §§ 1691-1691f.

<sup>5</sup> See cases discussed *infra* at notes 26-33.

which relief can be granted rather than giving any guidance as to what conduct or failure to act is actually sufficient to violate the law. Nevertheless, it appears that these cases may have run their course since new filings have not been reported for some time and the pool of targetable finance company defendants has shrunk considerably through class action settlements.

## **BACKGROUND**

Arrangements for the sale of consumer retail installment contracts (RISCs) where the value of the RISC in the secondary sale of that RISC is higher to the extent the dealer has negotiated a higher interest rate with the consumer, *i.e.*, the vehicle dealer benefits by its ability to negotiate a higher interest rate with its customer because that RISC has a higher value when sold to a contract purchaser, goes by a number of names in the industry. Inevitably, the dealer receives a higher price for selling a contract that bears a higher rate of interest, of Annual Percentage Rate (APR). It may be in the form of an APR split, a credit, a dealer spread, a dealer reserve, a dealer markup or other similar arrangement or term.

Whatever arrangement or term is used, the program operates in much the same fashion. A finance company which purchases automobile RISCs from the dealers who enter into them with car buyers announces to the dealers the minimum APR that it will consider for car buyers that meet certain credit risk criteria. This is commonly called the "buy rate." If the contract has an APR above the buy rate, usually within a pre-determined range of points, the assignee credits or pays the dealer part of the difference between the higher APR and the buy rate. In effect, the finance company pays the dealer more for a contract which is worth more over its term because of the higher APR. This price is negotiated between the dealer and the finance company, the

latter hoping to motivate the dealer to sell the contract to the finance company which offers such a program instead of one of its competitors.

Even though the amount the consumer pays is negotiated between the dealer and the consumer, and is fully disclosed on the face of the RISC, the fact that the dealer has "marked up" the APR over the buy rate for its own financial benefit has led to much litigation over the years.<sup>6</sup> Claims against dealers based on an alleged promise to obtain "the best rate available" for the car buyer, when the dealer instead elected to mark up the APR from the buy rate, have occasionally survived a motion to dismiss.<sup>7</sup> However, much more often such claims have been dismissed.

For example, dealing with a case where the dealer allegedly made just such a "promise" about rates to a customer, the Alabama Supreme Court ruled against imposing a "duty to speak" on automobile dealers in *Ex parte Ford Motor Credit Co.*<sup>8</sup>

The court held:

While the law still requires, even in the present adversarial world of commercial transactions, that direct questions be responded to truthfully and accurately, the law also generally allows a business to keep confidential its internal operating procedures.<sup>9</sup>

Likewise, the Seventh Circuit U.S. Court of Appeals rejected the argument that an automobile dealer had a duty to disclose information outside the parameters of disclosures required by the Truth in Lending Act (TILA) because the car dealer is the

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<sup>6</sup> See generally Eugene J. Kelley, Jr., John L. Ropiequet and Anna-Katrina S. Christakis, *APR Splits: Still Legal After All These Years*, 56 Consumer Fin. L.Q. Rep. 296 (2002) (*APR Splits*).

<sup>7</sup> See, e.g., *Fairman v. Schaumburg Toyota, Inc.*, 1996 WL 392224 (N.D. Ill. 1996); *Bramlett v. Adamson Ford*, 717 So. 2d 772 (Ala. App. 1996), *rev'd sub nom. Ex parte Ford Motor Credit Co.*, 717 So. 2d 781 (Ala. 1997).

<sup>8</sup> 717 So. 2d 781 (Ala. 1997), *rev'g Bramlett v. Adamson Ford*, 717 So. 2d 772 (Ala. App. 1996).

<sup>9</sup> *Id.* at 787.

buyer's agent for purposes of obtaining financing. In *Balderos v. City Chevrolet, Buick & Geo, Inc.*,<sup>10</sup> the court, by Chief Judge Posner, held:

[A]n automobile dealer is not its customer's agent, obviously not in selling cars but only a little less obviously in arranging financing. . . . If the buyer wants to buy on credit, he recognizes that his decision does not change the arms' length nature of his relation to the dealer. He knows, or at least has no reason to doubt, that the dealer seeks a profit on the financing as well as on the underlying sale.<sup>11</sup>

Courts have likewise found that dealer participation programs between car dealers and the finance companies that buy contracts from them which are not disclosed to car buyers do not give rise to an actionable TILA violation,<sup>12</sup> an actionable RICO violation,<sup>13</sup> or a violation of a state Uniform Deceptive Acts and Practices statute as a consumer fraud.<sup>14</sup> Indeed, one court addressing arguments that a dealer participation program "artificially inflated" the APR and constituted a "kickback" to the dealer held that such programs constituted "perfectly legal conduct."<sup>15</sup>

Two class action complaints filed in 1998 and 2000 in federal court in Nashville, Tennessee claiming ECOA violations completely changed this picture. In *Coleman v. General Motors Acceptance Corp.*<sup>16</sup> and *Cason v. Nissan Motors Acceptance Corp.*,<sup>17</sup> it was alleged that the defendant finance companies "allowed" car dealers to negotiated

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<sup>10</sup> 214 F.3d 849 (7th Cir. 2000).

<sup>11</sup> *Id.* at 853.

<sup>12</sup> *Perino v. Mercury Finance Co. of Illinois*, 912 F. Supp. 313, 316 (N.D. Ill. 1995); *Baldwin v. Laurel Ford Lincoln-Mercury*, 32 F. Supp. 2d 894, 898 (S.D. Miss. 1998).

<sup>13</sup> *Perino*, 912 F. Supp. at 316; *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 678 (N. D. Ala. 1996).

<sup>14</sup> *Kunert v. Mission Financial Services Corp.*, 110 Cal. App. 4<sup>th</sup> 242, 261-62, 1 Cal. Rptr. 3d 589, 603-04 (2003); *Geller v. Onyx Acceptance Corp.*, 2001 WL 1711313 (San Diego Cty. Super. Ct., Cal. November 13, 2001); *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 589-92, 836 N.E.2d 681 (2005) (citing *APR Splits*); *Duran v. Leslie Oldsmobile, Inc.*, 229 Ill. App. 3d 1032, 594 N.E.2d 1355 (1992); *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.*, 160 S.W. 3d 874, 880 (Tenn. App. 2004); *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 276 (Tenn. App. 1999).

<sup>15</sup> *Perino*, 912 F. Supp. at 316.

<sup>16</sup> See 196 F.R.D. 315 (M.D. Tenn. 2000), *vacated*, 296 F.3d 443 (6th Cir. 2002).

<sup>17</sup> See 28 Fed. Appx. 392 (6th Cir. 2002) (vacating class certification).

(or "mark up") the APR in a racially discriminatory manner that had a disparate impact on protected racial minorities. These claims were not dismissed, nor were similar claims in many other cases containing the same types of allegations of race discrimination.

### **KEY ISSUES UNDER THE ECOA**

The ECOA prohibits any "creditor" from discriminating against any "applicant" "on the basis of race, color, religion, national origin, sex or marital status."<sup>18</sup> A "creditor" can include more than the creditor defined under the TILA<sup>19</sup> since it can include "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."<sup>20</sup> The responsibility of such a "creditor" is further defined in Federal Reserve Board (FRB) Regulation B with the following exclusion:

A person is not a creditor regarding any violation of the [ECOA] or this regulation committed by another creditor *unless* the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction.<sup>21</sup>

Thus, a finance company which purchases a RISC from an auto dealer, although it is not the "creditor" under the TILA, may be a "creditor" under the ECOA and held liable for the dealer's allegedly discriminatory acts, if the contract purchaser participated in the dealer's unlawful discrimination. This contrasts with the TILA limitation on assignee liability to defects "apparent on the face" of the disclosure agreement.<sup>22</sup>

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<sup>18</sup> 15 U.S.C. § 1691(a).

<sup>19</sup> 15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17).

<sup>20</sup> 15 U.S.C. § 1691(a)(e).

<sup>21</sup> 12 C.F.R. § 202.2(1) (emphasis supplied).

<sup>22</sup> 15 U.S.C. § 1641(a). See generally Mark E. Dapier, Eugene J. Kelley, Jr., John L. Ropiequet, and Christopher S. Naveja, *Assignee Liability Under the TILA: Is the Conduit Theory Really Dead?*, 54 Consumer Fin. L.Q. Rep. 242 (2000).

However, not only must the assignee "participate" in the decision to extend credit, it must also know or have reasonable notice of the dealer's discriminatory conduct.

The ECOA dealer participation cases typically allege that the contract purchaser participates in the credit transaction before the contract is executed by preapproving the car buyer for credit. Sometimes this participation element is not a contested issue, though in others it is, particularly if the contract purchaser has merely provided the dealer information about its credit underwriting standards and has not preapproved the terms of a specific retail transaction. The knowledge or notice requirement has typically been addressed by the plaintiff with allegations that the defendant contract purchaser was aware of alleged discrimination by mortgage lenders because of news articles, Department of Justice press releases, and lawsuits concerning mortgage lending discrimination.<sup>23</sup> Coupled with an alleged "non-delegable duty" to make sure that the finance company's otherwise racially neutral computerized credit scoring system does not have any disparate impact on a protected class,<sup>24</sup> this rather dubious evidence alleging "notice" that a particular, independent car dealer is engaged in unlawful discrimination has not been addressed in any reported decision dealing with either motions to dismiss or motions for summary judgment.

One issue which has been addressed is whether the ECOA allows a recovery based solely on a claim of disparate impact on the protected class, which requires no proof of intent, as opposed to disparate treatment, which does require such proof. Two commentators in last year's *Survey* challenged the basis for using a disparate impact theory under the ECOA by arguing that the statutory language differs from civil rights

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<sup>23</sup> See *e.g.*, Complaint, Rodriguez v. Ford Motor Credit Co., 2002 WL 655679 (N.D. Ill. 2002), ¶¶ 20, 27, 29, 31-32.

<sup>24</sup> See *id.*, ¶ 20.

laws that expressly permit such actions and provides no support for such claims.<sup>25</sup> The few cases which have addressed this subject have found in favor of maintaining a disparate impact theory under the ECOA, but the issue remains murky at best.<sup>26</sup>

With few exceptions, ECOA class action defendants have not mounted summary judgment motions, although such motions have been granted where the facts made the named plaintiffs unrepresentative of a class. In *Osborne v. AmSouth Bank Corp.*,<sup>27</sup> for instance, the defendant bank got the case dismissed by demonstrating that the African American named plaintiffs received a lower "markup" than that on any other contract which the car dealer sold to the bank.<sup>28</sup>

In *Claybrooks v. Primus Automotive Finance Services, Inc.*,<sup>29</sup> summary judgment was granted on a showing that none of the named plaintiffs suffered the alleged discrimination within the ECOA's two-year statute of limitations. Summary judgment on statute of limitations grounds was also granted in *Anderson v. General Motors Acceptance Corp.*,<sup>30</sup> when plaintiffs' "best available rate" state law claim was belatedly augmented by ECOA race discrimination claims after plaintiffs became aware of the *Coleman* and *Cason* cases through a 2000 New York Times article.<sup>31</sup> And in *Smith v. Chrysler Financial Co.*,<sup>32</sup> the defendant successfully argued that the named plaintiffs lacked standing to sue for equitable relief because the prospective harm they alleged was "speculative and depends not only on Plaintiffs' future choice to purchase another

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<sup>25</sup> Peter N. Cubita and Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact - Interpreting the Meanings of the Words That Actually Are There*, 61 Bus. Law. 829 (Feb. 2006).

<sup>26</sup> *Smith v. Xerox Corp.*, 196 F.3d 358, 364-65 (2d Cir. 1999); *Coleman v. General Motors Acceptance Corp.*, 196 F.R.D. 315, 323 (M.D. Tenn. 2000), *vacated*, 296 F.3d 443 (6th Cir. 2002).

<sup>27</sup> 2003 U.S. Dist. Lexis 24507 (M.D. Tenn. July 15, 2003).

<sup>28</sup> *Id.* at \*6-7.

<sup>29</sup> 363 F. Supp. 2d 969 (M.D. Tenn. 2005).

<sup>30</sup> 2006 U.S. Dist. Lexis 47145 (N.D. Miss. July 12, 2006).

<sup>31</sup> *Id.* at \*7.

<sup>32</sup> 2004 U.S. Dist. Lexis 28504 (D.N.J. December 30, 2004).

car on credit from a Chrysler dealer but also in the future choice of Defendant to purchase that contract from the dealer."<sup>33</sup>

## **RECENT CLASS ACTION SETTLEMENTS**

While the successful argument in *Smith* is one that might have been raised with equal success in many other ECOA class actions, it has not been. Instead, as noted in the previous *Survey* articles,<sup>34</sup> most of the class actions – including *Smith* itself -- have now been settled. Eight settlements in 2003 through 2005 have been reported in the previous *Survey* articles. There was an additional settlement in 2005 and two (one pending as of this writing, subject to a fairness hearing in November 2006) have been negotiated in 2006. This appears to leave only one pending ECOA class action discrimination case, *Borlay v. Primus Automotive Financial Services, Inc.*,<sup>35</sup> a continuation of the *Claybrooks* case after the court allowed new named plaintiffs to be added who did not suffer from statute of limitations problems after the original plaintiffs' claims were dismissed.<sup>36</sup>

## **DAIMLERCHRYSLER FINANCIAL SERVICES SETTLEMENTS**

Curiously, although the defendant finance company was able to obtain a summary judgment dismissing the case in *Smith* as discussed above, and a denial of class certification, the case proceeded to a class settlement anyway. Within two weeks after the court's order was entered, plaintiffs filed a motion to reconsider, and Rainbow/PUSH moved to intervene in the case two weeks after that.<sup>37</sup> The case then

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<sup>33</sup> *Id.* at \* 9.

<sup>34</sup> See articles *supra* note 3.

<sup>35</sup> No. 3:02 cv 00382 (M.D. Tenn.).

<sup>36</sup> See *Claybrooks*, 363 F. Supp. 2d 969 (M.D. Tenn. 2005).

<sup>37</sup> Settlement agreement, *Smith v. Daimler Chrysler Services North America LLC*, No. 00-CV-6003 (D.N.J.), ¶ 1.2 (Smith Settlement) The four settlement agreements discussed in this article are on file with *The Business Lawyer*.

proceeded, as reported in the previous *Survey* article, to the same type of settlement which had been entered into by seven other finance company defendants in 2003 through 2005.<sup>38</sup> The settlement agreement was filed June 7, 2005 and was approved by the court on October 24, 2005.<sup>39</sup>

The *Smith* settlement provided for a limit on the amount the APR could be "marked up" from the buy rate ranging from 2.5 points for RISCs of up to 60 months duration, 2.0 points for contracts between 61 and 71 months duration and 1.75 points on contracts of longer duration (and 1.25 points if the defendant elected to make additional preapproved firm offers of credit available to the protected class).<sup>40</sup> DaimlerChrysler also agreed to include standard language disclosing the existence of dealer participation in its future form contracts as follows:

The Annual Percentage Rate may be negotiated with the Seller. Seller may assign this contract and retain its right to receive a part of the Finance Charge.<sup>41</sup>

DaimlerChrysler agreed to extend 600,000 preapproved firm offers of credit under one scenario or 875,000 firm offers under a second scenario.<sup>42</sup> It further agreed to provide a total of \$65,000 to class representatives and individual plaintiffs in amounts ranging from \$10,000 to \$15,000, up to \$7,500,000 in attorneys' fees to plaintiffs' attorneys and up to \$200,000 in litigation costs.<sup>43</sup>

While the *Smith* case was pending in federal court in New Jersey, another case was pending against the same defendant in Chicago, *Coburn v. DaimlerChrysler*

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<sup>38</sup> Kenneth J. Rojc and Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Auto Financing*, 61 Bus. Law. 819, 820 (2006).

<sup>39</sup> Order approving class action settlement, October 24, 2005.

<sup>40</sup> *Smith* Settlement, ¶ 10.2.

<sup>41</sup> *Id.*, ¶ 10.4.

<sup>42</sup> *Id.*, ¶ 10.8.

<sup>43</sup> *Id.*, ¶¶ 13-15.

*Financial Services North America LLC*. A settlement agreement in that case was approved by the court on September 5, 2005.<sup>44</sup> *Coburn* covered the same national class of African Americans that *Smith* did, but also included Hispanic Americans in its coverage. Evidently due to the fact that presumed class benefits such as a cap on the APR markup, disclosing the possibility of a dealer participation in the standard RISC form, and extending preapproved firm offers of credit were about to be part of the *Smith* settlement, the *Coburn* settlement contained none of these features.

Instead, the *Coburn* settlement provided that DaimlerChrysler would spend \$950,000 for employee training programs to sensitize its employees.<sup>45</sup> It also agreed to set up a diversity panel to discuss diversity and outreach programs to minority communities, and to review a summary of complaints about possible discrimination that the company would forward to the panel.<sup>46</sup> In addition, it agreed to spend \$250,000 to print and distribute brochures about vehicle financing to not-for-profit minority organizations and to grant \$500,000 to them to improve consumer financial education.<sup>47</sup> The settlement further provided for \$14,000 in payments to class representatives and individual plaintiffs at \$2,000 apiece plus up to \$2,800,000 for attorneys' fees and up to \$175,000 in costs.<sup>48</sup>

### **FORD MOTOR CREDIT CO. SETTLEMENT**

Although Ford Motor Credit Co. (FMCC) achieved some success in a couple of ECOA class action cases, it entered into a settlement agreement in a third case against

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<sup>44</sup> Settlement Agreement, *Coburn v. DaimlerChrysler Services North America LLC*, No. 03-cv-00759 (N.D. Ill.) (Coburn Settlement).

<sup>45</sup> Coburn Settlement, ¶ 8.3.

<sup>46</sup> *Id.*, ¶ 8.4.

<sup>47</sup> *Id.*, ¶ 8.5.

<sup>48</sup> *Id.*, ¶¶ 10-11.

it in 2006. In the first case, *Ceiba, Inc. v. Ford Motor Credit Co.*,<sup>49</sup> FMCC was able to get the complaint dismissed on the ground that the plaintiff consortium of community-based Latino organizations was not an "applicant" within the meaning of the ECOA and therefore lacked standing to sue either in its own right or through associational standing.<sup>50</sup>

In the second case, *Rodriguez v. Ford Motor Credit Co.*,<sup>51</sup> the court declined to certify a class under Rule 23(b)(2) or Rule 23(b)(3) because it accepted FMCC's argument that it was entitled to defend the case on the basis of individualized factors that could explain disparity in financial charges, such as "buyer preferences, negotiation skills and creditworthiness, all of which must be evaluated in the light of 7,500 individual dealerships' policies and practices."<sup>52</sup> The court also would not dismiss FMCC's counterclaims against the named plaintiffs because of their failure to make payments on their retail installment contracts, which also had great potential for making the case so fact-intensive that it could not be maintained as a class action.<sup>53</sup> The case was then dropped on an agreed motion to dismiss.<sup>54</sup>

However, in the third case FMCC proceeded to settle with a national class of African American and Hispanic American consumers in *Jones v. Ford Motor Credit Co.* on the same basis as previous ECOA class actions. It agreed to limit the APR markup over the buy rate to 2.5 points for retail installment contracts of duration up to 60 months, 2.0 points for contracts with 61 to 71 months duration, and 1.5 points for longer

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<sup>49</sup> 2003 U.S. Dist. Lexis 180829 (E.D. Pa. September 23, 2003).

<sup>50</sup> *Id.* at \*6, \*14-18.

<sup>51</sup> 2002 U.S. Dist. Lexis 7280 (N.D. Ill. April 19, 2002).

<sup>52</sup> *Id.* at \*15.

<sup>53</sup> *Id.* at \* 18-19.

<sup>54</sup> Order, No. 01 C 8525 (N.D. Ill. July 25, 2002).

contracts, along with extending either 1,250,000 or 2,000,000 preapproved firm offers of credit, depending on the scenario.<sup>55</sup> It agreed to include the same contract disclosure language in its RISC forms.<sup>56</sup> It agreed to spend \$2,000,000 on consumer assistance initiatives to be proposed by plaintiffs.<sup>57</sup> The preapproved firm offers of credit were connected to a Diversity Marketing Initiative which is to feature consumer financial education.<sup>58</sup> It was further stipulated that the Diversity Marketing Initiative itself will not violate the ECOA.<sup>59</sup> A total of \$125,000 was to be paid to class representatives in amounts ranging from \$10,000 to \$15,000, up to \$7,750,000 was to be paid for attorneys' fees and up to \$400,000 for costs.<sup>60</sup>

The *Jones* settlement excluded claims against subsidiaries of FMCC, including Primus Automotive Financial Services, Inc.<sup>61</sup> The exclusion expressly mentioned the what appears to be the one remaining ECOA class action against an auto finance company, *Borlay v. Primus Automotive Financial Services, Inc.*<sup>62</sup>

### **TOYOTA MOTOR CREDIT CORP. SETTLEMENT**

The settlement negotiated in *Baltimore v. Toyota Motor Credit Corp.*, set for a fairness hearing in November 2006 as of this writing, follows the same form as the others. The APR markup will be limited to a range of 2.5 points to 1.75 points for contracts of the same duration as in the other settlements.<sup>63</sup> Toyota also agreed to

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<sup>55</sup> Settlement Agreement, *Jones v. Ford Motor Credit Co.*, No. 00-CIV-8330 (S.D.N.Y.), ¶ 8.3 (Jones Settlement).

<sup>56</sup> *Jones Settlement*, ¶ 8.2.

<sup>57</sup> *Id.*, ¶ 8.4.

<sup>58</sup> *Id.*, ¶ 8.5.

<sup>59</sup> *Id.*, ¶ 8.5.2.

<sup>60</sup> *Id.*, ¶¶ 8.6, 9.1, 9.2.

<sup>61</sup> *Id.*, ¶ 7.

<sup>62</sup> *Id.*; see *Claybrooks*, 363 F. Supp. 2d 969 (M.D. Tenn. 2005).

<sup>63</sup> Settlement Agreement, *Baltimore v. Toyota Motor Credit Corp.*, No. CV 01-05564 (C.D. Cal.), ¶ 7.3 (Baltimore Settlement).

disclose dealer participation in its standard form RISCs.<sup>64</sup> It agreed to spend \$750,000 for consumer financial education programs focusing on minorities.<sup>65</sup> A Diversity Marketing Initiative will encourage African Americans and Hispanic Americans to make use of special rate programs to be offered by Toyota through 850,000 preapproved firm offers of credit, with the stipulation that the program does not itself violate the ECOA.<sup>66</sup> In addition, \$95,000 is to be paid to class representatives in amounts ranging from \$5,000 to \$15,000, and up to \$10,600,000 is to be paid for attorneys' fees and costs.<sup>67</sup>

One unique feature of the Toyota settlement provides for cash or certificates that can be applied to credit costs if members of the class submit claim forms showing that they have paid more than \$750 in finance charges for APRs that exceed the buy rate. Class members can qualify for a cash payment varying between \$25 to \$225 or certificates of credit in amounts varying between \$50 and \$400, depending on how much they have paid in finance charges.<sup>68</sup>

## **CONCLUSION**

Since the targeted finance company defendants in the ECOA discrimination cases have almost all chosen to settle the litigation, often after suffering defeat on motions to dismiss and motions for class certification but occasionally succeeding on summary judgment, the case law provides little practical guidance as to what is or is not prohibited by the Act in the auto finance arena. Moreover, the settlements do not appear to do more than tinker with the dealer participation programs which allegedly caused a disparate impact on protected minorities.

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<sup>64</sup> Baltimore Settlement, ¶ 7.2.

<sup>65</sup> *Id.*, ¶ 7.4.

<sup>66</sup> *Id.*, ¶¶ 7.5, 7.5.2.

<sup>67</sup> *Id.*, ¶¶ 7.7, 9.

<sup>68</sup> *Id.*, ¶ 7.6.

The class action plaintiffs have shied away from any attempt to prove actual discriminatory impact with respect to members of their classes because of the difficulties involved in proving up actual damages. The contract purchasers ordinarily use computerized credit scoring systems that are racially neutral on their face in order to determine whether to purchase a particular contract from a car dealer. Thus, for a nationwide class whose contracts have been sold to a single contract purchaser, any actual discriminatory decision-making would be in the hands of hundreds or thousands of independent dealers and sales persons rather than in the hands of the contract purchaser.

Given this fact, any number of non-discriminatory reasons for marking up the APR by an additional point or two for a particular car buyer by each dealer could also be involved for that contract. This is the reason why all of the settlements have been limited to certification of the class under Rule 23(b)(2) and why the settlements have given little in the way of financial relief to members of the class on their existing contracts.

The presumed class benefits of the settlements do little to address what should be the underlying problem: Are discriminatory credit decisions being made by a given car dealer? For example, instead of limiting the amount dealers may mark up the APR to four or five points over the buy rate, a common limit for dealer participation programs, under the settlements dealers selling contracts to the settlement defendants are limited to 2.5 percentage points. This does not in any way address the possibility of discrimination within that range. While this may or may not affect the way dealers negotiate and price retail vehicle credit sales, nothing in the settlement guarantees that

discriminatory credit decisions will be eliminated -- if they ever existed at the dealer level in the first place. Indeed, only one non-class action ECOA case has come to light where dealers were co-defendants with a finance company, and the court granted summary judgment dismissing the claims.<sup>69</sup>

Likewise, sums spent on consumer financial education, while certainly helpful for consumers in a general sense, whether they are members of a protected minority or not, do not address any underlying discriminatory credit decisions by either dealers or finance companies. They merely enable consumers who happen to go through such an educational program to learn more about the system and become better negotiators. Sensitivity training for finance company personnel, a feature of the *Coburn* settlement, may also be helpful in a general sense, but it would do little or nothing to combat discriminatory conduct at the dealer level.

While the settlements feature extension of preapproved firm offers of credit at or below the buy rate to members of the affected class who qualify for such credit treatment, the efficacy of such relief depends on the class members actually taking advantage of the offers to buy cars in order to obtain any benefit. This is what the *Smith* court found to be too "speculative" to give the named plaintiffs standing to represent a Rule 23(b)(2) class.<sup>70</sup> And arguably, the net benefit of such marketing programs, if they are taken advantage of, is greater for the defendant contract purchaser than it is for plaintiff class members.

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<sup>69</sup> Anderson v. General Motors Acceptance Corp., 2006 U.S. Dist. Lexis 47145 at \*7 (N.D. Miss. July 12, 2006).

<sup>70</sup> Smith v. Chrysler Financial Co., 2004 U.S. Dist. Lexis 28504 at \*9 (D.N.J. Dec. 30, 2004). See also Clement v. American Honda Finance Co., 176 F.R.D. 15, 25 n. 16 (D. Conn. 1997) (a "heightened sense of disgust" expressed by objectors to receiving benefits from a proposed class settlement only if they continued to deal with the defendant contract purchaser important factor in decertifying TILA class action).

Most troubling is the inability to predict with any degree of confidence what contract purchasers, or creditors generally, may or may not do in the future without running afoul of the ECOA's antidiscrimination provisions if they are not protected by a class action settlement agreement approved by a court. Would voluntarily adopting a cap on APR markups of 2.5 points provide a "safe harbor" for a contract purchaser in a dealer participation program?<sup>71</sup> Can a finance company which is not subject to a settlement agreement safely go over that limit by a point or two in order to gain a competitive advantage on price with vehicle dealers, as against other finance companies that are bound by the class action settlements, in order to lure car dealers' business away from them? Note that there is no basis for the 2.5 percent limit in either the ECOA or Regulation B; indeed, there is no apparent relation between that limit and the allegations of discrimination. Realistically, is there any way for finance companies to police potentially discriminatory decisions by independent car dealers? Can a finance company protect itself contractually by requiring written reassurances or indemnities from the dealers it buys contracts from? And what evidence of knowledge or notice of dealer discrimination, and what level of "participation" in the dealer's retail credit negotiations, is sufficient to trigger ECOA liability anyway?

As the cases stand, even after all of these years and the massive litigation costs, these issues are unresolved and it remains unlikely that they and many other fundamental ECOA questions will ever be addressed or answered by the courts. In the absence of any such guidance from the courts, the most that can be suggested is that finance companies, and dealers, consider modeling their practices on the program

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<sup>71</sup> This limit may be required by state law, as under the California Car Buyer's Bill of Rights, Cal. Civ. Code § 2982.10, effective July 1, 2006. See Elizabeth A. Huber, *California Car Buyer's Bill of Rights*, 60 Consumer Fin. L.Q. Rep. 393 (2006).

limitations which have been approved in these settlement agreements as an effort to appear non-discriminatory if and when a class action complaint is served on them for what would otherwise be "perfectly legal conduct."

Dealer\_Rate\_Participation\_Class\_Actions\_Under\_the\_ECOA