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ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer financial services and has

CFPB Employs "Mystery Shopper" Strategy in Fair Lending Investigation

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The CFPB and the Department of Justice have partnered together to enter into a proposed consent order with BancorpSouth Bank regarding allegations the bank engaged in a practice of redlining in its mortgage lending practice, including discrimination in its underwriting and pricing of individual mortgage loans to minorities, and implementing an explicitly discriminatory denial practice. The investigation marks the first time that the CFPB has used testers or "mystery shoppers" to support an allegation of discrimination. The consent order, if approved, requires the bank to invest \$4 million in loan subsidies, pay \$2.78 million in settlement to African-American consumers harmed by the bank's practices, spend at least \$300,000 on targeted advertising in majority-minority neighborhoods in its Memphis MSA, spend at least \$500,000 on local partnerships with community or governmental organizations that provide financial literacy and pay a \$3 million civil penalty. The proposed consent order also requires the bank to extend credit offers to previously denied African-American consumers who were denied mortgage loans as a result of the bank's allegedly discriminatory underwriting policies and add at least one additional branch in a majority-minority neighborhood in its Memphis MSA.

The complaint alleges that between 2011 and 2013, the bank violated the Equal Credit Opportunity Act and Fair Housing Act. Both Acts prohibit discrimination based upon race, color, and national origin. The agencies alleged that the bank "discriminated in distinct ways through virtually every stage of its lending process." Complaint, at ¶ 3. The complaint makes four key allegations against the bank. First, the complaint alleges that the bank engaged in redlining in minority neighborhoods in its Memphis MSA. *Id.* at ¶4. Secondly, the complaint alleges that the bank illegally discriminated against African-American mortgage applicants in its loan underwriting, rejecting both consumer and business purpose loans at significantly higher rates than those of "similarly situated non-Hispanic White applicants" ("White"). *Id.* at ¶5. Thirdly, the complaint alleges the bank discriminated against African-American applicants, charging higher prices than similarly situated White applicants. *Id.* at ¶6. Finally, the complaint alleges that the bank implemented a policy and practice that required its employees to treat mortgage applicants differently based upon their race. *Id.* at ¶7.

been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

The bank, while neither admitting nor denying the allegations of the complaint, entered into the consent order “solely for the purpose of avoiding contested litigation with the United States and the Bureau, and to instead devote its resources to providing fair credit services to eligible borrowers with meeting their credit needs.” The consent order further notes that before the entry of the Order, the Bank engaged in steps to improve its compliance management system, including:

- Implementing rate sheets to price loans originated by its Community Banking Department;
- Transitioning to centralized underwriting;
- Appoint a Chief Lending Officer with responsibility for the bank’s fair lending compliance program;
- Opening a full-time service branch in a minority neighborhood in its Memphis MSA;
- Implementing enhanced fair lending training; and
- Monitoring pricing and underwriting outcomes on a quarterly basis.

Beyond the monetary remediation previously discussed, the consent order requires the bank:

**With the assistance of a third party independent compliance-management-system consultant, develop and submit for approval a written Fair Lending Compliance Plan that includes at a minimum:

- Steps to effectively and promptly revise the bank’s current mortgage lending policies and practices to ensure compliance with ECOA and the FHA;
- Diversity policies and practices;
- Fair lending training on an annual basis to all lending personnel to ensure employees’ conduct themselves in a nondiscriminatory manner;
- Written policies and procedures that ensure the bank provides equal information and assistance to all applicants regardless of race or other prohibited characteristics;
- A formal process for ongoing monitoring of defendant’s mortgage lending for compliance with ECOA and the FHA, including conducting periodic fair lending statistical analyses of loan pricing and underwriting outcomes;
- Internal regular audits of the bank’s mortgage lending at least annually; and
- Implementation or revision of a consumer complaint resolution program which addresses complaints alleging discrimination in mortgage lending.

**Implement policies and procedures for achieving complete objectivity in the pricing of all mortgage loans based on credit and borrower characteristics supported by legitimate business needs;

**Maintain specific race-neutral underwriting guidelines, policies, and procedures for mortgage loans that are designed to ensure consistent application of legitimate underwriting criteria and avoid unlawful discrimination.

Banks and other lenders should take notice that the CFPB has now embraced the use of “testers” or mystery shoppers – sending individuals (both white and African American)

into branch offices to ascertain whether testers experience different treatment. The CFPB contended in this matter that, in several instances, a Bancorp South Bank loan officer treated the African-American tester less favorably than a white counterpart with similar credit qualifications.

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