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CONSUMER NEWS: THE NATION'S ANTIRACIST INTERVENTIONS TO FIGHT CONSUMER RACISM

Shane Stover, News Editor

A long overdue fight is at the forefront of the United States, and consumer law is playing a large role. This article shall address two antiracist interventions in support of racial equality within consumer law and represent important steps towards righting past wrongs of consumer racism.

I. THE CONSUMER BANKRUPTCY REFORM ACT OF 2020'S ATTEMPT TO RIGHT THE WRONGS OF THE U.S. BANKRUPTCY CODE

In December 2020, Senator Elizabeth Warren and Congressman Jerrold Nadler proposed the Consumer Bankruptcy Reform Act of 2020¹ (the "CBRA") in an attempt to overhaul consumer bankruptcy law.² While not overtly racist, the U.S. Bankruptcy Code "is designed to give relief to people who fit a certain profile."³ Blacks are disproportionately choosing to file their

¹ Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. (2020).

² Elizabeth Brusa, Alexandra Dugan, & Christopher Hawkins, *Top 10 Changes to Consumer Bankruptcy Proposed in the Consumer Bankruptcy Reform Act of 2020*, JDSUPRA (Dec. 15, 2020), <https://www.jdsupra.com/legal-news/top-10-changes-to-consumer-bankruptcy-76292/> (proposing the changes to the system would be of benefit to consumers); Jay Adkisson, *Warren-Nadler Consumer Bankruptcy Reform Act Portends Biggest Changes to Bankruptcy Code Since 2005*, FORBES (Jan. 27, 2021), <https://www.forbes.com/sites/jayadkisson/2021/01/27/warren-nadler-consumer-bankruptcy-reform-act-portends-biggest-changes-to-bankruptcy-code-since-2005/?sh=27d5c3e847ad> (finding the proposed changes to be the biggest since the Bankruptcy Abuse Prevent and Consumer Protection Act of 2005).

³ Leslie A. Pappas, *Bankruptcy Racial Disparities Poised to Add to Pandemic Pain*, BLOOMBERG LAW (Aug. 31, 2020),

debts under Chapter 13 rather than Chapter 7, even though there is much agreement that Chapter 7 would provide a better outcome for families of limited means.⁴ One explanation for why Blacks are using Chapter 13 at a higher rate is that it can be a “no-money-down” process.⁵ While Chapter 7 is likely a better option, Black families are not able to afford attorney fees up front and must rely on Chapter 13 that allows the debtor to spread their expenses over a payment plan.⁶ The CBRA would address this filing discrepancy by streamlining Chapter 7 and Chapter 13 bankruptcies into a new Chapter 10.⁷ Under this new regime, a debtor’s inability to afford good legal representation, which is recommended by the federal government⁸, will no longer restrict filers from being able to choose the correct chapter under which to file.⁹ The new regime will allow for court approved payment plans and all low-income and low-asset families will be considered for a “no payment discharge.”¹⁰

<https://news.bloomberglaw.com/bankruptcy-law/bankruptcys-racial-disparities-poised-to-add-to-pandemics-pain> (finding the U.S. Bankruptcy Code benefits people of wealth the most); Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), <https://projects.propublica.org/graphics/bankruptcy-data-analysis> (finding disparities in income, assets, and the court districts where debtors lived).

⁴ Pappas, *supra* note 3 (finding Blacks are filing under Chapter 13 more than Chapter 7 even though Chapter 7 is used more than twice as much overall); Elena Botella, *The Bankruptcy Code is Stacked Against Black Families. Elizabeth Warren’s New Bill Would Change That*, FORBES (Dec. 15, 2020), <https://www.forbes.com/sites/elenabotella/2020/12/15/the-bankruptcy-code-is-stacked-against-black-families-elizabeth-warrens-new-bill-would-change-that/?sh=a8b0eca1b250> (showing Chapter 7 is likely a better option for families of limited means yet Black families tend to file under Chapter 13).

⁵ Pappas, *supra* note 3 (allowing expenses and fees to be wrapped up in a payment plan versus having to pay all up front under Chapter 7).

⁶ *Id.*; Botella, *supra* note 4 (findings typical costs for declaring bankruptcy to be \$986 for Chapter 7 and \$2,515 for Chapter 13).

⁷ Botella, *supra* note 4; Adkisson, *supra* note 2 (advocating the new regime would operate similar to a Chapter 11 reorganization).

⁸ Botella, *supra* note 4 (“Americans can declare bankruptcy without a lawyer, filing on their own, or filing with an online legal service like Upsolve, but the federal government ‘strongly’ recommends that Americans make use of a qualified attorney, because of the ‘long-term financial and legal outcomes.’”).

⁹ Botella, *supra* note 4 (finding judges previously discouraged payment plans under Chapter 7 filings); Adkisson, *supra* note 2.

¹⁰ Botella, *supra* note 4; Adkisson, *supra* note 2.

Additionally, the CBRA will make certain criminal justice fines and fees dischargeable through bankruptcy.¹¹ It is well documented that there is racial bias in arrests and prosecutions in the United States.¹² The CBRA attempts to address such racial disparities by making criminal justice fines and fees, such as costs of public defense or incarceration, fully dischargeable. Conversely, the CBRA prevents debts stemming from civil rights violations from being dischargeable.¹³ While many do not expect this exact version of the CBRA to be passed, it is a good indication of the direction Congress and general bankruptcy law are heading under the Biden administration.¹⁴

II. THE EXPECTED APPLICATION OF THE EQUAL CREDIT OPPORTUNITY ACT AND THE DISPARATE IMPACT THEORY UNDER THE BIDEN ADMINISTRATION

In 2014, the Obama administration enacted the Equal Credit Opportunity Act (the “ECOA”) which “prohibits

¹¹ Botella, *supra* note 4.

¹² The list of reports and statistics supporting this is astounding, but here a few to get the research started. Kiel, *supra* note 3 (finding unpaid criminal court debt, like unpaid parking tickets, lead to driver’s license suspensions at a higher rate for Blacks); Abby Ohlheiser, *Racial Bias in Marijuana Arrests is Worse than You Thought*, THE ATLANTIC (June 3, 2013), <https://www.theatlantic.com/national/archive/2013/06/racial-bias-marijuana-arrests-worse-you-thought/314623/> (finding Blacks were four times more likely to be arrested for marijuana across the nation in 2013); THE SENTENCING PROJECT, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (reporting African American adults are 5.9 times as likely to be incarcerated than whites).

¹³ AMERICAN BANKRUPTCY INSTITUTE, *The Consumer Bankruptcy Reform Act of 2020*, <https://www.abi.org/feed-item/the-consumer-bankruptcy-reform-act-of-2020> (last visited Apr. 26, 2021) (noting these debts were previously non-dischargeable under the U.S. Bankruptcy Code).

¹⁴ Andrea Wimmer, *CBRA – The Next Big Reform in Consumer Bankruptcy?*, UPSOLVE (Jan. 29, 2021), <https://upsolve.org/learn/cbra-series-1-intro/> (noting the CBRA represents a good starting point for negotiations even if the bill is not passed); Adkisson, *supra* note 2 (finding the CBRA needs a few changes primarily with the financial and business formation portions but is a good start for the parts addressing the racial discriminations within the U.S. Bankruptcy Code).

discrimination on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or good faith exercise of any rights under the Consumer Credit Protection Act.”¹⁵ Although previously enforced, the ECOA codified the Obama administration’s belief that disparate impact – that is, the legal doctrine that a policy may be discriminatory if it has a disproportionate adverse impact against a minority group¹⁶, is prohibited.¹⁷ During the Obama Administration, the Department of Justice recovered over \$1 billion in settlements from the financial services industry through the ECOA and its disparate impact theory.¹⁸ Under the Trump administration, the disparate impact theory was rarely used and much controversy surfaced as to its appropriate use in enforcing fair-lending statutes.¹⁹ The Trump administration

¹⁵ Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2016); FED. TRADE COMM’N, *Equal Credit Opportunity Act*, <https://www.ftc.gov/enforcement/statutes/equal-credit-opportunity-act> (last visited Apr. 26, 2021).

¹⁶ NFHA, *NFHA Disparate Impact Information*, <https://nationalfairhousing.org/disparateimpact/> (last visited Apr. 26, 2021) (applying disparate impact to any group based on race, national origin, color, religion, sex, familial status, or disability when there is no legitimate, non-discriminatory business need for the policy); SHRM, *What are Disparate Impact and Disparate Treatment*, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx> (last visited Apr. 26, 2021) (defining disparate impact as unintentional discrimination).

¹⁷ Christie Thompson, *Disparate Impact and Fair Housing: Seven Cases You Should Know*, PROPUBLICA (Feb. 12, 2013), <https://www.propublica.org/article/disparate-impact-and-fair-housing-seven-cases-you-should-know> (referring to the disparate impact legal standard that was formalized through the U.S. Department of Housing and Urban Development prohibiting practices that result in discrimination “regardless of whether there was an intent to discriminate).

¹⁸ Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PENNSTLR 421, 422 (2015) (reaching a \$355 million settlement with Countrywide Home Loans (currently known as Bank of America, N.A.), \$175 million settlement with Wells Fargo Bank, \$21 million settlement with SunTrust Mortgage Inc., and \$2 million settlement with PrimeLending).

¹⁹ Daniel H. Burd, *Fair-Lending Enforcement Under the Biden Administration – the Return of Disparate Impact*, THE NATIONAL LAW REVIEW (Nov. 19, 2020), <https://www.natlawreview.com/article/fair-lending-enforcement-under-biden-administration-return-disparate-impact> (finding many political action groups and progressive members of Congress denounced the Trump

published the HUD's Implementation of the Fair Housing Act's Disparate Impact Standard in September 2020, which allegedly made it harder to prove forms of bias needed to recover under the ECOA.²⁰ This transferred the defendant's burden to justify the policy to the plaintiff, requiring proof that a specific policy or practice directly caused a statistical disparity between outcomes for different groups.²¹

In March 2021, Marcia L. Fudge²² was confirmed as the Secretary of the Department of Housing and Urban Development, making her the first Black woman in that position in over 40 years.²³ Fudge shares similar priorities with the Biden administration, and plans to end discriminatory housing practices in the hopes of dismantling systematic racial injustice and boosting Black homeownership.²⁴ Many expect Fudge to reinstate the

administration's application of the disparate impact theory and their fair housing practices).

²⁰ Tracy Jan, *New Federal Rule Will Make it Harder to Challenge Discrimination in the Housing Industry, Lawsuits Allege*, THE WASHINGTON POST (Oct. 22, 2020), <https://www.washingtonpost.com/business/2020/10/22/housing-discrimination-lawsuit-hud/>.

²¹ *Id.*; Arthur Anthony, *Will HUD's New "Disparate Impact" Rule Stand in the Biden Administration?*, JDSUPRA (Dec. 21, 2020), <https://www.jdsupra.com/legalnews/will-hud-s-new-disparate-impact-rule-73003/#:~:text=HUD%20would%20also%20require%20a,impact%20on%20a%20protected%20class.&text=The%20Rule%20also%20outlines%20defenses,disparate%20impact%2C%20among%20other%20changes> (following the ruling in *Tex. Dep't of Housing & Cmty. Affairs et al. v. The Inclusive Communities Project, Inc. et al.*, 135 S. Ct. 2507 (2015)).

²² *Fudge, Marcia L.*, HUD, https://www.hud.gov/about/leadership/marcia_fudge (last visited Apr. 26, 2021) (Under Secretary Fudge's leadership, the Department of Housing and Urban Development will work to eradicate the growing homelessness issue, put an end to discriminatory practices in the housing market, and ensure that our fair housing rules are doing what they are supposed to do: opening the door for families who have been systematically locked out for generations to buy homes and have a fair shot at achieving the American dream.").

²³ Tracy Jan, *Marcia Fudge Confirmed as First Black Woman to Lead HUD in More Than 40 Years*, THE WASHINGTON POST (Mar. 10, 2021), <https://www.washingtonpost.com/business/2021/03/10/hud-secretary-marcia-fudge-confirmation/> (receiving 66 out of 100 votes in the Senate after being nominated by President Biden).

²⁴ *Id.*; Kelsey Ramirez, *Marcia Fudge Vows to End Discrimination as HUD Secretary*, HOUSINGWIRE (Jan. 28, 2021), <https://www.housingwire.com/articles/marcia-fudge-vows-to-end-discrimination-as-hud-secretary/> (vowing to

Obama administration rule under ECOA, which barred the housing industry from discriminatory practices that may have seemed race-neutral on the surface, but actually lead to an adverse effect on minority groups.²⁵ Additionally, in tandem with President Biden, the U.S. Department of Housing and Urban Development submitted the Affirmatively Furthering Fair Housing Rule, which requires local governments accepting federal funding to review existing and create new policies to actively work towards reversing segregation.²⁶ This rule was originally included under the Fair Housing Act of 1968²⁷, but has since seldom been enforced with the exception being under the Obama administration.²⁸ Among the administration's many priorities, the disparate impact theory is expected to return under Fudge's direction and the entire Biden administration as part of their initiative to restore the dismantling of fair housing regulations done under the Trump administration.²⁹

III. CONCLUSION

Industries throughout the country have been reminded of the role they play in righting past wrongs regarding racism and racist practices. As currently written, the United States Bankruptcy Code has exhibited racist tendencies towards filers who do not fit a certain profile. While the Consumer Bankruptcy Reform

right past wrongs rather than just ensuring proper treatment in the housing market in the future).

²⁵ Jan, *supra* note 23; Alex Roha, *Industry Welcomes Marcia Fudge as HUD Secretary*, HOUSINGWIRE (Mar. 10, 2021), <https://www.housingwire.com/articles/industry-welcomes-marcia-fudge-as-hud-secretary/> (expecting Marcia Fudge to renegotiate the changes made under the Trump administration, including the disparate impact application and burden, affecting minority groups).

²⁶ Kriston Capps, *Trump Scrapped Two Fair Housing Rules; Biden is Bringing Them Back*, BLOOMBERG CITYLAB (Apr. 13, 2021), <https://www.bloomberg.com/news/articles/2021-04-13/biden-to-restore-two-obama-era-fair-housing-rules> (speculating the rule may serve as a stand-in until a fuller rule can be introduced).

²⁷ Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1968) (signed under President Lyndon Johnson and expanded the Civil Rights Act of 1964 to prohibit discrimination against minority groups in the housing market.)

²⁸ Capps, *supra* note 26 (stating the Obama administration drew formal guidance on how to reduce and eliminate systematic discrimination using fair housing assessments during their time in office but repealed during the Trump administration and direction from then Secretary of the Department of Housing and Urban Development Ben Carson).

²⁹ Jan, *supra* note 23; Capps, *supra* note 23.

Act of 2020 may not be the final form of legislation that attempts to rights these wrongs, it shows that some legislators are aware of inherent racism within bankruptcy law. The current presidential administration, joined by the Secretary of the Department of Housing and Urban Development, are taking steps towards ending systemic racial injustice. It is expected that the disparate impact theory will be re-introduced into housing practices to help boost Black homeownership. Bankruptcy law and fair housing regulations are just two of the many areas within the country that need to be investigated for systemic racial injustice and improved through legislation. These proposed legislative actions and reintroductions of prior policies demonstrate positive signs that actions towards ending systemic racial injustice could be coming.