The Consumer Finance Podcast **–** Redlining Enforcement: Past and Future
Host: Chris Willis
Guests: Lori Sommerfield and Stephen Hayes
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Chris Willis (00:05):

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's, Consumer Financial Services Regulatory Practice. And today we're going to be taking a dive into both the past and potential future of redlining under our country's fair lending laws. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And of course, don't forget about all our other great podcasts, the *FCRA Focus*, *Payments Pros*, *Moving the Metal*, our auto finance podcast, and the *Crypto Exchange*, all about the crypto and digital assets industry. All of those are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing. Now, as I said, today we're going to be taking a deep dive into both the past and potential future of redlining, and I've got two guests joining me for this conversation.

First is my partner, Lori Sommerfield, whom you will recognize her voice as a very frequent participant in our podcast. But we also have a very special guest today, and that's Stephen Hayes. Stephen is the co-managing partner of Relman Colfax, which is a civil rights law firm. And Stephen has the distinction of not only representing consumers on civil rights questions, including very frequently fair lending questions and fair housing questions, but also regularly providing compliance advice to industry actors, again relating to those subjects, civil rights, but particularly fair lending. He's really a very well-known figure in the fair lending community, and I'm really happy to have him on the podcast with us today. So, Stephen, welcome to the podcast.

Stephen Hayes (01:42):

Thank you. I'm very excited to be here.

Lori Sommerfield (01:44):

And Chris, thanks for having me again.

Chris Willis (01:46):

So, Lori, thank you too for being on. Why don't you kick off our conversation because I think the best place to start with the discussion of the past and future of redlining is to start with what I think of as the traditional understanding of what it takes, what bad things does someone have to do in order to be accused of mortgage redlining as it has been traditionally defined. So can you take us through that, Lori?

Lori Sommerfield (02:09):

Sure. Let's start with the legal theories that are actually used traditionally to bring a redlining case, because I think that's important for the audience to understand first. So, since the early 1990s, the DOJ, HUD, and the federal banking agencies recognized redlining as a form of disparate treatment, and that's a type of intentional discrimination that violates the federal fair lending laws, like the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA). For example, back in 2009 when the FFIEC issued the Interagency Fair Lending Examination procedures, the agencies defined the term “redlining” as a form of disparate treatment discrimination whereby a lender provides unequal access to credit or unequal terms of credit because of the race, color, or national origin of the residents of the area where the mortgage applicant either resides or seeks to reside. And even as recently as 2019 in a redlining consent order with an Indiana bank, the DOJ continued to use the term redlining using that definition.

(03:12):

So, in order to establish a redlining case, the federal government has to prove that a financial institution acted intentionally because of the race or ethnicity of a particular neighborhood. But in terms of the types of indicia that the federal agencies look for in a redlining case, they typically look for Home Mortgage Disclosure Act (HMDA) data first to see if there's any disparities in either mortgage application or mortgage origination volume. But then they also have to look at other factors to see whether there's any other supplemental information that could present evidence of a lender's weaker performance in minority neighborhoods. And that could be things like basically not having any branches in majority-minority census tracks, closing branches that it acquires from another bank in communities of color, drawing its service areas to exclude census tracks where there are majority-minority populations, or conducting minimal advertising in communities of color. Those are just some examples.

Chris Willis (04:16):

Got it. So Lori, I think that's a great description of at least my traditional understanding of redlining. But Steve, let me switch to you now because during the Biden administration, redlining became an incredibly high focus point of all the federal regulators. And in fact, in the fall of 2021, there was an interagency, sort of whole of government, initiative announced, the Combatting Redlining Initiative, led by DOJ, but also joined by the federal banking regulators, HUD, and others. And so we saw an outpouring of activity related to redlining during the Biden administration, some of it public and some of it confidential in places like supervision. And so I think there is a perception in the industry that redlining really changed during the course of that initiative. And you've written a recent article about that subject, and I wanted to give you the opportunity to talk about your perceptions of redlining as it existed during the Biden administration.

Stephen Hayes (05:15):

Yeah, I'm happy to talk about that. And I think that you're right, we should distinguish what was happening in public enforcement actions, the complaints and the consent decrees that we saw filed, and then confidential supervisory activity. And I think that's an important thing to distinguish because in the public enforcement actions that we saw, I think really nothing changed in the sense of, Lori did a great job of running through traditional factors that are used and have been for decades used as circumstantial evidence to show that a lender intended not to serve minority areas. So those are where our branch is located. Where did advertising go? How were assessment areas drawn? And in fact, actually we got some additional evidence in the past several years, which were employee statements that described communities and people of color and derogatory and racist terms. Some of that language was quite shocking to see.

(06:14):

And we also saw repeated warnings by internal compliance folks and by regulators that an institution had fair lending redlining risk, and those warnings were ignored. And then we saw the comparative statistical evidence. So, all of that evidence actually existed in every public enforcement action to some extent. Not all of them had the racist comments, but many of them did. So I think if we look at those public enforcement actions, there's really very little that changed. The article that you referenced that I wrote for the *American Banker* was in response to a white paper that the American Bankers Association (ABA) had written about redlining. And that white paper was really making the case that you just alluded to, which is something is different right now with respect to the Biden administration, how they're bringing it. And I will give this caveat, which is I think really maybe they were channeling some frustration with things that occurred in the confidential supervisory process.

(07:12):

They directed their criticism to public enforcement actions. And I think that their descriptions of those actions were inaccurate. And if you'll give me a second, what I'd like to do is actually just take a step back and state something really obvious, which is one of the reasons that I wrote this response. We're in a really pivotal time right now for fair lending and actually for the federal regulatory apparatus generally, which is we have an administration that's taken very extreme positions, not just with respect to fair lending, although they are, but with respect to financial regulation. And I say this not just to suggest that we should be skeptical of what's coming out of the government, but to make a bigger point, which is we're all faced with the question, and by we, I mean financial institutions, lawyers, trade groups, advocates, public servants. And that question is, do we want to maintain the federal regulatory system that we have had and that this administration is trying to dismantle right now?

(08:12):

And I think we should. People might have complaints about it, but we sort of understand how to do compliance. When companies make a good faith to comply, they're generally able to. I'm confident the counterfactual without this system would've been much worse for institutions and for consumers. And if we don't maintain this system, we're going to have a very unpredictable federal regulatory system and a very, very unpredictable state regulatory system. So why is this tangent relevant? I want to bring it back to that ABA white paper that I responded to. I think that there were claims in that white paper that essentially were articulating theories that would de-legitimize not just redlining, but fair lending actions generally. And it felt like this is a moment where we have to have some credibility. And by we again, I mean every actor I just mentioned, including financial institutions and trade groups, and credibility won't exist tomorrow if institutions appear implicit today in what is a dismantling of the system.

(09:13):

So to bring it all back to this, if you read this white paper that the ABA wrote, I think it really amounts to rejection of redlining as a legal theory. And then in fact, in September, HUD issued its own memorandum, which I read to be a rejection of redlining as a legal theory, essentially saying it is not illegal to redline. I don't think that ABA members want to be on that side of the argument. I don't think that they want to say we are on the same side as this administration, which essentially is dismantling this state. And so how do we get there? If we look at the actual public enforcement actions, they had all the evidence that we've seen historically. If we asked a question, if an institution wanted to redline a community, how would it do that? It would decide to not market there.

(10:02):

It would decide to close branches that are located there. It would decide to drive community assessment area to exclude that. It would speak about those communities in racist terms. And so we see all this evidence. The paper made a few claims which are really stark. One, it criticized the use of statistics in these cases. We have to have statistics in these cases. The Supreme Court has affirmed that for decades, and that's for two reasons. One, if the theory is that this institution intended to discriminate against an area, we need statistics to see whether it actually did that or not. And the statistics which are very stark disparities for each one of these targeted lenders in the enforcement actions were disparities that were two times or up to 30 times as bad as their peers. So it isn't a matter of racial balancing in these public enforcement actions.

(10:54):

It is very stark disparities that show the discrimination was successful. And the second piece in the article is they criticize the remedies that consent decrees landed on. Those remedies traditionally have benefited entire communities that have been redlined, so programs to get investments back into those communities. The paper says, no, no, that's not legitimate. You can only remedy specific individuals that were denied or discriminated against. And obviously in the redlining context, we can't do that because the theory is the lender avoided that area. No one knew to apply to that lender. So how could we identify the people that were denied? Again, if we think about that argument, really what they're saying is there's no remedy for redlining. I think that's its very dangerous position to be in. So I'll pause there to say, if we look at the public enforcement actions, I don't think that these are fair criticisms. I think the Biden administration focused on these cases, and it brought very strong cases that I wouldn't want to be in a position of defending. Maybe their gripe was on what was happening in the confidential supervisory process, which all of us are limited in terms of how much we can talk about that. But I think in the course of venting that frustration, they made arguments that I think went too far. And I would encourage members to ask the ABA to not take positions like that because they're going to lose credibility.

Chris Willis (12:20):

Well, I do think that a lot of, at least what Lori and I experienced during the last administration, in what we perceived as a change in the formula for redlining, a change from what the traditional one that we all talked about at the beginning of the episode, did occur in supervision. And it was equally stark, to use your word, Stephen, in the sense that our perception was that a peer analysis of HMDA data was literally the only factor that the regulator would look at. And that would even be in instances where it was in the face of affirmative marketing efforts, community partnerships, special loan programs made available to people in a majority minority area in a city. And if those efforts didn't work for whatever reason, and the institution being examined had originations that were below the average of their peers, they were redlining. And that was enough, actually, to get them referred to DOJ during the Biden administration and get 15-day letters and downgrades to their CRA ratings and all of that sort of thing.

(13:34):

And to us, it felt like redlining had become like a disparate impact claim, but without the business justification defense. And that felt very unfair and arbitrary. And not only was there sort of a shelving of any consideration of any evidence other than the statistical evidence, but there was also the departure from the idea of very large disparities in volume shown by the HMDA data. You referenced this, Stephen, and it's true. Historically, if you were to read the DOJ complaints and the cases that have been public over many years, you'd see the targeted lender, the defendant in that case doing one third, one fourth, one tenth, as much business in the majority minority census tract as their peers. Whereas the standard in supervision was if you were below the average, period. What our perception was, was that drove then the fear of being in the bottom half.

(14:37):

First of all, there was always somebody in the bottom half because anybody who vaulted themselves up into the top half was going to push someone else into the bottom half. And so it created this arms race between mortgage originators of ever escalating special purpose credit programs. And they generally were oriented around down payment or cash-to-close assistance with the dollar amounts of those escalating over time as institutions tried to get market share in those areas to avoid the accusation of redlining by their prudential regulator. And to us, not only was that not consistent with our traditional understanding of what it actually means to engage in redlining, but it also didn't make sense from a policy standpoint because it didn't do anything to promote the availability of mortgage credit in those areas. And in fact, we've heard from a lot of industry players that the loans made under those escalating special purpose credit programs came to perform very much worse from a delinquency standpoint than loans without them.

(15:44):

And so it takes us back to the old accusation during the subprime mortgage crisis that it was wrong to make loans to people who didn't have a demonstrated ability to pay. But I felt like the redlining push sort of forced mortgage originators into that, again, through the supervision process. And I know that we're going to talk in a minute about how redlining is still here and may return at the federal level in the future, but the one thing I would wish for is to not have a return to that. Lori, do you have any comments on that?

Lori Sommerfield (16:13):

Yeah, I absolutely agree with your perception, Chris, because I was in the trenches with you working on these client matters that stemmed from fair lending examinations and rolled into supervisory issues or came at the financial institution from just a pure investigatory perspective. So, I think another point worth mentioning is that often we saw, especially the federal banking agencies, sometime disregard its own fair lending examination procedures to reach the outcome based on mere HMDA data evidence. For example, the OCC's Fair Lending Examination manual has a laundry list of additional factors that need to be considered in addition to HMDA data. And you had mentioned that, Stephen, in your remarks, but we sometimes saw the agencies ignore those factors and proceed with redlining investigations just based on mere HMDA data, as Chris indicated.

Chris Willis (17:06):

Yeah. So, Stephen, I just want to give you the opportunity to comment on that and with your thoughts.

Stephen Hayes (17:11):

Yeah, I think to the extent that what you're describing was happening in supervision. Those could be very fair criticisms, fair lending should not be a "got you" exercise, including for redlining, so we could debate what was happening in that supervisory space. Again, though I don't think that that was happening in the public enforcement action space, and I think it is what you described could be credible criticisms, but I don't think that it's credible to argue that the use of statistics in the public enforcement actions raises a constitutional problem, for example, or that remediating efforts that benefit entire communities raises a constitutional problem. I think that's actually not a credible argument. And so we should keep the criticisms in the space that you described, which is if it looks like fair lending's becoming a "gotcha" exercise in the supervisory space, that's a legitimate conversation to have.

(18:10):

And actually that's one that would establish credibility among these actors to do that. To the extent you're describing those criteria and supervision, we should have that conversation. I'd be interested if you thought any of the public enforcement actions reflected anything at that level. I didn't see any that I thought did. I would also, one issue I would note too, is at least in the special purpose credit programs that I'm familiar with, I didn't see rates of default that were higher than what you would expect for an FHA program or other similar program that are designed for folks that otherwise wouldn't qualify for a mortgage. So that wasn't my experience, and I didn't have the same concerns. Certainly I saw a lot of special purpose credit programs and a lot of data coming out of those. I didn't see any concerns that we were venturing into some sort of predatory mortgage scenario.

(19:04):

What I saw were actually very legitimate efforts by lenders, whether it was to avoid a redlining issue or because they were interested in the programs generally, they were being actually quite creative in designing mortgage programs that were extending credit to people in communities that otherwise would not get it. And I think we should celebrate that. I think that actually at the end of the Biden administration, we saw mortgage pricing disparities that had been chronic for 20 years. We saw those disparities go down to almost zero. And I would attribute the fair lending enforcement efforts and the special purpose credit programs as contributors to that decline, and we should celebrate that too.

Chris Willis (19:45):

Thanks, Steve. Lori, do you have any thoughts on this before we leave this topic?

Lori Sommerfield (19:47):

Yes, Chris, I'd like to add a few comments. First of all, I'd like to say that I respectfully disagree with Stephen's statement that the ABA lacks credibility by issuing this redlining white paper. As one of the primary trade associations for U.S. banks, I think the ABA is a highly credible trade group with a great deal of integrity. And I'm certain they put a lot of time, effort, and thought into this white paper before issuing it, including gathering information from their members about their experiences. And I think the white paper makes certain very valid points, even if there isn't a clear dividing line in the paper between redlining consent orders and redlining allegations in a supervisory context. Chris, as you and I know, certain banks were indeed unfairly targeted for alleged redlining practices during the Combatting Redlining Initiative, often on the basis of HMDA data alone, without other factors, as we've just discussed in this podcast. And DOJ’s cases do sometimes rely on the disparate impact legal theory instead of disparate treatment, even if they don't clearly acknowledge or distinguish it. And finally, I think there are always two sides to a story. Consent orders and press releases are always written by federal regulators, so there are often facts that are favorable to lenders that don't appear in them. So I just wanted to make these points before we left this topic.

Chris Willis (21:03):

Well, we've talked about the past of redlining. Let's talk about the present for a moment because you alluded to this, Stephen, in very graphic terms, but it's fair to say redlining and indeed fair lending in general doesn't seem to be a topic of much interest under the current administration. So is there still redlining in play for industry participants over the next three years? We're going to talk about a future Democratic administration separately in a minute, but for the remainder of this Trump 2 administration, is redlining just gone or is it something that we still need to concern ourselves with?

Stephen Hayes (21:41):

I agree with you. I don't think this federal administration can be focused on redlining, although I will make the point that when the OCC changed its exam manual to eliminate references to disparate impact, it also included a statement that said we will continue to look at HMDA data to the extent it's relevant to disparate treatment. And as Lori said, redlining has always been conceived as a disparate treatment issue. So I don't think it's likely to come back at the federal level, but they certainly left it open. We can't fully divorce the future administration from what's happening now because statute of limitations will cover this period if there is a future Democratic administration. And redlining of course looks at disparities year over year. And so, ignoring redlining compliance now and not following through on action plans now will increase disparities, and they'll get worse and worse over the next few years, which is exactly the period that the next administration will be looking at.

(22:35):

So from a compliance perspective, it would be a mistake to act as though redlining is not a threat. We also have seen a lot of interest from state AGs in redlining issues, and historically we've seen some state AG actions that are redlining actions. Cities, too, have brought redlining actions, but we as a firm have had state AGs reach out to us interested in exploring how do you develop a redlining case. What does this look like? So, I think we could probably expect to see some state AG redlining actions, and then private actors can also bring redlining action. So, our housing centers and other advocacy organizations are getting more sophisticated at looking at HMDA data and other indices of redlining. Those don't always result in public enforcement actions. Sometimes they do, but they can also result in conversations with institutions that lead to agreements to improve practices. So I think all of those continue to be in play.

Chris Willis (23:26):

Yeah, I think those are all very good points. And you made the point that if we have a Democratic administration, the statute of limitations includes everything that's happening now. And let me make another couple of comments and then let you respond to it, you and Lori both, which is, I first believe that most if not all of the things that the current administration is doing at the federal regulatory level via executive orders or actions of the regulators themselves under the direction of the administration can with just as much ease be redone or undone by a future administration. So I think it's important for us all to remind ourselves that much if not all of what we see today shouldn't have the stamp of permanence affixed to it in our minds. Second, my belief is if you were to have a Democratic administration follow this one, there would be a great desire not just to undo what this administration has done, but to try to make the case publicly that the relaxation of regulation in the financial services industry created a situation where industry misbehaved and to create public examples of that which necessarily requires not just vigorous enforcement by the federal regulators, again under a future democratic administration, but specifically for them to look at conduct that occurred right now between now and the next presidential election.

(25:02):

And so in addition to just thinking in the abstract of, oh, well, we may have another Democratic administration someday, and when that happens, they'll go back to where they were before. I don't think that quite captures it in my mind as I foresee it, because I foresee it being just as vigorous in the opposite direction as what we are seeing from the Trump administration today. Those are just my thoughts about what may happen from having observed the industry. But I'd love for you and Lori to react to that because I think it informs our, and by our, I mean the industry's behavior today.

Lori Sommerfield (25:37):

Well, Chris, I'll weigh in first on those comments you just made. And you and I have talked in the past about regulatory whiplash and how these pendulum swings are becoming more extreme between Republican and Democratic administrations. So like you, I absolutely concur that if a Democrat was to assume the Office of the President in 2028 or beyond, we would see a return to what we experienced during the Biden or perhaps the Obama administration. I think the federal government would be inclined to pick up the Combatting Redlining Initiative where they left off. I also think that because of ECOA’s five-year statute of limitations, that would cover the entire Trump 2.0 administration. So financial institutions would be well-advised to just simply stay the course and maintain strong, fair lending risk management programs that include robust redlining analyses to mitigate those types of risks.

Chris Willis (26:32):

Stephen, what's your view?

Stephen Hayes (26:32):

I fully agree, and I think it ties into the point that I tried hard articulate earlier, which is I don't think any institution or trade group or lawyer, anyone should look like they're trying to exploit this moment in a way that undermines fair lending to a significant degree. And we saw institutions take similar positions in the past. So during the first Trump administration, many financial institutions, very large ones came out and said, now is not the time to dismantle disparate impact, for example. I think that calculus is even more important now to really think about, let's make sure that positions what we're taking don't look like they are designed to exploit this moment. One point I would make too, Chris, which might tie into something I know we are going to talk about, is what does the future of redlining look like? Not just with respect to new administration but substantively.

(27:27):

And this ties into what's happening in this moment now too, which is I think one of the real futures of redlining will be about digital advertising. And we know that technologies allow lenders to essentially pre-screen prospective applicants through marketing, not just based on their interests, but based on things that look a lot like eligibility criteria for those prospective applicants. That's the easiest way for an institution to redline. If an institution says, we only want applications from White people and White communities, it's not hard to do that through targeted digital advertising. We've seen lawsuits from the National Fair Housing Alliance and from DOJ alleging that sort of behavior. We've seen that Washington Lawyers' Committee filed a lawsuit in the educational space this year, which survived a motion to dismiss. That's a real problem. It's not hypothetical. Right now, I think this CFPB should say that's the easiest way for a lender to evade ECOA, and we won't permit it.

(28:33):

We're going to expand Regulation B's coverage so that it clearly prohibits that type of evasion of the Act. And instead, this current CFPB has decided to restrict the application of ECOA and Regulation B to pre-application conduct. It's proposed that in fact, no, we don't want ECOA to apply really to almost any pre-application conduct. I think that's a huge mistake. And if we think about that as the future of redlining, that sort of digital redlining, we should ask this CFPB now to acknowledge that. And rather than limit ECOA's application with essentially no explanation, all of us, institutions too, should be encouraging the CFPB to say, we don't tolerate discrimination. This is a very clear way to evade the Act, and you should prohibit that. So again, I think that redlining is not going to go away. I think we're going to see it come back. And I think this type of change by the CFPB limiting the applicability will essentially light a fire under a future CFPB who will take those steps and expand the coverage of Reg. B to clearly prohibit that, and institutions should be ready for that.

Chris Willis (29:46):

Yeah. I do want to engage with you a little bit on that because I agree with you in my experience, that is typical for financial institutions to use criteria to target advertisements using a prediction of two things essentially. One, is this consumer somebody who will want or be interested in or need the product? And number two, if they apply, are they likely to be approved? I have always considered that to be a perfectly good business justification on both fronts. You have to advertise a product, and that seems to be the class of people you want to advertise to who satisfy those two criteria because you don't want to advertise to people who are going to get declined, that just creates a bad experience for them and waste everybody's time and money. I would not, in my own comments equate targeting on those bases with redlining because they're going to be facially neutral criteria having to do with credit worthiness to the extent that the lender has information related to that. And I'm curious as to why you seemed to draw that equivalence.

Stephen Hayes (30:57):

Well, I would say the assumption that you baked in, which is that they would have credit worthy criteria, and that's what this targeting would be based on. We're putting an awful lot of faith in large digital advertisers to hold that line. I don't know that I have that confidence, especially because in areas outside of housing, credit and employment, they certainly don't. They allow you to target based on all kinds of demographic criteria. They essentially can peg every demographic criteria to almost everyone. Right now, there are voluntary statements by some institutions that they won't do that in credit, and they won't do it in employment or housing. There's nothing really if ECOA doesn't apply here that would require them to continue to do that, that would allow creditors then to say, find me everyone who's emerging affluent. And the digital advertiser says, okay, we'll look for everyone who is 40 and below, and this offer that you have this credit product will not be advertised to people who are elderly. That seems quite discriminatory and would be a big problem and a very easy way to evade ECOA. That's a hypothetical. I think it's not hard for me to imagine that happening with respect to almost any protected class. The only thing holding the line frankly now has been the threat that ECOA might apply and financial institutions' own compliance programs who said we refuse to have that happen. We do not want you to do that. But if that starts to slip, that's a very easy way to redline.

Chris Willis (32:29):

Okay. Well, I appreciate you talking with me about that, and we might have another conversation about that at some point because my own perception of advertising as it existed in regulatory thought at the end of the last administration was I felt like it was pretty clear that everybody knew to avoid the direct use of protected characteristics and targeted advertising. So the enforcement actions that we had seen in the private litigation, we had seen involved allegations of that happening. I did not perceive there to be a determination even in the regulators of saying that disparate impact applies to advertising. And I was not anticipating that that was going to happen. And so maybe someday we'll have a conversation about that general subject because I think it would be a fascinating one actually.

Stephen Hayes (33:16):

I would love to have that too. But I would also pause on something you just said, which is there was a shared understanding that institutions should not use protected class status in their advertising, which I agree with that is a shared understanding. If this CFPB restricts application of ECOA to pre-application conduct, there is no application of ECOA or Reg. B in that context. So, there's a shared understanding that, according to this CFPB, is not backed up by law outside of the housing context. That's a problem. We should actually encourage the CFPB to make clear the assumption that every institution has held, which is that's an illegal thing to do. The CFPB should be clear about that.

Chris Willis (33:56):

And I think as a side matter, we would have to discuss whether if it were done on the basis of race, whether it also potentially violates 42 USC 1981, if done intentionally, because it doesn't have any limitation to applicants in it.

Stephen Hayes (34:13):

Although that law in 1981, there's Supreme Court precedent suggesting it does not apply to advertising.

Chris Willis (34:19):

Yeah.

Stephen Hayes (34:19):

So I agree, this is a great conversation. I'd love to have a longer version of it.

Chris Willis (34:22):

We'll put a pin in that and have a conversation about that. I think it actually would be a really good conversation to have. Let me just ask you one off-topic question that is of interest to me, and I think to the industry as well before we close the episode. And that is a lot of people in the industry think that there's a case where a cert petition is pending to the Supreme Court right now that will give the Supreme Court the opportunity to weigh in on what exactly it meant to have the guardrails that were discussed and in the *Inclusive Community* decision to guard against what the court called abusive disparate impact claims. That's where robust causality came in and some of the other things that were talked about in inclusive communities. And that's a case that your firm is involved in representing the plaintiffs, which is the *Emigrant Bank* case out of the Second Circuit. And I wonder if you just take a few minutes to talk to the audience about what that case is and what you think its significance might be.

Stephen Hayes (35:13):

Sure. I'm happy to do that. So, this was a case, as you said, against Emigrant Bank from 1999 to right before the mortgage recession in 2008. They ran a predatory lending scheme that deliberately targeted and disproportionately harmed Black and Latino homeowners. And it was a kind of classic equity stripping scheme where they would target people who had a lot of equity in their homes with a product that was really designed to default. So if folks missed a single payment, the interest rate shot up to 18%. We had litigated this for years, and a federal jury ultimately found the scheme violated state and federal anti-discrimination laws like ECOA, the Fair Housing Act, and New York City and state laws. And then that jury finding was affirmed by the Second Circuit earlier this year. So as you said, there's been a cert petition. I don't think this is a good vehicle, frankly, for cert at all.

(36:13):

The first question they raise is about equitable tolling, not about disparate impact. And then the second and third questions they raise are about the articulation of disparate impact in jury instructions. And so a few reasons this is not a good vehicle for cert is number one, there's a jury finding about the state law violations. So what the Supreme Court says here actually wouldn't affect this case really. It also involved intentional targeting. So it's not a pure disparate impact case. It's one of those disparate impact cases where essentially you get in the door and then you find a lot of evidence of intent, too. And then the third piece, and this is probably for the Supreme Court, the one that matters the most, is the Second Circuit actually agreed with the defendants on the legal standard. There wasn't really disagreements about what the legal standard was. It is about whether the jury instructions adequately conveyed that standard, which is a very case-specific application. And so it's not a pure legal question that is a nice vehicle to tee up to the Supreme Court. So, I don't expect cert to be granted on that case, although it's a very important case that we've litigated for I think 15 years, and the plaintiffs really deserve to finally get that remediation.

Chris Willis (37:21):

Yeah. Well, thank you very much for the description of that case, and obviously we'll see if the Supreme Court takes the case or not, but thank you very much for your description of it. And of course, thank you to you and to Lori for being on the show today. And thanks to our audience for listening into today's episode. As I reminded you at the beginning of the show, don't forget to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're at it, why not visit us on the web at Troutman.com and add yourself to our consumer financial services email list? That way we can send you copies of the alerts and advisories that we send out from time to time as well as invitations to our industry only webinars. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.