Federal Court Says CFPB Can't Ban 'Discouragement' Of Minority Loan Applicants

forbes.com/sites/joshuastein/2023/02/21/federal-court-says-cfpb-cant-ban-discouragement-of-minority-loan-applicants

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Federal law prohibits creditors from discriminating against applicants for credit. In 2010, Congress created the Consumer Financial Protection Board as an independent agency responsible for enforcing some consumer protection laws, including those protecting credit applicants from discrimination.

A Chicago mortgage broker, Townstone, operated a radio show discussing real estate, finance, mortgages, Chicago, and whatever else the show participants felt like discussing. It was a free-wheeling conversation that amounted to a long-form commercial for Townstone, a way to drum up mortgage brokerage business.

Participants on the show sometimes said nasty things about particular neighborhoods of Chicago—areas that often had higher crime rates and higher percentages of African-American residents. For example, at one point the discussion focused on the Markham neighborhood. Someone declared that "it's crazy in Markham on weekends." As a result, "you drive very fast through Markham." In another episode of the show, the host commented that the South Side of Chicago, which is majority African-American, is "hoodlum weekend" from Friday to Monday.

The CFPB didn't like those expressions of opinion. It asserted that the nasty comments on Townstone's radio show, whether or not accurate, discouraged African-American homeowners from applying for mortgage loans. They often lived in the criticized neighborhoods, so saying bad things about those neighborhoods suggested no African-Americans need apply for credit.

The CFPB had issued a regulation that prohibited companies like Townstone from making "any oral or written statement, in advertising or otherwise, to prospective applicants that would discourage an application." The CFPB took action against Townstone, saying the conversations on the radio show amounted to prohibited speech under CFPB's regulation against "discouragement."

Townstone defended against the CFPB. If Townstone asserted any First Amendment "free speech" rights against CFPB, those arguments didn't make it into the final reported decision. Instead, Townstone prevailed based on a careful reading of the federal statute that banned creditors from discriminating.

That statute, the Equal Credit Opportunity Act, says it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race." And it defines "applicant" to mean "any person who applies to a creditor for an extension, renewal, or continuation of credit."

Townstone argued, and the court agreed, that nothing Townstone did involved anyone who had applied for credit. Whether obnoxious or not, and whether true or not, the conversations on Townstone's radio show did not affect any applicants for credit. No one was being discriminated against as an applicant for credit, because no one had applied for credit.

The CFPB argued it had broad administrative authority going beyond the words of the federal equal credit opportunity law. The court said no. The court said that if Congress had intended to empower the CFPB to guard against "discouragement" of credit applications, Congress would have said that. And it didn't. It just prohibited discrimination against "applicants."

The CFPB tried to rely on its own regulation that banned "discouragement" of credit applicants. The court concluded that the regulation itself exceeded CFPB's authority. Thus CFPB couldn't rely on it.

The court dismissed CFPB's action against Townstone. It remains to be seen whether Congress will help CFPB out by allowing it to abridge the freedom of mortgage brokers to say nasty things about minority neighborhoods on radio talk shows.

Note: Some quotations in the preceding article were shortened and simplified for clarity, without substantive change.