

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GUADALUPE L. GARCIA,  
Appellants,

v.

MICHAEL JOHANNNS,  
Appellee.  
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No. 04-5448, et al.

Monday, February 6, 2006

Washington, D.C.

The above-entitled matter came on for oral  
argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES SENTELLE AND HENDERSON AND  
SENIOR CIRCUIT JUDGE EDWARDS

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

STEPHEN S. HILL, ESQ.

ON BEHALF OF THE APPELLEE:

\_\_\_\_\_  
CHARLES W. SCARBOROUGH, ESQ.

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P R O C E E D I N G S

THE CLERK: Case No. 04-5449, et al., Guadalupe L. Garcia, For himself and on behalf of G.A. Garcia and Sons Farm, et al., Appellants v. Michael Johanns, Secretary, United States Department of Agriculture.

MR. HILL: Good morning, Your Honors. May it please the Court, I would like to reserve three minutes for rebuttal. I'm Stephen Hill with Howrey, LLP, on behalf of the Appellants in this case.

This case is brought to address years of admitted and well-documented discrimination in the administration of USDA's foreign credit and benefit programs. After 14 months of wrangling and hard-fought battles with the government over discovery disputes, on July 15, 2003, the District Court gave plaintiffs a very narrow assignment, that was to demonstrate that commonality existed among the named plaintiffs in this proceeding.

With respect to our disparate impact claims, we have 35 loan files, and that was the extent of our discovery for all practical purposes. With the examination of those loan files, we identified two practices that we said appear to adversely impact our clients. One was the overall subjectivity, admitted overall subjectivity, of the loan requirements, as administered on a local basis, and loosely overseen by USDA.

1           The second was the feasibility criteria, and we  
2 specifically identified that. That 17 of the 35 farmers had  
3 loans rejected on the basis of that factor. The District  
4 Court rejected it out of hand because it was not, in his  
5 words, entirely subjective. There is no requirement  
6 whatsoever that a disparate impact claim be based upon a  
7 practice that's subjective at all, much less entirely  
8 subjective.

9           THE COURT: Counsel, when you are undertaking, as  
10 the District Judge were here, a task that is itself a  
11 balancing and somewhat inherently case-by-case process and  
12 we're reviewing on an abuse of discretion standards, your  
13 language bothers me, as did that of the Appellant in the  
14 previous case, when you say there is no requirement for this.  
15 Of course, there is no requirement. We're not reviewing an  
16 area in which there are a lot of requirements. These are  
17 class certifications, inherently case-by-case, and the review  
18 is abuse of discretion. So he never said it was a  
19 requirement, he just listed it as one of the things that he  
20 was looking at.

21           MR. HILL: Well, with respect, Your Honor, he did.  
22 Because what --

23           THE COURT: He did?

24           MR. HILL: Yes, in the sense --

25           THE COURT: That -- where is the Joint Appendix I

1 would find where he treated that as a requirement?

2 MR. HILL: He treated that as a requirement because  
3 he concluded that these cases were subject to the entirely  
4 subjective standard and set forth at Footnote 15 of the Falcon  
5 case. And to that extent, it's an error of law. He applied  
6 the wrong standard. There is no requirement whatsoever.

7 THE COURT: You just completed the circle there,  
8 Counsel. But I'm going to assume that we have passed each  
9 other in the night on that and let you go ahead, but I still  
10 don't find you telling me where the judge established he was  
11 treating this as a requirement as opposed to as a fact.

12 MR. HILL: Well, whether he treats it as -- that he  
13 treats it as a fact, Your Honor, seems to me he has adopted  
14 the wrong standard of law or burden of proof. The burden of  
15 proof with respect to disparate impact is that --

16 THE COURT: That wasn't the issue. The burden of  
17 proof here is as to apply for certification as to commonality  
18 predominantly. He is not classing on the merits of the claims  
19 at this point, neither are we, we're classing only upon the  
20 inherently case-by-case question to apply for certification.

21 MR. HILL: Well, with respect, we were asked to  
22 identify specific practices that were neutral on their face,  
23 and that said, had an adverse impact on our plaintiffs. We  
24 identified, we precisely identified, such a practice and it  
25 seems to me that was the end of our requirement with respect

1 to disparate impact claims.

2 With respect to the disparate treatment claims, we  
3 cited certain tactics that were engaged in by USDA, and in  
4 fact, reported by USDA in the CRAT Report that we claim denied  
5 our clients equal access to foreign credit and benefit  
6 programs. And those practices are described, in detail, by  
7 USDA in the CRAT Report at pages 15 and 16 of the CRAT Report.  
8 And that's J.A. 35-36, I believe, Your Honor.

9 Those practices included, one, refusing to give  
10 farmers applications because they were Hispanic; refusing to -  
11 - or delaying and slowing the processing of loan applications  
12 once they got -- if they succeeded in getting an application;  
13 denying loan applications on the basis of highly subjective  
14 criteria; requiring Hispanic farmers to have supervised bank  
15 accounts; and finally, denying them servicing, or delaying  
16 servicing, when they, invariably, got in trouble because of  
17 the other discrimination, and by not giving them the servicing  
18 they needed, they were eventually required to lose their  
19 farms.

20 Now these practices were identified in the CRAT  
21 Report. They are well-documented. We cite them and we report  
22 them.

23 THE COURT: Help me out, Counsel. There is a  
24 problem that we have to address in a case like this, the one  
25 that the presiding Judge has mentioned several times, standard

1 of review. Do you cite, I don't recall, do you cite any  
2 cases in which the Court has reversed the denial of class  
3 certification, and if so, on what standards, because it is  
4 abuse of discretion. How have we narrowed that passenger, so  
5 to speak, where you can claim a win?

6 MR. HILL: Well, it's a --

7 THE COURT: First of all, is there any case in the  
8 Circuit?

9 MR. HILL: Not that I can think of, Your Honor.

10 THE COURT: Okay, so there's not -- and there have  
11 been plenty of class certification cases. Not a single case  
12 where we reversed the denial of class certification. Is that  
13 right?

14 MR. HILL: That's my recollection, Your Honor. But  
15 here --

16 THE COURT: So the problem we have now is we're in  
17 this standard, it is a variable standard, it does depend upon  
18 circumstances, but the thing is what is it here that makes it  
19 compelling that we will reach down and take a case like this  
20 from the District Court, where there are certainly some  
21 questions about commonality, there are certainly some  
22 questions about whether damages predominate, etc., what is it  
23 that leaps out and demands reversal or remand for  
24 reconsideration under an abusive discretion standard? That's  
25 what we're facing here. Because I didn't think you cited, or

1 the other side, cited a single case in which we reversed,  
2 because that would tell me how we think about it in the  
3 Circuit and I can't find any.

4 MR. HILL: Well, the issue seems to be, Your Honor,  
5 is that while there is the standard of abusive discretion,  
6 where there is a legal error committed, and in this case we  
7 think it's the burden of proof that the Judge adopted in terms  
8 of establishing what the disparate impact claim was, for  
9 example, that law, that legal opinion, as we view de novo, and  
10 is entitled to no deference. So here his finding that a  
11 disparate impact claim --

12 THE COURT: I mean, even if you are right on that,  
13 that doesn't command a reversal, that just would command a  
14 remand, that's all.

15 MR. HILL: Well, it would command a remand with the  
16 -- hopefully, would be a proper standard applied, yes.

17 THE COURT: Just say, for example, that you're  
18 right, that the entirely subjective standard was used in a way  
19 to assess whether or not you were entitled to class  
20 certification and used incorrectly because it's the wrong  
21 standard, all we do would be remand and say don't use that  
22 standard. Don't you think it's more likely than not that the  
23 District Court can still, within his discretion, reach the  
24 same result pretty easily in this case.

25 MR. HILL: I'm not sure about that, Your Honor, but

1 it's clear --

2 THE COURT: I'm not saying that that's the way we  
3 should think it through, but I mean, in looking at this case,  
4 one wonders.

5 MR. HILL: But it is clear as a bell that the  
6 District Court applied the Falcon across-the-board standard to  
7 both our disparate impact and disparate treatment claims and  
8 they simply don't apply because we are not asserting across-  
9 the-board claims. For every class, sub-class, that we  
10 identify, there is at least one named plaintiff who is a  
11 victim of the tactics that we say give rise to that sub-class.  
12 And, therefore, that's not an across-the-board play, as Falcon  
13 defines it and as this Court has defined it in both Wagner and  
14 Hartman. So it was [INDISCERNIBLE].

15 Then with respect to our disparate treatment claims,  
16 the District Court adopted this highly unsubstantiated  
17 hypothesis that geographically-diverse decision makers  
18 precludes any possibility of commonality.

19 THE COURT: I don't think he said it precluded any  
20 possibilities. He said but as another factor, didn't he,  
21 Counsel?

22 MR. HILL: No, I --

23 THE COURT: He didn't rule, as a matter of law,  
24 there can never be a place where you have geographically-  
25 diverse decision makers, did he?

1 MR. HILL: He came about as close in our case as I  
2 think you can, because that is --

3 THE COURT: Or maybe he came about as close as you  
4 can and get away with it?

5 MR. HILL: Well, hopefully, he won't get away with  
6 it.

7 THE COURT: I'm glad you're hopeful, Counsel, but  
8 the fact remains the Judge making the decision that is  
9 inherently case-by-case in balancing is going to list factors,  
10 each of which might not be sufficient by itself.

11 MR. HILL: I --

12 THE COURT: That's not the [INDISCERNIBLE].

13 MR. HILL: I understand that, Your Honor, but, you  
14 know, the case that gives rise to this geographic diversity  
15 hypothesis is the Stastny case in the 4th Circuit. The 4th  
16 Circuit makes quite clear in that case that that hypothesis is  
17 not a showstopper, if there is evidence that will support an  
18 inference of discrimination.

19 Here we have just that. We have the admission of  
20 the original defendant in this case, Secretary Glickman, that  
21 USDA has a long history of discrimination. We have the  
22 testimony of the Chief Civil Rights Enforcer at the Commission  
23 -- at USDA, who had personally reviewed thousands of  
24 discrimination complaints that concluded on the basis of that  
25 review and the documentation that underlies it that the

1 systemic exclusion of minorities is the standard operating  
2 procedure of FSA. We have this Court's finding in Pigford 292  
3 F.3d 920, that USDA has a long history of discrimination  
4 that's well-documented since the 1960s in various federal  
5 reports, task forces, and investigations. We cite numerous of  
6 those in our Joint Appendix.

7 So there is clearly more than enough evidence here  
8 to support, and that's all we had to do at this point, an  
9 inference of discrimination. But the Judge took this  
10 hypothesis and that was a discussion stopper. That's clear as  
11 a bell, Your Honor.

12 Finally, with respect to the question of the failure  
13 to investigate, here we think we demonstrated our brief pretty  
14 thoroughly that he's just flat wrong on the law.

15 THE COURT: It's a relief if you are right.

16 MR. HILL: On the failure to investigate? Well,  
17 there is the possibility of adjunctive relief with respect to  
18 --

19 THE COURT: To do what?

20 MR. HILL: To order investigations, if necessary.  
21 But here's the point, with respect to -- he said there  
22 couldn't even be a basis for --

23 THE COURT: I get you. I'm going to give you the  
24 benefit of the doubt. I think there is some serious question  
25 about the District Court's understanding of liability of that

1 claim.

2 MR. HILL: Yes.

3 THE COURT: But the question I'm raising is so what?  
4 What relief do you get?

5 MR. HILL: Well, we don't make a big deal of it  
6 because --

7 THE COURT: Well, that's my point. That's really a  
8 throw-in. So you and I agree that the District Court is  
9 completely off the wall, respectfully --

10 MR. HILL: Yes.

11 THE COURT: -- on that one, but so what? I mean,  
12 you have to tell me, because I think the answer to so what is  
13 there isn't anything.

14 MR. HILL: Well, there --

15 THE COURT: It's interesting. It just kind of gives  
16 a little flavor and it shows you that the whole thing is  
17 tainted is the way I get you're presenting it. But it doesn't  
18 -- if that's all this case was about, you would have left,  
19 right?

20 MR. HILL: Yeah.

21 THE COURT: But doesn't the District Court itself in  
22 Footnote 9 say, "If the plaintiff's complaint, processing  
23 claim were still in the case, and the only reason it wasn't  
24 was he had decided the ECOA claim on the merits first," it  
25 goes on to say, "if it were still in the case and my decision

1 is what made it not be in the case, their prayer for specific  
2 performance with respect to their program benefits might  
3 support the certification of the Rule 23(b) to class."

4 MR. HILL: Yes.

5 THE COURT: So he himself says that but for my  
6 ruling on the merits, which even I, being the District Court  
7 speaking, recognize might be questionable under In re;  
8 Veneman, where we said you don't go to the merits first before  
9 class certification.

10 MR. HILL: Yes.

11 THE COURT: So he recognizes injunctive relief is  
12 important, but for his own actions.

13 MR. HILL: Yes, that's true. In fact, if I may make  
14 one final point that seems to have troubled the panel earlier  
15 this morning, on the question of forward-looking injunctive  
16 relief, unlike the situation in the Pigford case where you  
17 have Black farmers who, by dent of years of discrimination,  
18 were becoming an endangered species were being driven out of  
19 farming, here you have Hispanic farmers facing the same  
20 discrimination, who are trying desperately to come in to  
21 farming. For them, and I can tell you Mr. Anderson and I have  
22 criss-crossed the country talking to farmers, for them a  
23 critical component of any relief is forward-looking injunctive  
24 relief that will give them a fair shot at credit and the  
25 opportunity to participate in benefit programs.

1           THE COURT: So then you're saying there is some  
2 relief that would be viable with respect to failure to  
3 investigate?

4           MR. HILL: Absolutely.

5           THE COURT: Well, but that was what I was asking  
6 before.

7           MR. HILL: I apologize.

8           THE COURT: Because it wasn't clear from the brief.

9           MR. HILL: Well, it --

10          THE COURT: The District Court's position on that  
11 point is fragile at best, so I was very curious as to what it  
12 was you saw playing out.

13          MR. HILL: Well, you know, just so we're clear, I  
14 don't tie our injunctive relief to just the failure to  
15 investigate.

16          THE COURT: I understand that.

17          MR. HILL: Because we have --

18          THE COURT: But that is one of the classes. I mean,  
19 you win on that, you've won something.

20          MR. HILL: Yes. It's a statutory prerequisite for  
21 any farmer who is going to assert a claim for the period 1981  
22 to 1996. So it's in there as a fact, a common fact, but  
23 that's sub-class regardless of what the Judge says.

24          THE COURT: Thank you, Counsel. Unless my  
25 colleagues have further questions, we'll hear from the Justice

1 Department.

2 MR. SCARBOROUGH: Judge Edwards, the exchange that  
3 you just had with Counsel is sort of indicative of the  
4 problems I think that confronted the District Court, in the  
5 sense that he could only deal with what was before him and  
6 what was being requested and the bases that were being  
7 presented to him for class certification. They sort of  
8 changed and he gave them ample opportunity to present a  
9 variety of theories. You know, wrote two decisions in Garcia  
10 and ultimately concluded that sort of I don't see what it is  
11 that I would try on a class-wide basis here.

12 THE COURT: On failure to investigate?

13 MR. SCARBOROUGH: Well, the failure to investigate  
14 point is -- he put out at the gates, as you said. I'm trying  
15 to make a larger point about sort of the way the relief  
16 changes, depending upon who's asking and when. And a  
17 subsidiary point to that is you heard a lot in the  
18 presentation about the various sub-classes that have been  
19 defined. All those things come from the third amended  
20 complaint, that the District Court, in the exercise of his  
21 discretion, said, "I'm not going to allow you to amend at this  
22 late stage in the game," basically, sort of at the very last  
23 point in class briefing. What you had before that was sort of  
24 a very generalized prayer for sort of largely obey the law  
25 type injunctive relief and then a claims -- individualized

1 claims for \$20 billion in damages.

2 The plaintiffs in Garcia, like the plaintiffs in  
3 Love have tried to step away from the \$20 billion figure and  
4 say, "Well, no, really the damages are not that big. We're  
5 not going to put a price tag on it at this point." Really,  
6 the price tag is not so much as important as the fact that  
7 they ultimately are requesting individualized damages relief.  
8 And that, as many, many Courts, including this Court in a  
9 variety of cases, have recognized that undermines the class  
10 cohesion that you would otherwise expect in a (b)(2) case. So  
11 the case boils down to basically a (b)(3) question, and the  
12 District Court was very clear about this, it boils down to  
13 sort of do individual issues predominate under (b)(3) over  
14 common issues. Is a class action a superior mechanism for  
15 resolving these claims?

16 THE COURT: Why isn't failure to investigate a  
17 viable claim?

18 MR. SCARBOROUGH: It's not a viable claim as an APA  
19 matter of law because the existence of the ECOA remedy for the  
20 underlying discrimination is there. And under Section 704,  
21 that's --

22 THE COURT: You have agency rules in the statutes  
23 that require this?

24 MR. SCARBOROUGH: That require what?

25 THE COURT: Investigation.

1 MR. SCARBOROUGH: There are agency regulations that  
2 allow for people to make discrimination complaints.

3 THE COURT: And get investigation.

4 MR. SCARBOROUGH: Well, Your Honor, yes, at some  
5 point.

6 THE COURT: And those are enforceable.

7 MR. SCARBOROUGH: But there are agency rules, of  
8 course, that say a lot of things. I mean, there are agency  
9 rules that say --

10 THE COURT: That's not my point. I don't care what  
11 else the agency rules say, I'm just asking --

12 MR. SCARBOROUGH: I understand.

13 THE COURT: That's not an answer.

14 MR. SCARBOROUGH: Well, I'm --

15 THE COURT: I mean, there are plenty of APA cases.  
16 The District Court is wrong.

17 MR. SCARBOROUGH: I don't believe the District Court  
18 is wrong. The adequate remedy --

19 THE COURT: The case law on that is clear, the  
20 District Court is wrong, it's an enforceable claim. If the  
21 agency has prescriptions, you are supposed to follow them and  
22 a party who is the beneficiary of those prescriptions can seek  
23 them [INDISCERNIBLE].

24 MR. SCARBOROUGH: Well, then let me try to respond  
25 to that, because there are no prescriptions that they have

1 identified that require the agency to do a particular thing by  
2 a particular time that are judicially enforceable. It's the  
3 same --

4 THE COURT: How about that they are required to do  
5 something?

6 MR. SCARBOROUGH: Again, there is nothing that says  
7 that they are required to do something, but there are lots and  
8 lots --

9 THE COURT: There is no requirement to investigate?

10 MR. SCARBOROUGH: There is a process that is set out  
11 to --

12 THE COURT: Yes, an investigation process.

13 MR. SCARBOROUGH: I understand, Your Honor.

14 THE COURT: [Voices overlap] claim they are not  
15 doing it.

16 MR. SCARBOROUGH: That's a separate question from  
17 whether there is a judicially enforceable obligation in Court.  
18 And the District Court -- and that's sort of a threshold  
19 point. The District Court's ruling is adequacy of a remedy at  
20 law under Section 704 of the APA. Congress looked at this  
21 very problem, the alleged failure to investigate, over a long  
22 period of time, sort of a systemic breakdown in the  
23 investigatory process, and said, "Your remedy here is not  
24 something, you know, an independent cause of action there,  
25 it's I'm going to extend the ECOA limitations."

1 THE COURT: That doesn't mean that an agency can't  
2 create something else that becomes a remedy for parties.

3 MR. SCARBOROUGH: But, Your Honor, the agency has  
4 done no such thing. Congress looked at the problem in 1998  
5 and said, "What we are going to give you for this problem is  
6 an extension of limitations."

7 THE COURT: That isn't what [VOICES OVERLAP] Court  
8 couldn't fashion an equitable remedy, would it? Now I  
9 understand the difficulty of both sides you're having here. I  
10 think you're correct; there is no specific obligation that  
11 forces to regulate and investigate. But that doesn't mean an  
12 agency can get by with discriminatory basis [INDISCERNIBLE].  
13 I'm not asking you to concede there was that discrimination.  
14 If there was, that would be judicially, wouldn't it?

15 MR. SCARBOROUGH: Well, I'm not even sure that this  
16 is a discriminatory failure to investigate. I mean, what  
17 they're saying is the systemic failure to investigate these  
18 complaints sort of independent of the underlying ECOA  
19 violation. And congress looked at the problem. That's all  
20 I'm trying to suggest. They looked at the problem and said,  
21 "What you get is an extension of your limitations."

22 THE COURT: But if they didn't investigate anybody,  
23 there would be no cause -- no claim for relief.

24 MR. SCARBOROUGH: That's right.

25 One additional point, Counsel made a point about the

1 District Court essentially saying that the geographic  
2 diversity here precluded classification. The District Court  
3 did no such thing. I mean, the District Court really bent  
4 over backwards to give the plaintiffs sort of every possible,  
5 you know, consideration under the entirely subjective footnote  
6 in Falcon. Whatever that means, the District Court said,  
7 "Look, the criteria here do not fit with an entirely  
8 subjective. They are not a mask for sort of a general policy  
9 of discrimination." So the District Court in no way said,  
10 "Look, there is dispersed decision making and, therefore, I'm  
11 going to deny classification. Ultimately, it came down to the  
12 District Court's view of (b) (3) and the predominance of  
13 individual issues over any conceivable common issues. And his  
14 view that you couldn't squeeze this case into the (b) (2)  
15 rubric because damages were such an important part of the  
16 case.

17 THE COURT: The District Court is wrong in its  
18 thinking on entirely subjective and its requirement, and  
19 obviously, you thought something was there because you were  
20 battling in the briefs over it. You send it back on that and  
21 geographically reversed as well?

22 MR. SCARBOROUGH: No, I don't believe so, because I  
23 think the 23(b) provides an independent basis for sustaining  
24 the class certification denial. I don't believe there is  
25 anything wrong with the District Court's analysis. Like I

1 said, I think, if anything, the District Court sort of erred  
2 on the side of giving the plaintiff every benefit of the  
3 doubt. There is a criticism of sort of creating the  
4 subjectivity spectrum. I mean, the alternative to a  
5 subjectivity spectrum would be to take Falcon's footnote, for  
6 what it said, that entirely subjective really means entirely  
7 subjective.

8 THE COURT: In the context in which it arose.

9 MR. SCARBOROUGH: I'm sorry?

10 THE COURT: In the context in which it arose.

11 Falcon, we often, when are trying to apply precedent, we look  
12 at the situation in which it arose. This is not the same  
13 situation.

14 MR. SCARBOROUGH: I understand, Your Honor. But the  
15 point is the criteria that were sent out to the field by which  
16 the USDA decision makers made individual [INDISCERNIBLE]  
17 included some subjective, arguably subjective, components,  
18 some more objective components, and what the plaintiffs are  
19 complaining about is individual deviations from those  
20 criteria, you know, whether they are subjective or objective  
21 or some combination of both, it's individual deviations and  
22 that's sort of where the claims have to be adjudicated, out in  
23 the field on an individualized basis. And that's the point.  
24 This is not the end of the road for the case. The case just  
25 becomes individual claims of discrimination. And the enclosed

1 provision for attorney's fees ensures that these cases will go  
2 forward, if they have merit.

3 Under Track B in Pigford, the average claim,  
4 successful claim, for compensatory damages is \$600,000. These  
5 are not insignificant claims that these people can bring and  
6 they will proceed --

7 THE COURT: Realize this is a bit of quibble, but  
8 you are arriving by that by only averaging the successful  
9 complaints.

10 MR. SCARBOROUGH: Sure, Your Honor, obviously.

11 THE COURT: [VOICES OVERLAP] 30 or 40 percent failed  
12 claims in Pigford?

13 MR. SCARBOROUGH: That's correct, Your Honor. In  
14 our view, that --

15 THE COURT: If you averaged in all of the zeroes  
16 that amount would drop.

17 MR. SCARBOROUGH: Well, actually, the average I was  
18 talking about was a different one. It was -- there is the  
19 Track B and the Track A claims. Track A is 40 percent of  
20 denial. The Track B is about 180 claims, and the average  
21 among the successful claims there is about \$600,000.

22 THE COURT: That was the Track B average you gave.

23 MR. SCARBOROUGH: That's correct.

24 THE COURT: The Track A's, even if you take only --  
25 the successful are much smaller.

1           MR. SCARBOROUGH: Well, the Track A is sort of the  
2 de minimus proof where you can come in and if you can show a  
3 very minimal amount you essentially get \$50,000. My point is  
4 simply that with the combined --

5           THE COURT: Depending what week when you put all the  
6 cases in, right?

7           MR. SCARBOROUGH: I understand, Your Honor. But the  
8 point is also the ECOA attorney's fee provision allows these  
9 cases to be brought individually. If there are no further  
10 questions --

11          THE COURT: I've got a question.

12          MR. SCARBOROUGH: Yes?

13          THE COURT: I wanted to wait until you finished your  
14 argument. Can you point me to where the denial of credit is  
15 within the definition of credit transaction?

16          MR. SCARBOROUGH: The denial of credit?

17          THE COURT: The denial, as opposed to the  
18 termination or revocation?

19          MR. SCARBOROUGH: I'm sorry. So you are suggesting  
20 that, in fact, even the denial of credit wouldn't fit within  
21 the --

22          THE COURT: Well, have you got the statute in front  
23 of you?

24          MR. SCARBOROUGH: I can get it in front of me.

25          THE COURT: All right. Because I've got 1691(a),

1       which is the statute, which says, "Activities Constituting  
2       Discrimination." And it says, "It shall be unlawful for any  
3       creditor to discriminate against any applicant with respect to  
4       any aspect of a credit transaction."

5               MR. SCARBOROUGH: Sure.

6               THE COURT: All right. Now that's not defined in  
7       the statute, but the revs at 202.2(m) says, "Credit  
8       transaction means every aspect of an Applicant's dealings with  
9       a Creditor regarding an application for credit or an existing  
10      extension of credit," and then goes through a laundry list of  
11      information requirements, investigation procedures, standards  
12      of credit worthiness" --

13              MR. SCARBOROUGH: Sure.

14              THE COURT: -- "terms of credit, furnishing of  
15      credit, revocation, alteration, or termination of credit."  
16      And it doesn't say denial.

17              MR. SCARBOROUGH: I mean, I think, ultimately, this  
18      is a favorable question that would further narrow the waiver  
19      of sovereign immunity under the ECOA. It's not something that  
20      we briefed, that we've argued that --

21              THE COURT: Well, I'm just asking you if it's  
22      somewhere else. Now it is somewhere else in the definition of  
23      adverse action.

24              MR. SCARBOROUGH: Maybe that's why we haven't raised  
25      that point as contesting. What we do contest, I want to be

1 very clear, is that the back-end failure to investigate,  
2 whatever that is, that does not fit within the definition of  
3 the ECOA credit transaction, so it's not any co-claim there.  
4 So I want to be very clear, not conceding that. But I don't  
5 believe that we've --

6 THE COURT: You don't think that furnishing of  
7 credit in those regulations includes a denial?

8 MR. SCARBOROUGH: No, no, Your Honor, that's not  
9 what I said. I --

10 THE COURT: No, no, no. I want this question  
11 because I can't believe that you wouldn't have said to Judge  
12 Henderson that, of course, the mile is within the compass of  
13 the statutory --

14 MR. SCARBOROUGH: I'm not embracing the argument,  
15 Judge Edwards.

16 THE COURT: Well, I want to make that clear because  
17 it's terribly important. And if I have to look at the  
18 regulations, furnishing would include giving or denying,  
19 right? Come on. Sometimes the government can say, of course,  
20 we mean not to allow people to deny.

21 MR. SCARBOROUGH: Yes, yes.

22 THE COURT: Thank you. Come on, put it on the  
23 record.

24 MR. SCARBOROUGH: But I do want to be clear before I  
25 leave that the failure to investigate a claim is a separate

1 issue and there is no way in which that fits within the  
2 definition of credit transaction.

3 THE COURT: My point was simply there is a gap in  
4 the language.

5 MR. SCARBOROUGH: There may, in fact, be a gap, but  
6 it's not one that we've explored or briefed.

7 THE COURT: You just said you don't even embrace it.

8 MR. SCARBOROUGH: Well --

9 THE COURT: Are you walking away from it?

10 MR. SCARBOROUGH: We've not embraced it.

11 THE COURT: Usually, he's gets cross-wised of either  
12 objectives [VOICES OVERLAP].

13 MR. SCARBOROUGH: I don't want to cross anyone here.

14 THE COURT: He's started talking to us.

15 MR. SCARBOROUGH: Thank you, Your Honors.

16 THE COURT: Okay. I don't think we have any  
17 [INDISCERNIBLE]. Do we have time left? We're going to give  
18 you about three minutes for rebuttal, Counsel.

19 MR. HILL: Thank you, Your Honor.

20 THE COURT: We may keep you up longer than that with  
21 all our questions. Excuse me, go ahead.

22 MR. HILL: One quick thing. With respect to the  
23 notion that we were given every opportunity to prove our case,  
24 that's just not quite right. We were given 35 loan files and  
25 that was really what we were asked to work with -- were given

1 to work with. The Court was very solicitous, for whatever  
2 reason, of the government's arguments of burden and we were  
3 never able to get into any substantive discovery in that  
4 regard.

5 Now with respect to the notion of damages  
6 predominating, in our case, that's, clearly, not the case.  
7 And to pick up on a discussion that took place in the earlier  
8 case, if indeed this Court is leaning towards the standard in  
9 the 2nd Circuit, we think we, clearly, satisfy that standard  
10 because the test there is to look at the injunctive relief  
11 that you're asking for. Does it fit within the framework of  
12 the claims you are making? We lay out in very great detail  
13 the precise injunctive relief we're asking for that goes to  
14 fixing this problem. Fixing the data problem that has been so  
15 confounding to us.

16 And the ultimate -- the last test there, and the  
17 Robinson Court passed this, would these plaintiffs go forward  
18 with this case if damages were ruled out altogether? The  
19 answer is unequivocally yes. We, our client, want this system  
20 fixed. They desperately want it fixed. The only way it's  
21 going to be fixed is through a class action. The notion that  
22 these cases will somehow survive as individual cases is  
23 ludicrous. The District Court, clearly, recognized that by  
24 denying certification it meant the death nail to these cases.  
25 You are talking about --

1           THE COURT: I'm not at all sure that's a true  
2 statement. I read this, as I usually do [INDISCERNIBLE] try  
3 to understand what he's saying and I did not hear him saying  
4 none of these cases were [INDISCERNIBLE].

5           MR. HILL: Well, I can say this, Your Honor --

6           THE COURT: Congress certainly didn't think it when  
7 they allowed Counsel fees.

8           MR. HILL: Yeah, Counsel fees raises an interesting  
9 question. You're still at the discretion of the Court to get  
10 the Counsel fees. And if our experience --

11          THE COURT: We've been pretty hard on that  
12 discretion in this Circuit too. Got to look at the life  
13 [INDISCERNIBLE].

14          MR. HILL: I'll just say this, Your Honor, if our  
15 experience is any indicator, then it doesn't bode very well.  
16 We had a discovery dispute where Counsel fees were -- when we  
17 were told to apply for Counsel fees, the government conceded  
18 that we were entitled to \$14,000, but this request said give  
19 them \$5,000. So --

20          THE COURT: Let me take you to the failure to  
21 investigate.

22          MR. HILL: Yes, sir.

23          THE COURT: About the legal theories on that. You  
24 are not claiming there is an act of discrimination in and of  
25 itself with the failure to investigate, right?

1           MR. HILL: As a disparate impact. Who is most  
2 likely to file a Civil Rights investigation complaint?  
3 Minorities. If you stop investigating Civil Rights  
4 complaints, it's going to adversely impact minorities.

5           THE COURT: So that would be a disparate impact.

6           MR. HILL: Yes, sir.

7           THE COURT: Still, does it come within the  
8 definition of credit transaction? I'm not asking about the  
9 denial, I'm asking about the failure to investigate. Is that  
10 within the action?

11          MR. HILL: My reading of the law says it's -- the  
12 statute is sufficiently broad, the regulations are  
13 sufficiently broad to cover exactly that. Yes, Your Honor.

14          THE COURT: Your time would be up, unless -- but my  
15 colleague does have another question. I told you you'd be up  
16 longer than three minutes.

17          MR. HILL: Yes, sir.

18          THE COURT: Go ahead.

19          THE COURT: It goes to the statute itself and I just  
20 want to be clear, when these plaintiffs were denied credit,  
21 did the individual decision makers even follow the requirement  
22 for the adverse action? That is a statement of reasons?

23          MR. HILL: In many cases, no, Your Honor. That's  
24 absolutely right.

25          THE COURT: I mean, they didn't follow the statute

1 --

2 MR. HILL: Not at all.

3 THE COURT: -- which requires that once there is an  
4 adverse action, including a denial of credit, they have to be  
5 given within a certain length of time, a statement of reason.  
6 Nothing? They were just told denied?

7 MR. HILL: Nothing. That's correct, Your Honor.

8 THE COURT: Thank you, Counsel.

9 MR. HILL: Thank you, Judge.

10 THE COURT: The case is submitted.

11 (Recess.)

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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

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Debra L. Blum  
DEPOSITION SERVICES, INC.

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February 27, 2006