CERTIFICATE OF SERVICE

EDNC RECEIVES TWO AWARDS AT FBA ANNUAL MEETING

The Eastern District of North Carolina Chapter of the Federal Bar Association received two awards at the national FBA's annual meeting and convention held in Salt Lake City, Utah, earlier in September.

The first award presented was the Chapter Activity Presidential Achievement Award, which was received in recognition of the chapter's "accomplished chapter activities in the areas of Administration, Membership Outreach, and Programming." Presenting the award were United States Magistrate Judge Michael J. Newman, Chair of the Chapter Activity Awards Committee, and FBA National President Matthew B. Moreland.

The EDNC also received the Chapter Membership Growth (cont. p. 3)

CAMPBELL ESTABLISHES LAW STUDENT CHAPTER

Under the leadership of Professor Zack Bolitho, Campbell Law School has established a student chapter of the Federal Bar Association. Establishing a chapter at Campbell, the only law school in the Eastern District of North Carolina, has been a longtime goal of the EDNC Chapter.

The student chapter held its first meeting on September 21. On hand to welcome interested student members were Chapter President Kat Shea, President-Elect Kacy L. Hunt, Vice President Meredith Woods Hubbard, and Publicity & Public Relations Chair Raymond Tarlton.

A MESSAGE FROM OUTGOING CHAPTER PRESIDENT KAT SHEA

Dear Members of the Federal Bar Association,

I have loved serving as your President this year. Thank you for allowing me the opportunity to serve this chapter.

I am proud of what our chapter has accomplished this year. We hosted eight high-quality events for federal practitioners in our district, multiple of which featured judges from our bench. Events featuring our bench are enormously beneficial to our practitioners, giving them practical insight from the judges themselves about best practices. For the first time, our chapter hosted a Fourth Circuit judge, Chief Judge Traxler. Also for the first time, our chapter hosted a service day, bringing local attorneys to the Tammy Lynn Center for Developmental Disabilities. We bolstered our programming with events focused on specific topics, including substance abuse and recent US Supreme Court decisions on health care.

We have also grown significantly as a chapter. We expanded our executive board to include more positions, allowing more of our members to assume leadership roles and also allowing the board to better serve the chapter by putting together additional programming. Our executive committee met in person each month, working to plan the events we were able to offer this year and to strategize about ways we can continue improving the chapter. We had our chapter's first organized membership drive, garnering our first national award for being one of the chapters with the highest membership increase this calendar year.

Our chapter started a newsletter, of which this is the second edition, which we hope will bring valuable updates to our members. And, we also started the first Federal Bar Association chapter at a law school in the state of North Carolina, at Campbell Law School. Our chapter's achievements were recognized by receiving our second national award for Presidential Achievement.

I want to thank the members of the executive board for their service to the chapter and their dedication to making this year the chapter's best yet. And, again, I want to thank all of you for the opportunity to lead this chapter. I love practicing in the Eastern District, and I'm grateful for the opportunities the Federal Bar Association has given me to meet so many of you. I look forward to being a part of our chapter in the future and to all of the milestones we will meet in years to come.

Many thanks again,

Kat Shea

Assistant Federal Defender

Raleigh, NC

EDNC Chapter President (2014-15)

SUPREME COURT UPHOLDS DISPARATE IMPACT: WHAT ARE THE PRACTICAL CONSEQUENCES FOR MORTGAGE LENDERS?

The Supreme Court has held that disparate impact claims are valid under the federal Fair Housing Act (the "FHA"). In essence, this means that liability under the FHA can be proven by showing discriminatory effects of challenged conduct instead of by showing discriminatory intent. The Supreme Court's decision significantly affects mortgage lenders.

The first practical consequence for the industry is that disparate impact claims will be easy to plead but hard to prove. In a complaint, a plaintiff need only allege that a challenged lending practice caused, or predictably would cause, a discriminatory effect on the basis of race, color, religion, sex, disability, familial status, or national origin. 24 C.F.R. § 100.500. According to the Supreme Court: "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., No. 13-1371, slip op. at 20 (June 25, 2015). (cont. p. 4)

EDNC Receives Two Awards (Continued from Page 1)

Recognition Award for "growing chapter membership by at least twenty percent over the past year." This honor was presented by Jonathan Hafen, Chair of the FBA Membership Committee.

EDNC President-Elect Kacy Hunt was present to accept both awards on behalf of the chapter. The awards reflect the national organization's awareness and appreciation of the extensive efforts taken by chapter members to support the FBA's mission.

U.S. DISTRICT COURT CONSIDERING LOCAL RULES CHANGES

On May 5, 2015, the judges of the United States District Court for the Eastern District of North Carolina announced several proposed changes to the Court's local civil and criminal rules. The period for receipt of public comments has now closed, and a final announcement from the Court is being awaited. The following summarizes the changes to the rules as proposed by the Court in its May notice:

Proposed Changes to Local Civil Rules

Rule 5.1(a) Electronic Filing: The proposed change would require that all documents submitted for filing be filed electronically in a text searchable format.

Rule 6.1 (b) Motions for An Extension of Time to Perform Act: The proposed change would add subsection (b) which states: "Except as ordered by the court, designated secured leave under Rule 26 of the General Rules of Practice for the Superior and District Courts of the State of North Carolina shall not be the sole basis for an extension of time or continuance."

Rule 7.1(c) Discovery Motions: The proposed change would amend subsection (c) to be titled "Discovery Motions" and would no longer be titled "Motions Relating to Discovery and Inspection." The new rule would include subparts (1) and (2). Subpart (1) defines the phrase "discovery motion," and subpart (2) contains the text of current Rule 7.1(c).

Rule 16.1(b)(3) Preparation by Counsel for Final Pretrial Conference: The proposed change would add subpart (3) to Rule 16.1. This subpart would mandate that if counsel requires any type of courtroom technology for a hearing or trial she request training from the Court's IT staff and, unless otherwise excepted by the clerk, submit

Proposed Local Rules Changes (Continued from Page 3)

certification of such training no later than 7 days prior to the hearing or trial.

Rule 56.1 Motions for Summary Judgment: It is proposed that Rule 56.1 be amended in its entirety to provide guidelines for filing a motion for summary judgment. The new rule would require the moving party to support its motion with a Statement of Material Facts to which the moving party contends there is no genuine dispute. The opposing party must submit a response to the moving party's statement and, if necessary, include additional paragraphs containing any material facts to which the opposing party contends there is a genuine dispute. Failure to specifically controvert the facts contained in the moving party's statement will result in those facts being deemed admitted for purposes of the motion. All statements must be supported with specific citations to admissible evidence. The proposed rule also contains provisions for requesting an exemption from the requirements of the rule.

72.4(a) Appeal of Non-Dispositive Matters – 28 U.S.C. § 636(b)(1)(A) and 72.4(b) Review of Case-Dispositive Motions and Prisoner Litigation: It is proposed that both rules now include "unless otherwise ordered by the court" in reference to the 14 day time limit within which a party may respond to another party's objections after being served.

73.1 [Consent of Parties to Civil Trial Jurisdiction]: It is proposed that this rule be deleted.

79.2(a) Filing Sealed Documents: The CM/ECF Help Desk phone number is added to this rule. The rule also strongly encourages first-time filers to call the Help Desk.

83.1(c) Procedure for Admission: The change proposes that subparts (1) and (2) be joined together to create new subpart (1) and that subpart (3) become new subpart (2). Additionally, the proposed rule sets the filing fee as required by the Administrative Office of the United States Courts and the Eastern District Court for admission to practice in the Eastern District.

83.1(e) Appearances by Attorneys Not Admitted in the District – Special Appearance: The proposed change would broaden the requirement that an attorney be a member in good standing of the bar of a United States District Court to require that an attorney be a member in good standing of the bar of any United States Court. The proposed change would also add subpart (5) which reads: "Unless otherwise ordered for good cause shown, no attorney may be admitted pursuant to Local Civil Rule 83.1 in more than three unrelated cases in any 12 month period, nor may any attorney be admitted pursuant to Local Civil Rule 83.1 in more than three active unrelated cases at any one time."

83.1 (l) Electronic Devices in Courtroom Facilities: The proposed change would add subsection (l) to Rule 83.1. This

Supreme Court Uphold Disparate Impact (Continued from Page 2)

While the Supreme Court calls this a "robust causality requirement[,]" id., for all practical purposes, it is a low bar. A plaintiff can meet this low bar at the pleadings stage by alleging, for example, that a lender's credit score cutoff caused a statistical disparity in the number of disqualified applicants. Notably missing from the Supreme Court's "robust causality requirement" is any expectation that a plaintiff allege facts showing that he or she otherwise would have qualified for the loan but for the lender's use of the challenged practice. Once the plaintiff pleads that a challenged practice caused a discriminatory effect, the burden then shifts to the lender to show that the challenged practice is necessary to achieve one or more of its substantial, legitimate, and nondiscriminatory interests. 24 C.F.R. § 100.500. If the lender meets its burden, then the plaintiff may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect. Id. (cont. p. 6)

Proposed Local Rules Changes (Continued from Page 4)

subsection reemphasizes the Court's Standing Order on Prohibition of Wireless Communication Devices in Courtroom Facilities (05-PLR-7) and the requirements to be exempted from that Order. Additionally, the new subsection would set forth guidelines and rules for electronic devices brought into the courthouse by an attorney, which includes the requirement that any persons using a wireless communication device for presentation of evidence or similar purpose notify the Court that the device is in her possession.

83.7g Reinstatement: The proposed changes would now give a judge discretion under Subsection (c) to assign the matter for a prompt hearing upon receipt of a petition for reinstatement. The proposed changes also amend the cost provisions in subsection (d).

Proposed Changes to Local Criminal Rules

Rule 5.2(A) Misdemeanor Cases: The proposed change clarifies that this rule applies only to misdemeanor cases that have not already been assigned to a district judge.

Rule 11.1 Disclosure of Pretrial Services Report: The proposed change would add Rule 11.1 which, pursuant to 18 U.S.C. § 3153(c)(1), authorizes the United States Probation Office for the EDNC to disclose pretrial services reports to counsel for both the accused and government. The disclosure must be done by filing the report under seal in the CM/ECF filing system. The proposed rule provides guidelines for how to file the report and for the use of the report.

Rule 24.1 Attorney Preparations for Criminal Trial: The proposed change would add subpart (3) to Rule 24.1. This subpart would mandate that if counsel requires any type of courtroom technology for a hearing or trial she request training from the Court's IT staff and, unless otherwise excepted by the clerk, submit certification of such training no later than 7 days prior to the hearing or trial.

Rule 47.1 (h) Motions for An Extension of Time to Perform Act: The proposed change would add subpart (2) which states: "Except as ordered by the court, designated secured leave under Rule 26 of the General Rules of Practice for the Superior and District Courts of the State of North Carolina shall not be the sole basis for an extension of time or continuance."

Rule 49.1(a) Electronic Filing: The proposed change would require that all documents submitted for filing be filed electronically in a text searchable format.

Rule 55.2 (A) Filing Sealed Documents: The CM/ECF Help Desk phone number is added to this rule. The rule also strongly encourages first-time filers to call the Help Desk.

Rule 57.1 (C) Procedure For Admission: The proposed rule change sets the filing fee as required by the Administrative Office of the United States Courts and the Eastern District Court for admission to practice in the Eastern District.

Rule 57.1 (E) Appearances by Attorney not Admitted in the District – Special Appearance: The proposed change would broaden the requirement that an attorney be a member in good standing of the bar of a United States District Court to require that an attorney be a member in good standing of the bar of any United States Court. The proposed change would also add subpart (5) which reads: "Unless otherwise ordered for good cause shown, no attorney may be admitted pursuant to Local Civil Rule 57.1 in more than three unrelated cases in any 12 month period, nor may any attorney be admitted pursuant to Local Civil Rule 57.1 in more than three active unrelated cases at any one time."

New Criminal Rule 57.1(l) would also make the same change regarding electronic devices as new Civil Rule 83.1(l).

Supreme Court Uphold Disparate Impact (Continued from Page 4)

In the majority's view, this scheme leaves defendants free "to state and explain valid interests served by their policies[.]" Texas Dep't, slip op. at 18. Missing from this statement, however, is the common sense recognition that even a successful defense against a disparate impact claim leaves a lender exposed to significant legal expenses and reputational harm.

Still, a lender can and should defeat disparate impact claims early in the litigation, most likely on summary judgment, if it can clearly convey the substantial, legitimate, and nondiscriminatory reasons for the challenged credit decision. Ideally, this would involve:

- Producing documents that clearly define the underwriting criteria for each loan product and establishing that loan officers and underwriters have ready access to these documents.

- Establishing that loan officers and underwriters rely entirely on objective credit-related factors with no individual discretion on credit decisions.

- Producing historic data on the performance of loans underwritten to its standards, coupled with testimony (through affidavit or declaration) that loans underwritten to this standard have comparatively low levels of delinquency. Here, the new ability-to-repay (ATR) rule could be a blessing in disguise if the challenged credit decision was caused by ATR compliance.

- Establishing a well-documented compliance program that includes FHA-specific training.

Evidence of this type should shift the burden back to the plaintiff, who would then be required to show that some other underwriting practice could have served the lender equally well without producing a disparate impact. The plaintiff would need an expert witness to offer this type of evidence, at which point the court would be forced to compare the lender's explanation of how it conducts business with an outside expert's opinion of how he or she thinks the lender should have conducted its business. Here, the outside expert should be at a disadvantage unless he or she has access to a significant amount of historic data showing low levels of delinquency for comparable loans underwritten without use of the offending practice.

Perhaps an even more significant risk facing mortgage lenders is the specter of an enforcement action by the Consumer Financial Protection Bureau ("CFPB"). The CFPB is empowered to enforce the entire array of federal consumer protection laws, including the FHA. Since its inception, the CFPB has proven to be an aggressive and tough regulator, and its interpretation of the substantive laws that it enforces uniformly favors consumers. The Supreme Court's ruling hands the CFPB an additional tool to enforce the FHA, which will certainly be used by the CFPB to the fullest extent.

At bottom, the Supreme Court's ruling significantly changes the landscape for the mortgage lending industry. The CFPB will enforce the FHA aggressively and will use disparate impact evidence to do so. Plaintiffs' attorneys, already incentivized to bring suit due to the possibility of an award of attorneys' fees under the FHA, likely will increase the number of suits filed against lenders. And lenders' FHA compliance programs now must examine the potential that otherwise neutral lending policies disparately impact protected classes. These factors send a clear, unmistakable signal that the mortgage lending industry must take a new look at FHA compliance risk.

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A version of this article originally appeared as a Williams Mullen news alert, and it is reprinted here with permission.

THE CHAPTER'S YEAR IN REVIEW

November 2014 -- Second Amendment CLE With Camden Webb, Esq.

February 2015 -- Federal Practice CLE With United States District and Magistrate Judges from the EDNC,
the Clerk of Court, and Local Practitioners

April 2015 -- Substance Abuse and Mental Health CLE
With Dan W. Bolton, III, D.O., Esq.

May 2015 -- Chapter Service Day at Tammy Lynn Center

June 2015 -- Luncheon
With United States Magistrate Judge Robert B. Jones, Jr.

June 2015 -- Luncheon With Chief Judge William B. Traxler, Jr., of the
United States Court of Appeals for the Fourth Circuit
(Co-Sponsored with Smith Moore Leatherwood LLP)

July 2015 -- Health Law CLE
(Co-Sponsored with the North Carolina Society of Health Care Attorneys, the FBA's Health Law Section, and Parker Poe Adams & Bernstein LLP)

September 2015 -- YLD Luncheon
With United States Magistrate Judge Robert T. Numbers, II