

## Department of Justice and Financial Regulators Win 5-4 in Fair Housing Act Case

June 26, 2015

Financial Institutions

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The Supreme Court handed the Department of Justice (“DOJ”), bank regulators, and private plaintiffs a victory yesterday in a 5-4 decision holding that the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (the “Act”), authorizes disparate-impact claims.<sup>1</sup> In doing so, however, the Court made clear that there are important limitations on the use of disparate-impact claims and on the scope of remedies available in the case of disparate-impact violations.

### Background

The Fair Housing Act prohibits persons engaged in the business of residential real estate-related transactions (including banks making mortgage loans) from discriminating against any person in making such transactions available or in the terms or conditions of such transactions, based on the person’s race, color, religion, sex, handicap, familial status, or national origin.<sup>2</sup>

It is uncontested that the Act explicitly authorizes “disparate-treatment” claims, or claims based on a practice that reflects discriminatory intent. A “disparate-impact” claim, in contrast, can target facially-neutral practices that have a discriminatory effect. Over the years, regulators and private plaintiffs have contended that the Act also supports disparate-impact claims. On Thursday, the Supreme Court confirmed that it does.

### The Supreme Court’s Opinion

The case—*Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*—centered on a claim that the Texas Department of Housing and Community Affairs had caused too many low-income housing tax credits to be allocated to housing in largely black, inner-city neighborhoods, and not enough tax credits to be allocated in predominantly white, suburban neighborhoods.

Without ruling on the merits of the claim, the Court held that the Act recognizes disparate-impact claims. In doing so, the Court analogized to similar anti-discrimination statutes, including Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, both of which the Court has previously found authorize disparate-impact claims.

The ruling, while no doubt a victory for DOJ, financial regulators, and private plaintiffs, does not significantly alter the current enforcement landscape. For years, courts and regulators have

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<sup>1</sup> [Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.](#), No. 13-1371, 576 U.S. \_\_\_\_ (June 25, 2015).

<sup>2</sup> 42 U.S.C. § 3605(a).

contended that the Act authorizes disparate impact claims. For instance, in 1994, the bank regulators, along with DOJ, the Department of Housing and Urban Development (“HUD”), and the Federal Trade Commission, released a policy statement on lending discrimination that recognized disparate impact as a type of lending discrimination under the Act.<sup>3</sup> In 2013, [HUD issued a final rule](#) under the Act prohibiting practices that cause an unjustified disparate impact.<sup>4</sup> Circuit courts of appeal addressing the issue have been unanimous in recognizing that the Act provides for disparate-impact claims.<sup>5</sup> As such, financial institutions have had to contend with the threat of disparate-impact claims under the Act for some time, although the Supreme Court’s decision may embolden DOJ and regulators to investigate and pursue more such claims.

Moreover, the Supreme Court’s opinion points to important limitations on the use of disparate-impact claims and the scope of remedies available for disparate-impact violations. For instance, the Court stated that a disparate-impact claim based on a statistical disparity alone cannot succeed where there is no causal connection to a defendant’s policies.<sup>6</sup> In addition, the Court noted that practices having a disparate effect might still be permissible if they meet the traditional test of showing a “sufficient justification.”<sup>7</sup> The Court did not define precisely what type of justifications would suffice, but did note that the analysis would be similar to the “business necessity” standard that provides a defense to disparate-impact claims under Title VII, where the defendant can demonstrate that the practice at issue served a business necessity.<sup>8</sup> The Court also expressed a desire to avoid abusive litigation under the guise of disparate impact.

The Court emphasized that such claims should be resolved expeditiously and that, where courts do find liability, remedies imposed should focus on “elimination of the offending practice.”<sup>9</sup>

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<sup>3</sup> 59 Fed. Reg. 18266 (1994).

<sup>4</sup> See 78 Fed. Reg. 11460 (2013). However, a district court later ruled that the disparate-impact rule exceeded HUD’s authority. *American Ins. Ass’n v. HUD*, No. 1:13-cv-00966, 2014 WL 5802283 (D.D.C. Nov. 3, 2014).

<sup>5</sup> *Langlois v. Abington Housing Auth.*, 207 F.3d 43 (1st Cir. 2000); *Mountain Side Mobile Estates P’ship v. HUD*, 56 F.3d 1243 (10th Cir. 1995); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Smith v. Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986); *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982); *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546 (11th Cir. 1984).

<sup>6</sup> *Texas Department of Housing and Community Affairs*, No. 13-1371, 576 U.S. \_\_\_\_ (June 25, 2015) (slip op. at 19-20).

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 18-19.

<sup>9</sup> *Id.* at 22.

## Financial Institutions

In sum, financial institutions and others subject to the Fair Housing Act should remain vigilant in ensuring that their fair lending compliance focuses not only on disparate-treatment issues, but also lending practices that could give rise to disparate-impact claims.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Institutions practice group:

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