

# PUBLICATION

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## Supreme Court Broadens Scope for Housing Discrimination Claims

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Beneficial intent will not shield lenders and other financial services companies from discrimination claims under the Fair Housing Act (FHA), according to a recent decision by the United States Supreme Court. Specifically, the Court ruled that it is sufficient to show disparate impact, i.e., that a defendant's practices have a disproportionately adverse effect on minorities. Prior to this decision, each lower court addressing the issue independently held that the FHA should be interpreted to include liability under a disparate impact theory, so the ruling was not one of total surprise, but it is the first time the Supreme Court has addressed the question.

In the case, the Department of Housing and Community Affairs was responsible for the distribution of low income tax credits in Texas. The Inclusive Communities Project, Inc. brought a disparate impact claim under the FHA, claiming the Department was allocating too many tax credits to housing in predominantly African American-populated inner city locations and too few in predominantly Caucasian suburban areas. The ICP contended that the Department's procedures had caused continued segregated housing practices by not equally allocating the tax credits. To prove their claim they simply produced statistical data stating that the Department's rate for approved tax credits was higher in non-Caucasian areas. The district court then looked to the Department to show that "there are no other less discriminatory alternatives to advancing their proffered interests," and ruled that it failed to do so. The Department appealed.

While the Department's appeal was pending, HUD issued a regulation which stated that the FHA did in fact encompass disparate impact liability. HUD stated that after a plaintiff establishes that a defendant's practice caused or predictably will cause a discriminatory effect, the burden shifts to the defendant to "prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." If the defendant is successful in doing so 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."

The Court of Appeals for the Fifth Circuit subsequently affirmed the district court, holding that disparate-impact claims are cognizable under the FHA. The Department then filed a petition for a writ of certiorari, which brings us to the discussion of this ruling.

For lenders, this decision may encourage future claims that a lender's underwriting guidelines, marketing efforts or products themselves can be in violation of the FHA, without a finding or even an allegation of intent. As part of its reasoning, the Court stated, in part, "recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." Nevertheless, lenders will be faced with defending disparate impact claims brought under the FHA where they had no prejudice at all, be it overt or unconscious. It can also open the door to plaintiffs second-guessing valid, well intentioned business decisions.

Lenders may take slight comfort in language the Court included, which states, in part, "A disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." The court went on to explain that without this causality requirement, race could be used as a quota to safeguard against unintended disparate impact. This does increase a plaintiff's initial threshold, but not by much.

In the long term, the ruling and its application could have a constricting effect on lenders' operations and their appetite to expand, given that an inadvertent disparate impact may not be revealed until after a product or service has been offered to the marketplace. Justice Alito recognized this in his dissent, noting, "Today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty." Justice Alito is referring to the possible unintended consequence of this ruling where providers of housing or lenders may shy away from certain products or policies which intend to help those very people who the Court's ruling, the FHA and the ALCU aim to protect, simply to avoid a possible disparate impact claim. At the very least it will be interesting for the lending and housing industries to see how this holding is used going forward and what its effects will be on the development of new policies, procedures and products.