

## **U.S. Supreme Court Upholds Disparate Impact Liability under Fair Housing Act**

The U.S. Supreme Court today upheld disparate impact as a viable theory of liability under the Fair Housing Act. In doing so, the Court has included what could be important limiting factors to that liability moving forward, most importantly that statistical data alone cannot state a prima facie case for fair lending violations based on disparate impact. Additionally, the Court affirmed that business necessity is a defense to liability.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court considered whether the theory of disparate impact was a viable basis for a claim of housing discrimination under the Fair Housing Act. This is actually the third time in the past 5 years the Supreme Court has taken a case in which it was to consider this question, but the previous two cases settled prior to decision by the Court.

Here, in a decision split 5-4, the Court found that the logic and reasoning of its previous case law construing disparate impact under Title 7 of the Civil Rights Act, specifically relating to equal employment laws, applied to the Fair Housing Act. While the Court upheld disparate impact, it was also quick to point out that statistical disparities alone are not sufficient, but instead a plaintiff must point to a specific practice, and there is a “robust causality” requirement. That is, the statistical disparity must have been caused by a policy or action of the person. Even then, if that policy is necessary to achieve a “valid interest,” liability will not lie. The Court emphasized that the limitations stated in the opinion are “necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system.”

Unfortunately, much of this language is likely to only spur more litigation regarding which statements in the opinion are binding holdings and which are merely non-binding dicta, as well as what these limitations actually mean. Because the opinion will give ammunition to both sides of the disparate impact debate – upholding the theory while placing seemingly broad limitations on its application – the Court’s lack of specificity leaves many unanswered questions as to the effect of those limitations.

The Court’s opinion may be found here:

[http://www.supremecourt.gov/opinions/14pdf/13-1371\\_m64o.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1371_m64o.pdf)

WBK regularly defends financial services companies in administrative proceedings and federal courts throughout the United States, including complaints arising under the Fair Housing Act.