



Urgent Update: After Supreme Court Ruling, Expect Greater CFPB Scrutiny of Disparate Impact in Lending

David A. Felt

The U.S. Supreme Court's surprising disparate-impact ruling on June 25, 2015 regarding tax-credit allotments and discrimination means lenders need to take a hard look at their policies and operations.

The Court ruled 5-4 for a Texas nonprofit group that said the Texas Department of Housing and Community Affairs fostered segregated housing by giving too many tax credits to developments in low-income, predominately non-white areas.

Writing for the Court, Justice Anthony Kennedy explained that statistics alone can show discrimination even if the defendant lacked intent to discriminate in trying to improve neighborhoods. The state needs to demonstrate that it could not accomplish its purposes through means that do not support patterns of segregated housing, the Court said.

The Court is using the same analysis found in employment cases, said David Felt, a government and regulatory affairs lawyer in Arnall Golden Gregory's Washington, D.C., office. If an employer hires more whites than blacks, a case could be made the employer did not try hard enough to recruit from non-white pools and could be found liable for discrimination. "The disparate-impact analysis that has been applied to hiring now must be applied to lending," Mr. Felt said.

"Any doubt about the importance of analyzing financial institutions' lending operations for disparate impact is now dispelled -- the CFPB will doubtlessly double down on examinations and investigations of disparate impact in lending."

Mr. Felt recommended that financial institutions can protect themselves by analyzing their consumer-facing operations to determine if they have a disparate impact on any protected group. If disparate impact is found, make sure it can be justified and all available less-discriminatory alternatives have been considered, he said. There are numerous legal benefits to hiring outside counsel to perform or oversee the analysis, Mr. Felt added. For example, recommendations provided by the counsel will likely be privileged.

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