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## Consumer Finance Litigation

### U.S. Supreme Court Holds Disparate Impact Claims Can Be Brought under Fair Housing Act

**Action Item: Lenders, servicers, and developers should continue to consider whether their policies and procedures result in unintended discrimination that may subject them to disparate impact claims under the Fair Housing Act.**

In *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, decided on June 25, 2015, the United States Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act. No. 13-1371, \_\_\_ U.S. \_\_\_ (2015). The Inclusive Communities Project (“ICP”) alleged that the Texas Department of Housing and Community Affairs (“DOH”) disproportionately allocated low-income housing tax credits to developers of properties in areas highly populated by minorities, resulting in a disparate impact

on the availability of low-income housing in minority areas versus nonminority areas in violation of the Fair Housing Act (“FHA”).

Previously, the District Court of Texas ruled in favor of the ICP on its disparate impact claim and imposed a structural injunction on the DOH after it found that the ICP had established a *prima facie* case of disparate impact, and the DOH failed to show that no less discriminatory alternatives for the allocation of tax credits were available. In 2013, the U.S. Department of Housing and Urban Development (“HUD”) issued a new regulation interpreting the FHA to include disparate impact liability, and implementing a new burden-shifting framework for adjudication of such claims. The United States Court of Appeals for the Fifth Circuit upheld the district court’s decision, but reversed

and remanded the case in light of HUD's new regulation, because the district court had improperly required the DOH to demonstrate that no less discriminatory alternatives were available.

In the Supreme Court's 5-4 opinion, Justice Kennedy opined that although the language of the FHA does not expressly allow for disparate impact claims, such claims are consistent with the policy behind the FHA. But, the court clarified that a disparate impact claim under the FHA cannot be proved based on statistical disparity alone. The plaintiffs must be able to point to a defendant's policy or policies that cause the disparate impact in order to establish their *prima facie* case. Specifically, Justice Kennedy quoted *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which established the disparate impact cause of action under Title VII of the Civil Rights Act of 1964, noting that policies are not subject to disparate impact liability unless they are "artificial, arbitrary, and unnecessary barriers." Justice Kennedy further noted that these limitations are in place to prevent potential defendants from making race-based decisions to avoid disparate

impact litigation. Without such limitations on disparate impact claims, developers may be deterred from building low-income housing, which would undermine the purpose of the act. Despite these limitations, with this decision, the Supreme Court has resolved any controversy regarding whether disparate impact claims can be brought under the FHA.

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