PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 120
Issue 2 *Dickinson Law Review - Volume 120, 2015-2016*

10-1-2015

Should I Stay Or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry

Bethany A. Corbin

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

Bethany A. Corbin, *Should I Stay Or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 DICK. L. REV. 421 (2015).
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol120/iss2/3

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Should I Stay Or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry

Bethany A. Corbin*

Introduction

The United States housing market was built on a structure of discrimination.[1] From bias in lending to exclusionary zoning to state-sanctioned segregation, discrimination has existed as a pervasive and constant undertone in housing transactions.[2] As early as 1968, Congress recognized the danger of racial discrimination in mortgage and housing terms and enacted the Fair Housing Act ("FHA") to eradicate discrimination in the sale or rental of dwelling units and property.[3] The FHA sought not only to increase available housing opportunities for racial minorities, but also to "promote integration for the benefit of all Americans."[4] As the scope of the FHA expanded over subsequent decades, however, the methods and sources of discrimination similarly evolved. While cases of blatant, intentional discrimination were typical in the mid-1900s, present forms of discrimination are not so obvious. Rather,

* Adjunct Professor of Law, Wake Forest University; J.D., Wake Forest University School of Law, 2013; B.A., University of North Carolina at Chapel Hill, 2011. While writing this Article, Bethany Corbin worked as an Associate at Bradley Arant Boult Cummings, LLP, and focused her practice on financial services litigation. The views expressed in this Article are solely those of the author.

1. Jamelle Bouie, *The Next Assault on Civil Rights*, SLATE *Oct. 9, 2014, 10:53 AM), http://www.slate.com/articles/news_and_politics/politics/2014/10/the_supreme_court_s_next_attack_on_civil_rights_the_justices_will_likely.html; *see* Rebecca Tracy Rotem, Note, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal From the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1973 (2010).

2. *See* Bouie, *supra* note 1.

3. *See* Dana L. Kaersvang, Note, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 MICH. L. REV. 1993, 1995 (2006) ("Congress recognized that widespread racial discrimination in the housing market was preventing integration and interfering with minority access to jobs and quality education.").

4. John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 145 (2002).

in the contemporary mortgage loan market, discrimination must often be proven by examining the effects or impact that a particular practice or decision has on protected classes under the FHA. Such circumstantial cases almost never involve direct discriminatory evidence.

The difficulty of proving overt discrimination under the FHA has long been recognized by the judiciary and executive agencies since the 1980s. To ease the burden on consumers and ensure housing participants act fairly toward minorities, federal courts and the United States Department of Housing and Urban Development ("HUD") approved the use of disparate impact theory under the FHA. Specifically, disparate impact enables protected minorities to establish a prima facie case of discrimination by showing that the challenged act or practice had a disproportionate effect on the minority class; the injured party need not prove the defendant acted with intent to discriminate.

As a result of this relaxed discrimination standard, businesses are routinely forced to settle disparate impact lawsuits because the reputational cost of litigating is too great.[5] Currently, the Obama Administration has extracted over $1.1 billion in settlements from the financial services industry (specifically mortgage lenders) through the use of disparate impact litigation.[6] For example, the Department of Justice ("DOJ") reached recent settlements with the following lenders: (1) Countrywide Home Loans (now Bank of America, N.A.) for $335 million;[7] (2) Wells Fargo Bank for $175 million;[8] (3) SunTrust Mortgage Inc. for

5. *See Disparate Impact Rejected*, WALL ST. J. (Nov. 3, 2014, 7:11 PM), http://online.wsj.com/articles/disparate-impact-rejected-1415059893.

6. *See Supreme Court May Yet Blunt Obama's 'Disparate Impact' Weapon*, AGENDA 21 RADIO (Oct. 19, 2014), http://agenda21radio.com/?p=12601; *see also* Trevor Burrus, *How Mischievous Obama Administration Officials Scuttled An Important Supreme Court Case*, FORBES (Sept. 2, 2013, 10:00 AM), http://www.forbes.com/sites/trevorburrus/2013/09/02/how-mischievous-obama-administration-officials-scuttled-an-important-supreme-court-case/ (noting that the Obama Administration "is a big fan of disparate impact theory," has used disparate impact "to extract large settlements from big banks," and "even created an entire unit in the Justice Department to pursue [disparate impact] claims").

7. Christie Thompson, *Disparate Impact and Fair Housing: Seven Cases You Should Know*, PRO PUBLICA (Feb. 12, 2013, 8:00 AM), http://www.propublica.org/article/disparate-impact-and-fair-housing-seven-cases-you-should-know; *see* Press Release, Dep't Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation, (Dec. 21, 2011), http://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination.

8. Thompson, *supra* note 7; *see* Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES (July 21, 2012), http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html?_r=0.

$21 million;[9] and (4) PrimeLending for $2 million.[10] The threat of disparate impact litigation thus looms heavily over lending institutions and has become a major source of controversy between the financial services industry and fair housing advocates.

Despite the historical use of disparate impact theory under the FHA, the United States District Court for the District of Columbia recently called into question the legitimacy of disparate impact in the fair housing context. In *American Insurance Association et al., v. U.S. Department of Housing and Urban Development*,[11] Judge Richard Leon held that disparate impact lacked a statutory foundation in the FHA and was therefore unavailable as a remedy for discrimination.[12] Although 11 out of 12 Circuit Courts of Appeals have affirmed the validity of disparate impact theory under the FHA,[13] the District Court for the District of Columbia rejected those opinions and concluded that the FHA contained no effects-based language to authorize disparate impact.[14] This holding effectively stripped protected minorities of their ability to prove discrimination by disparate impact under the FHA.

In light of the risks of eliminating disparate impact as a vehicle for recovery under the FHA, the Supreme Court granted certiorari in the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* to address this precise issue.[15] Civil rights activists closely followed the case, expressing extraordinary concern that the Supreme Court could undermine one of the greatest pieces of civil rights legislation by removing disparate impact as a theory for recovery.[16] This concern was particularly warranted given that "the Supreme Court has chipped away at the major provisions and policies of the civil rights era"

9. Thompson, *supra* note 7; *see* Press Release, Dep't Justice, Justice Department Reaches $21 Million Settlement to Resolve Allegations of Lending Discrimination by SunTrust Mortgage, (May 31, 2012), http://www.justice.gov/opa/pr/justice-department-reaches-21-million-settlement-resolve-allegations-lending-discrimination.

10. Thompson, *supra* note 7; *see* Consent Order, United States v. PrimeLending, No. 3:10-cv-02494-P (N.D. Tex. Jan. 11, 2011), http://www.justice.gov/crt/about/hce/documents/primelendsettle.pdf.

11. Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d 30 (D.D.C. 2014).

12. *Id.* at 39.

13. *See infra* note 137.

14. *Am. Ins. Ass'n*, 74 F. Supp. 3d at 41–43.

15. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2014).

16. *See, e.g.*, Emily Badger, *The Supreme Court May Soon Disarm the Single Best Weapon for Desegregating U.S. Housing*, WASH. POST (Jan. 21, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/21/the-supreme-court-may-soon-disarm-the-single-best-weapon-for-desegregating-u-s-housing/; Bouie, *supra* note 1.

over the last decade.[17] However, on June 25, 2015, a deeply divided Court affirmed the viability of disparate impact under the FHA. While this ruling is perceived as a major win for the Obama Administration, the rationale and alleged support for the Court's ruling is less than persuasive and will have significant ramifications for the financial services industry.

This Article analyzes the Supreme Court's recent decision on disparate impact under the FHA and highlights why disparate impact is an inappropriate remedy given the FHA's statutory language. Specifically, the Article discusses Justice Alito's dissent in depth and elaborates on the proposition that Congress did not extend the FHA's plain language to encompass disparate impact theory. Additionally, this Article presents the realistic ramifications of the Supreme Court's holding on the financial services industry. In particular, the Article explores lenders' heightened exposure to monetary damages and reputational harm, potential expansion of disparate impact to the Equal Credit Opportunity Act ("ECOA"), and the Consumer Financial Protection Bureau's ("CFPB") ability to prosecute disparate impact actions under its Unfair Deceptive and Abusive Acts or Practices ("UDAAP") standard.

To support these arguments, this Article is divided into six parts. Part I offers a detailed overview of relevant fair lending legislation. Particularly, this section focuses on the provisions of the FHA, ECOA, and UDAAP. Part II then analyzes the two primary theories of discrimination: disparate treatment and disparate impact. The section then transitions into an analysis of how disparate impact has been historically used under the FHA. Part III details the recent disparate impact decision by the District Court for the District of Columbia, focusing specifically on Judge Leon's reasoning for rejecting disparate impact. Part IV then provides a succinct discussion of the Supreme Court's ruling, including an examination of both the majority and dissenting opinions. In addition to detailing this case, Part IV also discusses the Supreme Court's two prior attempts to adjudicate this subject and explains how the Obama Administration and civil rights activists successfully settled the cases prior to oral argument. Part V offers a realistic prediction of the impact FHA disparate impact claims will have on lenders and financial institutions. Additionally, this section explains why disparate impact claims may invade the statutory framework of ECOA, and how the CFPB is now poised to prosecute disparate impact actions under its UDAAP legislation. Finally, Part VI concludes this Article.

17. Bouie, *supra* note 1.

Table of Contents

I. REGULATORY BACKGROUND 426
A. The Fair Housing Act 426
1. Talkin' Bout A Revolution: The Origins of the FHA 427
2. Administering and Enforcing the FHA: Where Are We Today? 431
B. The Equal Credit Opportunity Act and Regulation B 433
C. Consumer Financial Protection Bureau and Unfair Deceptive Abusive Acts or Practices 435
II. THEORIES OF DISCRIMINATION: DISPARATE TREATMENT AND DISPARATE IMPACT 439
A. A Tale of Two Theories: Disparate Treatment and Disparate Impact 440
B. Disparate Impact under the FHA 442
III. THE D.C. DISTRICT COURT DEFIES GRAVITY: AN ANALYSIS OF AMERICAN INSURANCE ASSOCIATION V. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 445
IV. ONE WAY OR ANOTHER: SUPREME COURT REVIEW OF FAIR HOUSING DISCRIMINATION 448
A. Don't Think Twice, It's All Right: Two Prior Attempts at Supreme Court Review 449
1. The First Case: *Magner v. Gallagher* 449
2. The Second Case: Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly 452
B. Three Is the Magic Number: The Supreme Court Finally Tackles Disparate Impact 454
1. Stayin' Alive: The Majority Saves Disparate Impact Liability under the FHA 455
i. Statutory Language 456
ii. Congressional FHA Amendments and Appellate Precedent 458
iii. Legislative Purpose 459
iv. Disparate Impact Limitations 460
2. Disparate Impact Should Have Gone "Bye Bye Bye": Justice Alito Explains Why the Majority Got It Wrong 461
i. Statutory Language Does Not Support Disparate Impact 461
ii. Congress Only Sought to Eliminate Intentional Discrimination 462
iii. Silence is Not Consent: Congress Did Not Adopt Judicial Precedent 463
iv. HUD's Disparate Impact Rule Does Not Warrant Deference 464
v. Expanding Disparate Impact to the FHA Contravenes Supreme Court Precedent 465

vi. Unfortunate Consequences 465
3. We Took the Wrong Step Years Ago: Justice Thomas' Dissent 466
V. WRECKING BALL: WHAT THE SUPREME COURT'S HOLDING MEANS FOR THE FUTURE OF THE FINANCIAL SERVICES INDUSTRY 467
A. Money, Money, Money: Implications of Disparate Impact on Lenders in FHA Cases 468
B. I Heard It Through the Grapevine: Will Disparate Impact Expand to ECOA? 470
C. Lenders' Kryptonite: The Rise of UDAAP to Curb Discriminatory Lending 474
VI. CONCLUSION 475

I. REGULATORY BACKGROUND

Discriminatory practices in the financial services and housing industries have long been regulated and governed by federal agencies tasked with promoting fair and equal opportunities regardless of race, gender, national origin, or religion. As part of the Civil Rights movement in the 1960s, Congress created and enacted legislative initiatives aimed at guaranteeing non-discriminatory access to credit and housing. In particular, Congress passed two federal laws with corresponding implementing regulations that presently govern fair lending practices in the United States: (1) the Fair Housing Act and applicable HUD regulations;[18] and (2) the Equal Credit Opportunity Act and Regulation B.[19] Recently, however, Congress established the Consumer Financial Protection Bureau to oversee these legislative initiatives and further regulate unfair, deceptive, and abusive acts and practices in the financial services industry. This section analyzes these fundamental pieces of fair lending legislation and provides a concrete foundation for the upcoming examination of disparate impact under the FHA and ECOA.

A. The Fair Housing Act

The Fair Housing Act, subsumed within Title VIII of the Civil Rights Act of 1968, prohibits widespread discrimination in the sale or rental of housing units and property.[20] As passed by Congress, the FHA criminalizes the refusal to sell or rent any property or dwelling to a per-

18. Fair Housing Act, 42 U.S.C. § 3604 (1968); 24 C.F.R. §§ 100.1-100.90.

19. Equal Credit Opportunity Act, 15 U.S.C. § 1691; Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202.14.

20. Brian S. Prestes, Comment, *Application of the Equal Credit Opportunity Act to Housing Leases*, 67 U. CHI. L. REV. 865, 870 (2000).

son based on race, religion, sex, familial status, or national origin.[21] Enacted to remedy the damaging effects of racial and residential segregation, the FHA seeks to establish "truly integrated and balanced living patterns" in place of segregated neighborhoods.[22] This laudable goal has thus transformed the FHA into a tenant's most powerful weapon to fend off discrimination by potential landlords.[23] Given the widespread nature of the FHA litigation today, this section analyzes the creation and passage of the FHA and describes the Act's most important provisions and amendments.

1. Talkin' Bout A Revolution: The Origins of the FHA

Despite the popularity of modern FHA litigation, passage of the FHA occurred under tense circumstances. Beginning in the 1890s and lasting until the 1940s, African Americans migrated in substantial numbers from the South to the North, settling in urban areas.[24] During this relocation, realtors refused to show African Americans any homes, rental units, or property in traditionally white neighborhoods.[25] The few African Americans who succeeded in purchasing homes often experienced substantial depreciation in the value of their investments due to realtors using "blockbusting to increase housing prices temporarily in neighborhoods transitioning from white to black."[26] Racially restrictive zoning regulations and covenants combined with segregated housing projects further reinforced—and encouraged—housing discrimination across the United States.[27] "White flight" from transitioning neighborhoods additionally exacerbated the problem and created an epidemic of voluntary segregation.[28]

This physical isolation on the basis of race produced unintended social, economic, and political consequences. African Americans became culturally and linguistically isolated, with "Black English" vernacular growing apart from "Standard English."[29] The lack of social control and transient nature of the African American population contributed to inef-

21. Fair Housing Act, 42 U.S.C. § 3604 (1968).

22. Eric W. M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1438 (2012).

23. Prestes, *supra* note 20, at 870.

24. Rotem, *supra* note 1, at 1975.

25. Kaersvang, *supra* note 3, at 1995.

26. *Id.*

27. Bain, *supra* note 22, at 1438.

28. *Id.*

29. *Some Notes on the Effects of Residential Segregation, and Spatial Isolation*, STAN. UNIV. (Mar. 2013), http://web.stanford.edu/~mrosenfe/urb_notes_effects_segregation.htm [hereinafter *Effects of Residential Segregation*].

fective police intervention in segregated neighborhoods and created a climate conducive to gang and drug operations.[30] Because the police response to African Americans was unpredictable, rates of violent crime in black neighborhoods skyrocketed.[31] Poverty became concentrated in neighborhoods known as ghettos, depriving African Americans of the economic strength to support marketing and retail sectors within their communities.[32] Additionally, white flight to the suburbs left urban schools with an insufficient tax base—and thus, inadequate resources—to fund African American educational needs.[33] This segregation further spurred a conscious governmental policy of redlining, which deprived African Americans of loan, investment, and credit opportunities in the inner city and, by extension, the benefits of home ownership.[34] By concentrating African Americans in ghettos and segregated neighborhoods, the government encouraged a culture of poverty in the inner cities, isolated African Americans from the bureaucracies controlling their lives, and intentionally established an atmosphere of alienation and hopelessness.

Despite these obvious negative consequences of racial segregation, Congress did not address the race problems plaguing the nation until the riots of 1967 illuminated the potential for explosive rebellions and mobilizations.[35] During what became known as the "long hot summer of 1967," the government witnessed a total of 164 race riots in locations as diverse as New Jersey, Michigan, Florida, Texas, Wisconsin, and Minnesota.[36] The riots in Detroit and Newark were the most memorable, with over 2,000 injuries in Detroit and 1,500 injuries in Newark.[37] Eight of

30. *Id.*; *see also* Raymond Bernard, *Consequences of Racial Segregation*, 10 AM. CATH. SOC. REV. 82, 90–91 (1949).

31. *Effects of Residential Segregation*, *supra* note 29.

32. *Id.*; *see* Bernard, *supra* note 30, at 94.

33. *Effects of Residential Segregation*, *supra* note 29; *see* Bernard, *supra* note 30, at 85–86.

34. *Effects of Residential Segregation*, *supra* note 29.

35. *See* Rotem, *supra* note 1, at 1976 ("The legislative history of the FHA shows that the riots of the summer of 1967 brought to light the major problems of the nation's inner cities and spurred Congress to pass the bill."); *see also* Kaersvang, *supra* note 3, at 1995 (noting that Congress did not look to the FHA to ease the tension from racial isolation until the race riots of the late 1960s).

36. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1428 (2004); L.A. Powe, Jr., *The Not-So Brave New Constitutional Order*, 117 HARV. L. REV. 647, 658 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)).

37. *See, e.g.*, Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 97 n.24 (2006) ("Although Watts, in July 1964, and then Detroit and Newark, in the 'long hot summer' of 1967, witnessed the most spectacular and catastrophic episodes, hundreds of smaller cities across the country also experienced unprecedented eruptions. The disturbances were responsible for more than 200 deaths and several thousand injuries.").

the racial disturbances were serious enough to call in the National Guard.[38] Detroit's riot, in particular, lasted six days, spanned 14 square miles of ghetto, left 43 people dead, and caused $45 million in property damage.[39] As a result of the widespread destruction from these riots, "it was only natural for the public, press, and politicians to become alarmed that the country was 'rapidly approaching a state of anarchy' in the second half of 1967."[40]

In response to these riots, President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders (the "Commission") to identify the root causes of the uprisings.[41] The Commission, composed of 11 members and more commonly known as the Kerner Commission, concluded that the United States was moving towards two separate and unequal societies—one white and one black.[42] In a report published on March 1, 1968, the Commission cited racism and residential segregation as primary factors contributing to the riots and disorder.[43] The report, however, further linked the motivation for the uprisings to African Americans' feelings of powerlessness and frustration regarding high rates of unemployment, poverty, police brutality, and inadequate public services.[44] To remedy the chaos devouring inner cities, the Commission recommended the adoption and implementation of comprehensive legislative reforms to eradicate housing discrimination at its core.[45]

Although the Commission's report was unwavering in its recommendations, Congress failed to pass the suggested legislation immediately.[46] Rather, it was the extensive lobbying efforts of Senator Edward

38. Lain, *supra* note 36, at 1428.

39. *Id.* at 1429.

40. *Id.*

41. Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 56 (2008); *see* U.S. RIOT COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf.

42. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 41, at 1; *see* Vernon M. Briggs, Jr., *Report of the National Advisory Commission on Civil Disorders: A Review Article*, 2 J. ECON. ISSUES 200, 200 (1968).

43. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 41, at 5 ("Race prejudice has shaped our history decisively; it now threatens to affect our future. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."); Aleo & Svirsky, *supra* note 41, at 56; Briggs, Jr., *supra* note 42, at 200 ("The main culprit is said to be 'white racism.'").

44. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 41, at 5.

45. *Id.* at 13; Aleo & Svirsky, *supra* note 41, at 56.

46. It is important to note that while the Commission had a substantial impact on creating separate and independent federal housing regulations, the effort to introduce a form of fair housing legislation actually began as early as 1966. Kirk D. Jensen & Jeffrey

Brooke, the first African American senator to be elected by popular vote, and Martin Luther King, Jr., that forever turned the tide on housing discrimination.[47] While Senator Brooke partnered with Senator Edward Kennedy to publicize his personal experience of returning from World War II and being denied housing based on race, Martin Luther King, Jr. organized and participated in open housing marches across the nation.[48] This publicity brought racial discrimination back to the forefront of public consciousness.

In early April 1968, the Senate passed the Fair Housing Act by an exceedingly slim margin and sent the bill to the House of Representatives for review. The House of Representatives, however, had grown increasingly conservative as a result of the urban unrest, and politicians predicted defeat of the bill at the House level. While defeat appeared imminent, the unexpected assassination of Martin Luther King, Jr. on April 4, 1968, served as the catalyst for President Johnson to finally push the fair housing bill through Congress as a "last tribute to King."[49] Thus, just seven days after Martin Luther King, Jr.'s death, the House quickly passed the FHA without debate.[50]

Upon enacting the FHA, Senator Walter Mondale, the primary sponsor of the Act, expressed in the congressional record that the FHA was necessary "'to correct the enduring effects' of discriminatory governmental action."[51] This remark mirrored the lengthy floor debate in the

---

P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and* Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 115 (2012). In 1966, Congress, at the behest of President Johnson, introduced Title IV of the Civil Rights Act of 1966. *Id.* "Title IV contained a provision for a Fair Housing Board that could hear and adjudicate complaints of violations of the Act." *Id.* In its original form, Title IV barred racial discrimination in the sale and rental of all housing. While the House passed the bill on August 9, 1966 after amendment and attack, the Senate killed the bill through filibuster on September 19, 1966. Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation: Not an Easy Row to Hoe*, 4 CITYSCAPE 21, 21–24 (1999), http://www.huduser.org/portal/Periodicals/CITYSCPE/VOL4NUM3/mathias.pdf. For a more in depth discussion of the housing provisions in Title IV, see *1966 Civil Rights Act Dies in Senate*, 22 CQ ALMANAC 450, 450–72 (1966), http://library.cqpress.com/cqalmanac/document.php?id=cqal66-1301767.

47. Bain, *supra* note 22, at 1439.

48. *Id.*

49. *Id.* at 1439–40.

50. *Id.* at 1440; *see* Matthew Jordan Cochran, *Fairness in Disparity: Challenging the Application of Disparate Impact Theory in Fair Housing Claims Against Insurers*, 21 GEO. MASON U. CIV. RTS. L.J. 159, 161 (2011); *see also* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1172 (2007).

51. Aleo & Svirsky, *supra* note 41, at 56; *see generally* Bain, *supra* note 22, at 1438 (explaining that Senator Mondale introduced the FHA bill to eliminate all discriminatory practices employed by property owners, real estate brokers, home financers, and builders); Cochran, *supra* note 50, at 161.

Senate concerning the negative effects of discrimination in housing.[52] Therefore, consistent with these comments, the original version of the FHA contained no express language requiring a showing of discriminatory intent before recovering damages under the Act.[53] Perplexingly, however, the text of the FHA does not expressly prohibit conduct having a discriminatory effect on protected minorities.

2. Administering and Enforcing the FHA: Where Are We Today?

While passage of the FHA represented a significant victory for civil rights activists, the Act did not remain static or untouched for long. Congress explicitly expanded the FHA's anti-discrimination provisions on two unique occasions. First, in 1974, Congress amended the FHA to include sex as a protected class.[54] Second, Congress increased the FHA's scope by passing the Fair Housing Amendments Act in 1988, which banned housing discrimination on the basis of familial status and disability.[55] These revisions strengthened the FHA for the benefit of all Americans by broadening its scope of applicability. Signifying a congressionally protected right to be free from housing discrimination and enjoy independent living, these amendments transformed the FHA into a true piece of civil rights legislation beyond its previously limited racial context.[56]

In addition to amending the text of the FHA, Congress entrusted the interpretation and enforcement of the FHA's provisions to a separate regulatory body beginning in 1988.[57] The executive agency, the Department of Housing and Urban Development (known as HUD), possesses broad authority to issue federal regulations and rules related to the FHA and initiate claims under the Act.[58] The department's primary re-

52. Aleo & Svirsky, *supra* note 41, at 56–57 ("Throughout the lengthy floor debate concerning the Fair Housing Act (Title VIII) in the Senate, a number of Senators spoke to the significance of the Act in eliminating the negative effects of discrimination in housing."); *see also* Equal Justice Soc'y et al., *Lessons from* Mt. Holly*: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L.J. 241, 245 (2014) ("In enacting the FHA, Congress emphasized the harmful effects of housing discrimination.").

53. Bain, *supra* note 22, at 1440.

54. Stanton, *supra* note 4, at 145.

55. *Id.*; *see also* Cochran, *supra* note 50, at 161 (stating that "[s]ex and familial status have since been added to the list of protected classes").

56. *See* Stanton, *supra* note 4, at 145.

57. The Fair Housing Act was amended in 1988 to authorize HUD to enforce the Act through the issuance of rules. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1354 (6th Cir. 1995).

58. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282 (5th Cir. 2014); Lopez v. City of Dall., Tex., No. 3:03-CV-2223-M, 2004 WL 2026804, at *8 (N.D. Tex. Sept. 9, 2004); Jensen & Naimon, *supra* note 46, at 131–32;

sponsibility is to ensure equal access to housing and "create strong, sustainable, inclusive communities" that are free from discrimination.[59] As such, this federal agency is the primary enforcer and interpreter of the FHA's text.

In light of the significant protections afforded by the FHA and the strong regulatory authority of HUD, Congress established three avenues for relief under the Act. First, a victim may file a complaint with HUD setting forth detailed facts and allegations of improper treatment and discrimination.[60] HUD, through the Office of Fair Housing and Equal Opportunity ("FHEO"), then conducts a thorough investigation. If the complaint has merit, the FHEO moves to resolve the dispute "through informal methods of conference, conciliation, and persuasion."[61] Complaints that are not successfully conciliated require the FHEO to determine whether reasonable cause exists to support a finding of discriminatory intent.[62] When reasonable cause is found, HUD issues a Determination and a Charge of Discrimination to all parties listed in the Complaint.[63] A hearing is then scheduled before a HUD administrative law judge. Either party, however, may terminate the administrative proceeding and elect to litigate the claim in federal court.[64] If the administrative proceeding is terminated, the Department of Justice takes over HUD's role as counsel seeking resolution of the charge.[65] Second, the Attorney General may elect to independently initiate suit against a realtor or agent in response to widespread discriminatory housing practices.[66] These cases are typically based on a "pattern or practice" of denying Title VIII rights or an "issue of general public importance."[67] Such action

Aleo & Svirsky, *supra* note 41, at 60; *see* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972) ("The Act gives the Secretary of HUD power to receive and investigate complaints regarding discriminatory housing practices.").

59. *Mission*, HUD, http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited Jan. 11, 2014).

60. Frank Lopez, Note, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 92 (1999).

61. *Id.* (quoting Jane McGrew et al., *Washington Lawyers' Committee for Civil Rights Under the Law: Fair Housing*, 27 HOW. L.J. 1291, 1319 (1984)).

62. *Programs Administered by FHEO*, HUD (Sept. 25, 2007), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8.

63. *Id.*

64. *Id.*

65. *Id.*

66. Lopez, *supra* note 60, at 92.

67. *Id.* at 92–93; *see* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) ("So far as federal agencies are concerned only the Attorney General may sue; yet, as noted, he may sue only to correct 'a pattern or practice' of housing discrimination.").

is rare and represents an infrequently used avenue of prosecution.[68] Finally, an individual may assert a private right of action against an offender without involvement from HUD or the Attorney General.[69]

In cases involving private enforcement of the FHA's anti-discrimination provisions, an affected individual must engage in a three-step analysis. First, the plaintiff must show that she is a member of a statutorily protected class who applied for and was qualified to purchase or rent housing when her application was denied.[70] The dwelling, rental unit, or property must further have remained available following the denial of the plaintiff's application.[71] Second, the defendant may defeat the plaintiff's claim by proving that the denial of plaintiff's application was based on permissible considerations unrelated to the plaintiff's status as a protected class member.[72] Finally, the plaintiff may establish that the defendant's claimed motivation was merely a pretext for prohibited discrimination.[73] Most claims brought pursuant to this three-step framework assert discrimination under either the disparate impact theory (discriminatory effect) or the disparate treatment theory (intentional discrimination).[74]

B. The Equal Credit Opportunity Act and Regulation B

Following enactment of the FHA, Congress passed the Equal Credit Opportunity Act on October 28, 1974, to address gender and marital discrimination in the context of consumer credit.[75] Prior to 1974, married women were required to obtain their husband's guarantee on any application for a loan. Despite the woman's credit history or income, it was common practice for creditors to refuse to extend individual credit to a woman without her husband's signature. In a report dated December 1972, the National Commission on Consumer Finance expressed disapproval at the denial of credit based solely on characteristics such as sex,

68. *See Trafficante*, 409 U.S. at 211 (explaining that the "role of the Attorney General in the matter [is] minimal" and "the main generating force must be private suits").

69. Lopez, *supra* note 60, at 93.

70. Prestes, *supra* note 20, at 870. Consumed within this first requirement are four implicit steps. First, the discrimination must be attributable to the plaintiff's protected category—race, religion, sex, national origin, familial status, or disability. Lopez, *supra* note 60, at 93. Second, the discrimination must have occurred within the context of a rental or sale of real estate. *Id.* Third, the specific transaction between the plaintiff and the defendant must fall within the scope of the FHA. *Id.* Finally, the plaintiff must satisfy her burden of proof. *Id.* If the plaintiff meets all of these requirements, she will have established a *prima facie* case of discrimination.

71. Prestes, *supra* note 20, at 870.

72. *Id.*

73. *Id.* at 870–71.

74. Stanton, *supra* note 4, at 165.

75. *See* Prestes, *supra* note 20, at 868.

race, or occupation.[76] The report disclosed that underrepresented groups—particularly women—promised to be an increasingly profitable market but creditors remained slow in adopting non-discriminatory practices.[77] In subsequent legislative hearings, the Senate reported no fewer than 13 types of credit discrimination based on sex and marital status prevalent in the credit industry.[78] These findings prompted Congress to enact ECOA to eradicate discrimination among lending institutions.[79]

As originally enacted, ECOA provided the Federal Reserve Board with the responsibility for creating and prescribing an implementing regulation to effectuate its non-discriminatory mandate.[80] The Board of Governors of the Federal Reserve System subsequently issued Regulation B to implement and enforce the fair credit guidelines established under ECOA.[81] Regulation B outlines mandatory rules lenders and lending institutions must adhere to when obtaining and processing applications for loans or dealing with sensitive credit information.[82] Applying to all persons "who, in the ordinary course of business, regularly participate[] in the credit decision, including setting the terms of the credit," Regulation B governs lending conduct for all aspects of an applicant's interactions with a creditor, including information requests, investigation procedures, creditworthiness standards, termination or rejection of credit, furfurnishing credit information, and terms of credit.[83] If a lender rejects a credit application, it must provide a written notice of rejection to the applicant and explain why credit was denied.[84] Although ECOA and Regulation B initially only barred credit discrimination based on sex and marital status, Congress enacted the ECOA Amendments in 1976, which significantly expanded the scope of prohibited conduct to include discrimination based on age, race, color, national origin, religion, receipt of public assistance benefits, and the exercise of rights under the Consumer Credit Protection Act.[85]

---

76. Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 659 (1981).

77. *Id.*

78. *Id.*

79. ECOA was enacted as Subchapter IV of the Consumer Credit Protection Act.

80. CONSUMER FIN. PROT. BUREAU, CFPB SUP. AND EXAM. MANUAL I.1 1 (2013), http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf; *see also* BD. OF GOVERNORS OF THE FED. RESERVE, CONSUMER COMPLIANCE HANDBOOK, FEDERAL FAIR LENDING REGULATIONS AND STATUTES EQUAL CREDIT OPPORTUNITY (REGULATION B) 1 (2006), http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_reg_b.pdf.

81. *See* CONSUMER COMPLIANCE HANDBOOK, *supra* note 80, at 1.

82. *See id.* at 1–6.

83. 12 C.F.R. § 1002.2(*l*) (2015).

84. 12 C.F.R. § 202.9(a)(2) (2015).

85. Blakely, *supra* note 76, at 662–63.

Comparable to the FHA, ECOA and Regulation B provide both private and governmental rights of enforcement. Any individual harmed by a creditor's violations of ECOA may bring a private lawsuit against the creditor, who is liable for compensatory damages, attorneys' fees, and costs of a successful suit.[86] A consumer has two years after the occurrence of the discriminatory conduct to initiate a lawsuit.[87] Congress, however, was not confident that consumers would always protect and enforce their own rights; therefore, it provided concurrent enforcement powers to the Attorney General of the United States.[88] If the agencies responsible for ECOA's enforcement cannot obtain lender compliance with the Act, they may refer the matter to the Attorney General and include a recommendation that a civil action be instituted. Additionally, the Attorney General may act independently to initiate a civil action, including an action for injunctive relief, if there is reason to believe a creditor has engaged in a pattern or practice in violation of ECOA.[89] Like the FHA, this discriminatory conduct typically takes the form of either disparate impact or disparate treatment.

C. Consumer Financial Protection Bureau and Unfair Deceptive Abusive Acts or Practices

While the FHA and ECOA represented significant steps to curb discriminatory lending practices, federal regulators nonetheless continually "shied away from the shadow banking industry that had abused consumer trust with impunity."[90] A patchwork of federal agencies existed to govern various aspects of the financial system; however, these agencies were unorganized and focused on consumer safety and credit soundness rather than consumer protection.[91] Prior to the 2008 financial crisis, nonbank providers of financial products and services were not subject to oversight or federal supervisory authority, and fragmented jurisdiction prevented federal regulators from conducting meaningful investigations of banking institutions.[92] This regulatory gap permitted state legislators and state attorney generals to legislate and sue banking institutions primarily with an "eye toward buying in-state votes with the money of out-

86. 15 U.S.C. §§ 1691e(a), (d) (2012).

87. Blakely, *supra* note 76, at 663.

88. *Id.*

89. THOMAS E. PEREZ, THE ATTORNEY GENERAL'S 2012 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 2 (July 2013), http://www.justice.gov/crt/about/hce/documents/ecoa_reports/ecoareport2012.pdf.

90. Dylan J. Castellino, *A Spotlight on Shadow Banking: The CFPB Finalizes Procedures to Supervise Risky Nonbanks*, 18 N.C. BANKING INST. 333, 333 (2014).

91. Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 857–58 (2013).

92. Castellino, *supra* note 90, at 335.

of-state banks while also balkanizing the consumer banking system."[93] This political motivation drove state enforcement of consumer protection laws, and such enforcement was often arbitrary and irregular. As a result, despite the widespread nature of consumer protection regulation at both the state and federal levels, no unifying regulator existed to ensure consistent and lawful enforcement of protection standards or to develop a cohesive consumer protection strategy. Subsequently, in 2008, the United States experienced a debilitating financial crisis, which burst the housing bubble and threatened the collapse of large financial institutions in part because of high-risk financial products, overvaluation of subprime mortgages, and the failure of regulators to control market practices.

In response to this financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), which transferred regulatory authority for ECOA and other federal legislation to the Consumer Financial Protection Bureau.[94] Congress created the CFPB to more effectively regulate consumer financial products and services;[95] however, in doing so, Congress sent the CFPB into uncharted waters. Prior to the 2008 financial crisis, non-bank providers of financial products and services were not subject to oversight or federal supervisory authority, and fragmented jurisdiction prevented federal regulators from conducting meaningful investigations of banking institutions.[96] The Dodd-Frank Act thus granted the CFPB supervisory authority and jurisdiction over bank and non-bank institutions in an effort to establish a comprehensive regulatory regime to prevent future financial crises.[97] This concept of a new consumer financial protection agency was a centerpiece of President Barack Obama's financial regulatory reform program, and was first proposed by Elizabeth Warren in 2007.[98]

Termed the "new consumer watchdog," the CFPB's primary purpose is to "prevent unfair, deceptive, and abusive financial practices, and to level the playing field between depository and non-depository institu-

93. Zywicki, *supra* note 91, at 858.

94. *See* CFPB SUP. AND EXAM. MANUAL I.1, *supra* note 80, at 1. The CFPB is a bureau within the Federal Reserve Board with financial independence.

95. *See* Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 109 (2012).

96. Castellino, *supra* note 90, at 335.

97. *See id.* at 337. Although the CFPB possesses authority over bank and non-bank institutions, this jurisdiction is limited. The CFPB may only supervise banks and credit unions that possess more than $10 billion in assets. Banks possessing less than $10 billion in assets are primarily supervised by federal banking regulators, though the CFPB may, in certain instances, retain concurrent jurisdiction. *Id.* With regards to non-bank institutions, the CFPB may only regulate certain "covered persons," defined as any entity that "engages in offering or providing a consumer financial product or service." *Id.* (quoting 12 U.S.C. § 5481(6) (2012)).

98. Zywicki, *supra* note 91, at 860–61.

tions that offer consumer financial products and services."[99] As such, an important goal of the CFPB is to provide consumers with access to financial services in fair and transparent markets.[100] The CFPB is therefore authorized to administer and enforce federal consumer financial laws and, to the extent the CFPB's rulemaking or enforcement authority conflicts with that of another agency, the CFPB possesses a superior claim.[101] That said, states are permitted to supplement the CFPB's rulemaking and enforcement efforts.

Among the CFPB's most substantive—and arguably threatening—powers is its ability to regulate unfair, deceptive, or abusive acts or practices.[102] According to the Dodd-Frank Act, conduct is considered "unfair" when: "(1) [i]t causes or is likely to cause substantial injury to consumers; (2) [t]he injury is not reasonably avoidable by consumers; and (3) [t]he injury is not outweighed by the countervailing benefits to consumers or to competition."[103] The term "injury" encompasses monetary harm, such as fees and costs paid by the consumer as a result of the unfair practice, but also extends to severe emotional distress.[104] Actual injury is not required so long as there is a significant risk of concrete harm.[105] The CFPB deems an injury "not reasonably avoidable" if the practices hinder a consumer's ability to make informed decisions about the credit transaction or interferes with a consumer's ability to avoid that injury.[106] As a matter of practice, the CFPB has determined that an injury caused by transactions that occur without a consumer's knowledge or an injury that can only be avoided by spending large amounts of money or resources is not reasonably avoidable.[107]

Similarly, an act or practice is deemed deceptive if: (1) the representation, act, or omission, is likely to mislead consumers; (2) the consumer's interpretation of the act or omission is reasonable under the circumstances; and (3) the misleading information or practice is material.[108]

---

99. Castellino, *supra* note 90, at 336.

100. *Id.*; *see* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 895 (2011) ("CFPB's mission is to 'help protect consumers from unfair, deceptive, and abusive acts that so often trap them in unaffordable financial products.'").

101. Castellino, *supra* note 90, at 340.

102. CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-07: PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 2 (2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf [hereinafter CFPB BULLETIN 2013-07].

103. *Id.*

104. *Id.*

105. *Id.* at 2.

106. *Id.* at 3.

107. *Id.*

108. *Id.*

To determine whether an act or practice is deceptive, the CFPB must evaluate the conduct within the context of the entire course of dealing or transaction to decide whether the net impression is deceptive.[109] The CFPB may not view the act in isolation. Deception is additionally determined by analyzing the conduct from the perception of a reasonable member of the target audience.[110] Exaggerated claims or puffery are not deceptive if a reasonable consumer would not take the representation seriously. Moreover, the deceptive act or representation must be material—i.e., it must be likely to affect a consumer's choice or conduct regarding a product or service.[111] Any information a consumer would deem important to a transaction is considered material.

Finally, Congress added the term "abusive" to UDAAP in an effort to create a broader standard of regulation beyond the simple prohibition of unfair or deceptive acts. Although "abusive" means something different than unfair or deceptive, the CFPB and Congress have failed to provide a solid, concrete definition for the term.[112] Rather, the proffered definition is situational and subjective, and is dependent upon the facts and circumstances of the case.[113] No legislative history exists to suggest what the term might mean, and the CFPB is permitted to alter the definition of any term at will.[114]

While the CFPB's UDAAP standards appear amorphous and unsettled, the CFPB refuses to issue rules that define or describe which acts or practices qualify as unfair, abusive, or deceptive.[115] Rather, the CFPB casts a wide net for UDAAP and makes clear that complying with all federal consumer protection regulations is not sufficient to avoid UDAAP claims.[116] This limited guidance from the CFPB establishes UDAAP claims as a "know it when [you] see it" standard, particularly given the scarcity of binding legal precedent on this topic.[117] The undefined boundaries of UDAAP are concerning because the CFPB may seek civil penalties for violations of its laws and regulations.[118]

While the CFPB is the sole enforcer of UDAAP, states have created their own UDAAP counterparts that allow for local and private enforce-

109. *Id.*

110. *Id.*

111. *Id.* at 3–4.

112. Castellino, *supra* note 90, at 354; Zywicki, *supra* note 91, at 918.

113. Castellino, *supra* note 90, at 354–55.

114. Zywicki, *supra* note 91, at 918.

115. MORRISON & FOERSTER, THE CFPB & UDAAP: A "KNOW IT WHEN YOU SEE IT" STANDARD? 1 (June 2014).

116. *Id.*

117. *Id.* at 1–2.

118. *See* Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1289 (2011).

ment.[119] Every state has a law prohibiting unfair and deceptive trade practices,[120] and the primary difference between state unfair and deceptive acts and practices ("UDAP") and UDAAP lies in the consumer's ability to sue for injury. Each state's UDAP statute is a variant on the federal model, but consumers are permitted to sue for monetary damages under the state legislation.[121] This two-tiered enforcement structure for unfair and deceptive behavior means that lending and banking institutions may be liable for damages at both the state and federal levels for conduct that is imprecisely defined and constantly evolving.[122]

II. THEORIES OF DISCRIMINATION: DISPARATE TREATMENT AND DISPARATE IMPACT

Understanding the prohibitions of the FHA, ECOA, and numerous other regulatory frameworks requires an exploration of the multi-faceted structure of discrimination. Discrimination, which is defined as an action that denies social participation or fundamental rights to certain categories of people based on prejudice or specific characteristics, is a pervasive evil that has permeated all aspects of society from ancient to modern.[123] Perceived almost as a global constant, discrimination has evolved and assumed numerous forms over the course of history. Yet, despite activism and social progress towards the eradication of discrimination, discriminatory conduct has not disappeared; it has merely changed form. This section analyzes the two prominent categories of discrimination: disparate treatment and disparate impact. Further, this section chronicles the use of these two discriminatory forms within the FHA. Through this

119. *See* NAT'L CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES: STATE-BY-STATE SUMMARIES OF STATE UDAP STATUTES (2009), *available at* https://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

120. *See id.*

121. Michael R. Pfeifer, *Dodd-Frank's UDAAPS—Have We Lost Our Way?*, MORTG. COMPLIANCE MAG., (Dec. 9, 2013), http://www.mortgagecompliancemagazine.com/featured/dodd-franks-udaaps-lost-way/; Jeffrey Naimon et al., *Under the Microscope: A Brief History of UDAP Laws and Predictions for Post-Dodd Frank Developments*, 14 CONSUMER FIN. SERVS. L. REP. 3, 4 (2010), http://www.buckleysandler.com/uploads/36/doc/cfs1411.pdf; Travis P. Nelson, *Emerging Issues in UDAP: Preemption*, AM. BAR Assoc. (2008), http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/200803/nelson-b.pdf.

122. *See* NAT'L CONSUMER L. CTR., THE ROLE OF THE STATES UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010 1–4 (2010), https://www.nclc.org/images/pdf/legislation/dodd-frank-role-of-the-states.pdf; Pfeifer, *supra* note 121 ("Even more significantly, under state UDAP and other state consumer protection statutes, claims by private litigants may be available for violation of Federal UDAAPs.").

123. *Discrimination*, MERRIAM WEBSTER DICTIONARY (2014), http://www.merriam-webster.com/dictionary/discrimination.

analysis, this section provides the foundation for understanding the rise of disparate impact theory as a method of recovery in the financial services industry.

A. A Tale of Two Theories: Disparate Treatment and Disparate Impact

Within the financial services industry, the two most prevalent methods of discrimination have long been identified as disparate treatment and disparate impact. Disparate treatment operates as an intent-based theory of discrimination in which the injured party must show that the defendant possessed a discriminatory motive for taking a certain action.[124] This action, in turn, must result in unfavorable treatment of the plaintiff and be undertaken after consideration of impermissible criteria.[125] Depending on the statute, impermissible criteria may encompass race, religion, national origin, sex, familial status, and receipt of public health benefits. The focus of any disparate treatment case is the defendant's mens rea or state of mind, and proof of intent to discriminate is absolutely crucial to establishing a prima facie case of discrimination.[126] This proof of intent can be either circumstantial or direct, but "need not be so direct and uncontrovertible [sic] as 'smoking gun' evidence to compel a rebuttal by the defendant."[127] Thus, disparate treatment liability depends on whether a protected trait motived the defendant's decision-making process and had a material influence on the outcome of the decision.[128]

In contrast to disparate treatment, disparate impact theory does not question the defendant's motivation or intent for performing discriminatory conduct. Rather, a disparate impact claim is established when the defendant's practices disproportionately affect a protected class.[129] In other words, if a facially neutral policy unjustifiably impacts protected minority groups when applied, those protected individuals may file suit

124. Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

125. *See id.*

126. *See* Eastland v. Tenn. Valley Auth., 704 F.2d 613, 618 (11th Cir. 1983); *see also* Lewis v. City of Chi., Ill., 560 U.S. 205, 214–15 (2010).

127. Green v. USX Corp., 896 F.2d 801, 807 (3d Cir. 1990) (citing Green v. USX Corp., 843 F.2d 1511, 1526 (3d Cir. 1988)) (emphasis omitted); *see also* Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011); Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104, 1108 (6th Cir. 1987); Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985).

128. *See Ricci*, 557 U.S. at 577; *see also* Wood v. City of San Diego, 678 F.3d 1075, 1081 (9th Cir. 2012); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1273 (11th Cir. 2000).

129. *Ricci*, 557 U.S. at 577.

for recovery under the disparate impact theory.[130] The disproportionate impact is routinely established through proof of statistical disparities. In particular, statistical evidence is gathered through studies that compare the practical effects of a facially neutral policy on affected minority groups and the general population.[131] Comparisons that reveal that a seemingly neutral policy adversely affects the protected class serve as prime foundations for disparate impact suits. In this manner, disparate impact covers unintentional discrimination and does not require a mens rea element.[132]

In both disparate treatment and disparate impact claims, however, obtaining direct proof of discrimination is extremely difficult.[133] Acknowledging that almost no discrimination suit would be successful in the absence of circumstantial evidence, courts adopted a burden-shifting mechanism to ease the plaintiff's evidentiary hardship. This test, termed the *McDonnell-Douglas* test in employment discrimination cases,[134] affords a plaintiff the opportunity to establish a prima facie case of discrimination by eliminating common, non-discriminatory explanations for the defendant's act or practice in three steps. First, the plaintiff must show that a challenged practice or policy has a disproportionately adverse impact on a protected class.[135] After this requisite showing, the burden shifts to the defendant to rebut the plaintiff's case by offering proof of a legitimate business justification for the challenged act or practice.[136] During this step, the defendant must establish that the act, procedure, or policy is a business necessity.[137] Even if the defendant proves that business necessity justifies the policy, the burden shifts back to the

130. *See* Bouie, *supra* note 1 ("Another way to understand disparate impact is this: It's a way to confront the realities of racial inequality without trying to prove the motivations of an institution, organization, or landlord.").

131. *See Disparate Impact Rejected*, *supra* note 5.

132. *See id.* ("Disparate-impact legal theory relies on racial statistical disparities in lending, housing, or other business practice without having to show evidence of actual discriminatory intent.").

133. *See, e.g.*, Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 693 (2009) ("Direct proof that a lender denied loans or set terms because of an applicant's race is rarely available.").

134. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

135. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp.*, 411 U.S. at 802; Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366, 374 (6th Cir. 2007).

136. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Graoch Assocs.*, 508 F.3d at 374; Nat'l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 60 (D.D.C. 2002).

137. *See, e.g.*, Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1195 (9th Cir. 2006); Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003).

plaintiff to show the availability of a less discriminatory practice.[138] If the plaintiff satisfies both of its burdens, he or she has established a prima facie case of discrimination sufficient to warrant jury consideration.

B. Disparate Impact under the FHA

While it is unquestionable that the FHA and consumer financial protection laws prohibit intentional discrimination, it is disparate impact that "has been at the bedrock" of fair housing and fair lending enforcement for the past four decades.[139] Judicial and agency interpretations of the FHA have discerned an implicit prohibition against discriminatory effects, and similarly have found unlawful conduct resulting in a disparate impact based on protected characteristics. Eleven federal circuit courts of appeals have addressed the applicability of disparate impact under the FHA and unambiguously concluded that it provides a vehicle for redress.[140] Only the D.C. Circuit Court of Appeals has yet to weigh in on the issue. Nonetheless, a recent D.C. District Court opinion cast doubt on the availability of disparate impact as a viable theory of recovery under the FHA.[141] This section analyzes judicial and agency interpretations of disparate impact under the FHA to better shed light on the disparate impact dispute.

Recognition of disparate impact within the context of the FHA began in 1974 when the Eighth Circuit Court of Appeals explicitly permitted a disparate impact discrimination lawsuit under the Act.[142] Since then, federal courts across the United States have applied the disparate impact standard in evaluating discrimination claims under the FHA and other financial services regulations, particularly ECOA. Of the 12 circuit courts of appeals, 11 approve using disparate impact as a method of recovery under the FHA and hold that discriminatory housing practices

138. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Graoch Assocs.*, 508 F.3d at 374; *Nat'l Fair Hous. All., Inc.*, 208 F. Supp. 2d at 60.

139. Bouie, *supra* note 1.

140. *See, e.g.*, Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–36 (2d Cir. 1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146–47 (3d Cir. 1977); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995); United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984).

141. *See* Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d. 30 (D.D.C. 2014).

142. *See City of Black Jack*, 508 F.2d 1179.

may be litigated even in the absence of discriminatory intent. These courts, therefore, recognize that "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[143] As a result of this ideology, federal courts have interpreted the FHA as prohibiting unjustified practices with discriminatory effects for over 40 years.[144]

Despite the nearly uniform acceptance of disparate impact theory, federal judges have differed in their interpretations of *how* the theory should be applied, and developed three distinct standards for proving a disparate impact claim. First, the Fourth, Sixth, Seventh, and Tenth Circuit Courts of Appeals employed a balance-of-factors test.[145] This standard requires courts to analyze and weigh the following considerations when determining whether the plaintiff has established a case of discrimination: "(1) the strength of plaintiff['s] showing of discriminatory impact; (2) a quantum of evidence of discriminatory intent; (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or an injunction to restrain [the] defendant[] from interfering with property owners who wish to provide housing."[146] A plaintiff need not make a strong showing on all four factors.[147]

Second, the Third, Eighth, and Ninth Circuits developed a burden-shifting analysis similar to the *McDonnell-Douglas* test used in employment discrimination cases. As discussed, this framework requires three steps: (1) the plaintiff must first offer evidence of discriminatory conduct; (2) the defendant must then show a business justification for the act or practice; and (3) the plaintiff must demonstrate that a reasonable non-discriminatory alternative exists.[148] The Third Circuit, however, has modified this three-step framework to require the *defendant* to demonstrate that no viable alternative exists in the third stage.[149]

---

143. Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. CR-CL L. REV. 155, 156 (2014) (alteration in original) (quoting Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976)).

144. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 359 (2013).

145. *See Town of Clarkton*, 682 F.2d at 1065; *Arthur*, 782 F.2d at 575; *Vill. of Arlington Heights*, 558 F.2d at 1290.

146. Bain, *supra* note 22, at 1446 n.83 (quoting Brief for Int'l Mun. Lawyers Ass'n as Amici Curiae Supporting Petitioners at 2–4, Magner v. Gallagher, 132 S. Ct. 548 (2011) (No. 10-1032)).

147. *See* Keith v. Volpe, 858 F.2d 467, 483 (9th Cir. 1988) (explaining the balance-of-factors test and citing Fourth and Seventh Circuit case law).

148. *See* Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997); United States v. City of Black Jack, 508 F.2d 1179, 1187 (8th Cir. 1974).

149. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977).

Third, the First and Second Circuits employ a hybrid test, consisting of four factors: (1) the plaintiff must present a prima facie case of disparate impact discrimination; (2) the defendant must then demonstrate that its actions furthered a governmental or business interest and no reasonable non-discriminatory alternative existed; (3) the court should then consider whether the plaintiff presented any evidence of discriminatory intent; and (4) the court must finally determine whether the plaintiff seeks an injunction or merely affirmative relief.[150] Thus, while the courts agree that disparate impact is a viable theory under the FHA, they are divided over the proper test to evaluate a disparate impact claim.

In response to the conflicting judicial tests employed for disparate impact lawsuits, HUD issued a proposed rule on November 16, 2011, that interpreted the disparate impact standard in FHA cases and set forth uniform parameters for evaluating FHA claims. This proposal was then adopted as a final rule in February 2013, titled "Implementation of the Fair Housing Act's Discriminatory Effects Standard."[151] Particularly, the rule recognized the validity of disparate impact recovery and set forth the respective burdens of proof to be applied. In doing so, HUD formalized the burden-shifting mechanism used by a majority of circuit courts.[152] HUD, however, made clear that it was not espousing new law with the final rule, but rather formalizing its long-held recognition of disparate impact liability under the FHA.[153] As stated by HUD, the final rule "embodies law that has been in place for almost four decades and that has consistently been applied . . . by HUD, the Justice Department and nine other federal agencies, and federal courts."[154] Thus, both HUD and the federal courts have recognized the availability of disparate impact under the FHA for decades, resulting in a well-established precedent of curbing housing discrimination on the basis of acts or practices that adversely affect protected minorities.

150. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988), *aff'd in part per curiam* Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988); *see also* Bain, *supra* note 22, at 1455.

151. 24 C.F.R. § 100.500 (2013). The Final Rule took effect on March 18, 2013. *Id.*

152. *Id.*

153. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11462 (Feb. 15, 2013) (implementing 24 C.F.R. § 100).

154. *Id.*

III. THE D.C. DISTRICT COURT DEFIES GRAVITY: AN ANALYSIS OF AMERICAN INSURANCE ASSOCIATION V. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In direct contrast to the widely accepted use of disparate impact as a viable legal theory of discrimination under the FHA, the United States District Court for the District of Columbia issued a surprising opinion on November 4, 2014, that declared disparate impact inapplicable under the FHA.[155] Specifically, Judge Richard J. Leon relied heavily on the statutory text of the FHA to conclude that Congress did not intend to prohibit discriminatory *effects* under the FHA, but rather only barred actual discriminatory conduct. This section summarizes the D.C. District Court's opinion in *American Insurance Association v. United States Department of Housing and Urban Development*, which created a split among federal jurisdictions regarding the availability of disparate impact theory in the financial services industry.

Following the promulgation of HUD's final rule, which expressed acceptance of the disparate impact theory for FHA claims, plaintiffs American Insurance Association and National Association of Mutual Insurance Companies (collectively, "Plaintiffs") challenged HUD's rule as a violation of the Administrative Procedure Act ("APA").[156] Specifically, Plaintiffs alleged that HUD exceeded its statutory authority by impermissibly expanding the scope of the FHA to include disparate impact claims.[157] Plaintiffs filed a motion for summary judgment, and HUD filed a motion to dismiss or, in the alternative, for summary judgment.[158] After consideration of the parties' pleadings and the arguments of counsel, the D.C. District Court agreed with Plaintiffs that the FHA prohibited disparate treatment claims only, and thus ruled that HUD exceeded its authority under the APA.[159] Accordingly, the court granted summary judgment in favor of Plaintiffs.

In agreeing with Plaintiffs' position, the court consulted well-established administrative procedure principles. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court mandated judicial deference to agency constructions of their own statutes, provided such interpretations are reasonable.[160] The determination of whether agency rules and statutory constructions should receive defer-

155. Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev, 74 F. Supp. 3d 30 (D.D.C. 2014).

156. *Id.* at 31; 5 U.S.C. §§ 551–559 (2012).

157. *Am. Ins. Ass'n*, 74 F. Supp. at 31.

158. *Id.* at 32.

159. *Id.*

160. Chevron, U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837, 844 (1984).

ence is governed by a two-step test: (1) has Congress spoken on the provision at issue; and, if not, (2) is the agency's interpretation based on a permissible construction of the statute?[161] Where Congress has expressed an unambiguous intent through the statute's plain language, this intent controls and inquiry into the second prong is impermissible.[162] If Congress has not interpreted the provision at issue, however, it "has explicitly left a gap for the agency to fill" and "there is an express delegation of authority to an agency" to interpret the provision.[163] In these cases, agency interpretations of the statute must be afforded controlling weight unless they are "manifestly contrary to the statute."[164] Thus, in determining whether disparate impact claims are cognizable under the FHA, the D.C. District Court first examined the text of the FHA to see if it unambiguously evidenced Congress' intent to allow disparate impact causes of action.[165]

Pursuant to 42 U.S.C. § 3604, the following conduct is unlawful under the FHA:

> (a) To *refuse* to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To *discriminate* against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> (c) To *make*, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[166]

Within these prohibitions, the following operative verbs are discerned: "refuse," "discriminate," and "make."[167] The plain meaning of "discriminate," the relevant verb at hand, is "to make a difference in *treatment* or favor on a class or categorical basis in disregard of individual merit."[168]

---

161. *Id.* at 842–43.
162. *Id.*
163. *Id.* at 843–44.
164. *Id.* at 844.
165. Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d. 30, 39–42 (D.D.C. 2014).
166. 42 U.S.C. §§ 3604(a)–(c) (2012) (emphasis added).
167. *Am. Ins. Ass'n*, 74 F. Supp. 3d at 40.
168. *Id.* at 40–41.

Nowhere within the definition of "discriminate" is reference made to the *effects* of this difference in treatment.[169] Thus, the express language of the FHA prohibits only intentional discrimination (disparate treatment).

To further support this reasoning, the D.C. District Court concluded that Congress knew how to prohibit disparate impact if it had so desired.[170] Specifically, the court referenced the discriminatory effects language of Title VII and the Age Discrimination in Employment Act of 1967 ("ADEA"), both of which include "key textual differences" from the FHA's provisions prohibiting only disparate treatment.[171] The striking contrast between the language of these three statutes, all of which were enacted within a relatively close time frame, provides significant evidence that Congress did not intend to prohibit disparate impact under the FHA.[172]

Moreover, the FHA's statutory scheme solidified the D.C. District Court's reasoning. In 1988, Congress amended the FHA but did not make changes to the operative language of §§ 3604 and 3606.[173] However two years later in 1990, Congress enacted the Americans with Disabilities Act ("ADA"), which explicitly authorized disparate impact claims upon a showing that a practice "adversely affects" a disabled employee.[174] Less than a year later in 1991, Congress amended Title VII to include similar language authorizing disparate impact claims.[175] The fact that Congress consciously elected not to amend the FHA in 1988 to include effects-based language "clearly illustrates that it never intended for claims of disparate impact to be cognizable under the FHA."[176]

In addition to examining the express language and historical statutory scheme of the FHA, the D.C. District Court next analyzed the practical implication of permitting disparate impact under the FHA. In particular, the court expressed great concern that recognizing disparate impact theory in the context of the FHA would "run afoul" of the McCarran-Ferguson Act, which ensures the primacy of state law in the field of insurance regulation.[177] Specifically, the McCarran-Ferguson Act states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."[178] Expanding the FHA to include

169. *See id.* at 40.
170. *Id.* at 41.
171. *Id.*
172. *Id.* at 42.
173. *Id.*
174. *Id.*
175. *Id.* at 43.
176. *Id.*
177. *Id.* at 43–44.
178. 15 U.S.C. § 1012(b) (2012); *Am. Ins. Ass'n.*, 74 F. Supp. at 44.

disparate impact claims would produce a "wide-ranging disruptive effect" on the states' ability to regulate homeowners insurance pricing, and would further require insurance agencies to collect and analyze race-based data, which is expressly prohibited under state law.[179] The McCarran-Ferguson Act would thus reversely preempt the FHA and raise serious concerns about federal encroachment on state insurance regulation.[180] For these reasons, the court concluded that no reasonable interpretation of the FHA could lead to the conclusion that Congress intended to prohibit disparate impact.[181]

Finally, the district court briefly addressed the countervailing decisions of the 11 Circuit Courts of Appeals. The court noted that these contrary decisions were issued *before* the Supreme Court decided *Smith v. City of Jackson*, 544 U.S. 228 (2005).[182] In *Smith*, the Court made clear that the availability of disparate impact liability turns primarily—if not exclusively—on the presence or absence of effects-based language.[183] No circuit court has recognized a claim for disparate impact subsequent to the Supreme Court's decision in *Smith*; however, no court has reconsidered its circuit's precedent in light of the Supreme Court's holding.[184] Because the 11 Circuit Courts of Appeals issued their rulings before *Smith*, their reasoning and subsequent holdings are outdated and inapplicable to the present disparate impact framework. Thus, the D.C. District Court concluded that disparate impact was not an available vehicle for discrimination recovery under the FHA.[185]

IV. ONE WAY OR ANOTHER: SUPREME COURT REVIEW OF FAIR HOUSING DISCRIMINATION

Although the D.C. District Court issued its opinion as recently as November 2014, the Supreme Court has been attempting to resolve the disparate impact question since 2012. The D.C. District Court's ruling is just another minefield in the disparate impact landscape. Having failed to address the applicability of disparate impact under the FHA twice, the Supreme Court finally issued a ruling affirming its validity on June 25, 2015. This opinion clarifies the disparate impact doctrine in light of *American Insurance Association* and resolves these conflicting judicial opinions. This section analyzes the Supreme Court's prior attempts to

179. *Am. Ins. Ass'n.*, 74 F. Supp. at 44.
180. *Id.* at 44–45.
181. *Id.* 45–46.
182. *Id.* at 46.
183. Smith v. City of Jackson, 544 U.S. 228, 235–36 (2005).
184. *Am. Ins. Ass'n.*, 74 F. Supp. at 46.
185. *Id.* at 47.

adjudicate disparate impact under the FHA and discusses the Court's controversial affirmance of the disparate impact doctrine.

A. Don't Think Twice, It's All Right: Two Prior Attempts at Supreme Court Review

The applicability of disparate impact under the FHA has successfully eluded Supreme Court review for almost three years. While the Court has twice before granted certiorari on this precise issue, the Obama Administration and civil rights activists orchestrated behind the scenes settlements to prevent actual adjudication of these claims.[186] Both *Magner v. Gallagher*[187] and *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*[188] were conveniently settled after the Supreme Court granted the writ of certiorari but before oral argument could be held. Thus, despite the Supreme Court's desire to clarify the disparate impact doctrine, the opportunities to complete this objective remained unavailable until 2015.

1. The First Case: *Magner v. Gallagher*

The most controversial settlement coordinated by the Obama Administration occurred in the case of *Magner v. Gallagher* in 2011. In *Magner*, the City of St. Paul established the Department of Neighborhood Housing and Property Improvement ("DNHPI") in 2002 to administer and enforce the housing code.[189] The DNHPI director drafted procedural guidelines to keep the city clean and ensure all available housing was habitable.[190] As part of its mission, the DNHPI was empowered to inspect family dwellings to check compliance with applicable housing codes.[191] From 2002 to 2005, in particular, DNHPI director Andy Dawkins "increased the level of Housing Code enforcement targeted at rental properties."[192] Mr. Dawkins enforced the Housing Code "to the max" and sought to compel property owners to take responsibility for their

186. *See* Greg Stohr, *Supreme Court to Hear 'Disparate Impact' Housing Case*, INS. J. (Oct. 3, 2014), http://www.insurancejournal.com/news/national/2014/10/03/342556.htm (explaining that "President Barack Obama's administration and civil rights advocates have sought to steer the issue away from the Supreme Court").

187. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011).

188. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013).

189. *Magner*, 619 F.3d at 829.

190. *Id.*

191. *Id.*

192. *Id.*

homes.[193] To achieve this objective, DNHPI issued orders to correct conditions, condemnations, fees for excessive services, tenant convictions, revocations of rental registrations, and court actions.[194]

The *Magner* appellants ("Appellants") owned or rented properties that were subject to DNHPI enforcement and received between 10 and 25 code violations per property.[195] These violations included "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails."[196] As a result of these code violations, Appellants were forced to endure increased maintenance costs, pay for property improvements, and sell properties in numerous instances.[197] These rental property owners then brought suit against the City of St. Paul to challenge the enforcement of the housing code.[198] Specifically, Appellants argued that the city's enforcement efforts resulted in making low-income housing unavailable through condemnations and forced sales.[199] As such, Appellants contended that the purpose and effect of the enforcement mechanism was to put them out of business.[200]

The United States District Court for the District of Minnesota sided with the City of St. Paul and held that the evidence "d[id] not support a conclusion of racial animus toward African-Americans . . . ."[201] The Eighth Circuit disagreed and reversed the district court's dismissal of the disparate impact claim.[202] Importantly, however, the Eighth Circuit did *not* enter final judgment on the merits in favor of Appellants. Rather, the Eighth Circuit simply acknowledged that Appellants had satisfied their burden of proving a prima facie case of discrimination, and allowed the case to proceed to trial.[203] Subsequently, the Eighth Circuit denied the petition for rehearing *en banc* and by panel,[204] and the Supreme Court granted certiorari a year later.[205]

Faced with inevitable Supreme Court review, the Obama Administration and civil rights advocates engaged in desperate measures to preclude elimination of the disparate impact theory. Calculatingly, just nine

193. *Id.*
194. *Id.*
195. *Id.* at 830.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. Seicshnaydre, *supra* note 144, at 379.
201. Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 1005 (D. Minn. 2008).
202. *Magner*, 619 F.3d at 845.
203. *Id.*
204. Gallagher v. Magner, 636 F.3d 380 (8th Cir. 2010).
205. Magner v. Gallagher, 132 S. Ct. 548 (2011).

days after the Supreme Court granted certiorari in *Magner*, HUD issued its proposed final rule to recognize disparate impact as a legitimate theory of discrimination under the FHA.[206] When HUD's rule failed to conclusively resolve the issue, however, newly minted Secretary of Labor Thomas Perez flew to St. Paul to negotiate dismissal of the case.[207] At this point, briefs from both sides had already been filed with the Court and oral argument was only weeks away.

To help force a settlement in *Magner*, Mr. Perez sought leverage to stop the City of St. Paul from pressing its appeal and potentially destroying the "lynchpin" of civil rights enforcement.[208] During these negotiations, Mr. Perez stumbled upon Fredrick Newell, a small-business owner in St. Paul who filed a whistleblower lawsuit against the City in 2009.[209] Mr. Newell alleged that the City of St. Paul received millions of dollars in community development funds by improperly and illegally certifying its compliance with federal law.[210] After discussing this claim with HUD, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department's Civil Division, Mr. Newell and his attorneys believed the case could be worth as much as $200 million.[211] The strength of this case led Mr. Newell to seek federal government intervention to create a *qui tam* suit.[212]

Unfortunately, Mr. Newell's suit never achieved fruition. In February 2012, Mr. Perez struck "a secret deal behind closed doors" with St. Paul's Mayor, Christopher Coleman, and St. Paul's outside counsel, David Lillehaug. In exchange for the City of St. Paul agreeing to a settlement in *Magner*, Mr. Perez promised that the Department of Justice would not intervene in Mr. Newell's False Claims Act *qui tam* complaint pending against Minneapolis, Minnesota.[213] In fact, Mr. Perez called HUD's general counsel and asked her to reconsider HUD's support for

206. *See* Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d 30, 33 (D.D.C. 2014).

207. *See* HOUSE COMMITTEE ON OVERSIGHT & GOV'T REFORM ET AL, 113TH CONG., DOJ'S *QUID PRO QUO* WITH ST. PAUL: HOW ASSISTANT ATT'Y GEN. THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW 1 (2013), http://oversight.house.gov/wp-content/uploads/2013/04/DOJ-St-Paul.pdf [hereinafter DOJ'S QUID PRO QUO].

208. *Id.*

209. *Id.*

210. *Id.*; *see also* Burrus, *supra* note 6 ("Mr. Newell began to suspect the city had falsely claimed to be in compliance with Section 3 [of the Housing and Urban Development Act] for six years in order to get $62 million in federal aid.").

211. DOJ'S QUID PRO QUO, *supra* note 207, at 1.

212. *See* Burrus, *supra* note 6 (explaining that "[i]n order for a *qui tam* suit to work, . . . the government must support the citizen."). A *qui tam* lawsuit enables private individuals to assist in the prosecution of cases and receive all or part of the recovery. *See* United Seniors Ass'n, Inc. v. Phillip Morris USA, 500 F.3d 19, 24 (1st Cir. 2007).

213. DOJ'S QUID PRO QUO, *supra* note 207, at 1.

intervention in Mr. Newell's case.[214] "The withdrawal of HUD's support for Newell's case led to an erosion of support in the Civil Division" and the Civil Division eventually declined to intervene in Mr. Newell's case.[215] Subsequently, the City of St. Paul withdrew its appeal in *Magner* two weeks before oral argument.

Despite this obvious *quid pro quo* to protect the disparate impact doctrine, Mr. Perez and the Obama Administration undertook significant measures to ensure that the exchange was not discovered. According to the House Committee on Oversight and Government Reform, the Senate Committee on the Judiciary, and the House Committee on the Judiciary, Mr. Perez "attempted to cover up the true reasons behind the Justice Department's decision to decline Fredrick Newell's case by asking career attorneys to obfuscate the presence of *Magner* as a factor in the declination decision and by refraining from a written agreement."[216] In particular, Mr. Perez explicitly instructed the Civil Division Section Chief in the U.S. Attorney's Office in Minnesota to eliminate any mention of the *Magner* case in the declination memo that would be distributed to the Civil Division.[217] Mr. Perez avoided written agreements in connection with the exchange that settled two cases potentially worth millions of dollars and instead insisted that your "word was your bond."[218] Taken with additional circumstantial evidence, the legislative committees concluded that Mr. Perez and the Obama Administration impermissibly and unethically undermined the administration of justice in two cases and cost American taxpayers the opportunity to recover up to $200 million from Mr. Newell's lawsuit.[219] In this manner, the Obama Administration narrowly avoided Supreme Court review on the disparate impact doctrine.

2. The Second Case: Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly

Shortly after *Magner*, the Supreme Court received a second opportunity to review and adjudicate disparate impact theory under the FHA. The case of *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly* presented more sympathetic facts and plaintiffs, but still raised the critical question of disparate impact's scope. In this case, Mount Holly Township, located in Burlington County, New Jersey, proposed a rede-

214. *Id.*
215. *Id.* at 1–2.
216. *Id.* at 2.
217. *Id.* at 42.
218. *Id.* at 45.
219. *See id.* at 64.

velopment plan to eliminate homes in its Gardens neighborhood, which was occupied primarily by low-income residents.[220] Almost all residents of the Gardens neighborhood earned less than 80 percent of the area's median income.[221] The Township proposed replacing these low-income houses with significantly more expensive housing units. At each stage of the redevelopment process, the Gardens' residents objected and expressed fear that they would be displaced and unable to afford housing elsewhere in the community.[222] The Township, however, ignored these complaints and hired Keating Urban Partners, LLC, to develop a relocation plan for all displaced residents.[223] Although the Township offered to purchase existing homes for between $32,000 and $49,000, the expected cost of a new home after the redevelopment was between $200,000 and $275,000.[224]

In May 2008, the residents filed suit in the United States District Court for the District of New Jersey, alleging violation of the FHA based on the theory of disparate impact. The district court rejected this claim and granted summary judgment in favor of the Township, holding that no prima facie case of discrimination had been established.[225] The residents timely appealed to the United States Court of Appeals for the Third Circuit, which vacated the district court's grant of summary judgment and remanded the case for further proceedings and factual development.[226] The Supreme Court granted certiorari on June 17, 2013.[227]

Similar to *Magner*, the Obama Administration and civil rights advocates sought to halt Supreme Court review of the disparate impact doctrine. Importantly, the final rule HUD proposed during *Magner* was adopted and implemented between the filing and granting of the *Mount Holly* certiorari petition.[228] This governmental action, however, failed to spark settlement negotiations between the parties. As a result, Mount

220. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375, 377 (3d Cir. 2011).

221. *Id.* at 378.

222. *Id.* at 379.

223. *Id.*

224. *Id.* at 380.

225. *Id.* at 381.

226. *Id.* at 387–88.

227. Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013).

228. Allen et al., *supra* note 143, at 158 ("Four months before the grant of certiorari, HUD promulgated a final rule, 'Implementation of the Fair Housing Act's Discriminatory Effects Standard,' . . . in which HUD 'formalize[d] its long-held recognition of discriminatory effects liability under the Act . . . ."); Seicshnaydre, *supra* note 144, at 403 ("On February 15, 2013, after the *Mount Holly* petition was filed, but before it was granted, HUD issued its Final Rule, entitled 'Implementation of the Fair Housing Act's Discriminatory Effects Standard.'").

Holly, the Ford Foundation, George Soros' Open Society Foundations, the National Fair Housing Alliance, and Self Help Community Development—all housing allies of the Obama Administration—contributed money to foster negotiations in an effort to help the parties find common ground.[229] On the opposite side, representatives from the banking and financial services industry "offered [monetary] incentives to the [T]own[ship] to continue litigation rather than settle."[230] The Township, however, rebuffed the offer and entered into an eleventh-hour settlement with the residents.[231] While "Republicans accused the Justice Department of seeking to intervene again with the *Mount Holly* case," the Township "said that the feds had nothing to do with the settlement," but rather attributed the successful negotiations to a change in political leadership.[232] Thus, the *Mount Holly* case became the second case in two years that the Supreme Court lost its ability to conclusively adjudicate fair housing discrimination claims.

B. Three Is the Magic Number: The Supreme Court Finally Tackles Disparate Impact

Despite the Supreme Court's failed attempts to address FHA disparate impact claims in *Magner* and *Mount Holly*, the Court received its third opportunity to tackle the disparate impact question when it granted certiorari in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* on October 2, 2014.[233] In this case, the State of Texas sought to overturn a Fifth Circuit Court of Appeals decision ordering it to more evenly allocate affordable housing subsidies between black and white neighborhoods in Dallas.[234] Specifically, the Inclusive Communities Project ("ICP"), which operates as a non-profit Texas organization seeking racial and socio-economic integration in the Dallas area, challenged the Texas Department of Housing and Communi-

229. *Rigging Antidiscrimination Law*, WALL ST. J. (Nov. 18, 2013, 6:46 PM), http://www.wsj.com/articles/SB10001424052702304243904579198144114654908; *see also* Daniel Fisher, *Supreme Court Once Again Takes Challenge to Disparate-Impact Claims*, FORBES (Oct. 3, 2014, 12:15 PM), http://www.forbes.com/sites/danielfisher/2014/10/03/supreme-court-once-again-takes-challenge-to-disparate-impact-claims/.

230. Adam Serwer, *Mount Holly Settlement Spares Fair Housing Act—For Now*, MSNBC (Nov. 15, 2013, 10:41 AM), http://www.msnbc.com/msnbc/mount-holly-settlement-spares-fair-housing-act-for-now.

231. *Id.*

232. *Id.*

233. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2014).

234. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 278 (5th Cir. 2014).

ty Affairs' distribution of tax credits.[235] The ICP assists African Americans in finding affordable housing through the use of subsidies, which take the form of vouchers.[236] While private landlords may decline the vouchers, landlords receiving federal tax credits for low-income housing are required to accept the subsidy.[237] The Texas Department of Housing and Community Affairs, in turn, decides where to apply the tax credits and thus implicitly alters the housing options available to low-income families.[238]

In March 2008, the ICP filed suit against the Texas Department of Housing and Community Affairs in the United States District Court for the Northern District of Texas, alleging that its distribution of tax credits violated the FHA and the Fourteenth Amendment.[239] In particular, the ICP claimed that the Texas Department of Housing and Community Affairs applied the tax credits in a racially segregated manner by disproportionately granting housing credits in minority neighborhoods.[240] The Northern District of Texas agreed and found that the tax credit had a disparate impact on minorities. The United States Court of Appeals for the Fifth Circuit agreed that the disparate-impact claim was cognizable, but remanded the case on the merits, and the Supreme Court granted the writ for certiorari on October 2, 2014.[241] Oral argument in the case was held on January 21, 2015, and the Court issued its decision affirming disparate impact on June 25, 2015.[242]

1. Stayin' Alive: The Majority Saves Disparate Impact Liability under the FHA

In an unexpected blow to financial institutions nationwide, a deeply divided Supreme Court affirmed the viability of disparate impact claims under the FHA.[243] Justice Kennedy, writing for the majority that included Justices Ginsburg, Breyer, Sotomayor, and Kagan, handed civil rights activists an unquestionable victory when it ruled that racial discrimination claims in the housing context are not "limited by questions of intent."[244] Specifically, the 5-4 ruling expressly authorizes discrimination

235. *Id.* at 277.
236. *Id.*
237. *Id.*
238. *See id.* at 277–78.
239. *Id.* at 278.
240. *Id.*
241. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2014).
242. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2507.
243. *See id.* at 2526.
244. *See* Bill Chappell, *In Fair Housing Act Case, Supreme Court Backs 'Disparate Impact' Claims*, NPR (June 25, 2015, 12:26 PM), http://www.npr.org/sections/thetwo-

claims based upon statistics and circumstantial evidence that illustrate a discriminatory *effect* on certain minority groups, even if the lending institution possessed no discriminatory *intent*.[245] This section offers a succinct overview of the Supreme Court's holding and explains why the majority's opinion is fatally flawed through an in-depth analysis of Justice Alito's dissent.

The precise question presented for the Court's determination was whether disparate impact theory is a cognizable vehicle for recovery under the FHA.[246] Answering this question in the affirmative, the majority divided its analysis into four primary categories: (1) statutory language; (2) congressional FHA amendments and appellate precedent; (3) legislative purpose; and (4) disparate impact limitations.

i. Statutory Language

In no uncertain terms, the majority concluded that the plain language of the FHA recognizes disparate impact liability. In particular, the Court focused a substantial portion of its analysis on the statutory phrase "otherwise make unavailable," and analogized this language to two seemingly similar anti-discrimination statutes: Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Looking first at § 703(a) of Title VII, the Court reiterated its holding in *Griggs v. Duke Power Co.*[247] that disparate impact liability supported the purpose and design of Title VII.[248] While the Court did not examine § 703 in full, it relied principally on the phrase "otherwise adversely affect" in § 703(a)(2), which provides:

It shall be an unlawful employer practice for an employer . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.[249]

In interpreting this provision, the Court explained that the "otherwise adversely affect" language was designed to combat the consequences of discriminatory employment practices, not simply discriminatory intent or motivation.[250] This conclusion, according to the Court, furthered

way/2015/06/25/417433460/in-fair-housing-act-case-supreme-court-backs-disparate-impact-claims.

245. *Id.*

246. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2513.

247. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

248. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2517.

249. 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

250. *Tex. Dep't of Hous. & Cmty. Affairs*,135 S. Ct. at 2519.

the congressional purpose of the statute, which included removing discriminatory barriers to equal employment.[251] However, although the Court recognized the applicability of disparate impact in the employment context, it limited its holding by imposing a business necessity defense.[252]

Next, the Court turned to § 4(a) of the ADEA, which comparably states: "[i]t shall be unlawful for an employer . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's age."[253] In 2005, the Court in *Smith v. City of Jackson* addressed whether this provision allowed disparate impact claims, with a plurality concluding that the same reasoning used in *Griggs* was applicable to the ADEA.[254] The plurality emphasized that the "adversely affect" language encompassed the discriminatory effects of an action, not merely discriminatory intent.[255] Thus, the Court concluded that *Griggs* and *Smith* stand for the proposition that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions . . . and where that interpretation is consistent with statutory purpose."[256]

Analogizing these statutory provisions to the FHA, the Court explained that the FHA's "otherwise make unavailable" language encompasses disparate impact claims.[257] Specifically, the Court found no practical difference between the phrases "otherwise make unavailable" and "otherwise adversely affect" that would preclude disparate impact recovery.[258] Instead, the Court determined that "otherwise make unavailable" refers directly to the consequences of an action, rather than an actor's discriminatory intent.[259] In fact, the Court went so far as to label this phrase "results-oriented."[260]

---

251. *Id.* at 2521.

252. *Id.* at 2517.

253. 29 U.S.C. § 623(a)(2) (2012) (emphasis added).

254. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2517; *see* Smith v. City of Jackson, 544 U.S. 228 (2005).

255. *Smith*, 544 U.S. at 236.

256. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2518.

257. *Id.*

258. *Id.* at 2519 ("Title VII's and the ADEA's 'otherwise adversely affect' language is equivalent in function and purpose to the FHA's 'otherwise make unavailable' language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent.").

259. *Id.*

260. *Id.*

Additionally, the Court placed significant weight on the location of this language in the FHA's statutory text.[261] Similar to the "otherwise adversely affect" phrase in Title VII and the ADEA, the FHA's "otherwise make unavailable" language is located at the end of a lengthy sentence that begins with a prohibition on disparate treatment.[262] As such, the Court determined that this language served as a catchall phrase that referred to an action's effects, not the defendant's intent.[263]

Finally, in further support of its textual language analysis, the Court contended that it construed similar statutory language in a 1979 case, *Board of Education of City School District of New York v. Harris*,[264] when it held that the term "discriminat[e]" included disparate impact liability.[265] For these reasons, the Court concluded that the FHA expressly authorizes disparate impact actions.

ii. Congressional FHA Amendments and Appellate Precedent

To supplement its plain language analysis, the Court further supported its holding by examining the congressional FHA amendments and appellate precedent.[266] As previously discussed, Congress expanded the reach of the FHA in 1988 with the Fair Housing Amendments Act, which banned discrimination on the basis of familial status and disability.[267] At the time Congress enacted these amendments, nine circuit courts of appeals had determined that the FHA encompassed disparate impact claims.[268] Congress, therefore, must have been aware of this unanimous precedent when it revised the scope of the FHA.[269] The Court placed particular emphasis on the fact that Congress amended the FHA in light of this appellate precedent without altering the operative language of §§ 804(a) and 805(a).[270] Accordingly, Congress' decision to amend the FHA without contradicting these judicial holdings "is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the courts of appeals finding disparate-impact liability."[271]

---

261. *Id.*
262. *Id.*
263. *Id.*
264. Bd. of Educ. of City Sch. Dist. of New York v. Harris, 444 U.S. 130, 140–41 (1979).
265. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2518–19.
266. *Id.* at 2519.
267. *Id.* at 2520.
268. *Id.* at 2519.
269. *Id.*
270. *Id.* at 2520.
271. *Id.*

Furthermore, the Court noted that the Fair Housing Amendments Act included three exemptions from disparate impact liability. First, the FHA does not prohibit an appraiser from taking into account factors other than race, religion, national origin, sex, or familial status.[272] Second, the FHA does not prohibit adverse conduct against an applicant who has been convicted of illegally manufacturing or distributing controlled substances.[273] Finally, Congress explained that the FHA does not prohibit the housing industry from applying reasonable restrictions regarding the maximum number of occupants for a dwelling.[274] These exclusions, according to the Court, would have been unnecessary if Congress had intended that the FHA apply solely to disparate treatment claims.[275] In fact, the exclusions would not even make sense unless disparate impact claims had been contemplated by Congress.[276] Thus, Congress' failure to explicitly ban disparate impact liability in light of these nine circuit courts of appeals' rulings and the FHA amendments, results in an implicit acceptance of these judicial holdings.[277]

iii. Legislative Purpose

Next, the majority analyzed the FHA's legislative purpose and concluded that disparate impact liability furthers the congressional goal of eliminating discrimination in the housing market. Over the past several decades, courts and administrative agencies have used disparate impact liability to vindicate the FHA's objectives and stop the enforcement of arbitrary and discriminatory ordinances, housing policies, and financial lending practices.[278] Not only have these actions addressed indirect discrimination, but they have also played a direct role in uncovering overt discriminatory intent. Pursuant to the Court's reasoning, disparate impact claims permit "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[279] Thus, the Court maintains that disparate impact liability is a

272. *Id.*; *see* 42 U.S.C. § 3605(c) (2012).

273. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520; *see* 42 U.S.C. § 3607(b)(4).

274. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520; *see* 42 U.S.C. § 3607(b)(1).

275. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520.

276. *Id.* at 2520–21.

277. *See id.*

278. *Id.* at 2522; *see, e.g.*, Town of Huntington. v. Huntington Branch, NAACP, 488 U.S. 15, 16–18 (1988) (invalidating zoning laws that prohibited the construction of multi-family rental units); Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 641 F. Supp. 2d 563, 569 (E.D. La. 2009) (invalidating discriminatory post-Hurricane Katrina ordinances).

279. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520.

vehicle for preventing segregated housing patterns that might result from unconscious stereotyping, and furthers the FHA's primary legislative objective.[280]

iv. Disparate Impact Limitations

Although the Court upheld the use of disparate impact under the FHA, it imposed what some consider "significant limitations" on the practical application of the doctrine.[281] Analogizing the limitations of the FHA's disparate impact theory to the business necessity standard under Title VII, the Court held that a racial imbalance, without more, is insufficient to sustain a discrimination claim.[282] Rather, a plaintiff must identify a particular practice or policy that supports the alleged discriminatory outcome. This "robust causality" requirement allegedly protects lenders and housing institutions from liability for racial disparities they did not create.[283] Without this limitation, governmental and private housing entities may impose numerical quotas that exacerbate the racial divide.[284]

Moreover, the Court emphasized that lower tribunals must "examine with care whether a plaintiff has made out a prima facie case of disparate impact" and strive towards a "prompt resolution" of the case.[285] If a plaintiff cannot provide sufficient facts and evidence demonstrating a causal connection between the harm suffered and the defendant's policies and procedures, the case should be dismissed at an early stage in the litigation.[286] This instruction seeks to protect lenders and housing agencies from frivolous disparate impact suits. Moreover, an influx of meritless disparate impact claims may cause lenders and developers to refuse to construct or renovate housing units for low-income families, thus undermining the FHA's fundamental purpose and the free-market system at the same time.[287] Therefore, while the Court supports the application of disparate impact to FHA claims, the judiciary "should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."[288]

280. *Id.*

281. *See* Paul Hancock & Andrew C. Glass, *Symposium: The Supreme Court Recognizes But Limits Disparate Impact in its Fair Housing Act Decision*, SCOTUSBLOG (June 26, 2015, 8:58 AM), http://www.scotusblog.com/2015/06/paul-hancock-fha/.

282. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 2523–24.

288. *Id.* at 2524.

Finally, the Court noted that remedial orders for disparate impact claims must be consistent with the Constitution.[289] In achieving this mandate, orders granting relief should concentrate specifically on eliminating the offending practice through race-neutral means.[290] Remedial orders that focus on racial targets or quotas may "raise more difficult constitutional questions" and should be avoided when possible.[291]

2. Disparate Impact Should Have Gone "Bye Bye Bye": Justice Alito Explains Why the Majority Got It Wrong

In contrast to the Court's majority, Justices Alito, Roberts, Scalia, and Thomas dissented from the judgment that disparate impact is viable under the FHA. Arguing that the ruling creates impermissible legal liability unintended by the FHA, the dissent structured its analysis around six core categories similar to those embraced by the majority: (1) statutory language; (2) legislative intent; (3) congressional FHA amendments and appellate precedent; (4) deference to HUD; (5) violation of Supreme Court precedent; and (6) ramifications of the majority's opinion.[292] In addressing these six divisions, the dissent aptly explained that the majority misconstrued the plain text, legislative history, and congressional purpose in an activist manner to placate "ambitious federal bureaucrats."[293] This decision, according to the dissent, "is a serious mistake."[294]

i. Statutory Language Does Not Support Disparate Impact

The dissent first took issue with the majority's focus on the phrase "otherwise make unavailable." While the majority viewed this is the operative focus of the statute, the dissent argued that the key phrase is "because of."[295] The link between the prohibited actions in the statute and the protected characteristics is the conjoining phrase "because of," not "otherwise make unavailable."[296] Two terms ago, the Court explained that the ordinary meaning of "because of" is "by reason of" or "on ac-

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 2526 (Thomas, J., dissenting); *id.* at 2532 (Alito, J., dissenting).
293. John Fund, *The Supreme Court's Disparate-Impact Decision is a Disaster*, NAT'L REV. (June 26, 2015, 4:00 AM), http://www.nationalreview.com/article/420339/supreme-courts-disparate-impact-decision-disaster-john-fund.
294. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2532 (Alito, J., dissenting).
295. *Id.*
296. *Id.*

count of."[297] Thus, an individual acts "because of" a particular motivation if that was the reason the person decided to act.[298]

Expanding this concept to the FHA itself, the dissent stated that the protected characteristic must be the motivating factor for causing a lending or housing institution to discriminate. According to Justice Alito:

> Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any covered actions "because of"—meaning "by reason of" or "on account of," . . . — race, religion, etc. Put another way, the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful . . . . Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.[299]

Merely treating a person less favorably *because of* a protected trait does not implicate adverse effects, but rather includes a mens rea element that cannot be ignored. Therefore, the phrase "because of" signifies that intent to discriminate is required to sustain an FHA claim.

The dissent next specifically refuted the Court's conclusion that the phrase "make unavailable" includes actions that result in discriminatory effects. Pursuant to ordinary English usage, "otherwise make unavailable" must be viewed in conjunction with the preceding statutory text in § 804(a).[300] The verbs in the statutory provision include "refuse," "deny," and "make unavailable."[301] Because the statute contains a list of related actions, the Court must avoid supplying a word with a meaning so broad that it is inconsistent with the remainder of the list.[302] Given that the words "refuse" and "deny" describe intentional actions, the phrase "otherwise make unavailable" must be similarly limited to intentional conduct. It is impermissible to twist the FHA's language to authorize disparate impact claims.[303]

ii. Congress Only Sought to Eliminate Intentional Discrimination

Shifting from a plain language analysis to legislative intent, Justice Alito determined that the congressional purpose of the FHA was solely to eliminate intentional discrimination.[304] The concept of disparate im-

297. *Id.*

298. *Id.* at 2534 ("When English speakers say that someone did something 'because of' a factor, what they mean is that the factor was a reason for what was done.").

299. *Id.* (internal quotation marks omitted) (citation omitted).

300. *Id.*

301. *Id.*

302. *Id.* at 2536.

303. *Id.* at 2537.

304. *Id.*

pact liability was "quite novel" in 1968 and likely not contemplated by the legislature.[305] It is, in fact, "anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text."[306] Rather, the "because of" language employed by Congress in the statute suggests that Congress sought solely to end intentional housing discrimination, not to mitigate the discriminatory effects of racially neutral policies. According to Justice Alito, the majority has no right to question the means through which Congress accomplishes its objectives, nor can it expand the reach of the statute to target unintentional discriminatory outcomes.

iii. Silence is Not Consent: Congress Did Not Adopt Judicial Precedent

The dissent next dispelled the majority's misconception that congressional silence in light of judicial affirmation of disparate impact claims constitutes ratification of that position. First, the majority's position erroneously assumes that Congress "must have known about the judiciary's interpretation of the FHA."[307] Although nine Circuit Courts of Appeals had addressed the disparate impact question by 1988, the Supreme Court had not yet confronted the issue and had not provided guidance to Congress on the interpretation of the FHA.[308] The majority, however, tasks Congress with reviewing and analyzing lower court opinions from throughout the United States to determine how its own statute should be construed.

Furthermore, the United States formally took the position that the FHA prohibits only intentional discrimination shortly before Congress adopted the 1988 amendments. The United States had taken this position for years in the lower courts, and had remained consistent with this approach through the 1988 amendments. This was even the position President Reagan held when he signed the FHA amendments into law.[309] It is therefore implausible and irreconcilable that Congress would be aware of lower court rulings on the disparate impact doctrine but simultaneously oblivious to the formal U.S. public view that those decisions were incorrect.[310]

Moreover, if Congress wished to change the plain meaning of the FHA to encompass discriminatory effects, it must pass an amendment to

305. *Id.*
306. *Id.*
307. *Id.* at 2538.
308. *Id.*
309. *Id.* at 2540.
310. *Id.* at 2540–41.

the legislation.[311] The Court has rejected arguments concerning implicit ratification in similar cases, noting particularly:

> It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.[312]

The majority, however, ignores this principle and its supporting cases without explanation.[313]

Additionally, the 1988 FHA amendments did not modify the operative language or meaning of §§ 804(a) and 805(a). While the amendments did create three exceptions to liability, "[t]hese provisions neither authorize nor bar disparate-impact claims[.]"[314] Rather, these amendments offer enhanced protection for specific categories of persons and entities engaging in certain behavior under the FHA. Thus, the 1988 amendments in no way addressed or approved the doctrine of disparate impact.[315]

iv. HUD's Disparate Impact Rule Does Not Warrant Deference

In another line of attack, the dissent obliterated the Solicitor General's argument that the FHA is sufficiently ambiguous to warrant deference to HUD's FHA disparate impact rule. Although the dissent maintained that the FHA provisions at issue were unambiguous, it assumed such ambiguity existed for the sake of argument. In rejecting the Solicitor General's contention, the dissent expressed its valid concern that HUD's rule did not reflect a "fair and considered judgment on the matter in question."[316] Rather, HUD first promulgated its disparate impact rule 43 years after the FHA's enactment and nine days after the Court granted certiorari in *Magner*.[317] Following *Magner*, the Court requested a brief from the Solicitor General in *Township of Mount Holly*. Although HUD took no immediate action to finalize its rule after *Magner* settled, it con-

311. *Id.* at 2540.

312. *Id.* (quoting Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 186 (1994)) (internal quotation marks omitted) (citations omitted).

313. *Id.*

314. *Id.* at 2541.

315. *Id.*

316. *Id.* at 2542 (quoting Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (internal quotation marks omitted)).

317. *Id.* at 2542–43.

veniently adopted the disparate impact regulation immediately before the Solicitor General's brief in *Township of Mount Holly* was due.[318] Given the unexpected settlement in both *Magner* and *Mount Holly*, and the suspicious timing of HUD's disparate impact rule, the dissent found deference to HUD to be unwarranted.

v. Expanding Disparate Impact to the FHA Contravenes Supreme Court Precedent

Furthermore, Justice Alito's dissent criticized the majority's opinion for placing too much emphasis on *Griggs* at the expense of *Smith*. The *Smith* Court explained that the availability of disparate impact depends on the presence of statutory language that "has no parallel in the FHA."[319] Specifically, the Court in *Smith* analyzed a provision of the ADEA with similar statutory language as the FHA and concluded unanimously that it did not authorize disparate impact liability.[320] The majority, however, ignored *Smith* and instead concentrated on *Griggs*, which analyzed a statutory provision readily distinguishable from the FHA. The Court in *Griggs* looked primarily to the overall "objective" of Title VII in concluding that disparate impact liability was warranted, and did not provide a particularly clear textual reason for its conclusion.[321] Lower courts following the *Griggs* decision "often made little effort to ground their decisions in the statutory text."[322] This is an error the majority repeated in its opinion without care, placing more emphasis on the FHA's purpose and mangling the text to support its position. Not only that, but the majority also improperly expanded the analysis in *Griggs* to establish a broad acceptance of disparate impact applying to all anti-discrimination statutes. In this manner, the majority ignored a precedential opinion directly on point in favor of an inapplicable decision that was never intended to apply to anti-discrimination statutes outside the employment context.[323]

vi. Unfortunate Consequences

In addition to powerfully articulating the undeniable pitfalls of the majority's opinion, Justice Alito's dissent expressed further concern at the practical consequences disparate impact could produce in the housing context. In particular, "[d]isparate impact puts housing authorities in a

318. *Id.* at 2543.
319. *Id.*
320. *Id.*
321. *Id.* at 2544.
322. *Id.*
323. *Id.* at 2544–45.

very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate impact claim."[324] As illustrated in *Magner*, even a city's good faith and racially neutral attempt to improve housing conditions can be perceived as discriminatory.[325] These claims can extend further and directly threaten tax, welfare, regulatory, and licensing statutes.[326] Moreover, this form of liability alters the power structure of discrimination claims and provides borrowers with significantly increased leverage to force lenders and housing agencies to settle meritless disputes.[327] Thus, the majority's activism will undoubtedly create a cascading series of unfortunate events for lending institutions and housing agencies. The scope of the disaster is all that remains unknown. For these reasons, Justice Alito's dissent rightfully disagreed with the majority's activist opinion and succinctly exposed the fatal flaws in the majority's reasoning.

3. We Took the Wrong Step Years Ago: Justice Thomas' Dissent

Justice Thomas, although joining Justice Alito's poignant dissent in full, wrote separately to express his disagreement with *Griggs* and *Smith*, and to advocate substantially limiting their application to the employment context. Arguing that *Griggs* is "made of sand," Justice Thomas criticized the decision for upholding agency interpretation over congressional enactment, and refused to "amplify its error."[328] In Justice Thomas' view, the doctrine of disparate impact has been impermissibly imported into the Title VII and FHA statutes without clear statutory authorization and intent. For this reason, Justice Thomas began his dissent with the mandate that the Court "drop the pretense that *Griggs*' interpretation of Title VII was legitimate."[329]

According to Justice Thomas, the mere fact that the phrase "otherwise adversely affect" appears in § 703(a)(2) does not detract from the congressional requirement of discriminatory intent.[330] Rather, the preceding phrase "because of" means that a discriminatory action must be taken "by reason of" or "on account of" a particular protected trait.[331] Accepting *Griggs*' interpretation of Title VII to include disparate impact claims deletes the entire § 703(a)(2) requirement that an employer may not discriminate "*because of* such individual's race, color, religion, sex,

324. *Id.* at 2548.
325. *Id.*
326. *Id.*
327. *Id.* at 2549–50.
328. *Id.* at 2526 (Thomas, J., dissenting).
329. *Id.*
330. *Id.* at 2527.
331. *Id.*

or national origin."[332] Thus, under a plain reading of Title VII, there is no question that Congress did not permit disparate impact claims in § 703(a)(2).

Instead, Title VII's disparate impact authorization originated from the Equal Employment Opportunity Commission ("EEOC"). The EEOC determined that discrimination had become more institutionalized and less overt, and thus sought to prohibit race-neutral actions that produced discriminatory effects.[333] The *Griggs* Court then embraced this interpretation by affording the EEOC's position significant deference and acknowledging disparate impact worked to achieve the perceived purpose of Title VII.[334] However, only plainly written statutory provisions go through the process of bicameralism, not statutory purpose. The Court should, therefore, not "transfer [its] responsibility for interpreting those provisions to administrative agencies," particularly when the administrative agency lacks substantive rulemaking authority.[335]

In addition to his disagreement over *Griggs*, Justice Thomas concluded that the Court's opinion in *Smith* was similarly "incorrect" and "regrettable."[336] Because disparate impact liability had no foundation under Title VII, it would be illogical to conclude that Congress supplied the ADEA with disparate impact recovery *four years before* recognizing the doctrine under Title VII.[337] For these reasons, Justice Thomas proposed limiting disparate impact to the employment context, and not improperly importing the doctrine into statutes that were passed years before the Court decided *Griggs*. The majority's mistake of expanding disparate impact to the FHA will undoubtedly "take its toll."[338]

V. WRECKING BALL: WHAT THE SUPREME COURT'S HOLDING MEANS FOR THE FUTURE OF THE FINANCIAL SERVICES INDUSTRY

For the reasons discussed in Justice Alito's scathing dissent, the disparate impact doctrine should never have been approved for use in conjunction with the FHA. Not only does disparate impact lack *any* textual foundation in §§ 804 and 805, but it also contains no parallel language to § 703(a) that warrants use of the *Griggs* analysis. The majority should have abided by its decision in *Smith*, which prohibits disparate impact liability unless *expressly* provided for in the statutory text. In-

332. *Id.* at 2527–28.
333. *Id.* at 2528.
334. *Id.* at 2529; *see* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).
335. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2529 (Thomas, J., dissenting).
336. *Id.* at 2531.
337. *Id.*
338. *Id.* at 2533.

stead of interpreting the law as written, the majority improperly injected its activist beliefs into the case and essentially re-wrote substantive provisions of the FHA. The ramifications of this activism, however, will not fall on the Supreme Court. Rather, the financial services industry will shoulder the burden of this decision.

A. Money, Money, Money: Implications of Disparate Impact on Lenders in FHA Cases

Although the Supreme Court arguably limited the application of disparate impact under the FHA to cases in which plaintiffs can prove "robust causation," the practical reality is that mortgage lenders and financial institutions are now exposed to vast liability for discrimination—even when there is no animus or discriminatory motive. The major consequence of the Court's ruling is that plaintiffs can now easily plead disparate impact claims even though the facts may be difficult to prove or sustain.[339] While the Court noted that a plaintiff who fails to allege specific facts at the pleading stage could not make a prima facie case of discrimination, this is a relatively low hurdle that is easily overcome.[340] In fact, it is arguable that the Supreme Court's "robust causality requirement" is no more than a recitation of the federal *Twombly/Iqbal* pleading standard.[341]

In *Bell Atlantic Corp. v. Twombly*[342] and *Ashcroft v. Iqbal*,[343] the Supreme Court established a plausibility standard for pleading claims for relief. This standard requires the plaintiff to plead "enough facts to state a claim to relief that is plausible on its face."[344] A claim is deemed "plausible" when the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[345] Although the Court may consider legal conclusions within the

339. *See* J.P. McGuire Boyd, Jr. et al., *Supreme Court Upholds Disparate Impact: What are the Practical Consequences for Mortgage Lenders?*, JD SUPRA (June 29, 2015), http://www.jdsupra.com/legalnews/supreme-court-upholds-disparate-impact-72162/; *see also* Tyree Jones, Jr., et al., *Supreme Court Upholds 'Disparate Impact' under the FHA but Emphasizes that Claims Cannot Rely on Statistics Alone*, JD SUPRA (June 26, 2015), http://www.jdsupra.com/legalnews/supreme-court-upholds-disparate-impact-16367/.

340. Boyd, Jr. et al., *supra* note 339.

341. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Aschroft v. Iqbal, 556 U.S. 662 (2009).

342. Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

343. Ashcroft v. Iqbal, 556 U.S. 622 (2009).

344. *Twombly*, 550 U.S. at 570.

345. *Iqbal*, 556 U.S. at 678 (explaining that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief'") (citations omitted).

complaint's framework, such conclusions must be supported by factual allegations.[346] Thus, while the level of factual content necessary to sustain a complaint will vary depending on the context, a plaintiff must prove the grounds for his or her entitlement to relief beyond mere labels, conclusions, and a formulaic recitation of the claim's elements.[347]

In the FHA context, the Supreme Court has merely *clarified* the pleading standard for disparate impact claims, not *enhanced* it. For example, the Court states that a disparate impact claim relying solely on statistical disparities must fail if the plaintiff is unable to identify a specific policy or procedure of the defendant responsible for the alleged harm.[348] This is not an "adequate safeguard" for lenders, but merely a recitation of the federal pleading standard. Essentially, the Court is requiring plaintiffs to plead the facts of their case that show how the defendant caused the particular harm. This mandate is analogous to the *Twombly/Iqbal* standard that instructs plaintiffs to state facts giving rise to a plausible claim for relief. In almost all civil actions, a plaintiff must prove a causal connection between the harm suffered and the defendant's actions. The Supreme Court's reiteration of this well-established standard adds nothing new to this analysis. Thus, "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact"[349] for the sole reason that such a claim would fail the *Twombly/Iqbal* standard. This standard has been well settled since 2007, and the Supreme Court's analysis offers no heightened requirements that would limit frivolous disparate impact lawsuits.[350]

Furthermore, the readily available disparate impact claim exposes lenders to unlimited financial liability. Each claim filed against a lender or mortgage company requires the institution to hire an attorney and prepare either an answer or a motion to dismiss. If the case is not dismissed at the pleading stage, the lender must engage in several months of discovery, both serving and responding to discovery requests. Assuming no genuine issues of material fact arise, the lender may then move for summary judgment. Denial of the motion means the lender must prepare its

346. *Id.* at 664.

347. *Id.* at 678.

348. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

349. *Id.*

350. *See* Boyd, Jr. et al., *supra* note 339 (noting that a plaintiff can satisfy this pleading requirement "by alleging, for example, that a lender's credit score cutoff caused a statistical disparity in the number of disqualified applicants. Notably missing from the Supreme Court's 'robust causality requirement' is any expectation that a plaintiff allege facts showing that he or she otherwise would have qualified for the loan but for the lender's use of the challenged practice").

case for trial or negotiate a settlement with the plaintiff, even if the claim is meritless. Thus, regardless of whether a lender possesses a meritorious defense to the disparate impact claim, it is exposed to significant legal expenses and, potentially, reputational harm.[351] In this manner, not only does the disparate impact doctrine subject lenders to heightened liability through an increased number of claims, but it also provides plaintiffs with unprecedented bargaining power to force settlements for meritless claims. For these reasons, this financial nightmare for lenders has only just begun.

B. I Heard It Through the Grapevine: Will Disparate Impact Expand to ECOA?

In addition to the immediate implications the disparate impact doctrine will produce for FHA claims, it is plausible that the theory will invade another realm of financial services: ECOA. As previously discussed, ECOA covers automobile lenders as well as mortgagees and makes it unlawful for a creditor to discriminate against any applicant during a credit transaction.[352] This legislative purpose is undeniably comparable to the FHA's overarching goals for the housing market. Given this similarity, the Supreme Court's reasoning in *Inclusive Communities* may apply with equal force to ECOA, which has been used by the Obama Administration in conjunction with the FHA against Bank of America and Wells Fargo.[353]

The argument disfavoring the expansion of disparate impact to ECOA centers primarily on a material difference between the wording of the FHA and ECOA: ECOA does not contain the catchall "otherwise make unavailable" language that is present in the FHA. The Court relied heavily on this language in comparing the foundation for disparate impact liability under the FHA with that of Title VII. Particularly, the Court repeatedly noted that "otherwise make unavailable" served the same functional purpose as Title VII's "otherwise adversely affect" language. By making this comparison, the Court found sufficient similarity between the phrases to authorize disparate impact. Because ECOA lacks this critical phraseology, it is conceivable that the Court would apply the

351. *See id.*

352. *See* 15 U.S.C. § 1691(a)(1) (2012) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) of the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract). . . .").

353. *See* Greg Stohr, *Insurers Disappointed as Supreme Court Backs Disparate Impact Claims*, INS. J. (June 25, 2015), http://www.insurancejournal.com/news/national/2015/06/25/373004.htm.

rationale in *Smith* and rule that there is no textual foundation for disparate impact liability under ECOA.

Unfortunately for lenders, however, the argument in favor of applying disparate impact to ECOA is stronger and more persuasive. From a textual perspective, the rationale for disparate impact's expansion rests on the Supreme Court's definition of the term "discriminate." Instead of applying the plain, modern definition of "discriminate" advocated by the dissent, the majority analyzed statutory language from *Harris*, a 1979 case.[354] In *Harris*, the Court deciphered the meaning of § 702(b) of the Emergency School Aid Act ("ESAA"), which authorizes providing financial assistance "to meet the special needs incident to the elimination of minority group segregation and *discrimination* among students and faculty in elementary and secondary schools."[355] The Court found the statutory text—particularly the term "discrimination"—to be ambiguous.[356] This ambiguity sparked an examination into the legislative history and purpose of the statute, where the Court concluded that the ESAA encompassed disparate impact claims.[357] Thus, from *Harris* alone, the *Inclusive Communities* Court found that the term "discriminate" can prohibit discriminatory effects in addition to discriminatory intent. Because the word "discriminate" appears in both the FHA and ECOA, it is conceivable that the Court would apply *Harris* to ECOA actions and authorize disparate impact liability under this similar statutory scheme.[358]

Further supporting this position is that the CFPB has previously upheld the applicability of disparate impact to ECOA actions. In an April 18, 2012 Bulletin, the CFPB expressly reaffirmed that "the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B."[359] To arrive at this conclusion, the CFPB relied extensively on the commentary to Regulation B, which states that an act or regulation may prohibit conduct that is discriminatory *in effect* because it has a disproportionately negative impact on a protected group.[360] This

354. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2518–19 (analyzing statutory language discussed in Bd. of Educ. of City Sch. Dist. of N.Y. v. Harris, 444 U.S. 130 (1979)).

355. Emergency School Aid Act of 1972, 20 U.S.C. § 1601(b) (1972) (repealed); *Harris*, 444 U.S. at 132.

356. *See Harris*, 444 U.S. at 140, 152.

357. *Id.* at 141.

358. *See* Jones, Jr., et al., *supra* note 339 (explaining this concept).

359. CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2012-04 (FAIR LENDING): LENDING DISCRIMINATION 1 (2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

360. *Id.*; *see* 12 C.F.R. pt. 202, Supp. I, § 202.6, ¶ 6(a)-2 ("The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to

explanation, however, is problematic because the actual text of ECOA does not include effects-based language. The CFPB's analysis is based solely on commentary to ECOA's implementing legislation. Regulation B was issued by the Board of Governors of the Federal Reserve System, not Congress. Therefore, it is improper to use the legislative history and commentary of Regulation B to determine congressional intent at the time ECOA was passed.[361] Such reasoning is equivalent to arguing that disparate impact under the FHA is authorized by HUD's effects-based rule.

In addition to the broad position taken by the CFPB in its April 2012 Bulletin, the CFPB has already found financial institutions liable under ECOA for providing Spanish speaking consumers with different financial products than non-Spanish speaking clients.[362] For example, the CFPB held a financial servicer liable under ECOA for charging higher interest rates on loans to Hispanic borrowers.[363] Similarly, a financial services institution violated ECOA by discriminating against consumers on the basis of national origin and excluding all individuals with Puerto Rico mailing addresses from debt relief offers.[364] In late 2013, the CFPB forced Ally Financial to pay a $98 million settlement after finding discriminatory effects in Ally Financial's use of dealer reserve.[365] Although it is unclear whether these actions involved intentional discrimination or discriminatory effects, it is obvious that the CFPB has become actively involved in regulating discriminatory conduct in the financial services industry, particularly under ECOA.

---

discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.").

361. *See* John L. Culhane, Jr. & Christopher J. Willis, *CFPB Confirms Plans to Use "Disparate Impact" to Prove Lending Discrimination*, CFPB MONITOR (Apr. 18, 2012), http://www.cfpbmonitor.com/2012/04/18/cfpb-confirms-plans-to-use-disparate-impact-to-prove-lending-discrimination/.

362. *See* Gerald Sachs et al., *Regulatory Scrutiny of Language Discrimination in the Marketing and Offering of Consumer Financial Products and Services*, PAUL HASTINGS (Apr. 20, 2015), http://www.paulhastings.com/publications-items/details/?id=0601e469-2334-6428-811c-ff00004cbded; *see also* Hannah Lutz, *Supreme Court Ruling Could Favor All Groups Debating Bias in Auto Lending*, AUTOMOTIVE NEWS (June 25, 2015, 7:45 PM), http://www.autonews.com/article/20150625/FINANCE_AND_INSURANCE/150629929/supreme-court-ruling-could-favor-all-groups-debating-bias-in-auto.

363. Sachs et al., *supra* note 362.

364. *Id.*

365. Hannah Lutz, *Has High Court Raised Bar for CFPB in Auto Bias Cases?*, AUTOMOTIVE NEWS (July 8, 2015, 12:01 AM), http://www.autonews.com/article/20150708/BLOG13/307019990/has-high-court-raised-bar-for-cfpb-in-auto-bias-cases?.

Moreover, while anticipating the Supreme Court's ruling on disparate impact under the FHA, the CFPB went as far as to claim that the Court's ruling in *Inclusive Communities* would have very little impact on the regulation of claims under ECOA.[366] In fact, less than one month after the Court issued the *Inclusive Communities* opinion, the CFPB announced a high-profile ECOA disparate impact action.[367] According to American Banker and Asset Finance International, the CFPB took action against Honda for unintentional discrimination in its automotive lending practices.[368] Specifically, the automotive giant is accused of discriminatory auto loan pricing arising from its dealer compensation practices, including high interest rates.[369] Interestingly, however, the CFPB did not impose civil monetary penalties against Honda, but rather developed a structured remediation plan.[370] As the rationale for this decision, the CFPB credited Honda's agreement to "to reduce its dealer markup cap from as high as 2.25% to as low as 1.00%."[371] Thus, the Court's decision in *Inclusive Communities* has "undoubtedly provided the [CFPB] with some comfort," regarding the use of disparate impact, and has already resulted in one high-profile consent order.[372]

---

366. *See, e.g.*, *Special Alert: Disparate Impact Under the Equal Credit Opportunity Act After* Inclusive Communities, BUCKLEY SANDLER LLP (June 27, 2015), http://www.buckleysandler.com/news-detail/special-alert-disparate-impact-under-the-equal-credit-opportunity-act-after-inclusive-communities ("When certiorari was granted in *Inclusive Communities*, senior officials from the CFPB and DOJ made clear that they would continue to enforce the disparate impact theory under the Equal Credit Opportunity Act (ECOA) even if the Supreme Court held that disparate-impact claims were not cognizable under the FHA."); Hannah Lutz, *Will CFPB's Use of Disparate Impact be Altered by Supreme Court Housing Ruling?*, AUTOMOTIVE NEWS (May 27, 2015, 12:15 PM), http://www.autonews.com/article/20150527/FINANCE_AND_INSURANCE/305279997/will-cfpbs-use-of-disparate-impact-be-altered-by-supreme-court.

367. Joe Rodriguez, *CFPB Brings First ECOA Disparate Impact Action Post-Inclusive Communities*, MOFO *RE* ENFORCEMENT (July 15, 2015), http://www.moforeenforcement.com/2015/07/cfpbs-brings-first-ecoa-disparate-impact-action-post-inclusive-communities/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

368. Rachel Witkowski, *CFPB Nears Landmark Victory Against Three Large Auto Lenders*, AMERICAN BANKER (June 30, 2015), http://www.americanbanker.com/news/law-regulation/cfpb-nears-landmark-victory-against-three-large-auto-lenders-1075179-1.html; Pat Sweet, *Disparate Impact Investigations by CFPB*, ASSET FIN. INT'L (July 3, 2015), http://www.assetfinanceeurope.com/index.php/global-news/americas/news-americas-2/11946-disparate-impact-investigations-by-cfpb.

369. Rodriguez, *supra* note 367.

370. *Id.*; *see* In re Am. Honda Fin. Corp., 2015-CFPB-0014 (July 14, 2015), http://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf.

371. Rodriguez, *supra* note 367.

372. *Id.*

Regardless of how the Supreme Court would actually rule on disparate impact under ECOA, the holding in *Inclusive Communities* is unsettled and sufficiently ambiguous regarding its expansion to ECOA to allow plaintiffs and the CFPB to file suit under this theory; nothing limit an ambitious plaintiff from asserting an ECOA disparate impact claim and forcing lenders to litigate such claims in court. This course of action will undoubtedly force lenders to incur legal fees in defending these suits and, again, may cause reputational damage. Thus, it is highly probable that the CFPB and individual consumers will use *Inclusive Communities* to initiate disparate impact actions under ECOA to force big settlements from lenders. The CFPB's prior precedent on the issue, its pending ECOA case in light of *Inclusive Communities*, and the seemingly indestructible doctrine of disparate impact itself all lend credence to the position that lenders should fully expect effects-based liability under ECOA. Therefore, mortgage servicers and lenders must closely monitor their internal fair lending practices and incorporate regular statistical analysis into their procedures to minimize the potential for significant financial liability and exposure.

C. Lenders' Kryptonite: The Rise of UDAAP to Curb Discriminatory Lending

Finally, the *Inclusive Communities* decision may serve as a catalyst for the CFPB's prosecution of disparate impact claims under UDAAP. The UDAAP standard is incredibly amorphous and alterable at the CFPB's will, ruining any attempt by lenders to comply with clear regulatory standards. As a "know it when [you] see it" standard, UDAAP evolves on a daily basis in conjunction with judicial precedent and consumer complaints. The unfettered authority provided to the CFPB to remedy "unfair," "abusive," and "deceptive" conduct means that lenders may face liability for disparate impact not only from the FHA but also from UDAAP. Nothing limits lender liability for discriminatory conduct solely to the FHA. It is thus readily conceivable that the CFPB would classify discriminatory effects as "unfair" conduct and prosecute violations under UDAAP's regulatory framework.[373]

373. *See* Dana Lumsden & Bethany Corbin, *Fair Lending Law Litigation and Compliance: An Uncertain Future for the Financial Services Industry*, MORTG. COMPLIANCE MAG. (May 2, 2015), http://www.mortgagecompliancemagazine.com/featured/fair-lending-law-litigation-and-compliance-an-uncertain-future-for-the-financial-services-industry/ ("Additionally, it may become common to tie alleged fair lending violations to the Unfair, Deceptive, or Abusive Acts or Practices Act (UDAAP). It is conceivable that consumers and regulators will argue that the effects of alleged discriminatory lending practices could result in unfair advantages prohibited by UDAAP.").

Assuming the CFPB prosecutes disparate impact actions, financial services institutions face a heightened potential for double liability. Not only will lenders be liable for damages and remediation pursuant to a federal court order or settlement agreement, but they will also endure regulatory fines that can reach up to $1 million per day for knowing violations of the law.[374] In 2014, for example, at least six of the CFPB's enforcement actions resulted in penalties greater than $5 million, with two actions producing penalties greater than $10 million.[375] This unlimited potential for arbitrary liability thus exposes lenders to significant financial risk under UDAAP's regulatory framework. This is particularly worrisome given that the CFPB can alter UDAAP's applicability at whim and without notice to the public. Additionally, if the CFPB takes this course of action, states may be able to initiate suit under their own local consumer protection statutes, exposing lenders to liability not only from borrowers and the CFPB, but also from state agencies. Thus, a decision by the CFPB to classify discriminatory effects as "unfair" could be the kryptonite that threatens the stability of the financial services industry. When the dust settles from the destruction, it will be consumers and remaining bank employees that are left to pick up the pieces—not the activist Court that purposefully pushed the first domino.

In light of these financial and reputational risks, lenders and mortgage servicers should implement comprehensive monitoring systems that track and report the effects that lending practices have on minorities and protected individuals. This system should involve a high level statistical analysis that warns of impending disparities. In the event that a disparity is discovered, the lender should ensure that it has a viable and believable business objective that is furthered by tthe discriminatory practice. In the event that such justification does not exist, the lender should take immediate corrective action to eliminate the statistical imbalance before the CFPB or affected consumers investigate and file suit.

VI. CONCLUSION

The Supreme Court has at last conclusively settled the viability of disparate impact claims under the FHA. In what can only be described as a major win for the Obama Administration and civil rights activists,

374. Martin Bishop, *Regulatory: The CFPB's UDAAP Deceptive Standard Does Not Require Knowledge or Intent*, INSIDE COUNSEL (Mar. 20, 2013), http://www.insidecounsel.com/2013/03/20/regulatory-the-cfpbs-udaap-deceptive-standard-does.

375. Joseph L. Barloon & Anand S. Raman, *CFPB Defines 'Unfair,' 'Deceptive' and 'Abusive' Practices Through Enforcement Activity*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM (Jan. 2015), https://www.skadden.com/insights/cfpb-defines-unfair-deceptive-and-abusive-practices-through-enforcement-activity.

the Court's opinion endorsed a broad interpretation of the terms "discriminate" and "otherwise make unavailable." To authorize disparate impact recovery under this framework, the Court twisted the FHA's plain language and legislative amendments to create an unrecognizable statutory scheme. Given that disparate impact lacks a textual foundation under the FHA and contains no parallel language warranting use of the *Griggs* analysis, the Court should have followed its decision in *Smith* and prevented disparate impact liability unless expressly provided for in the FHA's text.

Nonetheless, the authorization of disparate impact claims under the FHA is conclusively settled for the foreseeable future. This decision, however, will produce far-reaching and long-term consequences for the financial services industry. Lenders will be forced to defend meritless disparate impact suits that plaintiffs can easily allege, leading to increased litigation costs and reputational damage. Although the Supreme Court maintains it has implemented a "robust causality" requirement, this restriction imposes no heightened pleading requirements beyond those established in *Twombly* and *Iqbal*. Moreover, the heightened risk of litigation costs may persuade some lenders to settle disparate impact claims, even where the lender possesses a meritorious defense.

In addition to increased litigation concerns, lenders also face the threat of disparate impact's expansion to ECOA. While ECOA does not contain the "otherwise make unavailable" language relied upon by the Supreme Court, its purpose mirrors that of the FHA. Additionally, its reference to discrimination is nearly identical to the FHA. It is entirely possible that consumers and the CFPB will initiate disparate impact actions under ECOA while the law in this area remains unsettled. Most importantly, however, the authorization of FHA disparate impact claims means that the CFPB may be able to classify discriminatory effects in lending as "unfair" under UDAAP. UDAAP's unrestricted application and hefty damage awards make it a potent tool for ensuring lender compliance above and beyond the regulatory minimums. Accordingly, lenders should prepare for an influx of disparate impact claims under the FHA, ECOA, and UDAAP, which will be costly to defend or settle.