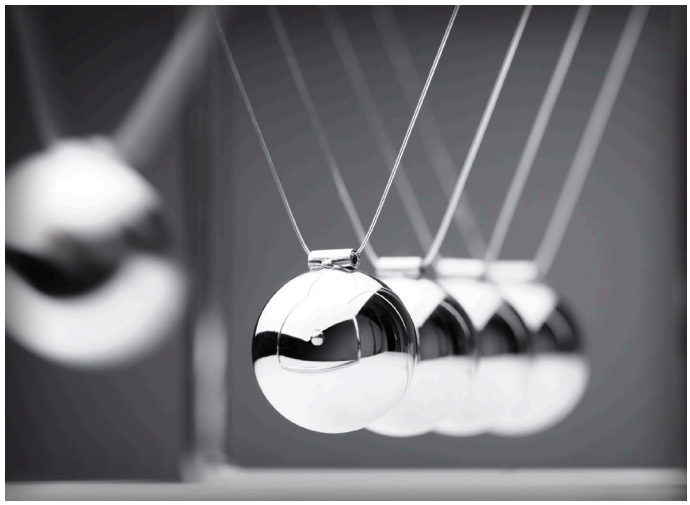
BankDirector.com CHARTING A COURSE FOR AMERICA'S BANKING LEADERS

Supreme Court Ruling Could Impact Your Bank

By: *Michael Mancusi, Helen Mayer Clark* | OCTOBER 16TH, 2015



On June 25, 2015, nearly four years after first agreeing to consider the question, the Supreme Court issued a decision in the case Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., holding that disparate impact claims may be brought under the Fair Housing Act (FHA). The Court's decision confirms that, irrespective of intent, an institution engaged in residential real estate-related transactions such as mortgage lending may be held liable for a practice that has an adverse impact on members of a particular racial, religious, or other statutorily protected class.

However, the **Court pointed out the following important limitations on the ability of plaintiffs to raise claims:**

- It is not sufficient to point out statistical disparities alone. Instead, plaintiffs must show that a defendant's policy or policies caused that disparity.
- Policies may only be challenged under disparate impact analysis if they are "artificial, arbitrary and unnecessary barriers."
- A defendant's valid business justification may not be rejected unless a plaintiff identifies an alternative practice that has less disparate impact while still serving the entity's legitimate needs.

To receive the benefit of any heightened standard resulting from the Court's opinion, however, financial institutions must be willing to litigate. To avoid litigation in the first place, experience has shown that proactive steps taken by financial institutions can protect against possible disparate impact claims. Those steps include, for example:

Internal Audits and Fair Lending Risk Analysis

Financial institutions should be proactive in identifying and analyzing lending portfolios to identify areas susceptible to statistical challenge. One of the most reliable methods of doing so is to conduct routine statistical self-assessments on a portfolio-wide basis, appropriately structured to ensure attorney-client privilege will apply. **Institutions should conduct periodic assessments,** analyze the results (including file reviews of any outliers), and tailor policies and procedures to address the results, thus ensuring the institution is alert to potential disparities and can address any fair-lending related issues before they become supervisory concerns.

Policies and Procedures

Institutions should carefully review their policies and procedures to identify instances in which discretion is permitted in any aspect of underwriting or other credit processes, as discretion may give rise to discriminatory results. To the extent policies and procedures allow for discretion or exceptions, institutions should craft corporate governance mechanisms to approve such exceptions or departures from common practice as well as record keeping procedures to ensure proper documentation. In effect, the financial institution is creating **a record of why it departed from its normal business practices.** To the extent that the institution considers any changes to its policies and procedures as a result of its review, senior management should articulate the business- or risk-related reasons why such changes were or were not made.

Corporate Governance and Documentation

With increased scrutiny from regulators on fair lending issues, any business decisions that may involve practices that could have a disparate impact on a protected class, such as changing or discontinuing a particular product or service, should be carefully considered and the justifications for them should be clearly documented. **Institutions should establish corporate governance procedures that provide for review of material changes to product and services offerings** by senior management and fair lending/risk committees. The results of the review, including assessments of the reasons for the business decisions at issue, should be documented through meeting minutes and other records.

The Inclusive Communities decision almost certainly will embolden private plaintiffs and government agencies to assert claims of disparate impact discrimination. Proactive steps taken now can head off years of litigation and costly settlements by preventing statistical disparities from ripening into claims of discrimination. Financial institutions should aggressively review and enhance their compliance efforts to ensure the compliance of their business policies and practices.

Michael Mancusi is a partner at Arnold & Porter LLP. He is in the firm's Washington, DC office and is a member of the financial services practice. He represents domestic and foreign banks, credit unions and other financial services clients in a wide range of state and federal regulatory, compliance and enforcement matters.

Helen Mayer Clark is an associate at Arnold & Porter LLP. She represents banking organizations and other financial institutions before the federal banking agencies, CFPB, and HUD in enforcement and consumer protection matters under ECOA/Regulation B, Fair Housing Act, the Telemarketing Sales Rule, and BSA/AML.