

Living with the robust causality requirement for disparate impact under the Fair Housing Act

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Two recent decisions from the Ninth Circuit Court of Appeals shine some light on issues related to the United States Supreme Court's 2015 decision that the Fair Housing Act recognizes a right to bring disparate impact claims.

In 2015, the United States Supreme Court held that aggrieved parties may pursue claims of racial discrimination under the Fair Housing Act based upon the disparate impact of a bank's lending policies. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2523, 192 L.Ed.2d 514 (2015).

To prove such a claim, the plaintiff must show that there is a statistical disparity between races in lending outcomes and that the bank's lending policies caused the disparity. The plaintiff's proof of causality must be robust for the case to go forward.

Since that decision, banks and other lending institutions have waited for guidance on what litigation will look like under the "robust causality" requirement.

Robust generally means "vigorous" or "uncompromising and forceful." However, the Supreme Court did not fully define it in the context of disparate impact claims under the Fair Housing Act.

The Ninth Circuit provided some guidance on the issue in *City of Los Angeles v. Bank of America Corporation*, No. 15-55897 (9th Cir. May 26, 2017), and *City of Los Angeles v. Wells Fargo*, No. 15-56157 (9th Cir. May 26, 2017).

In these cases, Los Angeles pursued disparate impact claims under the Fair Housing Act and lost on summary judgment in the District Court.

On appeal, the Circuit Court affirmed. In both cases, the Court concluded that the trial court correctly granted summary judgment because Los Angeles did not show discrimination.

In the *Wells Fargo* case, the Circuit Court did not address whether Los Angeles actually established a statistical disparity and focused instead on the robustness of causality.

The Court concluded that Los Angeles' proof of causality failed the test of robustness.

Los Angeles had alleged that three policies caused the disparity: (1) the bank's compensation scheme provided incentives for loan officers to issue higher-amount loans; (2) the bank's marketing targeted low-income borrowers; and (3) the bank failed to adequately monitor its loans for disparities.

Ultimately, the Court ruled in the bank's favor because Los Angeles did not show how the first two policies were causally connected in a "robust" way to the racial disparity. The Court concluded that those policies are, in fact, race neutral.

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Turning to the third policy, the Court concluded that it was simply not a policy and therefore could not support a disparate impact claim.

In the *Bank of America* case, the Circuit Court concluded that Los Angeles established a statistical racial disparity through the testimony of its expert but failed to show a "robust" causal connection between the disparity and any of the facially neutral policies it identified.

Los Angeles pressed its argument based upon the same three policies upon which it relied in the *Wells Fargo* case. Yet it fared no better.

Despite the existence of a statistical disparity that apparently did not exist in *Wells Fargo*, Los Angeles still failed to show robust causality for the same reasons.

These cases are important because they represent two of the first attempts by plaintiffs to satisfy the robust causality burden and because Los Angeles ultimately failed to carry its burden.



These decisions bode well for the financial services industry. Future plaintiffs are on notice that rudimentary claims related to run-of-the-mill policies will not satisfy the robustness requirement.

Los Angeles founded both of its cases upon basic, facially neutral policies and consequently failed to carry its burden. Perhaps this heavy burden will discourage future plaintiffs.

Meanwhile, financial institutions should review their policies for disparate impact and take appropriate steps to be prepared for a successful defense when the day comes.

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