

Texas Court Puts Hold on CFPB's Use of Unfairness Authority to Include "Discrimination"

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As the Supreme Court deliberates over the [Fifth Circuit's ruling](#) that the CFPB's funding method is unconstitutional, another court in the Fifth Circuit dealt a blow to the CFPB's aggressive agenda. On Friday, the District Court for the Eastern District of Texas [invalidated](#) the Bureau's March 2022 updates to its examination manual that instructed CFPB examiners to determine whether financial institutions and service providers adequately protect against discrimination, including disparate impact. If it holds in likely appeals, the decision could have a far-reaching impact on both the CFPB's and the FTC's attempts to use their unfairness authority to bring enforcement to remedy perceived discriminatory practices, as well as other attempts by both agencies to broadly interpret statutory grants of authority and use them in novel and untested ways.

Examination Manual and Chamber of Commerce Challenge

In a [March 2022 announcement](#), the Bureau announced "changes to its supervisory operations to better protect families and communities from illegal discrimination, including in situations where fair lending laws may not apply." As explained in that press release, the Bureau updated its UDAAP examination manual, which instructs CFPB examiners how to evaluate whether covered entities are engaged in unfair, deceptive, or abusive acts and practices (UDAAP), to "require supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups." The updates instruct examiners to evaluate potential discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits, and irrespective of whether specific discrimination statutes such as the Equal Credit Opportunity Act (ECOA) apply.

The Chamber of Commerce brought suit to challenge the examination manual on a number of constitutional and statutory grounds, including that the Bureau exceeded its authority by unilaterally attempting to sweep in discriminatory conduct as "unfair" without Congressional authorization.

District Court Decision and Key Takeaways

In the [decision](#) on Friday, Judge Barker first acknowledged that the Fifth Circuit already found the CFPB's funding mechanism to be unconstitutional, but that that decision was pending Supreme Court review. The court nonetheless reached the issue of statutory authority because of a "compelling reason to reach at least one alternative ground for the same relief sought on Appropriations Clause grounds." The court also found that the examination manual itself was final agency action

warranting review under the Administrative Procedure Act because “it obligates agency personnel to act on a particular understanding of unfair act or practice in examining and supervising companies,” namely that they must also consider whether financial institutions have adequately considered potential discriminatory effects in advertising, pricing, and offering financial products and services.

On the crux of the court’s decision on statutory authority, the court applied the “major-questions canon” to hold that the Bureau could not sweep in discrimination under its unfairness authority because:

- “whether the CFPB has authority to police the financial-services industry for discrimination against any group that the agency deems protected, or for lack of introspection about statistical disparities concerning any such group, is a question of major economic and political significance”; and
- state and federal statutes, including the Consumer Financial Protection Act itself, at times authorize regulation of discrimination in clear and precise terms, so the lack of reference to discrimination in connection with the CFPB’s UDAAP authority suggests that it should not be impliedly included.

In so doing, the court also rejected the Bureau’s arguments that relied, in part, on the FTC’s historical and recent use of unfairness to police discriminatory practices. The CFPB had argued, among other things, that the plain language of unfairness clearly covered discrimination (“There has never been an unstated, atextual exception to the prohibition on unfairness for discrimination, just as there is not an unstated exception to unfairness for conduct that happens on Leap Day.”). While the court agreed that the unfairness language in Section 5 of the FTC Act (on which the relevant portion of the Dodd-Frank Act was based) could plausibly be construed to cover discrimination, including disparate impact, the language is not “exceedingly clear” and its history “does not refute its ambiguity.” Without that clear language, the court could not find that Congress intended for unfairness to encompass discrimination.

This decision suggests that the CFPB and FTC may face an uphill battle if they bring similar actions grounded on findings of discriminatory impact on unfairness grounds, as well as in other enforcement actions attempting to broadly construe longstanding statutory authority in new ways. As we discussed [here](#), the FTC last year alleged that Passport Automotive violated the FTC Act by, among other things, engaging in unfair conduct that had a disparate impact on Black and Latino customers. The FTC’s settlement against Passport Automotive required the company to establish a fair lending program with written guidelines specifying the reasons for assessing or not assessing any fee or other charge and objective factors that may be considered in so doing. Nonetheless, the Bureau is likely to appeal the court’s decision and the FTC is similarly unlikely to accept the underlying rationale of the ruling on its face anytime soon. So while the decision marks a substantial setback in the CFPB’s attempts to take expansive views of its statutory authority, the battle of whether the Bureau – and the FTC – can use unfairness principles to combat practices with discriminatory effects will likely continue.