

B. Civil Rights Laws and Regulations Applicable to the Appraisal Industry

Federal and state civil rights laws prohibit home appraisal discrimination on the basis of race, color, religion, national origin, sex, disability, familial status, and other protected classes. For almost 30 years, courts have held that appraisal discrimination can violate federal and state civil rights laws.⁴⁹

In the mid-1970s, the DOJ successfully challenged the use of appraisal standards and training materials that steered appraisers to lower values in racially mixed neighborhoods.⁵⁰ The resulting settlement agreement between the DOJ and the American Institute of Real Estate Appraisers called for the adoption of several policy statements, including one in repudiation of the so-called “principle of conformity,” that notes: “it is improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or a property is necessary for maximum value.”⁵¹

Under existing civil rights laws, cases brought against appraisers, appraisal firms, and lenders have alleged discrimination based on the race and other protected characteristics of both individual borrowers and the neighborhoods where the appraised properties are located.

The Fair Housing Act and the HUD Regulation

The principal federal statute that prohibits appraisal discrimination is Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988 (the “Fair Housing Act”), which bars discrimination in home appraisals and other housing-related transactions on the basis of race, color, religion, national origin, sex, disability, and familial status (known as “prohibited bases,” “protected classes,” or “protected characteristics”).⁵²

- The Fair Housing Act makes it unlawful for “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction or in the terms or conditions of such transaction” on the basis of any protected class under the statute.⁵³ The term “residential real estate-related transaction” is defined in the statute to include “the appraising of residential real property.”⁵⁴
- Courts have relied on other provisions of the Fair Housing Act to prohibit discrimination in the appraisal industry, including provisions associated with housing-related services that “otherwise make unavailable...a dwelling” or that discriminate in the “terms,

⁴⁹ See, e.g., *Stephoe v. Savings of America*, 800 F. Supp. 1542 (N.D. Ohio 1992).

⁵⁰ *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), appeal dismissed, 590 F.2d 242 (7th Cir. 1978). Additional information about the scope of this settlement is detailed above.

⁵¹ *Id.* at 1077.

⁵² 42 U.S.C. § 3601, *et seq.*

⁵³ *Id.* at § 3605(a).

⁵⁴ *Id.* at § 3605(b).

conditions, or privileges of sale or rental of a dwelling.”⁵⁵ Courts have observed that “an appraisal sufficient to support a loan request is a necessary condition precedent to a lending institution making a home loan.”⁵⁶ Because an appraisal is a critical service associated with securing a home loan, a discriminatory appraisal may lead to the denial of a home, thereby making housing “unavailable.” Appraisals may be regarded as a service provided in connection with the sale of a home, such that discriminatory appraisal practices may result in unlawful differences in treatment.

- Implementing regulations under the Fair Housing Act, promulgated by HUD , broadly define the term “appraisal” to mean “an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.”⁵⁷
- According to these regulations, the Fair Housing Act squarely bars persons and entities engaged in appraising residential real property from discriminating against any person “in making available such services, or in the performance of such services, because of race, color, religion, sex, handicap, familial status, or national origin.”⁵⁸ The regulation also states that prohibited practices include “[u]sing an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.”⁵⁹
- This prohibition against discrimination as it expressly applies to appraisal services was added to the Fair Housing Act in 1988, essentially clarifying the existing scope of the Fair Housing Act as the courts had come to interpret its application in the appraisal industry.⁶⁰ The update also included a section titled “Appraisal Exemption,” which notes that nothing in these mandates prohibits a person “engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex handicap, or familial status.”⁶¹

The Equal Credit Opportunity Act and the CFPB’s Regulation B

Appraisal-related services are necessary in the provision of housing-related credit services. Accordingly, a discriminatory appraisal that results in the denial of home financing may also violate the Equal Credit Opportunity Act of 1974 (“ECOA”), which prohibits creditors from

⁵⁵ *Id.* at § 3604(a) and § 3604(b).

⁵⁶ *Steptoe v. Savings of America*, 800 F. Supp. 1542, 1546 (N.D. Ohio 1992).

⁵⁷ 24 C.F.R. § 100.135(b).

⁵⁸ 24 C.F.R. § 100.135(a).

⁵⁹ 24 C.F.R. § 100.135(d)(1).

⁶⁰ Robert Schwemm, *Housing Discrimination and the Appraisal Industry*, in *Mortgage, Lending, Racial Discrimination, and Federal Policy* (John Goering and Ron Wienk eds., 1996), <https://www.fhcci.org/wp-content/uploads/2021/05/Schwemm-Housing-Discrimination-Appraisal-1996.pdf>.

⁶¹ 42 U.S.C. § 3605(c).

discriminating on the basis of race, color, religion, national origin, sex, marital status, age, and source of income (known as “prohibited bases,” “protected classes,” or “protected characteristics”).⁶² In 2013, the Consumer Financial Protection Bureau (“CFPB”) amended Regulation B, which implements the ECOA, by requiring creditors to provide to applicants free copies of all appraisals and other written valuations developed in connection with an application for a loan to be secured by a first lien on a dwelling, and to notify applicants in writing that copies of appraisals will be provided to them promptly.⁶³ Notably, these provisions of ECOA and Regulation B only apply to the “creditor” and only if the appraisal was conducted in connection with the issuance of credit.

The Civil Rights Act of 1866

Racial discrimination in the appraisal of housing may also violate the Civil Rights Act of 1866.⁶⁴ Section 1981 of this law, among other things, guarantees to all persons within the jurisdiction of the United States the same right as White citizens to make and enforce contracts. Section 1982 of this law provides all citizens with the same right as is enjoyed by White citizens to purchase, lease, sell, hold, and convey real and personal property. The Civil Rights Act of 1866 generally applies only to intentional racial discrimination, but the Supreme Court has expanded the scope of the Act to include certain types of ethnic discrimination. In conjunction with the Fair Housing Act, this law has been used in the courts to challenge appraisal discrimination.

State Laws and Other Prohibited Bases

In addition to these federal laws, most states and many localities have statutes prohibiting discrimination in housing-related transactions, including home appraisals.⁶⁵ Moreover, compliance with federal and state fair housing laws requires understanding each prohibited basis. With respect to state law, while the theories of discrimination generally are the same, the prohibited bases may be broader. For example, the state of California prohibits discrimination in appraisals on the basis of gender expression and military status.⁶⁶ Similarly, while rare, the interpretation of a prohibited basis under federal law may evolve. For example, based on a recent Supreme Court holding in the employment context, the CFPB and HUD have recently interpreted the ECOA and the Fair Housing Act’s prohibition on discrimination on the basis of “sex” to include discrimination on the basis of sexual orientation and gender identity.⁶⁷

⁶² 15 U.S.C. § 1619(a); see e.g., *Cartwright v. American Savings & Loan Ass’n*, 880 F.2d 912, 925-27 (7th Cir. 1989).

⁶³ CFPB, *Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B)*, 78 Fed. Reg. 7215 (Jan. 31, 2013) (codified at 12 C.F.R. § 1002).

⁶⁴ 42 U.S.C. §§ 1981-1982; See, e.g., *Steptoe v. Savings of America*, supra, 800 F. Supp. at 1547.

⁶⁵ A recent survey of state fair housing laws is available here: <http://lawatlas.org/datasets/state-fair-housing-protections-1498143743>.

⁶⁶ Cal. Business and Professions Code § 11424(a).

⁶⁷ See CFPB, *Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, Interpretive Rule*, 86 Fed. Reg. 14363 (March 16, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-16/pdf/2021-05233.pdf>; HUD, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

Theories of Proof

Courts have relied on different theories of proof when assessing claims of discrimination under civil rights statutes. The primary means of establishing discriminatory conduct under the Fair Housing Act include disparate treatment (through either direct evidence or circumstantial evidence), or disparate impact.⁶⁸

Disparate Treatment

Both the Fair Housing Act and the ECOA prohibit explicit intentional or differential discrimination, known as “disparate treatment discrimination.” Although this form of discrimination is often referred to as “intentional discrimination,” the law does not require proof that the lender or appraiser acted with malice, but that they acted in part on the basis of the alleged discriminatory reason rather than on some other, non-prohibited consideration.⁶⁹

Direct Evidence: One means of establishing disparate treatment discrimination is through direct evidence. For example, disparate treatment discrimination may be established through evidence of instances where a home appraiser makes express discriminatory statements when performing appraisal services or utilizes policies that, in their terms, limit or otherwise restrict services to individuals or neighborhoods on the basis of a protected class.

- *Example*: A bank provides appraisers with written guidelines requiring the appraisers to assign a higher value to mobile home parks that are for childless adults than to mobile home parks that allow families. This policy would likely violate the Fair Housing Act’s prohibition against discrimination on the basis of familial status.⁷⁰
- *Example*: An appraiser indicates on an appraisal form that a deduction has been made with respect to the location of a property due to its close proximity to a group home for persons with disabilities. This policy would likely violate the Fair Housing Act’s prohibition on discrimination on the basis of disability.

Circumstantial (or Comparative) Evidence: Absent direct discriminatory statements or policies, disparate treatment discrimination may be established through an analysis of relevant circumstantial (or comparative) evidence. One means of using circumstantial evidence to prove disparate treatment discrimination in home appraisals is by examining divergent activities from otherwise standard business practices, such as soliciting information from only some prospective borrowers on appropriate comparable sales on a prohibited basis.⁷¹ An appraiser’s seemingly race-neutral policy may be unequally applied, resulting in different treatment based on race or some other protected characteristics.

⁶⁸ Based on legal precedent, the federal financial regulators have also based fair lending risk assessments on these theories of discrimination. See FFIEC, *Interagency Fair Lending Examination Procedures* (2009), <https://www.ffiec.gov/pdf/fairlend.pdf>.

⁶⁹ See 12 C.F.R. Part 1002, 4(a)-1: “Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.”

⁷⁰ See OCC, *Appeal of Potential Violations of the Fair Housing Act* (Second Quarter 1998), <https://www.occ.gov/topics/supervision-and-examination/dispute-resolution/bank-appeals/summaries/files/appeal-potential-violation-fha-q2-1998.html>.

⁷¹ See, e.g., *Cartwright v. American Savings & Loan Ass’n*, supra, 880 F.2d at 912.

Some cases alleging disparate treatment discrimination hinge on a loan denial based on an undervaluation of a prospective borrower's home for purchase where the appraisal may have been based on racial considerations.⁷² Cases involving these claims rely on testimony that the challenged appraisal was unjustifiably undervalued and improperly done. One court identified the elements of a *prima facie* case of appraisal discrimination involving the race of the neighborhood to include: (1) that the home in question is in a community of color; (2) that a loan application for the home was made; (3) that an independent appraisal determined that the home in question was equal to the sales price; (4) that the buyers were creditworthy; and (5) that the loan was denied.⁷³

- *Example:* An appraisal management company allows appraisers the discretion to select the distance from the subject property from which the appraiser will select comparable homes. For refinancings, several appraisers who work mainly in majority White census tracts select comparable homes within a small radius of the subject property for White homeowners, but select comparable homes in majority Black census tracts that are a greater distance from the subject property for Black homeowners. This results in lower valuations for homes owned by Black homeowners. These actions would likely violate the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of race.⁷⁴
- *Example:* An appraiser works in majority White census tracts and majority Latino census tracts. For home purchase transactions, the appraiser routinely determines a valuation that is at or above the contract price for homes in majority White census tracts, but routinely determines a valuation that is below the contract price for comparable homes in majority Latino census tracts. These actions would likely violate the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of national origin.⁷⁵
- *Example:* A lender conducts a study of the appraisals from a certain appraisal management company with whom it regularly does business. After controlling for all of the home and neighborhood characteristics that the company uses to determine value, the lender finds that there is still an unexplained, statistically significant disparity between the home values in majority White census tracts and those in majority Black or Latino census tracts. These results provide evidence of a likely violation of the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of race and national origin.⁷⁶

⁷² See, e.g., *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1339 (N.D. Ind. 1987); *Steptoe v. Savings of America*, 800 F. Supp. at 1542.

⁷³ *Id.* at 1546-47.

⁷⁴ See, e.g., *United States v. Countrywide Financial Corp. et al.*, CV11-10540-PSG (C.D. Cal. Complaint filed Dec. 21, 2011) at Paragraph 48,

<https://www.justice.gov/sites/default/files/crt/legacy/2011/12/21/countrywidecomp.pdf>. The settlement resolved allegations that, among other things, the lender "had knowledge that the subjective and unguided discretion that it granted to loan officers and other [lender] employees in its retail loan policies and practices was being exercised in a manner that discriminated against Hispanic and African-American borrowers, but continued to implement its policies and practices with that knowledge."

⁷⁵ See *id.* Under the Fair Housing Act and the ECOA, the term "national origin" includes discrimination on the basis of ethnicity, such as Latino individuals or neighborhoods.

⁷⁶ See *id.*

Disparate Impact

Under the “disparate impact” theory of discrimination, home appraisal services may be performed in a discriminatory manner if they employ neutral policies that have an unjustified discriminatory effect. In 2015, the U.S. Supreme Court upheld broad consensus among the circuit courts in its *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* decision holding that disparate impact is a viable means for proving discrimination under the Fair Housing Act.⁷⁷ Disparate impact claims arise when there is a policy that is otherwise non-discriminatory on its face, but when put into practice has an unjustified discriminatory effect on the basis of a protected class. Disparate impact claims may be brought in conjunction with intentional discrimination claims but can occur absent any showing of intentional discrimination.

To establish a case of disparate impact liability in the appraisal context, a prospective borrower first must identify a specific policy or practice that has a discriminatory impact on the basis of race or some other prohibited basis.⁷⁸ Often, statistical evidence is used to show the discriminatory effect.⁷⁹ Second, the lender or appraiser must then defend the challenged policy by showing that it serves some legitimate, nondiscriminatory purpose. Finally, if a legitimate justification is identified, the prospective borrower may still establish a policy is unlawful if the borrower identifies a less discriminatory alternative for achieving the stated purpose.

- *Example:* An appraisal management company has a policy of not conducting any appraisals for homes valued at less than \$100,000. Although this policy does not explicitly mention race or national origin, the loan amount threshold has a disproportionate adverse impact on borrowers of color and on borrowers in neighborhoods of color. Assuming the appraisal management company cannot provide a legitimate, non-discriminatory purpose for the policy (or that a plaintiff can provide a less discriminatory alternative to the policy), this policy likely would violate the Fair Housing Act’s and the ECOA’s prohibition on discrimination on the basis of race and national origin.⁸⁰

⁷⁷ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

⁷⁸ HUD, *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500). See also HUD, *Proposed Rule: Reinstatement of HUD’s Discriminatory Effects Standard*, 86 Fed. Reg. 33590 (June 25, 2021) (“HUD 2021 Disparate Impact Proposed Rule”) (proposing to reinstate HUD’s 2013 rule).

⁷⁹ See, e.g., *Hanson v. Veterans Administration*, 800 F.2d 1381, 1388-89 (5th Cir. 1986).

⁸⁰ See, e.g., HUD, *Conciliation Agreement between National Community Reinvestment Coalition and SouthStar Funding LLC*, Sept. 25, 2006), <https://archives.hud.gov/news/2006/pr06-120.cfm>. The conciliation agreement resolved allegations that SouthStar Funding LLC discriminated against Blacks and Latinos by refusing to make loans on any row house valued at less than \$100,000 and on all row houses in Baltimore.

Increase in Appraisal Discrimination Enforcement

The limited set of published court decisions in cases alleging appraisal discrimination suggests that proving such claims may be difficult, often involving the use of statistical analysis and expert testimony. However, there has been a recent uptick in appraisal discrimination claims being filed with HUD and in court.⁸¹

- In March 2020, HUD approved a conciliation agreement between a Black woman and JPMorgan Chase Bank.⁸² The complainant alleged that JPMorgan Chase discriminated on the basis of race in violation of the Fair Housing Act by relying on an appraisal that valued her home at an amount lower than its actual value because of her race. JPMorgan Chase agreed to revise its Reconsideration of Value (“ROV”) process – the process followed when borrowers raise challenges concerning the accuracy of appraisals – to ensure that borrowers are appropriately informed of the ROV process as well as of their right and ability to raise concerns about discrimination in appraisals. The bank further agreed that its home lending advisors and client care specialists would receive training on fair lending issues related to appraisals and on the revised ROV process. As part of the conciliation agreement, JPMorgan Chase also agreed to pay the complainant \$50,000.

This case involves a lender, which is a reminder that the general rule followed by the federal courts is that the duty not to discriminate is non-delegable.⁸³ Under the Fair Housing Act, a corporation and its officers can be responsible for the discriminatory acts of a subordinate employee even though those acts were neither directed nor authorized.⁸⁴ In addition, the Fair Housing Act imposes liability in accordance with traditional agency principles, so in limited circumstances, a lender may be liable for the wrongdoing of an appraiser, even if the appraiser is an independent contractor.

⁸¹ See e.g., Marilyn Odendahl, *HUD Complaints Allege Racial Bias in Indianapolis Home Appraisals*, The Indiana Lawyer (May 4, 2021), <https://www.theindianalawyer.com/articles/hud-complaints-allege-racial-bias-in-indianapolis-home-appraisals>; see also, Julian Glover, *HUD Investigates \$439k Difference in Oakland Homeowner’s Appraisals*, ABC-7 News (July 22, 2021), <https://abc7news.com/home-appraisal-oakland-homeowner-too-low-discrimination/10902427/>.

⁸² HUD, *Conciliation Agreement between Complainant and JPMorgan Chase Bank, N.A.*, FHEO No. 05-21-0635-8 (HUD March 8, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_037.

⁸³ See, e.g., *Alexander v. Riga*, 208 F.3d 419, 433 (3rd Cir. 2000).

⁸⁴ See, e.g., *Saunders v. General Services*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987).