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# Supreme Court Affirms FHA Disparate Impact Claims

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*Late last month, the Supreme Court handed down a significant decision affecting rights and obligations under the Fair Housing Act. The Court's 5-4 decision in* Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. *makes clear that "disparate impact" (unintentional discrimination) claims are cognizable under the Fair Housing Act. While the decision's full scope will be the subject of future federal court litigation, landlords, property managers, developers, lenders and others subject to the Fair Housing Act are well-advised to take affirmative steps to ensure that their policies and practices can withstand disparate impact claims of discrimination.*

## The Fair Housing Act and Theories of Liability

Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA), makes it unlawful to refuse to sell or rent, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, national origin, or disability, or to discriminate against any such person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith. 42 U.S.C. § 3604(a), (b) and (f)(1)-(2). With respect to individuals with disabilities, the statute also requires that covered entities provide reasonable accommodations to afford such individuals equal opportunity to use and enjoy the dwelling. *Id.* at (f)(3).

Historically, the FHA, like all federal anti-discrimination statutes, had been interpreted to prohibit "disparate treatment" discrimination, which required a showing that a protected individual had been the subject of an intentional act of discrimination. In the landmark 1971 employment discrimination case of *Griggs v. Duke Power Co.*, however, the Supreme Court held that a defendant can be liable for discrimination (under Title VII) without any evidence of such unlawful bias. (The Court subsequently extended its holding to other federal employment anti-discrimination statutes.) Under this "disparate impact" theory of liability, a defendant can be liable for discrimination, even in the absence of any intentional discrimination, so long as the plaintiff identifies a facially neutral policy or practice that has a disproportionate impact on a protected group (unless the defendant can justify the challenged policy as serving a legitimate business purpose,

and the plaintiff cannot identify an alternative means of achieving the business purpose with a lower impact on the protected group).

## The *Inclusive Communities* Case

In 2008, the Inclusive Communities Project, a nonprofit Texas group assisting low-income, predominantly African-American families in finding affordable housing in predominantly Caucasian, suburban neighborhoods, filed suit against the Texas Department of Housing and Community Affairs, alleging the Department's administration of federal Low-Income Housing Credits for residential developers violated the FHA. Using a disparate impact theory of liability, Inclusive Communities pointed to statistical evidence that the Department awarded a disproportionately high number of tax credits to projects in predominately minority neighborhoods as compared to projects in predominantly Caucasian neighborhoods. Siding with the plaintiff, the district court held that Inclusive Communities had made a prima facie case of disparate impact discrimination.

On appeal, the Court of Appeals for the Fifth Circuit held that disparate impact claims are cognizable under the FHA based on its prior decisions. At the same time, however, the Fifth Circuit reversed the district court's decision on the merits, and remanded the case to the district court for further proceedings, holding that the district court had wrongly placed the burden on the Department to prove that there were no less discriminatory alternatives to its challenged practices. The Department petitioned the Supreme Court for certiorari, and the Supreme Court granted that petition.

## The Supreme Court Recognizes FHA Disparate Impact Claims

In a 5-4 majority opinion, the Supreme Court held that disparate impact claims are cognizable under the FHA. The Court found support for its holding in the statute's text, interpreting "otherwise make unavailable" as a "catch-all" phrase that looks "to consequences, not intent." According to the Court, the phrase is the functional equivalent of the "otherwise adversely affect" language found in Title VII and the Age Discrimination in Employment Act (both of which the Supreme Court previously construed to permit disparate impact claims in the employment context).

The Court also based its decision on Congress' 1988 amendments to the FHA. Noting that all nine circuits that had addressed the subject at the time of the amendments had endorsed disparate impact claims, the Court inferred that Congress was aware of, and, through its silence, implicitly ratified those decisions.

Finally, the Court invoked the FHA's underlying purpose "to eradicate discriminatory practices within a sector of the Nation's economy." According to the Court, Congress passed the FHA in reaction to the assassination of Dr. Martin Luther King Jr., and the subsequent social unrest in the inner cities, and thereby adopting President Lyndon Johnson's Kerner Commission recommendation to pass a statute against "both open and covert racial discrimination prevent[ing] black families from obtaining better housing and moving to integrated communities." The Court thus recognized disparate impact liability as a crucial legal tool against bias that may "escape easy classification as disparate treatment."

## The Court Cautions Against Low Bar For Disparate Impact Claims

To guard against claims that are *solely* based on a showing of a statistical disparity, however, the Court took care to emphasize constitutional limits to disparate impact liability. Quoting its decision in *Griggs*, the Court interpreted the FHA not to be a tool to interfere with valid housing policies, but rather a safeguard against "artificial, arbitrary, and unnecessary barriers."

The Court held that, as with disparate impact employment claims, a plaintiff in an FHA disparate impact case must first establish a prima facie case of disparate impact discrimination. To establish that prima facie case, a plaintiff cannot simply rely on a statistical disparity, but, rather, must "point to a defendant's policy or policies causing that disparity." As the Court explained, without this "robust causality requirement" at the prima facie stage, "disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead [covered] entities to use numerical quotas, and serious constitutional questions could then arise." Correspondingly, the Court warned lower courts not to "interpret[] disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." Rather, employing "race-neutral means," courts should "concentrate on the elimination of the offending practice that 'arbitrar[ily] ... operate[s] invidiously to discriminate on the basis of rac[e]."

The Court also made clear that, if and when a plaintiff has made a prima facie showing of FHA disparate impact liability, the same "business necessity" defense available in employment disparate impact claims is also available in the FHA context. (In the context of FHA disparate impact claims against governmental entities, this is known as the "public interest" defense.) As the Court explained, "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies." According to the Court, "[t]he FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities." Rather, "[e]ntrepreneurs must be given latitude to consider market factors," and zoning officials must be able to account for conditions ranging from traffic patterns to historic architecture. The Court expressly recognized that "race may be considered in certain circumstances and in a proper fashion[,]" explaining that it "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns." Thus, "[w]hen setting their larger goals, housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."

Finally, by affirming the Fifth Circuit's decision, the Court made clear that in FHA disparate impact cases, as in employment disparate impact cases, if and when a defendant presents evidence supporting a "business necessity" (or "public interest") defense, the plaintiff bears the burden of proving the existence of an alternative policy or practice that has a less disparate impact and nonetheless serves the defendant's needs.

## Implications for Housing Developers and Other Covered Entities

On remand, *Inclusive Communities Project* will offer a first glimpse at the impact of the "artificial, arbitrary, and unnecessary" test in the FHA context. On the facts presented, it is unclear whether Inclusive Communities will be able to establish that the Department's decisions to award housing development tax credits to benefit low-income neighborhoods, rather than wealthier communities, were the result of an "artificial, arbitrary, and unnecessary" policy.

The Court's holding applies to all entities subject to the FHA, including developers, landlords, property managers, lenders, and any entity that provides "services or facilities in connection" with the sale or rental of dwellings. To guard against potential disparate impact claims, affirmative steps should be taken to review, and, if necessary, make changes to, existing policies and practices. In doing so, the demographic implications of policies and practices should be considered, and, to the extent there are statistical disparities, the legitimate business and mission-driven considerations behind the policies should be documented. The ability to identify the underlying "business necessity" or "public interest" will go a long way in undercutting a claim that a policy is "artificial, arbitrary and unnecessary." And, finally, because

plaintiffs will have to show that there is "an available alternative practice that has less disparate impact and serves the [entity's] legitimate needs," an entity subject to the FHA may wish to proactively engage in that analysis itself and modify its policies and practices if it determines that an alternative approach would serve its purposes and soften the statistically adverse impact on a protected group.

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