

# Supreme Court Allows Fair Housing Disparate-Impact Claims

August 07, 2015

The U.S. Supreme Court recently issued several important opinions addressing, among other things, the Affordable Care Act, same-sex marriage and disparate-impact claims under the Fair Housing Act. Specifically, in *Texas Department of Housing and Community Affairs, et al. v. Inclusive Communities Project, et al.*, the Supreme Court held that FHA discrimination claims may be premised on "disparate impact," meaning that the practice challenged, while not intended to discriminate, has a disproportionate impact on minorities and other protected classes. The Inclusive Communities Project Inc., a Texas-based nonprofit corporation that assists low-income families with obtaining affordable housing, sued the Texas Department of Housing and Community Affairs, for violation of the FHA in connection with the Department's distribution of federally funded low-income housing tax credits to developers based on certain selection criteria. The ICP alleged that the department and its officers allocated too many tax credits to housing in predominantly black inner-city areas and too few tax credits in predominantly white suburban neighborhoods, thereby perpetuating segregated housing patterns in Texas. In its analysis, the Supreme Court considered instructive its earlier decisions in *Griggs v. Duke Power* and *Smith v. City of Jackson*, which addressed, respectively, the viability of disparate-impact claims under Title VII of the Civil Rights Act of 1964, enacted four years before the FHA, and the Age Discrimination in Employment Act of 1967, enacted four months before the FHA. In determining in *Griggs* and *Smith*, that Title VII and the ADEA encompassed disparate-impact claims, the Supreme Court examined the language of both statutes and found that it went beyond merely focusing on the intent or motivation of the actors (i.e., disparate treatment) and also encompassed the consequences of the action (i.e., disparate impact). Because the FHA contains language similar in function and purpose to that contained in Title VII and the ADEA, the Supreme Court concluded that it likewise permits disparate-impact claims. The Supreme Court also considered significant the 1988 amendments to the FHA, which the court explained would be superfluous if Congress had assumed that only disparate-treatment claims were cognizable. More importantly, at that time, all nine Courts of Appeals to have addressed the issue had uniformly

concluded that the FHA encompassed disparate-impact claims. Congress thus made a "considered judgment" not to amend the operative language of the statute, thereby ratifying and accepting the view of the appellate courts. **Discriminatory Effect** Although disparate-impact claims are now recognized under the FHA, the plaintiff has the initial burden of establishing that the challenged practice caused or will cause a discriminatory effect. Once a prima facie showing of disparate impact has been made, the burden then shifts to the defendant to demonstrate that the challenged practice is needed to accomplish "one or more substantial, legitimate, non-discriminatory interests." Once established, the burden shifts back to the plaintiff to prove that the defendant's "substantial, legitimate, nondiscriminatory interests" can be achieved by another less discriminatory practice. The Supreme Court has warned that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." Where a plaintiff fails to allege factual allegations at the pleading stage or produce statistical evidence demonstrating the required causal nexus, the plaintiff has not established a prima facie case of disparate impact, thereby warranting dismissal. Defendants should be afforded leeway to "state and explain the valid interest served by their policies" — an analysis similar to the business necessity standard under Title VII, which would provide a defense against disparate-impact liability. That is, "an entity 'could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.'" In addition, "courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." When such liability is found to exist, courts should fashion their remedial orders to ensure that they are consistent with the Constitution and that they "concentrate on the elimination of the offending practice that 'arbitrar[ily] ... operates invidiously to discriminate on the basis of race.'" If additional remedial measures are adopted, courts should aim to fashion such measures to eliminate racial disparities through race-neutral means. *Originally published by the Daily Business Review (August 7, 2015).*

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