LEGAL BULLETIN

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when it really matters

On June 25, 2015, the Supreme Court of the United States issued its decision in Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al., holding that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). Disparate impact claims under the Fair Housing Act can be brought with respect to sales and/or rentals of residential properties by public agencies and private parties. In contrast to a disparate treatment case in which a plaintiff must prove that the defendant acted with intent to discriminate against someone in a protected category, a disparate impact case involves a facially neutral policy or practice which has a disproportionately adverse effect on minorities without legitimate rationale or purpose. For example, building a high rent apartment building would be facially neutral as to minorities, but if minorities are found to generally have insufficient income to rent the apartments and the apartments are rented disproportionately to affluent white persons, a claim may be brought alleging that the building rents were created in violation of the FHA because they had an adverse disparate impact on minorities.

The Supreme Court was split 5-4 on whether the wording of the FHA permitted claims based on disparate impact where there was no discriminatory intent. The FHA makes it unlawful to "refuse to sell or rent after the making of a bonafide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." The dissent argued that the phrase "because of race. . ." meant that the denial of a dwelling had to be intentional. The majority reasoned that the phrase "otherwise make unavailable" refers to the consequences of an action (impact) rather than intent, even though that phrase is followed in the same sentence by the words "because of race" etc.

This case came to the U.S. Supreme Court from the State of Texas. The federal government provides low income housing tax credits that are distributed to developers through state agencies. In Texas, the credits are distributed by the Texas Department of Housing and Community Affairs

("Department"). The Inclusive Communities Project ("ICP") is a private housing rights organization which brought suit against the Department alleging that the Department's allocation of credits to develop low income housing caused continued segregation because too many credits were used to develop low income housing in predominantly black inner city areas and too few credits were used to develop low income housing in predominantly white suburban neighborhoods. The ICP contended that the Department was obligated to do more to construct low income housing in suburban communities.

The Supreme Court adopted the burden shifting analysis propounded by the Department of Housing and Urban Development ("HUD"). HUD requires that in order to set forth a prima facie case of disparate-impact, a plaintiff must prove "that a challenged practice caused or predictably will cause a discriminatory effect." Upon establishing same, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests." Where a defendant satisfies its burden at this step, the burden shifts back to the plaintiff who must demonstrate "that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." This framework, the Court noted, adequately limits disparate-impact liability to avoid serious constitutional questions, requiring that a plaintiff, at the outset, allege sufficient facts or produce statistical evidence demonstrating that the policy or practice was the cause of the discriminatory effect. Thus, liability cannot be based solely on a statistical disparity showing that the policy or practice has merely a statistically different impact on minorities. There must be a causal relationship between the policy or practice and the discriminatory effect.

The Supreme Court recognized that disparate impact claims could open a floodgate of litigation with no clear guidelines delineating what is a substantial, legitimate, nondiscriminatory interest which would justify a policy or practice that might create a disparate impact adverse to minorities. In an effort to assuage the anxieties of municipalities and private interests who would seek to build affordable housing, the Court made some pronouncements which should help defend against disparate impact claims:

> Disparate impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. . . .The FHA is not an instrument to force housing authorities to reorder their

> priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.
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> The 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.
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> [A] disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and this protects defendants from being held liable for racial disparities they did not create.
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> Courts should avoid interpreting disparate impact liability to be so expansive as to inject racial considerations into every housing decision.
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> If the specter of disparate impact litigation causes private developers to no longer construct or renovate housing units for low income individuals, then the FHA would have undermined its own purpose as well as the free market system.

Prior to this case, almost all of the Circuit Courts of Appeal held that the FHA authorized claims for disparate impact. Opponents were hopeful that the strict constructionists in the Supreme Court would prevail on their interpretation of the "because of race" language. While the strict constructionists did not prevail, the majority did provide some guidelines which should be encouraging to counsel defending disparate impact claims. The Court gave some encouraging insight into the Texas case before it:

> From the standpoint of determining advantages or disadvantages to racial minorities, it seems difficult to say as a general matter that a decision to build low income housing in a blighted inner-city neighborhood instead of a suburb is

> discriminatory, or vice-versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas – a circumstance that itself raises serious constitutional concerns.

With this holding by the Supreme Court, we can expect disparate impact claims to continue and probably increase but at least defendants will have some court enunciated standards by which they may seek dismissal of those claims.

LBC&C has experience in representing owners, developers, brokers and not-for-profit agencies in defending against claims for discrimination and Fair Housing violations in administrative agencies or a federal or state court of law. In addition, LBC&C will counsel its clients to help them manage their businesses in order to avoid claims. For more information please contact Marie Ann Hoenings, Esq. at 516-837-7345 or via email at mhoenings@lbcclaw.com