Fair Housing Act and Disparate Impact

Update on Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (2015)

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Agenda

- Background
- Case Summary and Analysis
- Practice Points
- What's Next?

BACKGROUND

The Fair Housing Act ("FHA")

Section 3604:

"[I]t shall be unlawful:

- (a) To refuse to sell or rent after the making of a bona fide 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.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities include connection therewith, because of race, color, religion, sex, familial status, or national origin." (emphasis added)

Section 3605(a):

- "It shall be 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 a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."

FHA – Background

- Historically the following theories have been recognized as bases for FHA claims:
  - Disparate Treatment
  - Disparate Impact
  - Failure to Make Reasonable Accommodation
- Prior to *Inclusive Communities*, the eleven circuits that considered the issue recognized disparate impact under the FHA.
- SCOTUS granted cert on two prior occasions, but the cases settled before oral arguments.

FHA – HUD Interpretation

- In 2013, HUD issued a regulation affirming that disparate impact is actionable under the FHA
  - Rule was in line with all courts of appeal to have decided the issue.

- The Rule also adopted a familiar burden-shifting framework:
  - Plaintiff makes *prima facie* case by showing that a defendant's action has or had a discriminatory effect.
  - Defendant may escape liability by showing a "legally sufficient justification" for its action – one that is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and which cannot be served by another practice that has a "less discriminatory effect."
  - Plaintiff then has ultimate burden of proving the interest can be served by less discriminatory practice.

Circuit Split

- Courts of appeals are split on whether a showing must be made that the policy interest could not be achieved by a less discriminatory practice and who has the burden to make that showing.
  - **Second and Third Circuits:** Defendant must also show there are no less discriminatory alternatives.
  - **Eighth, Fifth, and Tenth Circuits:** After the defendant's showing, burden shifts to plaintiff to prove availability of less discriminatory alternatives.
  - **Seventh Circuit:** four-factor balancing test rather than burden-shifting.
  - **Fourth and Sixth Circuits:** four-factor balancing test for public defendants and burden-shifting approach for private defendants.

- Although circuits are split, this question was not presented squarely to the Court in *Inclusive Communities*.

Disparate Impact Under Pressure

- HUD's three-part test and recognition of disparate impact liability was rejected in a 2014 district court ruling in *Am. Ins. Ass'n v. HUD*, 2014 WL 5802283 (D.D.C. Nov. 7, 2014). The court also rejected disparate impact as a theory of liability.
  - The court held that the FHA authorized only liability for disparate treatment – intentional discrimination – and not disparate impact.
  - "*In the FHA, Congress has included no such effects-based language. Each of the FHA's operative terms' definitions describe intentional acts, which are – more often than not – motivated by specific factors . . . The focus of these sections is clearly not the effect of conduct, but rather the motivation for the conduct itself*."
- Many expected that the SCOTUS cert grant in *Inclusive Communities* suggested SCOTUS would also reject disparate impact.

INCLUSIVE COMMUNITIES: CASE SUMMARY AND ANALYSIS

Inclusive Communities: Background

- ***Facts*:** Plaintiffs allege Texas state agency disproportionately approved tax credits for low-income housing in minority neighborhoods, perpetuating segregated housing patterns

- ***Issue*:** Whether disparate impact claims are cognizable under the FHA.
  - *Inclusive Communities* is the third case in which SCOTUS grated cert on the question of the cognizability of disparate impact under the FHA. It was the first case to go to argument and decision.

- ***Procedural History*:** District court found for plaintiffs; Fifth Circuit found disparate impact claims cognizable (and adopted the HUD standard), but reversed and remanded on the merits. Before the district court could consider the case on remand, the Texas agency petitioned SCOTUS to opine on the question of whether disparate impact is permitted under the FHA. SCOTUS grants cert.

Inclusive Communities: The Decision

- ***Held*:** Disparate-impact claims are cognizable under the FHA. (5-4 decision)
- Justice Kennedy authored the 5-4 majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.
- Justice Alito wrote the dissent joined by Chief Justice Roberts, Justice Scalia, and Thomas.
- Justice Thomas filed a separate dissenting opinion.

Majority Opinion – Rationale for Disparate Impact Liability

- ***Statutory Text and Prior Precedent***
  - The Court interprets FHA's text, which makes it illegal to "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, or national origin," as focusing on the end result (or impact) of unavailability instead of only on intent.
  - Court does not believe that FHA requires a different interpretation than Title VII and the ADEA – both of which contain the term "otherwise adversely ***affect***" (emphasis added). Formulation in each statute is focused on the consequences of a decision not just intent.
  - Court notes that the FHA, Title VII, and the ADEA contain the term "because of race" and that term does not foreclose disparate impact liability.

Majority Opinion – Rationale for Disparate Impact Liability

- ***Congressional Amendments***
  - Court also found significant Congress's actions in passing amendments to the FHA in 1988.
  - When the amendments were passed, nine courts of appeals had recognized disparate impact liability and Congress's decision to keep the language at issue in the FHA implicitly ratified the courts of appeals' interpretation.
  - Amendments would have been superfluous if disparate impact was not a viable theory of liability.

Majority Opinion – Rationale for Disparate Impact Liability

- ***Statutory Purpose***
  - Court stated that recognition of disparate-impact liability is consistent with the FHA's "central purpose" of eradicating discriminatory practices in the housing sector.
  - Court noted that disparate-impact claims had empowered plaintiffs to counteract "unconscious prejudices and disguised animus" that may hide disparate treatment, and plays an important role in uncovering discriminatory intent.

Majority Opinion – Limitations of Disparate Impact

- Court notes that "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA."
- Court recognizes limits to disparate impact for prudential and constitutional reasons

Majority Opinion – Limits on Disparate Impact

- ***Statistical disparity not enough***
  - Court emphasizes that a showing of statistical disparity alone is not enough to succeed on a claim at the *prima facie* stage.
  - If statistical disparity were enough, serious constitutional questions could arise
  - Plaintiffs must also show "robust causality," and a disparate-impact claim must fail if the plaintiff cannot show a defendant's policy or policies *caused* the challenged disparity.
    - *E.g.,* Causality may be defeated by a one-time decision, or by the presence of multiple factors precluding a causal inference.

Majority Opinion – Limits on Disparate Impact

- ***Business-necessity defense***
  - The Court emphasizes the business-necessity defense (imported from the Title VII context) as an "important and appropriate means of ensuring that disparate-impact liability is properly limited," so that defendants can "state and explain the valid interest their policies [or decisions] serve."
  - "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies and business decisions. The FHA is not an instrument to force housing authorities to reorder their priorities."

Majority Opinion – Limitations on Disparate Impact

- ***Remedies***
  - "*[E]ven when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e].*"
  - "*Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions*."
  - But, the opinion leaves room for race-conscious remedies, although precise contours are not outlined.
    - "*…[It] is also true that race may be considered in certain circumstances and in a proper fashion….*"

Dissenting Opinions

- Justice Alito (joined by all dissenting justices)
  - Argues “because of race” language in FHA evidences that liability must be based on intent.
  - Questions the majority’s presumption of Congressional reaffirmation of disparate impact in the 1988 amendments.
  - Notes that the majority’s standards for disparate-impact liability are too vague.

- Justice Thomas (writing separately)
  - Writes separately to note that original precedent recognizing disparate impact liability under Title VII, *Griggs v. Duke Power*, was wrongly decided.
  - Discusses racial imbalances present in society and notes they may not be racially motivated.

AFTER *INCLUSIVE COMMUNITIES*: PRACTICE POINTS

Disparate Impact Liability Practice Points

- Disparate impact liability is unlikely to go away, absent legislative amendment.
- It remains prudent to engage in analysis of one's practices to ensure that there are no arbitrary racial imbalances.
- Court recognizes that disparities may also be used to evidence discriminatory intent in treatment cases.
- Develop business justifications that can be substantiated and consider alternatives.

Disparate Impact Liability Practice Points

- There are important limits to disparate impact liability under the FHA.
- A mere showing of racial imbalance is not enough.
  - Bare-bones statistical disparity complaints may be subject to successful motions to dismiss.
  - Plaintiffs must show “robust causality” between the challenged practice and the imbalance that they allege.
- Because an FHA defendant can explain the legitimate interests animating its decisions to defeat a disparate impact claim, it is prudent to ensure that bona fide reasons are developed and documented.

WHAT'S NEXT?

After *Inclusive Communities* Remand

- Court appears skeptical as to whether Inclusive Community's "novel" claim can survive
- Following Court's decision, the lower court may scrutinize *prima facie* showing more stringently.
  - Has causation been demonstrated? Or, is the alleged effect the result of a "multitude of factors"?
- If disparate impact is found, what remedy will be fashioned?
  - Remedies should be tailored to curtail the practice.
  - Could a race-based remedy survive constitutional scrutiny?

After *Inclusive Communities*: Unanswered Questions

- What about the circuit split on the less discriminatory means requirement?
  - Does the Court's statement that a defendant should be given "leeway to state and explain the valid interest served by [its] policies" obviate the need to show that the practice could not be achieved by less discriminatory means, as some courts have held is required?
  - Court recognizes in ADEA and Title VII context *the plaintiff* has to demonstrate a less discriminatory alternative, which is consistent with HUD rule.
    - As noted, other courts have required that the defendant make this demonstration under the FHA.
  - SCOTUS did not expressly opine on this aspect of the HUD rule.

After *Inclusive Communities*: Unanswered Questions

- Future constitutional challenge?
  - Court recognizes that if not properly limited, disparate impact liability could raise constitutional concerns.
  - Could we see a constitutional challenge if a court interprets disparate impact too broadly?

- Does *Inclusive Communities* change the remedies analysis?
  - The Court may find that disparate-impact race-based remedies cannot be reconciled with equal protection.
    - What is the "proper" consideration of race?
  - Court noted that remedies should be focused on ensuring practice is curtailed.

After *Inclusive Communities* What About ECOA?

- Federal regulatory agencies have taken the position that ECOA permits disparate-impact claims.
- ECOA provides that it "shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction – (1) on the basis of race, color, religion, national origin, sex or marital status, or age…"
- ECOA does not contain express "effects" language. Future litigation likely as to the viability of disparate impact claims under ECOA.

QUESTIONS?

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