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Disparate Impact Survives—Court Outlines Limitations on Liability

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On June 25, 2015, the US Supreme Court issued a decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, holding that disparate-impact claims are cognizable under the Fair Housing Act (FHA).[1] The Court's recognition of disparate-impact claims is in line with the 11 circuit courts that have considered the issue. While recognizing disparate-impact claims, the Court's opinion notes that "disparate-impact liability has always been properly limited in key respects" and discusses limitations that provide key defenses for those facing potential disparate-impact liability.

Background

The petitioner, the Texas Department of Housing and Community Affairs (the Department), was sued by The Inclusive Communities Project (Inclusive Communities), a nonprofit organization that assists lower income families, which are disproportionately minority, with finding affordable rental housing. Inclusive Communities alleged that the Department disproportionately allocated tax credits to developments in predominantly minority areas, as opposed to those with majority Caucasian residents. Because the landlords would then be required to accept housing vouchers for properties built with tax credits, and vouchers were used predominantly by minority members, the practice had the effect of concentrating minority residents in those communities. Inclusive Communities alleged that this practice was a form of disparate-impact discrimination prohibited by the FHA.

The district court ruled for Inclusive Communities and, in so doing, held that disparate-impact claims were cognizable under the FHA. The Department appealed. While the appeal was pending, the US Department of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to permit disparate-impact claims. On appeal, the Fifth Circuit held that disparate impact was cognizable under the FHA, adopting HUD's test, but on the merits reversed and remanded the case. Before the district court could consider the matter on remand, the Department petitioned the US Supreme Court on the question of disparate-impact liability under the FHA. The Court granted certiorari on the question of first impression of whether disparate-impact claims are cognizable under the statutory text of the FHA.

The FHA prohibits individuals and entities from, among other things, refusing "to sell or rent . . . [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."[2] Relying on the Court's prior interpretations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA)—both of which prohibit practices that constitute express disparate treatment or "otherwise adversely affect" an individual's status because of a prohibited factor—the petitioners argued that the lack of similar "effects" language in the FHA required the Court to interpret the FHA as permitting only disparate-treatment claims.

The Court's Holding

The Court, in an opinion authored by Justice Kennedy and joined by Justice Breyer, Justice Kagan, Justice Ginsburg and Justice Sotomayor, rejected the petitioner's interpretation, holding that the statutory text of the FHA permits disparate-impact liability. The Court relies on three principal rationales in reaching its holding, as described below.

Prior Precedent. The Court finds that under its prior cases interpreting similar language in Title VII and the ADEA, the statutory text of the FHA permits disparate-impact liability. The Court reasons that the operative phrase "otherwise make unavailable" in § 3604(a) of the FHA is analogous to the phrase "otherwise adversely affect" in § 703(a)(2) of Title VII and § 4(a)(2) of ADEA, which in *Griggs v. Duke Power*[3] and *Smith v. City of Jackson*[4] respectively, the Court interpreted as permitting disparate-impact liability. The Court construes the "otherwise make unavailable" language in the FHA as referring to an action's consequences rather than an actor's intent. The Court also dismisses the petitioners' contention that inclusion of the "because of race" language in the FHA necessarily requires that a plaintiff show discriminatory intent. The Court notes that the same phrase is present in Title VII and the ADEA and those statutes have consistently been interpreted as permitting disparate-impact liability.

The 1988 Amendments. The Court also relies on Congress's actions in passing the 1988 amendments to the FHA to support its interpretation. The Court notes that at the time Congress passed the 1988 amendments, Congress knew that nine courts of appeals had addressed the question and concluded the FHA encompassed disparate-impact claims. The Court states that Congress's decision to retain the "otherwise make unavailable" language in the FHA is strong evidence that Congress implicitly ratified the interpretation of the courts recognizing disparate-impact liability. Further, the Court notes that the 1988 amendments would have been "superfluous" if disparate-impact liability did not exist under the FHA. Indeed, the amendments added safe-harbor provisions that allowed an exemption for certain species of impact claims. According to the Court, Congress's recognition of the need for such exemptions assumed the existence of disparate-impact liability; otherwise the exceptions would have been unnecessary.[5]

AFHA's Purpose. The Court also finds that recognition of disparate-impact liability is consistent with the FHA's "central purpose" of eradicating discriminatory practices in the housing sector.[6] The

Court notes that disparate-impact claims have empowered plaintiffs to counteract "unconscious prejudices and disguised animus" that may hide disparate treatment, and has played an important role in uncovering discriminatory intent.[7] Disparate-impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment,"[8] the Court states.

Limits on Disparate-Impact Liability

In holding that disparate-impact claims are cognizable under the FHA, the Court acknowledges several important limitations on disparate-impact liability. In particular, the Court admonishes that disparate-impact claims should be "examine[d] with care" to determine whether the plaintiff has made out a *prima facie* case, noting that a claim may fail when the plaintiff fails to allege facts or present statistical evidence that demonstrate "robust causality" between the alleged disparity and the challenged policies or practices.[9] This examination should be conducted so as to "promptly" resolve cases where plaintiffs do not meet their *prima facie* burden. As the Court explains, the causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a *prima facie* case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create."[10] The Court notes that policies that create a disparate impact are those that erect "artificial, arbitrary, and unnecessary barriers."[11]

The Court also explains that disparate-impact liability should be "properly limited" by giving defendants in disparate-impact cases "leeway to state and explain the valid interest served by their policies," a standard similar to the Title VII business-necessity defense.[12] Legitimate considerations may include market factors.[13] This language may well provide greater flexibility for legally sufficient business justifications than contemplated by HUD guidance, which calls for the policy to be the least discriminatory option.

Finally, the Court focuses on the important role that carefully tailored remedies play in disparate-impact cases. Courts should "strive to design [relief] to eliminate racial disparities through race-neutral means,"[14] with room for race consciousness "in certain circumstances and in a proper fashion."[15]

The Court notes the aforementioned protections—especially those at the *prima facie* stage—are needed to protect defendants against potential "abusive disparate-impact claims," especially when the "specter" of liability could cause defendants to forego actions that may benefit protected classes.[16] Relatedly, the Court notes that not all racial imbalances harm protected classes. For example, without deciding the issue, the Court observes that a decision to site low-income housing for health or safety code violations in either the cities or the suburbs may be a defensible policy choice.

Dissenting Opinions

Justice Alito's dissent—joined by Chief Justice Roberts, Justice Scalia and Justice Thomas—

focuses on the "because of race" language in the FHA, which, the dissenting justices contend, indicates a discriminatory-intent requirement for liability under the FHA.[17] Justice Alito also questions the majority's presumption of congressional intent behind the 1988 amendments.[18] Finally, Justice Alito argues that the majority's standards for disparate-impact liability are too vague.[19]

Although Justice Thomas joined Justice Alito's dissent, he also wrote separately to emphasize his view that *Griggs* was improperly decided.[20] Justice Thomas notes that many racial imbalances might not be discriminatorily motivated[21] and posits that the majority's approach may actually disincentivize state authorities from providing affordable housing in fear of disparate-impact liability.[22]

Implications

Because disparate impact remains cognizable under the FHA, financial institutions should continue to conduct rigorous analyses of their policies and practices to ensure compliance with the law.

The Court's emphasis on the limits and rigor required for successful FHA disparate-impact claims —including the requirement that plaintiffs show "robust causality" and the role of business justifications—should be carefully developed and considered when defending a disparate-impact claim under the FHA. Indeed, the Court's opinion, which expressly acknowledges that "prompt resolution" of disparate-impact claims should be sought in cases where plaintiffs do not make out their *prima facie* case, provides important opportunities for defendants facing potential liability to seek dismissal if plaintiffs rely only on statistical disparities or otherwise fail to show causality. Moreover, the Court's focus on the serious constitutional questions that may arise if disparate-impact liability is interpreted too broadly or if remedies are not sufficiently tailored to curtail the offending practice may pave the way for future challenges to overbroad interpretations of disparate-impact liability.

The Court's discussion of the limits on disparate-impact liability could also be helpful for defending against disparate-impact claims in other contexts, such as in cases arising under the Equal Credit Opportunity Act (ECOA). It also bears noting that the Court has never weighed in on the availability of disparate-impact liability under ECOA. Because ECOA has a distinct legislative history and different operative language, the issue of whether it, too, is focused on the impact of a particular practice will likely be clarified in future cases.

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[1] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, No. 13–1371, slip op., - - - U.S. - - - (June 25, 2015).

[2] 42 U.S.C. § 3604(a) (emphasis added).

[3] 401 U.S. 424, 431 (U.S. 1971).

[4] 544 U.S. 228, 236 (2005).

[5] *Inclusive Cmtys. Project*, slip. op. at 13.

[6] *Id.* at 12.

[7] *Id.* at 13.

[8] *Id.*

[9] *Id.* at 14-15.

[10] *Id.* at 14.

[11] *Id.* at 15 (citing *Griggs*, 401 U.S. at 431).

[12] *Id.* at 14.

[13] *Id.*

[14] *Id.*

[15] *Id.* (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007)).

[16] *Id.* at 21.

[17] *Id.* at 24.

[18] *Id.* at 32.

[19] *Id.* at 40.

[20] *Id.* at 20.

[21] *Id.* at 21.

[22] *Id.* at 23.

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