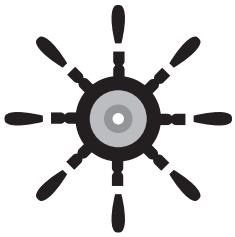
Disparate Impact



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In the winter of 2015, housing providers, fair housing organizations, banks, and local governments, among others, were all intensely focused on the Supreme Court, which was considering the case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (hereinafter "*Inclusive Communities*"). The Supreme Court took that case in order to decide whether disparate impact is a valid theory of liability under the federal Fair Housing Act.[1]

Disparate impact is best understood as a method for proving housing discrimination without having to show that the discrimination was intentional. Under disparate impact theory, most courts, as well as HUD, use a "burden shifting" test. First, the plaintiff must show that the challenged conduct, policy, or practice disproportionately harms members of a group that is protected by the Fair Housing Act.[2] For example, a plaintiff could show that a city zoning ordinance that excludes mobile homes disproportionately harms Latinos because in that jurisdiction, Latinos are overrepresented among mobile home occupants.

Second, the defendant may seek to prove that the challenged practice is justified by a legitimate, non-discriminatory purpose. In our hypothetical, the city might try to prove that it passed the ordinance to ensure a minimum level of habitability for all housing in the jurisdiction.

At the final stage of the analysis, the plaintiff may prove that despite any legitimate, non-discriminatory purposes, the jurisdiction could achieve that goal in a way that has a less discriminatory impact on Latinos. For example, the plaintiff might show that the city could achieve its habitability goals by enacting and enforcing specific codes for the maintenance of mobile home parks, rather than banning such housing altogether.

The burden-shifting proof framework ensures that courts apply the disparate impact standard in a pragmatic, fact-specific way, thereby reconciling the two goals: (1) ferreting out conduct that unjustifiably discriminates by harming a protected class, and (2) allowing housing providers, lenders, local governments, and other potential defendants to pursue legitimate business and governmental goals. In fact, a quantitative survey of disparate impact cases over the past four decades found that disparate impact plaintiffs only rarely prevail,[3] indicating that the availability of disparate impact liability is not an obstacle to legitimate planning or business objectives.

In Inclusive Communities, a civil rights organization claimed that the State of Texas's methodology for allocating Low Income Housing Tax Credits lead to increased racial segregation in Dallas. Dozens of friend-of-the-court briefs submitted to the Court on the plaintiff's side argued that preserving the disparate impact standard was consistent with the statutory text and congressional intent and was critical to fulfill and further the broad mandate of the federal Fair Housing Act. On the state's side, dozens of such briefs argued the contrary, saying that a defendant should not be held liable without evidence of discriminatory intent, because allowing liability to turn on discriminatory effect alone would chill reasonable underwriting practices, local zoning decisions, city planning efforts, etc.

The majority opinion, by Justice Kennedy, addresses both themes. First, the Court recognized that disparate impact is a necessary tool for combatting ongoing, systemic discrimination of the type that motivated passage of the Fair Housing Act in the first place, such as exclusionary zoning. The Court found that "[m]*uch progress remains to be made in our Nation's continuing struggle against racial isolation" and that the Fair Housing Act has an important "continuing role in moving the Nation toward a more integrated society" by helping to combat, among other things,* "discriminatory ordinances barring the construction of certain types of housing units."[4] Thus, recognizing disparate impact liability enables "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," and "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[5]

Second, the Court emphasized that the disparate impact standard has been and remains properly limited "to give housing authorities and private

developers leeway to state and explain the valid interest served by their policies. . . . [H]ousing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. . . . 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."[6]

The *Inclusive Communities* decision thus continues a long tradition of allowing disparate impact liability under the Fair Housing Act while ensuring that the theory does not serve as a trap for housing providers or governments that are pursuing legitimate, housing-related objectives, so long as those legitimate objectives could not be achieved with less harmful impact on protected classes.[7]

As discussed in *Inclusive Communities*, courts have historically applied disparate impact liability under the Fair Housing Act in "heartland" cases targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[8] But this pragmatic and flexible standard has also been used to challenge myriad other housing-related practices that have discriminatory effects, such as subsidized housing waitlist preferences,[9] community redevelopment,[10] redlining and predatory lending,[11] mobile home registration requirements,[12] and condominium association rules restricting the presence of children,[13] to give just a few examples. Courts have also applied the disparate impact standard to conduct that, while facially neutral, would have the effect of perpetuating existing patterns of residential segregation.[14]

The *Inclusive Communities* decision confirms that going forward, disparate impact will remain an important tool for combatting practices that may not be motivated by bias but which nonetheless disproportionately harm protected groups.

One such example is redevelopment or urban renewal efforts. As cities throughout the country experience a massive resettlement of the urban cores,[15] they are rapidly seeking to redevelop formerly blighted areas. Because long-time residents of these areas are disproportionately African American and Latino, redevelopment can have a disparate impact if it causes displacement. In a case that settled before *Inclusive Communities*, a group of African-American and Latino residents of a blighted neighborhood in Mount Holly, N.J., challenged a redevelopment plan using a disparate impact theory.[16] The plaintiffs argued that the proposed redevelopment would displace them; indeed, their statistical evidence showed that that the negative impact would overwhelmingly affect African Americans and Latinos, who were also significantly less likely to be able to afford replacement housing in the community.[17] The plaintiffs got a favorable decision from the Court of Appeals, and the case subsequently settled in a fashion that permitted most of the families to move into newly constructed units in the same neighborhood. Now that the *Inclusive Communities* decision has resolved that plaintiffs can challenge this type of conduct using disparate impact, one can expect similar cases to be brought in areas facing rapid gentrification.[18]

We can also expect disparate impact challenges to "disorderly conduct" or "chronic nuisance" ordinances, which subject landlords to fines and other penalties based on (among other things), police activity at their properties. Because these ordinances are drafted broadly, they have often been applied to include police responses to domestic violence incidents. Such ordinances will often force landlords to take steps to evict affected tenants following a triggering number of police responses at the property, under threat of hefty fines or other penalties.[19] These laws can have a clear disparate impact on women, who make up the very large majority of domestic violence victims.

One plaintiff who had experienced extreme and life-threatening domestic violence and had been threatened with eviction after the police were called to her apartment three times sued the Borough of Norristown, Penn., which had applied its disorderly conduct ordinance to compel her landlord to evict her.[20] The plaintiff argued, among other things, that the Norristown ordinance violated the Fair Housing Act because it adversely affected and penalized victims of domestic violence, who are disproportionately women.

Although the Norristown case ultimately settled,[21] it provides an important model that should be studied and applied by fair housing practitioners. Hundreds of jurisdictions across the country have similar nuisance laws, some of which may have a

chilling effect by discouraging victims from calling the police in an event of domestic violence for fear of losing housing.[22] To the extent such laws lead to evictions of tenants affected by domestic violence, they will also create a risk of increased homelessness for domestic violence victims and their children.[23] The availability of the disparate impact standard will allow plaintiffs to bring successful challenges if they can present evidence of a discriminatory effect on women or families with children, without having to also present frequently difficult or impossible-to-obtain evidence of bias. ■

ENDNOTES

1 135 S. Ct. 2507 (2015).

2 24 C.F.R. § 100.500(a). The federal Fair Housing Act prohibits discrimination based on race, color, religion, national origin, sex, handicap, and familial status. Some state and local fair housing laws prohibit discrimination based on additional classifications, for example source of income or sexual orientation.

3 Stacy E. Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 363 (2013).

4 *Inclusive Cmtys.*, *supra* note 1, 135 S. Ct. at 2525-26.

5 *Id.* at 2523.

6 *Id.* at 2522-23.

7 A similar balancing is achieved in HUD's 2013 disparate impact rule, *codified at* 24 C.F.R. § 100.500.

8 *Inclusive Communities*, *supra* note 1, 135 S. Ct. at 2522 (citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (holding that town's zoning restrictions against multifamily housing had an unlawful adverse racial impact and perpetuated segregation); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009))).

9 *See, e.g.*, *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000).

10 *See, e.g.*, *Mount Holly Gardens Citizens in Action Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert granted*, 133 S. Ct. 2824 (2013); *cert dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

11 *See, e.g.*, Compl. for Declaratory and Inj. Relief and Damages, *Mayor of Balt. v. Wells Fargo, N.A.*, No. 08-062 (D. Md. Jan. 8, 2008); *Ramirez v. GreenPoint Mortg. Funding Inc.*, 633 F. Supp. 2d 922 (N.D. Cal. 2008).

12 *See Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165 (M.D. Ala. 2011), *vacated as moot*, No. 11-16114, 2013 WL 2372302 (11th Cir. May 17, 2013).

13 *See, e.g.*, *Hous. Opportunities Project for Excellence Inc. v. Key Colony No. 4 Condominium Assoc.*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007).

14 *See, e.g.*, *Huntington Branch*, *supra* note 8.

15 Leigh Gallagher, "The End of the Suburbs," July 31, 2013, *Time*, *available at* http://ideas.time.com/2013/07/31/the-end-of-the-suburbs/ ; William H. Frey, "Demographic Reversal: Cities Thrive, Suburbs Sputter," June 29, 2012, Brookings Institute, *available at* http://www.brookings.edu/research/opinions/2012/06/29-cities-suburbs-frey

16 *Mount Holly*, *supra* note 10.

17 *Id.* at 382-83.

18 Such cases may be brought against private developers as well as governmental entities. In the recently filed case *Crossroads Residents Organized for Stable and Secure ResiDencieS et al. v. MSP Crossroads Apartments LLC et al.*, No. 0:16-cv-00233 (D. Minn.), the plaintiffs, mostly low-income tenants, challenge a private housing provider's plan to "reposition the complex in the market in order to appeal to and house a different [young professional] tenant demographic population." *See* Compl. (Doc. 1), ¶ 1; *id.* ¶¶ 49-59, 68-71 (disparate impact allegations).

19 Matthew Desmond & Nicol Valdez, "Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women," *American Sociological Review* 78:117-141 (2013), *available at* http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf?m=1360100394'; Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (2013), Shriver Center, *available at* http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf.

20 *Briggs v. Borough of Norristown*, Compl. (Doc. 1), No. 2:13-cv-2191 (E.D. Pa. 2013).

21 *See* https://www.aclu.org/cases/briggs-v-borough-norristown-et-al (last updated Sept. 18, 2014).

22 *See Briggs*, *supra* note 20, Compl. ¶¶ 55–60, 68–75, 87–102; *Markham v. City of Surprise, AZ*, Compl. (Doc. 1), No. 2:15-cv-01696 (D. Az. 2015); Annamarya Scaccia, *How Domestic Violence Survivors Get Evicted from their Homes After Calling the Police*, RH Reality Check (June 4, 2013, 2:16 PM), http://www.rhrealitycheck.org/article/2013/06/04/norristown-ordinance-and-impact-on-domestic-violence-victims-2/, *archived at* http://perma.cc/05nZHmFoPQd.

23 Nationwide, one in five homeless women cites domestic violence as the primary cause of her homelessness, demonstrating a strong correlation between domestic violence and homelessness. *See* Scaccia, *supra* note 22 (citing a study by the National Law Center on Homelessness and Poverty).