Disparate Impact

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Disparate impact is best understood as a method for proving housing discrimination without having to show that the discrimination was intentional. Under the disparate impact theory, most courts, as well as HUD, use a "burden shifting" test (24 C.F.R. § 100.500, hereinafter "Disparate Impact Rule").

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 (FHA)" For example, a plaintiff could show that a municipal zoning ordinance that excludes mobile homes disproportionately harms Latinxs because in that jurisdiction, Latinxs 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 Latinxs. 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 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 (see Stacy E. Seicshnaydre's ***Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act***, 63 Am. Univ. L. Rev. 357 (2013), indicating that the availability of disparate impact liability is not an obstacle to legitimate planning or business objectives.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (135 S. Ct. 2507 (2015), hereinafter "*ICP*"), 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 in contrast 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, addressed 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" (*id.* at 2525-26). 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" (*id.* at 2523).

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" (*id.* at 2522-23).

The *ICP* 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 (a similar balancing is achieved in HUD's Disparate Impact Rule).

As discussed in *ICP*, 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" (*ICP*, 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). 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 (see, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 1st Cir. 2000), community redevelopment (see, e.g., *Mount Holly Gardens Citizens in Action Inc. v. Twp. of Mount Holly*, 658 F.3d 375 3d Cir. 2011), redlining and predatory lending (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) and *Ramirez v. GreenPoint Mortg. Funding Inc.*, 633 F. Supp. 2d 922 (N.D. Cal. 2008), mobile home registration requirements (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), and condominium association rules restricting the presence of children (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), to give 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.

Courts have long accepted that a diverse range of housing practices can be subject to a disparate impact challenge, and that has continued following *ICP*. One such example is redevelopment or urban renewal efforts. As cities throughout the country experience a massive resettlement of the urban cores (Leigh Gallagher, ***The End of the Suburbs***; William H. Frey, ***Demographic Reversal: Cities Thrive, Suburbs Sputter***), they are rapidly seeking to redevelop formerly blighted areas. Because long-time residents of these areas are disproportionately Black and Latinx, redevelopment can have a disparate impact if it causes displacement. In a case that settled before *ICP*, a group of African American and Latinx residents of a blighted neighborhood in Mount Holly, NJ, challenged a redevelopment plan using a disparate impact theory. 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 Latinxs, who were also significantly less likely to be able to afford replacement housing in the community (*Id.* at 382-83). 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 *ICP* 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. 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.* pgs 49-59, 68-71 (disparate impact allegations). The District Court held that the plaintiffs adequately alleged both disparate treatment and disparate impact under the FHA and allowed those claims to proceed. *Crossroads Residents Organized for Stable and Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, 2016 WL 3661146 (D. Minn. July 5, 2016). The case subsequently settled as a certified class action that will amend the screening criteria and fund the acquisition and preservation of affordable rental properties. *Soderstrom v. MSP Crossroads Apartments LLC*, Civ. No. 16-233, 2018 WL 692912 (D. Minn. Feb. 2, 2018).

An example along similar lines is addressed in a 2016 Second Circuit affordable housing case, *MHANY Management, Inc. v. County of Nassau* (819 F.3d 581 2d Cir. 2016). Citing the Supreme Court's recognition in *ICP* of the importance of such "heartland" zoning cases, the Second Circuit held that the plaintiffs met their burden of establishing that a rezoning decision by the City of Garden City, NY, prevented the development of affordable housing and therefore disproportionately harmed African Americans and Latinxs and perpetuated residential segregation (*Id.* at 619-20). On remand from the Second Circuit, the District Court held that the plaintiffs' evidence at trial met their burden to show that Garden City could achieve its professed zoning goals through less discriminatory alternative means (*MHANY Mgmt., Inc. v. Cty. of Nassau*, No. 05CV2301ADSARL, 2017 WL 4174787, at *1 E.D.N.Y. Sept. 19, 2017). The case settled in 2019 with terms that will allow for the creation of new affordable housing in Nassau County.

Similarly, in *Avenue 6E Investments, LLC v. City of Yuma*, the Ninth Circuit emphasized the importance of "policy to provide fair housing nationwide" in holding that the denial of an affordable housing provider's zoning request in order "to permit the construction of housing that is more affordable" may constitute an unlawful disparate impact, and rejected an argument that the availability of affordable housing in the same region necessarily precludes a plaintiff from showing disparate impact (818 F.3d 493, 509-13 9th Cir. 2016). On remand, the district court denied the city's motion for summary judgment, holding that the record showed that the rezoning denial had a discriminatory effect on Latinxs and that whether the city could establish a valid justification and the availability of less discriminatory alternatives were material issues of fact for trial (217 F. Supp. 3d 1040 D. Ariz. 2017).

Plaintiffs have also used a disparate impact theory to challenge housing restrictions against people with criminal records, another area where bias may well be at play but can be difficult to prove. In *Sams v. Ga West Gate, LLC*, for example, current and former tenants and a fair housing organization challenged an apartment complex's "99-year criminal history rule," which "barred from residency any individual who had certain felony or misdemeanor convictions within the past 99 years" (*Sams v. Ga W. Gate, LLC*, No. CV415-282, 2017 WL 436281, at *1 S.D. Ga. Jan. 30, 2017). The district court held that the plaintiffs had adequately pleaded a disparate impact claim by showing that nationwide, African Americans were more likely than whites to have criminal convictions and were over-represented in the prison population, and that the 99-

year criminal history rule therefore adversely impacted African Americans (*Id.* at *5). District courts across the country have recognized the viability of similar disparate impact challenges to criminal-record bans by housing providers. *See Fortune Soc'y v. Sandcastle Towers Hous. Dev. Corp*., 388 F. Supp. 3d 145 (E.D.N.Y. 2019): *Conn. Fair Hours. Ctr. v. Corelogic Rental Prop. Solutions, LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019); *Jackson v. Tryon Park Apartments*, No. 6:18-cv-06238 EAW, 2019 WL 331635 (W.D.N.Y. Jan. 25, 2019); *Alexander v. Edgewood Mgmt. Corp.*, No. 15-01140 (RCL), 2016 WL 5957673, at *2-*3 (D.D.C. July 25, 2016). It is critical in bringing such challenges to identify a policy of exclusion based on an applicant's criminal history (for example, an automatic ban against anyone with a felony conviction) and relevant statistical racial disparities comparing the group excluded by the policy and the relevant housing market.

Drawing on this breadth of successful disparate impact challenges in new areas, advocates should explore more 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 (see Matthew Desmond & Nicol Valdez, ***Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*** and Emily Werth, ***The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances***). 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, PA, which had applied its disorderly conduct ordinance to compel her landlord to evict her (*Briggs v. Borough of Norristown*, Compl. Doc. 1, No. 2:13-cv-2191 E.D. Pa. 2013). 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, 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 (see *Briggs*, Compl. pgs 55–60, 68–75, 87–102; *Markham v. City of Surprise, AZ*, Compl. Doc. 1, No. 2:15-cv-01696 D. Ariz. 2015; and Annamarya Scaccia's ***How Domestic Violence Survivors Get Evicted from their Homes After Calling the Police***). To the extent that such laws lead to the evictions of tenants affected by domestic violence, they will also create a risk of increased homelessness for domestic violence victims and their children (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). 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.

Courts have also allowed disparate impact challenges to policies characterized by the delegation of discretion, relying on Title VII case law. For example, in *City of Oakland v. Wells Fargo Bank* (*City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at *13 N.D. Cal. June 15, 2018 citing Title VII cases including *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 1988; *Rose v. Wells Fargo Co.*, 902 F.2d 1417 9th Cir. 1990; *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 N.D. Cal. 2012), the Court held that the plaintiffs adequately identified a

policy with a discriminatory effect—a lender's granting of discretion to loan officers combined with incentives that encouraged them to sell more expensive and riskier loans than for which borrowers were qualified. The court held that the complaint adequately alleged that the granting of such discretion and incentives was a specific policy, and that there was a "sufficient causal link between the specific policies and practices and the disparate impact on minority borrowers for pleading purposes." The court reached a similar conclusion in *National Fair Housing Alliance v. Federal National Mortgage Association*, holding that by identifying a policy of "delegate[ing] discretion or fail[ing] to supervise and differential maintenance based on the properties' age and value," the plaintiffs adequately alleged a policy that was the "robust cause" of disproportionate harm to communities of color (294 F. Supp. 3d 940, 948 N.D. Cal. 2018, hereinafter *"NFHA v. Fannie Mae*").

Also consistent with HUD's Disparate Impact Rule, courts have required that a defendant meet a burden of *proof*, not production, to justify a policy's discriminatory effect. The Ninth Circuit recently affirmed summary judgment for fair housing plaintiffs, including an award of punitive damages, in a disparate impact challenge to an occupancy limitation because the defendant failed to produce evidence sufficient to justify the policy (*Fair Hous. Ctr. of Washington v. Breier-Scheetz, LLC*, 743 F. App'x 116 Nov. 19, 2018). The court held that punitive damages were justified because the defendant did not change its policy even after being notified by the city's Office of Civil Rights that the occupancy limit was a fair housing violation).

Several Circuit Courts' adoption of HUD's Disparate Impact Rule, the *ICP* decision, and post-*ICP* caselaw confirm 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. At the same time, the Court's reference in *ICP* to a "robust causality requirement" has engendered debate in subsequent disparate impact litigation, with defendants frequently arguing that plaintiffs face a new or heightened burden to show causation. Justice Kennedy wrote that requiring "robust causality" was "important in ensuring that defendants do not resort to the use of racial quotas." Several courts have rejected this interpretation of *ICP*, applying longstanding disparate impact precedent in finding a sufficient causal link between the challenged practice and the disproportionate harm to a protected class.

The Fourth Circuit analyzed *ICP*'s "robust causality requirement" in detail in *de Reyes v. Waples Mobile Home Park Limited Partnership* (903 F.3d 415 4th Cir. 2018, *cert. denied*, 139 U.S. 2026 2019), in which non-U.S. citizen mobile home park residents claimed that a mobile home park's policy of requiring that adult occupants provide documentation showing legal immigration status in order to renew their leases had an unlawful disparate impact on Latinxs. After holding that the plaintiffs demonstrated the policy's disproportionate effect on Latinxs (based on statistical data showing that over 35% of the state's Latinx population was undocumented, compared to less than 4% of the overall population), the Fourth Circuit held that the plaintiffs could demonstrate robust causality by: (1) showing a statistical disparity (e.g., the group of people who cannot demonstrate legal immigration status is disproportionately Latinx); (2) identifying the specific housing practice being challenged (e.g., a requirement to provide documentation of legal immigration status in order to renew a lease); and (3) demonstrating that the policy causes the statistical disparity (e.g., the requirement to demonstrate legal immigration status disproportionately excludes Latinx renters compared to non-Latinx renters) (*Id.* at 428-29. The Court emphatically rejected the defendant's argument that unauthorized immigration status would preclude the plaintiffs from establishing a prima facie case of disparate impact: "That view 'threatens to eviscerate disparate impact claims altogether" by "require[ing] an *intent* to disparately impact a protected class in order to show robust causality . . . ." *Id.* at 430.

A similar conception of "robust causality" drove the decision in *NFHA v. Fannie Mae*, in which the district court found a sufficient causal connection between a habitational insurance policy that excluded landlords who rent to tenants who use Housing Choice Vouchers to pay their rent, and harm to African American and women-headed households (both protected classes under the Fair Housing Act), who were more likely to be voucher recipients in the relevant geographical housing market.

Yet other courts have been receptive to defense arguments that *ICP* changed or heightened the standard to prevail on a disparate impact claim under the Fair Housing Act, including in a recent decision from the Fifth Circuit. Despite the fact that the Supreme Court in *ICP* acknowledged HUD's Disparate Impact Rule without rejecting or discrediting it, the Fifth Circuit held in *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890 (5th Cir. 2019), that *ICP* requires a "more demanding test" than HUD's Disparate Impact Rule. *Id.* at 902. It concluded that the "robust causality" language in *ICP* meant that the plaintiff in *Lincoln Property* needed to show that the defendant's policy of excluding Housing Choice Voucher recipients existing disparity in the racial composition of voucher-holding households—the argument the Fourth Circuit and D.C. District Court rejected.

In a deeply concerning effort that appears intended to align with industry goals, HUD has signaled its own willingness to backpedal from its 2013 Disparate Impact Rule. In August 2019, the agency issued a Notice of Proposed Rulemaking (NPRM) that proposes a new five-pronged standard for disparate impact claims, in a clear departure from the existing Disparate Impact Rule and decades of well-settled caselaw (Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,855 Aug. 19, 2019). The new proposed standard would require that plaintiffs show how a challenged policy or practice actually results in a disparity, demonstrate a harmful impact on members of a protected class, and show not only that a statistical disparity exists but that it is directly caused by a specific policy or practice and not just attributable to chance. By requiring plaintiffs to plead, as an element of their claims, that a challenged policy or practice is "arbitrary, artificial, and unnecessary" to achieve a valid interest or legitimate objective, the Proposed Rule would force plaintiffs to anticipate at the pleading stage which justifications a defendant might invoke and preemptively debunk them.

The NPRM furthermore makes profit a legitimate justification and proposes a distinct framework for disparate impact challenges based on algorithmic modeling that would all but ensure that such challenges fail. Among other things, the proposed requirement to plead a "robust causal connection" between the challenged policy or practice and the discriminatory effect would be incredibly difficult in many cases, and especially in the context of algorithmic modeling, which is typically proprietary and incorporates a host of complex factors that are not transparent to the public. Moreover, the NPRM proposes a framework in which a business practice that relies on statistics or algorithms and has some predictive value will almost always be immune from liability, because such predictive algorithms, by nature and design, serve a valid interest or legitimate objective. The amendment would effectively shield many credit scoring, pricing, tenant screening, and underwriting models from liability under the FHA, even when it is clear that they result in the discriminatory denial of housing or credit.

As of the time of publication, the agency is reviewing comments on its NPRM. If and when HUD issues a final rule amending the current Disparate Impact Rule, it will likely face a number of legal challenges. Until HUD issues a final rule and such rule goes into effect, advocates should continue to plead and prove disparate impact claims consistent with the existing Disparate Impact Rule and any guidance in their Circuits.