U.S. Supreme Court Upholds Fair Housing Disparate Impact Principle

On June 25, 2015 Justice Anthony Kennedy announced the 5-4 decision of the Supreme Court of the United States upholding the disparate impact standard in housing discrimination cases that was challenge by the State of Texas in *Texas Department of Housing and Community Affairs v The Inclusive Communities Project.*.

The Inclusive Communities Project (ICP) sued the Texas Department of Housing and Community Development over the siting of most Low Income Housing Tax Credit properties in predominately black communities in Texas. ICP won in District Court. Texas appealed to the U.S. Supreme Court. NLIHC signed one of 22 *amici curiae* supporting the disparate impact standard).

ICP is a Dallas-based nonprofit that assists low income people in finding affordable housing and that seeks racial and socioeconomic integration in Dallas housing. ICP assists voucher holders who want to move into non-minority areas obtain apartments in non-minority suburban neighborhoods by offering counseling, assisting in negotiations with landlords, and by helping with security deposits.

At issue was whether the Fair Housing Act of 1968 bars not only intentional discrimination, but also policies and practices that have a disparate impact – that do not have a stated intent to discriminate but that have the effect of discriminating against the Fair Housing Act's protected classes – race, color, national origin, religion, sex, familial status, or disability.

Section 804(a) of the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent…, ***or otherwise make unavailable*** or deny, any dwelling to any person because of race, color, national origin, religion, sex, familial status, or handicap." (emphasis added)

Shortly after passage of Title VIII of the Civil Rights Act of 1968, which is the Fair Housing Act, all federal circuit courts that considered disparate impact unanimously upheld that violations of the Fair Housing Act can be established through a disparate impact standard of proof. By 1988 when the Fair Housing Act was amended to expand its scope, nine circuit courts of appeal had found the disparate impact standard necessary to enforce the law. Under the disparate impact standard, courts assess discriminatory effect and whether an action perpetuates segregation, whether the discrimination is justified, and whether less discriminatory alternatives exist for the challenged practice.

Two Antidiscrimination Laws Preceding Fair Housing Law Influence Court's Decision

The decision begins with an important reminder of the history of residential segregation by race. It then turns to two other antidiscrimination statutes that preceded the Fair Housing Act. The first is Title VII of the Civil Rights Act of 1964, which prohibits discriminating against people in protected classes in hiring, continued employment, compensation, and other employment-related topics. A key sentence in Title VII makes

it unlawful for an employer, “(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” (emphasis added) The 1971 Supreme Court case *Griggs v. Duke Power Co.* addressed disparate impact in employment. The Court in *Griggs* reasoned that the disparate impact standard furthered the purpose and design of Title VII, explaining “Congress proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”

The second law is the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful to discriminate on the basis of age. That statute also uses the phrase, “or otherwise adversely affect.” The Supreme Court again upheld the concept of disparate impact in the 2005 case of *Smith v. City of Jackson*. Referring to “or otherwise adversely affect” in both Title VII and ADEA, the Court observed that their texts “focus on the *effects* of the action on the employee rather than the motivation for the action of the employer and therefore compels recognition of disparate impact.” (emphasis in original)

In the present case, Justice Kennedy writes, “Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”

Although the phrase “or otherwise make unavailable” in the Fair Housing Act is not exactly like “or otherwise adversely affect” in Title VII and ADEA, the majority concludes that it contains language that “is equivalent in function and purpose.” Justice Kennedy writes, “Congress’ use of the phrase ‘otherwise make unavailable’ refers to the consequences of an action rather than the actor’s intent.” The decision states that in all “three statutes the operative text looks to results,” and “This results-oriented language counsels in favor of recognizing disparate impact liability.”

Congressional Intent

The similarity in the text and structure of Title VII, ADEA, and the Fair Housing Act “is all the more compelling given that Congress passed the Fair Housing Act in 1968 – only four years after passing Title VII and only four months after enacting the ADEA.” The decision adds, “It is of crucial importance that the existence of disparate impact liability is supported by amendments to the Fair Housing Act that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate impact claims… When it amended the Fair Housing Act, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text… Indeed, Congress rejected a proposed amendment that would have eliminated disparate impact liability for certain zoning decisions.”

Justice Kennedy continues, “Further and convincing confirmation of Congress’ understanding that disparate impact liability exists under the Fair Housing Act is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the Fair Housing Act as it had been enacted in 1968.”

Consistency with the Central Purpose of the Fair Housing Act

Another key aspect considered by the majority is that “Recognition of disparate impact claims is consistent with the Fair Housing Act’s central purpose. The Fair Housing Act, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation’s economy…These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate impact liability.”

A benefit of disparate impact noted by the decision is that it “has allowed private developers to vindicate the Fair Housing Act’s objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units.”

A particularly striking sentence reads, “Recognition of disparate impact liability under the Fair Housing Act also plays a role in uncovering discriminatory intent: It permits plaintiffs to *counteract unconscious prejudices* and disguised animus that escape easy classification as disparate treatment.” (emphasis added)

Limitations on Disparate Impact

Justice Kennedy writes, “disparate impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the Fair Housing Act…for instance if such liability were imposed based solely a showing of statistical disparity.”

Citing *Griggs*, the Justice declares, “Disparate impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.” He continues, “The Fair Housing Act 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.”

The Court states, “An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies…Housing

authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest."

NLIHC notes that HUD's disparate impact regulations allow just that. That rule standardizes a three-step "burden-shifting" approach that HUD has always used and that a majority of appeals courts have used.

- First, the party complaining that there is a discriminatory effect has the burden of proving that a practice caused, or predictably will cause, a discriminatory effect.
- Second, if the complaining party makes a convincing argument, then the burden of proof shifts to the defending party, which must show that the practice has a "legally sufficient justification," meaning it is necessary to achieve a substantial, legitimate, nondiscriminatory interest that cannot be served by another practice that has a less discriminatory effect.
- Third, if the defending party is successful, the complaining party can still succeed by demonstrating that the defending party's substantial, legitimate, nondiscriminatory interest could be served by another practice that has a less discriminatory effect.

Continuing with its discussion of limits to disparate impact, the majority notes, "It would be paradoxical to construe the Fair Housing Act to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable…The Fair Housing Act 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."

Later, the Court notes, it "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns."

Justice Kennedy declares, "a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's 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 thus protects defendants from being held liable for racial disparities they did not create."

"Without adequate safeguards at the prima facie stage, disparate impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."

Seemingly setting out a standard for lower courts, the decision states, "Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."

Reiterating *Griggs*, the decision declares, “Governmental or private policies are not contrary to the disparate impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”

Providing additional direction to lower courts, the opinion states, “It must be noted further that, even 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].” If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.”

Concluding the majority opinion, Justice Kennedy writes:

> “Much progress remains to be made in our Nation’s continuing struggle against racial isolation. In striving to achieve our ‘historic commitment to creating an integrated society,’ we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one black, one white – separate and unequal.’ The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”

The Supreme Court decision is easy for non-lawyers to read and understand. There is a four-page summary followed by Justice Kennedy’s 22-page opinion. The remaining 47 pages are two dissenting opinions. The decision is at
http://www.supremecourt.gov/opinions/14pdf/13-1371_m64o.pdf