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U.S. Supreme Court Decides Fair Housing Act Allows Disparate-Impact Claims

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Yesterday, the U.S. Supreme Court issued its opinion in *Texas Department of Housing and Community Affairs, et al. v. Inclusive Communities Project, Inc., et al.,* holding that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). The Inclusive Communities Project, Inc. ("ICP"), a Texas-based non-profit corporation that assists low-income families with obtaining affordable housing, brought a disparate-impact claim under the FHA against the Texas Department of Housing and Community Affairs (the "Department"), concerning certain federally funded low-income housing tax credits distributed by the Department to developers based on certain selection criteria. The ICP alleged that the Department and its officers allocated too many tax credits to housing in predominantly black inner-city areas – and too few tax credits in predominantly white suburban neighborhoods – thereby perpetuating segregated housing patterns in Texas. The ICP alleged that the Department must "modify its selection criteria in order to encourage the construction of low-income housing in suburban communities." The United States District Court for the Northern District of Texas determined that the ICP had demonstrated a prima facie case of disparate impact and, after assuming that the Department's proffered interests were legitimate, held that the Department "must prove 'that there are no other less discriminatory alternatives to advancing their proffered interests.'" The District Court ultimately ruled in favor of the ICP, finding that the Department failed to meet its burden of proof. The Fifth Circuit Court of Appeals held that disparate-impact claims are cognizable under the FHA but reversed, concluding that the District Court applied the wrong burden-shifting analysis. During the pendency of the Department's appeal, the Secretary of Housing and Urban Development ("HUD") issued a regulation interpreting the FHA to encompass disparate-impact liability; and establishing a burden-shifting framework for adjudicating such claims (*i.e.*, plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect" and, once a prima facie showing of disparate impact has been made, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests." If the defendant satisfies its burden, the burden then shifts back to the plaintiff to prove that the

"substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."). In its analysis, the Supreme Court considered instructive two of its earlier decisions addressing the viability of disparate-impact claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"), both of which the Court concluded authorized disparate-impact claims. In *Griggs v. Duke Power Co.* and *Smith v. City of Jackson*, the Court interpreted the language of Title VII and the ADEA, respectively, and determined that anti-discrimination laws such as these statutes "must be construed to encompass disparate-impact claims when their text refers to the consequences of actions [(*i.e.,*disparate impact)] and not just to the mindset of [the] actors [(*i.e.,* disparate treatment)], and where that interpretation is consistent with statutory purpose." The Court found that the "otherwise adversely affect" language in both Title VII and the ADEA focuses on the effects or consequences of the action, rather than on the intent or motivation behind the action and "therefore compels recognition of disparate impact liability." Turning to the FHA, the Court determined that the "otherwise make unavailable" language in the statute was equivalent in function and purpose to the "otherwise adversely affect" language in Title VII and the ADEA, and noted that Congress passed the FHA in 1968 – only four years after the passage of Title VII and only four months after the ADEA was enacted. The Court also considered significant the 1988 amendments to the FHA, wherein Congress amended the statute to create certain exemptions from liability and to include "familial status" as a further protected characteristic – amendments which the Court explained would be superfluous if Congress had assumed that only disparate treatment claims were cognizable – yet did not amend the "otherwise make unavailable" language in the statute even though by that time, all nine Court of Appeals to have addressed the issue had uniformly concluded that the FHA encompassed disparate-impact claims. The Court found this to be a convincing and crucial indication of Congress' acceptance and ratification that disparate-impact claims were indeed cognizable under the statute. Although the Court held that disparate-impact claims are cognizable under the FHA, it warned that "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," and that where a plaintiff fails to allege factual allegations at the pleading stage or produce statistical evidence demonstrating the required causal nexus, the plaintiff fails to establish a prima facie case of disparate impact thus warranting dismissal. The Court noted that defendants should be allowed leeway to "state and explain the valid interest served by their policies" – an analysis similar to the business necessity standard under Title VII – which would provide a defense against disparate-impact liability. That is, "an entity 'could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.'" The Court further cautioned that "[c]ourts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision," and that when such liability is found to exist, courts should fashion their remedial orders to ensure that they are consistent with the Constitution and that they "concentrate on the elimination of the offending practice that 'arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e].'" The Court explained that if additional remedial measures are adopted, courts should aim to fashion such measures to

eliminate racial disparities through race-neutral means. Justice Thomas dissented, opining that disparate-impact liability is “a rule without a reason, or at least without a legitimate one.” Justice Alito in his dissent predicted that this decision “will have unfortunate consequences for local, government, private enterprise, and those living in poverty.”

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