Fallout: Housing Discrimination and Disparate Impact After Inclusive Communities

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Fair Housing Act – Background

- Passed: 1968
- Multiple later amendments that expanded number of protected classes
  - Prohibits housing discrimination “because of” race, color, religion, national origin, sex, familial status, handicap (disability)
Fair Housing Act – Background

Two Primary Theories of Liability:

• Intentional Discrimination – most common
  – Definition: Individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated

• Disparate Impact – less common, complicated proof issues
  – Definition: a policy or practice which is neutral on its face but has a statistically significant negative effect on a group of persons protected by the non-discrimination law
Significance of Disparate Impact

• Need not show intent for disparate impact claims, theory imported from employment and other areas of law
• Claims based on statistics and expert analysis that suggest a rental housing policy has a discriminatory effect on a protected class
• But statistics don’t establish liability: If plaintiff makes out claim, courts look to defendant to show there is some legitimate grounds for action/policy
Significance of Disparate Impact

- By definition, disparate impact is used to challenge policies or practices that are neutral on their face but that have allegedly disproportionate impact on minorities.
- Due to socioeconomic realities in the US, almost any policy or practice may have a disparate impact on protected classes.
- As a result, disparate impact may expose housing providers to potential liability for otherwise “normal” operations and policies.

- Claim: Texas agency that allocated low income housing tax credits (LIHTC) used criteria that resulted in concentration of LIHTC development in minority communities, making it harder for minorities to locate affordable housing in non-minority communities.

• District court applied statistics and used burden-shifting:
  – Found that LIHTC housing was disproportionately allocated to minority communities: 92.29% of LIHTC units in Dallas in census tracts with less than 50% Caucasian residents.
  – Court concluded that concentration of LIHTC units in minority communities made it more difficult for plaintiff to develop housing in non-minority areas.
  – Texas agency did not contest disparity, so plaintiff made out “prima facie” case of disparate impact.

- Texas agency contended that it was forced to follow IRS rules that required most LIHTCs to be awarded to lowest-income tenants in “qualified census tracts”
- Court accepted that agency’s goals were bona fide and legitimate, but that it had not demonstrated that there were no less discriminatory alternatives to advance those interests
- Is it appropriate to find liability for governmental agency that is unquestionably complying with federal rules, where those rules have disparate impact?

- On appeal, Fifth Circuit upheld district court finding of liability for disparate impact
  - Court acknowledged that Fifth Circuit had not attempted to set legal standard for showing disparate impact
  - Fifth Circuit remanded the case to district court to apply the burden-shifting analysis developed in HUD regulations
  - Concurring opinion: Insufficient evidence of disparate impact shown

- Fall 2014: Supreme Court accepts certiorari petition to review Fifth Circuit’s decision
- Limits to one issue: Does Fair Housing Act recognize disparate impact liability?
  - Texas agency argued that express language of Fair Housing Act attacks discrimination “because of” protected class status, and does not address “effects” of discrimination
  - Recent SCOTUS decisions on other federal antidiscrimination statutes seem to turn on express language of the statute.
  - Does disparate impact lead to improper race-based decisions?
HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION (5-4)

• Upholds the existence of disparate impact under the Fair Housing Act
  – Disparate impact is consistent with past SCOTUS decisions
    • *Griggs* and *Smith* support disparate impact if statute refers to consequences of action, not just mindset of actors
    – “Making unavailable” “because of … race” includes *having the effect of* making unavailable.
  – 1988 amendments to FHAct presume that disparate impact exists
HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

• But recognizes that broad application of DI can have unintended and adverse consequences that actually result in opposite of what Congress intended and frustrate legitimate decisions by government entities and housing providers.

• Said the Court recognized that “disparate impact liability has always been properly limited in key respects.”

• Needs to allow “practical business choices and profit-related decisions that sustain a vibrant and dynamic free enterprise system”
Texas Dept. of Hous. And Comm. Affairs v. Inclusive Communities Project - Decision

HIGHLIGHTS OF KENNEDY’S MAJORİTY OPINION

• Recommends “safeguards” to protect “against abusive disparate impact claims”

1. Stresses “Robust Causality Requirement”
   – Mere statistical disparity is not sufficient to support DI, “racial imbalance does not, without more, establish a prima facie case. . .”
   – As part of its prima facie case, plaintiff must demonstrate that the challenged practice is the cause of the disparate impact
     • Without a causality requirement, providers will adopt racial quotas to avoid DI liability, which is suspect for equal protection reasons
     • Suggests that if multiple causes for disparity, no negative disparate impact
     • One time decision to build/not build may not be a “policy” at all
HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

2. Legitimate Policy as Defense

• Business must be given “leeway to state and explain the valid interest served by their policies.”
  – Stresses that if the defendant can show a legitimate basis for policy, plaintiff must demonstrate that there is an equally effective alternative that has less discriminatory impact
  – Recommends that housing providers in adopting a policy, make a statement explaining careful analysis and legitimate basis for their policy
Texas Dept. of Hous. And Comm. Affairs v. Inclusive Communities Project - Decision

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

3. A policy is not contrary to DI requirements unless it imposes artificial, arbitrary and unnecessary barriers
   • Does he intend this as a separate test that Plaintiffs must meet?

4. Burden on Plaintiff to show less discriminatory alternative
Texas Dept. of Hous. And Comm. Affairs v. Inclusive Communities Project - Decision

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

• Not clear how these “safeguards” will work out in practice
  – Maybe useful for litigants…But will they be helpful to providers in drafting their policies so as to avoid litigation later?
  – The Court said that remedial orders must “concentrate on the elimination of the offending practice” through “race-neutral means” – true with policies too?
  – How does this affect DI cases where race is not an issue (familial status, disability)?
HIGHLIGHTS OF ALITO’S DISSENTING OPINION

• Inconceivable that bona fide efforts to improve housing (rat infestation in *Magner*) can support DI claim

• Refutes each of Kennedy’s arguments:
  – Disparate impact was not included in 1968 text and nothing has happened since to change that
    • “Because of… race” requires intent
  – 1988 amendments did not assume DI exists
    • Solicitor General in 1988 said no disparate impact in FHAct
    • Don’t assume that failure of Congress to overturn law is acceptance of it.
HIGHLIGHTS OF ALITO’S DISSENTING OPINION

– DI can produce “unfortunate consequences” that frustrate legitimate policy decisions and goals of fair housing laws
  • “local governments make countless decisions that may have some disparate impact related to housing”
– Courts do not need disparate impact to sniff out claims of intentional discrimination
– Majority’s decision will encourage housing providers to take race into consideration in making policy decisions and that raises serious equal protection problems
HIGHLIGHTS OF THOMAS’ DISSENTING OPINION

• Challenges Kennedy’s reading of *Griggs*
  – Finding of disparate impact in *Griggs* was a mistake and Court should not compound the error
• Do not assume that all racial disparities are product of actual decisions or policies
  – Racial imbalances do not always disfavor minorities
• Disparate impact encourages government and private actors to engage in racial balancing, which is “patently unconstitutional”
• “Disparate impact is a rule without a reason, or at least without a legitimate one.”
Break for Questions

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Future of Disparate Impact

• Expect swift increase in number of cases challenging multiple policies and practices by housing providers, lenders, insurers, credit reporting agencies that have prima facia disparate impact on protected classes

• Effectively, expansion of disparate impact will result in expansion of “pseudo-protected classes” (high risk borrowers, convicted felons, persons with non-wage income, etc.) who can claim protections beyond those identified in Fair Housing Act, because of correlation between their class and classes expressly protected by Fair Housing Act
Future of Disparate Impact

• Leaves open details of how to prove disparate impact claims – understanding will evolve over time through future Court decisions
  – Burden of proof, amount of impact required, etc.

• Congress: Pressure to carve out exceptions and safe harbors from disparate impact?

In 2013, HUD adopted new regulations establishing rules to establish disparate impact liability in Fair Housing Act cases:

**Definition:** A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.
HUD Disparate Impact Regulation

Three-Step Burden Shifting Approach:

1. The Plaintiff (or charging party) must make a *prima facie* showing of either a disparate impact or a segregative effect.
2. If the discriminatory effect is shown, the burden of proof shifts to the respondent to show “legally sufficient justification.”
3. If the respondent satisfies the burden, then the charging party/plaintiff may still establish liability by proving that these substantial, legitimate, nondiscriminatory interests could be served by another practice that has a less discriminatory effect.
HUD Disparate Impact Regulation

“Legally Sufficient Justification”:
A practice or policy found to have a discriminatory effect may still be lawful if it has a “legally sufficient justification.”

1. A legally sufficient justification exists where the challenged practice:
   a) is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent; and
   b) those interests could not be served by another practice that has a less discriminatory effect.

2. A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.
HUD Disparate Impact Regulation

• Where does *Inclusive Communities* leave the HUD regulation?
  • HUD may view opinion as basic endorsement of its regulation…
  • But Kennedy is clearly concerned about need to demonstrate causation and protect housing providers so that legitimate and “profit-motivated decisions” are not second-guessed

• After *Inclusive Communities*, will HUD change rule to include safeguards or safe harbors?
  – HUD rule does not appear to require identifying a specific policy and showing causation

• HUD rule required defendant to show no less discriminatory practice but Court put burden on plaintiff to show available alternative practice which is less discriminatory and serves defendant’s legitimate needs.
Future of Disparate Impact

• Examples of future kinds of challenges:
  – Residency Preference
  – Drug/crime screening policies
  – Rental decisions based on source or type of income/income multipliers
  – Credit Screening
  – House rules (such as those affecting families)

• In all of these cases, providers may have sound, non-discriminatory reasons to impose neutral standards, but those standards may have disproportionately harmful impacts on protected classes
Decisions That Will Interpret Supreme Court Decision

- City of Los Angeles v. Wells Fargo
- Remand to District Court in Texas v. ICP
- American Insurance Assn. case (D.C. District Court)
- Property Casualty Insurers Assn. case (Illinois District Court)
What to do Now?

- Follow developments and stay current on what the decision means as it evolves
  - Identify new types of disparate impact claims
- Train employees to be sensitive to negative effects and being consistently fair
  - Be cautious about rules that focus on specific groups (like restricting children’s activities) or have broad prohibitions
- Housing and other industries press HUD for rule changes and safe harbors
What to do now?

- Disparate Impact Analyses
  - Review new/existing policies or practices
    - Not so much typical business decisions (like cable providers) but things like occupancy requirements, preferences and house rules
  - Identify and consider legitimate, nondiscriminatory reasons for changes
  - Consider less discriminatory alternatives
  - Document policy choices and rationales
Questions

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