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PERSPECTIVE

Disparate impact victory, but not complete

By Ralph W. Kasarda

On June 25, the U.S. Supreme Court handed down its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.*, holding that the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, encompasses claims for disparate impact. In other words, public and private entities whose practices and policies result in discriminatory effects can be subject to liability under the FHA, even when they acted without any discriminatory intent. But the decision should, in theory, make it more difficult for plaintiffs to bring abusive disparate-impact claims.

The case arose over efforts by the Texas Department of Housing and Community Affairs to distribute certain federal tax credits. Federal law offers tax credits to developers who build "qualified" low-income housing projects. Congress established this tax subsidy in 1986 to stimulate investment in low-income housing development and to increase the supply of decent and affordable housing. One objective of the law is to improve conditions of urban poverty and blight that afflict our inner cities. In other words, as the Supreme Court noted, "Federal law ... favors the distribution of these tax credits for the development of housing units in low-income areas. "

The Inclusive Communities Project, or ICP, sued the department claiming the distribution of credits in Dallas violated the FHA. ICP alleged that Texas disproportionately approved tax credits for units in minority-concentrated neighborhoods and disproportionately disapproved tax credit units in predominantly white neighborhoods. Frazier Revitalization Inc. intervened in the case to represent the interests of developers or organizations seeking to revitalize low-income neighborhoods. As one judge from the 5th U.S. Circuit Court of Appeals described the case, ICP is seeking a larger share of a fixed pool of tax credits at the expense of other low-income people who might prefer community revitalization. The Supreme Court granted review to decide one issue: whether the FHA encompasses claims for disparate impact.

The New york Times

The case quickly became a battleground concerning the expansion of disparate impact theory. On one side are those who believe disparate-impact claims are invaluable for carrying out one of the purposes of the FHA, to remedy segregated housing patterns — an effect of discrimination. On the other side are those who disfavor disparate impact theory. In the employment context, attempts to avoid disparate impact liability has lead public entities to engage in unconstitutional race-conscious decision-making, even intentional discrimination, in order to avoid being sued should their legitimate race-neutral practices be found to adversely and disproportionately affect minorities. That theory should not be extended to other statutes.

In the end, the court held that disparate-impact claims are cognizable under the Fair Housing Act upon considering (1) the FHA's results-oriented language; (2) the court's interpretation of similar language in Title VII and the Age Discrimination in Employment Act to allow claims for disparate impact; and (3) Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine courts of appeals, and the statutory purpose.

The result can be viewed as a victory — but not a complete victory — for those who champion disparate impact theory. The decision recognizes that doctrine may conflict with equal protection principles and offers a few important safeguards. First, a claim that relies on a statistical disparity must fail if the plaintiff cannot point to the defendant's specific practice or policy causing that disparity. A "robust causality requirement" ensures that any disparity does not establish a prima facie case of disparate impact, and will keep defendants from being held liable for racial disparities they did not create. This evidence can be costly to obtain and will most likely require expert witnesses.

Second, courts should give housing authorities and private developers "leeway" to state and explain the valid interest served by their policies. If developers and housing authorities are acting to further one of the goals of the FHA, they shouldn't have to worry about the threat of being sued. Plaintiffs should only prevail if a defendant's policy causes a disproportionate adverse effect that violates one of the act's purposes. Plaintiffs should not prevail if the result they seek would lead to segregated or substandard housing. The court noted that "if the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system."

If lower courts do not heed these limitations, then private and public entities should be concerned that plaintiffs will be encouraged to bring more disparate-impact claims. That would be unfortunate. The FHA applies not only to property owners, but to banks, realtors, appraisers, and insurers. Extending liability based on disparate impact to sellers and businesses engaged in real estate-related transactions will affect all facets of the nation's housing market, which is an integral part of our national economy.


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