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Supreme Court Upholds Disparate Impact Theory under FHA

The Supreme Court has ruled that disparate impact claims are recognized under the Fair Housing Act (FHA), *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc*., 2015 U.S. LEXIS 4249 (June 25, 2015). This is the first time the Supreme Court has formally endorsed the use of disparate impact theory in a housing discrimination case. "Disparate impact" occurs when a facially neutral policy or practice has in fact a disproportionate adverse impact on a prohibited basis group. There is no requirement to show that race-based considerations actually affected the thinking of the accused party.

The case involved an organization that assists low-income families eligible for Section 8 vouchers. The organization sued the Texas Department of Housing and Community Affairs (DHCA) claiming that the DHCA's allocation of tax credits resulted in a disparate impact. Specifically, the organization claimed that DHCA disproportionately approved tax credits for certain affordable housing developments in predominantly minority neighborhoods while it disproportionately denied tax credits for similar affordable housing developments in predominantly white neighborhoods.

Among other things, FHA provides that it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable . . . a dwelling to a person because of race." The Court noted that the use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. As such, this results-oriented language counsels in favor of recognizing disparate-impact liability. The Court did, however, place some limitations on the application of the disparate impact theory. According to the Court, a disparate impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. As such, courts are to "examine with care whether a plaintiff has made out a prima facie showing of disparate impact."

Note that an open question remains as to whether the Supreme Court's ruling may also apply to the Equal Credit Opportunity Act – that is, whether disparate impact can hold up in an ECOA claim. While this remains to be seen, lenders are reminded that the disparate impact doctrine has long been part of the official commentary to Regulation B and is widely accepted as law by banking regulators and the Consumer Financial Protection Bureau.

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18500 von karman avenue, suite 300, irvine, california 92612
phone: (800) 742-3600 • fax: (949) 474-0617
email: bcg@ablawyers.com • website: www.bankerscompliancegroup.com