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Expert Analysis

U.S. Supreme Court Upholds 'Disparate Impact' Theory in Housing

In *Texas Department of Housing and Community Affairs v. Inclusive Communities*, 2015 U.S. LEXIS 4249 (S. Ct. June 25, 2015), the U.S. Supreme Court upheld the use of the "disparate impact" theory in proving housing discrimination under the federal Fair Housing Act. That theory had been recognized by the vast majority of the circuit courts, including the U.S. Court of Appeals for the Second Circuit starting with its decision in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

Even though the decision in *Inclusive Communities* did not directly change the law in the Second Circuit or the other circuits that had recognized the "disparate impact" theory, the Supreme Court decision is significant because it did lay down guidelines for what the court would deem to be a proper use of the "disparate impact" theory. The Supreme Court also expounded on the purpose and strength of the federal Fair Housing Act with language that will likely see its way into briefs and future lower court decisions, even in cases that do not involve the "disparate impact" theory.

The "disparate impact" theory allows a person to bring a housing discrimination action under the Fair Housing Act without proving intentional discrimination. To establish a case under the "disparate impact" theory, a person must demonstrate the occurrence of outwardly neutral practices and policies and that those practices have a significantly adverse or disproportionate impact on persons of a particular protected class because of their membership in that class. For example, as was found by the Eastern District of New York in *MHANY Management v. Incorporated Village of Garden City*, 985 F.Supp.2d 390 (E.D.N.Y. 2013), a



By
Robert L. Schonfeld

municipality's change of zoning in a district to eliminate the potential for affordable rental multifamily units had a "disparate impact" on minorities.

As the Supreme Court noted in *Inclusive Communities*, a "disparate impact" claim cannot be sustained solely on a statistical disparity if a plaintiff cannot demonstrate that a particular policy caused that disparity. Moreover, as the Supreme Court suggested and as was held by the Second Circuit in *Regional Economic Community Action Program v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002), the "disparate impact" theory can only be used to challenge general policies and practices and not individual decisions of municipalities.

Dispute Over State Policy

Inclusive Communities stems from a dispute over a policy of a Texas state agency that disproportionately awarded low-income housing tax credits to entities developing housing in predominantly black inner city areas instead of in suburban communities. The *Inclusive Communities* plaintiffs argued that that policy constituted discrimination under the "disparate impact" theory of the Fair Housing Act because it purportedly caused continued segregation of housing patterns. Both the district court and the U.S. Court of Appeals for the Fifth Circuit, consistent with precedent, held that the plaintiffs' "disparate impact" claims were

cognizable under the Fair Housing Act, although the Fifth Circuit remanded the case back to the district court for a trial.

Texas filed a petition for a writ of certiorari on the question of whether "disparate impact" claims were cognizable under the Fair Housing Act, and the Supreme Court granted that petition. The Supreme Court had granted certiorari on the same issue in two earlier cases, *Magner v. Gallagher*, 132 S.Ct. 548 (2011) and *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action*, 133 S.Ct. 2824 (2013), but both of those cases settled prior to the oral argument before the Supreme Court. In an opinion delivered by Justice Anthony Kennedy, the Supreme Court by a 5-4 margin affirmed the order of the Fifth Circuit and held that "disparate impact" claims were cognizable under the federal Fair Housing Act.

The reasoning of the Supreme Court is not extraordinary. In finding that "disparate impact" claims could be brought under the Fair Housing Act, the court relied upon the fact that it had previously countenanced "disparate impact" claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and that the language in those two statutes regarding "disparate impact" was similar to that of the Fair Housing Act. The court also found significant the fact that Congress had enacted amendments to the Fair Housing Act in 1988 that did not address any issues pertaining to "disparate impact" even though Congress was aware that nine circuit courts had held by that time that "disparate impact" claims could be brought under the Fair Housing Act. The court also noted that the amendments enacted in 1988 assumed the existence of "disparate impact" claims under the statute.

Types of Cases

What is significant about the court's decision in *Inclusive Communities* is its

discussion of what types of cases lend themselves to the "disparate impact" theory and the language in the court's decision regarding the Fair Housing Act and segregation in general.

In its decision, the court specifically noted that "housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" were "at the heartland of disparate-impact liability." The court cited the decision of the Second Circuit in *Huntington Branch, NAACP* as an example of an appropriate use of the "disparate impact" theory. In *Huntington Branch, NAACP*, the Second Circuit held that the Town of Huntington's refusal to amend an ordinance restricting multifamily housing projects to largely minority urban renewal areas disparately impacted minorities.

Noting the findings of the district court that there was a shortage of affordable rental housing for low- and middle-income households in the town, that the impact of the shortage was three times greater on African-Americans than on the overall town population, and that the town had restricted new low-income housing to an area of the town that had a considerably greater percentage of minority residents than the town as a whole, the Second Circuit held that such evidence constituted an appropriate and convincing "disparate impact" claim under the Fair Housing Act.

In contrast to the Supreme Court's approval of the use of the "disparate impact" theory in cases involving exclusionary practices such as in *Huntington Branch, NAACP*, the court specifically held that the "disparate impact" theory could not be used to block a municipality from "achieving legitimate objectives, such as ensuring compliance with health and safety codes." The court noted as that type of case, *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), one of the cases cited above for which the Supreme Court had granted certiorari, but it was settled before the argument.

As discussed in detail at the beginning of Justice Samuel Alito's dissenting opinion in *Inclusive Communities*, *Gallagher* involved a municipality's aggressive enforcement of its codes to combat rodent infestation, missing dead-bolt locks, inadequate sanitation facilities and inoperable smoke detectors. While the Supreme Court cautiously did not directly opine on the merits of *Gallagher* since that case was not before the court, it appears that the court would not have approved of the use of the "disparate impact" theory in *Gallagher* and the fate of the "disparate impact" theory in general may have been entirely different had *Gallagher* rather than *Inclusive Communities* been the

case to decide its continued viability.

Even in cases involving health and safety codes rather than exclusionary zoning, housing advocates may have other tools. For example, in *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565 (2d Cir. 2003), the Second Circuit rejected a "disparate impact" challenge to a fire code that would have required major structural changes to a group home for people with disabilities. However, that court noted that the code could be challenged under a "reasonable accommodation" theory, which would have required a demonstration that an accommodation from the code's requirements was reasonable and necessary to afford the residents an "equal opportunity to use and enjoy" the residence.

It is also not clear whether the Supreme Court's decision in *Inclusive Communities* will have any impact on the New York City Human Rights Law. Chapter 1, §8-107(17) of the New York City Administrative Code pertaining to "disparate impact" contains different language from the Fair Housing Act, and it is possible that challenges to health and safety codes of the type involved in *Gallagher* and *Tsombanidis* could succeed under the New York City law.

As for the merits of the underlying case in *Inclusive Communities*, the Supreme Court was somewhat skeptical as to whether the "disparate impact" claims in that case would succeed. With regard to the issues involved in *Inclusive Communities*, the court stated that the case involved "a novel theory of liability" and that it "may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low income housing." The court noted that housing developers must be given latitude to consider market factors and zoning officials should be allowed to make decisions based on legitimate concerns, such as cost and traffic patterns.

Therefore, while the "disparate impact" theory survived the challenge to it in *Inclusive Communities*, the Supreme Court enunciated limitations to its usage in the future. Policies and laws that further segregation such as those challenged in *Huntington Branch, NAACP* will clearly be susceptible to a "disparate impact" challenge. Policies that are aimed at furthering legitimate health and safety objectives will not be susceptible to a "disparate impact" challenge. Those cases that do not fall clearly into either of those categories, such as *Inclusive Communities*, may still be sustainable under a "disparate impact" theory but will be considered on a case-by-case basis.

Big Picture

While it is not clear that the plaintiffs in *Inclusive Communities* will prevail when the case is tried, housing advocates will deem the Supreme Court's decision to be a victory against housing discrimination solely for the strong language used in the decision about the Fair Housing Act.

Besides acknowledging in its conclusion "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society," the Supreme Court's decision sets forth a detailed history of segregation in the United States. The court's opinion acknowledges that racially restrictive covenants, steering by real estate agents, and discriminatory lending practices such as redlining precluded minority families from being able to purchase homes in some communities. The court's decision states that by the 1960s, "these policies, practices and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs."

The court then notes the social unrest in the mid-1960s, President Lyndon Johnson's establishment of the Kerner Commission to determine the causes of social unrest, and the Kerner Commission's finding that social unrest was caused in part by residential segregation and unequal housing. The Kerner Commission recommended the enactment of a law like the Fair Housing Act to combat discrimination, Report of the National Advisory Commission on Civil Disorders, p. 263 (1968). As stated by the court, Congress enacted the Fair Housing Act in response to further unrest in the inner cities after the assassination of Dr. Martin Luther King, Jr. The court concluded that the Fair Housing Act "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 Supreme Court's notation that the enactment of the Fair Housing Act in 1968 was related to the assassination of Dr. King is particularly interesting. From the questions asked by Justice Kennedy at the *Inclusive Communities* argument in January, it appeared unlikely that he would ultimately deliver the court's opinion upholding "disparate impact." One can only wonder whether the subsequent events in Baltimore and concurrent media focus on segregation played a role in his support of the "disparate impact" theory.

In sum, housing advocates, housing developers, and municipalities can all find something to support in the Supreme Court's well-reasoned decision that enhances the power and viability of the Fair Housing Act.