

PUBLICATION

Supremes Expand Liability Under FHA

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On June 25, 2015, the Supreme Court of the United States, by a margin of 5-4, held that disparate impact claims are cognizable under the Fair Housing Act. *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 576 U.S. ____ (2015).

In light of this opinion, businesses who are subject to the FHA:

- Should review existing policies that are facially neutral but could arguably have a disproportionate impact on minorities or disabled individuals.
- Must be prepared to show a valid business interest for existing policies.
- Should consider new defense strategies on any pending FHA litigation including whether a plaintiff has made a sufficient *prima facie* showing of disparate impact.

Inclusive Communities Project (ICP), a Texas-based nonprofit corporation that assists low-income families to find affordable housing, sued the Texas Department of Housing and alleged the Texas agency caused continued segregated housing patterns by its disproportionate allocation of tax credits. Specifically, the Department was allegedly granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods.

The Supreme Court upheld the application of disparate impact under the FHA, in part, by comparing the language of the statute with similar language under Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA), both of which recognize disparate impact claims.

To establish a *prima facie* case of disparate impact, a plaintiff must allege facts or produce statistical evidence demonstrating a connection between a defendant's policy and the alleged discrimination. The Supreme Court urged lower courts to "examine with care whether a plaintiff has made out a *prima facie* showing of disparate impact..." The Supreme Court emphasized a "robust causality requirement" to "ensure that racial imbalance does not, without more, establish a *prima facie* case of disparate impact, thus protecting defendants from being liable for racial disparities they did not create."

The Court cautioned that a claim relying merely on a statistical disparity will fail if the plaintiff cannot point to a policy causing that disparity. Furthermore, like the "business necessity" standard under Title VII, defendants must be given an opportunity "to state and explain the **valid interest** served by their policies." This requirement appears more lenient than the standard advanced by the current Housing and Urban Development regulations, which require a defendant "to prov[e] that the challenged practice is necessary to achieve one or more **substantial**, legitimate, nondiscriminatory interests."

The Supreme Court also discussed the dangers posed by disparate impact liability and stressed that "disparate impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." The Supreme Court reasoned that, without adequate safeguards, disparate impact litigation would discourage private developers to no longer construct or renovate housing for low-income individuals, thereby undermining the purpose of the FHA as well as the free-market system.

Prior this decision, several federal courts concluded that the FHA encompassed disparate impact claims. Therefore, private businesses must proceed with caution in relying on older case law involving disparate impact claims under the FHA in light of this opinion.