Divided U.S. Supreme Court Holds Disparate Impact Claims Cognizable under FHA, but Subject to Safeguards Against Abusive Disparate Impact Claims

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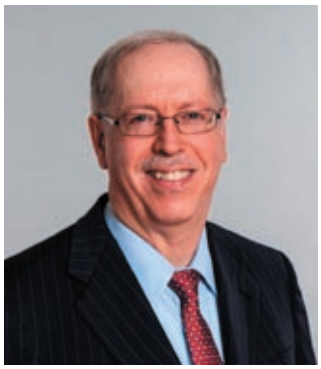

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I. Introduction

A sharply divided United States Supreme Court announced its decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc,*[1] on June 25, 2015. The Court held that disparate impact claims are cognizable under the Fair Housing Act (FHA).[2] Justice Kennedy wrote the majority opinion, in which Justices Ginsburg, Breyer, Sotomayor and Kagan joined. Justice Alito wrote a dissenting opinion, in which Chief Justice Roberts and Justices Thomas and Scalia joined. Justice Thomas also wrote a separate dissenting opinion.

II. Rationale of the Court

The Court stated that its holding, that disparate impact claims are cognizable under the FHA, was based upon "its results-oriented language, the Court's interpretation of similar language in Title VII and the [Age Discrimination in Employment Act (ADEA)], Congress' ratification of disparate impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals and the statutory purpose."[3]

With respect to the first consideration, the Court stated that "the phrase 'otherwise make unavailable'" in Section 804(a) was "of central importance to" its statutory construction analysis. The Court characterized this phrase as results-oriented language that "refers to the consequences of an action rather than the actor's intent" and is "equivalent in function and purpose to" the "otherwise adversely affect" language used in the disparate impact prongs of Title VII and the ADEA. The Court rejected the argument, advanced by the Texas Department of Housing and Community Affairs (TDHCA), that disparate impact liability was foreclosed by the phrase "because of race" used in the FHA. In so doing, the Court reasoned that the same phrase appears in the disparate impact prongs in section 703(a)(2) and 4(a)(2) of, respectively, Title VII and the ADEA, and the Court had previously held that disparate impact claims are cognizable under those prongs of Title VII and the ADEA.[4]

Additionally, the Court stated that "it is of crucial importance that the existence of disparate impact liability is supported by amendments to the FHA that Congress enacted in 1988." By the time these amendments were adopted, all nine Courts of Appeals to have considered the question had concluded that disparate impact claims were cognizable under the FHA. The Court noted that Congress was aware of this unanimous precedent when it enacted the FHA Amendments of 1988 and, "with that understanding, it made a considered judgment to retain the relevant statutory text." Accordingly, the Court stated that: "Congress' decision in 1988 to amend the FHA while still adhering to the operative language in [sections] 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the

1. 135 S.Ct. 2507 (June 25, 2015).

2. 42 U.S.C. §§ 3601 *et seq.*

3. *Inclusive Communities*, 135 S.Ct. at 2525.

4. *Id.* at 2517 – 20 (citing Griggs v. Duke Power Co., 401 U. S. 424 (1971), and Smith v. City of Jackson, 544 U. S. 228 (2005)).

unanimous holdings of the Courts of Appeals finding disparate impact liability."

The Court found "[f]urther and convincing confirmation of Congress' understanding that disparate impact liability exists under the FHA" in "the substance of the 1988 amendments." Specifically, the Court stated that the amendments included three "exemptions" from liability that would not "make sense if the FHA encompassed only disparate treatment claims."[5] Finally, the Court asserted that the recognition of disparate impact claims is consistent with the purpose of preventing discrimination in housing because it "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[6]

III. Safeguards Against Abusive Disparate Impact Claims

Having concluded that disparate impact claims are cognizable under the FHA, the Court proceeded to discuss at length limitations on disparate impact liability that "are necessary to protect potential defendants against abusive disparate impact claims," such as a "robust causality requirement" that would doom a claim based upon a statistical disparity "if the plaintiff cannot point to a defendant's policy…causing that disparity."[7] In this regard, the Court stated that disparate impact liability "has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity."[8]

At the outset of the majority opinion, Justice Kennedy describes a disparate impact claim as one that challenges practices that have a disproportionately adverse effect on minorities "and are otherwise unjustified by a legitimate rationale." The Court's subsequent discussion of the limitations on disparate liability claims includes the following observations and points of emphasis:

- A disparate impact claim based upon a statistical disparity "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[9] Those engaged in the motor vehicle sales finance business should read this statement, as well as the related discussion below of a robust causality requirement and other safeguards, in conjunction with a recent article by Ballard Spahr attorneys regarding substantive lessons learned from class certification decisions involving alleged disparate impact claims.[10]

- This "robust causality requirement" ensures that a mere racial imbalance, standing alone, does not establish a prima facie case of disparate impact, thereby protecting defendants "from being held liable for racial disparities they did not create."[11]

- Without adequate causality safeguards at the prima facie stage, race might be used and considered "in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."[12]

- Courts "must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important." "A plaintiff who fails to allege facts at the pleading stage or produce evidence demonstrating a causal connection" between the alleged policy and the disparity "cannot make out a prima facie case of disparate impact."

- Disparate impact liability does not mandate the displacement of valid governmental or private policies, only the removal of "artificial, arbitrary, and unnecessary barriers."[13]

- Housing authorities and private developers "must…be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest." The FHA does not mandate "a particular vision of housing development" or "put housing authorities and private developers in a double bind of liability, subject[ing] them to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities." Notably, the Court stated that "[e]ntrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective…and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute

5. *Id.* at 2520.

6. *Id.* at 2522.

7. *Id.* at 2523.

8. *Id.* at 2522.

9. *Id.* at 2523.

10. *See, e.g.,* Peter N. Cubita, Christopher J. Willis & Jonathan E. Selkowitz, *Auto Finance and Disparate Impact: Substantive Lessons Learned from Class Certification Decisions*, 18 No. 21 Cons. Fin. Services L. Rep. 3 (May 1, 2015) (discussing seminal class certification decisions that identified significant flaws in the underlying theory of liability with respect to disparate impact claims based upon an asserted "policy" of "allowing" discretionary decision-making).

11. *Inclusive Communities*, 135 S.Ct. at 2523 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e - 2(k)).

12. *Id.* (citing *Wards Cove Packing Co.*, 490 U.S. at 653).

13. *Id.* at 2522 & 2524 (citing *Griggs*, 401 U.S. at 431).

to a community's quality of life and are legitimate concerns for housing authorities."[14]

- Unless the standards "for proceeding with disparate-impact suits [include] at least the safeguards" discussed by the Court, "then disparate-impact liability might displace valid governmental and private priorities" rather than only removing "artificial, arbitrary, and unnecessary barriers."[15]

- *Inclusive Communities* involves a novel theory of disparate impact liability that might, on remand, "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."[16] As the Court noted, as a general matter it is by no means clear that "a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa."[17]

- Remedial orders in disparate impact cases should be focused on eliminating the offending practice and, if additional measures are adopted, courts should "design them to eliminate racial disparities through race-neutral means."[18]

The extensive discussion of limitations on disparate impact liability is consistent with the assertion, made earlier in the opinion of the Court, that *Griggs* and *Smith* "teach that disparate-impact liability must be limited so that 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." Significantly, the Court also stated that, before rejecting a business justification for a challenged practice, "a court must determine that *a plaintiff has shown* that there is 'an available alternative…practice that has less disparate impact and serves the [entity's] legitimate needs.'"[19]

The limitations on disparate impact liability that the Court characterized as "necessary to protect against abusive disparate-impact claims" are more protective of defendants and charged parties than the burden-shifting framework reflected in the Department of Housing and Urban Development's (HUD) Disparate Impact Rule.[20] Query whether HUD will amend its Disparate Impact Rule to reflect these safeguards against abusive disparate impact claims and eliminate any inconsistencies with them.

IV. The Principal Dissenting Opinion

The compelling dissenting opinion written by Justice Alito is a tour de force, meriting the Court's characterization of it as "the well-stated principal dissenting opinion in this case."[21] It begins with the statement that "[n]o one wants to live in a rat's nest," which is the segue into the poster child for disparate impact run amok -- the assertion in *Magner v. Gallagher* that the policy of "aggressive enforcement of the Housing Code" was actionable under the FHA "because making landlords respond to Housing Code violations increased the price of rent."[22] Thus, the good-faith efforts of a municipality to "ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit" premised on statistics indicating that minorities were disproportionately affected by the rent increases.

Justice Alito thus notes appropriately that, "[s]omething has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit."[23] In response to this example of a disparate impact claim that was far afield from the facially neutral practice at issue in *Griggs*, the majority merely says that "*Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability."[24] As noted previously, however, the majority opinion also stated that the very case before it involved a novel theory of disparate impact liability that might, on remand, "be seen simply as an [inappropriate] attempt" to second-guess a housing authority's discretionary choice between two reasonable approaches for allocating tax credits for low-income housing.[25]

The dissenting opinion of Justice Alito, which is eleven pages longer than the majority opinion, rebuts the key points made by Justice Kennedy in the majority opinion. Having done so, Justice Alito concludes as follows: "By any measure, the Court today makes a serious mistake."[26]

V. Dissenting Opinion of Justice Thomas

Justice Thomas, who joined Justice Alito's dissent in full, also wrote a separate dissenting opinion "to point out that the foundation upon which the Court builds its latest disparate-impact regime – *Griggs v. Duke Power Co.*, – is made of sand."[27] For reasons explained

14. *Id.* at 2523.

15. *Id.* at 2522 & 2524 (*see supra* note 13).

16. *Id.* at 2522.

17. *Id.* at 2523.

18. *Id.* at 2524.

19. *Id.* at 2518 (quoting Ricci v. DeStefano, 557 U. S. 557, 578 (2009) (emphasis added)).

20. *See* the HUD Disparate Impact Rule, 24 CFR § 100.500.

21. *Inclusive Communities*, 135 S.Ct. at 2524.

22. *Id.* at 2532 (Alito, J. dissenting).

23. *Id.* (Alito, J. dissenting).

24. *Id.* at 2524.

25. *Id.* at 2522.

26. *Id.* at 2551 (Alito, J. dissenting).

27. *Id.* at 2526 (Thomas, J. dissenting) (citing *Griggs,* 401 U.S. 424 (1971)).

in his exegesis on the historical origins of the disparate impact theory of liability under Title VII, Justice Thomas advocates "drop[ping] the pretense that *Griggs'* interpretation of Title VII was legitimate" and states that he "would not amplify its error by importing its disparate-impact theme into yet another statute."[28] Coming, as it does, from a former chairman of the Equal Employment Opportunity Commission, the conclusion reached by Justice Thomas with respect to *Griggs* is remarkable: *Griggs* "shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy prefer ences, *Griggs* bears little relationship to the statutory interpretation that we should expect from a court of law."[29]

VI. Implications with Respect to the ECOA

While *Inclusive Communities* holds that disparate impact claims are cognizable under the FHA, it does not resolve the question of whether disparate impact claims are cognizable under the Equal Credit Opportunity Act (ECOA).[30]

The basis for the *Inclusive Communities* holding with respect to the FHA, which is summarized at the end of Section II of the majority opinion, serves to highlight material differences between the FHA and the ECOA. The Court said, for example, that "the phrase 'or otherwise make unavailable' is of central importance to" its analysis.[31] This is the language that the Court characterized as the "results-oriented language [that] counsels in favor of recognizing disparate-impact liability."[32] The phrase "or otherwise make unavailable" does not appear in the ECOA discrimination proscription. The ECOA declares it unlawful "for any creditor to discriminate against any applicant…on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract."[33]

The Court also said that "it is of critical importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988." This "critically important" fact is likewise inapplicable to the ECOA, as is the reference to "Congress' ratification of disparate-impact claims [under the FHA] in 1988 against the backdrop of the unanimous view of nine Courts of Appeals…."[34]

The statutory purpose rationale is a fourth-tier rationale that was identified in the context of the FHA -- a statute that the Court first emphasized contained the phrase "or otherwise make unavailable" and three "exemptions" that the Court concluded contemplated a disparate impact proscription. It is axiomatic, however, that the purpose of each statute should be analyzed individually in relation to what the statute actually says about its scope and purpose.

In this connection, it is one thing to say that the purpose of a statute with the provisions that the Court characterized as of "critical" and "central" importance to its statutory construction analysis is furthered by allowing disparate impact claims. It is another thing entirely to make that assertion with respect to a statute that does not have those provisions. We submit that making an assertion of that nature without first analyzing the nature of the discrimination proscription would be tantamount to assuming the ultimate conclusion without pausing to examine what the statute actually says about the subject.[35]

28. *Id.* (Thomas, J. dissenting).

29. *Id.* at 2532 (Thomas, J. dissenting).

30. *See generally* Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact – Interpreting the Meaning of the Words That Actually Are There*, 61 Bus. Law. 829 (2006).

31. *Inclusive Communities*, 135 S.Ct. at 2518 (emphasis in original).

32. *Id.* (citing *Smith*, 544 U.S. at 236).

33. 15 U.S.C. § 1691(a)(1).

34. *Inclusive Communities*, 135 S.Ct. at 2519 – 20.

35. *See* Alexander v. Sandoval, 532 U.S. 275, 286 n.6 (2001) ("We cannot help observing, however, how strange it is to say that disparate-impact regulations are inspired by, at the service of, and inseparably intertwined with [section] 601 [of the Civil Rights Act of 1964 relating to discrimination in any covered program or activity "on the ground of race, color, or national origin"], when [the section] 601 [prohibition against intentional discrimination] permits the very behavior that the regulations forbid.") (internal quotations and citations omitted).