



COMMENTARY

Disparate Impact One Year After *Inclusive Communities*

Amy M. Glassman and Shanellah Verna

I. Introduction	12
II. Background	12
III. Regulatory Updates.....	14
IV. Litigation Updates.....	16
A. Housing Cases.....	16
1. <i>Inclusive Communities Project, Inc. v. Texas Department of Housing & Community Affairs</i>	16
2. <i>Burbank Apartments Tenant Association v. Kargman</i>	16
3. <i>Ellis v. City of Minneapolis</i>	17
4. <i>Azam v. City of Columbia Heights</i>	17
5. <i>Long Island Housing Services, Inc. v. Nassau County Industrial Development Agency</i>	18
6. <i>R.I. Commission for Human Rights v. Graul</i>	18
B. Employment Discrimination Cases	19
1. <i>Sneed v. Strayer University</i>	19
2. <i>Smith v. City of Boston</i>	19
3. <i>O’Neal v. Oregon Department of Justice</i>	19
4. <i>Abril-Rivera v. Johnson</i>	20
C. Cases to Watch.....	20
1. <i>American Insurance Association v. U.S. Department of Housing and Urban Development</i>	20
2. <i>Avenue 6E Investments, LLC v. City of Yuma</i>	21
3. <i>City of Miami v. Bank of America Corp.</i>	21
4. <i>City of Los Angeles v. Wells Fargo & Co.</i>	22
5. <i>Cobb County. v. Bank of America Corp.</i>	22
6. <i>Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC</i>	23
V. Conclusion	24

Amy M. Glassman (glassmana@ballardspahr.com) is a partner and Shanellah Verna (vernas@ballardspahr.com) is an associate with the Washington, D.C., office of Ballard Spahr LLP.

I. Introduction

Approximately one year ago, the U.S. Supreme Court confirmed in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*¹ that disparate impact claims are cognizable under the Fair Housing Act (FHA). Prior to that decision, nearly all federal appellate courts had recognized FHA claims for disparate impact and, in 2013, the U.S. Department of Housing and Urban Development (HUD) issued a regulation on the topic. By some accounts, *ICP* might have had little actual impact. The Court, however, devoted lengthy discussion to the limitation of disparate impact liability. This article highlights HUD actions and disparate impact litigation in lower courts since the *ICP* decision. Although there have been a range of disparate impact claims since *ICP*, our review of those cases suggests that the guidance of the *ICP* case is creating difficulty for many plaintiffs to make a *prima facie* showing of disparate impact.

II. Background

The FHA prohibits housing discrimination based on a person being a member of a protected class.² More specifically, the FHA makes it unlawful to refuse to sell, rent, finance, or otherwise deny or make unavailable a dwelling on the basis of one's race, color, religion, sex, disability, familial status, or national origin.³ The FHA includes several components. First, and most commonly, the FHA bans intentional discrimination (also referred to as disparate treatment) where individuals of a protected group are treated less favorably than others similarly situated. Next, the FHA recognizes and prohibits actions having disparate impact, meaning facially neutral practices that have a discriminatory effect on a protected class regardless of any evidence of intent to discriminate. Lastly, the FHA requires entities receiving funding from the HUD to take affirmative and meaningful actions to further fair housing.

In February 2013, HUD issued a final rule⁴ (the HUD Rule) expressly establishing HUD's approach to disparate impact liability under the FHA. Under the HUD Rule, "a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."⁵

1. 135 S. Ct. 2507 (2015).

2. 42 U.S.C. §§ 3601 *et seq.*

3. 42 U.S.C. §§ 3601 *et seq.*

4. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11459, 11460 (Feb. 15, 2013); 24 C.F.R. § 100.500.

5. 24 C.F.R. § 100.500(a).

The HUD Rule creates uniform procedural requirements for pleading a disparate impact case. Using a burden shifting framework, the plaintiff or charging party alleging an FHA violation under a disparate impact theory must first make a prima facie showing that the challenged practice “caused or predictably will cause a discriminatory effect.”⁶ If that burden of proof is met, the defending party must prove that the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.⁷ If met, liability may still be imposed if the plaintiff or charging party can prove that those interests could be served by an alternative practice with a less discriminatory effect.⁸

In *ICP*, the Texas Department of Housing and Community Affairs (TDHCA) was accused of allocating low income housing tax credits (LIHTC) for non-elderly developments disproportionately to high minority concentration. Although TDHCA argued that its procedures followed Internal Revenue Service rules requiring preferences for LIHTCs in low-income Qualified Census Tracts, the plaintiffs maintained that the practice made it difficult to house minority residents in other communities. The district court ruled in favor of ICP on the disparate impact claim, finding that however legitimate the intent, TDHCA failed to demonstrate its allocation practices served a compelling government interest or that there was no less discriminatory alternative—a burden of proof slightly different from what the HUD Rule provides. On appeal, the Fifth Circuit adopted the HUD Rule and agreed that disparate impact can be recognized under the FHA, but remanded the case to the district court for evaluation consistent with the HUD Rule. The Supreme Court granted certiorari solely to consider the disparate impact question in the case. In a five-to-four verdict, the Supreme Court ruled that there was a cognizable disparate impact claim under the FHA, citing to the wording and overall purpose of the FHA as well as congressional intent found in 1988 FHA Amendments to support its conclusion.

The Court’s opinion also discussed the limitation of disparate impact claims at length. The Court emphasized that disparate impact claims must be supported by more than statistical disparities and that plaintiffs must prove that a “robust causality” exists between the evidence presented and the challenged practice in order to make a prima facie case. This robust causality requirement protects defendants from liability for disparities that are not clearly connected with their policies and ensures that defendants do not resort to the use of racial quotas as a remedial measure.⁹ The Court also stated that disparate impact challenges should not

6. 24 C.F.R. § 100.500(c)(1)

7. 24 C.F.R. § 100.500(c)(2).

8. 24 C.F.R. § 100.500(c)(3).

9. *Tex. Dep’t of Housing & Cmty. Affairs v. Inclusive Cmty. Proj., Inc.*, 135 S. Ct. 2507, 2523 (2015).

prevent governments from achieving legitimate objectives and that policies are not contrary to the disparate impact requirement unless they create “artificial, arbitrary, and unnecessary barriers.”¹⁰

Following the *ICP* decision, the anticipated legal consequences and questions were vast. From a regulatory standpoint, some felt that Congress might feel pressure to carve out new statutory exceptions to disparate impact liability under the FHA. Although the HUD Rule on disparate impact provided the overall pleading framework, questions remained as to how to prove disparate impact claims and whether HUD would revise the HUD Rule to address safeguards and causation requirements. In terms of litigation, many wondered if the verdict would increase the overall number of cases challenging various housing practices or other well-intentioned policies with potential impacts on protected classes and whether there would be an expansion of pseudo-protected classes claiming the same FHA protections.

The remainder of this article examines the regulatory and litigation updates that have taken place in the past year.

III. HUD Regulatory Updates

Since the *ICP* verdict, HUD has not issued any changes to the HUD Rule. However, in April 2016, HUD’s Office of General Counsel released guidance on how the FHA applies to the use of criminal history by housing providers and other operators of housing and to real estate transactions (HUD Criminal History Guidance).¹¹ The HUD Criminal History Guidance examines how the burdens of proof outlined in the HUD Rule apply in the context of disparate impact and disparate treatment liability. Highlighting statistics that show African Americans and Hispanic persons suffer disproportionate rates of arrest, convictions, and incarceration compared to the rest of the nation’s population, the HUD Criminal History Guidance refers mostly to disparate impact on the basis of race and national origin, but recognizes that the same analysis would apply to discrimination on account of membership in any other protected class.¹²

The HUD Criminal History Guidance walks through a disparate impact analysis applicable to criminal records checks, using the burden shifting approach of the HUD Rule. The first step of the disparate impact analysis requires proof that a criminal history policy or practice has a discriminatory effect. Depending on the nature of the claim and relevant

10. *See id.* at 2522, 2524, 2543.

11. *See* Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions [hereinafter HUD Criminal History Guidance], http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf.

12. The HUD Criminal History Guidance also discusses the burdens of proof for disparate treatment cases, but this section will focus only on disparate impact.

facts, plaintiffs can present state, local, or national statistics on racial and ethnic disparities and additional evidence such as applicant data, tenant files, local criminal justice, or census demographic data to make their prima facie case.¹³

Once the burden shifts to housing providers to justify the challenged policy or practice, they must prove both that there is a substantial, legitimate, nondiscriminatory interest to support the policy and that the challenged policy actually achieves that interest.¹⁴ The HUD Criminal History Guidance warns that, although housing providers commonly argue that criminal history policies are needed for the protection of other residents and their property, they must be able to prove through reliable evidence, and not just generalized statements and stereotypes, that making decisions based on criminal history actually contributes to resident and property safety.¹⁵ Policies of excluding individuals from housing based on one or more records of prior arrest not resulting in a conviction cannot satisfy the housing provider's burden of proof.¹⁶ General prohibitions imposed against any persons with any conviction record without consideration of individualized facts or circumstances will also fail to meet the burden of proof. Similarly, a prohibition that would exclude persons based on specific types of convictions but do not take into account the amount of time passed since the conviction, the severity of the offense, or the person's behavior since the conviction is unlikely to satisfy that burden of proof because the housing provider cannot show that the practice serves a "substantial, legitimate, nondiscriminatory interest." Although HUD acknowledged that a statutory exemption from disparate impact liability exists where a housing provider excludes individuals due to conviction for the illegal manufacturing or distribution of certain controlled substances, there is no such exemption to disparate impact claims based on exclusions due to drug arrests or drug possession.¹⁷ There is also a statutory prohibition in the HUD-assisted housing program on admitting applicants into housing who are subject to a lifetime sex offender registration requirement, who were convicted of manufacturing methamphetamine in assisted housing, or persons evicted from federally assisted housing for drug-related criminal activity in the past three years.¹⁸

Lastly, HUD suggests that although identifying less discriminatory alternatives will vary by case, evaluating mitigating factors in one's personal and criminal records and/or delaying consideration of criminal history until after other qualifications are verified would likely produce

13. HUD Criminal History Guidance, *supra* note 11, at 3–4.

14. *Id.* at 4.

15. *Id.* at 4–5.

16. *Id.* at 5.

17. *Id.* at 8.

18. See 42 U.S.C. §§ 1437n, 13663.

fewer discriminatory effects than general prohibitions.¹⁹ We note this approach is generally consistent with that mandated for the public and Section 8 housing programs.²⁰

IV. Litigation Updates

In the year since the *ICP* verdict, courts across the county have adjudicated a variety of disparate impact cases, many of them largely falling into housing or employment discrimination categories. This section will briefly summarize a selection of those cases and will highlight several pending cases to watch in the near future.

A. Housing Cases

1. *Inclusive Communities Project, Inc. v. Texas Dep't of Housing & Community Affairs*²¹

On remand, the U.S. District Court for the Northern District of Texas reconsidered whether ICP established a prima facie case for disparate impact in light of the HUD rule and the causation requirements in the Supreme Court verdict. In August 2016, the court ultimately dismissed the disparate impact claims against TDHCA finding that (1) a generalized policy of discretion could not be the basis of a disparate impact claim; (2) ICP failed to display a robust causal connection between TDHCA's practices and statistical racial disparities in housing; and (3) ICP's claim, however worded, was essentially a complaint for disparate treatment rather than disparate impact.

2. *Burbank Apartments Tenant Association v. Kargman*²²

In this case, the principals and owners of the Burbank Apartments complex decided they would not renew Burbank's Section 8 Housing Assistance Payments (HAP) contract with HUD upon expiration of their subsidized mortgage contract term, but would accept enhanced Section 8 vouchers instead. The plaintiffs, comprised of current and potential building residents, brought suit under a disparate impact theory, alleging that the defendants' decision had a disproportionately negative impact on people of color, disabled persons, female-headed households, families with children, the elderly, and recipients of welfare assistance.

At issue was whether defendant's decision not to renew the project-based HAP contracts in favor of tenant-based Section 8 subsidies could be the basis of a disparate impact claim. Applying the burden shifting framework laid out in the *ICP* case and the HUD Rule, the Supreme Judicial Court found that plaintiffs did not meet their burden of proof because the allegations failed to meet the robust causality requirement. The

19. HUD Criminal History Guidance, *supra* note 11, at 7.

20. See 24 C.F.R. § 5, subpart I; 24 C.F.R. § 960.204; 24 C.F.R. § 982.553.

21. 2016 U.S. Dist. LEXIS 114562 (N.D. Tex., Aug. 26, 2016).

22. 48 N.E. 3d 394 (Mass. 2016).

plaintiffs could not demonstrate that the decision not to renew the HAP contracts had any negative impact—indeed, the enhanced vouchers allowed any tenants who wanted to remain on site or to move off-site to do so—nor did they prove that the statistical disparity was caused by the defendants’ policy. Citing to the *ICP* case, the court explained that a policy would be contrary to disparate impact rules if it created artificial, arbitrary, and unnecessary barriers that create discriminatory effects or perpetuate segregation. In making its ruling, the court also determined that despite the similarities in the language and intent of the FHA and Title VII of the Civil Rights Act, the FHA carries a heightened pleading requirement for disparate impact cases.

3. *Ellis v. City of Minneapolis*²³

In this case, landlords brought an action against the City of Minneapolis arguing that the city’s facially neutral housing policies, e.g., stricter housing and enforcement standards for low income rental in high poverty areas, had a disparate impact on protected classes. The court granted the city’s motion to dismiss the case, finding that under the *ICP* pleading standard, the city needed only to demonstrate a legitimate government interest to uphold its policies. The court found that the city’s desire to comply with health and safety codes qualified as a legitimate interest.

The plaintiffs previously argued incorrectly that the government needed a compelling interest to uphold its policies and also failed to articulate the plausible causation between the city’s housing policies and racial disparities.

The plaintiffs amended and re-alleged their disparate impact complaint in the fall of 2015, where the court again granted the city’s motion for judgment on the pleadings. The court again found that the plaintiffs had not grasped the pleading standard and robust causality requirements in *ICP* because the amended complaint failed to produce proper evidence that demonstrated a causal connection between the city’s policies and the discriminatory effects.

4. *Azam v. City of Columbia Heights*²⁴

The plaintiff landlord rented rooms in a multi-unit apartment building; when he failed to improve his building to meet the city’s health and safety codes, the city revoked his rental licenses. The district court granted the city’s motion for summary judgment on the disparate impact claim because the plaintiff failed to make a *prima facie* showing that city policies or practices had a discriminatory effect. The plaintiff simply alleged a sole instance of discrimination, which was not enough to evidence a city-wide practice or policy. The plaintiff also failed to show that there was a viable

23. No. 14-CV-3045(SRN/SER), 2016 U.S. Dist. LEXIS 40750 (D. Minn. Mar. 28, 2016).

24. No. CV 14-1044 (JRT/BRT), 2016 WL 424966 (D. Minn. Feb. 3, 2016).

and less discriminatory alternative practice by which the city could still achieve its interest in complying with local health and safety codes.

5. *Long Island Housing Services, Inc. v. Nassau County Industrial Development Agency*²⁵

The plaintiffs alleged that the city's affordable housing ordinance, which included age restrictions and a residency preference, had the effect of excluding middle-aged and non-white persons from eligibility and thus constituted unlawful housing discrimination and a violation of the FHA. The complaint alleged that the Industrial Development Agency (IDA) provided tax credits to housing projects on the condition that the projects apply the allegedly discriminatory city ordinance to affordable housing unit rentals. The plaintiffs also contended that, despite warning from the mayor of the ordinance's disparate impact, the IDA willingly insisted that the housing project continue to apply age requirements and residency preferences established by the allegedly discriminatory ordinance. The district court denied the defendant's motion to stay discovery, finding that the plaintiff's allegations, if true, would satisfy the causation requirement of *ICP* by showing sufficient connection between the challenged practice and the disproportionately adverse effect.

6. *R.I. Commission for Human Rights v. Graul*²⁶

After a Rhode Island couple gave birth to their first child, their landlord, claiming that the building's occupancy limits precluded more than two persons in a one-bedroom apartment, sent a letter requiring them to either move from their one-bedroom unit to a larger apartment or face eviction. The couple filed a housing discrimination complaint with the Rhode Island Commission for Human Rights, which in turn brought the lawsuit against the landlord alleging disparate impact discrimination due to the couple's familial status in violation of the FHA and state fair housing laws.

The district court granted the plaintiff's partial motion for summary judgment, following the *ICP* requirements for evaluating disparate impact claims. The court found that (1) the plaintiff met its burden through expert statistical evidence showing disproportionate impact of the occupancy policies on families with children versus families without children, and (2) the defendants' unreasonably flawed interpretation of applicable building codes and other defenses were insufficient business justifications to overcome the disparate impact. The parties entered a settlement agreement on June 6, 2016.

25. No. 14-CV-3307, 2015 WL 7756122 (E.D.N.Y. Dec. 1, 2015).

26. 120 F. Supp. 3d 110 (D.R.I. 2015).

B. Employment Discrimination Cases

To determine whether disparate impact liability exists under the FHA, the Supreme Court relied heavily on similar wording, intent, and interpretations of Title VII and landmark employment discrimination cases.²⁷ As a result, the *ICP* opinion also carried implications for Title VII discrimination cases going forward. Various courts began citing to the *ICP* decision in addition Title VII case precedent when adjudicating disparate impact claims, particularly focusing on the *ICP*'s burden shifting analysis when assessing causation or the business justifications of challenged employer practices. This section highlights select employment discrimination cases decided since the *ICP* verdict.

1. *Sneed v. Strayer University*²⁸

In 2014, the plaintiff sued his former employer alleging Title VII disparate impact based on age and race after the employer closed the plaintiff's branch facility and did not transfer him elsewhere. The district court granted the defendant's motion for summary judgment, finding that the plaintiff could not meet the causality requirement articulated in the *ICP* case for his Title VII disparate impact claims. The plaintiff based his allegations on the defendant's one-time decision to close the facility, an action that alone cannot establish the existence of a discriminatory policy or practice. In attempting to prove his prima facie case, the plaintiff pointed to statistical data of minority employee terminations, but could not demonstrate that the impact or statistical disparity of the terminations was caused by the facility closing.

2. *Smith v. City of Boston*²⁹

This Title VII discrimination suit involved black police sergeants claiming that the multiple choice lieutenant exam had racially disparate impact on minorities because blacks passed at lower rate than whites. Citing to the *ICP* decision, the district court maintained that the statistical disparity, without causation, was not enough to support the claim.

3. *O'Neal v. Oregon Department of Justice*³⁰

The plaintiff filed a Title VII gender discrimination suit against the Oregon State Department of Justice related to the state's collection and enforcement of child support payments. The plaintiff failed to show the causal connection between the defendant's collection of child support payments in that instance and statistical data showing that the state collected child support payments from more men than women. Here as

27. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. §§ 2000e et. seq.

28. No. 1:15-CV-0004-GBL-IDD, 2016 U.S. Dist. LEXIS 29894 (E.D. Va. 2016).

29. 144 F. Supp. 3d 177 (D. Mass. 2015).

30. No. 3:15-CV-00773-SI, 2015 WL 7722413 (D. Or. 2015).

well, the district court noted that under *ICP*, statistical disparity alone without a causal link to the defendant's policy is not enough to succeed on a disparate impact claim.

4. *Abril-Rivera v. Johnson*³¹

This case involved Title VII employment discrimination challenge based on national origin against the Federal Emergency Management Agency (FEMA). The plaintiff worked for a call center established by FEMA in 1995. After inspections revealed serious safety concerns, FEMA decided to reduce staffing levels of the plant, which was ultimately closed. Citing to the *ICP* case, the First Circuit concluded that FEMA had legitimate business justifications for its decisions regarding the call center and that the plaintiffs could not make a *prima facie* case of discrimination as the policies were not artificial, arbitrary, or unnecessary barriers. The plaintiffs also failed to show a less discriminatory alternative to serve FEMA's legitimate business necessities.

C. *Cases to Watch*

1. *American Insurance Association v. U.S. Department of Housing and Urban Development*³²

In June 2013, plaintiff trade associations argued that the HUD Rule exceeded the agency's authority under the Administrative Procedures Act, claiming that the FHA allowed only for disparate treatment liability and not disparate impact. Finding for the plaintiffs in a scathing opinion issued shortly before the Supreme Court heard oral arguments in *ICP*, the U.S. District Court for the District of Columbia vacated the HUD Rule. In light of the *ICP* verdict, the District of Columbia Circuit vacated the order striking down disparate impact liability and remanded the case to the district court. With the district court's consent, the plaintiffs filed an amended complaint on June 14, 2016, arguing that the HUD Rule is inconsistent with the *ICP* case. Additionally, the amended complaint argues that applying disparate-impact liability to the provision and pricing of homeowner's insurance is contrary to law because it would require insurers "pervasively to use and consider race and ethnicity in their insurance decisions and to discount or disregard limited risk-related factors."³³ The plaintiffs also assert that disparate impact theory conflicts with state insurance laws that limit insurers' discretion in underwriting and ratemaking.³⁴

31. 806 F.3d 599 (1st Cir. 2015).

32. 1:13-cv-966, 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sept. 23, 2015).

33. Amended Complaint ¶ 5.

34. *Id.*

2. *Avenue 6E Investments, LLC v. City of Yuma*³⁵

Plaintiff real estate developers alleged a disparate impact case against the City of Yuma, citing the city's refusal to rezone land for higher density development due to alleged animosity toward a protected class of minority homebuyers. The plaintiffs argued that alleged code words used by neighborhood opposition to stereotype Latinos demonstrated discriminatory intent and that the denial of the developers' application was contrary to the city's normal procedures. The district court decision issued prior to the *ICP* verdict ruled that the plaintiffs had no disparate impact claim because similar housing was available elsewhere in the city, negating any impact from the city's denial of the developers' application. The Ninth Circuit reversed the lower court's grant of summary judgment for the city and remanded the case to be decided consistent with the *ICP*, holding that the existence of similar housing did not necessarily preclude a finding of disparate impact. On June 23, 2016, the city filed a petition for certiorari to the U.S. Supreme Court.

3. *City of Miami v. Bank of America Corp.*³⁶

The City of Miami alleged that Bank of America and other defendants engaged in decades-long pattern of discriminatory lending in the residential housing market that caused the city economic harm. The lower court dismissed, finding that the city did not have standing because FHA allowed for complaints only by an "aggrieved person" and cities and other municipalities were not so defined in the FHA definition. Relying on Supreme Court precedent, the Eleventh Circuit disagreed, finding that the economic harm suffered could warrant an FHA claim. In September 2015, the court remanded the case so that the city could amend its complaint in light of the *ICP* pleading standards. The district court granted the defendant's motion to dismiss. The court held that plaintiffs must meet four requirements to establish disparate impact liability under the case. Plaintiffs must (1) show statistically imbalanced lending patterns that adversely impact a minority group; (2) identify a facially neutral policy used by defendants; (3) allege that such policy was "artificial, arbitrary, and unnecessary"; and (4) provide factual allegations that meet the "robust causality requirement" linking the challenged neutral policy to a specific adverse racial or ethnic disparity. In this case, the district court found that the city did not meet the second, third, and fourth requirements and failed the robust causality requirement by not showing causal link between the policy and alleged statistical disparity.

The U.S. Supreme Court granted the petition for certiorari on June 28, 2016, to decide in part whether the FHA's "aggrieved person" standard requires plaintiffs to plead more than just Article III injury-in-fact. The

35. 818 F. 3d 493 (9th Cir. 2016).

36. No. 13-24506-CIV, 2016 WL 1072488 (S.D. Fla. Mar. 17, 2016).

Court also consolidated this case with *Wells Fargo & Co. v. City of Miami*, in which it will decide whether the city is an “aggrieved person” under the FHA and the FHA’s standing requirements. Arguments for both will be heard during the October 2016 Term.

4. *City of Los Angeles v. Wells Fargo & Co.*³⁷

The City of Los Angeles alleged an FHA disparate impact claim against Wells Fargo for discriminatory mortgage lending practices toward to minorities. The city pointed to difference in the numbers of high-cost loans offered to whites versus minorities. The district court granted summary judgment for the defendant, stating that a disparate impact claim cannot rest solely on statistical evidence absent evidence that the bank’s policy actually caused the disparate impact. The court further argued that *ICP* required it to look at the entire picture and not just statistics, and entities cannot be held liable for racial disparities that they did not create. In July 2015, the city appealed to the Ninth Circuit, which has yet to release an opinion.

5. *Cobb County. v. Bank of America Corp.*³⁸

The plaintiffs in this case brought an FHA disparate impact claim against that the Bank of America and others, alleging that the defendants had engaged in mortgage discrimination against minority borrowers for the past fifteen years, and continued to do so through equity stripping, as well as engaging in predatory loan servicing and foreclosure practices. The complaint alleged that the practices resulted in both disparate treatment and disparate impact against minorities and decreased rates of minority homeownership, leading to the segregation and urban blight of certain communities.

The court agreed that the FHA provisions should be construed broadly and thus applied to both lenders and any other entity that directly or indirectly makes any loan unavailable to minority borrowers through equity stripping or other actions. Nevertheless, it granted the defendants’ motion to dismiss, stating that plaintiffs failed to meet the *ICP* pleading requirements. The court found that the plaintiffs’ claim (1) pleaded examples of intentional discrimination against minorities instead of pleading facially neutral policies; (2) did not allege that the challenged practices were artificial, arbitrary, and unnecessary; and (3) did not allege how the challenged policies led to the statistical imbalances in homeownership described.

The plaintiffs filed an amended complaint on June 17, 2016.

37. No. 2:13-CV-09007, 2015 U.S. Dist. LEXIS 93451 (C.D. Cal. July 17, 2015).

38. No: 1:15-cv-04081-LMM, 2016 U.S. Dist. LEXIS 70268 (N.D. Ga. May 2, 2016).

6. *Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC*³⁹

In September 2015, a new owner purchased an unsubsidized affordable complex that housed mostly low income residents, most of whom were ethnic minorities or disabled persons. Out of over 2,000 residents, thirty-five were federal housing choice voucher recipients, while approximately another hundred used state rental vouchers. The defendants renovated and rebranded the building and sent a notice to all current residents that their leases would terminate at the end of the lease term and that it would no longer accept housing choice vouchers once the lease term expired. Going forward, new tenants and those who wished to remain would have to submit an application, be approved under new screening criteria, and pay new market rate rents. The plaintiffs alleged both disparate treatment and disparate impact based on race, national origin, disability, and familial status.

In an April 2016 decision,⁴⁰ the district court denied the plaintiff's motion for preliminary injunction, which had requested a court order for the housing provider to accept the housing choice vouchers, noting that plaintiffs would have a difficult burden of establishing a disparate impact case on the merits based on the *ICP* standard. Although the court declined to answer whether rejecting housing choice vouchers could give rise to disparate impact liability, it highlighted a circuit split on that issue. The case noted that both the Second and Seventh Circuits adopted a *per se* rule that refusal to participate in Section 8 cannot form the basis of a disparate impact claim; the Sixth Circuit recognizes that such an act could form the basis of a claim but distinguishes between landlords who withdraw from Section 8 program and those who refuse to participate in the first place. In the latter case, the Sixth Circuit held that landlords should never face disparate impact liability for non-participation in Section 8.

In July 2016, in light of the *ICP* decision and HUD Rule, the district court allowed the plaintiffs' FHA disparate impact claim to go forward. The court found sufficient factual allegations to support an inference that the plaintiffs will be able to show through statistical analysis that the new housing policies disproportionately affect members of a different protected classes. The court also found that the plaintiffs' complaint showed a sufficient causal link between the revised housing policies and residents' inability to remain at the complex and adequately identified viable alternative practices to meet the defendants' business needs. In sum, the plaintiffs satisfied their burden of proof to assert a plausible disparate impact claim, thus shifting the burden to the defendants to

39. No 16-233 ADM/KMM, 2016 US Dist. LEXIS 86965 (D. Minn. July 5, 2016).

40. *Id.*

prove that the challenged practices were necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.

V. Conclusion

Although the Supreme Court's *ICP* verdict was significant in expressly confirming the existence of disparate impact claims under the FHA, in practice, the case has not resulted in increased victories for plaintiffs bringing disparate impact challenges. Indeed, as discussed above, it appears that courts are focusing on the "robust causality requirement," dismissing cases that cannot identify a causal link between a practice and a harmful impact against a protected class. Due to the strict pleading causation standards outlined by the Court, and a lack of further regulatory clarification, plaintiffs have great difficulty meeting their prima facie burden of proof.

The above, of course, only covers roughly the first year following *ICP* case. Time will tell as to the long-term impact of the *ICP* case.