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## LAW ALERT

### FEDERAL FAIR HOUSING DISPARATE IMPACT CLAIMS UNDER REVIEW

On June 17, 2013, the US Supreme Court agreed to review *Mount Holly v. Mt. Holly Gardens Citizens, Inc.*, to decide whether disparate impact claims may be brought under the federal Fair Housing Act ("FHA"). The FHA prohibits housing discrimination based on race, color, religion, sex, familial status, or disability. Under the FHA, disparate impact claims may be brought when policies that are neutral on their face, such as loan regulations or zoning requirements, cause segregation or have a discriminatory effect on housing availability for a racial, ethnic, religious, or other protected group. All federal Courts of Appeal have recognized these claims because of similarities between the FHA and Title VII of the Civil Rights Act, 42 U.S.C. § 2000 et seq., which prohibits employment discrimination and allows disparate impact claims.

*Mount Holly* concerns a New Jersey township's plan to redevelop a blighted residential area occupied predominantly by low-income African-American and Hispanic households. Residents sued, alleging that a disproportionate number of African-American and Hispanic households would be displaced and would be unable to afford the new housing developed under the plan. The district court dismissed the case on summary judgment. The Third Circuit reversed, however, and held that the

plaintiffs had established a prima facie case of disparate impact under the FHA.

Petitioners in *Mount Holly* now argue that the plain language and purpose of the FHA differ significantly from the plain language and purpose of Title VII, making disparate impact claims under the FHA inappropriate. The Supreme Court's grant of discretionary review suggests that disparate impact claims under the FHA may be in jeopardy.

Ironically, the U.S. Department of Housing and Urban Development ("HUD") issued a final rule on February 8, 2013 regarding the analysis of disparate impact. Under HUD's rule, a plaintiff bears the burden of proving that a challenged practice causes a discriminatory effect. If the plaintiff meets this burden, then the burden of proof shifts to the defendant to prove that the challenged practice has a necessary and manifest relationship to one or more of its legitimate, nondiscriminatory interests. If the defendant satisfies this burden, the plaintiff may nonetheless establish liability by demonstrating that the legitimate nondiscriminatory interest can be served by another practice that has a less discriminatory effect.

The future of the HUD rule now depends on the *Mount Holly* decision. However, in California, the state's Fair

Employment and Housing Act ("FEHA") explicitly recognizes claims of housing discrimination based on disparate impact. California courts currently use federal case law interpreting the FHA to analyze disparate impact claims under FEHA. If the Supreme Court disallows disparate impact claims under the FHA, then such claims will be made under FEHA only.

In 2012, the US Supreme Court was poised to decide whether the FHA permits disparate impact claims after it granted discretionary review to a St. Paul, Minnesota case - *Magner v. Gallagher*. That case disappeared from

the Court's docket just weeks before its scheduled oral argument when the City of St. Paul abruptly dismissed its appeal. There are rumors that Mount Holly may also settle with the plaintiffs. But it appears to be only a matter of time before the Supreme Court decides the issue.

If you have questions, please feel free to contact Barbara Kautz, Heather Gould, Polly Marshall, Karen Tiedemann, or any other attorney at Goldfarb & Lipman LLP for more information.



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