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LAW ALERT

FEDERAL FAIR HOUSING DISPARATE IMPACT CLAIMS SURVIVE SCOTUS

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the U.S. Supreme Court held that disparate impact claims are a valid basis for lawsuits under the Federal Fair Housing Act (the "FHA"). On June 25, 2015, the Court issued a ruling that disparate impact claims can be recognized and adjudicated by Federal Courts.

The FHA prohibits housing discrimination based on race, color, religion, sex, familial status, or disability. All eleven Courts of Appeal had held that disparate impact claims may be brought under the FHA when policies that are neutral on their face, such as zoning requirements or occupancy preferences for local residents, have a discriminatory effect on housing availability for a protected group. Because this appeared to be settled law, many observers thought the U.S. Supreme Court decided to hear the case to eliminate federal disparate impact housing claims.

I. Background

The Inclusive Communities Project (the "ICP") challenged how the Texas Department of Housing and Community Affairs ("Texas") distributes federally-funded low-income housing tax credits to subsidize new affordable housing development. Texas grants points to proposed developments in a competitive process for factors such as financial feasibility, income level of tenants, and other statutory criteria. The ICP alleged that Texas's distribution criteria caused continued segregated housing patterns by concentrating affordable housing in "predominantly black inner-city areas" and approving too few applications in "predominantly white suburban neighborhoods." The ICP brought a disparate impact claim under the FHA to force Texas to modify its scoring criteria to encourage the affordable housing in suburban neighborhoods.

After the District Court for the Northern District of Texas and Fifth Circuit Court of Appeals permitted the disparate impact claim to proceed, Texas appealed to the U.S. Supreme Court, arguing that disparate impact claims are not cognizable under the FHA.

II. Decision

The Court ruled that a housing policy or practice that has a disparate impact on a protected group is actionable under the FHA, even if there is no intentional bias and the impact was unintentional. The Court confirmed the validity of a three-part analysis of disparate impact housing claims used by lower courts. First, a claimant must point to a practice or policy, show that there is a disparate impact on a protected group (usually by a statistical analysis), and demonstrate that the policy or practice was the cause of the disparate impact. If no disparity exists, or if the disparity is caused by something other than the challenged practice or policy, there is no liability. Second, if it is proven that a challenged practice or policy causes a disparity, then the defendant may rebut the claim by proving that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Finally, even if the defendant is able to show the policy serves a valid interest, the plaintiff may prevail by proving that there is another means to achieving that interest with less disparate impact.

After holding that the ICP's disparate impact claim could proceed under the FHA, the Court affirmed the Fifth Circuit's ruling and remanded the case for further proceedings in district court to address the ICP's substantive claims. It remains to be seen if the ICP will be able to prove that Texas's policies caused the alleged disparities. If they do, and Texas is able to prove that funding affordable housing using federal low-income housing tax

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credits is a legitimate purpose, the ICP will also need to prove that less-discriminatory means are available to achieve this purpose.

III. Potential Application in California

Texas v. ICP has limited impact on California law, where the state's Fair Employment and Housing Act ("FEHA") explicitly recognizes disparate impact claims. Nevertheless, the decision could influence how future state claims are analyzed in California because state courts often look to federal court interpretations of the FHA when analyzing claims under FEHA. The Court's emphasis on the "robust causality requirement" reinforces the concept that the mere existence of statistical disparities, without more, will not result in liability, and the Court makes clear that the threat of liability should not "displace valid governmental and private priorities" related to housing policy. However, zoning laws and local preferences that exclude minorities "without any sufficient justification" is "the heartland of disparate impact liability."

This tension between revitalizing low-income communities and protecting against unlawful discrimination could affect future decisions about where to develop affordable housing and how affordable housing supported with federal funds is approved and funded. For example, developing housing in low-income, low-cost areas that may have a high percentage of minority residents may permit development of more housing units than could be supported in higher-cost areas. However, encouraging housing in such areas could promote and intensify segregation. Goldfarb & Lipman LLP will continue to monitor how the courts balance these competing priorities and remains ready to provide legal advice about how to approach development projects.

If you have questions, please feel free to contact Barbara Kautz, Heather Gould, Karen Tiedemann, James Diamond, Dave Kroot, Caroline Nasella, Eric Phillips, or any other attorney at Goldfarb & Lipman LLP for more information.

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