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SUPREME COURT DECIDES DISPARATE TREATMENT CASE UNDER FAIR HOUSING ACT

In a much-anticipated decision, the United States Supreme Court held on June 25, 2015, in a 5-4 decision, that disparate impact claims are cognizable under the Fair Housing Act (FHA). The Court's decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, Case No. 13-1371, resolved an issue that most federal circuits had considered settled for years, permitting the application of the disparate impact theory to discrimination cases. And while the Court placed some limits on the breadth and applicability of these claims, a number of important questions remain unanswered.

The Court considered whether lenders or other businesses could be held liable for discriminatory practices under the disparate impact theory – claims of discrimination where a practice has a discriminatory effect even though the practice is not based on a discriminatory purpose. In this case, the plaintiff sued the Texas Department of Housing and Community Affairs on the grounds that its implementation of a federal tax credit program for low income housing disproportionately supported developments in minority neighborhoods.

The Court held that while disparate impact claims are cognizable under the FHA, to be illegal, the action must be "artificial, arbitrary, and unnecessary." The Court indicated that statistical disparity alone is not sufficient to prove a claim. Similarly, racial quotas remain illegal, but the Court cautioned lower courts to avoid injecting racial considerations into every housing related case. These potential limits on disparate impact claims under the FHA may influence how lower courts approach such claims in the real estate market and beyond.

Because courts have generally applied the disparate impact theory for many years, businesses are already cognizant of that standard and trying to implement practices to avoid disparate impact claims. However, the Court's language limiting this theory may provide new defense strategies and should be carefully considered, particularly in the context of emerging business practices.

Many questions regarding business liability for disparate impact remain open. The Court did not address HUD rules that provide details on how the disparate impact may be proved. In November 2014, for example, a federal court in the District of Columbia held that certain HUD regulations were inconsistent with the FHA and vacated the regulations on the grounds that HUD exceeded its rulemaking authority. Even if this case revives such regulations, there may be challenges to the burden the rule places on the defendant to prove that the practices complained of had been adopted for legitimate business purposes.

The Court's decision also left undecided the applicability of the disparate impact theory in other antidiscrimination laws, such as the Equal Credit Opportunity Act. That statute prohibits discrimination in extensions of credit generally, beyond home loans, to include, for example, credit card and auto lending. That statute was not considered by the Court but was raised in the briefs as an example of another civil rights statue prohibiting discrimination, but, arguably, lacking terms that might authorize disparate impact claims. It could well emerge, however, as the next front on this battleground.

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