

FALLOUT: THE IMPACT OF SUPREME COURT'S DISPARATE IMPACT DECISION AND HUD'S AFFH RULE



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DISPARATE IMPACT AFTER INCLUSIVE COMMUNITIES

US SUPREME COURT: JUSTICE KENNEDY'S MAJORITY OPINION (5-4) IN *INCLUSIVE COMMUNITIES*

Determines that FHAct recognizes disparate impact liability

- Warns that “disparate impact liability has always been properly limited in key respects.”
- Needs to allow “practical business choices and profit-related decisions that sustain a vibrant and dynamic free enterprise system”

DISPARATE IMPACT AFTER INCLUSIVE COMMUNITIES

HIGHLIGHTS OF KENNEDY'S MAJORITY OPINION

Recommends “safeguards” to protect “against abusive disparate impact claims”:

1. **Mere statistical disparity** is not sufficient
2. **“Robust causality requirement”**
 - As part of its prima facie case, plaintiff must demonstrate that the challenged practice is the cause of the disparate impact
 - Suggests that if multiple causes for disparity, no disparate impact liability exists.
3. Disparate impact focuses “solely” on removal of **“artificial, arbitrary and unnecessary barriers”**
4. Defendant can demonstrate **“valid interest served”** by policies
5. Burden on plaintiffs to demonstrate **less discriminatory alternative**



POST-ICP LEGAL CASES

Post-Inclusive Communities, courts focus on applying safeguards to disparate impact cases:

- **ICP v. TDHCA**: on remand, court will apply HUD DI rule, but will reexamine initial prima facie determination
- **ICP v Treasury** (“ICP II”): ICP challenges Federal agencies for failure to promote pro-fair housing policies
- **City of Los Angeles v. Wells Fargo**: predatory lending case dismissed because City could not prove causation; DI focuses on removal of barriers, does not require positive action
- **City of Miami v. Bank of America**: recognizes City has standing, but warns new complaint must satisfy ICP



POST-ICP CASES

Other cases show potential scope of DI issues:

- **Viens v. Great American Insurance (settled)**: Insurer agrees not insure properties based on source of income
- **Winfield v. City of New York (pending)**: challenges policy of reserving 50% of new affordable units for neighborhood residents; claims preference has disparate impact on ability of minorities to move to non-minority areas:
- **Burbank Tenants Assn. v. Kargman (SJC appeal)**: Owners decision not to renew Section 8 contract has disparate impact on minority tenants
- **Ellis v. City of Minneapolis (dismissed)**: DI alleged from code enforcement practices; City has legitimate basis, lack of causation shown.

FUTURE OF DISPARATE IMPACT

- Courts will continue to flesh out disparate impact post-ICP decision
- Likely examples of future kinds of challenges for property management:
 - Residency Preference
 - Drug/crime screening policies
 - Rental decisions based on source or type of income/income multipliers
 - Credit Screening
 - House rules (such as those affecting families/children)
- Will disparate impact lead to new “pseudo-protected classes”?
 - If you restrict use of credit or crime history to determine occupancy, do persons with poor credit/conviction history become de facto protected classes?

BEST PRACTICES TO AVOID DI CLAIMS

Who: Owners, managers, developers, investors, public agencies

What:

- Identify “Inflection Points” that extend/restrict housing opportunities, such as:
 - Admission criteria and occupancy standards
 - Criteria for awarding benefits (tax credits/grants/etc.)
 - Preferences
- Evaluate potential disparate impacts
 - Assess other causes for any disparities
- Identify legitimate, nondiscriminatory interests
- Consider less discriminatory alternatives



AFFH RULE

Inclusive Communities and AFFH address similar issues

- Both are intended to reduce persistent patterns of segregation by attacking artificial barriers
- Positive news for developers:
 - Success of AFFH rule implicitly hinges on ability to persuade affordable housing industry to develop new units in “high opportunity areas”
- Some concerns too:
 - Many lower income neighborhoods have desperate need to preserve/expand decent, safe and affordable housing
 - Need **more** resources, not just reallocation
 - New statistical tools could lead to more FHAct complaints

