

BUSINESS IMPLICATIONS: NEW FAIR HOUSING REGULATORY ENVIRONMENT



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FAIR HOUSING ACT—BACKGROUND

Disparate Impact

- Definition: a policy or practice which is neutral on its face but has a statistically significant negative effect on a group of persons protected by the non-discrimination law
 - Example: 2-person/bdrm occupancy standard has harsher impact on families with minor children
- Need not show intent for disparate impact claims
- Claims based on statistics and expert analysis that suggest a rental housing policy has a discriminatory effect on a protected class

SIGNIFICANCE OF DISPARATE IMPACT

By definition, disparate impact is used to attack policies or practices that are neutral on their face but that have allegedly disproportionate impact on minorities

- Due to socioeconomic realities in US, almost any policy or practice may have a disparate impact on protected classes
- As a result, disparate impact may expose housing providers to liability for otherwise “normal” operations and policies

TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION (5-4)

- Upholds the existence of disparate impact under the Fair Housing Act
- But recognizes that broad application of DI can have **unintended and adverse consequences** that actually result in opposite of what Congress intended and **frustrate legitimate decisions** by government entities and housing providers.
 - Recommends “safeguards” to protect “against abusive disparate impact claims”



TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

Safeguards:

— Stresses “Robust Causality Requirement”

- Mere statistical disparity is not sufficient to support disparate impact
- 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 negative disparate impact
- One time decision to build/not build may not be a “policy” at all



TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

Safeguards:

— Legitimate Policy as Defense

- Business must be given “leeway to state and explain the **valid interest** served by their policies.”
- Recommends that housing providers in adopting a policy, make a statement explaining legitimate basis for their policy.



TEXAS DEPT. OF HOUS. AND COMM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT—DECISION

HIGHLIGHTS OF KENNEDY’S MAJORITY OPINION

Safeguards:

- A policy is not contrary to DI requirements unless it creates “artificial, arbitrary and unnecessary barriers”
- Burden on Plaintiff to show less discriminatory but equally effective alternative



FAIR HOUSING UPDATE

Business implications

- SCOTUS goal appears to be to use disparate impact to promote more housing opportunities for protected classes
 - Attack “heartland” of cases where “artificial, arbitrary and unnecessary barriers” reduce housing opportunities for minorities
 - Maybe, but not clear what is the real “barrier” to housing opportunities and if disparate impact can measurably make things better
- Meanwhile, many public/private groups feel exposed to new disparate impact claims
- Courts are starting to use *Inclusive Communities* to decide cases...



FAIR HOUSING UPDATE: POST-ICP CASES

Dismissed	Fair Housing Claim	Pending
City of LA v. Wells Fargo	Predatory Lending	
Burbank Ten. Assn. v. Kargman	Section 8 Renewal	
Merritt v. Countrywide Fin. Corp. (amend permitted)	Predatory Lending	
Ellis v. City of Minneapolis	Code Enforcement	
City of Miami v. Bank of America	Predatory Lending	
	Zoning Practices	Mhany Mgmt. v. Nassau County
	Zoning Practices	Avenue 6E Invest. LLC v. City of Yuma
	Zoning Practices	Long Island Housing Serv. v. Nassau Cnty. Indus. Devel.
	Residency Preference	Winfield v. NYC



FRAMEWORK FOR FUTURE OF DISPARATE IMPACT: HUD DISPARATE IMPACT REGULATION (24 CFR SEC. 100.500)

In 2013, HUD adopted new regulations imposing rules to establish disparate impact liability in Fair Housing Act cases:

— **Definition:**

A practice has a discriminatory impact where

- It actually or predictably results in a disparate impact on a group of persons or
- creates, increases, reinforces, or perpetuates segregated housing patterns
- of race, color, religion, sex, handicap, familial status, or national origin.

HUD DISPARATE IMPACT REGULATION

Three-Step Burden Shifting Approach:

1. The plaintiff/complainant must make a *prima facie* showing of either a disparate impact or a segregative effect.
2. If the discriminatory impact is shown, the burden of proof shifts to the respondent to show “legally sufficient justification.”
3. If the respondent satisfies the burden, then the charging party/plaintiff may still establish liability by proving that these interests could be served by another practice that has a less discriminatory effect.

HUD DISPARATE IMPACT REGULATION

“Legally Sufficient Justification”

A practice or policy found to have a discriminatory effect may still be lawful if it has a “legally sufficient justification.”

- A **legally sufficient justification** exists where the challenged practice:
 - is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent; and
 - those interests could not be served by another practice that has a less discriminatory effect.
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

OGC announces guidance explaining how criminal background checks may have disparate impact on minorities

Uses burden-shifting approach of HUD regulations:

1. Does Crime Screening have a discriminatory effect?

- State/local data can be used to prove DI if available, but if not, National data can be used to demonstrate a disparate impact if there is no reason to believe national data is different from state/local data
- Citing national data, OGC says minorities face disproportionately higher rates of arrest or incarceration
- HUD data shows nothing about actual impact on housing opportunities



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

2. Is Crime Screening necessary to achieve a substantial, legitimate, nondiscriminatory interest?

- Housing provider must be able to show that there is a legitimate reason to do this, and that the challenged policy actually achieves that interest.
 - Must be able to show this policy actually protects tenants/property.
 - Bald assertions without factual proof are not sufficient



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

— Arrest records:

- Since arrest does not equal proof of unlawful conduct, there is no evidence that excluding people on the basis of arrests protects tenants/property

— Conviction records:

- Doesn't dispute that conviction records prove individual engaged in criminal conduct.
- Housing providers that impose a flat “one-strike” policy cannot meet burden of proving policy achieves legitimate interest
- Housing provider with more tailored policy must still show that it meets a **substantial, legitimate, nondiscriminatory interest**



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

- To satisfy the “**substantial, legitimate, nondiscriminatory interest**” standard, policy must consider
 - Nature of the crime involved
 - “Severity” of crime
 - “Recency” of crime
- If you don’t address those issues, policy does not serve legitimate interest.



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

3. Is there a less discriminatory alternative?

- Burden shifts back to HUD or plaintiff to show that same interest could be served by a less discriminatory alternative
- An “**individualized assessment**” of relevant mitigating factors beyond person’s criminal record may have a less discriminatory effect than **categorical exclusions**, such as:
 - Facts surrounding the criminal conduct
 - Age of person at time the event occurred
 - Tenant history before/after event
 - Evidence of rehabilitation
- Perform crime checks after other tenant/financial screening?



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

Other Guidance:

- FHAct does not prohibit denial of admission due to conviction for some drug offenses (§ 807(b)(4))
- Use of crime records for **intentional discrimination** is forbidden
 - If you admit white persons with convictions but reject blacks with same records, that violates FHAct



HUD OFFICE OF GENERAL COUNSEL GUIDANCE (APRIL 4, 2016)

Questions/Comments:

- Has HUD effectively created a rebuttable presumption that crime screening has DI?
- How does proof of national arrest/conviction rates satisfy “robust causation” requirement of Inclusive Communities?
- What happens if local government imposes restrictions on criminals living on a property – can we refuse to follow the local ordinance? Pressure from police?
- Does “individualized assessments” make intentional discrimination claims more likely?

EMERGING FAIR HOUSING ISSUES

Affirmatively Furthering Fair Housing Rule (AFFH)

- **Westchester litigation:** Demonstrates challenges to encouraging development of affordable housing, opening housing opportunity for minorities in non-minority neighborhoods
- For many years, HUD has required PHAs, other grantees to develop analysis of impediments to fair housing
- **AFFH Rule:** expands scope of PHA and grantee duties
 - More expansive analysis of economic/demographic issues
 - More complete statistical information provided by HUD
 - More public participation in analysis
 - Encourages regional approach to expanding housing
- HUD developed **Assessment Tool** to assist analysis



EMERGING FAIR HOUSING ISSUES

Affirmatively Furthering Fair Housing Rule

- Goal is to stimulate expansion of affordable housing into “high opportunity” areas, to reduce housing segregation
 - Similar to eliminating artificial, arbitrary and unnecessary barriers
 - **Concept:** Expansion of housing opportunities in areas with better schools, employment opportunities, incomes will encourage economic development of protected classes
 - **Challenge:** PHAs, local grantees will have to overcome deep-seated NIMBYism, political reluctance to expand affordable housing
 - Does AFFH rule give PHAs necessary political leverage?



EMERGING FAIR HOUSING ISSUES

Affirmatively Furthering Fair Housing Rule

- HUD seeks “balanced” approach
 - Promote housing in new areas while preserving existing affordable housing
 - But directing PHAs and local grantees to promote housing in high opportunity areas will require more funding, not just better planning
- If successful, AFFH rule will provide new opportunities to develop/invest in affordable housing
 - Communities that have been reluctant to develop affordable housing may be willing to accept more development
 - Private developers/investors should encourage PHAs, grantees to promote AFFH goals



THANK YOU!



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