

**Disparate Impact and Fair
Housing Enforcement Post-
*Inclusive Communities Project***

**Housing Justice Network Conference
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Disparate Impact and Affordable Housing

Stacy Seicshnaydre, Will Disparate Impact Theory Survive? A Forty Year Analysis of Disparate Impact Theory under the Fair Housing Act, 63 Am. U. L. Rev 357 (2013)

Types of Disparate Impact Cases

- Housing Barrier Regulation: prevent the construction of housing that will likely be used by minority groups in places that lack minority residents or confine housing that will be used by minorities to neighborhoods where minority households already predominate
- Examples: *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (challenging an ordinance prohibiting the construction of multi-family housing in virtually all white suburban city)
- *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (challenging zoning scheme that allowed multifamily housing only in a narrow area where minorities already resided)

Types of Disparate Impact Cases

- Housing Improvement Regulation: regulation or plan to improve the condition of housing or the surrounding neighborhood, typically through some combination of demolition and replacement of housing units but also through other means such as the imposition of minimum housing standards or revitalization plans
- Examples: *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010) (manner in which city conducted code enforcement had a disparate impact upon protected classes)
- *Mt. Holly Citizens in Action v. Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011) (redevelopment of predominantly African-American and Latino neighborhood)

Disparate Impact Cases in the Federal Courts of Appeal

- Housing barrier cases successful 42% (8 of 19 cases)
- Housing improvement cases successful 21% (3 of 14 cases)

Disparate Impact Saved

*Texas Dep't of Hous. & Community Affairs
v. Inclusive Communities Project*, 135 S. Ct.
2507 (2015)

Supreme Court's Decision

- Anti-discrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and where that interpretation is consistent with statutory purpose. *Id.* at 2518.
- Congress' use of phrase "otherwise make unavailable or deny" in § 3604(a) refers to consequences of action rather than actor's intent *Id.*

Supreme Court's Decision

- Use of term “discriminate” in § 3605 similar to another statute that Court earlier had determined could be proven through the disparate impact method of proof. *Id.* at 2518-19.

Supreme Court's Decision

- At the time of the 1988 Amendments, all nine Courts of Appeal to address the question had concluded that disparate impact claims were cognizable. *Id.* at 2519-20.
- Exemptions assumed that disparate impact existed under the FHA. *Id.* at 2520-2521.
- Disparate impact liability is consistent with the FHA's central purpose of eradicating discriminatory practices in housing. *Id.* at 2521.
- Supreme Court does not rely on HUD's regulation.

Supreme Court's Decision

- Fair Housing Act needs to be interpreted expansively to accomplish its goals
- History of residential segregation
- Racial steering, restrictive covenants and discriminatory lending practices
- Kerner Commission concluded that residential segregation was a significant cause of social unrest
- Moving towards two societies –one black and one white – separate and unequal
- *Id.* at 2516-17.

Supreme Court's Decision

- Since the passage of the FHA and against the backdrop of disparate impact, many cities have become more diverse
- FHA must play an important role in avoiding the Kerner's Commission's grim prophecy that our nation is moving towards two societies – one white and one black – separate and unequal
- Court acknowledges the FHA's continuing role in moving our nation towards a more integrated society.
- *Id.* at 2526.

Additional Considerations

- Disparate impact analysis applies to all protected classes under the FHA not just race
- Disparate impact analysis applies to protected classes under state and local laws
- Robert G. Schwemm, Fair Housing After *Inclusive Communities Project*: What's New and What's Not. 15 Colum. L. Rev. Sidebar 106, 112-113 (2015).

Observations About ICP

- Overwhelming positive decision
- Limits on disparate impact are consistent with case law
- *May* make it more difficult to bring and prevail in housing improvement cases

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Litigating Under The Disparate Impact Regulation and ICP

What ICP Does Not Change: Disparate Impact As Evidence of Intent

- Robert G. Schwemm, Fair Housing After *Inclusive Communities Project*: What's New and What's Not. 15 Colum. L. Rev. Sidebar 106 (2015)
- Use of disparate impact evidence to determine if an intent claim can be sustained. *Id.* at 117-119.
- (1) Effect of the official action; (2) historical background of decision; (3) the sequence of events leading up to the decision including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)

What ICP Does Not Change: Disparate Impact As Evidence of Intent

- Majority Decision: “Disparate impact liability under the FHA plays an role in uncovering discriminatory intent. . .” 135 S. Ct. 2522.
- Justice Alito’s Dissent: “Disparate impact can be evidence of disparate treatment.” 135 S. Ct. at 2550.



Governing Standards After ICP

Overview

	Description	Burden
1	Plaintiff's Prima Facie Case: Plaintiff or complainant must show that practice or policy results in or would predictably result in a discriminatory effect	Plaintiff
2	Defendant's Rebuttal Burden: Burden shifts to defendant or respondent to show that practice necessary to achieve one or more of its substantial, legitimate non-discriminatory interests	Defendant
3	Less Discriminatory Alternative: Plaintiff or complainant must show that interest could be served by a practice that has a less discriminatory effect	Plaintiff

Overview

24 CFR §
100.500

- Showing of Intent Not Necessary: Liability may be established based on a practice's discriminatory effect even if the practice was not motivated by discriminatory intent. 24 C.F.R. § 100.500
- Some showing of intent may be helpful

Disparate Impact Under the Proposed HUD Regulation and ICP

- Two types of disparate impact
- Discriminatory effect
- Perpetuation of Segregation – Open question: ICP does not refer to perpetuation of segregation. Schwemm, *supra.* at 122.

Step 1: Plaintiff's Prima Facie Case

24 CFR §
100.500

- A housing practice has a discriminatory effect where it *actually or predictably* results in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns . . . because of [protected classes]. 24 C.F.R. § 100.500(a)
- Plaintiff or complainant has burden of proof.
- Usually proven through statistics

Step 1: Discriminatory Effect Defined

78 Fed. Reg.
at 11468-69

- ~~□ Rule does not require Plaintiff to identify the specific rule or policy because elements of decision-making process might not be capable of separation and therefore the entire decision-making process must be challenged according to response to comments. 74 Fed. Reg. at 11468-69.~~
- Regulation does not set forth a specific standard for establishing effect because standard may vary from case to case. 74 Fed. Reg. at 11466.

Step 1: Discriminatory Effect

- Any facially neutral actions e.g. laws, rules, **decisions**, standards, policies, practices or procedures including those that allow for discretion or use subjective criteria may result in a discriminatory effect. 78 Fed. Reg. 11468.
- Definition of disparate impact includes actions that “predictably” result in disparate impact or perpetuation of segregation because “aggrieved person” includes any persons who believe they “will be injured by a discriminatory housing practice that is about to occur” and FHA allows courts and ALJ to order relief for discrimination that is about to occur. *Id.*

Step 1: Plaintiff's Prima Facie Case

Supreme Court

- **“Robust Causality” Requirement.** (“Plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect. If a statistical disparity is caused by factors other than the defendant’s policy, a plaintiff cannot establish a prima facie case.) Id. at 2514.
- **Plaintiffs Must Identify the Policy.** Id. at 2522 (“Plaintiffs must point to the policy causing the disparity.”)
- **Only “artificial, arbitrary and unnecessary barriers” can be challenged.** Id.
- **Observation: Lack of Meaningful Choice Could Defeat a Disparate Impact Claim.** Id. at 2515. (If a defendant’s hands are tied such that they lack a meaningful choice, then there may be no disparate impact liability) (discussing Fifth Circuit opinion)

Step 1: Plaintiff's Prima Facie Case

Supreme
Court

- **Prompt Resolution of Disparate Impact Cases through a Motion to Dismiss or Motion for Summary Judgment.** *Id.* at 2523. (“Courts must examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to plead facts at the pleading stage or produce statistical evidence establishing a causal connection cannot make out a prima facie case.”)
- **One-Time Decision May Not Be Subject to Challenge, Must be a Policy or Practice.** *Id.* (e.g. Developer’s decision where to construct or renovate housing units may not be subject to challenge under disparate impact because it is a one time decision and multiple factors go into the decision about where to build or renovate)

Step 2: Defendant's Rebuttal Burden-

Legally sufficient justification

24 CFR §
100.500(b)

- A legally sufficient justification exists where the challenged housing practice:
 - **(1) Is necessary to achieve one or more *substantial, legitimate nondiscriminatory interests of the defendant/respondent***
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative
- Defendant or respondent has the burden of proof. 24 CFR 100.500(c)(2)

Step 2: Legally sufficient justification

78 Fed. Reg.
11470

- Equivalent to **business necessity** according to HUD. 78 Fed. Reg. 11470.
- Whether justification is **legitimate** is viewed under an objective test. Id at 11471.
- Justification must be **genuine** and **not false** and cannot itself discriminate based on a protected class. Id. 11470.
- **Substantial** interest is a core interest of the organization that has a direct relationship to the function of the organization. Id.
- **Legitimate** means genuine and not false, fabricated or pretextual. Id. at 11470-71

Step 2: Legally sufficient justification

- “Supported by evidence” requires that defendant or respondent must prove with evidence the legitimate, non-discriminatory interest and the necessity. 78 Fed. Reg. 11471.

Step 2: Defendant's Rebuttal Burden-

Legally sufficient justification

Supreme
Court

- Analogous to **business necessity**.
135 S. Ct. at 2522.
- **Defendant** has the burden of proof.
Id.

Step 3: Plaintiff's Burden - Less Discriminatory Alternative

24 CFR §
100.500(b)(2)

- Those interests could not be served by another practice that has a less discriminatory effect
- Plaintiff or complainant has the burden of proof
- Less discriminatory alternative must serve substantial, legitimate nondiscriminatory interests and may not be hypothetical or speculative.
78 Fed. Reg. 11473.

Step 3: Less Discriminatory Alternative

- Plaintiff or complainant need not show that prior to litigation the defendant knew of and rejected less discriminatory alternative. 78 Fed. Reg. 11473.
- Plaintiffs may want to provide the less discriminatory alternative to the defendant before litigation

Step 3: Less Discriminatory Alternative

Supreme
Court

- Plaintiff has the burden of proof to show a less discriminatory alternative. 135 S. Ct. at 2515.

Other Issues After ICP

- Are disparate impact claims cognizable under § 3604(b)?
- Likely yes because § 3604(b) uses the phrase “discriminate.” Schwemm, *supra*. at 123.



Proving a Disparate Impact Case

Proving a Prima Facie Case: Statistics

- A. Statistics-Proportional, not Absolute
- B. No Single Test
- C. Three Common Tests:
 - 1. Compare % those harmed who are in protected class to % of protected class in population
 - 2. Compare % of protected class harmed to % of general population harmed
 - 3. **Compare % of protected class harmed to % of people outside protected class harmed**

Supreme Court's View on Statistics

- “Robust causality” requirement. 135 S. Ct. at 2512.
- Observation: Statistics showing Department approved tax credits for 50% of non-elderly units in 0-9% white areas but only approved 37% of non-elderly units in 90-100% white areas may not be sufficient.

Sources of Statistics

- Census Bureau www.census.gov
 - 2010 Census
 - American Community Survey
- HUD
 - www.huduser.gov

Short Form Census and ACS Data

Selected Measures

- Race/Ethnicity
- Own or Rent (Tenure)
- Families with Children

Under 18

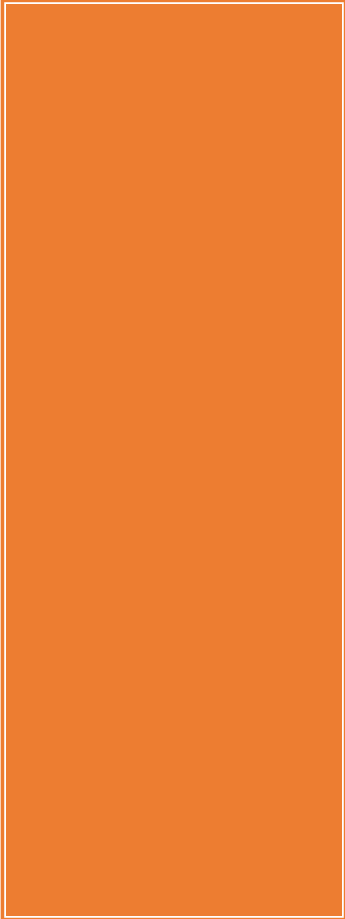
- Disability Status
- Income/poverty
- Education

Available

- Both
- Both
- Both

- ACS
- ACS
- ACS

Affordability Statistics

- 
- HUD Data
 - www.huduser.gov
 - Area median incomes
 - Fair Market Rent by size

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Legal Issues: Disparate Impact

Disparate Impact Decisions After ICP

- *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2015 WL 5916220 (N.D. Tex. Oct. 8, 2015) (holding that the court was required to revisit whether ICP established a prima facie case on remand)
- *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, No. 14-5321 (D.C. Cir. Sept. 23, 2015) (reversing summary judgment granted to the plaintiff holding that HUD disparate impact regulation was invalid and remanding to district court)

Disparate Impact Decisions After ICP

- *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1287 (11th Cir. 2015) (reversing district court's dismissal of case on zone of interest standing and noting that on remand the district court should consider that disparate impact claims must be aimed at artificial, arbitrary and unnecessary barriers and district court should assert a robust causality requirement)
- *City of Los Angeles v. Wells Fargo & Co.*, No. 213CV09007ODWRZX, 2015 WL 4398858, at *7 (C.D. Cal. July 17, 2015) (granting summary judgment to defendant based on the lack of significant disparate impact and failure to identify a policy or practice in a reverse redlining case within statute of limitations)
- *Ellis v. City of Minneapolis*, No. 14-CV-3045 SRN/JJK, 2015 WL 5009341, at *10 (D. Minn. Aug. 24, 2015) (granting a motion to dismiss on the grounds that plaintiffs failed to demonstrate that they have been prevented from renting or any of their tenants had been displaced by code enforcement policies and practices and the failure to allege a plausible, less discriminatory alternative)

Legal Issues: Disparate Impact

Must Examine Policy As A Whole

- *GNOFHAC (Road Home)*: Must Look at Policy As a Whole

- * Regulations and ICP do not deal with this issue but probably need to examine policy as whole

Must Show Link Between Policy/Effect

- *Reinhart*: Must identify policy at issue. Need more than showing increased housing costs and minorities less wealthy.

- * SCOTUS requires identification of policy. (Regulation says a plaintiff need not identify the policy but overruled by ICP.) Need to show more than increased housing costs and minorities less wealthy

Legal Issues: Disparate Impact

Evidence of Demand For Housing

- *Hallmark*: Need show that there is demand for housing

- * Regulation and ICP do not deal with this issue but probably need to show demand

Evidence Regarding Known Population

- *2922 Sherman Avenue*: Must do analysis of existing known population

- * Regulation and ICP does not deal with this issue but analysis probably needs to be done on known population

Legal Issues: Disparate Impact

Is the prima facie case too easy to establish in redevelopment cases?

- *ICP: Makes explicit additional requirements*
- **Regulation: Does not deal with directly**

Does the policy or practice affect the plaintiff?

Scott: Must show that the policy or practice affected the plaintiff

ICP and Regulation: Do not deal with issue but policy or practice probably needs to have effected Plaintiff

Legal Issues: Disparate Impact

2922 Sherman Ave. v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006)

Greater New Orleans Fair Housing Action Center v. HUD, 639 F.3d 1078 (D.C. Cir. 2011)

Hallmark Developers, Inc. v. Fulton County, Ga., 466 F.3d 1276 (11th Cir. 2006)

Reinhart v. Lincoln County, 482 F.3d 1225 (10th Cir. 2007)

City of Fort Lauderdale v. Scott, 551 F. App'x 972 (11th Cir. 2014)

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Uses of Disparate Impact Theory

Disparate Impact Claims Before ICP

- Schwemm, *supra.* at 107-8.
- Exclusionary zoning and other land uses restrictions that blocked or limited housing proposals of particular value to racial minorities or persons with disabilities
- Urban renewal, code enforcement and other actions by local officials that reduced opportunities for minorities
- Residency preference and other similar techniques used by housing officials and housing officials to favor people with local ties
- Screening devices used by landlords based on source of income, citizenship status and other criteria that have a negative impact on protected classes

Disparate Impact Claims Before ICP

- Schwemm, supra. at 107-8.
- Mortgage underwriting standards and other home finance practices that result in less favorable treatment of minorities and minority areas
- Home insurance standards that result in minorities being treated less favorably

Futures Uses of Disparate Impact After ICP

- Schwemm, *supra*. at 107-8.
- Landlord screening based on prior criminal record
- Refusal to rent to people with vouchers or other non-traditional source of income
- Residency preferences
- Credit scoring and other financial qualifying techniques

Practices that May Have a Disparate Impact

Preamble to
Proposed
Regulation: 76
Fed. Reg.
79021,
79024-25

- Federal Register – Proposed Rule
- Zoning ordinance that limits multi-family housing
- Provision and pricing of homeowners insurance
- Mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher fees unrelated to a borrower's creditworthiness
- Credit scoring overrides
- Predatory Lending
- Land use and zoning decisions
- Residency preferences for Section 8 vouchers
- Redevelopment

Summary

- Disparate impact claims are cognizable under the FHA
- ICP imposes limitations on disparate impact cases, particularly housing improvement cases. The extent of the limitations will be determined by future cases.
- Factors in developing good disparate impact cases: (1) serious or weighty issue; (2) Simple prima facie case; and (3) some evidence of intent