Disparate Impact

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Disparate impact is best understood as a method for proving housing discrimination without having to show that the discrimination was intentional. Under disparate impact theory, most courts, as well as HUD, use a "burden shifting" test (24 C.F.R. § 100.500, hereinafter "Disparate Impact Rule"; the federal "Fair Housing Act" prohibits discrimination based on race, color, religion, national origin, sex, handicap, and familial status. Some state and local fair housing laws prohibit discrimination based on additional classifications, for example source of income or sexual orientation). First, the plaintiff must show that the challenged conduct, policy, or practice disproportionately harms members of a group that is protected by the "Fair Housing Act." For example, a plaintiff could show that a city zoning ordinance that excludes mobile homes disproportionately harms Latinxs because in that jurisdiction, Latinxs are overrepresented among mobile home occupants.

Second, the defendant may seek to prove that the challenged practice is justified by a legitimate, non-discriminatory purpose. In our hypothetical, the city might try to prove that it passed the ordinance to ensure a minimum level of habitability for all housing in the jurisdiction.

At the final stage of the analysis, the plaintiff may prove that despite any legitimate, non-discriminatory purposes, the jurisdiction could achieve that goal in a way that has a less discriminatory impact on Latinxs. For example, the plaintiff might show that the city could achieve its habitability goals by enacting and enforcing specific codes for the maintenance of mobile home parks, rather than banning such housing altogether.

The burden-shifting proof framework ensures that courts apply the disparate impact standard in a pragmatic, fact-specific way, thereby reconciling the two goals: (1) ferreting out conduct that unjustifiably discriminates by harming a protected class, and (2) allowing housing providers, lenders, local governments, and other potential defendants to pursue legitimate business and governmental goals. In fact, a quantitative survey of disparate impact cases over the past four decades found that disparate impact plaintiffs only rarely prevail (see Stacy E. Seicshnaydre's *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*), indicating that the availability of disparate impact liability is not an obstacle to legitimate planning or business objectives.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (135 S. Ct. 2507; 2015, hereinafter "*ICP*"), a civil rights organization claimed that the State of Texas's methodology for allocating Low-Income Housing Tax Credits lead to increased racial segregation in Dallas. Dozens of friend-of-the-court briefs submitted to the Court on the plaintiff's side argued that preserving the disparate impact standard was consistent with the statutory text and congressional intent and was critical to fulfill and further the broad mandate of the federal "Fair Housing Act." On the state's side, dozens of such briefs argued in contrast that a defendant should not be held liable without evidence of discriminatory intent, because allowing liability to turn on discriminatory effect alone would chill reasonable underwriting practices, local zoning decisions, city planning efforts, etc.

The majority opinion, by Justice Kennedy, addressed both themes. First, the Court recognized that disparate impact is a necessary tool for combatting ongoing, systemic discrimination of the type that motivated passage of the "Fair Housing Act" in the first place, such as exclusionary zoning. The Court found that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation" and that the "Fair Housing Act" has an important "continuing role in moving the Nation toward a more integrated society" by helping to combat, among other things, "discriminatory

ordinances barring the construction of certain types of housing units" (at 2525-26). Thus, recognizing disparate impact liability enables "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," and "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping" (at 2523).

Second, the Court emphasized that the disparate impact standard has been and remains properly limited "to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. . . . [H]ousing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. . . .The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities" (at 2522-23).

The *ICP* decision thus continues a long tradition of allowing disparate impact liability under the "Fair Housing Act," while ensuring that the theory does not serve as a trap for housing providers or governments that are pursuing legitimate, housing-related objectives, so long as those legitimate objectives could not be achieved with less harmful impact on protected classes (a similar balancing is achieved in HUD's Disparate Impact Rule, *supra* note 1. HUD has called for comment on potential revisions to the Disparate Impact Rule, as discussed in more detail below).

As discussed in *ICP*, courts have historically applied disparate impact liability under the "Fair Housing Act" in "heartland" cases targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" (*ICP*, *supra* note 3, 135 S. Ct. at 2522 citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926; 2d Cir. 1988 holding that town's zoning restrictions against multifamily housing had an unlawful adverse racial impact and perpetuated segregation; *United States v. City of Black Jack*, 508 F.2d 1179 8th Cir. 1974; *Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish*, 641 F. Supp. 2d 563 E.D. La. 2009). But this pragmatic and flexible standard has also been used to challenge myriad other housing-related practices that have discriminatory effects, such as subsidized housing waitlist preferences (see, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 1st Cir. 2000), community redevelopment (see, e.g., *Mount Holly Gardens Citizens in Action Inc. v. Twp. of Mount Holly*, 658 F.3d 375 3d Cir. 2011, *cert granted*, 133 S. Ct. 2824 2013; *cert dismissed*, No. 11-1507, 2013 WL 6050174 U.S. Nov. 15, 2013), redlining and predatory lending (see, e.g., Compl. for Declaratory and Inj. Relief and Damages, *Mayor of Balt. v. Wells Fargo, N.A.*, No. 08-062 D. Md. Jan. 8, 2008; *Ramirez v. GreenPoint Mortg. Funding Inc.*, 633 F. Supp. 2d 922 N.D. Cal. 2008), mobile home registration requirements (see *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165 M.D. Ala. 2011, *vacated as moot*, No. 11-16114, 2013 WL 2372302 11th Cir. May 17, 2013), and condominium association rules restricting the presence of children (see, e.g., *Hous. Opportunities Project for Excellence Inc. v. Key Colony No. 4 Condominium Assoc.*, 510 F. Supp. 2d 1003 S.D. Fla. 2007), to give a few examples. Courts have also applied the disparate impact standard to conduct that, while facially neutral, would have the effect of perpetuating existing patterns of residential segregation (see, e.g., *Huntington Branch*, *supra* note 8).

The *ICP* decision confirms that going forward, disparate impact will remain an important tool for combatting practices that may not be motivated by bias but which nonetheless disproportionately harm protected groups. At the same time, the Court's reference in *ICP* to a "robust causality requirement" has engendered debate in subsequent disparate impact litigation, with defendants frequently arguing that plaintiffs face a new or heightened burden to show causation (*ICP*, *supra* note 3, at 2512. Justice Kennedy wrote that requiring "robust causality" was "important in ensuring that defendants do not resort to the use of racial

quotas." *Id*). Several courts have rejected this interpretation of *ICP*, applying longstanding disparate impact precedent in finding a sufficient causal link between the challenged practice and the disproportionate harm to a protected class.

The Fourth Circuit analyzed *ICP*'s "robust causality requirement" in detail in *de Reyes v. Waples Mobile Home Park Limited Partnership* (903 F.3d 415 4th Cir. 2018), in which non-U.S. citizen mobile home park residents claimed that a mobile home park's policy of requiring that adult occupants provide documentation showing legal immigration status in order to renew their leases had an unlawful disparate impact on Latinxs. After holding that the plaintiffs demonstrated the policy's disproportionate effect on Latinxs (based on statistical data showing that over 35% of the state's Latinx population was undocumented, compared to less than 4% of the overall population), the Fourth Circuit held that the plaintiffs could demonstrate robust causality by: (1) showing a statistical disparity (e.g., the group of people who cannot demonstrate legal immigration status is disproportionately Latinx); (2) identifying the specific housing practice being challenged (e.g., a requirement to provide documentation of legal immigration status in order to renew a lease); and (3) demonstrating that the policy causes the statistical disparity (e.g., the requirement to demonstrate legal immigration status disproportionately excludes Latinx renters compared to non-Latinx renters) (*Id.* at 428-29. The Court emphatically rejected the defendant's argument that unauthorized immigration status would preclude the plaintiffs from establishing a prima facie case of disparate impact: "That view 'threatens to eviscerate disparate impact claims altogether" by "require[ing] an *intent* to disparately impact a protected class in order to show robust causality . . . ." *Id.* at 430.

Nat'l Fair Hous. All. v. Travelers Indem. Co., ---261 F. Supp. 3d---, Civil Action No. 16–928, 2017 WL 3608232 20 D.D.C. 2017).

In *National Fair Housing Alliance v. Travelers Indemnity Co.*, the district court likewise found a sufficient causal connection between a habitational insurance policy that excluded landlords who rent to tenants who use Housing Choice Vouchers to pay their rent, and harm to African American and women-headed households (both protected classes under the "Fair Housing Act"), who were more likely to be voucher recipients in the relevant geographical housing market (*Nat'l Fair Hous. All. v. Travelers Indem. Co.*, ---261 F. Supp. 3d---, Civil Action No. 16–928, 2017 WL 3608232 20 D.D.C. 2017). The court cited a long line of cases finding insurance policies susceptible to challenge under the "Fair Housing Act" and rejected the defendant's argument that the "robust causality" language in *ICP* rendered them invalid. The district court observed that *ICP* "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged. Indeed, quite the opposite—the Supreme Court instructed courts to ensure that disparate-impact liability is confined to removing 'artificial, arbitrary, and unnecessary barriers'" (*Id.* at *730 citing *Inclusive Communities ICP*, *supra* note 1, 135 S. Ct. at 2524).

Courts have always accepted that a diverse range of housing practices can be subject to a disparate impact challenge, and that has continued following *ICP*. One such example is redevelopment or urban renewal efforts. As cities throughout the country experience a massive resettlement of the urban cores (Leigh Gallagher, *The End of the Suburbs*; William H. Frey, *Demographic Reversal: Cities Thrive, Suburbs Sputter*), they are rapidly seeking to redevelop formerly blighted areas. Because long-time residents of these areas are disproportionately black and Latinx, redevelopment can have a disparate impact if it causes displacement. In a case that settled before *ICP*, a group of African American and Latinx residents of a blighted neighborhood in Mount Holly, NJ, challenged a redevelopment plan using a disparate impact theory (*Mount Holly*, *supra* note 10). The plaintiffs argued that the proposed redevelopment would displace them; indeed, their statistical evidence showed that that the negative impact would overwhelmingly affect African Americans and

Latinxs, who were also significantly less likely to be able to afford replacement housing in the community (*Id.* at 382-83). The plaintiffs got a favorable decision from the Court of Appeals, and the case subsequently settled in a fashion that permitted most of the families to move into newly constructed units in the same neighborhood. Now that the *ICP* decision has resolved that plaintiffs can challenge this type of conduct using disparate impact, one can expect similar cases to be brought in areas facing rapid gentrification. Such cases may be brought against private developers as well as governmental entities. In the recently filed case *Crossroads Residents Organized for Stable and Secure ResiDencieS et al. v. MSP Crossroads Apartments LLC et al.*, No. 0:16-cv-00233 (D. Minn.), the plaintiffs, mostly low-income tenants, challenge a private housing provider's plan to "reposition the complex in the market in order to appeal to and house a different [young professional] tenant demographic population." *See* Compl. (Doc. 1), 1; *id.* pgs 49-59, 68-71 (disparate impact allegations). The District Court held that the plaintiffs adequately alleged both disparate treatment and disparate impact under the FHA and allowed those claims to proceed. *Crossroads Residents Organized for Stable and Secure ResiDencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, 2016 WL 3661146 (D. Minn. July 5, 2016). The case subsequently settled as a certified class action that will amend the screening criteria and fund the acquisition and preservation of affordable rental properties. *Soderstrom v. MSP Crossroads Apartments LLC*, Civ. No. 16-233, 2018 WL 692912 (D. Minn. Feb. 2, 2018).

An example along similar lines is addressed in a 2016 Second Circuit affordable housing case, *MHANY Management, Inc. v. County of Nassau* (819 F.3d 581 (2d Cir. 2016). Citing the Supreme Court's recognition in *ICP* of the importance of such "heartland" zoning cases, the Second Circuit held that the plaintiffs met their burden of establishing that a rezoning decision by the City of Garden City, NY, prevented the development of affordable housing and therefore disproportionately harmed African Americans and Latinxs and perpetuated residential segregation (*Id.* at 619-20). The Second Circuit sent the case back to the District Court to determine whether the plaintiffs could also show that Garden City could achieve any legitimate zoning goals through less discriminatory alternative means (*Id.* at 620).

Similarly, in *Avenue 6E Investments, LLC v. City of Yuma*, the Ninth Circuit emphasized the importance of "policy to provide fair housing nationwide" in holding that the denial of an affordable housing provider's zoning request in order "to permit the construction of housing that is more affordable" may constitute an unlawful disparate impact, and rejected an argument that the availability of affordable housing in the same region necessarily precludes a plaintiff from showing disparate impact (818 F.3d 493, 509-13 9th Cir. 2016). On remand, the district court denied the city's motion for summary judgment, holding that the record showed that the rezoning denial had a discriminatory effect on Latinxs and that whether the city could establish a valid justification and the availability of less discriminatory alternatives were material issues of fact for trial (217 F. Supp. 3d 1040 D. Ariz. 2017).

We should also explore more disparate impact challenges to "disorderly conduct" or "chronic nuisance" ordinances, which subject landlords to fines and other penalties based on (among other things), police activity at their properties. Because these ordinances are drafted broadly, they have often been applied to include police responses to domestic violence incidents. Such ordinances will often force landlords to take steps to evict affected tenants following a triggering number of police responses at the property, under threat of hefty fines or other penalties (see Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*; Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*). These laws can have a clear disparate impact on women, who make up the very large majority of domestic

violence victims.

One plaintiff who had experienced extreme and life-threatening domestic violence and had been threatened with eviction after the police were called to her apartment three times sued the Borough of Norristown, PA, which had applied its disorderly conduct ordinance to compel her landlord to evict her (*Briggs v. Borough of Norristown*, Compl. Doc. 1, No. 2:13-cv-2191 E.D. Pa. 2013). The plaintiff argued, among other things, that the Norristown ordinance violated the "Fair Housing Act" because it adversely affected and penalized victims of domestic violence, who are disproportionately women.

Although the Norristown case ultimately settled, it provides an important model that should be studied and applied by fair housing practitioners. Hundreds of jurisdictions across the country have similar nuisance laws, some of which may have a chilling effect by discouraging victims from calling the police in an event of domestic violence for fear of losing housing (see *Briggs*, *supra* note 30, Compl. pgs 55–60, 68–75, 87–102; *Markham v. City of Surprise, AZ*, Compl. Doc. 1, No. 2:15-cv-01696 D. Az. 2015; Annamarya Scaccia's *How Domestic Violence Survivors Get Evicted from their Homes After Calling the Police*). To the extent that such laws lead to the evictions of tenants affected by domestic violence, they will also create a risk of increased homelessness for domestic violence victims and their children (nationwide, one in five homeless women cites domestic violence as the primary cause of her homelessness, demonstrating a strong correlation between domestic violence and homelessness. *See* Scaccia, *supra* note 32 citing a study by the National Law Center on Homelessness and Poverty). The availability of the disparate impact standard will allow plaintiffs to bring successful challenges if they can present evidence of a discriminatory effect on women or families with children, without having to also present frequently difficult or impossible-to-obtain evidence of bias.

Plaintiffs have also used a disparate impact theory to challenge housing restrictions against people with criminal records, another area where bias may well be at play but can be difficult to prove. In *Sams v. Ga West Gate, LLC*, for example, current and former tenants and a fair housing organization challenged an apartment complex's "99-year criminal history rule," which "barred from residency any individual who had certain felony or misdemeanor convictions within the past 99 years" (*Sams v. Ga W. Gate, LLC*, No. CV415-282, 2017 WL 436281, at *1 S.D. Ga. Jan. 30, 2017). The district court held that the plaintiffs had adequately pleaded a disparate impact claim by showing that nationwide, African Americans were more likely than whites to have criminal convictions and were over-represented in the prison population, and that the 99-year criminal history rule therefore adversely impacted African Americans (*Id.* at *5). A similar disparate impact challenge to a restriction against renting to people with non-traffic criminal offenses is pending before another district court in *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.* In that case, the U.S. Department of Justice has filed a Statement of Interest setting forth its view that such bans may violate the "Fair Housing Act" (case 1:14-cv-06410-VMS, ECF No. 102 E.D.N.Y. Oct. 18, 2016. The plaintiffs in *Sams* and *Fortune Society* also claim that the criminal record bans are motivated by discriminatory intent).

Courts have also allowed disparate impact challenges to policies characterized by the delegation of discretion, relying on Title VII case law. For example, in *City of Oakland v. Wells Fargo Bank* (*City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at *13 N.D. Cal. June 15, 2018 citing Title VII cases including *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 1988; *Rose v. Wells Fargo Co.*, 902 F.2d 1417 9th Cir. 1990; *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 N.D. Cal. 2012), the Court held that the plaintiffs adequately identified a policy with a discriminatory effect—a lender's granting of discretion to loan officers combined with incentives that encouraged them to sell more expensive and riskier loans than for which borrowers were qualified. The court held that the complaint adequately alleged that the

granting of such discretion and incentives was a specific policy, and that there was a "sufficient causal link between the specific policies and practices and the disparate impact on minority borrowers for pleading purposes." The court reached a similar conclusion in *National Fair Housing Alliance v. Federal National Mortgage Association*, holding that by identifying a policy of "delegate[ing] discretion or fail[ing] to supervise and differential maintenance based on the properties' age and value," the plaintiffs adequately alleged a policy that was the "robust cause" of disproportionate harm to communities of color (294 F. Supp. 3d 940, 948 N.D. Cal. 2018).

Consistent with HUD's Disparate Impact Rule, courts have required that a defendant meet a burden of *proof*, not production, to justify a policy's discriminatory effect. The Ninth Circuit recently affirmed summary judgment for fair housing plaintiffs, including an award of punitive damages, in a disparate impact challenge to an occupancy limitation because the defendant failed to produce evidence sufficient to justify the policy (*Fair Hous. Ctr. of Washington v. Breier-Scheetz, LLC*, 743 F. App'x 116 Nov. 19, 2018. The court held that punitive damages were justified because the defendant did not change its policy even after being notified by the city's Office of Civil Rights that the occupancy limit was a fair housing violation).

In the aftermath of *ICP*, and consistent with decades of earlier precedent, fair housing advocates are continuing to make effective and creative use of the disparate impact theory to challenge a range of housing policies that have the effect of disproportionately harming protected classes without a lawful justification.

FORECAST FOR 2019

On June 28, 2018, HUD issued an Advance Notice of Proposed Rulemaking (ANPR) regarding the Disparate Impact Rule that was implemented on February 15, 2013. A HUD media release acknowledged the Supreme Court's decision in *ICP* upholding the use of disparate impact theory to establish liability under the "Fair Housing Act." HUD maintains that the *ICP* decision, however, did not directly rule on the rule itself. Therefore, the ANPR invited comment on certain issues relating to the Disparate Impact Rule, including the burden-shifting approach and whether the Rule should be amended or clarified in light of *ICP*. 83 Fed. Reg. 28560 (June 20, 2018). The comment period closed on August 20, 2018; as of December 2018, HUD has not published any further action with respect to its Disparate Impact Rule.