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The Disparate Impact Theory Survives Supreme Court Review, But Receives A Haircut

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In *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, the U.S. Supreme Court addressed whether claims brought under the Fair Housing Act, which prohibits housing discrimination “because of” race and other protected characteristics, can be based upon a “disparate impact.” In other words, can a defendant be held liable when even it wasn’t motivated by an intent to discriminate, but its actions have a discriminatory effect? The Supreme Court had agreed to review this question on two earlier occasions, but those cases settled before the Court could decide them. Now, in a 5-4 opinion, the Court rules that disparate impact claims are available under the Fair Housing Act, but it places new and significant limitations on them.

The Court’s opinion in *Inclusive Communities* draws parallels between the Fair Housing Act and two other statutes, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. The Court reasoned that both of those statutes allow claims based on disparate impact, and it found the relevant language and underlying policies of the Fair Housing Act to be similar. The Court also relied upon the fact that when Congress amended the Fair Housing Act in 1988, the amendments appeared to accept the premise that disparate impact claims were viable.

At the same time, however, the Court appears to have raised the bar significantly for anyone attempting to bring a disparate impact claim.

As a policy matter, the Court cautioned that the “disparate impact” theory should not be used to second-guess discretionary housing decisions made in good faith. The Court explained that the disparate impact theory only addresses “artificial, arbitrary, and unnecessary

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barriers” and is “not an instrument to force housing authorities to reorder their priorities.” Thus, to defeat a disparate impact claim, a state housing authority (and presumably, a local municipality) only needs to present a “valid interest served by their policies.” Significantly, the Court acknowledged:

“Zoning officials . . . must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community’s quality of life and are legitimate concerns for housing authorities.”

The Court instructed that such considerations must be addressed at the “*prima facie*” stage of a disparate impact case, which means prior to the time when the parties begin engaging in discovery. The Court stated that “prompt resolution of these cases is important.” Thus, a complaint that lacks sufficient facts showing a plausible cause/effect relationship between a policy and a statistically significant impact upon a protected class will be subject to dismissal. Moreover, the Court explained that a “one-time decision” involving a particular housing project “may not be a policy at all” and therefore might not be susceptible to a disparate impact challenge.

In sum, the Court appears to have significantly narrowed the scope of the disparate impact theory and made it far tougher for plaintiffs to plead a viable case. How tough? The answer to that question will draw into sharper focus as lower courts begin to apply these new standards.

Please contact Ed Phillips at ephillips@kblaw.com or any of our other municipal law attorneys if you have any questions or would like a copy of the decision.

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