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Courtside Newsletter

Recent SCOTUS Ruling on the FHA & How It Affects REALTORS®

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"Disparate impact" is a phrase sometimes heard but oftentimes not well understood. However, in late June, the Supreme Court of the United States (SCOTUS) brought the issue front and center in narrow ruling that held that disparate-impact claims are cognizable under the federal Fair Housing Act (FHA). The ruling on Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., et al. presents a huge victory for the Court, civil rights groups, and the struggle towards equality in the United States.

Although it may seem implausible, this decision does affect real estate practitioners, and mainly those working as property managers. It is important to pay extra attention to the detail when leasing or selling a home, to ensure that your practices or those of your clients are not adversely harming any specific group of people. With any luck, this will not be a major area of concern for most real estate agents, brokers, and property managers.

What is Disparate Impact?

According to the National Fair Housing Alliance, disparate impact is a doctrine under the FHA that states that any policy, rule or practice could be considered discriminatory if it has a disproportionate adverse impact against any group based on race, national origin, color, religion, sex, familial status, or disability when there is no legitimate, non-discriminatory business need for the policy, rule or practice. The policy, rule or practice (hereinafter "policy") can appear innocuous enough, but if it has an adverse affect on a protected class (as described above), it can be considered disparate impact. Examples of disparate impact include:

- A minimum height requirement for a specific job: In 1974, the New Bedford police department had a requirement that "police officers" were required to be at least 5'6" tall. This had a disproportionately adverse impact on women, since they failed to meet the height requirement more often than men.
- An education requirement: When hiring laborers, an employer required applicants to have a high school diploma. At the time, this had an adverse impact people of color applying for the job, more so than whites.

In a lawsuit, once a policy has been proven to have a disproportionately adverse effect on people of a protected class, the burden shifts to the employer or group instituting that policy to prove that there is a legitimate reason for the policy. If, as seen in the examples above, there is no legitimate, non-discriminatory reason for the policy, it can be considered disparate impact.

Up until the recent SCOTUS ruling, there has been a debate as to whether those filing a disparate-impact claim must prove that the intent of the policy was to discriminate. Civil rights groups have continuously fought the idea that the FHA only prohibits intentional discrimination, while the Supreme Court (as recently as 2011 and 2012) has continuously ruled otherwise, maintaining the precedent that intent must exist.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., et al.

In the instant action, the question brought before the Court was whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. According to the Court, a disparate-impact case differs from that of a disparate-treatment case in that, in a disparate-treatment case, a plaintiff must establish that the defendant had a discriminatory intent or motive. In a disparate-impact case, "a plaintiff…challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."

In Texas, federal housing credits are distributed by the Texas Department of Housing and Community Affairs ("Department"). Developers can apply for tax credits, and their developments are scored under a point system set forth by the Texas Government Code. Inclusive Communities Project, Inc. ("ICP") is a Texas-based non-profit that assists low-income families with obtaining affordable housing. In 2008, ICP brought a suit against the Department, alleging that the Department had caused "continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods."

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In its case, ICP relied on two pieces of statistical evidence to prove that a protect class was disproportionately adversely impacted by the Department's distribution of tax credit.

- "[F]rom 1999-2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed nonelderly units in 90% to 100% Caucasian areas."
- "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents."

The District Court held that the Department failed to prove that there were no less discriminatory alternatives to this practice, and therefore ruled in favor of ICP. The remedial order of the District Court required new selection criteria for tax credits, but did not contain explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. This regulation contains a burden-shifting framework in which:

1. First, the plaintiff has the burden of proving that a challenged practice has or will predictably have a discriminatory effect.
2. Thereafter, the defendant must show "that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests."
3. Lastly, once the defendant has satisfied its burden, the "plaintiff may 'prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.'"

In the Court of Appeals' review of this case, it took into consideration this HUD regulation, and thereafter reversed and remanded the District Court's decision, finding it improper to have place the burden on Defendant to prove there were no less discriminatory alternatives for allocating low income housing tax credits. The Department then filed a writ of certiorari with the Supreme Court on the question of whether disparate-impact claims can be brought under the FHA.

Title VIII of the Civil Rights Act of 1968 aka the Fair Housing Act

The opinion issued in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., et al. went into detail about the history of Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA). SCOTUS found that the history of the FHA, adopted shortly after the assassination of Dr. Martin Luther King, Jr., was important in interpreting the disparate impact claim brought before it.

According to the Court, both §703(a)(2) of Title VII of the Civil Rights Act of 1964 and §4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. These two statutes preceded the FHA, and determined that "antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." However, in order to protect employers in such instances where policy could seem to have an adverse effect on protected classes, the person or group bringing the disparate-impact claim must prove that there is "an available alternative … practice that has less disparate impact and serves the [entity's] legitimate needs."

With this in mind, the Court looked to the FHA, under which is it "unlawful to 'refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to a person because of race' or other protected characteristic … or 'to discriminate against any person in' making certain real-estate transactions 'because of race' or other protected characteristic…" In accordance the two previously-enacted antidiscrimination statutes described above, it would seem that the language in all three statutes shift the emphasis "from an actor's intent to the consequences of his actions." Continuing with this train of thought, the Court opined that "recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which… was enacted to eradicate discriminatory practices within" the nation's real estate sector. Of course, a disparate impact claim should be looked at by a court with fine-toothed comb. Disparate-impact liability should not be construed so broadly that racial considerations become a part of every housing decision.

SCOTUS' Decision & its Affect on REALTORS®

In a 5-4 ruling, the Court held that disparate-impact claims are cognizable under the FHA. However, at the same time the Court limited disparate impact liability to those policies that pose "artificial, arbitrary, and unnecessary barriers." According to the SCOTUS blog, such a qualifier could be the determining factor of the outcome of Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., et al. on remand.

It is important for all real estate professionals to ensure they are not acting in a discriminatory manner. This decision can and does affect real estate practitioners, and mainly those working as property managers. It is important to pay extra attention to the detail when leasing or selling a home, to ensure that your practices or those of your clients are not adversely harming any specific group of people. With any luck, this will not be a major area of concern for most real estate agents, brokers, and property managers. However, if there are any questions regarding a particular practice, or even how to deal with a client who might request something that could adversely affect a protected class, it is best to seek qualified counsel either in the form of an attorney or at your local REALTOR® association.