12 September 2016

Practice Groups:

Financial Institutions and Services Litigation

Commercial Disputes

Inclusive Communities Excluded from Court—Plaintiff Can't Meet Supreme Court Standard for Disparate-Impact Claims under the Fair Housing Act

By Paul F. Hancock, Andrew C. Glass, Olivia Kelman, and Joshua Butera

K&L Gates LLP previously observed that the U.S. Supreme Court's recognition of disparate-impact claims under the Fair Housing Act in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*[1] had a "silver lining."[2] In particular, the Supreme Court identified that a plaintiff must meet a rigorous standard to establish a prima facie case of disparate-impact discrimination under the Fair Housing Act. On remand, the U.S. District Court for the Northern District of Texas applied that standard, holding that the plaintiff fell far short of meeting the Supreme Court's "proof regimen" necessary to sustain a disparate-impact claim.[3] The district court's decision reaffirms that, in interpreting the Supreme Court's decision properly, a Fair Housing Act plaintiff proceeding under a disparate-impact theory faces a significant burden.

The District Court Rejects the Plaintiff's Disparate-Impact Claim

The *Inclusive Communities* plaintiff brought suit under the Fair Housing Act challenging the manner in which the Texas state government exercised its discretion in apportioning tax credits for subsidized housing developments. Asserting disparate-treatment and disparate-impact theories of liability, the plaintiff sought an order that the state exercise its discretion differently, namely to promote "developments that provide opportunities for desegregation" versus "developments in areas of slum and blight." In its original decision, rendered after a bench trial, the district court rejected the plaintiff's disparate-treatment claim but ruled that it had stated a disparate-impact claim. On appeal, the Fifth Circuit Court of Appeals, for the first time, adopted a Fair Housing Act disparate-impact standard; the circuit court then reversed and remanded so that the district court could apply the new standard. On further review, the Supreme Court ruled that the Fair Housing Act recognized a disparate-impact theory; at the same time, the Court articulated a rigorous standard that a plaintiff must meet for establishing such a claim.

After remand, the district court invoked the Supreme Court's instruction that lower "[c]ourts must [] examine with care whether a plaintiff has made out a prima facie case of disparate impact" under the Fair Housing Act. Reiterating the standard articulated in *Inclusive Communities*, the district court ruled that to sustain a disparate-impact claim, the plaintiff must (1) identify a specific, facially-neutral policy that (2) creates an artificial, arbitrary, and unnecessary barrier to housing and (3) causes a significant disparity between subject

---

[1] 135 S. Ct. 2507 (2015) ("*Inclusive Communities*").

[2] *See* Hancock, Glass, & Kelman, "*Inclusive Communities Project's* Silver Linings: Assessing the High Court's 2015 Fair Housing Act Ruling, Washington Legal Foundation, 30 Legal Backgrounder 28 (Nov. 20, 2015).

[3] *Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, C.A. No. 3-08-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

groups. The district court explained that the plaintiff "must affirmatively identify a *specific* policy that produced a disparate impact, rather than point to a *lack* of policy that caused it" (emphasis added). Applying the *Inclusive Communities* standard, the court found that the plaintiff had failed to meet its burden of proof. In particular, the court rejected the plaintiff's argument that the "'cumulative effects' of [the defendant's discretionary] decision-making process over a multi-year period" could constitute disparate impact. Rather, the district court ruled that although not present in this case, when "a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment," not disparate impact.[4]

The district court also noted that under *Inclusive Communities*, (1) not all remedies are available to a disparate-impact plaintiff, and (2) lower courts must consider whether a particular disparate-impact claim has an appropriate remedy. "[T]o remedy disparate impact," the court must be able to "craft a race-neutral remedy that removes the offending practice." As noted above, the *Inclusive Communities* plaintiff requested that the court order the defendant to apportion housing tax credits to promote desegregation rather than to redevelop blighted areas. But the district court held that because the plaintiff had "not identified any barriers to housing that the court can remove," it would not have been entitled to relief.[5]

Although the district court might have ended its analysis there, it ruled that even "assuming arguendo" that the plaintiff had identified a proper policy, it "has not proved that it was [the defendant]'s exercise of discretion—and not something else—that caused the [disparity]." In particular, the district court held that the plaintiff (1) "has not demonstrated that, had [the defendant] not been permitted to exercise any discretion … there would be no, or significantly less, disparity," and (2) offered no proof that "local zoning rules, community preferences, or developers' choices did not contribute to the statistical disparity." Thus, the district court held that the plaintiff had failed to meet the "robust causality requirement" necessary for sustaining a disparate-impact claim, which requirement is meant to "protect[] defendants from being held liable for racial disparities they did not create."[6]

Conclusion

The Supreme Court has directed lower courts to undertake a rigorous consideration of disparate-impact claims brought under the Fair Housing Act, and the *Inclusive Communities* plaintiff failed to meet its "onerous [] prima facie burden of proof."[7] The dismissal of that plaintiff's flawed claim stands in accord with other district and circuit court decisions issued in the wake of the Supreme Court's confirmation of the strict limits on disparate-impact liability under the Fair Housing Act.[8]

---

[4] *Id.* at *7.

[5] *Id.*

[6] *Id.* at *4 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

[7] *Id.* at *1.

[8] *See, e.g.*, *City of Miami v. Bank of Am. Corp.*, 2016 WL 1072488, at *4–5 (S.D. Fla. Mar. 17, 2016) (applying *Inclusive Communities* and granting defendants' Rule 12(b)(6) motion to dismiss); *Shahin v. PNC Bank*, 625 F. App'x 68 (3d Cir. 2015) (*per curiam*) (same).

Inclusive Communities Excluded from Court—Plaintiff Can't Meet Supreme Court Standard for Disparate-Impact Claims under the Fair Housing Act

Authors:

Paul F. Hancock
paul.hancock@klgates.com
+1.305.539.3378

Andrew C. Glass
andrew.glass@klgates.com
+1.617.261.3107

Olivia Kelman
olivia.kelman@klgates.com
+1.305.539.3382

Joshua Butera
joshua.butera@klgates.com
+1.617.951.9100