

INSURANCE AND REINSURANCE

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IN THIS ISSUE

Sharon Stuart examines the future of disparate impact claims under the U.S. Fair Housing Act in light of the Supreme Court's forthcoming decision in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., and the potential implications of that decision for the insurance industry.

Is the Wait Almost Over?

The Insurance Industry Watches as the U.S. Supreme Court Finally Considers Whether The Fair Housing Act Allows Claims for Discriminatory Impact

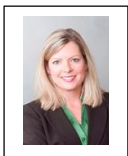
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As the case of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*¹ has wound its way through the district and appellate courts and on to the U.S. Supreme Court, the insurance industry has been closely watching. When the Supreme Court agreed to hear the case – which involves the viability of disparate impact claims under the U.S. Fair Housing Act of 1968 (“FHA”) – industry advocates weighed in as *amici curiae*. The decision may be one of the most important rulings the Court makes this year,² but why are insurance companies so interested? It is because the provision and pricing of homeowners’ insurance is a practice governed by the FHA. If plaintiffs can sue because a housing practice has a discriminatory effect, even if it is not intentionally discriminatory, insurers may be subject to those claims just as governmental entities, sellers, landlords and lenders are.

Background

Section 804(a) of the FHA makes it unlawful “[t]o refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”³ Likewise, the FHA provides that “[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions

of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”⁴ The stated purpose of the Act was to unravel “patterns of racial segregation” in housing by outlawing all the “manifold and insidious ways in which discrimination works its terrible effects.”⁵

In 2008, the Inclusive Communities Project, Inc. (“ICP”), a nonprofit that works to place African American tenants in Dallas’s predominantly white suburbs, sued the Texas Department of Housing and Community Affairs (“Texas”), claiming Texas disproportionately allocates tax credits to properties in minority populated areas. ICP brought both disparate treatment claims under the Equal Protection clause and 42 U.S.C. § 1982, and a disparate impact claim under the FHA. ICP also sought an injunction requiring Texas “to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many Low Income Housing Tax Credit assisted units in nonminority census tracts as exist in minority census tracts” and to prohibit denying credits to units by taking the race and ethnicity of residents of the project area into account.⁶

Following a bench trial, the U.S. District Court for the Northern District of Texas dismissed ICP’s equal protection and Section 1982 claims, finding that it had failed to prove intentional discrimination. However, the district court ruled that ICP had

¹ Supreme Court of the United States, No. 13-1371.

² Terry Eastland, “Will the Supremes Finally Rule?”, *The Weekly Standard*, Oct. 27, 2014.

³ 42 U.S.C. § 3604(a).

⁴ 42 U.S.C. § 3605(a).

⁵ 114 Cong. Rec. 2279, 2688, 2699 (1968).

⁶ Complaint, *The Inclusive Communities Project Inc v. Texas Department of Housing and Community Affairs et al.*, 3:08-cv-0546-D, N. D. Tex., March 28, 2008.

established a prima facie case of disparate impact liability by showing that Texas had approved tax credits for non-elderly developments in minority neighborhoods in a disproportionate fashion and had engaged in disproportionate denial of tax credits for non-elderly housing in predominately white neighborhoods.⁷ The district court found that Texas proved its actions furthered a legitimate government interest because they complied with state laws requiring award of low-income housing tax credits according to set criteria, including some that correlated with race. However, the court held that Texas failed to meet the burden of proving the absence of any alternative course of action that would enable the legitimate government interest to be served with less discriminatory impact.⁸ The court entered judgment in ICP's favor on the disparate impact claim and imposed an injunction on Texas, which in turn appealed to the Fifth Circuit.

HUD's Regulation

In 2013, while the case was on appeal, HUD issued a regulation interpreting the FHA to permit disparate impact liability and purporting to set standards for proving such claims under the FHA.⁹ According to HUD, the FHA imposes liability for practices that actually or predictably result in a

discriminatory effect on a group or create, increase, reinforce, or perpetuate segregated housing "because of race, color, religion, sex, handicap, familial status, or national origin."¹⁰ The HUD regulation provides a three-part burden-shifting mechanism different from that imposed by the district court. Under the regulation, the plaintiff must prove that a challenged practice has a discriminatory effect. If the plaintiff meets this burden, the defendant must then prove that the practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."¹¹ If the defendant meets its burden, the plaintiff bears the burden of proving that those substantial, legitimate, nondiscriminatory interests "could be served by another practice that has a less discriminatory effect."¹²

In addition to establishing the burden-shifting procedure, HUD's rule makes clear that it retroactively applies to both public and private parties and illustrates discriminatory housing practices found in the Fair Housing Regulations.¹³ The preamble of the proposed rule expressed HUD's view that insurers may be liable for practices related to the provision and pricing of homeowner's insurance under a disparate impact theory.¹⁴ Moreover, HUD's response to industry comments made clear that it

⁷ *The Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 860 F. Supp.2d 312, 331 (N.D. Tex. 2012).

⁸ 860 F. Supp.2d at 331.

⁹ HUD, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,474 (Feb. 15, 2013).

¹⁰ 24 C.F.R. § 100.500(a) (2014); see also 24 C.F.R. § 100.500(c)(2).

¹¹ 24 C.F.R. § 100.500(c)(1)-(2).

¹² *Id.* at § 100.500(c)(3).

¹³ HUD, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

¹⁴ HUD, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 76 Fed. Reg. 70924 (Nov. 16, 2011) (noting as an example of a practice that may have a disparate impact "the provision and pricing of homeowner's insurance, and citing *Ojo v. Farmers Group, Inc.*, 600 F.3d 1205, 1207-8 (9th Cir.

disagrees with insurers with regard to the burdens the FHA places on them.¹⁵

The Insurance Industry Takes Action

HUD's issuance of the rule spurred the homeowner's insurance industry to take action. In 2013, nonprofit trade organizations the American Insurance Association ("AIA") and the National Association of Mutual Insurance Companies (NAMIC) filed a lawsuit under the Administrative Procedures Act in the U.S. District Court for the District of Columbia, claiming that the rule was invalid because HUD's interpretation was contrary to the plain language of the FHA.¹⁶ Likewise, the Property Casualty Insurers Association of America ("PCI") sued HUD in the Northern District of Illinois, contending that the rule was procedurally defective because HUD did not adequately consider the inconsistency between disparate impact liability versus the nature of insurance and the McCarran-Ferguson Act.¹⁷ In November of 2014, after the Supreme Court granted certiorari in *Inclusive Communities*, the district court in AIA vacated HUD's rule, holding that the FHA unambiguously prohibits disparate treatment *only*, that the disparate impact rule is contrary to law, and that HUD

exceeded its authority by issuing a rule imposing disparate impact liability.¹⁸ Similarly, the PCI court agreed that HUD failed to adequately consider the inconsistency between the rule and the nature of insurance and the McCarran-Ferguson Act, and in September 2014, the PCI court remanded to HUD for further consideration.¹⁹

The Supreme Court Proceedings

Meanwhile, the Fifth Circuit was considering Texas's appeal of the *Inclusive Communities* decision. Previous decisions of the Fifth Circuit had held that disparate impact liability is allowed under the FHA and the panel was bound by those decisions.²⁰ However, that court had not previously ruled upon the burden-shifting test to be applied in disparate impact claims. In *Inclusive Communities*, the Fifth Circuit rejected the district court's test, adopted the HUD regulations, and remanded so that the district court could apply the HUD framework.²¹ On October 2, 2014, the U.S. Supreme Court granted certiorari as to a single issue in *Inclusive Communities* -- whether disparate impact claims are cognizable under the FHA.²²

2010)(en banc); HUD, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013). See also 24 C.F.R. 100.70(d)(4) (Mar. 15, 1989) (defining as prohibited the refusal "to provide ... property or hazard insurance for dwellings or providing such ... insurance differently" due to a protected class).

¹⁵ 78 Fed. Reg. at 11475.

¹⁶ *AIA v. HUD*, Civ. No. 13-966 (D.D.C. filed June 26, 2013).

¹⁷ *PCI v. Donovan*, Civ. No. 13-8564 (N.D. Ill. filed Nov. 27, 2013).

¹⁸ See WL 5802283 (D.D.C. Nov. 7, 2014).

¹⁹ 2014 WL 4377570 (N.D. Ill. Sept. 3, 2014).

²⁰ See, e.g., *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009).

²¹ *The Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 276 (5th Cir. 2014).

²² The Court refused to hear a second proposed issue regarding how disparate impact claims should be judged if they are allowed to be filed.

Contrary to the district courts' conclusions in *PCI* and *AIA*, all of the federal circuit courts except the D.C. Circuit have either held or assumed that the FHA authorizes disparate impact claims.²³ The U.S. Supreme Court has long been interested in this issue, having granted certiorari on two previous occasions to resolve whether the FHA provides for disparate impact liability. Both of those cases were dismissed before the Court resolved the question.²⁴ *Inclusive Communities*, however, is different from a political standpoint.²⁵

The parties' arguments before the Supreme Court are straightforward – Texas argues that the plain language of the FHA does not allow disparate impact claims; ICP argues that it does.²⁶ Texas says that even if it did, state and local governmental agencies

would improperly be forced to engage in “race-conscious decision-making to avoid legal liability;”²⁷ ICP (and HUD, which entered the case to defend HUD’s new regulation) contend that the Act must be construed broadly to eradicate the continuing effects of discrimination. According to Texas, if the FHA allows discriminatory effects liability, then any federal law barring discrimination “because of race” can be expanded; ICP urges the Court to defer to HUD’s expert view of the law’s intent.²⁸

The insurance industry, through *AIA*, *PCI* and *NAMIC* filed one of fifteen *amicus curiae* briefs in support of Texas. The industry’s stated purpose is to bring “to the Court’s attention further evidence, specific to the insurance industry, that Congress did not

²³ See *Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir. 2007); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Charleston Housing Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149–50 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

²⁴ See *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.). *Mount Holly*, a Third Circuit case, was settled before oral argument. *Magner*, from the Eighth Circuit, was withdrawn by the Petitioner before argument.

²⁵ *Statement of National Association of Mutual Insurance Companies to the United States House of Representatives Committee on Financial Services*

Subcommittee on Oversight and Investigations Hearing on A General Overview of Disparate Impact Theory, Nov. 19, 2013, p. 121 (referencing the Obama administration’s persuasion of Petitioner in *Magner* to withdraw its cert petition just before oral argument in February 2012 so HUD could issue the regulation); see also Lyle Denniston, “Argument preview: That housing bias issue is back”, *SCOTUSblog* (Jan. 20, 2015, 5:03 PM), <http://www.scotusblog.com/2015/01/argument-preview-that-housing-bias-issue-is-back/>.

²⁶ Interestingly, current and former members of Congress have filed one of twenty-plus *amicus* briefs supporting affirmance, contending that the law was intended to prohibit acts that have an unjustified discriminatory effect as well as those that are motivated by discriminatory intent. Brief for Current and Former Members of Congress as *Amicus Curiae* Supporting Respondent, No. 13-1371 (U.S. Dec. 23, 2014).

²⁷ Petitioner’s Brief at 12, *Texas Dep’t. of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, No. 13-1371 (U.S. Nov. 2014).

²⁸ Petitioner’s Brief at 13; Respondent’s Brief at 31-32.

intend to create disparate impact liability in the FHA.”²⁹ The industry points to two overarching reasons in support of its position: *first*, the text of the FHA unambiguously prohibits only disparate treatment; and *second*, disparate impact liability would disrupt the business of homeowner’s insurance to such an extent that Congress could not have intended to create such liability.

The first point, which is the centerpiece of Texas’s argument as well, is that the text of the FHA simply does not permit disparate impact claims. Clear language is required in order for a statute to prohibit practices resulting in disparate impact. Unlike Title VII and the Age Discrimination in Employment Act (“ADEA”), the FHA does not include language specifically focused on the *effects* of the prohibited conduct, nor does it contain an affirmative indication that Congress intended to prohibit practices resulting in disparate impact.³⁰ Rather, consistent with the classic articulation of disparate treatment, it focuses on the improper *motive* of the defendant.³¹

Moreover, even if the Supreme Court looks beyond the plain language of the statute, the imposition of disparate impact liability on insurers would conflict with the McCarran-

Ferguson Act and disrupt the business of insurance. McCarran-Ferguson provides that no law of general applicability “shall be construed to invalidate, impair, or supersede” any state law that regulates the business of insurance.³² *Amici* argue that states require insurers to use actuarial practices based on factors “legitimately related to the risks associated with insured properties” and usually prohibit insurers from considering inappropriate factors like race when making classification and rating decisions.³³ Furthermore, insurers’ solvency depends upon their “ability to match price with risk.”³⁴ A construction of the FHA allowing disparate impact claims against insurers impairs state insurance laws relating to differentiating among risks and laws that prohibit consideration of personal characteristics in the classification, pooling and rating process, and thus is incompatible with McCarran-Ferguson.³⁵ As *amici* note, by differentiating among insureds on the basis of risk, insurers engage in “fair discrimination” which in turn results in fairness to insureds and economically sound decision making for insurance companies. Discrimination on the basis of factors not legitimately related to risk would undermine the actuarial principles underlying the provision of insurance.³⁶ Furthermore, most states prohibit differentiating between

²⁹ Brief for American Insurance Association, et al., as *Amicus Curiae* Supporting Petitioner at 3, *Texas Dep’t. of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, No. 13-1371 (U.S. Nov. 24, 2014).

³⁰ Brief for American Insurance Association at 5-8. Compare 42 U.S.C. 2000e-2(a)(2) and 29 U.S.C. 623(a)(2), prohibiting actions that “otherwise adversely affect” an individual, to Section 804(a)’s prohibition of actions that “otherwise make unavailable or deny[] a dwelling” to an individual because of a protected characteristic. 42 U.S.C. §

3604(a). AIA points out that the language of Section 3604 focuses on the action taken by the defendant and the motivation for it, rather than on the effect on a member of a protected class. Brief for American Insurance Association at 8-9.

³¹ Brief for American Insurance Association at 8-9.

³² 15 U.S.C. § 1012(b).

³³ Brief for American Insurance Association at 10.

³⁴ *Id.* at 10.

³⁵ *Id.* at 11.

³⁶ *Id.* at 15.

similar risks based on protected characteristics like race.³⁷

Thus, disparate impact liability would “place insurers in an impossible position” because a claim could be triggered by any risk factor that affects a protected class in a disproportionate way, but eliminating otherwise appropriate risk factors because they have a disparate impact would violate sound insurance practice and result in unfairly discriminatory rates.³⁸ Moreover, insurers would be exposed to tremendous uncertainty and litigation risk due to their inability to predict the potential disproportionate effect of fair discrimination across different geographic areas, time, and hundreds of actuarially appropriate risk factors.³⁹ *Amici* argue that this outcome leaves insurers with a Hobson’s choice of (1) assigning insureds to alternative risk pools in contravention of sound actuarial principles; (2) ignoring risk characteristics that have a disparate impact and simply charging all

insureds the same, likely forcing insurers out of business; or (3) raising prices for all insureds, thus harming them in the near term.⁴⁰ The D.C. Circuit aptly summed up the problem: “it is utterly incomprehensible that Congress would *intentionally* provide for disparate-impact liability against insurers in the FHA, where doing so would *require* those same insurers to collect and evaluate race-based data, thereby engaging in conduct expressly proscribed by state law.”⁴¹

The High Court heard oral argument on January 21, 2015. The more liberal justices questioned Texas’s plain text argument, noting that the goal of the FHA was to reverse ages of discrimination. Interestingly, Justice Scalia joined those justices to point out that the 1988 changes to the law, which created three exceptions to disparate impact liability, show Congress’s awareness that a disparate impact remedy was well established.⁴² However, Justice

³⁷ *Id.* at 16.

³⁸ *Id.* at 21. As NAMIC stated in 2013 testimony before Congress: “Thus, what is really rotten at the core of the disparate-impact approach is this: Under the guise of combating the problem of ‘unintended’ or ‘hidden’ discrimination, the theory encourages deliberate, overt discrimination. Applied to property insurance, it requires underwriting and rating factors to be chosen with an eye on the racial bottom line. Such a practice would be condemned under any other circumstances, and rightly so.” *Statement of National Association of Mutual Insurance Companies to the United States House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations Hearing on A General Overview of Disparate Impact Theory*, Nov. 19, 2013, p. 121.

³⁹ Brief for American Insurance Association at 21.

⁴⁰ *Id.* at 22-23.

⁴¹ *Id.* at 23. See also NAMIC testimony before Congress wherein it stated, “[i]n sum, by pushing companies to substitute race-outcome-based

decisions for decisions that are color-blind and merit-based (or risk-based, in the case of insurance), disparate impact lawsuits have two bad results: less efficient and productive business practices, and the institutionalization of race-conscious decision-making. That is not just the effect of disparate impact; it is its intent.” *Statement of National Association of Mutual Insurance Companies to the United States House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations Hearing on A General Overview of Disparate Impact Theory*, Nov. 19, 2013, p. 121.

⁴² The Solicitor General argued for HUD that the 1988 amendments settled the issue or at least show that disparate impact liability is a permissible reading of the law, such that the Court should defer to HUD’s interpretation. Lyle Dennison, “Argument analysis: Scalia versus Scalia on housing law?”, *SCOTUSblog* (Jan. 21, 2015, 1:40PM), <http://www.scotusblog.com/2015/01/argument-analysis-scalia-versus-scalia-on-housing-law/>

Scalia was equally tough on ICP's counsel, noting that racial disparity is not the same as racial discrimination. The Court's more conservative members pressed the U.S. Solicitor General, who argued on behalf of HUD, about how decision makers can know in advance whether a policy's impact will be good or bad.⁴³ Ultimately, Texas's fallback argument -- that local governments will be required to adopt racial quotas to protect against effects-based liability -- could carry the day as it may be attractive to the more conservative justices.⁴⁴

The Supreme Court will rule by the end of its term on June 30, 2015. Until then, parties on both sides of this politically charged and emotional issue will wait, watch and plan for the future. Because regardless of the outcome of *Inclusive Communities*, it is unlikely that the debate surrounding disparate impact will end there.

⁴³ Amy Howe, "Justice Scalia keeps both sides guessing in Fair Housing Act case: In Plain English", *SCOTUSblog* (Jan. 22, 2015, 12:18 PM), [http://www.scotusblog.com/2015/01/justice-scalia-](http://www.scotusblog.com/2015/01/justice-scalia-keeps-both-sides-guessing-in-fair-housing-act-case-in-plain-english/)

[keeps-both-sides-guessing-in-fair-housing-act-case-in-plain-english/](http://www.scotusblog.com/2015/01/justice-scalia-keeps-both-sides-guessing-in-fair-housing-act-case-in-plain-english/).

⁴⁴ Lyle Dennison, "Argument analysis: Scalia versus Scalia on housing law?", *supra*, n. 42.

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