Banking and Finance Law Daily Wrap Up, TOP STORY—U.S.: Disparate-impact claims are cognizable under the Fair Housing Act, (Jun. 25, 2015)

Banking and Finance Law Daily Wrap Up

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By Thomas G. Wolfe, J.D.

In characterizing the issue as one of "first impression" in its majority opinion, the U.S. Supreme Court has ruled that disparate-impact claims are cognizable under the Fair Housing Act. Writing for the majority in a 5 to 4 decision, Justice Kennedy underscored the "results-oriented" language of the FHA and its statutory purpose, the Court's prior "interpretation of similar language" in other federal laws, and "Congress' ratification of disparate-impact claims in 1988" (*Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, June 25, 2015, Kennedy, A.).

Background. The case stemmed from FHA disparate-impact claims brought against the Texas Department of Housing and Community Affairs by a Texas-based nonprofit corporation, Inclusive Communities Project, Inc. (ICP), which assists low-income families in obtaining affordable housing.

More specifically, ICP alleged that the Texas Department "caused continued segregated housing patterns by its disproportionate allocation" of federal tax credits for housing, "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." Accordingly, the non-profit maintained that the Texas Department was required to "modify its selection criteria in order to encourage the construction of low-income housing in suburban communities."

Theory of liability. The Court's opinion distinguished the disparate-impact theory of liability from the disparate-treatment theory of liability. As related by Justice Kennedy, in disparate treatment cases, a plaintiff "must establish that the defendant had a discriminatory intent or motive." In contrast, a plaintiff who brings a disparate-impact claim essentially "challenges practices that have a disproportionately adverse effect on minorities" and "are otherwise unjustified by a legitimate rationale."

Procedural context. The federal trial court not only concluded that ICP had established a "prima facie case of disparate impact" against the Texas Department, but also placed the burden on the Texas Department "to rebut the ICP's prima facie showing." In addition, ruling in favor of ICP, the trial court determined that the Texas Department failed to satisfy its evidentiary burden to show that there were "no other less discriminatory alternatives to advancing their proffered interests."

As recounted by the Court, while the U.S. Court of Appeals for the Fifth Circuit held that disparate-impact claims are cognizable under the FHA, the federal appellate court also held that it was "improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits." The Fifth Circuit relied heavily on a Department of Housing and Urban Development regulation (12 CFR 100.500) in reaching its decision.

Still, the Texas Department appealed to the U.S. Supreme Court, challenging the Fifth Circuit's ruling that disparate-impact claims are cognizable under the FHA.

Title VII, ADEA analogies. In ultimately deciding that disparate-impact claims are cognizable under the FHA, the majority opinion examined "two other anti-discrimination statutes" that preceded the FHA: namely, section 703(a) of Title VII of the Civil Rights Act of 1964 and section 4(a)(2) of the Age Discrimination Act of 1967. In reviewing these federal laws and the attendant case law, the Court stressed that they were instructive and had bearing on a "proper interpretation of the FHA."

FHA provisions. Next, the Court focused on two FHA provisions (42 USC 3604(a) and 3605(a)). Under section 3604(a) of the FHA, it is unlawful to: "refuse to sell or rent after the making of a bonafide offer, or to refuse to

negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

Similarly, under section 3605(a) of the FHA, it is unlawful "for any person or other entity whose business includes engaging in 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."

According to the majority opinion, "Title VII's and the ADEA's 'otherwise adversely affect' language is equivalent in function and purpose to the FHA's 'otherwise make unavailable' language." In "these three statutes the operative text looks to results," the Court stressed.

Moreover, "it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988," the Court stated. "By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims," the majority opinion observed.

Asserting that there is a "longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result," the Court conveyed that "residents and policymakers have come to rely on the availability of disparate-impact claims." Accordingly, the Court affirmed the judgment of the Fifth Circuit and remanded the matter to it.

Dissenting opinions. Justice Alito wrote a dissenting opinion, with which Chief Justice Roberts and Justices Scalia and Thomas joined. Besides joining the Alito dissent, Justice Thomas also wrote a separate dissenting opinion.

In the Alito dissenting opinion, the Court minority contended that the Fair Housing Act "does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty."

According to the Alito dissent, the Court's majority acknowledges the "risk that disparate impact may be used to 'perpetuate race-based' considerations rather than move beyond them' … and agrees that 'racial quotas raise serious constitutional concerns.' Yet it still reads the FHA to authorize disparate-impact claims." In Justice Alito's view, the Court "should avoid, rather than invite, such 'difficult constitutional questions.'"

In his separate dissenting opinion, Justice Thomas indicated that while he joined the Alito dissent "in full," he was writing separately "to point out that the foundation on which the Court builds its latest disparate-impact regime —*Griggs v. Duke Power Co.*, 401 U. S. 424 (1971)—is made of sand."

The case is No. 13-1371.

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