

# The Robust Causality Requirement In Disparate Impact Claims Under The Fair Housing Act

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The Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>1</sup> reaffirmed 40 years of lower court precedent which recognized disparate impact claims brought under the Fair Housing Act. The Court held that "recognition of disparate-impact claims is consistent with the FHA's central purpose" to "eradicate discriminatory [housing] practices." It specifically noted that "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of disparate-impact liability."<sup>2</sup> At the same time, the *Inclusive Communities* decision explained that "disparate-impact liability has always been properly limited" and "mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."<sup>3</sup> In light of this limitation, the Court went on to set forth cautionary standards to guard against "abusive" impact claims.<sup>4</sup> Particular emphasis was placed on a "robust causality requirement" which requires plaintiffs who bring disparate impact claims based on statistical disparities to (1) identify the defendant's policy or policies causing that disparity, noting that "one-time decisions that may not be a policy at all;" and (2) produce statistical evidence at the pleading stage demonstrating that a defendant's policy or policies cause that disparity.<sup>5</sup>

These cautionary standards do not appear to diverge from how causality has generally been treated in past disparate impact claims.<sup>6</sup> However, since the *Inclusive Communities* decision, lower courts are examining causation issues much more closely.<sup>7</sup> A review of fair housing cases alleging disparate impact claims since the decision indicates that in cases that the Supreme Court defined as the "heartland" cases, lower courts have consistently found that plaintiffs have met the robust causality requirement. The Court explicitly cited several exclusionary zoning cases as examples of a "heartland" case and in two recent lower court exclusionary zoning cases attacking zoning decisions that disproportionately bar minorities from certain neighborhoods, courts have held that the causality requirement was met.<sup>8</sup>

Other cases in which courts have found that plaintiffs met the causality requirement also can be classified as "heartland" cases because the challenged housing restrictions, like exclusionary zoning decisions, exclude groups protected by the Fair Housing Act. One district court set forth in some detail how the plaintiff met the causality requirement in a challenge to an insurance company's refusal to insure landlords who rent to tenants with Housing Choice Vouchers.<sup>9</sup> Two other courts rendered similar holdings.<sup>10</sup>

The cautionary language in *Inclusive Communities* "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged."<sup>11</sup>

Causation in "heartland" cases is straightforward – the policies being challenged are easily identified,<sup>12</sup> and are the direct reason that plaintiffs are excluded from housing or high opportunity neighborhoods. Statistical evidence in these cases should compare those affected by the policy with those unaffected by the policy to demonstrate the disparate impact of the policy,<sup>13</sup> or demonstrate that those injured by the policy are more likely to be members of a protected class than is true for the population as a whole.<sup>14</sup>

By comparison, plaintiffs have not fared as well in cases that do not fall into the "heartland" category. In *Inclusive Communities* the Supreme Court noted that the limitations of disparate impact liability are necessary to protect defendants against "abusive disparate impact claims," explicitly stating that "governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." 135 S. Ct. at 2524. Thus, it is not surprising that several courts have dismissed disparate impact cases attacking such codes, primarily on the basis that plaintiffs had not identified the offensive policy.<sup>15</sup>

Similarly, in cases in which cities sued banks for injury to the City allegedly caused by discriminatory predatory lending practices, courts have found that plaintiffs failed to meet the causality requirements. In two cases decided by the Ninth Circuit Court of Appeals, the Court found (or assumed) that statistical disparities were shown, but the actions that plaintiffs alleged were neutral policies were either not a policy (the bank's failure to monitor loans), or plaintiffs did not demonstrate a robust causality between the alleged policies (the compensation "scheme" for loan officers and a targeted marketing policy) and the disparity.<sup>16</sup>

While the *Inclusive Communities* decision reaffirmed forty years of disparate impact claims under the Fair Housing Act, the cautionary language in the decision has resulted in increased scrutiny of the cause of the underlying disparate impact necessary for such claims. Attorneys contemplating pleading a disparate impact claim will need to carefully review these cautionary standards to determine how they affect such a claim.

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## Endnotes

<sup>1</sup>135 S. Ct. 2507 (2015)

<sup>2</sup>*Id.* at 2521-22

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 2524

<sup>5</sup>*Id.* at 2523-24

<sup>6</sup>In 2013, the Department of Housing and Urban Development (HUD) finalized its disparate impact regulation

– Implementation of the Fair Housing Act’s Discriminatory Effects Standard. 78 Fed. Reg. 11460 (Feb. 15, 2013). The definition of discriminatory impact is consistent with the Court’s causality requirements. See 24 C.F.R. 100.500(a) (“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons protected by the Act. . . . Any facially neutral action, e.g., laws, rules, decisions, standards, policies, practices, or procedures. . . may result in a discriminatory effect”)(emphasis added). The Second Circuit Court of Appeals has noted that the “Supreme Court implicitly adopted HUD’s approach.” *Mhany Management Co. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

<sup>7</sup>More recently, the Supreme Court in *Bank of America and Wells Fargo v. City of Miami*, 137 S. Ct. 1296 (2017) remanded a case in which a municipality had brought a fair housing case against banks alleging discriminatory lending practices to define the “contours of proximate cause” under the Fair Housing Act. While this issue is somewhat different than the robust causality requirement in ICP, it has further heightened the examination of causation issues in fair housing cases.

<sup>8</sup>*Mhany Management Co. v. County of Nassau*, supra; *Avenue 6E Investments, LLC v. City of Yuma*, 217 F.Supp.3d 1040 (D. Ariz. 2017).

<sup>9</sup>*National Fair Housing Alliance v. Travelers Indemnity Co.*, 2017 WL 3608232 (D.D.C., August 17, 2017).

<sup>10</sup>*Rhode Island Commission for Human Rights v. Graul*, 120 E. Supp. 3d 110 (D.R.I. 2015) (challenge to a landlord’s occupancy standards that denied an apartment to a family with children); *Crossroads Residents v. MSP Crossroads Apartments LLC*, 2016 WL 3661146 (D. Mn. July 5, 2016) (challenge to change of policy by raising rents and not accepting Section 8 vouchers and in occupancy standard policy). But see, *Inclusive Communities Project v. Lincoln Properties*, 2017 WL 3498335 (N.D. Tx, Aug. 18, 2017) (on appeal to Fifth Circuit Court of Appeals, No. 17-10943); (holding that plaintiff had not established the requisite causal connection between the defendant landlords’ policy of not renting to Section 8 voucher holders and the statistical disparity).

<sup>11</sup>*Travelers Indemnity*, 2017 WL at \*7

<sup>12</sup>In its analysis in this case, the Second Circuit also held that a single zoning decision met the Supreme Court’s definition of a policy, rejecting defendant’s argument that the zoning decision was the type of “one-time decision” that the Supreme Court noted may not be a policy subject to disparate impact claims. In rejecting this argument, the Court found that because the extended process required by the defendant in reaching its zoning decision that “required passage of a local law. . . , the challenged zoning decision falls well within a classification of a “general policy.” 819 F.3d at 619.

<sup>13</sup>*Graul*, 120 F.Supp.3d at 124.

<sup>14</sup>*Travelers Indemnity*, 2017 WL at \*9. In this case, the court contrasted this kind of statistical evidence – presented in *Mhany Management*, 843 F. Supp.287, 329 (E,D,N,Y, 2012) and *Avenue 6E Investments, LLC*, 217 F.Supp.3d 1048-50 -- with that presented in two decisions that found plaintiffs had not

demonstrated the requisite causality because the statistical evidence presented did not demonstrate the necessary connection between the policy and the disparity. 2017 WL at \*8 (citing *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 48 N.E.3d 394, 398 (2016)( distinguishing this case from the “heartland” cases of disparate impact liability) *Boykin v. Fenty*, 650 Fed.Appx. 42, 44 (D.C. Cir. 2016)( did not allege that disabled homeless individuals are more likely to rely on low-barrier shelters than non-disabled homeless individuals.); See also, *Oviedo Town Center II v. City of Oviedo, Florida*, 2017 WL 3621940 (M.D.Fl. Aug. 23, 2017) (statistical evidence did not demonstrate that the policy change at issue affected racial minorities differently than non-minorities.).

<sup>15</sup>In *Ellis v. City of Minneapolis*, 860 F3d 1106, 1114 (8th Cir. 2017), the Eighth Circuit Court of Appeals affirmed the lower court’s dismissal of the case, holding that plaintiffs did not plead sufficient facts to plausibly identify an “artificial, arbitrary, and unnecessary” policy causing the problematic disparity. See also, *Azam v. City of Columbia Heights*, 2016 WL 424966 (D. Mn. Feb. 3, 2016) (a series of decisions involving the same property owner does not constitute an identifiable policy).

<sup>16</sup>*City of Los Angeles v. Well Fargo & Co*, 691 Fed Appx 453 (9th Cir 2017); *City of Los Angeles v. Bank of America Corp.* 691 Fed Appx 464 (9th Cir. 2017). See also, *Cobb County v. Bank of America Corp.*, 183 F Supp 3d 1332 (N.D. Ga.) (the alleged policy -- steering minority borrowers into more costly loans – is an allegation of intentional discrimination. not a facially neutral policy); *Gomez v. Quicken Loans, Inc.*, 2016 WL 8229036 (C.D.Cal. April 20, 2016).