



Affirmatively Furthering Fair Housing:

**Disparate Impact Liability Under the
Fair Housing Act**

by Michael Allen, Relman, Dane & Colfax, PLLC

Fair Housing Council of Oregon

January 29, 2014



Contact Information

Michael Allen

Relman, Dane & Colfax, PLLC

1225 19th Street, N.W., Suite 600

Washington, D.C. 20036-2456

202/728-1888, ext. 114

FAX: 202/728-0848

E-mail: mallen@relmanlaw.com

Website: www.reلمانlaw.com



Disparate Impact

- Neutral Rule or Practice
- Disproportionate Adverse Effect on Members of a Protected Group
- No Less Discriminatory Alternative that Satisfies Business Need



Legal Application to Fair Housing Act

- Eleven Circuits Have Adopted
 - Keith v. Volpe, 858 F.2d 467, 482–83 (9th Cir. 1988)
- Supreme Court Has Yet to Rule
 - Buckeye (2003)
 - Magner (2012)
 - Mount Holly (2013)



Likely Areas to Find Impact Claim

- Zoning/Land Use
- Lending
- Section 8
- Income/Credit Requirements
- Credit Requirements
- Insurance



The Disparate Impact Standard Under the Proposed Regulation (Effective March 18, 2013)



The Need for The Disparate Impact Regulation

- Needed to formalize HUD's long held interpretation of the availability of discriminatory effects liability. 78 Fed. Reg. 11460.
- Provides a "clear, nationwide standard for litigating discriminatory effect cases under the Fair Housing Act." Id.
- Consistent with the manner in which nine other federal agencies have interpreted the FHA. Id. at 11462.
- Consistent with the manner in which HUD has historically interpreted the FHA. Id.
- All Courts of Appeals that have considered the question have held that disparate impact is cognizable under the FHA. Id.



Consistent with the Purpose and Language of the FHA

- Purpose of FHA was to combat and prevent discrimination in housing. 78 Fed. Reg. 11461.
- “Otherwise make unavailable or deny” focuses on effects of challenged action rather than motivation of the actor. *Id.* at 11466.
- “To discriminate” encompasses actions that may have a discriminatory effect.” *Id.*



Disparate Impact Under the Proposed HUD Regulation, 24 C.F.R. § 100.70(d)(5)

- Adds discriminatory housing practices for land use and zoning and lending
- Land use and zoning: “**Enacting** or implementing land use rules, ordinances, policies or procedures that restrict or deny housing opportunities or **otherwise make housing unavailable** or deny dwellings because of [protected classes]”



**Disparate Impact
Under the Proposed
HUD Regulation**

24 C.F.R. §
100.130(b)

- Unlawful practices include:
- “Servicing of loans or other financial assistance” . . . “in a manner that discriminates” “or providing such loans or financial assistance with other terms or conditions that discriminate.”



Overview

78 Fed Reg.
11460

- Burden shifting test
- Plaintiff or complainant must show that practice or policy results in or would predictably result in a discriminatory effect
- Burden shifts to defendant or respondent to show that practice necessary to achieve one or more of its substantial, legitimate non-discriminatory interests
- Plaintiff or complainant may show that interest could be served by a practice that has a less discriminatory effect



Overview

24 CFR §
100.500

- Liability may be established based on a practice's discriminatory effect even if the practice was not motivated by discriminatory intent. 24 C.F.R. § 100.500.
- Subsequent sections define discriminatory effect, legally sufficient justification, and burdens of proof.



**Disparate Impact
Under the Proposed
HUD Regulation**

- Two types of disparate impact
- Discriminatory effect
- Perpetuation of Segregation



**Discriminatory
Effect Defined**

24 CFR §
100.500

- “A housing practice has a discriminatory effect where it *actually or predictably* results in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns . . . because of [protected classes].” 24 C.F.R. § 100.500(a).
- Plaintiff or complainant has burden of proof. 24 C.F.R. § 100.500(c)(1).



**Discriminatory
Effect Defined**

78 Fed. Reg. at
11468-69

- Regulation does not set forth a specific standard for establishing effect because standard may vary from case to case



Discriminatory Effect

- Any facially neutral actions e.g. laws, rules, **decisions**, standards, policies, practices or procedures including those that allow for discretion or use subjective criteria may result in a discriminatory effect. 78 Fed. Reg. 11468.



Practices that May Have a Disparate Impact

Preamble to
Proposed
Regulation: 76
Fed. Reg. 79021,
79024-25

- Federal Register – Proposed Rule
- Zoning ordinance that limits multi-family housing
- Provision and pricing of homeowners insurance
- Mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher fees unrelated to a borrower's creditworthiness
- Credit scoring overrides
- Predatory Lending
- Land use and zoning decisions
- Residency preferences for Section 8 vouchers
- Redevelopment



**Legally sufficient
justification**

24 CFR §
100.500(b)

- A legally sufficient justification exists where the challenged housing practice:
- (1) **Is necessary to achieve one or more *substantial*, legitimate nondiscriminatory interests of the defendant/respondent**
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative
- Defendant or respondent has the burden of proof. 24 CFR 100.500(c)(2)



Legally sufficient justification

- Equivalent to **business necessity** according to HUD. 78 Fed. Reg. 11470.
- Whether justification is legitimate is viewed under an objective test. *Id.* at 11471.
- Justification must be genuine and not false and cannot itself discriminate based on a protected class. *Id.* 11470.
- **Substantial** interest is a core interest of the organization that has a direct relationship to the function of the organization. *Id.*
- **Legitimate** means genuine and not false, fabricated or pretextual. *Id.* at 11470-71



Legally sufficient
justification

- **Supported by Evidence** requires that defendant or respondent must prove with evidence the legitimate, non-discriminatory interest and the necessity



**Less
Discriminatory
Alternative**

24 CFR §
100.500(b)(2)

- Those interests could not be served by another practice that has a less discriminatory effect
- Plaintiff or complainant has the burden of proof
- Less discriminatory alternative must serve substantial, legitimate nondiscriminatory interests and may not be hypothetical or speculative. 78 Fed. Reg. 11473.



**Less
Discriminatory
Alternative**

- Plaintiff or complainant need not show that prior to litigation the defendant knew of and rejected less discriminatory alternative. 78 Fed. Reg. 11473.



Less Discriminatory Alternative: The Burden of Proof

- Burden is consistent with burden under Title VII and ECOA. 78 Fed. Reg. 11471.
- Does not require either party to prove a negative. *Id.*
- Plaintiffs/Complainant can obtain discovery regarding alternatives that exist, the extent to which alternatives were considered and data for which an expert could show a less discriminatory alternative. *Id.*



Retroactivity

- According to HUD, regulation applies to all pending and future cases because regulation embodies HUD's longstanding interpretation of the FHA
- Remains to be seen whether courts will apply regulation where precedent differs from regulation in pending cases



Municipal Ordinances Banning Immigrants and Fair Housing

- Creates incentives for landlords to discriminate based on national origin in violation of the FHA
- Housing providers may avoid renting to persons who appear or sound foreign
- Private housing providers may be violating Section 1981
- May be evidence of discriminatory treatment under the FHA
- May have a disparate impact upon national origin in violation of the FHA

Sample Cases -- Zoning

- *Anderson Group v. City of Saratoga Springs* (zoning policies that excluded low-income housing had a disparate impact on African- Americans and families with children; \$1 million judgment for developer)



1/26/2011

Fair Housing



GNOFHAC v. St. Bernard Parish

- Blood relative ordinance
- Moratorium on development
- Subsequent denials of permits



Sample Cases – Disparate Impact

- *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366 (6th Cir. 2007) (withdrawal from Section 8 program can violate FHA under disparate impact theory; but insufficient impact shown in this particular instance)



City of Baltimore v. Wells Fargo

- Disparate Treatment and Disparate Impact Claims:
Reverse Redlining
- Wells Fargo claimed individual loan decisions were based on neutral underwriting policies
- Consent Order, United States v. Wells Fargo Bank, N.A., No. 12-1150 (D.D.C. Sept. 21, 2012), *available at* <http://www.justice.gov/crt/about/hce/documents/wellsfargocd.pdf>, *archived at* <http://perma.cc/0bgREjvSHHB>



Inclusive Communities Project v. Texas Dept of Housing and Community Affairs

- 2012 WL 953696 (N.D. Tex. Mar. 20, 2012): Challenge to allocation of Low Income Housing Tax Credit by the Texas Dept. of Housing and Comm. Affairs. After a bench trial, the district court found that the plaintiff proved that the TDHCA's allocation decisions had a disparate racial impact.



Mt. Holly Gardens v. Township of Mt. Holly

- 658 F.3d 375 (3d Cir. 2011) (reversing grant of SJ): Challenge to proposed redevelopment that would replace affordable housing with expensive units.
- Supreme Court granted *certiorari*, but case settled before argument



Resources

- M. Allen, J. Crook & J. Relman, Assessing HUD's Disparate Impact Rule: a Practitioner's Perspective, 49 Harv. CR-CL L. Rev. ____ (forthcoming, February 2014)
- HUD Disparate Impact Rule, 78 Fed. Reg. 11460 (Feb. 15, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-03375.pdf>
- Principal and Amicus Briefs in *Mount Holly v. Mt. Holly Gardens Citizens in Action*, available at <http://www.naacpldf.org/case-issue/mount-holly-v-mount-holly-gardens-citizens-action-inc>