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Housing—Discrimination

Question Continues to Elude Supreme Court; HUD Disparate Impact Rule on Point, for Now

New regulations adopted by HUD give a Texas state agency a second chance at proving that its distribution of federal tax credits for low-income housing projects didn't violate the federal Fair Housing Act, the U.S. Court of Appeals for the Fifth Circuit ruled March 24 (*The Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 2014 BL 82130, 5th Cir., No. 12-11211, 3/24/14).

Judge James E. Graves's opinion for the court remanded the case so that the district court could apply new Department of Housing and Urban Development regulations specifying the correct legal standard to be applied in disparate impact claims brought under the act, 24 C.F.R. § 100.500.

Although that question had divided several circuit courts—creating four different tests in six separate circuits—attorneys experienced in analyzing FHA disparate impact claims told BNA that the intervening regulations will likely resolve that dispute.

But while the standard to be applied to these claims could be closer to being answered, the U.S. Supreme Court has twice attempted to resolve the more basic question of whether disparate impact claims are even cognizable under the Fair Housing Act.

In *Township of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens in Action Inc., dismissed*, 82 U.S.L.W. 3287 (U.S. Nov. 15, 2013) (No. 11-1507) and *Magner v. Gallagher, dismissed*, 80 U.S.L.W. 3465 (U.S. Feb. 14, 2012) (No. 10-1032), the Supreme Court agreed to answer that question, but in both cases the parties reached a settlement before the court heard oral arguments.

Michael Klein of Sedgwick, LLP, Austin, Texas, who represented an intervenor in the Fifth Circuit case, told BNA March 27 that if the Supreme Court ''determines that Congress did not intend for the FHA to apply to discriminatory effects of facially neutral actions,'' then HUD's regulations will be ''useless.''

Regulations Meaningless. John P. Relman of Relman, Dane & Colfax PLLC, Washington, who has represented numerous plaintiffs in fair housing cases, as well as written and lectured extensively in the area, told BNA March 28 that disparate impact claims under the Fair Housing Act have ''been embraced by the lower courts for 40–45 years.''

These claims are important, he said, because the theory has been used to ''challenge zoning laws and policies that have a disparate impact on minorities.''

If the disparate impact theory is no longer available under the Fair Housing Act, it will ''change the manner of how to prove liability,'' Relman said.

But even though David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Washington, who was involved in the *Mt. Holly* litigation, told BNA March 27 that ''[e]very federal circuit to have considered the issue has found that disparate impact claims are cognizable under the FHA,'' many individuals have speculated that the Supreme Court's grant of review on the same issue in two years signals that at least some of the justices don't agree (82 U.S.L.W. 755, 11/19/13).

At the very least, ''one could reasonably surmise that the Court felt this was an area of law that needed clarification,'' Klein said.

''One could further speculate that these regulations were HUD's attempt to provide that clarification with its own preferred interpretation, as opposed to leaving that to the court,'' he added.

But if the high court does agree to hear the issue again—which many anticipate will happen (82 U.S.L.W. 1208, 2/18/14)—''one of the questions that will need to be answered by the Supreme Court is whether to give any deference to HUD's regulations,'' M. James Maley Jr. of Maley & Associates, P.C., Collingswood, N.J., who was also involved in the *Mt. Holly* litigation, told BNA March 27.

If the court decides that HUD is not entitled to deference, and that disparate impact claims are not cognizable under the Fair Housing Act, then Maley, Frederick and Klein all agree that HUD's regulations would be meaningless.

''HUD cannot adopt regulations to create a cause of action that is not authorized by the Fair Housing Act,'' Maley explained.

At that point, ''Congress would have to amend the FHA to specifically apply to discriminatory effects of facially neutral actions,'' Klein said.

Bringing Uniformity. But for now, Klein said that the regulations ''should bring uniformity across the circuits'' with regard to the proper legal standard to apply.

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The Fifth Circuit's decision is ''the first instance in which a federal appeals court has explicitly referred to the February 2013 Final Rule while adopting HUD's disparate impact test,'' Frederick said.

However, ''HUD's regulations are pretty new still, having only became effective on March 18, 2013,'' Maley added.

He said that ''whether other courts will adopt HUD's regulations will depend on whether the other courts determine that Chevron deference is warranted.''

But ''courts tend to defer to agencies in these circumstances, as the Fifth Circuit did here,'' Frederick said. ''I see no reason why courts would not adopt HUD's test.''

Klein agreed, saying, ''I cannot imagine that a federal court would not adopt this test when confronted with an appropriate case. Especially since this test is patterned on the test used by various circuit courts.''

Three-Part Burden Shifting. ''HUD didn't reinvent the wheel'' when adopting its test, Frederick said.

''HUD adopted a test that had been used by most of the federal circuits'' in Title VII cases, Klein agreed.

And Relman said that HUD ''attempted to balance'' the approaches already taken by the circuit courts.

For example, Maley said that the HUD test ''is very similar to the burden-shifting test adopted by the Eighth Circuit,'' and that other circuits had adopted a similar ''three-part burden shifting test.''

As the Fifth Circuit explained, ''Most circuits agree that once a plaintiff establishes a prima facie case, the burden shifts to the defendants to show that the challenged practice serves a legitimate interest.''

''At that point, the circuits diverge in some respects,'' the Fifth Circuit said.

In the Second and Third circuits, for example, the defendant bears ''the burden of proving that there are no less discriminatory alternatives to a practice that results in a disparate impact.''

In contrast, the Fifth Circuit said that in the Eighth and Tenth circuits, the burden is ''on the plaintiff to prove that there are less discriminatory alternatives.''

''The Seventh Circuit has applied a four-factor balancing test rather than burden-shifting,'' the Fifth Circuit added, whereas the ''Fourth and Sixth Circuits have applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants.''

According to the Fifth Circuit, the HUD regulations adopt the burden-shifting approach.

''First, a plaintiff must prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect,'' the court said.

''If the plaintiff makes a prima facie case, the defendant must then prove 'that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.' ''

''If the defendant meets its burden,'' the court said, ''the plaintiff must then show that the defendant's interests 'could be served by another practice that has a less discriminatory effect.' ''

Because HUD had not yet adopted this new test at the time of the district court's trial, the appeals court sent the case back for the lower court apply the new standard.

Judge Jacques L. Wiener Jr. joined the opinion.

Judge Edith Hollan Jones concurred in judgment, but wrote separately to say that she believed the plaintiffs had not made a prima facie case.

Michael Maury Daniel of Daniel & Beshara, P.C., Dallas, represented the plaintiffs. Beth Ellen Klusmann of the Texas attorney general's office, Austin, represented the defendant state agency.

BY KIMBERLY ROBINSON

*Full text at http://www.bloomberglaw.com/public/document/The_Inclusive_Cmtys_Project_Inc_v_Tex_Dept_of_Hous__Cmty_Affairs_*

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