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The U.S. Supreme Court Grants Cert to Decide Whether the Fair Housing Act Allows for Disparate Impact Claims in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*

By Stephen A. Fogdall

On June 17, 2013, the U.S. Supreme Court granted a petition for certiorari in a case that will decide whether "disparate impact" liability — liability based solely on a practice's alleged discriminatory ***effect***, though the actor had no intent to discriminate — can be imposed under the Fair Housing Act. The Court took the case despite urging from the federal government to decline it. The Court appears poised to reject disparate impact liability.

This is not the first time the Court has granted review in a case raising the viability of disparate impact claims under the Fair Housing Act. The last time the Court took the issue, the petitioner withdrew the case prior to argument. There is some evidence that officials in the U.S. Department of Justice may have encouraged that decision in order to prevent the Court from ruling. It remains to be seen whether a similar outcome will occur here.

The Decision Under Review

The case now before the Supreme Court is *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* It arose from efforts by the Township of Mount Holly, in Burlington County, New Jersey, to redevelop a blighted neighborhood known as the Gardens. The redevelopment plan called for the demolition of all of the existing homes in the Gardens, to be replaced by homes of higher value. Most of the residents of the Gardens were low to moderate income minorities, many of whom would not be able to afford the new homes in the redeveloped neighborhood.

Residents of the Gardens brought suit in federal district court in New Jersey, alleging that the redevelopment plan discriminated against minorities in violation of the Fair Housing Act. The district court granted summary judgment in favor of the township, finding that the redevelopment plan was not discriminatory "because 100% of minorities will be treated the same as 100% of non-minorities in the Gardens," given that the plan required the demolition of all of the homes. *Mt. Holly Garden Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 383 (3d Cir. 2011) (describing district court opinion). The citizens appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the district court. The Third Circuit criticized the district court's "conflation of the concept of disparate treatment with disparate impact." The Third Circuit explained that the township's redevelopment plan potentially violated the Fair Housing Act not because it deliberately treated minority residents differently than non-minority residents, but because statistics submitted by the plaintiffs showed that "22.54% of African-American households and 32.31% of Hispanic households in Mount Holly will be affected by the demolition of the Gardens," but the "same is true for only 2.73% of White households." The Third Circuit concluded that these statistics were sufficient to establish a prima facie case that the redevelopment plan violated the Fair Housing Act.

The Third Circuit emphasized that this prima facie showing was not the end of the story. Rather, it merely shifted the burden to the defendant township to identify "a legitimate non-discriminatory reason for its actions." If the township identified such a reason, it would then have to show that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory effect." Only if the township met that burden would the burden then shift back to the plaintiff residents to show "that there is a less discriminatory way to advance the defendant's legitimate interest." The Third Circuit concluded that issues of material fact precluded summary judgment and remanded the case to the district court to develop the record under this burden-shifting framework.

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The Language of the Fair Housing Act

The Third Circuit is not alone in holding that disparate impact liability is available under the Fair Housing Act. Indeed, all of the federal circuit courts that have considered the issue have reached the same conclusion. But this conclusion does not sit well with the actual language of the statute. Courts have long held that federal anti-discrimination laws such as Title VII allow for disparate impact liability because they explicitly target discriminatory effects, even in the absence of discriminatory intent. Title VII, for example, not only prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," but also prohibits any employment practice "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) & (2). The Supreme Court has explained that the use of the word "affect" in the latter provision "focuses on the ***effects*** of the action on the employee rather than the motivation for the action of the employer." *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion) (emphasis in original); *see also id.* at 243-47 (Scalia, J. concurring) (deferring to the Equal Employment Opportunity Commission's interpretation of the word "affect" as "authoriz[ing] disparate-impact claims").

By contrast, the Fair Housing Act does not contain any "affect" language. The statute makes it unlawful to "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." 42 U.S.C. § 3604(a). Similarly, the statute makes it unlawful for anyone "engaging in residential real estate-related transactions" (such as making loans for the purchase or construction of a home) to discriminate "in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). These provisions look much more like Section 2000e-2(a)(1) of Title VII, which "does not encompass disparate-impact liability," *Smith*, 544 U.S. at 236 n.6, rather than Section 2000e-2(a)(2), which does recognize such liability.

The Petition for Certiorari

On June 11, 2012, the Township of Mount Holly filed a petition for certiorari in the Supreme Court seeking review of the Third Circuit's ruling. The petition posed two questions. First, the township asked the Court to take the case because the Third Circuit's ruling conflicts with the plain language of the Fair Housing Act, given the absence in the statute of the "affect" language on which such liability usually is predicated. Second, the township asked the court to review the burden-shifting framework articulated by the Third Circuit, which required the township not only to identify a legitimate nondiscriminatory reason for its actions but also to demonstrate that there was no alternative that could serve this interest with less discriminatory effect.

The township explained that while the various federal courts of appeal that had considered the issue agreed that the Fair Housing Act permitted disparate impact liability, there was considerable disagreement in the circuits regarding the appropriate framework to evaluate such liability. While some circuits, such as the Third, require the defendant to prove the absence of a less discriminatory alternative, others, such as the Sixth and Eighth Circuits, shift the burden back to the plaintiff to prove that there is such an alternative once the defendant identifies a legitimate nondiscriminatory reason to support its actions. In the First Circuit, however, the defendant's identification of a nondiscriminatory reason is fatal to the plaintiff's claim altogether. The township argued that these and other areas of confusion in lower courts' Fair Housing Act decisions needed to be resolved. (Click here to view the township's petition for certiorari.)

HUD's Disparate Impact Regulations

On February 15, 2013, while the township's petition for certiorari was pending, the U.S. Department of Housing and Urban Development (HUD), invoking its authority to interpret and implement the Fair Housing Act, issued a final rule recognizing disparate impact liability. *See* 24 CFR § 100.500. HUD may have issued its disparate impact rule either in an effort to preempt a grant of certiorari by the Supreme Court, or in the hopes that if the Court did grant certiorari it would defer to HUD's interpretation and uphold disparate impact liability, much as Justice Scalia deferred to the EEOC in *Smith*.

If this was HUD's strategy it may have been in vain. After the township filed its petition for certiorari, the Court asked to Solicitor General to submit a brief expressing the United States' views on whether the petition should

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be granted. The Solicitor General submitted that brief on May 17, 2013. The Solicitor General urged the Court not to grant the petition, in part because HUD had issued its regulations interpreting the Fair Housing Act to allow for disparate impact liability, so there was no pressing need for the Court to weigh in. The Court apparently disagreed that HUD's regulations obviated any need for review because it granted the petition for certiorari shortly after receiving the Solicitor General's brief. However, in granting the petition, the Court limited its review to the first question raised by the township (whether the Fair Housing Act permits disparate impact claims at all) and refused to resolve the second question in the township's petition (regarding what burden-shifting framework should be applied in evaluating such claims).

The Outcome?

If the Court is able to reach a decision on the merits, the likeliest outcome is that the Court will strike down disparate impact liability under the Fair Housing Act. As noted above, such liability is difficult to square with the language of the statute. Moreover, the Court limited its grant of certiorari to the first of the two questions raised by the township, the question on which the courts of appeal actually agree. If the Court were to uphold disparate impact liability, the considerable confusion regarding the applicable burden-shifting framework would remain unresolved, and the Court would have accomplished very little by taking the case in the first place. Hence, the Court's decision to limit review to the township's first question may indicate that a majority of the justices are inclined to hold that the Fair Housing Act does not authorize disparate impact claims.

However, the Court may never reach a decision on the merits. In 2011, the Court granted certiorari in a case, *Magner v. Gallagher*, that would have decided this same issue, but the petitioner, the City of St. Paul, Minnesota, withdrew the petition prior to argument. Afterwards, members of the House Judiciary Committee sent a letter to Attorney General Eric Holder, in which they suggested that Justice Department officials had made a deal with the city to drop the case. (Click here to view the letter.) It is always possible that similar developments may prevent the Court from deciding the *Mount Holly* case. ◆

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