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Housing discrimination: What's intent got to do with it?

The doctrine of disparate impact is an important tool for combating discrimination.

It provides a way of attacking actions or policies that are facially neutral if these actions or policies have a significant impact on protected classes. It is a way of proving discrimination without necessarily showing intent.

Disparate impact is an important weapon in the fight against discrimination because intent can be hard to prove. This is particularly true today because discrimination is more subtle than in years past. Rarely do you find "smoking gun" evidence of discrimination, particularly when looking at municipalities, private corporations and lending institutions. The disparate impact doctrine exposes unconscious or unintended bias and leads to the creation of more inclusive housing policies.

There are limits to the theory. The adverse impact must be substantial, usually measured and supported by statistics. For example, following Hurricane Katrina in 2005, as many people of color were desperately in need of housing, a community near New Orleans passed an ordinance prohibiting homeowners from renting to anyone who was not a blood relative. Statistics showed 93 percent of the homeowners in the community were white.

The disparate impact rule was used to challenge the ordinance as disproportionately affecting people of color and preventing them from living there. However, even a policy with a substantial and quantifiable negative impact may survive if it is justified by legitimate business reasons.

If legitimate reasons are shown, the inquiry becomes whether there are less restrictive alternatives available to achieve the goal. The theory thus balances the interests at stake

and provides a method for saving troubling policies.

An example of how a seemingly neutral rule may negatively impact protected classes can be seen through the use of occupancy restrictions.

To address overcrowding concerns, many communities limit the number of people in a house to two persons per bedroom. However, these rules, commonly known as occupancy standards, may disproportionately affect a number of protected classes.

Couples living in one-bedroom apartments, for example, have been forced out for violating occupancy restrictions because they have a baby. Occupancy restrictions can also negatively impact persons with disabilities, especially those needing live-in caregivers and prevent them from obtaining or retaining housing. These restrictions also place undue pressure on certain ethnic groups where it is common to have several generations living together.

Obviously, overcrowding is a legitimate business reason for establishing these rules, but there must be a better way to address the issues without so harshly and summarily impacting protected classes.

While the validity of the disparate impact theory has been recognized in the employment context, it has not been so well-received in housing. Although the U.S. Supreme Court has ruled the theory applies in employment discrimination cases (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), the court has not ruled on the theory's applicability in housing discrimination.

Lower courts addressing the issue have overwhelmingly ruled it applies (*Langlois v. Abington House. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36(2d Cir.), *aff'd in part*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*,

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564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Town of Clarkton*, 682 F.2d 1055,1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Metro. House. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *City of Black Jack*, 508 F.2d at 1184-85; *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311-12 (9th Cir.1982); *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1251; *United States v. Marengo Cnty.Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984). But there has nonetheless been considerable debate about its validity and application in housing discrimination cases.

Industry advocates argue it should not be used in housing because the plain language of the Fair Housing Act does not allow for it and it may prevent the use of legitimate screening criteria. They also argue it represents a retreat from a color-blind application of laws and actually introduces bias rather than prevent it.

Recently, the Supreme Court was scheduled to hear cases involving the applicability of the theory in two housing discrimination cases. Both cases settled. Fair housing advocates exhaled, fearing the current composition of the court might not yield a favorable ruling.

Since then, some help has

arrived from the Department of Housing and Urban Development, the federal department charged with enforcing the Fair Housing Act. In February 2013, HUD issued a rule clearly validating the theory in the housing context and explaining how it should be applied. 78 Fed. Reg. 11,4600 (Feb. 15, 2013).

The rule resolves questions over who bears the burden of identifying less restrictive alternatives by placing that burden squarely on the complaining party. It also made it clear that practices having a negative impact on protected classes will not be considered discriminatory if they serve a significant business objective and there is no less discriminatory alternative available to serve that interest.

Fair housing advocates generally applauded the HUD rule for clarifying the issue and balancing both sides of the issue. Should the Supreme Court take another case on the issue, advocates hope the rule will facilitate a favorable outcome. Real estate industry officials are not so happy with it and argue it will lead to racial quotas or other race/protected class conscious measures contrary to the purpose of civil rights laws.

A case challenging the rule (*American Insurance Association, et. al. v. United States Department of Housing and Urban Development*, U.S. District Court for the District of Columbia No. 1:13 — cv 00966) and its application in the insurance context is pending in the District of Columbia and bears watching closely.

I believe the disparate impact theory makes sense in housing, just as it does in employment. Protected classes are particularly vulnerable populations in need of special attention. While it may require extra effort to look at how a policy affects them, it is a worthwhile exercise given the important societal goals at stake.