

# POLUNSKY BEITEL GREEN

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## ATTORNEYS AT LAW

July 15, 2015

**To Clients and Friends:**

**RE: DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT:  
The United States Supreme Court Opinion in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.***

On Friday June 25, 2015, the United States Supreme Court rendered its decision in the *Texas Department of Housing and Community Affairs* case. At issue in this case was whether a plaintiff could establish liability for discrimination under the Fair Housing Act, without proof of intentional discrimination, but based instead on the fact that the identified practice has a disproportionate impact on certain groups of protected individuals. In a controversial 5-4 decision, the United States Supreme Court held that disparate impact claims could form a valid claim under the Fair Housing Act. However, the Supreme Court imposed a significant limitation on its application by ruling that a racial imbalance, without more, cannot sustain such a claim.

In the case before the Court, the plaintiff non-profit alleged that the manner in which the Texas Department of Housing and Community Affairs (“TDHCA”) awarded tax credits in predominantly minority neighborhoods had the effect of withholding such credits in predominantly Caucasian neighborhoods, and as a result the allocation had the effect of creating and preserving segregated housing patterns. While the case was pending before the Fifth Circuit Court of Appeals, HUD issued a rule interpreting the Fair Housing Act to include disparate impact claims and HUD proffered a standard under which, once the plaintiff made a prima facie case, the burden would shift to the defendant to “prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”

The majority opinion read the Fair Housing Act to refer to the consequences of certain actions as being actionable, without proof of the mindset of the people involved, and that these provisions supported recognition of a disparate impact theory of liability. The Court also opined, however, that disparate-impact liability must be limited to allow for “practical business choices and profit related decisions.” Accordingly, in apparent recognition of the potential for abuse of the theory of liability, the Supreme Court spent a substantial portion of its opinion discussing the LIMITATIONS on the imposition of such liability. The Court emphasized that lower courts must “examine with care” disparate-impact claims “at the pleading stage.” The decision

emphasized the importance of the power of lower courts to dismiss claims at an early stage to avoid subjecting defendants to expensive, and often intrusive, fact discovery. Interestingly, the Court noted that one of the dangers of NOT limiting disparate impact claims in some manner is the distinct possibility that “the specter of disparate-impact litigation” under the FHA would “undermine[] its own purpose as well as the free-market system.”

The requisite safeguards relied on by the Court were set forth in an earlier Supreme Court case, *Wards Cove Packing Co. v. Atonio*. In that case, the Supreme Court held that to sustain a disparate-impact case in an employment context, a plaintiff must identify a specific policy of the defendant and adequately plead that such policy is the *cause of* the disparity. In the TDDCA case, the Court directed lower courts to “avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations” into every FHA decision. Thus, the Court held that a “racial imbalance does not, without more, establish a prima facie case of disparate impact,” and that a plaintiff cannot maintain a disparate-impact claim by pleading a mere “statistical disparity.” The Court indicated that the lower courts should disallow claims where a plaintiff cannot establish a “robust” causal link between the disparate impact and the defendant’s actual policies. To hold otherwise, would make a defendant liable for alleged racial disparities it “did not create.” The Court also noted that “[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units.”

Additionally, the Court outlined the contours of an important defense to a plaintiff’s prima facie case, namely that “policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers.” Businesses must be given “leeway to state and explain the valid interest served by their policies,” and should be able “to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”

Further, the Court cautioned, as it did in *Wards Cove*, that when a defendant offers a legitimate business justification, a plaintiff cannot sustain a disparate-impact claim if it cannot prove “there is ‘an available alternative ... practice that has less disparate impact and serves the [entity’s] legitimate needs.’” The Court’s decision appears to create a more lenient standard for defendants than the standard the federal government has proposed, in line with the Court’s holding in *Wards Cove*.

Although this case dealt with a state agency, it is important to note that the theory of liability is equally applicable to private individuals because the Fair Housing Act (like other anti-discrimination laws) applies to both the public and private enterprises. For residential mortgage lenders, this ruling requires that lenders be vigilant in considering the potential impact of facially neutral policies and procedures to avoid the policies having a disparate impact on protected classes. To the extent a disparate impact is identified, the lender should consider whether alternative policies and procedures are available that would avoid the disparate impact.

Please note that the Supreme Court did NOT rule on the merits of whether the TDHCA had violated the Fair Housing Act by allocating credits in the manner it had chosen. Instead, the

issue before the Court was whether a disparate impact theory of liability existed. The Supreme Court remanded the case to the United States Court of Appeals for the Fifth Circuit to determine whether the facts of the case support more than a *prima facie* showing of disparate-impact liability.