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Supreme Court Takes Up Landmark Disparate Impact Case, Again, Over U.S. Objections

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On June 17, 2013, the Supreme Court granted certiorari in *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507, to decide whether disparate impact claims are cognizable under the Fair Housing Act ("FHA"). It did so over the U.S. government's strenuous objection that HUD's new rule interpreting the FHA is "dispositive." Of interest, the Court simultaneously declined to grant cert. on the question of the appropriate standard for evaluating disparate impact claims *if* the FHA is deemed to allow them. The repercussions of the Supreme Court's decision will be far-reaching, assuming a settlement does not prevent the Court from reaching the issue.

THE LONG LEAD UP

In 2002, the Township of Mount Holly ("Township") proposed a redevelopment project in the predominately African-American and Hispanic low-income neighborhood of Mount Holly Gardens, a subdivision of Mount Holly, New Jersey known as the "Gardens." The Township declared the Gardens blighted and proceeded with a plan to acquire all of the houses there through exercise of its powers of eminent domain, and replace them. In 2008, current and former Gardens residents filed suit in the District of New Jersey. They alleged, among other things, disparate-impact and intentional discrimination in violation of the FHA. The case proceeded slowly through dispositive briefing until, in January 2011, the District Court granted the Township's motion for summary judgment. It held that respondents had not established either intentional discrimination or a *prima facie* case of disparate impact. Plaintiffs appealed. The Third Circuit reversed, holding that the FHA permits disparate impact claims and that plaintiffs had established a prima facie case of disparate impact.[1]

While this was unfolding, the Supreme Court was poised to decide whether the FHA permits disparate impact claims in *Magner v. Gallagher*. But, the Court never rendered a decision, as the plaintiff in *Magner* (the City of Saint Paul) dismissed the appeal in February 2012, in a much-criticized settlement engineered by the Justice Department to avoid Supreme Court review of the disparate impact question.[2]

In June 2012, the Township of Mount Holly petitioned for a writ of certiorari. The questions presented were, "(1) Whether disparate impact claims are cognizable under the Fair Housing Act; and (2) whether, if such claims are cognizable, they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test." The Court invited the Solicitor General to offer the government's views on whether certiorari should be granted.

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[1] *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011); id. at 381-82.

[2] See our client alert here, and, for example, the Congressional Reports on the related investigation at http://oversight.house.gov/wp-content/uploads/2013/04/DOJ-St-Paul.pdf (Republicans) and http://democrats.oversight.house.gov/images/stories/2013-04-14-Dem-Memo-DOJ-Magner.pdf (Democrats).

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Seven months later, and after HUD issued a new rule "clarifying" that the FHA permits disparate impact claims, the Solicitor General responded to the Court's invitation. In May 2013, the Solicitor General finally filed a brief advising against the granting of cert. and arguing that HUD's new rule is entitled to deference. Apparently the Court was unpersuaded, as it granted cert. on June 17, 2013, but limited its review to the first question only.[3]

SUPREME COURT REVIEW

The only issue before the Supreme Court is whether disparate impact claims are cognizable under the FHA. The Township likely will argue that disparate impact theories are irreconcilable with the plain language of the FHA and are contrary to recent Supreme Court analysis of analogous statutes. Specifically, the text of the FHA bars actions taken "*because of*" certain factors, like race and national origin. But, it contains no language providing for liability based on the *effects* of nondiscriminatory actions. The Supreme Court has interpreted similar language in Title VI and the Age Discrimination in Employment Act to hold that the applicable provisions of those statutes address *intentional* discrimination *only*.[4] In contrast, the Court has required "effects" language—language not found in the FHA—in order to hold that a statute permits disparate impact claims.[5] Thus, the Township's arguments against the application of an effects test appear to be very well founded.

Plaintiffs will likely argue that the rulemaking of HUD, which is charged with interpreting the FHA, is entitled to deference. HUD's February 2013 rule reiterates the government's long-standing view that the FHA permits disparate impact claims, and sets forth a particularly plaintiff-friendly construction of such claims in at least three key areas, as we reported on here. The Supreme Court, however, has been increasingly willing to hold that even hotly-debated statutory language is "unambiguous," and therefore that the Court need not consider agencies' interpretations of those statutes.[6] In deciding to take up the *Mount Holly* case in the first instance, contrary to the Solicitor General's view that HUD's interpretation "should be dispositive," the Court may have signaled a willingness to look beyond the government's interpretation of the FHA.

BROAD IMPACTS BEYOND FAIR HOUSING

The FHA applies to a broad range of housing-related activity: not only to approval or denial of loan applications, but also to the alleged failure to provide equal "information regarding the availability of loans" or "application

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[3] *See* Docket Report at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1507.htm.

[4] *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (Title VI does not permit disparate impact claims because authorizing language is absent from the statute); *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240-41 (2005) (ADEA § 4(a)(1), which does not contain the requisite "effects" language, does not permit disparate impact claims); *see also id.* at 249 (O'Connor, J., dissenting) ("Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent . . . .").

[5] *See, e.g.*, *Smith*, 544 U.S.at 233-38 (2005) (Because Title VII § 703(a)(2) and ADEA § 4(a)(2) contain the "effects" language, they permit disparate impact claims); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 429-30 (1971) (interpreting "effects" language in Title VII).

[6] *See, e.g.*, *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, at 2304 n.8 (2011) ("Because we do not find the meaning of 'make' in Rule 10b-5 [as in to 'make' a statement] to be ambiguous, we need not consider the Government's assertion that we should defer to the SEC's interpretation of the word," and noting its "disagreement with the SEC's broad view" of section 10); *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2040 (2012) (declining to consider whether HUD's interpretation was entitled to deference because the statutory language was "unambiguous[]"); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

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requirements," the "type of loan, . . . loan amount, interest rate, cost, duration, or other terms offered," and the servicing of loans generally.[7]

But the impact of *Mount Holly* may be even broader than that. Any decision that the Court renders arguably might apply equally to the analysis of the Equal Credit Opportunity Act ("ECOA"), which makes it unlawful for any creditor to discriminate "on the basis of" protected attributes, and similarly lacks any of the "effects" language the Supreme Court has held is necessary to support disparate claims.[8] The ECOA is much broader than the FHA, and applies to nearly all extensions of credit to consumers, such as credit cards, auto loans, mortgage loans, and installment loans. The ECOA also applies to business-purpose credit transactions.[9] The Consumer Financial Protection Bureau (CFPB) also has stated that it will evaluate creditors' loan activities through a disparate impact lens.[10] Other regulatory and enforcement authorities similarly take the position that banks are subject to the disparate impact standard.[11]

POTENTIAL SETTLEMENT

Unfortunately, for an industry eager to have the Court address this important issue, a settlement in *Mount Holly* appears imminent. According to local press reports, the remaining Gardens residents have offered to settle for $1.2 million, and the parties are engaged in active settlement talks with a magistrate judge.[12] Perhaps the third time the Court takes up the issue, it will finally have an opportunity to reach it.

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[7] 24 C.F.R. §§ 100.120(b), 100.130(b).

[8] Regulation B, however, states that the legislative history of ECOA supports the application of an effects test to determinations of creditworthiness. *See* 12 C.F.R. 1002.6(a).

[9] *CFPB Consumer Laws and Regulations: ECOA*, at http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf.

[10] For more information, please see our client alert here.

[11] *See Interagency Task Force on Fair Lending, Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266 (Apr. 15, 1994), *available at* www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf; CFPB Compliance Bulletin at http://www.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

[12] *See, e.g.*, http://www.philly.com/philly/news/20130618_U_S__Supreme_Court_to_hear_Mount_Holly_case.html (quoting Township and plaintiff attorneys); http://www.courierpostonline.com/article/20130515/NEWS01/305150034/?nclick_check=1 (describing Township meeting in which remaining residents proposed settling for $1.2 million).

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