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SETTLEMENT EQUALS ANOTHER MISSED OPPORTUNITY FOR THE SUPREME COURT TO DEFINE DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT

Erika Flaschner

I. Introduction

In 2003, the New Jersey Township of Mount Holly designated a neighborhood known as the Gardens as a blighted, high crime area, and called for its redevelopment.¹ The Township adopted a plan to demolish the Gardens and replace it with new residential units, of which only a fraction were designated for affordable housing.² However, the predominately minority population of the Gardens filed suit to overturn the blight designation and stop the redevelopment plan on the grounds that the plan violated the Fair Housing Act (FHA) on a disparate impact theory.³

Both the New Jersey state court and the federal district court dismissed the case.⁴ However, the U.S. Court of Appeals for the Third Circuit reversed the lower courts, holding that the evidence submitted by the residents was sufficient to establish a case of disproportionate impact in violation of the FHA.⁵ On November 14, 2013, the parties decided to settle the matter rather than proceed with the appeal before the U.S. Supreme Court in December.⁶

Prior to settlement, this was viewed as a potential landmark case that would finally decide the extent to which disparate impact claims are recognized under the FHA.⁷ Although the residents of the Gardens celebrated the settlement, the best scenario would have been for the Supreme Court to hear the case of *Mount Holly Gardens Citizens in Action, Inc.* and to both recognize and provide a clear standard for disparate impact claims under the FHA.⁸

1. *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 379 (3rd Cir. 2011).

2. *Id.*

3. *Id.* at 380.

4. *Id.* at 381.

5. *Id.* at 382.

6. Adam Serwer, *Mount Holly settlement spares Fair Housing Act- for now*, MSNBC, (Nov. 14, 2013), <http://www.msnbc.com/msnbc/mount-holly-settlement-spares-fair-housing-act-for-now>.

7. *Id.*

8. See *infra* Part.III.

II. Background

A. *The History of the Fair Housing Act*

President Johnson signed the FHA into law as Title VIII of the 1968 Civil Rights Act as a response to a variety of circumstances, including the open housing marches in Chicago and the inability of the families of Vietnam veterans to obtain housing.⁹ The FHA declares that it “is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”¹⁰ This purpose is demonstrated in section 3604, which states that “it shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹¹

B. *A History of Mount Holly Gardens*

During the Korean War in the mid-1950s, Mount Holly Gardens was built to accommodate military personnel from Fort Dix.¹² In the early 1990s, residents, community organizers, and township representatives formed the Mount Holly Gardens Revitalization Association to address the continuing issue of deterioration.¹³ The Association commissioned a redevelopment plan that proposed the Mount Holly Township acquire all rental units in the Gardens and transfer them to a nonprofit organization, which would rehabilitate them.¹⁴ However, the Township did not provide the resources necessary to accomplish those goals and thus declared the Gardens to be blighted, acquired the properties, boarded up the vacant units, and began demolitions.¹⁵

In 2003, a group of Gardens residents, represented by South Jersey Legal Services, filed suit against the Mount Holly Township for violating section 3604 of the FHA, claiming that the redevelopment plan was a form of discrimination because it would have a disparate impact on the minority residents.¹⁶ The proposed redevelopment plan was to replace all of the existing homes in the Gardens with newer and more expensive homes.¹⁷ However, the redevelopment plan disproportion-

9. History of Fair Housing, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/abouttheo/history (last visited Dec. 27, 2013).

10. 42 U.S.C. § 3601 (2006).

11. *Id.* at § 3604(a). This is the section at issue in the Mount Holly case.

12. *Evicted from the American Dream: The Redevelopment of Mount Holly Gardens*, NEW JERSEY DEP'T OF THE PUB. ADVOCATE 2, 4 (Nov. 2008), http://www.njeminentdomain.com/uploads/file/PubAdvocate_gardens_report.pdf.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3rd Cir. 2011).

17. *Id.* at 377.

ately affected minority families¹⁸ as Mount Holly Gardens was comprised mostly of African-American and Hispanic residents, 80% of whom lived below the Township's median income.¹⁹

The District Court ruled that there was no *prima facie* case of discrimination under the FHA and, even if there was, the residents had not shown how an alternative course of action would have had a lesser impact.²⁰ The Gardens residents filed an appeal and the U.S. Court of Appeals for the Third Circuit reversed the lower court, holding that the evidence submitted by the residents was sufficient to establish a *prima facie* case of disproportionate impact in violation of the FHA.²¹ Furthermore, the Court held that factual issues existed as to whether the Township had shown that there was no less discriminatory alternative to the redevelopment plan.²²

C. *The Mount Holly Settlement*

The Mount Holly Township agreed to a settlement in November of 2013.²³ Under the terms of the settlement, the Township will compensate the residents who want to leave and provide new homes for those who want to stay.²⁴ Olga Pomar, one of the attorneys for the residents stated, "This is what the plaintiffs have always been requesting, they don't want the community redeveloped and them not to be able to be a part of it. They want to be able to stay in this community while it's being revitalized."²⁵ The settlement rendered moot a hearing on the issue that was scheduled for December before the Supreme Court, which took the Township's appeal of a lower court decision in favor of the residents.²⁶

D. *Disparate Impact Claims and the Fair Housing Act*

Prior to *Mount Holly Gardens Citizens in Action, Inc.* being settled in November of 2013, the Supreme Court was expected to hear the case, thus revisiting the controversial legal principle of disparate impact, which has been used for decades to enforce the FHA.²⁷ The justices

18. *Id.* at 382 (detailing that the plan would affect 22.54% of all African-American households, 32.31% of Hispanic households, and 2.73% of white households in Mount Holly).

19. *Id.* at 377-78.

20. *Id.* at 381.

21. *Id.* at 382.

22. *Id.* at 387.

23. Adam Serwer, *Mount Holly settlement spares Fair Housing Act- for now*, MSNBC (Nov. 15, 2013), <http://www.msnbc.com/msnbc/mount-holly-settlement-spares-fair-housing-act-for-now>.

24. *Id.*

25. *Id.* Olga Pomar is an attorney at South Jersey Legal Services. *Id.*

26. David O'Reilly, *Mount Holly Gardens discrimination dispute settled*, PHILLY.COM, (Nov. 15, 2013), http://articles.philly.com/2013-11-15/news/44078231_1_township-residents-olga-pomar-south-jersey-legal-services.

27. *Id.*

would have been asked to decide whether the Township had effectively discriminated against the predominately Hispanic and African-American residents who populated the Gardens when it condemned their homes as part of the redevelopment plan.²⁸

The concept of disparate impact comes from employment discrimination law.²⁹ In 1971, the landmark Supreme Court case of *Griggs v. Duke Power Co.* interpreted Title VII of the 1964 Civil Rights Act to include a discriminatory effect standard.³⁰ A disparate impact claim is an effective way to challenge policies that are facially neutral but have a disproportionate impact on a certain class.³¹ The purpose of a disparate impact claim is to focus on the effect of an action rather than the actor's intent, therefore making it easier for plaintiffs to prevail in discrimination cases because a showing of intent is often hard to prove.³²

The doctrine of disparate impact is unsettled because the FHA statute does not expressly mention it, even though every federal circuit recognizes it.³³ The Supreme Court has signaled that it is interested in the issue and willing to clarify the vagueness by considering cases in both 2012³⁴ and 2013.³⁵ It is imperative that the Supreme Court makes a definitive decision on this issue so that lenders and borrowers are operating in a more stable environment.³⁶ Disparate impact claims would allow the purpose of the FHA, to create fair housing for all, to be better enforced.³⁷

28. *Id.*

29. Eric W.M. Bain, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1440 (2013).

30. *Id.* at 1440-41. Prior to the Civil Rights Act, Duke Power Company had a policy of relegating African-American employees to a single department where they were paid substantially less than other "white" departments. After the Civil Rights Act passed, Duke changed its race-based employment assignments to a policy of requiring either a high school diploma or passing a standardized general intelligence test to be employed in jobs with higher wages. The Court sided with the plaintiffs, holding that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

31. Nicholas Cassidy, *The Fair Housing Act, Disparate Impact, and the Ability-to-Repay: A Compliance Dilemma for Mortgage Lenders*, 32 REV. BANKING & FIN. L. 431, 438 (2013).

32. *Id.* at 438.

33. Bain, *supra* note 29, at 1436.

34. *See generally* Gallagher v. Magner, 636 F.3d 380 (8th Cir. 2010) (discussing the Fair Housing Act and disparate impact issue as it applied to a St. Paul housing ordinance). The Supreme Court was going to hear this case in February of 2010, but St. Paul dismissed its appeal just before the case was going to be heard.

35. *See generally* Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3rd Cir. 2011).

36. Cassidy, *supra* note 31, 438.

37. *Id.*

III. Analysis

This case would have presented the Supreme Court with the opportunity to determine whether parties may bring disparate impact claims under the FHA.³⁸ While the residents of the Gardens welcomed the settlement, the best scenario would have been for the Supreme Court to hear the case of *Mount Holly Gardens Citizens in Action, Inc.* and establish a clear standard for disparate impact claims under the FHA.³⁹ This would allow for a better chance that the purpose of the FHA, fair housing throughout the United States, be carried out because the disparate impact claims would force decision-makers to be more aware of the effect of their lending policies.⁴⁰ Furthermore, there is much legal support that the Supreme Court could rely on in making the decision to allow disparate impact claims under the FHA.⁴¹

A. Similarities Between Title VII and the FHA

In order to justify a decision leading to this ideal outcome, the Court could rely on many of the same arguments used in the case of *Griggs v. Duke Power Co.*⁴² Title VII and the FHA share similar language and were enacted for the purpose of reducing discrimination only four years apart, therefore making it logical to presume that Congress intended the text to have the same meaning in both statutes.⁴³ Given the similarities in language, purpose, and time of enactment, the Court's allowing for disparate impact analysis pursuant to one statute but not for the other would be inconsistent.⁴⁴ The case of *Mount Holly Gardens Citizens in Action, Inc.* could have served the purpose for housing discrimination law that *Griggs* did for employment discrimination law.⁴⁵

B. Federal Circuit Courts and Administrative Agencies Support Disparate Impact

The Supreme Court should also consider the consensus of the circuit courts, as every circuit has decided that FHA disparate impact claims are viable.⁴⁶ Such unanimous agreement amongst the federal

38. *Id.* at 457.

39. *Id.*

40. *Id.* at 457-58.

41. *Id.* at 458.

42. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

43. Eric W.M. Bain, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1459 (2013). Title VII was passed as part of the Civil Rights Act of 1964 and the FHA was passed as part of the Civil Rights Act of 1968. *Id.*

44. *Id.* at 1460.

45. *Id.* at 1461.

46. Nicholas Cassidy, *The Fair Housing Act, Disparate Impact, and the Ability-to-Repay: A Compliance Dilemma for Mortgage Lenders*, 32 REV. BANKING & FIN. L. 431, 458 (2013).

circuit courts “is a resounding endorsement that the FHA includes a disparate impact standard.”⁴⁷ The Supreme Court would have a more difficult time allowing disparate impact claims under the FHA if the circuits were split over whether a disparate impact standard existed under the FHA, but this is not the case as all circuits agree that such a standard exists.⁴⁸ Furthermore, administrative agencies, like the Department of Housing and Urban Development (HUD), have supported a disparate impact standard in their implementation of the FHA.⁴⁹ For example, in a 1993 administrative decision, the HUD Secretary found that a “disparate impact, if proven, would establish a violation of the Act.”⁵⁰ Furthermore, HUD’s “Complaint Intake, Investigation, and Conciliation Handbook” establishes that disparate impact may be used to show a violation of the FHA.⁵¹ Additionally, the Department of Justice, using its enforcement powers, has urged courts to adopt an impact standard.⁵² The Fair Lending Unit of the Housing and Civil Enforcement Section of the Department of Justice has relied on the disparate impact theory in charging lenders with lending discrimination in violations on the FHA.⁵³

C. *The Purpose Behind the FHA*

The Supreme Court should examine the purpose behind the FHA, as the statute is ultimately concerned about the effects of housing policies and not the intent behind them.⁵⁴ The legislative history of the FHA demonstrates that Congress deliberately did not limit showings of violations to intent.⁵⁵ When advocating for the passage of the FHA, the Act’s principal sponsor, Senator Mondale, spoke of the Act combating effects of discrimination, stating that it “seems only fair. . . that Congress should now pass a fair housing act to undue the effects” of previous governmental discrimination.⁵⁶ Additionally, during congressional debate of the FHA, an amendment was introduced that would have specifically included an intent standard but the amend-

47. Bain, *supra* note 43, at 1463.

48. *Id.*

49. *Id.*

50. *Id.* at 1446, quoting Sec’y, United States Dep’t of Hous. & Urban Dev. v. Mountain Side Mobile Estates P’ship, HUDALJ 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993).

51. Bain, *supra* note 43, at 1446.

52. *Id.* at 1463.

53. Kirk D. Jensen, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 133 (2012).

54. Cassidy, *supra* note 46, at 458 (2013).

55. Robert G. Schwemm & Sara K. Pratt, *Disparate Impact under the Fair Housing Act: A Proposed Approach 10-12*, NATIONAL FAIR HOUSING ALLIANCE (2009), available at <http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf>.

56. *Id.* at 11 (citing 114 Cong. Rec. 2669 (1968)).

ment was defeated because the bill's supporters believed it would have made "proof of discrimination difficult in all but the most blatant cases."⁵⁷

D. If the Supreme Court Decides Disparate Impact is Not Allowed Under the FHA

While there is much legal support for the Supreme Court to recognize disparate impact claims under the FHA in the future, there is also the chance that the Court would decide that FHA disparate impact claims are invalid.⁵⁸ If the Court rejected FHA disparate impact claims, it could seriously undercut the enforcement of the FHA.⁵⁹ For example, if a landlord had a requirement that "all tenants must have a salaried job," this could disproportionately impact certain groups.⁶⁰ The landlord might have made this rule without any discriminatory intent, yet this type of requirement would seriously undermine the goal of the FHA.⁶¹ Without disparate impact liability, prospective tenants would have no way of challenging such a condition.⁶² The availability of disparate impact claims "encourages the inclusion of historically disadvantaged groups in the housing market" and the Court should not completely deny potential plaintiffs the opportunity to bring these claims under the FHA.⁶³

IV. Conclusion

Prior to *Mount Holly Gardens Citizens in Action, Inc.'s* being settled in November of 2013, the Supreme Court had the opportunity to decide whether disparate impact claims were permissible under the FHA. While the residents of the Gardens celebrated the long-awaited settlement, the settlement means another missed opportunity for the Supreme Court to define disparate impact claims under the FHA. When next given the opportunity, the Court not only has a responsibility to address the ambiguity of this area of law, but also owes it an identity. If and when this chance comes, the best scenario would be for the Supreme Court to recognize and provide a clear standard for disparate claims under the FHA.

57. Schwemm & Pratt, *supra* note 55, at 11 (citing 114 Cong. Rec. 5214 (1968)).

58. Cassidy, *supra* note 46.

59. *Id.*

60. *Id.* at 461.

61. *Id.*

62. *Id.* at 460.

63. *Id.* at 461.