



NCOIL SPECIAL COMMITTEE ON RACE IN INSURANCE UNDERWRITING

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DISPARATE IMPACT AS DEFINED BY THE U.S. SUPREME COURT IN 2015

Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015)

- A case under the Fair Housing Act considering how tax credits for developers who build low-income housing were administered by designated state agencies
- But set legal standards in determining disparate impact liability that are applicable to state insurance laws for home and auto



DISPARATE IMPACT AS DEFINED BY THE U.S. SUPREME COURT IN 2015

- **The Court recognized that there was “disparate impact” that would not subject the practitioner to liability**
 - ***“Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system.”***
 - **It did not specifically go so far as to recognize “good” disparate impact, but it did recognize permissible disparate impact**



DISPARATE IMPACT AS DEFINED BY THE U.S. SUPREME COURT IN 2015

- **The Court recognized that there were proper limitations to “disparate impact” liability**
 - **Disparate-impact liability is properly limited to avoid the serious constitutional questions – i.e. if such liability were imposed based solely on a showing of a statistical disparity**
 - **Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be considered in a pervasive way and lead to “numerical quotas” and serious constitutional questions**



DISPARATE IMPACT AS DEFINED BY THE U.S. SUPREME COURT IN 2015

- The Court articulated some “cautionary standards” concerning DI under the FHA and Title VII – and presumedly other laws - which would mandate only the “removal of artificial, arbitrary, and unnecessary barriers,” and not the displacement of valid policies
- Variations from numerical equilibrium was not itself a violation
- A mere showing of racial imbalance would “not, without more, establish a prima facie case of disparate impact,” and a plaintiff must prove a “robust” causal connection between the defendant’s challenged practice and any statistical disparities.



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- **Even if these elements are shown, a defendant could still prevail by proving that its challenged policy is “necessary to achieve a valid interest.”**
- **Following that, there have been certain “less-discriminatory-alternative” phases proposed and the court indicated how and when this burden should be placed on the plaintiff.**



DISPARATE IMPACT AS DEFINED BY THE U.S. SUPREME COURT IN 2015

- ***Inclusive Communities* does not explicitly require any state insurance disparate impact law to comply with every provision stated**
- **However, it is a virtual certainty that any state insurance disparate impact law that does not comply with *Inclusive Communities* will be subject to litigation challenges**

States that ignore *Inclusive Communities* in enacting insurance disparate impact laws do so at their own peril