Docket No. FR-6011-P-02

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Concerning

HUD'S IMPLEMENTATION OF THE FAIR HOUSING ACT'S DISPARATE IMPACT STANDARD

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 84 *FED. REG.* 42854 (AUGUST 19, 2019)

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October 18, 2019

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Submitted Electronically (http://www.regulations.gov)
Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 17th Street SW, Room 10276
Washington, DC 10410-0500

Re: Docket No. FR-6111-P-02
Implementation of the Fair Housing Act's Disparate Impact Standards
Notice of Proposed Rulemaking and Request for Comments
84 Fed. Reg. 42854 (August 19, 2019)

Dear Sir or Madam:

The Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Department of Housing and Urban Development's (HUD) proposed rule that would establish standards for determining the circumstances under which liability under Title VIII of the Fair Housing Act (FHA) can be established for practices with an unjustified discriminatory effect on protected groups, even if those practices were not motivated by discriminatory intent.

WLF strongly supports HUD's decision to undertake a rulemaking proceeding regarding the disparate-impact standards. Until its 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) ("*Inclusive Communities*"), the U.S. Supreme Court had never addressed whether disparate-impact liability may *ever* be imposed under the FHA. *Inclusive Communities* held that such liability is *sometimes* permissible, but it made clear that potential liability is far narrower than that permitted under some lower-court decisions and HUD's own existing disparate-impact

regulations. A new set of regulations is necessary to bring HUD regulations into compliance with *Inclusive Communities.*

WLF also strongly supports the standards set out in proposed Part 100 (the "Proposed Rule"). WLF particularly applauds Proposed § 100.500(b), which provides that a disparate-impact complaint is subject to dismissal on the pleadings unless the complaint states facts that "plausibly allege" five enumerated elements. Unless a plaintiff is required to meet that pleading burden before exposing the defendant to the expenses of discovery, there is too great a danger that defendants will be forced to settle even insubstantial claims or, even worse, to adopt racial-quota policies designed for the sole purpose of avoiding FHA liability.

Some preliminary criticism of the Proposed Rule has focused on this "prima facie burden" imposed on defendants. Critics argue that requiring the plaintiff to demonstrate that the challenged policy is "arbitrary, artificial, and unnecessary" cuts against long-standing understandings of FHA disparate-impact liability. Those criticisms are unfounded. They overlook that there was no definitive FHA disparate-impact standard until the 2015 *Inclusive Communities* decision, and that that decision called into question much of the pre-existing case law.

HUD solicits responses to the following question: "how well does the Proposed Rule align with the decision and analysis in *Inclusive Communities* with respect to the proposed prima facie burden." These comments focus almost exclusively on that question. WLF concludes that the Proposed Rule's prima facie burden aligns very closely with the requirements of *Inclusive*

Communities.

As explained below, we recommend several minor revisions. First, Proposed § 100.500(b)(3) should be revised to require the defendant to show that the alleged disparity caused by the challenged policy has an adverse impact on a *significant number* of members of a protected class. Even if the plaintiff plausibly alleges a statistically significant disparity, such disparities should not be actionable if the policy affects very few members of the protected class (say, 5% of such members versus 1% of the population as a whole).

Second, the clear implication of Proposed § 100.500(c) is that a defendant who makes one of the listed showings is entitled to judgment on the pleadings (because it has shown that the "a plaintiff's allegations do not support of prima case of discriminatory effect"). That implication should be stated explicitly. Otherwise, some district courts may erroneously decline to permit defendants to raise these defenses in connection with a Rule 12 motion to dismiss the complaint.

Third, WLF urges that a new clause be added to Proposed § 100.500(e), which governs "Business of Insurance Laws." The proposal states, "Nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." WLF urges addition of the following language: "or is intended to impose liability for any action permitted by state law." Federal law has long recognized the primacy of state law (over federal law) in the regulation of insurance. Nothing in the FHA suggests that Congress intended to override that policy with respect to challenged practices alleged to have a

disparate impact on protected groups, when a State has expressly authorized the challenged practice.

I. Interests of WLF

The Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF promotes economic liberty, free enterprise, a limited and accountable government, and the rule of law. WLF regularly appears in federal court in cases raising important issues arising under federal civil rights laws. *See, e.g., Comcast Corp. v. Nat'l Assoc. of African American-Owned Media, cert granted*, 139 S. Ct. 2693 (2019).

WLF also filed an *amicus curiae* brief in *Inclusive Communities*, to express its opposition to overly expansive standards for disparate-impact liability under the FHA. WLF shares the concern, expressed by all members of the *Inclusive Communities* Court, that disparate impact liability not be permitted to prevent affected entities "from achieving legitimate objectives, such as ensuring compliance with health and safety codes," and that defendants must be "protected against abusive disparate-impact claims." 135 S. Ct. at 2524.

II. The FHA's Statutory Mandate

FHA disparate-impact liability arises under Section 804(a), which makes it 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." Before 2015, the Supreme Court had not decided whether Section 804(a) authorized disparate-impact claims. Those opposing such

claims noted that "because of" generally indicates intentional conduct. Those supporting disparate-impact liability pointed to the "otherwise make unavailable or deny" language, arguing that such language indicated that Congress wanted to eliminate all housing policies that adversely affect protected group, regardless whether the defendant intended those effects.

III. The *Inclusive Communities* Decision

A closely divided Supreme Court resolved that issue in its 2015 *Inclusive Communities* decision. The Court steered a middle course between the position espoused by HUD (which argued for a broad disparate-impact standard) and the position espoused by the defendants (which argued that the FHA does not authorize *any* liability on the basis of disparate impact). The majority held that FHA disparate-impact liability could be imposed under some circumstances, but it narrowly confined the limits of such liability "in key respects," in order to avoid "the displacement of valid government policies." 135 S. Ct. at 2522. The majority opinion includes multiple warnings that FHA disparate-impact liability must be carefully circumscribed. To cite just a few of the Court's warnings:

- "[D]isparate-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 a vibrant business and dynamic free-enterprise system." *Id.* at 2518.

- Disparate-impact liability is warranted where necessary to help "eradicate discriminatory practices within a sector of our national economy. ... these unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate impact litigation." *Id.* at 2521-22.

- "[D]isparate impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such

liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid government policies." *Id*. at 2522 (citation omitted).

- Court is reluctant to impose disparate-impact liability when a case "involves a novel theory of liability" and does not lie in "the heartland of disparate-impact suits targeting artificial barriers to housing." *Ibid.*

- "Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)." *Id*. at 2523.

- "A disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and this protects defendants from racial disparities they did not create." *Ibid.*

- Noting the great difficulty in determining whether any of the policies at issue in *Inclusive Communities* were actually discriminatory, the Court stated that if those sorts of policies "are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotes—a circumstance that itself raises serious constitutional concerns." *Ibid.*

- "The limitations on disparate-impact liability discussed here are also necessary to protect defendants against abusive disparate-impact claims." *Id.* at 2524.

IV. The Proposed Rule 's Prima Facie Burden Properly Implements the Limitation on Disparate-Impact Liability Imposed by *Inclusive Communities*

Critics of the Proposed Rule have focused primarily on the prima facie burden imposed on FHA disparate-impact plaintiffs by Proposed § 100.500(b). They object that the five elements of a prima facie case set our in the Proposed Rule are overly burdensome and were not part of the prima facie case recognized by pre-*Inclusive Communities* case law and HUD's current regulations.

That criticism is not well taken. Critics are correct that Proposed § 100.5000(b) increases the previously recognized pleading burden imposed on plaintiffs. But that increased burden is mandated by *Inclusive Communities* itself.

Each of the five elements cited in the Proposed Rule derive directly from limitations on disparate-impact liability imposed by *Inclusive Communities*:

- Proposed § 100.500(b)(1) requires a complaint to state facts "plausibly alleging" that the challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective." That "arbitrary, artificial, and unnecessary" requirement is repeatedly cited in *Inclusive Communities*. Nor did the Court ever suggest that the burden of demonstrating that the policy is *not* "arbitrary, artificial, and unnecessary" should fall on the defendant. To the contrary, the Court stated that "government or private policies are not contrary to the disparate-impact requirement *unless* they are artificial, arbitrary, and unnecessary." *Id*. at 2524 (emphasis added). Use of the word "unless" signals that the burden is properly imposed on the plaintiff.

- Proposed §§ 100.500(b)(2), (4), and (5) require pleadings to meet strict causation requirements. None of those requirements is objectionable, given *Inclusive Communities*'s repeated directives that "a robust causality requirement" is called for and that the plaintiff must directly link the alleged disparate impact to the plaintiff's alleged injury.

- Proposed § 100.500(b)(3) requires the plaintiff to demonstrate that "the alleged disparity caused by the policy or practice has an adverse effect on members of the protected class." *Inclusive Communities* imposed this precise requirement in response to its concern that the policy challenged in that case, although it had an arguable disparate impact on low-income citizens of Dallas, could not be shown to actually have harmed them.

V. WLF Suggests Several Changes to the Proposed Rule

WLF strongly supports the vast majority of the items in the Proposed Rule. It suggests several minor changes:

- Proposed § 100.500(b)(3) should be revised to require the defendant to show that the alleged disparity caused by the challenged policy has an adverse impact on a *significant*

number of members of a protected class. Even if the plaintiff plausibly alleges a statistically significant disparity, such disparities should not be actionable if the policy affects very few members of the protected class (say, 5% of such members versus 1% of the population as a whole).

- The clear implication of Proposed § 100.500(c) is that a defendant who makes one of the listed showings is entitled to judgment on the pleadings (because it has shown that the "a plaintiff's allegations do not support of prima case of discriminatory effect"). But that implication is not stated explicitly. WLF proposes inserting a sentence somewhere in 100.500(c) stating, "The defendant may introduce evidence of the sort described herein in connection with a motion to dismiss the complaint for failure to state a cause of action, and is entitled to dismissal if he thereby successfully establishes one of the listed defenses." Otherwise, some district courts may erroneously decline to permit defendants to raise these defenses in connection with a Rule 12 motion to dismiss the complaint.

- WLF urges that a new clause be added to Proposed § 100.500(e), which governs "Business of Insurance Laws." The proposal states, "Nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." WLF urges addition of the following language: "or is intended to impose liability for any action permitted by state law." Federal law has long recognized the primacy of state law (over federal law) in the regulation of insurance. Nothing in the FHA suggests that Congress intended to override that policy with respect to challenged practices alleged to have a disparate impact on protected groups, when a State has expressly authorized the challenged practice. As currently written, the regulation bars disparate-impact liability when a challenged insurance company policy is expressly mandated by state law, but it fails to impose a similar bar when the challenged policy is one expressly authorized by state law.

Conclusion

WLF applauds HUD for initiating a rulemaking proceeding to bring its disparate- impact regulation into compliance with the limitations imposed by *Inclusive Communities.* It urges HUD to adopt the Proposed Rule in final form, except as noted above.

Sincerely,

/s/ Richard A. Samp
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Chief Counsel