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Brief Comments on Disparate Impact and Kick-backs*

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Two decisions, one by a court and one by an agency head acting as an appellate body, are worth brief comments.

Disparate Impact

The Supreme Court has now spoken and disparate impact claims of discrimination are cognizable under the Fair Housing Act.[1] This result, on the surface, is consistent with the conclusions most of the Courts of Appeals had reached, yet because of what appeared to be desperate scrambling in earlier cases before the Court by those seeking to uphold that theory,[2] something of a surprise. Those supporting disparate impact theory celebrated. However, it is unclear whether the theory can now be applied in more cases or fewer cases than before the Court handed down its decision.

Many of the cases of disparate impact have been based on a statistical analysis of patterns of discrimination in certain geographical areas, supported by an argument that the actions of a defendant necessarily would lead to aggravation of such patterns. The court has said that such analysis alone will be insufficient to create a claim. The plaintiff must show there is a "causal relationship" between the statistical analysis and the policies and practices complained of. That may be hard to do. In addition, the Court said that courts should "examine with care," these claims at the pleadings stage, implying that courts should avoid lengthy and expensive discovery proceedings in these cases.

Second, the Court said that the plaintiff must show that the practices which are alleged to cause the racial discrimination are arbitrary, unnecessary, or artificial. That, too, can now prove to be a substantial burden for plaintiffs.

Finally, the Court said that plaintiffs must not be put in situations in which two conflicting laws confront the plaintiff (disparate impact being one) and always be expected to adhere to the one supported by disparate impact.[3] Otherwise the conflict may give rise to defendants adopting such things as racial quotas which itself might give rise to equal protection clause issues.

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[1] Texas Dep't of Hous. and Cmty. Dev. v. Inclusive Communities Project, Inc., 576 U.S. ___ (2015).

[2] Disposition of the Magner case, for example.

[3] In this case, the issue was between building LMI housing in the blighted inner city neighborhoods to improve those communities or in the suburbs to integrate the suburbs. Both decisions were driven by interpretations of conflicting laws.

It will be interesting to see whether the plaintiffs that brought this suit have their case dismissed on remand. It appears that they will. Certainly the Court said that remedial orders must be directed at the offending practice through "race-neutral means," suggesting that punitive sanctions and penalties are probably ill-suited to these cases.

Left unaddressed directly in this case, the HUD rule on the use of disparate impact must now be reconsidered, and whether the theory will be applicable in ECOA cases will be left to courts to decide with the guidance of this decision.

Kickbacks

RESPA was designed to address abuses in the settlement process of mortgages, and one key provision is found in Section 8, a section that makes payments for referrals of business illegal. In the first decision by CFPB of a contested administrative proceeding,[4] Director Cordray reaches some decisions about Section 8 that challenge accepted beliefs, both of HUD and of the public.

In a lengthy and detailed decision, Director Cordray held that section 8(c)(2) of the Act, that says: "Nothing in this section shall be construed as prohibiting... the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed," is not an "exemption" from liability imposed by section 8(a), but is a "clarification" of section 8(a).[5] To be an exemption, the language would have to include something like the phrase, "Nothing in this section shall..." To be "bona fide" the payments (in this case of reinsurance premiums) must not be tied to referral of business, so even if reinsurance was provided and the cost was reasonable and paid, since they were integrated with referral of business the Act was violated.

The decision also set the bar for how CFPB would view a number of questions:

1. Statutes of Limitations do not apply to administrative proceedings brought by CFPB;
2. A RESPA claim arises each time a premium is paid, not just at the closing;
3. Indirect referrals or kick-backs are violations;
4. Reviews of Administrative Law Judge decisions will be conducted de novo and upon a preponderance of the evidence; and
5. Long-standing practices established through individual letters by HUD will not be treated as official interpretations or guidance unless published in the Federal Register.[6]

PHH is appealing the decision in the Court of Appeals for the D.C. Circuit, and they recently filed a motion to stay the decision pending this judicial review. So, this case, and its accompanying conclusions, have begun a trip through the judicial system.

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[4]CFPB Administrative proceedings, In Re PHH Corporation, et al., File No. 2014-CFPB-0002.

[5]Section 8(a) says No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

[6]Referring to a HUD letter in 1997 on reinsurance that was never published, Director Cordray said "The HUD letter is not in such a form as to be binding on any adjudicator... The letter was never published in the Federal Register. Thus... the letter provides no protection to PHH in this proceeding." Documents not published in the Federal Register do not constitute a "rule, regulation or interpretation" and do not offer protection for purposes of RESPA authority.