NOT STARRY-EYED: MASSACHUSETTS IMPOSES RIGOROUS STANDARD ON FAIR HOUSING DISPARATE IMPACT CLAIMS IN *BURBANK APARTMENTS*

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The Massachusetts Supreme Judicial Court ("SJC") recently answered the question of whether the Massachusetts anti-discrimination statute Chapter 151B recognizes a disparate impact theory of discrimination. In *Burbank Apartments Tenant Association v. Kargman*,[1] the SJC held that Chapter 151B recognizes such a theory. In doing so, however, the SJC adopted the framework from the U.S. Supreme Court's decision in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*,[2] and held that in pleading a disparate impact claim under Chapter 151B, a plaintiff must satisfy a rigorous burden. Because the *Burbank Apartments* plaintiffs failed to meet the rigorous burden, the SJC affirmed the dismissal of their claims.

INCLUSIVE COMMUNITIES SETS THE STAGE

[3]

The U.S. Supreme Court recently addressed whether the Fair Housing Act, 42 U.S.C. § 3601 et seq. (2012), recognizes disparate impact claims.[4] In a disparate impact claim, a plaintiff may establish liability, without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain enumerated groups of individuals and if the practice is not grounded in sound business considerations. The Supreme Court held that based on its language and purpose, the Fair Housing Act provides for disparate impact claims. The Supreme Court also relied on its interpretation of Title VII (the federal anti-discrimination in employment statute), as to which the Court had previously recognized disparate impact claims.

The Supreme Court, however, imposed important limitations "to protect potential defendants against abusive [Fair Housing Act] disparate-impact claims." It emphasized that the plaintiff has the burden "to establish a 'robust' causal connection between the challenged practice and the alleged disparities." The Supreme Court further cautioned that a defendant's business justification for a challenged practice is "not contrary to the disparate-impact requirement, unless . . . artificial, arbitrary, and unnecessary."[5] These considerations heavily influenced the SJC in *Burbank Apartments*.

BURBANK APARTMENTS FOLLOWS SUIT

The *Burbank Apartments* plaintiffs sued in Massachusetts state court when the defendants decided not to renew

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the apartment complex's contract with the Department of Housing and Urban Development for Section 8 housing assistance payments ("HAP"). In lieu of the HAP contract, the defendants decided to accept Section 8 vouchers directly from tenants. The plaintiffs — current residents, prospective residents, and advocacy groups — alleged that the defendants' decision not to renew the HAP contract constituted both disparate treatment (i.e., intentional discrimination) and disparate impact discrimination under the Fair Housing Act and Massachusetts Chapter 151B. The trial court dismissed the case, ruling that the defendants' compliance with federal and state law provided immunity from disparate impact claims.

The SJC exercised direct review of the plaintiffs' appeal. Drawing parallels to the Supreme Court's decision in *Inclusive Communities* and Massachusetts employment discrimination statutes, the SJC held that Chapter 151B recognizes a disparate impact theory of liability. Interpreting the statute's language and purpose, the SJC held that Chapter 151B "seek[s] to eradicate discrimination in all its forms, be they based on intent or effect."[6] Once the SJC concluded that Massachusetts law recognizes a theory of disparate impact liability, the next question was whether a disparate impact claim could exist against a property owner who was otherwise in compliance with federal and state regulations. The SJC declined to adopt such a rule. The SJC noted that its ruling is in accord with federal precedent, under which "violating a regulation or breaking the law has never been a prerequisite to disparate impact liability."[7]

In rendering its decision, however, the SJC adopted the same rigorous pleading standard set forth in *Inclusive Communities*. The SJC held that there was a "need to balance the interests of both property owners and protected classes by requiring a rigorous examination on the merits at the pleading stage."[8] Specifically, plaintiffs must meet "a robust causality requirement" that "point[s] to a defendant's policy or policies causing that [statistical] disparity."[9] The SJC then applied this rigorous standard to the case before it and held that the plaintiffs had failed to meet their burden. In particular, the SJC noted that the allegation that prospective tenants would not be able to afford rent without HAP subsidies did "not meet the 'robust causality requirement' in showing that the defendants' actions resulted in a statistical disparity, thereby supporting a claim that the defendants disproportionately disadvantaged members of a protected class."[10] Accordingly, the SJC affirmed the dismissal.

CONCLUSION

Although Massachusetts now recognizes disparate impact claims under Chapter 151B, the effect is tempered by a rigorous pleading standard. The SJC made clear that plaintiffs alleging disparate impact claims will be held to the same significant standard previously imposed by the U.S. Supreme Court. Recognizing the potential abuse of disparate impact claims on the sound business practices of property owners, the SJC made clear that plaintiffs must satisfy a high burden in order to establish a prima facie case of disparate impact liability.

NOTES:

[1] No. SJC-11872 (Apr. 13, 2016) ("*Burbank Apartments*").

[2] 135 S. Ct. 2507 (2015) ("*Inclusive Communities*").

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[3] For a more in-depth discussion of the Supreme Court's decision in *Inclusive Communities*, please see the K&L Gates Alert "The Supreme Court Recognizes but Limits Disparate Impact in its Fair Housing Act Decision."

[4] *Inclusive Communities*, 135 S. Ct. at 2512.

[5] *Id.*

[6] *Burbank Apartments*, slip op. at 25.

[7] *Id.* at 33 (citing *Graoch Assocs. No. 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relation Comm'n*, 508 F.3d 366, 376 n.5, 377 (6th Cir. 2007)).

[8] *Burbank Apartments*, slip op. at 35.

[9] *Id.* (quoting *Inclusive Communities*, 135 S. Ct. at 2512).

[10] *Id.* at 39.

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