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LEGAL ALERT

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Supreme Court to Decide Fair Housing Act "Disparate Impact" Case with Broader Fair Lending Implications

On Monday, the U.S. Supreme Court agreed to decide whether "disparate impact" discrimination claims are cognizable under the federal Fair Housing Act (FHA) and, if so, how such claims should be analyzed. The Court's decision, expected by the end of the Court's term this spring, could have broad implications for fair lending litigation and enforcement affecting all types of consumer finance products.

The Court granted a petition to review the Eighth Circuit's decision reversing summary judgment in the defendants' favor in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), which involved a challenge by owners of rental properties, under various theories of liability, to the City of St. Paul's alleged "practice" of "aggressively enforcing" its Housing Code. (Click here for copy of the opinion.) The district court granted the defendants' motion for summary judgment but the Eighth Circuit reversed with respect to the plaintiffs' "disparate impact" claim under the FHA, 42 U.S.C. § 3604(a)-(b). In so holding, the Eighth Circuit applied a three-part "burden-shifting" approach requiring, first, a *prima facie* case of disparate impact on protected classes; second, a showing by the defendant that the challenged policy or practice has a "manifest relationship" to a legitimate, non-discriminatory policy objective; and finally a showing by the plaintiffs that there exists "a viable alternative means" to meet the legitimate objective without discriminatory effects. 619 F.3d at 833-34.

The Eighth Circuit described the "policy or practice" at issue as "the City's aggressive Housing Code Enforcement practices," including allegations that "the City issued false Housing Code violations and punished property owners without prior notification, invitations to cooperate with the [enforcement authority], or adequate time to remedy Housing Code violations." *Id* at 834. The plaintiffs presented a *prima facie* case of disparate impact, the court held, by presenting evidence that the city had a shortage of affordable housing; that racial minorities were disproportionately represented in the pool of those requiring affordable housing; that the city's "aggressive enforcement" of its code made ownership of rental properties more expensive; and that these increased costs to owners resulted in less affordable housing in the city. *Id.* at 834-35. (As pointed out in the city's petition for certiorari, this reduces to a finding that enforcement of a housing code – or any other "practice" that increases the costs borne by owners of low-income rental property – will always have a *prima facie* disparate impact in cities in which there is not enough low-income housing and minorities are disproportionately in need of it.)

After finding a *prima facie* case of disparate impact, the Eighth Circuit found that the city had demonstrated that the challenged "aggressive enforcement" of its Housing Code promoted legitimate objectives, but that the plaintiffs had produced evidence of a viable alternative without discriminatory effect. The proffered alternative was an enforcement program previously used by the city called "Problem Properties 2000." *Id.* at 837. The program is not described in detail in the panel's opinion, and the defendants argued that use of the prior enforcement program would not reduce the alleged impact on protected class tenants (presumably because any enforcement program would result in greater costs to landlords). The Eighth Circuit panel, however, found that it could be inferred from the record, at the summary judgment stage, that the alternative enforcement program "would significantly reduce the impact on protected class members." *Id.* at 838.

The city petitioned for rehearing *en banc*. That petition was denied, with five judges dissenting. The city then filed a petition for certiorari presenting two questions: whether disparate impact claims are cognizable under the FHA and, if so, whether the proper mode of analysis is the burden-shifting approach

applied by the Third, Eighth and Ninth Circuits; one of the balancing tests applied by the Fourth, Sixth, Seventh and Tenth Circuits; the "hybrid" approaches applied by the First and Second Circuits; or some other approach.

Regarding the threshold question of the availability under the FHA of "disparate impact" claims of any stripe, the city's petition for certiorari, like the dissent from the petition for rehearing *en banc*, emphasizes that the Supreme Court has never addressed the propriety of "disparate impact" claims under the FHA and that lower courts' recognition of such claims began before the Supreme Court's decision in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005). In *Smith*, the Supreme Court found disparate impact claims cognizable under Section 4(a)(2) of the Age Discrimination in Employment Act because of text in that section "identical" to that of Title VII – language which is absent from the FHA. That key language is also absent from the Equal Credit Opportunity Act ("ECOA"), though many courts, even after *Smith,* have allowed disparate impact claims to proceed under the ECOA. *See, e.g.*, *Guerra v. GMAC LLC*, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009) (allowing disparate impact claims under FHA and ECOA, rejecting argument that *Smith* counsels otherwise, and collecting similar cases); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008); *Ramirez v. GreenPoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922 (N.D. Cal. 2008). These decisions followed in the wake of the availability of expanded Home Mortgage Disclosure Act data in recent years.

The Court's decision in *Gallagher* could effectively determine the availability of disparate impact claims under the ECOA as well as under the FHA. The Eighth Circuit's ruling may be so far afield, however, that a more limited decision, vacating the Eighth Circuit opinion but leaving intact the possibility of FHA disparate impact claims in some circumstances, may attract a majority of the Court in this case.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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