



## LAW OF THE LAND

# Disparate-Impact Liability Quietly Arrives in Massachusetts

State Statute Broader Than Federal Standard

BY CHRISTOPHER R. VACCARO

SPECIAL TO BANKER & TRADESMAN



Christopher Vaccaro

It is disgraceful to intentionally deny housing to people because of their race, color, religion, sex, national origin or various other attributes. Shortly after Dr. Martin Luther King Jr.'s assassination in 1968, Congress enacted the Fair Housing Act (FHA) to punish this misconduct.

While the FHA clearly prohibits deliberate discrimination, debate continues over whether it forbids policies that inadvertently have disparate impacts on protected minorities. For example, do local zoning ordinances against apartment buildings violate the FHA if they disproportionately reduce housing options for minorities? Do landlords break the law if they refuse to rent to applicants with criminal backgrounds? When the United States Supreme Court issued its 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, most federal courts had already applied the FHA to these disparate-impact cases.

*Inclusive Communities* involved a federal tax credit program, locally administered by the Texas Department of Housing and Community Affairs, which

encouraged low-income housing developments. The nonprofit Inclusive Communities Project (ICP) sued the department in federal court, alleging that it granted too many tax credits for “black inner-city areas,” compared to “white suburban neighborhoods.” ICP claimed that department policy had a disparate impact on minorities, causing continued segregation in violation of the FHA. The department countered that the FHA only prohibited intentional discrimination, not programs having incidental disparate impacts. The U.S. Supreme Court took up the case.

The nine-member court had already accepted disparate-impact theory in employment discrimination, but it was divided on whether to extend it to housing. Justice Anthony Kennedy's majority opinion held that disparate-impact theory applies to FHA cases, endorsing a three-step analysis with shifting burdens of proof.

To prevail in disparate-impact cases, plaintiffs must first prove that defendants' decisions have disparate impacts on protected minorities. When plaintiffs succeed, the burden of proof shifts to defendants, who must rationalize their decisions as “necessary to achieve a valid interest.” If defendants prove a valid interest, plaintiffs can still win by showing that the interest is achievable using policies with less discriminatory effects. The five-justice majority observed that “much progress remains to be made in our nation's struggle against racial isolation,” and recognized the FHA's “con-

tinuing role in moving the nation toward a more integrated society.”

Four justices disagreed, calling the majority's ruling “a serious mistake.” Justice Samuel Alito's dissent discussed *Gallagher v. Magner*, a 2010 FHA disparate-impact case out of Minnesota. In *Magner*, the St. Paul building department vigorously prosecuted rodent infestations and housing code violations. Owners of problem properties raised rents to correct the problems. St. Paul landlords sued the city, claiming that its aggressive enforcement policies caused disparate impacts on minorities, in violation of the FHA. A federal appeals court agreed with the landlords. Before the Supreme Court could hear the city's appeal, the parties hastily settled, but not without Alito complaining that “something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit.”

## Massachusetts Statute Casts Wider Net

The Massachusetts antidiscrimination statute is broader than the FHA. In addition to protecting traditionally recognized minority groups, it also forbids discrimination based on gender identity, sexual orientation, age, genetic information, ancestry and veteran status. It specifically protects recipients of government rental assistance from housing discrimination. That form of illegal discrimination was at issue when the Massachusetts Supreme Judicial Court considered disparate-im-

pact liability in *Burbank Apartments Tenant Association v. Kargman*.

In *Kargman*, a landlord had a 40-year contract with the U.S. Department of Housing and Urban Development, giving his apartments project-based Section 8 housing assistance payments. The landlord let the contract expire, opting instead to accept Section 8 vouchers directly from tenants. A tenant organization filed a disparate-impact suit against the landlord under the FHA and

Massachusetts antidiscrimination law. The housing court dismissed the lawsuit, but the SJC took the case on appeal. Citing the Supreme Court's *Inclusive Communities* decision, the SJC unanimously endorsed disparate-impact theory under state law. However, the SJC held that the tenant organization failed to allege sufficient facts to maintain its suit against the landlord. The SJC ruled in favor of the landlord and upheld the housing court's dismissal.

The U.S. Supreme Court is divided on disparate-impact theory under the FHA. A change of one justice could swing the balance against it. In Massachusetts, however, disparate-impact theory under the state antidiscrimination statute is firmly established as the law of the land. ◀

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**Christopher R. Vaccaro** is a partner at Dalton & Finegold in Andover. His email address is [cvaccaro@dfllp.com](mailto:cvaccaro@dfllp.com)

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