



The feds are running from a New Jersey fight over race, housing

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It isn't very often a case reaches the Supreme Court only to settle before a ruling. Of course, litigation can be a poker game and one side may fold, but such calculations are typically made long before parties invest in high-court petitions, briefing and argument preparation.

That's why it's curious that, for the second time in less than three years, a settlement has apparently been reached on the eve of oral arguments; taking away the chance for the Supreme Court to review one particular legal question that divides lower courts: disparate impact.

The case, *Mount Holly vs. Mount Holly Gardens Citizens in Action*, saw a Burlington County township accused of racism for attempting to improve housing conditions in a blighted neighborhood. Because the ambitious redevelopment program would make housing more expensive for the predominantly black residents — most of whom have accepted resettlement packages — the federal appeals court declared the program discriminatory.

The plaintiffs did not claim any eminent domain abuses, so the issue is about as simple as legalese allows: “whether disparate impact claims are cognizable under the Fair Housing Act.” That is, while the FHA makes it illegal to refuse to “sell or rent ... (or) make unavailable or deny, a dwelling to any person because of race,” does it also forbid race-neutral policies that may have an unequal effect (i.e. disparate impact) on minorities?

The Obama administration has aggressively pushed “disparate impact” theory, but shies away from taking such cases to the Supreme Court. That's because disparate impact claims are flawed. They hold people responsible not for bad actions, but for statistical anomalies that result from harmless behavior. Since minorities are disproportionately poor, any policy that makes any product more expensive can be said to have a disparate impact.

The Supreme Court took a similar case two years ago.

In that case, *Magner vs. Gallagher*, a group of tenement landlords claimed that the city of St. Paul violated the FHA by enforcing a strict housing code that required rental properties to be rat-

free, have a working toilet and operate a safe heating system. The Magner plaintiffs argued disparate impact because these regulations would make the properties more expensive.

But the court never got to decide the case. Instead, it was settled after the head of the Justice Department's civil rights division, Tom Perez — now Labor secretary — made the city an offer it couldn't refuse: In return for settling, the DOJ agreed not to pursue an unrelated case where St. Paul was accused of misappropriating tens of millions of dollars.

Why would the government persuade defendants in a case it wasn't even a party to drop their perfectly valid position? Maybe the answer lies in the hundreds of millions of dollars DOJ has extracted from banks and insurers through disparate impact lawsuits.

To be fair, pressure to settle cases before courts can make adverse rulings isn't a new phenomenon. In 1996, the NAACP Legal Defense Fund financed a settlement that the Washington Post reported "was designed to forestall what the groups feared could have been a precedent-setting Supreme Court ruling limiting the use of affirmative action in the American workplace."

The difference between the 1996 case and the Magner and Mount Holly cases are that private parties are free to act however they wish, but the government should be held to a higher standard. We can only wonder what strings were pulled — and by whom — to get rid of Mount Holly.

Even with Mount Holly off the table for this term, there is still hope the Supreme Court will get a chance to resolve the matter. The American Insurance Association has filed a suit presenting the same question, and because of the high stakes, this won't settle.

When the Supreme Court finally gets to hear the case, it will decide a question more important than the scope of the FHA: Who gets to say what the law means — agenda driven bureaucrats, or our nation's highest court?