

FAIR HOUSING: DISPARATE IMPACT LIABILITY

NMHC/NAA Viewpoint

The apartment industry is committed to equal housing opportunity for all without regard to race, religion, color, sex, national origin, handicap or familial status. However, more clarity is needed on the applicability of disparate impact liability, as it could be used to undermine apartment providers' otherwise valid policies to ensure safe and decent housing for residents.

During the Obama Administration, HUD actively expanded fair housing compliance and enforcement efforts and relied heavily on the use of disparate impact theory. Disparate impact theory provides legal recourse where practices or policies are employed without intentional discrimination, yet they have a disproportionate impact on a protected class such as race and sex. For apartment owners and managers, that means that seemingly neutral and common business policies, such as criminal background screening, credit screening and Section 8 voucher policies, among others, could trigger discrimination claims despite no intention of singling out a particular group for adverse treatment.

In 2013, HUD issued a final rule formalizing the agency's position on disparate impact liability and establishing uniform standards for determining when a real estate practice or policy violates the Fair Housing Act (FHA). Subsequently, the U.S. Supreme Court issued a milestone decision on disparate impact liability in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (Inclusive Communities)*. The housing industry weighed-in on the issue and raised concerns that broad use of disparate impact theory could create liability for conducting ordinary and necessary business practices. While the opinion upheld the use of disparate impact liability under the FHA, the Court offered new analysis and limitations on the use of the theory.

Courts have used disparate impact theory in discrimination cases for over 40 years.

There are numerous inconsistencies, however, in the language and reasoning of the HUD rule and the Supreme Court decision - resulting in the establishment of two conflicting analytical frameworks for evaluating disparate impact liability. The tension between these two competing standards has resulted in confusion, uncertainty and litigation.

HUD has also issued a series of subsequent rules and guidance documents reinforcing an interpretation of disparate impact theory that conflicts with the Supreme Court. NMHC/NAA have raised concerns about the uncertainty created for housing providers and continue to seek clarification about the reach of disparate impact liability. NMHC/NAA urge HUD to reevaluate their interpretation of disparate impact liability to ensure compatibility with the Supreme Court and reissue guidance that helps housing providers execute necessary business practices without running afoul of fair housing requirements.