NAR Issue Summaries

Fair Housing / Disparate Impact

NAR Committee:

Fair Housing Policy Committee

What is the fundamental issue?

The federal Fair Housing Act protects anyone in a housing-related transaction from discrimination on the basis of race, color, religion, national origin, sex, disability, or familial status (presence of children in the family). State and local laws add additional protected categories. Disparate impact refers to a policy or practice which is neutral on its face, but which disproportionately affects a group of people defined by one of the fair housing laws' protected characteristics, without a legitimate business necessity for the practice, or where there is a less-discriminatory alternative.

I am a real estate professional. What does this mean for my business?

Many disparate impact claims are filed against local government policies that limit private property rights, block property development, and exclude populations based on race. Disparate impact claims against housing providers are rare. To protect against liability, housing providers should ensure that there is a legitimate business necessity for any policy or practice that has a disparate impact on a protected class, and that such business necessity cannot be accomplished by an alternative policy with a less-discriminatory effect.

NAR Policy:

NAR supports a housing market free from discrimination, including illegal disparate-impact discrimination, in order to achieve more fair, open, and diverse housing markets and communities. NAR opposes policies and practices that have a disproportionately adverse effect on a demographic group defined by race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity, unless such policies are justified by a legitimate business necessity and there is no less-discriminatory alternative. NAR believes that eliminating disparate-impact discrimination, as defined by the Supreme Court in its 2015 Inclusive Communities decision, helps protect both the legitimate business interests of real estate professionals and the fair housing rights of consumers.

Opposition Arguments:

Some argue that disparate impact liability goes beyond the mandate of the Fair Housing Act. Federal courts since the 1970s, however, and the U.S. Supreme Court in 2015, have affirmed that disparate impact discrimination is cognizable under the Fair Housing Act.

Legislative/Regulatory Status/Outlook

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In 2013, the U.S. Department of Housing and Urban Development (HUD) issued a regulation codifying various appellate court decisions interpreting the Fair Housing Act to prohibit disparate impact discrimination.The 2013 regulation addressed differences among various courts about which party in a case has the burden of proof as the case progresses. The U.S. Supreme Court ruledin 2015 in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* that the Fair Housing Act does recognize cases based on disparate impact, and largely agreed with the burdens of proof codified by the 2013 HUD rule.

In 2020, HUD published a rule that effectively altered the accepted standard for proving disparate impact claims under the Fair Housing Act. A court enjoined the 2020 rule before it could take effect. In 2021, HUD issued a proposed regulation reaffirming the approach of the 2013 rule. On March 31, 2023, after considering public comments on the proposed regulation, HUD issued its final rule reinstating and maintaining the 2013 rule and rescinding the 2020 rule. **The final rule became effective on May 1, 2023** .

Current Legislation/Regulation (bill number or regulation)

Reinstatement of HUD's Discriminatory Effects Standard, FR-6251-F-02

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