NOW & NEXT

Affordable Housing Alert

MARCH 29, 2023

HUD reinstates 2013 Disparate Impact Rule: Everything old is new again

By Harry J. Kelly

The reinstatement did not address limits on disparate impact claims imposed by the U.S. Supreme Court, leaving unclear whether housing providers' tenant selection and property management policies are permissible or expose them to potential liability.

What's the Impact?

- The "new" disparate impact rule doesn't provide clarity to housing providers about key components of disparate impact liability.
- We anticipate that litigation will arise in an attempt to clarify how the Inclusive Communities standards and the 2023 Rule align.

After months of waiting—and to the surprise of almost no one—HUD announced earlier this month that it is reinstating the regulation defining disparate impact liability under the Fair Housing Act (FHAct) that it originally released in 2013. This may mark—at least for now—the end of ten years of regulatory ping-pong over disparate impact liability. What it is unlikely to do is to provide housing providers, lawyers, and judges with clear guidance on how that "new" rule

comports with the U.S. Supreme Court's decision in *Tex. Dept. of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 573 U.S. 576 (2015), which affirmed the existence of disparate impact liability under the FHAct but imposed a variety of restrictions on it. Unfortunately, in reinstating the 2013 Rule, HUD didn't provide much more guidance, leaving housing providers uncertain about whether key policies they adopt to select tenants and manage their properties are in fact permissible or may create liability.

What is disparate impact?

Before getting into the recent reinstatement announcement, a little background. "Disparate impact" refers to a theory that holds that liability under the FHAct exists, not only in cases of intentional discrimination, but also where it is shown that a "neutral" policy or practice has a harsher (or "disparate") impact on a protected class under the FHAct. It's important because many policies or practices adopted without any discriminatory intent and for good reason by a housing provider may, in practice, have a disparate impact on a protected class—for example, a two-person per bedroom occupancy policy may have a harsher impact on families with minor children if it leads to eviction of a couple in a one-bedroom apartment who has a baby in the course of the lease term.

HUD's regulatory seesaw

For years after the FHAct was adopted, most lower courts had applied some version of disparate impact liability. In 2013, HUD released a regulation attempting to define and formalize disparate impact liability. Two years later, the *Inclusive Communities* decision confirmed that disparate impact liability exists under the FHAct but, to prevent "abusive" applications of that liability, imposed a series of "safeguards," such as limiting disparate impact to cases involving "artificial, arbitrary and unnecessary barriers" to housing (e.g., exclusionary zoning rules) and requiring plaintiffs to show a "robust causality" between the challenged practice and the resulting disparate impact.

What that decision ***didn't*** do is to explain how to incorporate those "safeguards" into the framework of HUD's 2013 disparate impact rule. In 2020, HUD replaced the 2013 rule with a new disparate impact regulation that expressly addressed the safeguards identified in *Inclusive Communities*. In doing so, it raised the pleading requirements for plaintiffs so high that, in the view of many, it made proving a disparate impact violation almost impossible. The 2020 rule was stayed almost immediately by a federal court and never really took effect.

In June 2021, HUD announced it intended to repeal the 2020 rule and reinstate the original 2013 rule. Given its quick start, it's surprising that it's taken almost two years to produce a final rule. That delay led some to speculate that perhaps changes to the 2013 rule were being made after all. So much for speculation: In its announcement earlier this month, HUD essentially reinstated the original 2013 rule with very minor additions, and with no attempt to expressly incorporate any of the "safeguards" discussed in the *Inclusive Communities* decision.

Why no changes?

HUD claims that by referring to the 2013 rule several times, the *Inclusive Communities* decision implicitly endorsed the 2013 rule, and that if the Supreme Court intended to "overhaul disparate impact jurisprudence, the Court would have done so expressly." It also claims that many of the "safeguards" are already incorporated in the 2013 rule. Maybe, maybe not. Certainly, the Supreme Court was not helpful by identifying multiple "safeguards" but failing to explain how to incorporate them into the so-called "burden-shifting" analysis used by the 2013 rule. Say what you may about the 2020 rule, at least it took those safeguards seriously and attempted, perhaps clumsily, to incorporate them into the liability formula established in the 2013 rule.

The bottom line

Whatever else it does, the "new" disparate impact rule doesn't provide clarity to housing providers about key components of disparate impact liability as explained by the Supreme Court. It looks like the rulemaking is done, but more litigation may be in the offing.

So what is old is new again. After 10 years of rulemaking and litigation, we are back where we started. Now courts and litigants will have to figure out how to fit the square peg of the *Inclusive Communities* safeguards into the round hole of the "new" 2023 disparate impact rule.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Harry J. Kelly
202.585.8712
hkelly@nixonpeabody.com

Richard Michael Price
202.585.8716
rprice@nixonpeabody.com

Deborah VanAmerongen
212.940.3054
dvanamerongen@nixonpeabody.com