

HUD's Revised Rule Makes Disparate Impact Claims Under the Fair Housing Act More Difficult

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Late last week, the U.S. Department of Housing and Urban Development issued its final order relating to claims of "disparate impact" under the Fair Housing Act. Under the theory of disparate impact, the Fair Housing Act can be violated even if there was no discriminatory intent. Meaning, a housing provider or lending institute could be liable for discrimination even if they were not meaning to discriminate against minorities or other protected classes.

In 2013, HUD issued a rule for determining whether a practice or policy had an unlawful disparate impact, which set forth three criteria that had to be satisfied to succeed on a claim for a violation of the Fair Housing Act. In 2015, the Supreme Court ruled that the Fair Housing Act could be violated based upon a practice's disparate impact on protected classes. The Supreme Court, however, interpreted the three criteria previously adopted by HUD to be more restrictive than lower courts had previously found.

Supposedly to reflect the 2015 Supreme Court ruling, HUD revised its rule relating to

disparate impact. This new rule places more onerous pleading requirements on the person claiming that they were disparately impacted by a practice or procedure. It also sets forth certain "legitimate" objectives that outweigh any alleged disparate impact upon minorities. These objectives include practical business, profit, and policy considerations.

Basically now monetary reasons may defeat a claim that a practice or policy has a disparate impact on a protected class. While the new rule is more challenging for a party to bring a disparate impact claim, it actually lessens the requirements of the defending party. Defending parties no longer have to demonstrate that the challenged practice or procedure is necessary, only that it is valid.

This new 2020 rule imposes what can be considered almost insurmountable barriers to being able to claim that the Fair Housing Act was violated based upon the theory of disparate impact.