

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.

Forty-seven years have passed since President Johnson signed the Fair Housing Act into law, putting a symbolic end to systematic and intentional housing discrimination. Since that time, instances of overt, intentional discrimination are far less common and more likely to be identified and remedied, thanks in part to continued federal support, education and outreach.

However, on Feb. 8, 2013, the U.S. Department of Housing and Urban Development (HUD) issued a final rule that marked a significant expansion of the Fair Housing Act. The rule affirmed the agency's position on disparate impact liability and established uniform standards for determining when a real estate practice or policy violates the act.

Liability under this theory can arise when a business practice or policy can be shown to disproportionately impact a protected class. Violations can be alleged through the use of statistics or other available data, regardless of whether the discrimination was intentional. HUD's rule establishes a three part burden-shifting test to determine liability for discrimination.

The charging party has the burden of proving a challenged practice caused or predictably will cause a discriminatory effect. The respondent then has the burden of proving that the challenged practice can be supported by a legally sufficient justification. The burden shifts back to the plaintiff to prove there are other practices that can be employed that have a less discriminatory effect.

At issue for apartment owners and managers is that, under the 2013 rule, seemingly neutral and common business policies regarding the use of criminal background screening and Section 8 vouchers, among others, could trigger discrimination claims despite no intention of singling out a particular group for adverse treatment.

Litigation challenging the HUD disparate impact liability under the Fair Housing Act is currently before the U.S. Supreme Court. Oral arguments were heard in January of 2015 and a decision is expected in June.

Disparate impact liability is a judge-made rule not supported by the text of the Fair Housing Act.