



New Look At Fair Housing Linchpin

It was considered the key tool to help enforce the Obama administration's new interpretation of Fair Housing Act enforcement powers, but HUD is now calling the theory of "disparate impact" into question despite the U.S. Supreme Court's 2015 blessing of the concept.

HUD Secretary Ben Carson says the department will reconsider the application of the 2013 HUD rule, which is a legal tool to challenge actions involving housing decisions considered to have a discriminatory effect even if overt bias isn't apparent.

Under the rule, HUD can hold lenders, landlords, and other housing providers liable for discrimination against protected classes even if there was no intent to discriminate.

Like Carson's moves to neutralize the Obama administration's initiative to expand the Section 8 housing voucher program by giving poor families more money to live in wealthy neighborhoods under the Small Area Fair Market Rent rule (a move overturned in federal court late last year), coupled with Carson's effort to stall the Affirmatively Furthering Fair Housing enforcement tool, Carson decided to test whether its 2013 Disparate Impact regulation is consistent with the 2015 high court ruling clarifying liability as it pertains to disparate impact claims.

Carson's move generated immediate howls from civil rights groups intent on protecting the Obama administration's efforts to enhance enforcement of the 1964 Civil Rights Act and the 1968 Fair Housing Act.

Immediately after taking office in 2009, then HUD Secretary Shaun Donovan triggered use of the 1863 False Claims Act, a.k.a. the Lincoln law, to corral violators of the Fair Housing Act by proving local governments lied about their use of Community Development Block Grant funding to avoid building, low-cost housing for poor families.

The FCA became HUD's first building block toward stepped up fair housing violation enforcement as part of the Obama administration's decision to transform HUD's operations and close all loopholes in Fair Housing Act enforcement. It became a key part of the agency's strategy to desegregate largely white suburban single-family home neighborhoods by altering local zoning laws to accommodate clustered high-rise apartment building to house poor families.

In tandem with adding new classes of protected minorities to FHA enforcement, disparate impact

emerged as the primary element to refute all challenges against HUD enforcement efforts.

HUD issued its regulatory disparate impact proposal on Nov. 16, 2011, and made the rule final on Feb. 3, 2013. That drew an immediate challenge from the Texas Department of Housing & Community Affairs in its legal complaint against the Inclusive Communities Project.

Two other lingering challenges against disparate impact -- *Magner v. Gallagher* and *Township of Mount Holly v. Mount Holly Gardens Citizens* -- were sidetracked when then Justice Department Civil Rights Division Chief Thomas Perez (subsequently Labor Secretary and head of the Democratic National Committee) surreptitiously persuaded St. Paul, MN and Mount Holly, NJ officials to settle their complaints and allow the Texas lawsuit to proceed. HUD considered the Texas complaint the most favorable to its cause among the three.

HUD had placed all other fair housing changes on hold to await the Supreme Court decision on disparate impact, which the department considered the single, most important element of its rewrite of the Fair Housing Act regulations.

That assumption proved correct by a slim margin. The high court on June 25, 2015 ruled 5-4 that “Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justifications are at the heartland of disparate-impact liability.” In the ruling, the court said, “Recognition of disparate impact liability under the FHA plays an important role in uncovering discriminatory intent.”

Within 15 days of the court’s decision, HUD Secretary Julian Castro posted the AFFH rule, opening several new avenues of FHA enforcement and imposing zoning restrictions and withdrawal of federal subsidies from any of the initial 1,200 communities targeted that refused to comply.

Carson now seeks public comment on what to do with disparate impact, which remains intact for the time being. While the 2015 ruling mentions the Texas Inclusive Communities Project complaint, it did not directly rule on it.

Info: See the HUD statement at <https://tinyurl.com/yagy6rbs>

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