HUD Restores 2013 Discriminatory Effects Rule

April 20, 2023

On March 17, 2023, in honor of Fair Housing Month, the U.S. Department of Housing and Urban Development (HUD) announced it would reinstate the 2013 discriminatory effects rule (the 2013 Rule) (*see* 24 C.F.R. § 100.500 (2014)) under the Fair Housing Act. In doing so, HUD will also officially rescind its 2020 rule governing Fair Housing Act disparate impact claims (the 2020 Rule) (*see* 24 C.F.R. § 100.500 (2020)). While HUD believes the 2013 Rule is more consistent with how the Fair Housing Act has been applied in the courts, in its announcement, HUD failed to reference the U.S. Supreme Court's 2015 ruling in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), which was one of the primary motivators behind the 2020 Rule.

The final rule re-adopting the 2013 Rule was published March 31, 2023, in the Federal Register. The effective date is May 1, 2023.

The Fair Housing Act (42 U.S.C. § 3601 *et seq*.) prohibits discrimination in housing and housing-related services because of race, color, religion, national origin, sex (including sexual orientation and gender identity), familial status, and disability. This includes a general prohibition against discrimination in the sale or rental of housing, in "residential real estate-related transactions," and the provision of brokerage services. Further, the discriminatory effects doctrine, which includes disparate impact, can extend Fair Housing Act protections to policies that result in discrimination—even if such policies were not adopted with discriminatory intent. For example, 42 U.S.C. § 3605(a) provides: "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, **because of** race, color, religion, sex, handicap, familial status, or national origin" (emphasis added).

As background, the 2013 Rule was an attempt to, at that time, codify then-relevant case law under the Fair Housing Act's discriminatory effects test. Under the 2013 Rule, the discriminatory effects framework focused on whether a policy had a discriminatory effect on a protected class, and if so, assessed whether such a policy was necessary to achieve a substantial, legitimate, non-discriminatory interest, or if a less discriminatory alternative could serve that same interest. For the Rule 2013 analysis, a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin. 24 C.F.R. § 100.500(a) (2014). Naturally, if a less-intrusive option is available, such an option would prevail over a more intrusive one.

The 2020 Rule changed this analysis by adding new pleading and proof requirements, as well as new defenses, all fashioned upon the U.S. Supreme Court's ruling in *Inclusive Communities*. However, in *Mass. Fair Housing Ctr.*

v. HUD, 496 F. Supp. 3d 600 (D. Mass. 2020), the court stayed the 2020 Rule prior to implementation on the basis that development of the rule did not meet the requirements of the Administrative Procedure Act. As such, the 2013 Rule remained in effect, and following the 2020 election (which ushered in a new presidential administration), the 2020 Rule was never implemented.

Regarding the discriminatory effects doctrine and disparate impact, under the 2013 Rule, a legally sufficient justification:

> *[E]xists where the challenged practice: (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. § 3612, or defendant, with respect to claims brought under 42 U.S.C. §§ 3613 or 3614; and (ii) Those interests could not be served by another practice that has a less discriminatory effect.*
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> *(24 C.F.R. § 100.500(b)(1) (2014))*

Moreover,

> *[a] legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.*
>
> *(24 C.F.R. § 100.500(b)(2) (2014))*

As for which party shoulders the burden of proof in discriminatory effects cases, the 2013 Rule provides:

> *(1) The charging party, with respect to a claim brought under 42 U.S.C. § 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. §§ 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.*
>
> *(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.*
>
> *(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.*
>
> *(24 C.F.R. § 100.500(c) (2014))*

However, the 2013 Rule does not clearly address several important concepts, such as causation and proximate cause. It also does not fully articulate limitations on disparate impact claims. Consequently, the U.S. Supreme Court would ultimately weigh in.

In *Inclusive Communities*, the Court outlined that, while disparate impact applies under the Fair Housing Act, certain conditions first must be met before it applies. First, plaintiffs must demonstrate a "robust causality" and "direct" proximate cause, as opposed to merely showing a discriminatory effect exists where it actually or

predictably results in a disparate impact. *See Inclusive Communities*, at 542, and *Bank of America Corp. v. City of Miami, Fla.*, 581 U.S. 189, at 202–203 (2017). In *Inclusive Communities*, the Court stated that a "disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Inclusive Communities*, at 542. A robust causality requirement "protects defendants from being held liable for racial disparities they did not create." *Id*. Two years later, the Court addressed causation in the context of the Fair Housing Act and ruled that all claims require "direct" proximate cause between the defendant's challenged conduct and the plaintiff's asserted injury. *City of Miami, Fla.*, 581 U.S. 189, at 202–203.

The Court also stated that if a plaintiff "cannot show a causal connection between the [defendant's] policy and a disparate impact—for instance, because federal law substantially limits the [defendant's] discretion—that should result in dismissal." *Inclusive Communities*, at 543. The Court continued: "Governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'" *Id*. It also said, "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers'" to "avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity." *Id*. at 540. The 2013 Rule is silent about the artificial, arbitrary, and unnecessary limitation on disparate-impact claims.

In contrast, the Court clarified that a "plaintiff who fails to allege facts at the pleading stage … cannot make out a prima facie case of disparate impact" and directed lower courts to "examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important." *Id.* at 543. It also reiterated that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system" and "[e]ntrepreneurs must be given latitude to consider market factors." *Id.* at 533, 541, 542.

Ultimately, reinstatement of the 2013 Rule in a post-*Inclusive Communities* environment will likely raise more questions than it answers.

The practical effect of HUD reinstating the 2013 Rule after *Inclusive Communities* might be that courts will not give the same deference to HUD's 2013 Rule as reinstated ten years later. Unfortunately, to arrive at such verdicts, companies may get caught in additional rounds of protracted, costly—and, in some cases, unnecessary—litigation. Such litigation will undoubtedly include administrative action brought by HUD in coordination with the U.S. Department of Justice. It seems inevitable that the "re-litigation of dead issues" will occupy administrative and judicial resources, which arguably should not occur given that the Supreme Court has already spoken in *Inclusive Communities.*

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