# Years Later, D.C. District Court Reverses Course: HUD Rule Doesn't Conflict with Fair Housing Act

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This past March, the U.S. Department of Housing and Urban Development (HUD) announced it was simultaneously rescinding its 2020 discriminatory effects rule (the 2020 Rule) and reinstating its 2013 rule (the 2013 Rule) under the Fair Housing Act. Curiously, in reinstating the 2013 Rule and rescinding the 2020 Rule, HUD reinstated the old rule almost verbatim—failing to adequately consider the U.S. Supreme Court's ruling in *Tex. Dep't of Hous. & Cmty. Affairs et al. v. Inclusive Communities Project, Inc., et al.*, which was instrumental in HUD's development of the 2020 Rule. (*See* "HUD Restores 2013 Discriminatory Effects Rule" for additional background information.) This merry-go-round of events has left several industries in a lurch, with the homeowner's insurance industry the latest victim.

As background, a decade ago, concurrent with the above timeline, two industry trade associations that primarily represent the interests of members that sell homeowner's insurance challenged the 2013 Rule before the U.S. District Court for the District of Columbia (the D.C. Court) as exceeding HUD's authority. In 2014, the D.C. Court held that disparate impact claims are impermissible under the Fair Housing Act and vacated HUD's 2013 Rule. *See American Insurance Assn. v. HUD*, 74 F.Supp.3d 30, 46-47 (D.D.C. 2014). However, the D.C. Court also noted that, at least with regards to disparate impact claims, it anticipated that the Supreme Court would further clarify the matter in *Inclusive Communities* (which, at the time, was pending). *Id*. at 47.

Sure enough, just months later, in *Inclusive Communities*, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act. 576 U.S. 519, 545–546. Subsequently, the D.C. Circuit Court vacated the D.C. Court ruling and remanded the case for consideration in light of *Inclusive Communities*. In response to the Supreme Court's ruling, the insurance industry changed tack in its amended complaint—arguing that, while disparate impact claims may be cognizable under the Fair Housing Act, the 2013 Rule still exceeds the parameters the Supreme Court laid out in *Inclusive Communities*.

Fast forward to today. Nearly a decade later, in *Nat'l Assn. of Mutual Insurance Companies v. HUD, et al.*, the D.C. Court has ultimately determined that, post-*Inclusive Communities*, the reinstated 2013 Rule does not conflict with the Fair Housing Act as applied to insurers' underwriting and rating practices. 2023 WL 6142257, *1 (D.D.C. 2023).

In summarizing the meandering course of events over the previous decade, the D.C. Court said:

> *[In] a period covering three Presidential administrations—the Disparate-Impact Rule [i.e., the 2013 Rule] was substantially overhauled, then stayed, then revived to its original form. Along the way, one of the two associations dropped out of the action, leaving the National Association of Mutual Insurance Companies ("NAMIC") as the only plaintiff. The good news for NAMIC is that its challenge is, at long last, ripe for decision. The bad news for NAMIC is that its post–Inclusive Communities arguments for invalidating the . . . Rule, creative as they might be, are unconvincing. Indeed, because I have concluded that the Rule does not conflict with the Fair Housing Act as applied to insurers' underwriting and rating practices, I must DENY NAMIC's motion for summary judgment and GRANT HUD's cross-motion for summary judgment.*

*Id*.

First, the D.C. Court reiterated that the 2013 Rule still expressly applied to providers of homeowner's insurance, which is why the trade associations initially brought action against HUD, arguing that the Fair Housing Act only prohibited intentional discrimination—thus, HUD's "[2013] Rule recognizing disparate-impact liability exceeded [HUD's] statutory jurisdiction, authority, and limitations. *Id*. at *2. The D.C. Court also said that, while it originally agreed with the trade associations, the Supreme Court ultimately held that disparate impact claims are cognizable under the Fair Housing Act, but with the caveat that disparate impact liability should not "displace valid governmental and private priorities." *Id*. at 3.

In quoting key parts of *Inclusive Communities*, the D.C. Court said:

> *For one, at the prima facie stage of the analysis, "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." Id. at 542 (emphasis added). This "causality requirement" is "robust": a mere statistical correlation is insufficient, and external factors that might limit a defendant's discretion can sever the causal connection between a housing practice and any disparate impact. Id. at 542–43. If a prima facie case is met, it is a defense to a disparate-impact claim if a housing practice or policy is proven to be "necessary to achieve a valid interest." Id. at 541. In the final calculus, housing practices or policies "are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'" Id. at 543 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).*

*Id*. at *3 [emphasis in original].

Second, in summarizing the short-lived 2020 Rule, the D.C. Court recognized that it made things more difficult "for plaintiffs to advance disparate-impact claims and easier for defendants to justify housing practices and policies so as to avoid liability." *Id*. Naturally, this upset fair housing groups, which challenged the 2020 Rule and obtained a preliminary injunction postponing its effective date. *Id*. In the interim, the new Presidential administration (i.e., the Biden administration), announced its opposition to the 2020 Rule (which was promulgated under the Trump administration), and "by June 2021, HUD issued a Notice of Proposed Rulemaking with plans 'to recodify its previously promulgated rule.'" *Id*. at *4. The D.C. Court also noted that, "[a]ccording to HUD, the 2013 Rule 'better states Fair Housing Act jurisprudence and is more consistent with the Fair Housing Act's remedial purposes.'" *Id*.

Finally, in analyzing HUD's reinstated 2013 Rule—but through the lens of *Inclusive Communities*—the D.C. Court reiterated that the disparate impact standard has been restated verbatim. *Id*. Consequently, NAMIC has been forced to change its strategy, arguing in its amended complaint that the 2013 Rule still conflicts with the Fair Housing Act, but in more nuanced ways. *Id*. at *8. In reviewing each of NAMIC's more nuanced arguments, the D.C. Court noted that, while they likely would have been convincing before *Inclusive Communities,* it must ultimately reject all of them. *Id*. at *9–12.

However, the D.C. Court appears to suggest in its analysis that the 2013 Rule—which was reinstated verbatim without considering *Inclusive Communities*—may still provide plaintiffs with too much leeway to second-guess a defendant's legitimate business decisions, and this would likely conflict with the parameters laid out by the Supreme Court. Consequently, while it is uncertain NAMIC will appeal, this case (or one like it) may ultimately end up at the Supreme Court.

Given that HUD reinstated its 2013 Rule with barely a consideration for *Inclusive Communities*, it should come as no surprise that the "re-litigation of dead issues" is causing headaches for the insurance industry. Other industries should anticipate the same, as more courts and regulatory agencies reexamine HUD's 2013 Rule to determine how it fits within the *Inclusive Communities* framework.

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