NAR Issue Summaries

Fair Housing / Disparate Impact

NAR Committee:

Fair Housing Policy Committee

What is the fundamental issue?

Under the Fair Housing Act, it is illegal to discriminate against a person involved in a real estate transaction on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, and familial status (presence of children in the family). Some state and local laws include additional protected categories. Disparate impact refers to a policy or practice which is neutral on its face, but which disproportionately affects a group of people defined by one of the fair housing laws' protected characteristics, without a legitimate business necessity for the practice, or where there is a less-discriminatory alternative.

I am a real estate professional. What does this mean for my business?

Many disparate impact claims are filed against local government policies that limit private property rights, block property development, and exclude populations based on race. Few disparate impact claims are filed against housing providers. To protect against liability, housing providers should ensure that there is a legitimate business necessity for any policy or practice that has a disparate impact on a protected class, and that such business necessity cannot be accomplished by an alternative policy with a less-discriminatory effect.

NAR Policy:

NAR supports a housing market free from discrimination, including illegal disparate-impact discrimination, in order to achieve more fair, open, and diverse housing markets and communities. NAR opposes policies and practices that have a disproportionately adverse effect on a demographic group defined by race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity, unless such policies are justified by a legitimate business necessity and there is no less-discriminatory alternative. NAR believes that eliminating disparate-impact discrimination, as defined by the Supreme Court in its 2015 *Inclusive Communities* decision, helps protect both the fair housing rights of consumers and legitimate business interests of real estate professionals.

Opposition Arguments:

Some argue that disparate impact liability goes beyond the mandate of the Fair Housing Act. Federal courts since the 1970s, however, and the U.S. Supreme Court in 2015, have affirmed that disparate impact discrimination is cognizable under the Fair Housing Act.

Legislative/Regulatory Status/Outlook

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The Supreme Court's 2015 decision in *Texas Dept. of Housing & Community Affairs. v. Inclusive Communities Project, Inc.* affirmed four decades of jurisprudence recognizing the role of disparate-impact doctrine in achieving the goals of the Fair Housing Act.

In April 2025, President Trump signed an executive order (EO) declaring that "it is the policy of the United States "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." The EO ordered federal agencies to "deprioritize" cases utilizing the disparate impact theory of liability under the Fair Housing Act and other civil rights laws.

Despite the EO, disparate impact remains a viable theory of liability under the Fair Housing Act in state and federal courts. State attorneys general, other regulators, and private litigants may continue to employ the disparate impact theory against facially neutral practices that have a discriminatory effect where such practices have no legitimate business necessity and where a less-discriminatory alternative is available.

Current Legislation/Regulation (bill number or regulation)

Reinstatement of HUD's Discriminatory Effects Standard, FR-6251-F-02

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