

## 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.***

Disparate impact liability occurs when a business practice or policy has a disproportionately adverse effect on a protected class, regardless of whether the discrimination was intentional. At issue for apartment owners and managers is that seemingly neutral and common business policies, such as occupancy limitations, criminal background screening and Section 8 voucher policies, among others, could trigger discrimination claims despite no intention of singling out a particular group for adverse treatment.

The Fair Housing Act served an important role in ending systematic and intentional discrimination in housing. Since enactment, instances of overt, intentional discrimination are much diminished and more likely to be identified and remedied, thanks in part to continued federal support, education and outreach. As a result, today, federal action is being directed towards this much more nuanced area of law that focuses on disparate impact liability.

Last year, the U.S. Supreme Court issued a long-awaited decision on disparate impact theory that could have far-reaching impacts for the housing sector in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*. The housing industry weighed-in on the issue by jointly submitting an amicus brief to the Court, arguing that disparate impact liability could trigger discrimination claims for conducting resident criminal history and credit screenings, among other business practices. While the opinion upheld the use of disparate impact liability under the Fair Housing Act, the Court ruling offered new analysis and limitations on the use of the theory.

HUD has also issued a final rule affirming the agency's position on disparate impact liability and establishing uniform standards for determining when a real estate practice or policy violates the Fair Housing Act.

NMHC/NAA continue to seek clarification about the reach of disparate impact liability and HUD's education and enforcement efforts in light of the Supreme Court's ruling.

***Courts have used disparate impact theory in discrimination cases for over 40 years.***