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HUD Proposal Would Make it Harder to Bring Fair Housing Claims (1)

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- A HUD proposal would increase the proof plaintiffs would need to bring a Fair Housing Act case based on disparate impact
- The proposal would also increase protections for insurance companies from disparate impact claims

The Department of Housing and Urban Development is set to propose a rule that would make it harder to bring discrimination claims against lenders, developers, municipalities and others under the Fair Housing Act.

The rule would set a five-step test for plaintiffs to prove unintentional discrimination based on race, color, religion, sex, national origin, disability or familial status. Defendants would only have the burden of proving that their programs are not discriminatory if plaintiffs could meet that five-part test, according to the proposal that HUD sent to Congress July 29 and was obtained by Bloomberg Law.

The HUD proposal would update a 2013 rule stating how the agency would use disparate impact—the use of statistics to identify unintentional discrimination—to enforce the Fair Housing Act. The existing standard only has a three-step process for determining if disparate impact claims can proceed.

"They're trying to make the hurdle higher. I think that's clearly what they're trying to do," said Richard Andreano, the co-leader of Ballard Spahr LLP's mortgage banking group.

Protecting Insurers

HUD's proposal also would make a change to the way that insurers are treated under the disparate impact standard. Insurers have long argued that state insurance laws should preempt the Fair Housing Act, the landmark 1968 law banning discrimination against aplicants renting or buying a home, getting a mortgage, or seeking housing assistance.

In 2016, HUD declined to provide a safe harbor for all insurers, instead stating that disparate impact claims must be governed on a case-by-case basis because of the differences among insurance laws in the 50 states.

HUD's proposal would not give the insurance industry the blanket safe harbor it is seeking. But it does make it easier for insurers to argue that their procedures and practices are allowed under state law in fending off a Fair Housing Act claim based on the disparate impact theory.

The proposal ensures that ensuring that "parties are never placed in a 'double bind of liability' where they could be subject to suit under disparate impact for actions required for good faith compliance with another law."

Raphael Williams, a HUD spokesman, confirmed that the agency had sent the proposal to HUD and that it would be published in the Federal Register after a 15-day review period.

Supreme Court Alignment

HUD said in its proposal that it intends to bring its interpretation of the disparate impact standard in line with the 2015 U.S. Supreme Court decision in *Texas Department of Housing and Community Affairs v. the Inclusive Communities Project Inc.*

That decision, authored by then-Justice Anthony Kennedy, preserved the use of disparate impact, but applied some limitations.

Plaintiffs would have to argue that a lending or other practice directly led to discriminatory outcomes.

The Obama-era HUD elected not to update its disparate impact rule.

A 2017 Treasury Department report ordered by President Donald Trump called for changes to the interpretation, and HUD Secretary Ben Carson complied.

Housing advocates have feared that HUD's disparate impact rewrite would make it harder to bring discrimination claims.

While HUD said in the proposal that it was merely trying to bring its disparate impact interpretation into alignment with the 2015 ruling, the five-part burden shifting test may have the effect that consumer advocates fear if finalized.

"This is unnecessarily introducing pieces that courts already use" in evaluating disparate impact cases, said Nikitra Bailey, executive vice president and mortgage expert at the Center For Responsible Lending.

Five-Step Test

Under the proposal, plaintiffs would have to prove that a lender, developer, municipality or other defendant put in place a policy that is "arbitrary, artificial and unnecessary."

They would then have to allege a "robust causal link" between the conduct and the alleged discrimination and that the alleged conduct had an effect on a group of people in a protected class and not just an individual.

Under the fourth element, plaintiffs would have to allege that the effect was "significant," while the fifth element would require them to successfully allege that the conduct was directly responsible for the discriminatory effect.

All of that would be necessary at the motion to dismiss phase of any case, which comes early in litigation. HUD said that all five elements would have to be satisfied for a case to move forward.

Plaintiffs would have difficulty rounding up the information necessary to survive a motion to dismiss without getting information from defendants in discrimination cases through discovery, Bailey said.

Under the proposed standard, plaintiffs' cases would unlikely to get that far, she added.

The proposal would impact not just federal authorities bringing a fair housing case, including HUD and the Justice Department. Courts could use the burden-shifting test to private plaintiffs seeking to bring a case.

(Updates with comments from industry and consumer advocates throughout.)

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