US Supreme Court Rules on Disparate Action

Many of you have been waiting on pins and needles on the ruling from the United States Supreme Court regarding the amicus brief NARPM participated in. As expected, in late June, almost the last day of the Court’s Session, the Supreme Court ruled. Unfortunately they ruled in favor of the plaintiff, Inclusive Communities Project, Inc.  The fact that they waited until nearly the last day of their session says they too were trying to come to grips with this decision. Let me give a little background and then I’ll explain how it may affect us as property managers.

Disparate Impact is a theory developed by the Department of Housing and Urban Development (HUD) that states a housing provider or lender can inadvertently discriminate against a protected class, and not even be aware of it, through their normal business practices and be held liable for it. For example, if you choose to only rent to people with an education of a graduate degree or better, and statistically those people were all of one protected class or left out another protected class, you could be guilty of discrimination.

There have been a few cases of disparate impact go through the court system, most of which have been settled out of court. So far only one has made all the way to the US Supreme Court. That was Texas Department of Housing and Community Affairs (Texas) vs. Inclusive Communities Project, Inc. (ICP). In this case, Texas offered low-income tax credits to home purchasers. ICP noted that a disproportionate number of the tax credit users were black and that most of the homes purchased were in inner city black areas, rather than predominantly white suburban neighborhoods. ICP argued that this was steering low-income black people in specific areas.  ICP won in the lower courts who cited “segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods.”

After many appeals the US Supreme court agreed to hear the case. After much debate and a 5-4 vote, they found for ICP stating “antidiscrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just to the mindset of actors and where that interpretation is consistent with statutory purpose”. In other words, even if you did not mean to, or do not even know it, you can discriminate against a protected class.

But, equally important (and confusing) the court went on to recognize the enormous liability on businesses surrounding disparate impact, limiting the scope of the discrimination to beyond legitimate business practices. What does this mean? The only thing we know for sure is that this debate is not over. It will all depend on what a judge determines to be a legitimate business practice. For property managers I can see some of our day to day activities being called into question such as criminal background checks on new applicants, minimum credit scores for tenants or even breeds of dogs you may or may not accept in your properties.

As you can see, this ruling is not exactly clear. There will be lawyers and judges across the country trying to make heads or tails of this. Your Government Affairs Committee has attempted to digest the Supreme Court Ruling as much as we can and are still trying to sort it out. We highly recommend you seek legal advice if you are concerned about your company's policies and procedures.

What do we as property managers do for now? Immediately, for the most part, the entities affected by this Supreme Court Decision will be government agencies, real estate developers, apartment complexes and lenders. There will undoubtedly be more lawsuits to help define disparate impact even further. Until then, keep good records of all of your business activities, watching for statistics that may show the potential for discrimination. For example, if your company does not allow three legged dogs and you notice that most people with three legged dogs are from Mars (assuming Intersolar Aliens were a protected class), then you may want to rethink that policy.

In the meantime, keep your ear to the ground. Disparate impact discrimination most likely will be tested in all 50 states at some point. If you hear of another lawsuit filed or law proposed regarding disparate impact, let your government affairs committee know so we can keep an eye on it as well. Better yet, join us, get involved and fight alongside us for our business.

Respectfully Submitted for the Residential Recourse Legislative Scoop Column by:

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