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# Community Association Liability Neighbor-to-Neighbor Discrimination

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There is a dangerous trend being established by the U.S. Department of Housing and Urban Development (HUD) under the Federal Fair Housing Act (the Act) and the enforcement of the Act of which community associations must be aware. On April 4, 2016, HUD's General Counsel issued guid-

ance regarding the application of the Act on the use of criminal arrests and convictions by community associations to screen potential purchasers and renters. Pursuant to this guidance, HUD provides a three-element standard by which criminal history-based screening provisions are evaluated: (1) whether the criminal history policy or practice has a discriminatory effect; (2) whether the criminal history policy or practice is necessary to achieve a substantial, legitimate, non-discriminatory interest; and (3) whether there is a less discriminatory alternative.

This HUD guidance comes less than a year after a June 25, 2015, decision of the Supreme Court of the United States in which it held that claims of racial discrimination under the Act may be based upon disparate impact, the case having been based upon the discriminatory effects of the allocation of housing tax credits. Thus, it is possible that a discrimination claim based on the theory of disparate impact may be brought under the Act due to credit score requirements where the application of the requirement causes a disproportionate effect on individuals of a protected class.

Now, community associations have another concern. On September 13, 2016, HUD released final regulations regarding the Act, which became effective on October 14, 2016. Under this new regulation, community associations may be liable under the Act for the discriminatory actions of residents who harass or create a hostile environment for other residents.

In its Rules and Regulations set out in Chapter 24, Part 100 of the Code of Federal Regulations, which further interprets the Act, HUD stated that it believes that "we are long past the time when racial harassment is a tolerable price for integrated housing; a housing provider is responsible for maintaining its properties free from all discrimination prohibited by the Act."


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Attorney Jeffrey Rembaum has considerable experience representing countless community associations that include condominium, homeowner, commercial, cooperative, and developer-controlled associations throughout Florida. In 2012, 2013, and 2014, Rembaum was named to the Florida Super Lawyers list. Together with his partners, attorneys Robert Kaye and Michael Bender, their law firm, Kaye Bender Rembaum PLLC, is devoted to the representation of community and commercial associations throughout Florida. Kaye Bender Rembaum PLLC, with its 14 lawyers and offices in Palm Beach and Broward Counties, strives to provide their clients with an unparalleled level of personalized and professional service.


## UNDER THIS NEW REGULATION, COMMUNITY ASSOCIATIONS MAY BE LIABLE UNDER THE ACT FOR THE DISCRIMINATORY ACTIONS OF RESIDENTS WHO HARASS OR CREATE A HOSTILE ENVIRONMENT FOR OTHER RESIDENTS.

As everyone should already be familiar, the Act provides, in relevant part, that it is unlawful "to interfere with persons in their enjoyment of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of such persons or of visitors or associates of such persons." With that in mind, HUD believes that there has been significant misunderstanding among the public and private housing providers (such as community associations) as to the circumstances under which they will be subject to liability under the Act for discriminatory housing practices undertaken by others. (In other words, is a community association liable for third-party behavior that is not the board's business to begin with? According to HUD, you bet.) To answer this question, HUD amended its Rules and Regulations. HUD maintains that these amendments only clarify existing law. But, in fact, HUD has created unnecessary and unwarranted liability for community associations, their boards of directors, and quite possibly their managers and management companies, too.

Until now, neighbor-to-neighbor disputes have largely been a private matter. Ending this notion, HUD maintains that a person is directly liable for "failing to fulfill a duty to take prompt action to correct a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium, or cooperative), or by federal, state, or local law." HUD further maintains that "the power to take prompt action to correct the discriminatory housing practice by a third–party depends upon the extent of control or other legal responsibility the person may have with respect to the conduct of such third party." HUD commented that "the duty to take prompt action to correct a discriminatory housing practice by a third party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules and a homeowners association, condominium,

or cooperative), or by federal, state, or local law." And further, HUD notes that even if the governing documents do not expressly create obligations to act, the power to act may derive from other legal responsibilities or by operation of law.

HUD believes that the community association generally has the power to respond to third-party harassment by imposing conditions authorized by the association's covenants, conditions, and restrictions or by other legal authority, and that community associations regularly require residents to comply with the covenants, conditions, and restrictions and community rules through such mechanisms as notices of violations, threat of fines, and fines. Finally, HUD maintains that "the community association is required to take whatever actions they can legally take to end the harassing conduct."

As to when the community association is on notice that it should act, HUD maintains that "a verbal or written account from an aggrieved tenant [occupant] may be enough to provide notice to a housing provider that a hostile environment may be occurring, but whether it would be sufficient to establish that the conduct is sufficiently severe or pervasive to create a hostile environment depends upon the totality of the circumstances." As to when the community association "should have known" of the harassment of one resident by another, it occurs when the "housing provider had knowledge from which a reasonable person would conclude that the harassment was occurring. Such knowledge can come from, for example, the harassed resident, another resident, or a friend of the harassed resident."

With all the above in mind, your community association should review its governing documents to determine whether the association is authorized to curtail conduct that contravenes existing law and review other types of "nuisance" provisions. No matter how innocuous such a provision might seem, the liability for the community association to act can be demonstrated from the requirements of such a provision. But remember, the power to act can also be derived from other legal responsibilities or by operation of law, too.

So, what can a community association do to protect itself from a claim of discrimination brought by a member asserting that the association knew or should have known that the resident was being discriminated against by another member and failed to take action to protect them? Minimally, the association can amend its governing documents to provide it is not responsible to police neighbor-to-neighbor conduct under any circumstances. But, nevertheless, if the association becomes aware of discriminatory conduct as caused by one neighbor to another, the association should consider taking remedial action by having its lawyer send a cease-and-desist letter to the offending owner, employing such penalties as may be permitted in the governing documents, and notifying local law enforcement of the situation. ■