PUBLICATION

SCOTUS to Review the Reach of the Fair Housing Act

July 25, 2016

On Jun 28, 2016, the Supreme Court granted Wells Fargo's petition for a writ of certiorari in *Wells Fargo & Co. and Wells Fargo Bank, N.A. v. The City of Miami* as well as Bank of America's petition for a writ of certiorari in *Bank of America Corp., et al. v. City of Miami* and consolidated the two cases. These cases have been watched closely by Baker Donelson as a final decision will most likely define the reach of the Fair Housing Act.

The City of Miami brought an action against multiple lenders claiming their practices were discriminatory and in violation of the FHA, resulting in a disproportionate and excessive number of defaults and subsequent foreclosures by minority homebuyers. This caused financial harm that included an increase in municipal costs and a decrease in tax revenue. The city of Miami sought an injunction, barring the lenders from engaging in similar conduct and punitive damages, as well as attorney's fees.

It was alleged that the banks' conduct violated the FHA in two ways. First, that they intentionally discriminated against minority borrowers and second, that their conduct had a disparate impact, resulting in an unbalanced number of foreclosures on minority-owned properties. The banks moved to dismiss, most notably stating the city lacked statutory standing to sue under the FHA as the claim fell outside the act's "zone of interest." The city failed to plead that the banks' actions were the proximate cause of the alleged damages. The motion was granted by the district court. The city then moved in the district court for reconsideration and for leave to file an amended complaint, which the district court denied. The city chose to appeal.

Upon review the appellate court held, "the City claims that the Banks' discriminatory lending practices caused minority-owned properties to fall into foreclosure…This, in turn, decreased the value of the foreclosed properties themselves and the neighboring properties, thereby depriving the City of property tax revenue, and created blight, thereby forcing the City to spend additional money on municipal services. We have little difficulty in finding…that the City has said enough to allege an injury in fact for constitutional standing purposes."

The court did not stop there, holding that, "In sum, we agree with the City that the term "aggrieved person" in the FHA sweeps as broadly as allowed under Article III; thus, to the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case." It went on to note the proximate cause argument: "While we acknowledge the real possibility of confounding variables, at this stage in the proceedings the City's alleged chain of causation is perfectly plausible…the Banks' extensive pattern of discriminatory lending led to substantially more defaults on [their] predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base."

If the 11th Circuit's opinion is upheld, there will be a very real cost associated with the resulting wider scope of the FHA. A lender would have to price in the risks associated with these third-party FHA claims, the risk that those not a party to the lending transaction can now bring a suit under the FHA. Lenders and servicers would see an uptick in inquiries from state attorney general offices and regulators, such as the Consumer Finance Protection Bureau, when community groups and municipalities complain about blight. It is easy to see what a slippery slope would be created, if the City of Miami was able to bring an FHA claim for lost wages, why not a public school district or a condo association.

Another risk is raised in Bank of America's petition where they state, "Like most U.S. cities during and after the late-2000s financial crisis, Miami experienced a drop in property-tax revenue as property values decreased with the economic disruptions. Although it is not a victim of lending discrimination, Miami wants to use the FHA to make Bank of America and other financial institutions replace that revenue. Other cities and counties are doing the same thing in other cases like this one. These suits were the brainchild not of the local governments themselves, but a group of plaintiffs' lawyers that have brought nearly-identical suits on behalf of municipalities across the country." Therefore, if these cases are successful and the decision of the 11th Circuit upheld, mortgage lenders should expect a wave of similar suits to follow.