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# Lenders Take Note: U.S. Supreme Court to Decide Scope of Right to Sue Under Federal Fair Housing Act

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The federal Fair Housing Act ("FHA") outlaws discrimination in lending based not only on race, color and national origin, but also religion, sex, disability and familial status. Across the country, courts are grappling with the scope of the right to sue under the FHA, with some permitting the cases of less obvious lending discrimination plaintiffs, like municipalities, to proceed. Lenders may soon find themselves with better protection however, as the U.S. Supreme Court has agreed to resolve the split among lower courts as to who is a proper FHA plaintiff. A Supreme Court ruling that restricts the right to sue to only those persons with interests and injuries in sync with the purposes of the FHA, for example, would reduce lender exposure by shrinking the categories of people able to bring claims for lending discrimination. Accordingly, a major shift in the lending industry's exposure to FHA lawsuits may be on the horizon.

## The Fair Housing Act

The FHA makes it unlawful for any person or entity who engages in residential real estate-related transactions to discriminate against any person in making a loan or the terms of such loan on the basis of race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3605. This prohibition includes residential mortgage lending. *Id*. Accordingly, the FHA permits persons injured by a discriminatory lending practice to sue their lender for appropriate relief. *Id*. §§ 3602(i) & 3613(a)(1)(A).

## Who Can Make A Claim Under The FHA?

On the surface, who can bring an FHA claim should be simple: Persons who claim to have been injured by a discriminatory lending practice can sue. Courts, however, have disagreed over what types of claimants and alleged injuries are proper under the FHA. More specifically, they have reached different conclusions over the extent to which the FHA allows *any* person claiming *any* injury from a discriminatory lending practice to sue, even when the discrimination is directed at an unrelated third party or where the tie between the alleged discrimination and injury is attenuated. The disagreement rests with the courts' differing interpretations of the U.S. Supreme Court's cases, which suggest two conflicting standards for a proper FHA plaintiff: the "Article III" interpretation and the "zone of interests" interpretation.

Based on Supreme Court cases from the 1970s, the Article III approach provides that standing to sue under the FHA is coextensive with Article III of the Constitution. To have Article III standing, plaintiffs (whether individuals or entities like a corporation or municipality) merely need to allege (1) that they have been injured, (2) that the defendant caused the injury, and (3) that a favorable judicial decision would likely redress the injury. This is a fairly low bar that most plaintiffs have little difficulty clearing.

The "zone of interests" interpretation of the FHA is of a more recent vintage with its origins in Supreme Court decisions from the past five years. As the name might imply, this second approach limits standing to sue under federal statutes to only those persons who Congress sought to protect by passing the law. In defining the "zone," a court must assess whether the plaintiffs' interests have a close enough relation to the purpose of the statute to permit the court to conclude that Congress intended to authorize the lawsuit. For this reason, the "zone of interests" test is more difficult to pass than its Article III counterpart. Which test controls FHA standing, therefore, has major implications for would-be FHA plaintiffs and the exposure of lenders to FHA claims.

## The Supreme Court Agrees to Decide Whether the Zone of Interests or Article III Standard

## Controls the Right to Sue Under The FHA

On June 28, 2016, the U.S. Supreme Court granted review in *Bank of America v. City of Miami* to resolve which standard controls the right to sue under the FHA and whether the City of Miami may bring FHA litigation against various lenders. In its lawsuit, the City of Miami alleged that discriminatory lending practices caused minority-owned properties to fall into foreclosure, which in turn decreased the value of the foreclosed properties and neighboring properties, thereby depriving the City of property tax revenue and creating a blight that required the City to spend additional funds on municipal services. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1272 (11th Cir. 2015). The trial court applied the zone of interests test and dismissed the City's FHA claims. The trial court concluded that the City's claims were for injuries outside the purpose of the FHA (*i.e.* the prevention of housing discrimination). The U.S. Court of Appeals for the Eleventh Circuit reversed. The appellate court determined that the Article III view was the correct standard and that the City's claims survived under this less rigorous test.

The implications of the Supreme Court's review are significant. A decision against the Article III standard would cabin the scope of lending discrimination plaintiffs under the FHA to those harmed by the denial of a loan or the offering of unfavorable loan terms because of their race (or other protected trait). Likewise, a decision against the Article III standard would limit the exposure of lenders by restricting the pool of FHA plaintiffs to those within this zone of interests, rather than anyone who conceivably could be harmed by the denial of a loan to a third party or the offering of unfavorable loan terms to that party.

The consequences of a contrary decision are equally serious: not only would the City of Miami's claims likely proceed, but so would those of a host of other people or entities who might claim harm from a foreclosure of a person denied a loan or given less favorable loan terms on account of alleged discrimination. For example, neighbors who experience a decline in property value because of a foreclosure, utility providers who lose a customer due to a foreclosure, and businesses in struggling neighborhoods whose bottom lines are affected by alleged discriminatory lending patterns could all ostensibly bring FHA claims if the Article III interpretation prevails. Such an expansion of FHA exposure would likely require the lending industry to adjust its practices, including a possible tightening of credit. This outcome, therefore, could ironically wind up hurting the very persons Congress intended to protect with the FHA.

The Supreme Court has scheduled oral argument for November 8, 2016, with a decision likely to be rendered in winter 2017. Stay tuned.

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