Lending Industry Take Note: U.S. Supreme Court Rules on Scope of Right to Sue Under Federal Fair Housing Act

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A city's lawsuit against various banks under the federal Fair Housing Act ("FHA") to recover property tax revenues allegedly lost due to discriminatory lending practices has survived . . . for now. In a recent decision, the U.S. Supreme Court concluded that municipalities are within the FHA's "zone of interests" and can sue for such losses under the statute. In the same breath however, the Court's decision in *Bank of America v. City of Miami* also raises a hurdle to recovery that could actually limit the exposure of financial institutions to this particular brand of FHA litigation.

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 loans or the terms of such loans on the basis of race, color, religion, sex, handicap, familial status, or national origin. This prohibition includes residential mortgage lending. Accordingly, the FHA permits persons injured by a discriminatory lending practice to sue their lender for appropriate relief.

Who Can Bring an FHA Claim?

On the surface, the answer to who can bring an FHA claim is simple: Persons injured by a discriminatory lending practice can sue. Courts, however, have disagreed over the types of claimants and injuries that 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. This disagreement rests with the courts' differing interpretation of the U.S. Supreme Court's cases, which suggested 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 federal 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 more recent vintage, with its origins in Supreme Court decisions from the past six 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 sufficiently close 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 standard is usually more difficult to pass than its Article III counterpart. Which test controlled standing, therefore, would have major implications for would-be FHA plaintiffs and lender defendants.

The City Of Miami's FHA Litigation

In 2013, the City of Miami sued various lenders under the FHA. In its lawsuit, the City 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. 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 U.S. Supreme Court granted review.

The Supreme Court's Decision

In reviewing the standing question, the Supreme Court acknowledged the Article III and zone of interests tests, but concluded that, for the purposes of Miami's lawsuit, they represented the same inquiry. This is because the FHA "reflects a congressional intent to confer standing broadly." And, to the extent the two standards were not coextensive, the Court reasoned that it need not define where the overlap ceased because "the City's financial injuries [fell] within the zone of interests that the FHA protects" at any rate. The City had alleged that the defendants had targeted minority communities with predatory lending practices, leading to a concentration of foreclosures that "hindered the City's efforts to create integrated, stable neighborhoods," and "reduced property values." This, according to the City, "diminish[ed] the City's property-tax revenue and increase[ed] demand for municipal services," harming the City. Such alleged injuries, the Court held, were within the FHA's anti-discrimination zone of interests and therefore the City could bring an FHA claim.

The Court did not stop there however. Instead, the Court noted that the City not only had to establish standing, but also that the alleged injury had "a sufficiently close connection" to the defendants' wrongful conduct to have proximately caused the City harm. Here, the Court was more skeptical. Although unwilling to answer the question itself, the Court ruled that the City's alleged harm from the discriminatory conduct had to be more than merely foreseeable to establish an FHA claim. "The housing market is interconnected with economic and social life," the Court observed. "A violation of the FHA may, therefore, be expected to cause ripples of harm to flow far beyond [a] defendant's misconduct." But, "[n]othing in the statute," the Court stated, "suggests that Congress intended to provide a remedy wherever those ripples travel." Rather, the "FHA requires some direct relation between the injury asserted and the injurious conduct alleged." The Court then returned the case to the Eleventh Circuit to "define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses."

Where Do We Go From Here?

The ramifications of *Bank of America* will take time to assess, but in its immediate wake, both FHA plaintiffs and defendants seem to have reason to cheer. The Court's conclusion that Miami has standing represents a victory for FHA plaintiffs—particularly less obvious plaintiffs—like municipalities. It also leaves open the possibility that a host of other people or entities might be able to bring FHA claims for harms attributable to a foreclosure of a person allegedly denied a loan or given less favorable terms due to discrimination. For example, neighbors who experience a decline in property value because of a foreclosure allegedly brought on by discriminatory lending practices could ostensibly bring FHA claims. Lenders, therefore, arguably have greater exposure following *Bank of America*.

Such an interpretation, however, is tempered by the Court's causation discussion. The FHA, the Court clarified, does not provide a remedy wherever the "ripples" of an FHA-violation go. Instead, there must be "some direct relation" between the harm and the alleged misconduct, such that attenuated chains of causation would not seem to pass muster. Rigorous application of the Court's causation holding, therefore, may defeat claims by neighbors for lost property value and perhaps even claims by municipalities for lost property tax revenues. *Bank of America*, therefore, may actually limit lender exposure to an equal or greater degree than the standing determination expands it.

Only time—and the courts—will tell whether prospective FHA plaintiffs or defendants are the true beneficiaries of *Bank of America*. In the interim, lenders should remain vigilant in their compliance efforts. This includes the continued employment of generally-accepted credit assessment standards (*e.g.* debt-to-income requirements, down-payment requirements, etc.) to evaluate an applicant's eligibility for a mortgage loan. Such objective standards will allow financial institutions to defend their lending practices as motivated by valid, non-discriminatory

interests. In doing so, lenders can reduce the risk of FHA-liability, as well as the prospects that they will need to avail themselves of the untested protections offered by the Court's decision. Post-*Bank of America* therefore, it would appear that the old saying is still true: a pinch of prevention is worth a pound of cure.

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