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Client Alert

Financial Services Litigation Practice Group

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"Predatory Lending" Claims by Cities and Counties Against Financial Institutions Escalate in 2014

Cities and counties that have experienced increased foreclosure and vacancy rates in the aftermath of the housing market crash of 2007-2008, perhaps emboldened by recent court decisions, have recently filed several new "predatory lending" cases under the federal Fair Housing Act ("FHA")[1] against financial institutions. In the last six months, for example, Los Angeles, Miami, Providence, and Cook County, Illinois, have filed lawsuits under the FHA against a variety of mortgage lenders to attempt to recover lost property tax revenues and other damages.[2]

Allegations in Recent Predatory Lending Lawsuits

These new lawsuits share similar factual allegations and legal theories. The governmental entities assert that the mortgage lender defendants engaged in "reverse-redlining" by aggressively targeting minority communities within the city or county for subprime, Alt-A and other home mortgages that were not sustainable by the borrowers and thus were, in essence, destined to fail. In some cases, the plaintiffs also assert that lenders engaged in traditional redlining by improperly refusing to lend to borrowers in minority communities. The plaintiffs assert that these alleged predatory lending practices caused erosion of city and county tax bases, loss of property tax income and other costs related to abandoned or vacant properties. Plaintiffs allege that the practice of specifically targeting minority communities for subprime loans or, conversely, curtailing lending to minority communities, constitutes intentional discrimination on the basis of race or ethnicity in violation of the FHA. Plaintiffs typically seek injunctive relief, compensatory damages, punitive damages and attorney's fee awards under 42 U.S.C. §3613.

Threshold Legal Issues

These lawsuits raise several significant threshold legal issues, including: (i) their highly attenuated causation theories; (ii) whether cities and counties have Article III and statutory standing to assert FHA claims; (iii) the existence and applicability of the two year statute of limitations under the FHA; and (iv) whether the disparate impact theory that undergirds the claims is viable under the FHA. Nonetheless, a decision from the Northern District of Georgia in September, 2013 denying a motion to dismiss filed by HSBC and the settlement of the *Township of Mt. Holly, New Jersey* case, which had been scheduled for argument before the United States Supreme Court in

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December 2013 and which could have provided clarity on the viability of FHA disparate impact claims, may have contributed to the recent uptick in cases by giving prospective plaintiffs (and the plaintiff's bar) hope that these claims can survive initial dispositive motions. Two orders denying motions to dismiss issued within the past three weeks may trigger additional new filings.

DeKalb v. HSBC

Judge Steve Jones of the Northern District of Georgia issued a decision on September 25, 2013, denying a motion to dismiss filed by HSBC entities in a reverse redlining/predatory lending case filed by metro-Atlanta counties DeKalb, Fulton and Cobb.[3] Judge Jones rejected the defendants' argument that the counties lack standing, holding that the counties' alleged harm suffered from increased vacancy and foreclosure rates was sufficiently traceable to the defendants' conduct to satisfy the threshold showing of standing. The court rejected the defendants' arguments that the FHA's two year statute of limitations barred the claim, holding that plaintiffs had pled that the defendants committed repeated acts in violation of FHA and thus had alleged sufficient facts to preclude dismissal of the complaint under the FHA's "continuing violation" doctrine. Finally, the court denied defendants' arguments that the FHA does not permit disparate impact claims, but expressly reserved the right to revisit the issue after the Supreme Court issued its decision in *The Township of Mt. Holly* case.

Settlement of *The Township of Mt. Holly* Case

In *The Township of Mt. Holly*,[4] the Third Circuit articulated its view of the standard for establishing a disparate impact FHA claim and reversed the district court's grant of summary judgment to the defendant, the Township of Mt. Holly, New Jersey. The Supreme Court granted the township's petition for *certiorari*, and the case was scheduled for oral argument in December, 2013. Less than a month before argument, however, the parties settled the case, thus denying the Supreme Court the opportunity to provide clarity as to the viability of FHA disparate impact claims. The settlement of the case represented the second time in two years that an FHA case involving disparate impact claims was settled after the Supreme Court had granted a petition for *certiorari*.

City of Los Angeles Litigation

In a May 28, 2014 decision, Judge Otis D. Wright, II of the Central District of California relied in part on the decision in *DeKalb County* to deny a motion a dismiss filed by Wells Fargo & Co. in a case filed by the City of Los Angeles.[5] As in the *DeKalb County* decision, the court concluded that the City of Los Angeles' complaint asserted sufficient facts regarding a causal link between Wells Fargo's lending practices and the foreclosures and vacancies that the City of Los Angeles suffered to satisfy Article III and statutory standing. The court also rejected Wells Fargo's statute of limitations argument based on the continuing violation doctrine. Finally, the court rejected the argument that disparate impact is not legally viable under the FHA, noting case law in the Ninth, Sixth and Tenth circuits that recognizes the viability of such claims.[6] On June 9, 2014, Judge Wright denied a motion to dismiss filed by Citigroup defendants in a similar case filed by the City of Los Angeles.[7]

Conclusion

The legal theories upon which these claims are based are not unassailable, despite the three recent orders denying motions to dismiss. Nonetheless, the success of the plaintiffs in the *DeKalb County* and *City of Los Angeles* cases in defeating initial motions to dismiss predatory lending claims, as well as the absence of clear direction from the Supreme Court about the viability of FHA disparate impact theories, may entice other counties and municipalities to consider filing similar claims against lending institutions in the near future.

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[1] 42 U.S.C. §§ 3601-19.

[2] *City of Los Angeles v. JP Morgan Chase & Co., et al.*, Case No. 2:2014-cv-04168 (C.D. Cal.) (filed May 30, 2014); *City of Providence v. Santander Bank, N.A.*, Case No. 1:2014-cv-00244 (D. R.I.) (filed May 29, 2014); *County of Cook v. Bank of America Corp., et al.*, Case No. 1:2014-cv-02280 (N.D. Ill.) (filed March 31, 2014); *County of Cook v. HSBC North American Holdings, Inc., et al.*, Case No. 1:2014-cv-022031 (N.D. Ill.) (filed March 21, 2014); *City of Miami v. CitiGroup Holdings, Inc., et al.*, Case No. 1:2013-cv-24510 (S.D. Fla.) (filed December 13, 2013); *City of Miami v. Bank of America Corp., et al.*, Case No. 1:2013-cv-24506 (S.D. Fla.) (filed December 13, 2013).

[3] *DeKalb County, et al. v. HSBC North America Holdings, Inc., et al.*, Case No. 1:12-cv-03640 (N.D. Ga., Sept. 25, 2013).

[4] *Township of Mt. Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, 658 F. 3d. 375 (2011).

[5] *City of Los Angeles v. Well Fargo & Co.*, Case No. 2:13-cv-9007 (C.D. Cal., May 28, 2014).

[6] *See Ojo Farmers Group, Inc.*, 600 F. 3d., 1205, 1208 (9th Cir. 2010); *Graoch Association No. 33 LP v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F. 3d., 366, 392 (6th Cir. 2007); *Reinhart v. Lincoln County*, 482 F. 3d., 1225, 1229 (10th Cir. 2007).

[7] *City of Los Angeles v. Citigroup, Inc., et al.*, Case No. 2:13-cv-09009 (C.D. Cal. June 9, 2014).