CRITICAL FAIR HOUSING ACT CASE DEMONSTRATES NEED TO FILL SCOTUS VACANCY

By Kevin J. O'Connor*

It is no small irony that the Supreme Court of the United States ("SCOTUS") heard oral argument on election day in two consolidated cases that squarely place significant issues of standing under the Fair Housing Act ("FHA") before the Court. The Court heard argument in *Bank of America v. Miami* (15-1111) and *Wells Fargo v. Miami* (15-1112) to consider whether standing under the FHA can be extended to the outer reaches of Article III, and the viability of claims by the City of Miami against lenders seeking to recover damages from the fallout of bad mortgages.

The FHA was enacted with the laudable goal of combating racial discrimination in housing, and was substantially revised in 1988 to combat discrimination in housing as against disabled persons. The cases above concern the question of whether a city can sue a lender for financial losses caused as a result of alleged predatory lending practices which lead to foreclosure, and then indirectly led to financial losses to the municipality through, for instance, lost tax revenue.

The cases therefore squarely present two issues: (1) Whether the term "aggrieved" in the FHA imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III; and (2) whether the City of Miami is an "aggrieved person" under the FHA. The stakes for Wells Fargo and Bank of America are huge in light of the sheer number of cities who could make similar claims if the Court does not reverse the decisions of the Eleventh Circuit, allowing the cases to proceed to discovery.

Essentially, the theory of the city in those cases is that since the banks engaged in alleged predatory lending, and since the borrowers defaulted on their loans and their homes were foreclosed, and since this resulted in lost taxes and other financial losses to the city due the blight caused by empty homes, the city could sue the banks for these losses. This raises the obvious question of why all others in the city could not make the same claims, such as the corner grocery store owner, the laundromat owner, etc. Where does the liability end? How could the banks ever deal with the cascading liability and potential litigation losses? Wouldn't the banks simply turn around and shift those losses to their shareholders and society at large?

The recording of the oral argument (available at http://www.scotusblog.com/case-files/cases/wells-fargo-co-v-city-of-miami/) showed hostility to the City's theories by several members of the the Court, but it remains to be seen how the Court would rule. If the Court splits, this would leave the 11th Circuit's ruling intact.

In the author's view, the better ruling is to adopt the well-reasoned arguments of the DRI which submitted an amicus brief arguing for a zone of interests test that is applied in the

context of other statutes using the same language as the FHA. Such a holding would more practically define who qualifies as an "aggrieved party," and place limits on who can claim damage proximately caused by the wrongful acts of others. (*See* DRI Brief, 2016 WL 4547961). These cases offer a further demonstration of what the country has to lose each day that the vacancy on the SCOTUS continues.

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