

Fair Lending Developments: Wrestling with Causation

By John L. Ropiequet and L. Jean Noonan*

INTRODUCTION

The past year saw the lower courts wrestle with the aftermath of the U.S. Supreme Court's decision in *Bank of America Corp. v. City of Miami*¹ that, like the Court's previous ruling in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*,² stressed the importance of properly pleading and proving the causation element in fair lending cases based on an alleged disparate impact rather than on disparate treatment. While the *Miami* cases remained unresolved on remand to the Eleventh Circuit as of this writing, several decisions were issued in pending cases both inside and outside that circuit that indicated that the Supreme Court's rulings will significantly limit the scope of municipal fair lending litigation.

Federal fair lending enforcement actions under the new administration were also significantly more limited than they have been in the past. The last redlining case filed under the Obama Administration was challenged by an unusual motion to dismiss that was denied, resulting in a settlement agreement with relatively modest relief and without a consent order. One five-year-old investigation of mortgage loan pricing discrimination was also settled without an enforcement action being filed or a consent order being entered.

Finally, the U.S. Department of Housing and Urban Development has sought public comments on whether to modify its 2013 Disparate-Impact Rule.

APPLICATION OF *CITY OF MIAMI* TO MUNICIPAL LITIGATION

LITIGATION IN THE ELEVENTH CIRCUIT

As reported in the previous *Annual Survey*,³ the U.S. Supreme Court's decision in *City of Miami* concluded with a remand of the case to the Eleventh Circuit for

* John L. Ropiequet is of counsel to Saul Ewing Arnstein & Lehr LLP at its Chicago office. He is co-editor of the *Annual Survey*. L. Jean Noonan is a partner in Hudson Cook LLP, where she manages the firm's Washington, D.C. office.

1. 137 S. Ct. 1296 (2017).

2. 135 S. Ct. 2507 (2015).

3. See John L. Ropiequet & L. Jean Noonan, *Fair Lending Developments: The End of an Era?*, 73 *Bus. Law.* 543, 545 (2018) (in the 2018 *Annual Survey*) [hereinafter *Fair Lending 2018*].

further proceedings because the decision had been based on a foreseeability standard rather than its newly announced proximate causation requirements.⁴ The Supreme Court stated that the lower courts needed to deal with the issue of how those requirements applied to the types of claims that were being brought by Miami against the two defendant banks.⁵

The Eleventh Circuit received the Supreme Court's judgment in June 2017,⁶ but it took no immediate action either to remand the cases back to the district court or to request that the parties provide it with additional briefing. Subsequently, both banks moved to remand their cases to the district court in October 2017, which the city opposed.⁷ As of this writing, the Eleventh Circuit had not set a date for oral argument on the banks' motions to remand. Thus, more than a year after the Supreme Court issued its decision, the Eleventh Circuit had not yet remanded the cases to the district court or otherwise disposed of them. The failure of the Eleventh Circuit to act has left several fair lending cases pending in district court in limbo.⁸

However, unlike several courts that have refused to act until the Eleventh Circuit rules on remand,⁹ one district court in that circuit reopened a case against Wells Fargo and granted the bank's motion for summary judgment, thus illustrating how other courts may eventually deal with fair lending claims on the merits. At issue before the court in *City of Miami Gardens v. Wells Fargo & Co.*¹⁰ was whether there were any discriminatory loans made by the bank to minority borrowers during the limitations period that would support either a disparate treatment claim or a disparate impact claim under the Fair Housing Act ("FHA").¹¹ The *Wells Fargo* court observed that its earlier rulings had required the city to allege precisely how it was injured by the bank's conduct, how the injury was traceable to the conduct of the various Wells Fargo defendants, and how the injury could be redressed by a favorable decision.¹² Limited discovery was allowed on the statute of limitations question as to whether any loans issued between mid-2012 and mid-2014 violated the FHA.¹³ This produced a universe of 153 loans of twelve different types that were originated in the limitations period, in-

4. 137 S. Ct. at 1306.

5. *Id.*

6. See Docket Entry, *City of Miami v. Bank of Am. Corp.*, No. 14-14543 (11th Cir. June 2, 2017); Docket Entry, *City of Miami v. Wells Fargo Bank & Co.*, No. 14-14544 (11th Cir. June 2, 2017).

7. See Motion to Remand, *City of Miami v. Bank of Am. Corp.*, No. 14-14543 (11th Cir. Oct. 26, 2017); Motion to Remand, *City of Miami v. Wells Fargo Bank & Co.*, No. 14-14544 (11th Cir. Oct. 26, 2017).

8. See, e.g., *DeKalb Cty. v. HSBC N. Am. Holdings, Inc.*, No. 1:12-cv-3640-SJJ (N.D. Ga. Mar. 12, 2018) (order) (continuing stay orders entered July 28, 2016, and May 17, 2017).

9. Other district courts have refused to reopen their cases until the Eleventh Circuit rules on remand in the *City of Miami* cases. See, e.g., *City of Miami Gardens v. Citigroup, Inc.*, No. 1:14-cv-22204-MGC (S.D. Fla. May 21, 2018) (order denying plaintiff's motion to reopen case).

10. No. 1:14-cv-22203-FAM, 2018 WL 3213488 (S.D. Fla. June 29, 2018).

11. Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631 (2018)).

12. *Miami Gardens*, 2018 WL 3213488, at *2.

13. *Id.*

cluding 130 loans made to minority borrowers and eight to non-Hispanic white borrowers.¹⁴

The testimony of Miami Gardens' city manager did not identify any discriminatory or predatory loans, nor could he identify any minority borrowers who received loans that were made on different terms than those made to similarly situated white borrowers.¹⁵ The city instead relied on the testimony of an expert witness who matched two pairs of loans that he asserted showed evidence of discrimination.¹⁶ The bank's expert, on the other hand, attacked the two pairings as not showing that borrowers were similarly situated because of the receipt of lender credits to defray closing costs in exchange for higher interest rates and the receipt of certain promotional discounts, among other reasons.¹⁷

The *Miami Gardens* court observed that the "core issue" was whether any FHA violations occurred during the limitations period, because the city could sue for conduct occurring outside of the limitations period on a continuing violation theory only if some violations could be identified that were not barred by the FHA's two-year statute of limitations.¹⁸ Wells Fargo's first argument was that because the city manager's testimony identified no discriminatory conduct and the city was bound by its representative's testimony, all claims were time-barred. The court agreed that the city was so bound and that this lack of evidence by itself was sufficient to support summary judgment for the bank.¹⁹

As an alternative holding, addressing the expert testimony that the city relied on to establish prima facie cases of disparate impact and disparate treatment, the *Miami Gardens* court took note of the requirements set forth in *Inclusive Communities* and the U.S. Department of Housing and Urban Development's ("HUD") burden-shifting test under its Disparate-Impact Rule.²⁰ It also considered the Supreme Court's instructions in *Inclusive Communities* stating that disparate impact liability cannot be based "solely on a showing of statistical disparity," that the policy that caused the disparity must be identified, and that "a 'robust causality' between the policy and the statistical disparity . . . must be shown to prevent defendants from being found liable for disparities they did not create."²¹

14. *Id.* at *3.

15. *Id.*

16. *Id.* at *4.

17. *Id.*

18. *Id.* at *6.

19. *Id.* (citing *QBE Ins. Corp. v. Jorda Enters. Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012); *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, 310 F.R.D. 683, 687 (S.D. Fla. 2015)).

20. *Miami Gardens*, 2018 WL 3213488, at *7 (citing *Tex. Dep't of Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2017)); *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100); see generally John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: Whither Disparate Impact?*, 71 BUS. LAW. 701, 701-04 (2016) (in the 2016 Annual Survey) [hereinafter *Fair Lending 2016*]; John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: Is Disparate Impact Here to Stay?*, 69 BUS. LAW. 609, 613-14 (2014) (in the 2014 Annual Survey) [hereinafter *Fair Lending 2014*].

21. *Miami Gardens*, 2018 WL 3213488, at *7 (quoting *Inclusive Communities*, 135 S. Ct. at 2523-24; citing *City of Miami*, 137 S. Ct. at 1306).

The *Miami Gardens* court found that the city's evidence was insufficient to establish a disparate impact claim in several respects. First, the court had stricken the declaration of a former bank employee concerning the bank's policies for lack of foundation, leaving no evidence in the record on that issue.²² Second, the city's expert only identified two loans out of the 130 made to minority borrowers that were allegedly more expensive and, in the court's view, there was "insufficient record evidence to show the policies produce 'statistically-imbalanced lending patterns.'"²³ Third, with respect to the claim of disparate treatment regarding the matched pairs of loans, the court noted the Eleventh Circuit's requirement that loan details that compared minority and non-minority borrowers must be "nearly identical."²⁴ Because the loan details for the matched pairs were not nearly identical due to being originated at different times and under different structures, the *Miami Gardens* court held that the comparisons "cannot support a claim of discrimination" under the Eleventh Circuit's standard.²⁵ It therefore granted summary judgment to the bank.

LITIGATION OUTSIDE OF THE ELEVENTH CIRCUIT

There have been several other rulings in municipal fair lending cases outside of the Eleventh Circuit where district courts have moved ahead without waiting for the results of the Supreme Court's remand. In the first such post-*City of Miami* decision, a case that Philadelphia filed against Wells Fargo in 2017 survived a motion to dismiss for failure to state a claim.²⁶ First, the court held that an earlier settlement in 2012 between Wells Fargo and the Pennsylvania Humans Relations Commission did not meet the elements of res judicata and thus did not operate as a bar against Philadelphia's fair lending claims because the city was not in privity with the state agency.²⁷ Next, it held that the FHA's statute of limitations did not bar the city's claims because six of the alleged discriminatory loans were found to have been issued within the limitations period.²⁸

The *Philadelphia* court also found that the city plausibly alleged a specific race-neutral policy that nevertheless was causally connected to disparities in lending with respect to "at least seven specific policies . . . that led to disparate impacts in Wells Fargo's mortgage lending."²⁹ Further, it found that the city also plausibly alleged proximate causation between the bank's lending practices and the city's

22. *Id.* at 8.

23. *Id.* (quoting *City of Miami v. Wells Fargo & Co.*, No. 13-cv-24508, 2016 WL 1156882, at *4 (S.D. Fla. Mar. 17, 2016)).

24. *Id.* (citing *Boykin v. Bank of Am. Corp.*, 162 F. App'x 837, 839 (11th Cir. 2005)).

25. *Id.* at *10.

26. *City of Phila. v. Wells Fargo & Co.*, No. 1:17-cv-2203, 2018 WL 424451, at *3 (E.D. Pa. Jan. 16, 2018).

27. *Id.* at *3; see John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: Enforcement Intensifies, Class Actions Diminish*, 68 *Bus. Law.* 637, 641-42 (2013) (in the 2013 Annual Survey).

28. *Phila.*, 2018 WL 424451, at *4.

29. *Id.*

alleged non-economic injuries.³⁰ Lastly, the court declined to limit discovery to limitations issues because the city adequately alleged a continuing violation of the FHA based on disparate impact activity occurring within the limitations period.³¹

A trio of decisions in cases brought by Cook County, Illinois, against major mortgage lenders and servicers probed more deeply into the allegations made by the county than the *Philadelphia* court did. In each of the cases, the courts dealt with motions to dismiss complaints that had been amended after the *City of Miami* ruling came down from the Supreme Court. These Illinois cases attempted to comply with the Court's discussion of the proximate causation requirement, with each rejecting some damage claims that were too remote from the alleged discriminatory practices while allowing other, less remote claims to proceed.

The first ruling was in *County of Cook v. Wells Fargo & Co.*³² The court detailed the alleged equity-stripping practices of Wells Fargo that targeted minority borrowers in Cook County to a greater extent than it targeted non-minority borrowers with similar credit histories.³³ Discrimination also allegedly "continued into the loan-servicing process," such as activities dealing with loan modification requests, managing defaulted loans through workouts, and handling foreclosure.³⁴ The county alleged a variety of harms resulting from the alleged equity-stripping practices, specifically, the sheriff's direct costs for posting eviction and foreclosure notices; registering, inspecting, and securing properties; serving foreclosure case summonses; executing evictions; administering an increased number of foreclosure cases in the circuit court; increased demand for county services like housing counseling; reduced property tax revenue and other fee income; destabilization of minority communities; and increasing the likelihood that homeowners would have negative equity.³⁵

The *Wells Fargo* court then carefully examined each type of claimed injury in light of *City of Miami's* proximate causation requirement and the bank's argument that "numerous intervening factors . . . could have contributed to the County's alleged harms."³⁶ It found that the cost of administering and processing foreclosure cases by the sheriff and by the circuit court "falls within the first step of the causal chain and thus is sufficiently direct to satisfy the proximate cause inquiry."³⁷ However, other claimed harms were found to be "precisely the 'ripples' that *City of Miami* cautions 'flow far beyond the defendant's misconduct[,] . . . risk[ing] massive and complex damages litigation and . . . involving too many

30. *Id.* at *5–6.

31. *Id.* at *7.

32. No. 1:14-cv-9458, 2018 WL 1469003 (N.D. Ill. Mar. 26, 2018).

33. *Id.* at *2.

34. *Id.* at *3.

35. *Id.* at *4.

36. *Id.* at *5.

37. *Id.*

'intricate, uncertain inquiries' to establish proximate cause."³⁸ Allowing a recovery for the county's lost property tax revenue would require determining "how much property tax the County would have collected but for the equity stripping," which involves too many variables.³⁹

The *Wells Fargo* court found similar problems inherent in determining costs for the increased need for counseling programs, for "programs designed to address increases in crime and blight," and for "loss of racial balance and stability."⁴⁰ Although the court found that the county stated plausible disparate treatment and disparate impact claims, the limitation on damage claims substantially restricted the scope of what the county would eventually be able to recover.⁴¹ Like in *Philadelphia*, the *Wells Fargo* court rejected a statute of limitations defense because implementation of the alleged equity-stripping practice "continues to the present day."⁴² Relatedly, the court found that a 2012 consent decree that was brought by the Illinois Attorney General against Wells Fargo did not preclude the county's claims because the county was not in privity with the attorney general.⁴³

The next decision, in *County of Cook v. Bank of America Corp.*,⁴⁴ was much the same. The court concluded that under the *City of Miami* analysis, "the bulk of the injuries the County asserts—tax losses and increased costs for county services such as police patrol and support services to evicted borrowers—do not flow directly from the discrimination it alleges."⁴⁵ Such losses were "several steps removed—both temporally and causally" from the foreclosures that the county emphasized, as was its "catch-all claim for 'various other injuries *resulting from the deterioration and blight* to the hardest hit neighborhoods and communities."⁴⁶ Thus, the court limited the county's claims to the "narrow category" of those that were "plausibly within the 'first step' of causation: the out-of-pocket costs it claims to have incurred in processing the discriminatory foreclosures, such as additional funding for the Cook County Sheriff to serve foreclosure notices and for the Circuit Court of Cook County to process the deluge of foreclosures."⁴⁷

The third decision was in *County of Cook v. HSBC North America Holdings, Inc.*⁴⁸ Like the *Wells Fargo* and *Bank of America* courts previously discussed, the *HSBC* court examined the county's various damage claims to determine whether they were directly related to the alleged discriminatory practices or

38. *Id.* at *8 (citing *City of Miami*, 137 S. Ct. at 1306; *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006)).

39. *Id.* at *9.

40. *Id.*

41. *See id.* at *10–13 (finding that disparate treatment and disparate impact claims met pleading requirements).

42. *Id.* at *14–16.

43. *Id.*

44. No. 1:14-cv-2280, 2018 WL 1561725 (N.D. Ill. Mar. 30, 2018).

45. *Id.* at *5.

46. *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982)).

47. *Id.* at *7.

48. No. 1:14-cv-2031, 2018 WL 2431987 (N.D. Ill. May 30, 2018).

were too remote to be legally cognizable. It found that the county's alleged out-of-pocket costs dealing with foreclosures and evictions were "within 'the first step' of injury" and, therefore, were recoverable.⁴⁹ The claims for lost recording and other fees resulting from the bank's alleged practice of using the MERS database to further its discriminatory practices were also found to be the subject of "a squarely direct relationship" and, therefore, were also recoverable.⁵⁰ However, none of the county's other claims met the *City of Miami* test for proximate causation, including the cost of social services to foreclosed homeowners; lost property tax revenue from foreclosed, abandoned, and vacant properties; the diminished property values of other properties; the cost of demolishing foreclosed homes; and urban blight.⁵¹

In *City of Oakland v. Wells Fargo Bank, N.A.*,⁵² the court took a less skeptical view of the city's damage claims than was taken in the three Cook County decisions. Ruling on the bank's motion to dismiss the city's claims based on the alleged discriminatory targeting of minority borrowers for high-cost loans likely to result in foreclosure, the *Oakland* court first focused on how to apply the *City of Miami* proximate cause requirements, rejecting several arguments advanced by the city for a relatively loose standard.⁵³

The *Oakland* court then analyzed the three "consequences" that the city allegedly suffered: the effects of foreclosures on property values and property tax collections; the city's costs due to criminal problems due to foreclosures; and undermining "Oakland's goals and spending in programs for non-discrimination in housing."⁵⁴ Although the court noted that "[t]he causal relationship between [Wells Fargo's] conduct and Oakland's alleged harm is indirect and goes through several links," and that the claimed injuries were "entirely distinct" from any alleged discrimination in the issuance of high cost loans, it found that being "several steps removed from [Wells Fargo's] conduct . . . does not appear to be determinative" because similar facts present in the *City of Miami* case did not cause the Supreme Court to hold that "there was no proximate cause as a matter of law."⁵⁵

The *Oakland* court found that the city's proffered statistical analysis linking the alleged discriminatory conduct to an increase in foreclosures and thus a loss of property tax revenue was sufficient to survive dismissal despite language in a Ninth Circuit decision that suggested a contrary conclusion.⁵⁶ Because no similar statistical analysis was proffered with respect to the city's municipal expenditure injury, the court dismissed that claim without prejudice, allowing it to

49. *Id.* at *7 (quoting *Hemi Grp. LLC v. City of New York*, 559 U.S. 1, 10–12 (2010)).

50. *Id.* at *10.

51. *Id.* at *7–9.

52. No. 15-cv-04321-AMC, 2018 WL 3008538 (N.D. Cal. June 15, 2018).

53. *City of Oakland*, 2018 WL 3008538, at *7 (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 358, 269 (1992)).

54. *Id.* at *3.

55. *Id.* at *8 (citing *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 982 (9th Cir. 2008)).

56. *Id.* at *9 (distinguishing *Or. Laborers-Employer's Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 965 (9th Cir. 1999)).

amend to add similar substantiation.⁵⁷ The city's third category of injury, its non-economic injuries, was challenged by Wells Fargo for lack of Article III standing. Because there were no allegations that the bank's alleged discrimination caused the city to divert resources to address housing discrimination rather than general blight, the *Oakland* court held that the city lacked standing to bring such claims and dismissed them without prejudice.⁵⁸

OTHER FAIR LENDING LITIGATION

A different kind of claimed discrimination under the FHA was addressed by the court in *National Fair Housing Alliance v. Federal National Mortgage Association*.⁵⁹ A large group of fair housing community organizations alleged that the Federal National Mortgage Association ("Fannie Mae") discriminatorily neglected to maintain foreclosed properties in minority neighborhoods on a nationwide basis following the 2008 foreclosure crisis. The plaintiffs alleged that Fannie Mae was required to maintain all of its Real Estate Owned ("REO") homes following foreclosure "without regard to race, color, . . . or national origin" pursuant to the FHA.⁶⁰ They further alleged that their investigation of more than 2,300 properties over a four-year period revealed that Fannie Mae "failed to conduct routine exterior maintenance and marketing of REO properties in communities of color, thereby leaving those REOs in a state of neglect, while satisfactorily conducting routine exterior maintenance and marketing of its REO properties in predominantly white neighborhoods, therefore leaving those REOs in a materially better condition."⁶¹ Fannie Mae moved to dismiss for lack of standing and for failure to state a claim.

With respect to standing, the *NFHA* court held that the allegations that the plaintiffs had to devote "significant resources to identifying and counteracting discriminatory practices, thus requiring the diversion of resources from the organization's counseling referral services" established the necessary organizational standing to sue.⁶² With respect to the plaintiffs' FHA claim based upon a disparate impact on protected minorities, the court found that the assertion that Fannie Mae had a policy of delegating discretion while failing to supervise "differential maintenance based upon the properties' age and value" was sufficient to establish "the robust cause of discriminatory impact" at the pleadings stage.⁶³

On the causation issue, the *NFHA* court found that the plaintiffs' "statistical evidence demonstrating the causal connection between the delegation of duties and the differential maintenance" also met the pleading requirements.⁶⁴ The court specifically noted that concerns raised about deficiencies in the plaintiffs'

57. *Id.* at *10.

58. *Id.* at *11–12.

59. 294 F. Supp. 3d 940 (N.D. Cal. 2018).

60. *Id.* at 943.

61. *Id.* at 944.

62. *Id.* at 946.

63. *Id.* at 948.

64. *Id.* (citing *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 259 (D. Mass. 2008)).

methodology “go to the weight of the evidence and are not dispositive of the determination whether Plaintiffs have adequately pled discrimination at this procedural stage.”⁶⁵ The court also found no problem with the allegations concerning conduct that occurred outside the limitations period because a continuing violation of the FHA that extended beyond the limitations period had been alleged.⁶⁶ However, the court dismissed the plaintiffs’ disparate treatment claim because there were no allegations that established that Fannie Mae was motivated to discriminate on the basis of race, as required to state such a claim.⁶⁷

FAIR LENDING ENFORCEMENT ACTIONS

A week before the end of the Obama Administration, the U.S. Department of Justice (“DOJ”) filed a lawsuit against KleinBank for allegedly “redlining” majority-minority neighborhoods in the entire Minneapolis-St. Paul metropolitan area from 2010 through 2015, thus constituting a violation of the FHA and the Equal Credit Opportunity Act (“ECOA”).⁶⁸ In June 2017, KleinBank moved to dismiss, arguing that the DOJ failed to allege any facts supporting its claim that the bank intended to discriminate in setting its assessment areas, in establishing branches in only majority-white neighborhoods, or in its marketing.⁶⁹ The bank also argued that the government should be estopped from asserting redlining claims against it because the Federal Deposit Insurance Corporation (“FDIC”), its prudential regulator, had repeatedly found no evidence of discriminatory or other illegal credit practices and had given the bank “satisfactory” ratings in its Community Reinvestment Act (“CRA”) examinations.⁷⁰

In April 2018, the court denied KleinBank’s motion to dismiss.⁷¹ The *KleinBank* court noted that the DOJ alleged that only 1.06 percent of the bank’s mortgage applications were related to residential property located in majority-minority census tracts. In addition, only 1.16 percent of KleinBank’s 4,392 loans were secured by residential property in majority-minority census tracts.⁷² The court found that KleinBank’s horseshoe-shaped CRA assessment area as it expanded from rural areas into the Minneapolis suburbs in Hennepin County was “redolent of a business philosophy that potentially prefers to avoid minority borrowers” in Minneapolis and, thus, to make credit unavailable based on race.⁷³ Despite KleinBank’s

65. *Id.*

66. *Id.* at 948–49.

67. *Id.* at 949.

68. Complaint at 1, *United States v. KleinBank*, No. 0:17-cv-00136 (D. Minn. Jan. 13, 2017), <https://www.justice.gov/opa/press-release/file/926566/download>; see *Fair Lending 2018*, *supra* note 3, at 548–49.

69. Memorandum in Support of Defendant’s Motion to Dismiss at 14–20, *United States v. KleinBank*, No. 0:17-cv-00136 (D. Minn. June 5, 2017) (redacted version).

70. *Id.* at 32–37.

71. Sealed Report & Recommendation at 1, *United States v. KleinBank*, No. 0:17-cv-00136 (D. Minn. Apr. 23, 2018) (unredacted version), <https://www.justice.gov/crt/case-document/file/1061956/download>, adopted by Amended Order, *United States v. KleinBank*, No. 0:17-cv-00136 (D. Minn. Apr. 2, 2018), <https://www.justice.gov/crt/case-document/file/1061931/download>.

72. *Id.* at 2.

73. *Id.* at 10.

argument concerning the FDIC findings, the court held that the DOJ would not be estopped from bringing suit and that allowing the case to proceed did not constitute a due process violation.⁷⁴

In May 2018, the DOJ reached a settlement with KleinBank, resolving allegations that the bank engaged in a pattern or practice of unlawful redlining. Under the settlement, KleinBank agreed to meet the credit needs of residents located in majority-minority census tracts in Hennepin County, covering Minneapolis, but not Ramsey County, covering St. Paul. The bank was also required to revise its main CRA assessment area to include all of Hennepin County and to open a full-service brick-and-mortar office within a majority-minority census tract within that county. The new branch will provide all services offered at KleinBank's other full-service branches, including a full-time on-site residential lending officer, fully trained in all of the aspects of home mortgage and home equity lending. The lending officer's work will include marketing and outreach to residents of majority-minority census tracts.⁷⁵

Over a three-year period, KleinBank will be obligated to spend a minimum of \$300,000 on advertising, outreach, and education. The bank must also create credit repair initiatives to establish a presence in majority-minority census tracts in the county. The bank will also provide financial education and a credit repair program to identify qualified loan applicants within the majority-minority census tracts in Hennepin County.⁷⁶ KleinBank will continue to provide fair lending training to all employees, including training on the ECOA, the FHA, and redlining.⁷⁷ It must also invest a minimum of \$300,000 over three years in a special-purpose credit program that will offer home loans and home improvement loans on a more affordable basis than otherwise available from KleinBank and will be offered to residents of majority-minority census tracts in Hennepin County.⁷⁸ Notably, unlike other DOJ fair lending enforcement actions, the settlement was not made the subject of a consent order.

In July 2018, the DOJ settled a five-year investigation against Pacific Mercantile Bank ("PMB"), resolving allegations that between April 2011 and April 2013, the bank engaged in a pattern or practice of FHA and ECOA discrimination in the pricing of its first-lien retail and wholesale mortgage loans on the basis of race and national origin.⁷⁹ PMB ceased wholesale lending in April 2013 and exited the retail mortgage market indefinitely in December 2013.⁸⁰ Under the terms of the consent order, PMB will deposit \$1,000,000 in an interest-bearing escrow account to create a settlement fund that will be used to provide

74. *Id.* at 11–12.

75. Settlement Agreement at 1–2, *United States v. KleinBank*, No. 0:17-cv-00136 (D. Minn. May 8, 2018), <https://www.justice.gov/crt/case-document/file/1061061/download>.

76. *Id.* at 3–4.

77. *Id.* at 6.

78. *Id.* at 5.

79. Settlement Agreement Between the United States and Pacific Mercantile Bank at 1 (July 18, 2018), <https://www.justice.gov/crt/case-document/file/1082996/download>.

80. *Id.* at 2.

relief to persons deemed eligible to receive monetary relief.⁸¹ The PMB settlement was not made the subject of a complaint or a consent order in federal court.

HUD DISPARATE-IMPACT RULE

In response to the U.S. Supreme Court's 2015 decision in *Inclusive Communities*, HUD issued an advance notice of proposed rulemaking ("ANPR") in June 2018.⁸² The ANPR seeks public comment under a variety of issues on whether a need exists for potential modifications to HUD's 2013 final rule implementing the FHA's disparate impact standard, as well as the 2016 supplement to HUD's responses to certain industry comments made during the rulemaking.⁸³

In *Inclusive Communities*, the Supreme Court ruled that disparate impact claims are cognizable under the FHA.⁸⁴ The Court referenced HUD's Disparate-Impact Rule in its opinion, but it did not review the rule or rely on it for its holding.⁸⁵ Considering the Supreme Court decision in *Inclusive Communities*, HUD is seeking to determine what changes, if any, need to be made to its rule. HUD's general counsel stated that the "[k]ey questions are about burdens of proof and persuasion, causation, what is the standard for a business justification defense, and the role of statistics in establishing an initial case."⁸⁶ Public comments on the ANPR were due by August 20, 2018.⁸⁷

81. *Id.* at 3–5.

82. Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28560 (June 20, 2018) [hereinafter ANPR]; see *Fair Lending 2014*, *supra* note 20, at 613–14 (discussing HUD Disparate-Impact Rule).

83. *Id.* at 23561.

84. *Tex. Dep't of Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2017) (2017); see *Fair Lending 2016*, *supra* note 20, at 703.

85. See *Inclusive Cmty.*, 135 S. Ct. at 2514–15.

86. Paul Compton, Jr., Gen. Counsel, Dep't of Hous. & Urban Dev., Closing Remarks: Insights into HUD at the Housing Policy Council 2018 Annual Meeting (June 12, 2018), https://www.hud.gov/press/speeches_remarks_statements/Speech_061218.

87. ANPR, *supra* note 82, at 23561.

