Fair Lending Developments in the Wake of *City of Miami*

*By John L. Ropiequet and L. Jean Noonan**

Introduction

The fair lending cases filed by Miami against large mortgage lenders in 2013, in which the city sought to recover lost property tax revenues and increased municipal expenses allegedly caused by foreclosures that in turn were caused by the banks' alleged redlining (denying credit on a discriminatory basis) and reverse redlining (targeting predatory loans on a discriminatory basis), have been prominently featured in several previous *Annual Surveys*.[1] They are featured again here because the Eleventh Circuit has issued its long-awaited decision on remand from the U.S. Supreme Court's 2017 decision in *Bank of America Corp. v. City of Miami*.[2] While other municipal fair lending cases were stayed as the court considered petitions for rehearing en banc the remand opinion, which have now been denied,[3] the Eleventh Circuit affirmed summary judgment granted in a case brought by the City of Miami Gardens. Meanwhile, other non-municipal fair lending plaintiffs have appeared on the scene.

Both the U.S. Department of Housing and Urban Development ("HUD") and the U.S. Department of Justice ("DOJ") were active in filing enforcement actions against alleged racial and national origin discrimination and to protect servicemembers' rights. HUD also published a proposed rule to clarify what must be

* 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. *See* John L. Ropiequet & L. Jean Noonan, *Fair Lending Developments: Wrestling with Causation*, 74 Bus. Law. 609, 609–10 (2019) (in the 2019 *Annual Survey*) [hereinafter *Fair Lending 2019*]; John L. Ropiequet & L. Jean Noonan, *Fair Lending Developments: The End of an Era?*, 73 Bus. Law. 543, 543–48 (2018) (in the 2018 *Annual Survey*) [hereinafter *Fair Lending 2018*]; John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: Standing to Sue Takes the Floor*, 72 Bus. Law. 549, 551–53 (in the 2017 *Annual Survey*); John L. Ropiequet, Christopher S. Naveja & L. Jean Noonan, *Fair Lending Developments: A Continuation and a New Beginning*, 70 Bus. Law. 625, 635–36 (2015) (in the 2015 *Annual Survey*).

2. 137 S. Ct. 1296 (2017).

3. Order, City of Miami v. Bank of Am. Corp., No. 14-14543-CC (11th Cir. Aug. 26, 2019); Order, City of Miami v. Wells Fargo & Co., No. 14-14544-CC (11th Cir. Aug. 26, 2019). *See Fair Lending 2019*, *supra* note 1, at 610 n.9.

alleged and proven in cases seeking recovery under the Fair Housing Act ("FHA")[4] for disparate impact claims.

The Eleventh Circuit's Remand Ruling

Almost two years after the Supreme Court ruled in *City of Miami* that the Eleventh Circuit erred in adopting a foreseeability standard for discrimination claims under the FHA and remanded for further consideration, the Eleventh Circuit's remand opinion was finally handed down in *City of Miami v. Wells Fargo & Co.*[5] As noted in the previous *Survey*,[6] no decision was forthcoming from the Eleventh Circuit, even though the two defendant banks filed motions to remand several months after the Supreme Court's ruling. While the court subsequently requested briefing on "the meaning of direct, proximate causation under the Fair Housing Act" and "how this Court should proceed" after that,[7] no oral argument was set, and the *Wells Fargo* ruling appeared more than one year later.

The *Wells Fargo* court began its analysis of the allegations of the amended complaints[8] in "[t]his pair of ambitious fair housing lawsuits" against Wells Fargo & Co. ("Wells Fargo") and Bank of America Corp. ("Bank of America") by noting that the Supreme Court had "disagreed with this panel" on the proximate cause issue "but reached no firm conclusions."[9] The court observed that "[w]hile the Court was clear that foreseeability was not enough, it was less definitive when it came to laying out what more FHA proximate cause requires."[10] Thus, the *Wells Fargo* court "endeavor[ed] carefully to apply the Court's mandate to these complaints, to determine if they plausibly state a claim under the Fair Housing Act."[11]

The *Wells Fargo* court found that the Supreme Court's instructions required that in addition to foreseeability, proximate cause includes "some direct relation between the injury asserted and the injurious conduct alleged."[12] This led to a conclusion that "direct relation" is a broader concept than "direct causation," so an intervening step in the causal chain would not necessarily vitiate proximate cause.[13] The court rejected the banks' contention that only the "first step" in the causal chain after a violative act would carry FHA liability because the *City of Miami* Court's statement that "[t]he general tendency in these cases . . . is not

4. Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–31 (2018)).

5. 923 F.3d 1260 (11th Cir. 2019), *reh'g denied*, Nos. 14-14543-CC, 14-14544-CC (11th Cir. Aug. 26, 2019), *petitions for cert. docketed,* Nos. 19-675 (U.S. Nov. 26, 2019), 19-688 (U.S. Nov. 27, 2019).

6. *See Fair Lending 2019*, *supra* note 1, at 610.

7. Order, City of Miami v. Bank of Am. Corp., No. 14-14543-CC (11th Cir. Feb. 28, 2018).

8. The court analyzed the same first amended complaints on which the Supreme Court had based its ruling, even though later amended complaints had been filed in the district court during the course of the prolonged appeal process. *Wells Fargo*, 923 F.3d at 1266 n.2.

9. *Id.* at 1270.

10. *Id.*

11. *Id.* at 1271.

12. *Id.* at 1272 (citing Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017)).

13. *Id.* at 1273 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)).

to go beyond the first step" was "not the same as a hard and fast rule that dictates the outcome in every case."[14] In particular, the *Wells Fargo* court stated that if there were such a "first step" rule, "there would have been no reason for the Supreme Court to remand this case back to our Court for further proximate cause analysis" because the case "would be over at the pleading stage."[15] The *Wells Fargo* court further observed that the banks' proposed first-step limit on FHA liability could even prevent a plaintiff homeowner from pursuing an FHA claim because when the middle step of the homeowner's default was counted in the causal chain, there were two steps between the act of redlining or reverse redlining and foreclosure.[16]

In line with the *City of Miami* Court's instruction to consider "the nature of the statutory cause of action," the *Wells Fargo* court examined the FHA's "broad remedial purpose."[17] The starting point was the Supreme Court's holding that "[t]he injury to the City is as valid and as cognizable under the FHA as the injury to the homeowner."[18] While the FHA's legislative history was limited, it persuaded the *Wells Fargo* court that "[t]he legislation, as the sponsors saw it, was designed to extend through chains of causation" to reach the many societal ills of the housing market caused by discrimination, including "harm to a city's tax base."[19]

A final consideration was "what is administratively possible and convenient,"[20] using the factors listed by the Supreme Court in *Holmes v. Securities Investor Protection Corp*.[21] Applying these factors, the *Wells Fargo* court found that Miami's claims for lost property tax revenue were recoverable, while its claims for increased municipal expenses due to foreclosures were not. Miami's amended complaints described in detail how a hedonic regression analysis of tax records could control for other variables and isolate the effect of redlining in a non-speculative and non-conclusory fashion.[22] The "aggregative nature" of Miami's claims on a citywide basis "also help[ed] eliminate any discontinuity between the statutory violation and the injury."[23] The court took note of the fact that district courts in *City of Oakland v. Wells Fargo Bank, N.A.* and *City of Philadelphia v. Wells Fargo Bank, N.A.* reached the same conclusion.[24]

14. *Id.*

15. *Id.* at 1276. The concurring and dissenting justices in *City of Miami* would have found that the case should have been dismissed because the claimed injuries were too remote in the causal chain on the face of the complaint. *City of Miami*, 137 S. Ct. at 1311–12; *see Fair Lending 2018*, *supra* note 1, at 546–47.

16. *Wells Fargo*, 923 F.3d at 1276.

17. *Id.* at 1278 (citing *City of Miami*, 137 S. Ct. at 1306).

18. *Id.* at 1279 (citing *City of Miami*, 137 S. Ct. at 1303).

19. *Id.* at 1280.

20. *Id.* at 1281 (citing *City of Miami*, 137 S. Ct. at 1306).

21. 503 U.S. 258, 268 (1992).

22. *Wells Fargo*, 923 F.3d at 1283.

23. *Id.* at 1284 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139–40 (2014)).

24. *Id.* at 1284–85 (citing City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321, 2018 WL 3008538 (N.D. Cal. June 15, 2018); City of Philadelphia v. Wells Fargo & Co., No. 17-cv-2203 (E.D. Pa. Jan. 16, 2018)); *see Fair Lending 2019*, *supra* note 1, at 612–13, 615–16.

However, the claims for increased municipal police, fire, and building code expenses for dealing with foreclosed properties lacked such allegations to support them. The *Wells Fargo* court found that for these claims, there was nothing in the complaints that provided similar direct connections between the banks' allegedly discriminatory acts and the city's injuries and that would allow a court to "ascertain with any level of detail or precision which expenditures w[ould] be attributable to the Banks."[25]

With respect to the other *Holmes* factors, the *Wells Fargo* court found that Miami's damage claims would not overlap or duplicate any claims of injury that homeowners might bring, so there was no danger of a double recovery.[26] In addition, it found that the city was far better suited than more directly injured homeowners to effectively pursue the banks' alleged FHA violations and deter future misconduct.[27]

The banks promptly filed petitions for rehearing. Wells Fargo's petition argued, among other things, that the court's proximate cause analysis based on a "logical bond" between the violative conduct and the claimed injury did not comport with the Supreme Court's requirement that "direction relation" be alleged,[28] and that the "several links" involved in the causal chain took the case outside the Supreme Court's boundaries.[29] Bank of America's petition also took issue with the *Wells Fargo* court's "logical bond" analysis.[30] The petitions were denied in August 2019,[31] and the many municipal cases that were stayed pending the *City of Miami* decision on remand[32] may now have their stays lifted.

The Eleventh Circuit's Ruling in *City of Miami Gardens*

By contrast, the Eleventh Circuit ruled with alacrity in affirming the summary judgment granted in *City of Miami Gardens v. Wells Fargo & Co.*,[33] which was discussed in the previous *Annual Survey*,[34] just six weeks after hearing oral argument. The court took a very thorough look at the city's evidence of alleged discrimination in the summary judgment record and concluded that Miami Gardens failed to meet its burden to establish subject matter jurisdiction. Accordingly, it found that the district court should have dismissed the case for lack of jurisdiction.

The *Miami Gardens* court first disconnected the issue of standing to sue from the issue of the statute of limitations, ruling that the first question was whether a

25. *Wells Fargo*, 923 F.3d at 1285–86.
26. *Id.* at 1287.
27. *Id.* at 1289.
28. Petition for Panel Rehearing and Rehearing En Banc at 7, City of Miami v. Wells Fargo & Co., No. 14-14544 (11th Cir. May 24, 2019).
29. *Id.* at 8–9.
30. Petition for Rehearing En Banc at 8–10, City of Miami v. Bank of Am. Corp., No. 14-14543 (11th Cir. May 24, 2019).
31. Order, City of Miami v. Bank of Am. Corp., No. 14-14543-CC (11th Cir. Aug. 26, 2019); Order, City of Miami v. Wells Fargo & Co., No. 14-14544-CC (11th Cir. Aug. 26, 2019).
32. *See Fair Lending 2019*, *supra* note 1, at 610 n.9.
33. 328 F. Supp. 3d 1369 (S.D. Fla. 2018), *vacated & remanded*, 931 F.3d 1274 (11th Cir. 2019).
34. *See Fair Lending 2019*, *supra* note 1, at 610–12.

discriminatory Wells Fargo mortgage loan caused it an injury, with the timeliness of the city's complaint being a separate issue.[35] The court focused on one pair of loans that the city asserted showed standing and found standing to be "insufficient" because the possibility that the loan to the minority borrower in the pairing might someday go into foreclosure showed no "impending risk" of injury to the city's "property values, property-tax revenues, or municipal spending."[36] In addition, the court pointedly observed that the city had never performed a hedonic regression analysis to show a causal connection by isolating the injuries allegedly caused by Wells Fargo's foreclosures and could not do so "in light of the paucity of allegedly discriminatory loans identified by the City."[37] Other loans that the city pointed to also lacked any evidence showing an injurious effect on the city or that they were "issued on discriminatory terms."[38]

The concurring opinion began its detailed analysis of the shortcomings of Miami Gardens' evidence by stating that "it would be difficult to overstate how misguided this litigation has proved to be."[39] Among other problems, the concurrence found that the city's expert's efforts to mathematically control for variables to sustain the city's claims of discriminatory loan pricing, even if it were permissible to do so, did not establish the necessary discriminatory intent by Wells Fargo for the city's disparate treatment theory.[40] The concurrence further found that the evidence contradicted that theory because non-minority borrowers were charged more than minority borrowers in some cases, which should not happen "[i]f Wells Fargo priced membership in a minority race or ethnicity into its loans" in a systematic fashion.[41] The concurrence also examined the city's evidence to determine whether it would support a disparate impact claim, and similarly found it wanting.[42]

Other Fair Lending Litigation

The previous *Survey* also reported on a decision granting and denying a motion to dismiss in *National Fair Housing Alliance v. Federal National Mortgage Association*,[43] in which a group of community organizations alleged that the defendant discriminatorily neglected to maintain foreclosed properties in minority neighborhoods. The plaintiffs filed an amended complaint that also was the subject of a motion to dismiss.[44] The court issued a notice of tentative ruling granting the

35. *Miami Gardens*, 931 F.3d at 1283.
36. *Id.* (citing Clapper v. Amnesty Int'l, 568 U.S. 398, 409 (2013)).
37. *Id.* at 1284.
38. *Id.*
39. *Id.* at 1288 (Pryor, J., concurring).
40. *Id.* at 1294.
41. *Id.* at 1295.
42. *Id.* at 1297.
43. 294 F. Supp. 3d 940 (N.D. Cal. 2018); *see Fair Lending 2019*, *supra* note 1, at 616–17.
44. Motion to Dismiss Amended Complaint, Nat'l Fair Hous. Alliance v. Fed. Nat'l Mortg. Ass'n, No. C 16-06969 JSW (N.D. Cal. May 11, 2018).

motion in part and denying it in part, which did not state which parts of the amended complaint were dismissed or the grounds for the decision.[45] Instead, the court posed questions for the parties to address at an oral argument set for two days later, inquiring how the plaintiffs could claim disparate treatment with respect to maintenance decisions delegated to "lower-level agents and employees," whether that claim was based on intentional discrimination or only deliberate indifference, which new facts in the amended complaint supported an inference of racial animus, and how the defendants distinguished another district court decision.[46] The court has not issued a final ruling as of this writing.

In *Connecticut Fair Housing Center v. Liberty Bank*,[47] the plaintiff organization filed a complaint alleging that the bank engaged in redlining minority mortgage loan applicants. The bank allegedly maintained "gerrymandered CRA assessment areas" in the Hartford metropolitan area, generated "significantly fewer applications for credit from majority-non-white neighborhoods than its competitors," denied mortgage loans to minority applicants "at a substantially higher rate" than its competitors, and made statements that discouraged minority borrowers from applying for credit.[48] Shortly after answering the complaint, the bank entered into a settlement agreement, the terms of which were not filed of record with the court.[49] The plaintiff organization announced that the settlement resulted in "more than $16 million dollars in access to credit, homeownership subsidies, and economic development loans into low and moderate income communities of color" for both homeowners and small businesses, and that the bank would "open a loan production office in a neighborhood that continues to be underserved by banking institutions."[50] The settlement made $10 million available to minority borrowers at below-market rates, expanded the bank's community development program by $5 million, set up a fund of $300,000 to promote home ownership, and made grants of $200,000 to community organizations.[51]

45. Notice of Tentative Ruling and Questions, Nat'l Fair Hous. Alliance v. Fed. Nat'l Mortg. Ass'n, No. C 16-06969 JSW (N.D. Cal. Oct. 31, 2018).

46. *Id.* at 2; *see* Burke v. Fed. Nat'l Mortg. Ass'n, 221 F. Supp. 3d 707, 710 (E.D. Va. 2016).

47. Complaint, Conn. Fair Hous. Ctr. v. Liberty Bank, No. 3:18-cv-01654-AVC (D. Conn. Oct. 4, 2018).

48. *Id.* at 3. Under the Community Reinvestment Act, 29 U.S.C. § 2903(a), and Regulation BB, 12 C.F.R. § 228.41(a), financial institutions are responsible for delineating the assessment area or areas that financial regulators will take into account when determining whether the institutions have adequately met the credit needs of the communities they serve, including low- and moderate-income neighborhoods.

49. Stipulation to Dismiss, Conn. Fair Hous. Ctr. v. Liberty Bank, No. 3:18-cv-01654-AVC (D. Conn. Feb. 28, 2019).

50. *See* Fionnuala Darby-Hudgens, *A Historic Fair Lending Settlement for Connecticut Residents*, CONN. FAIR HOUS. CTR.: BLOG (Mar. 4, 2019), https://www.ctfairhousing.org/a-historic-fair-lending-settlement-for-connecticut-residents.

51. *See* Kenneth R. Gosselin, *Fair Housing Advocates Hail Settlement with Liberty Bank in Lawsuit Alleging Racial Bias in Lending Practices*, HARTFORD COURANT (Mar. 4, 2019, 2:36 PM), https://www.courant.com/breaking-news/biz-liberty-bank-fair-housing-complaint-20190304-yvlurbk56za75cx2ymfricfq4m-story.html.

Fair Lending Enforcement Actions

Racial and National Origin Discrimination Cases

HUD initiated a housing discrimination complaint against Facebook, Inc. ("Facebook") for violations of the FHA. The complaint alleged that Facebook unlawfully discriminated by providing a platform that allowed advertisers to restrict which users would receive housing-related ads based on race, color, religion, sex, familial status, national origin, and disability.[52] HUD alleged that Facebook then permitted advertisers to express unlawful preferences by offering discriminatory options under the guise of "targeted advertising," which would allow advertisers to effectively limit housing options for these protected classes.[53] After an investigation, HUD announced that it was charging Facebook with violating the FHA in March 2019.[54]

According to the charge, Facebook provides advertisers with tools to define which users—or which types of users—they would like to see their ads. It allegedly offers search boxes that can restrict individuals based on language or exclude or include them based on specified attributes.[55] To group users by shared attributes, Facebook allegedly "combines data it has about user attributes and behaviors from its platforms and data obtained about user behavior on other websites and in the non-digital world," and it "then uses machine learning and other prediction techniques to classify and group users so as to project each user's likely response to a given ad."[56] In so doing, Facebook allegedly recreates arrays of individuals defined by their protected class.[57] The charge required Facebook's agents and employees to attend training addressing the FHA's prohibitions against discrimination in advertising. The charge was to be heard by an administrative judge, and the final outcome is pending as of this writing.

HUD reached a conciliation agreement resolving claims for violations of the FHA brought by three homeowners—one couple and one individual—against LoanDepot.com, LLC ("LoanDepot") and Appraisal Management Services of America, Inc. ("Appraisal Management"). HUD alleged that LoanDepot, as the lender, refused to refinance the loans because the homeowners were on Native American lands. One of the homeowners also claimed that LoanDepot would not refinance his house because he was Native American.[58] Under terms of the conciliation

52. Complaint at 2, U.S. Dep't of Hous. & Urban Dev. v. Facebook, Inc. (Aug. 13, 2018), https://www.hud.gov/sites/dfiles/PIH/documents/HUD_01-18-0323_Complaint.pdf.

53. *See* Press Release, U.S. Dep't of Housing & Urban Dev., HUD Files Housing Discrimination Complaint Against Facebook (Aug. 17, 2018), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085.

54. *See* Press Release, U.S. Dep't of Housing & Urban Dev., HUD Charges Facebook with Housing Discrimination over Company's Targeted Advertising Practices (Mar. 28, 2019), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035.

55. Charge of Discrimination at 4, U.S. Dep't of Hous. & Urban Dev. v. Facebook, Inc., No. 01-18-0323-8 (Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

56. *Id.* at 5.

57. *Id.*

58. Conciliation Agreement at 2–3, U.S. Dep't of Hous. & Urban Dev. (Sept. 4, 2018), https://www.hud.gov/sites/dfiles/FHEO/documents/18CA.pdf.

agreement, LoanDepot agreed to pay $60,000, half to each homeowner. It also agreed to fund a $40,000 loan subsidy program for the benefit of prospective borrowers on Native American reservations. In addition, LoanDepot will provide a minimum of $80,000 each year, and $240,000 over the course of the agreement, to support outreach programs that improve housing conditions or support or partner with organizations that provide credit, financial, homeownership, or foreclosure-prevention education to Native Americans on and around reservations.[59] LoanDepot is required to revise its policies on underwriting of home mortgage loans on reservation land. Appraisal Management will be required to revise its policies regarding appraisals for mortgages on homes located on reservations and will have to contract with appraisers who are not prohibited from conducting appraisals on reservations.[60]

The DOJ filed a complaint against Advocate Law Groups of Florida, P.A., and its principals, alleging violations of the FHA and seeking redress for a pattern or practice of housing discrimination and for discrimination that raises an issue of general public importance.[61] The DOJ alleged that the defendants "deliberately targeted Complainants and other homeowners because of their Hispanic national origin for a scheme involving unfair and predatory loan modifications and foreclosure rescue services."[62] It claimed that the defendants instructed the complainants to stop making their mortgage payments and communicating with their mortgage servicer. The defendants allegedly collected upfront fees and charges of between $8,420 to $13,500 from each complainant but failed to provide the services they had been hired to perform.[63] The case remains pending as of this writing on a motion to dismiss that the defendants filed in December 2018.[64]

In June 2019, the DOJ filed a complaint against First Merchants Bank for violations of the FHA and the Equal Credit Opportunity Act.[65] From 2011 to at least 2017, the bank allegedly engaged in unlawful redlining of majority African-American areas of Indianapolis-Marion County by avoiding and otherwise failing to provide mortgage credit services on the basis of race.[66] The DOJ alleged that the bank's policies and procedures intentionally denied residents in majority African-American census tracts equal access to real estate-related credit.[67] The DOJ found, among other things, that the bank redlined majority African-American areas within the Indianapolis-Carmel-Anderson Metropolitan Statistical Area

59. *Id.* at 5–9.

60. *Id.* at 9.

61. Complaint at 1–2, United States v. Advocate Law Grps. of Fla., P.A., No. 6:18-cv-01836 (M.D. Fla. Oct. 29, 2018), https://www.justice.gov/crt/case-document/file/1106471/download.

62. *Id.* at 4.

63. *Id.* at 7–19.

64. Motion to Dismiss and for More Definite Statement, United States v. Advocate Law Grps. of Fla., P.A., No. 6:18-cv-01836 (M.D. Fla. Dec. 28, 2018).

65. Pub. L. No. 43-495, tit. V, 68 Stat. 1500, 1521–25 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2018)).

66. Complaint at 4, United States v. First Merchs. Bank, No. 1:19-cv-02365 (S.D. Ind. June 13, 2019), https://www.justice.gov/crt/case-document/file/1174041/download.

67. *Id.* at 1–2.

("MSA") by excluding Indianapolis-Marion County from the bank's Community Reinvestment Act assessment area while including overwhelmingly white counties; that it had a disproportionately low number of loan applications from majority African-American neighborhoods compared with its peer institutions; that it declined to market in majority African American areas; and that it neglected to have any branch locations in majority African American areas.[68]

Under the settlement, the bank will be required to invest $1.12 million in a special subsidy fund to be used to increase credit opportunities to residents of predominantly African American neighborhoods in Indianapolis-Marion County; devote $500,000 toward advertising, community outreach, and credit repair and consumer financial education; and open a full-service branch and a loan production office to serve the banking and credit needs of residents in predominantly African-American neighborhoods in Indianapolis.[69]

Servicemember Discrimination Cases

In a case involving home foreclosures, the DOJ reached a settlement of claims under the Servicemembers Civil Relief Act ("SCRA")[70] in January 2018 with Northwest Trustee Services Inc. ("Northwest"), a trustee company that provided default services to mortgage lenders in the western United States. The amended complaint alleged that Northwest foreclosed at least twenty-eight homes owned by servicemembers who took out mortgage loans prior to entering military service without court orders.[71] Under terms of the settlement agreement, Northwest must pay each aggrieved servicemember up to $125,000 for a total payout of no more than $750,000.[72] This was the DOJ's first SCRA lawsuit against a foreclosure trustee company.[73]

The DOJ reached a settlement with Hudson Valley Federal Credit Union ("HVFCU"), one of the largest credit unions in the country, in November 2018.[74] The DOJ alleged that HVFCU engaged in a pattern or practice of violating the SCRA by repossessing protected servicemembers' motor vehicles without

68. *Id.* at 4–5.

69. Settlement Agreement and Agreed Order at 10–15, United States v. First Merchs. Bank, No. 1:19-cv-02365 (S.D. Ind. June 13, 2019), https://www.justice.gov/crt/case-document/file/1174051/download (proposed order); *see also* Order, United States v. First Merchs. Bank, No. 1:19-cv-02365 (S.D. Ind. Aug. 12, 2019), https://www.justice.gov/crt/case-document/file/1193966/download (approving settlement as lawful, fair, reasonable, and adequate).

70. Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified as amended at 50 U.S.C. §§ 3901–4013 (2018)).

71. Amended Complaint at 1, United States v. Nw. Tr. Servs., Inc., No. 2:17-cv-01686 (W.D. Wash. Jan. 8, 2018), https://www.justice.gov/crt/case-document/file/1026976/download.

72. Settlement Agreement at 4–5, United States v. Nw. Tr. Servs., Inc., No. 2:17-cv-01686 (W.D. Wash. Sept. 24, 2018), https://www.justice.gov/crt/case-document/file/1097761/download.

73. *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Northwest Trustee Services of Bellevue, Washington, for Illegally Foreclosing on Servicemembers' Homes (Sept. 27, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-northwest-trustee-services-bellevue-washington.

74. Stipulation of Settlement, United States v. Hudson Valley Fed. Credit Union, No. 7:18-cv-10195 (S.D.N.Y. Nov. 2, 2018), https://www.justice.gov/crt/case-document/file/1108646/download [hereinafter Hudson Valley Settlement].

obtaining court orders.[75] As a part of the settlement, HVFCU will pay $65,000 to compensate seven servicemembers whose cars were unlawfully repossessed. It will also pay a civil penalty of $30,000. To alleviate the negative impacts of wrongful credit reporting of repossessions, HVFCU is required to continue to seek credit repair from all three major credit bureaus and any other credit bureaus to which it directs its reports. In addition, the credit union will have to provide ongoing annual SCRA compliance training to all its collections and lending employees.[76]

The DOJ sued California Auto Finance ("CAF"), which specializes in subprime auto lending, for allegedly repossessing servicemembers' motor vehicles without obtaining court orders while they were on active duty in violation of the SCRA.[77] Under the consent order, CAF is required to adopt new repossession policies, pay one servicemember $30,000, take steps to repair the credit of servicemembers affected, and pay a civil penalty of $50,000.[78] The $30,000 award is the highest amount obtained by the DOJ for a single servicemember in an automobile repossession case.[79]

The DOJ settled SCRA allegations with Nissan Motor Acceptance Corp. ("NMAC") for repossessing vehicles of covered servicemembers without court orders and failing to refund all fees paid in advance by covered servicemembers who terminated their auto leases early.[80] The parties resolved the matter through a settlement agreement and moved jointly to dismiss the complaint.[81] NMAC created a settlement fund of $2,937,971 and paid $62,029 to the U.S. Treasury.[82]

HUD Proposed Disparate Impact Rule

HUD published a proposed rule to amend its interpretation of the FHA's disparate impact standard.[83] The proposed rule provides guidance on what constitutes unlawful disparate impact to better reflect the Supreme Court's 2015 ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities*

75. Complaint at 1, United States v. Hudson Valley Fed. Credit Union, No. 7:18-cv-10195 (S.D.N.Y. Nov. 2, 2018), https://www.justice.gov/crt/case-document/file/1108396/download.

76. Hudson Valley Settlement, *supra* note 74, at 6–11.

77. Complaint at 1–2, United States v. Cal. Auto Fin., No. 8:18-cv-00523 (C.D. Cal. June 14, 2018), https://www.justice.gov/crt/case-document/file/1047371/download.

78. Consent Order at 7–11, United States v. Cal. Auto Fin., No. 8:18-cv-00523 (C.D. Cal. Mar. 12, 2019), https://www.justice.gov/crt/case-document/file/1142566/download.

79. *See* Press Release, U.S. Dep't of Justice, Justice Department Obtains $80,000 Settlement Against Subprime Auto Lender in Orange County, California, for Illegally Repossessing Servicemembers' Cars (Mar. 6, 2019), https://www.justice.gov/opa/pr/justice-department-obtains-80000-settlement-against-subprime-auto-lender-orange-county.

80. Settlement Agreement at 1–2, United States v. Nissan Motor Acceptance Corp., No. 3:19-cv-00658 (M.D. Tenn. Aug. 20, 2019).

81. *Id.* at 26.

82. *Id.* at 16–17, 23.

83. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854–63 (Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100) [hereinafter Disparate Impact Rule]; *see* 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*).

Project, Inc.[84] The proposed rule also provides clarification regarding the application of the standard to state laws governing the business of insurance.[85]

The scope provision of the proposed amended rule states:

> Allegations of unlawful housing discrimination under this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, and defenses and rebuttals to such allegations may be made, consistent with the standards outlined in § 100.500.[86]

Stating a prima facie case of discriminatory effects requires plausible allegations of each of the following elements:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

(3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct link between the disparate impact and the complaining party's alleged injury.[87]

Defendants can counter a disparate impact claim by establishing that their discretion to act is "materially limited by a third party" such as a statute or court order or that their model or risk assessment algorithm that allegedly caused discrimination meets certain standards.[88] The proposed rule also sets forth the plaintiff's and the defendant's burdens of proof.[89]

84. 135 S. Ct. 2507 (2015); *see* Disparate Impact Rule, *supra* note 83, at 42854.
85. *See* Disparate Impact Rule, *supra* note 83, at 42854.
86. *Id*. at 42862 (to be codified at 24 C.F.R. § 100.5(b)).
87. *Id*. (to be codified at 24 C.F.R. § 100.500(b)(1)–(5)).
88. *Id*. (to be codified at 24 C.F.R. § 100.500(c)(1)–(2)).
89. *Id*. at 42862–63 (to be codified at 24 C.F.R. § 100.500(d)).