# Banking and Finance Law Daily Wrap Up, TOP STORY—11th Cir.: Miami wins battle in predatory mortgage suit against nationwide banks, (Sept. 2, 2015)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

The U.S. Court of Appeals for the Eleventh Circuit has overturned the dismissal of Miami's suit claiming that Bank of America, Citigroup, and Wells Fargo harmed the city through what was termed "a decade-long pattern of discriminatory lending in the residential housing market." Three separate opinions—one resolving the same issues against each of the three banking organizations—said that the city could sue the banks under the Fair Housing Act, had described injuries caused by the claimed violations, and could rely on the continuing violation doctrine to extend statutes of limitations that otherwise would have ended the suits (*City of Miami v. Bank of America Corp.*, *City of Miami v. Citigroup, Inc.*, *City of Miami v. Wells Fargo & Co.*, Sept. 1, 2015, Marcus, S.).

**Pattern of predatory lending.** As described by the opinions, Miami's complaints claimed the three banks engaged both in redlining—which the opinion described as refusing to make loans to minority borrowers on the same terms that were available to nonminority borrowers—and reverse redlining—which was described as making loans to minority borrowers on exploitative terms. The banks refused to make loans to minority borrowers on terms similar to those available to white borrowers with comparable credit qualifications, offered loans only on predatory terms, and refused to extend refinancing loans to minority borrowers on terms similar to those available to white borrowers, Miami claims.

The city added that the banks' loan officer compensation practices encouraged these practices. In the case of Bank of America and Wells Fargo, the city offered confidential witnesses who gave evidence describing how the banks' executives led loan officers to target minority borrowers for more expensive, high-risk loans.

Statistical data also were offered to establish that minority borrowers paid more for loans than comparable white borrowers and were more likely to go into foreclosure.

**Claimed FHA violations.** The banks' lending practices violated the FHA in two ways, the city said. First, they amounted to intentional discrimination against black and Hispanic borrowers. Second, they had a disparate impact on those borrowers, resulting in a disproportionate number of foreclosures on their properties and a disproportionate number of predatory loans in their neighborhoods.

Miami claimed several types of damages from the violations. Properties that the banks foreclosed on lost value, and the foreclosures also reduced the value of surrounding properties, the city said. This resulted in reduced property tax revenues. Also, the city had to pay higher police, fire protection, and garbage collection costs to deal with problems presented by the often vacant properties that had been foreclosed on.

**Trial court results.** The federal district court judge to whom the cases were assigned dismissed all three (see *Banking and Finance Law Daily*, July 10, 2014). The judge offered the same reasoning in each case:

- Miami did not have statutory standing to sue under the FHA because it was not within the law's zone of interests.
- Miami had not described any injuries that were proximately caused by the banks' activities.
- The alleged violations all were outside of the FHA's two-year statute of limitations, and the city had not described any violations within that two-year span.

After the judge rebuffed its effort to amend the complaints to address the deficiencies, the city appealed.

**Constitutional standing.** Before addressing the district court judge's decisions, the appellate court first considered whether the city had standing to sue under Article III of the U.S. Constitution. Article III standing goes to the question of subject matter jurisdiction and thus had to be considered even though the district court judge had dismissed the suits on other grounds, the appellate court said.

For Miami to have Article III standing to sue the banks it had to demonstrate three factors: that it had suffered an injury in fact; that the injury had been caused by the banks' actions; and that the court had the ability to impose a remedy for that injury. The banks disputed the second factor.

The city had described an injury that was "fairly traceable" to the claimed FHA violations, the appellate court decided. Despite the banks' assertions that other factors caused the foreclosures and resulting neighborhood deterioration—such as the housing market decline and vandalism—the city's chain of causation was plausible enough to describe causation.

Proving causation of the injuries might be difficult, the court conceded, but that was an issue for a later time.

**Zone of interests.** A person whose interests fall within the zone of interests that a law is intended to protect can sue for a violation of that law, the appellate court said. Some laws protect a broader range of interest than others. The question was whether Miami's interests were within the zone of interests that Congress intended the FHA to protect. Using the act's terminology, was Miami an "aggrieved person"?

After reviewing more than 40 years of precedent, the court decided the city was an aggrieved person. While the zone of interests to be protected by the FHA perhaps is unclear, it should be interpreted to be as broad as is permitted under Article III of the Constitution, the court decided. Recent decisions by the U.S. Supreme Court might hint that the zone of interests is narrower, but they did not clearly overrule contrary direct precedent because they interpreted other laws.

Since Miami had described Article III standing, and the FHA's zone of interests was the same as Article III standing, the city's interests were within the act's zone of interests, the court reasoned.

**Proximate causation.** The district court was correct in saying that proximate causation is required by the FHA, the court said. However, the city's claims were sufficient to satisfy the requirement.

Contrary to Miami's argument, the city had to do more than just satisfy the Article III requirement that it describe an injury that was fairly traceable to the predatory lending pattern that it was complaining about. A suit under the FHA is akin to a tort suit, which would require that proximate cause be shown, the court said.

The city claimed that the predatory lending practices caused it to lose tax revenue and forced it to increase its expenditures. The banks claimed that such damages would have been at most indirectly caused, not proximately caused, by the lending practices. The court disagreed with the banks.

While proximate cause is difficult to define precisely, what it requires depends on the statute in question, the court observed. Requiring the city to prove a direct relationship between the banks' lending practices and the city's injuries would be inconsistent with the FHA, which was to be interpreted broadly to facilitate the accomplishment of its purposes.

The proper standard under the FHA is foreseeability, the court then said. If the banks were engaging in a pattern of predatory lending, as the city claimed, they would reasonably have been able to foresee that their actions would cause the injuries the city described. There might be several links in the city's chain of causation, but none of those links were unforeseeable, the court said.

**Continuing violation.** The FHA has a two-year statute of limitations that begins to run on the date a loan is closed. Since the suit was filed on Dec. 13, 2013, that ordinarily would mean a suit could be only address loans that closed after Dec. 13, 2011. None of the loans specifically described in any of the city's three complaints were alleged to have satisfied the requirement.

According to the appellate court, Miami conceded that its original complaints did not satisfy the time limit. However, the city argued that it should be permitted to file an amended complaint that would do so. The district

court judge never ruled on the adequacy of the proposed amended complaint because, he believed, his zone of interests and proximate cause rulings made doing so unnecessary.

Having reversed those rulings, the appellate court instructed the district court judge to consider whether the City's proposed amended complaint would satisfy the statute of limitations issue by describing a continuing violation. The court also decided to provide "guidance" to help the judge in his deliberations.

Miami should be allowed to sue under a continuing violation theory as long as a single act of discrimination that was part of a discriminatory policy occurred within the two-year time limit, the appellate court advised the district court judge. The city's case was not based on a single act of discrimination, but rather on alleged longstanding unlawful lending practices that extended into the limitations period. While the specific factors that made the loans discriminatory might have changed over time, "The fact that the burdensome terms have not remained perfectly uniform does not make the allegedly unlawful practice any less 'continuing'," the court said.

The city was to be allowed to amend its complaint, the appellate court instructed the judge, and the statute of limitations issue should be considered after that.

**Unjust enrichment.** Miami also asserted a more creative claim for unjust enrichment. According to the city's theory, the banks received the benefits of city services and laws that allowed them to operate profitably in the city; however, as a result of their lending practices, they enjoyed those services while denying the city its expected tax benefits.

The appellate court, noting the lack of any precedent under Florida law, agreed that the district court judge was right to dismiss the claim. First, tax revenue the city did not receive was not a benefit conferred on the banks.

Second, the claim for extra services the city was forced to provide did not describe a benefit that fell under an unjust enrichment theory, and the services were not conferred directly on the banks. Moreover, as the banks were legally entitled to any city services they received, the city could not argue that it was inequitable for the banks to have accepted those services.

**Similar litigation.** Los Angeles has filed comparable suits against some of the same banking organizations. A 2014 federal district court decision has allowed the city to proceed with its claims against Citigroup (see *Banking and Finance Law Daily*, June 11, 2014).

On the other hand, a recent, scathing decision utterly rejected Los Angeles's claims against Wells Fargo, relying on the Supreme Court decision in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* to determine that the city had failed to prove the bank had a policy that resulted in discrimination or that there was a statistical relationship between the bank's lending practices and any alleged discrimination (see *Banking and Finance Law Daily*, July 21, 2015).

The Eleventh Circuit noted that the *Inclusive Communities Project* decision could apply to Miami's suit but did not offer an opinion on how the decision could affect the suit.

The cases are No. 14-14543 (against Bank of America), No. 14-14544 (against Wells Fargo), and No. 14-14706 (against Citigroup).

Attorneys: Steve W. Berman (Hagens Berman Sobol Shapiro, LLP) and Robert S. Peck (Center for Constitutional Litigation, PC) for City of Miami. Thomas Hefferon (Goodwin Procter, LLP) and Christopher Stephen Carver (Akerman, LLP) for Bank of America Corp., Bank of America, N.A., Countrywide Financial Corp., Countrywide Home Loans, and Countrywide Bank, FSB. Paul Francis Hancock (K&L Gates, LLP), and Carol Ann Licko (Hogan Lovells US, LLP) for Wells Fargo Bank & Co., and Wells Fargo Bank, N.A. Lucia Nale (Mayer Brown, LLP), and Benjamine Reid (Carlton Fields Jorden Burt, PA) for Citigroup Inc., Citibank, N.A., CitiMortgage, Inc., Citi Holdings, Inc., and Citicorp Trust Bank, FSB.

Companies: Bank of America Corporation; Bank of America, N.A.; Citibank, N.A.; Citicorp Trust Bank, FSB; Citigroup, Inc.; Citi Holdings, Inc.; Citimortage, Inc.; Countrywide Bank, FSB; Countrywide Financial Corp.; Countrywide Home Loans; Wells Fargo Bank, N.A.; Wells Fargo & Co.

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