

Miami's Supreme Court cases could change — or impede — paths to suing under the FHA

BY NINA LINCOFF

nlincoff@bizjournals.com
786-533-8214, @SFBJMoney

On Tuesday, Nov. 8, Miami Commissioner Francis Suarez, who represents the city's District 4, wasn't at a polling booth. He wasn't handing out "I Voted!/Yo Voté!" stickers to Miamians. He voted early and wasn't even in the city.



Francis Suarez

While many in Miami were focused on Election Day, Suarez was in Washington, D.C. He was at the U.S. Supreme Court, listening to oral arguments from Miami, Bank of America and Wells Fargo in cases that could determine whether or not big banks are liable for damages the city suffered during the foreclosure crisis.

And the court's decision could have major ramifications beyond Miami. If the Supreme Court decides that Miami's cases don't fall under the scope of the Fair Housing Act — Title VIII of the Civil Rights Act of 1968 — it could lead to obstacles when other municipalities, businesses and nonprofits try to bring cases. For an affordable housing developer or rehabilitation facility owner looking to put a project in a new neighborhood, should the neighborhood resist, a limited FHA could mean that the developer or owner has a slimmer chance of bringing a discrimination suit.

The Supreme Court, currently seating eight justices, heard arguments Nov. 8 in the consolidated cases *Bank of America Corp. v. City of Miami* and *Wells Fargo & Co. v. City of Miami*. The court won't decide a "winner;" it will simply decide whether the city has the right to bring these cases under the FHA, which bars discrimination when selling, renting or financing housing.

What's at stake may seem insignificant: Can Miami continue on with its cases and take on the big banks? After all, the city's

lawsuits had been dismissed by a federal trial court in 2014, then reinstated by the U.S. Court of Appeals for the 11th Circuit in 2015. But then the banks appealed that decision to the Supreme Court.

The ripple effect



Michael Masinter

"The claim in these cases is that the banks engaged in a kind of reverse redlining," said Michael Masinter, an attorney and professor at Nova Southeastern University's Shepard Broad College of Law in Davie. "Rather than refusing to lend to ... African-Americans, they were eager to do so, but at highly predatory rates, which led to defaults and the loss of property value and taxes."

For Masinter, Miami's cases hinge on that claim. But there's another, underlying, question, he said: "Whether, based on some intervening Supreme Court decision, you should narrow the class of people who can sue under the FHA."

And that's where municipalities, businesses and nonprofits should worry.

As it stands, people and entities can sue under the FHA if they can prove they were damaged by violations of the statute. But if the court decides that Miami can't sue, it could set a precedent that narrows the scope of the law and limits the ability of others to prosecute FHA claims.

On the flip side, if the court allows Miami's case to move forward, there could be an explosion of FHA cases, Masinter said. Local businesses damaged by the foreclosure crisis in Miami, such as hotels, may try to sue banks.

If a city can recover damages by measuring a drop in property values and taxes, Chief Justice John Roberts asked, why couldn't damages also be "measured by all sorts of things, including tourists [who] aren't going to want to visit it as much." If hotels or the city could link a drop in tourism to FHA violations, what's to stop them from filing a lawsuit? It's unclear what will happen if Miami's cases move on to discovery and a deluge of bank data is handed over to the city's attorneys. A

Supreme Court decision to allow the cases to move along will likely only set precedent for other municipalities with similar claims.

"They could see this repeated in thousands of cities across the U.S.," Masinter said.



Matthew Mandel

Attorney Matthew Mandel, chair of the Litigation Division of law firm Weiss Seroeta Helfman Cole & Bierman, has been involved in FHA cases, sometimes on the side of a municipality that is being sued for allegedly violating the FHA. But he also sees cases where businesses use the FHA to open rehabilitation facilities or group homes, for example.

"There [are] situations like when a business wants to locate a group home for people in recovery or people with disabilities, and then a city will push back," Mandel said. "The company will bring claims under the FHA and the Americans with Disabilities Act because they are dealing with a protected class."

Various cases have been cited by the city of Miami, but *Gladstone, Realtors v. Village of Bellwood* was heavily mentioned during the Nov. 8 arguments.

The Bellwood case is similar to Miami's in that a municipality sued; that case alleged a real estate company's leasing practices segregated the neighborhood. It reached the Supreme Court on appeal, and the court sided with Bellwood.

From Mandel's perspective, if Miami can show direct damage to property values, and then lost property taxes as a result of the banks' alleged behavior, then it has the right to continue.

"When damages are not speculative, that's something you can pursue," he said.

The road to the high court

For Suarez, a real estate attorney and candidate for mayor of Miami in 2017, the path to the Supreme Court began in 2013.

At that time, about five years had passed since the foreclosure and financial crisis hit, but the effects of the collapse were still being felt. South Florida was one of five U.S. regions hit hardest by the housing crisis, according to a 2015 city analysis, and Miami suffered financial losses due to plummeting property values and vacant homes.

"We're a city that had to basically declare bankruptcy for three consecutive years to get back on track," Suarez said. "We broke our union contracts, we had to do a variety of things that were very painful for our residents and employees to become solvent."

By 2013, two other cities — Memphis and Baltimore — had filed and resolved suits under the FHA, claiming damages from the allegedly discriminatory and predatory lending practices of Wells Fargo leading up to the foreclosure crisis. Those cases ended in multimillion-dollar concessions to the cities as part of a larger federal settlement.

The city of Miami noticed some of those alleged discriminatory and predatory lending patterns within its own borders, and that year filed complaints against Bank of America and Wells Fargo, claiming the city was damaged by the bank's lending practices, which targeted minorities like blacks and Hispanics, and ultimately led to scores of foreclosures.

The city alleged that bank data showed "African-American borrowers were 1.581 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics. Latino borrowers were 2.087 times more likely to receive such loans," according to a court document.

Both banks dispute the city's claims.

"We do not believe the city has standing under the Fair Housing Act to make the claims it has put forth in its lawsuits against Wells Fargo and other lenders," Wells Fargo said in a statement.

"[We] believe that a municipality seeking purely monetary recovery is not covered by the statute, and we welcome the Supreme Court's scrutiny and clarity," said Lawrence Grayson, a spokesman for Bank of America.

The crux of these cases is whether the city is covered by the FHA, and whether it can prove that damages were caused

by Bank of America's and Wells Fargo's lending practices — known in legalese as "zone of interests" and "proximate cause."



Neal K. Katyal

Attorney and Georgetown University law professor Neal K. Katyal presented arguments on behalf of the banks to the Supreme Court. He contends that, yes, sometimes cities can sue under the FHA. But "sometimes" is the operative word. "The answer can't be yes, always" and that "the answer can't be no, never," Katyal said during the Nov. 8 arguments. He declined to comment outside of his statements.



Robert S. Peck

"Miami suffered damages from the resources that it devoted to its fair housing efforts," Peck told the *Business Journal*. "That is something that the court has indicated is defensible."

The damages clock

Assigning specific damages to one or two banks when there are many factors at play is complicated — particularly because the FHA is an anti-segregation and -discrimination statute, and Miami itself is not 100 percent integrated. An analysis of census data shows different races in the city of Miami, and there are clear pockets of blacks, whites, Hispanics and more.



Charlton Copeland

Charlton Copeland said.

It turns out that Miami hasn't asked for a specific amount in damages.

"We mention the fact that we had lost millions — not hundreds of millions, no billions," Peck said, according to a court transcript.

It's not strange that Miami hasn't asked for a specific number. After all, if the case moves to discovery and city attorneys get access to bank data, it could be looking at a much larger award.

John Relman is the managing partner of Washington, D.C.-based law firm Relman, Dane & Colfax. He was one of the attorneys that brought Memphis' and Baltimore's cases against Wells Fargo.

In those cases, assessing damages was simpler because they were filed in 2008, as the alleged discriminatory and predatory lending was happening.



John Relman

"The theory of the cases at that time was relatively new, in the sense that it was dealing with an issue that was quite timely in the run-up to 2008," Relman said. "Subprime lending [had been] leaving the responsible space and moving into what many people have thought was in the category of predatory lending."

The cases were dismissed in 2012, and the cities received millions of dollars from the bank. At that point, Relman thought the reverse redlining claims were essentially over, because the banks had all but stopped the alleged lending practices that had gotten them into trouble in the first place.

"When we got done in 2012, I thought the point had been made, the issue had been litigated and the future didn't lay in more cities bringing these cases," he said.

Regardless, Relman's firm filed a brief in Miami's cases because it worries that a decision could severely narrow who can prosecute under the FHA.

"If the 11th Circuit decision is overturned ... I think the FHA will be damaged and we will be starting ... down a very slippery slope," he said.

While Memphis and Baltimore received funds from Wells Fargo, a case brought by the city of Los Angeles was thrown out by a federal judge.

In all likelihood, the Supreme Court will come back with a decision by summer 2017. And a tie would revert the case to the 11th Circuit Court, which decided to let the city pursue its cases.

To settle, or not settle

It turns out that the Election Day timing was particularly fitting, and Suarez had the right idea when voting early.

"This is a really important time for this case," Copeland said. "These cases might have a more important set of issues connected to them than the cases themselves ... My sense is that if this gets into discovery, the banks will settle." ❧