Fair Lending Developments: Disparate Impact Lives On

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

Introduction

The fair lending cases filed by Miami against four major mortgage lenders, reported in several previous *Annual Surveys*, came to a sudden, anticlimactic end when the city voluntarily dismissed all of them in January 2020.[1] None of the dismissals were the result of a settlement, although some municipal fair lending cases elsewhere were settled during the past year. Other fair lending litigation remains active.

Both the United States Department of Justice ("DOJ") and the Consumer Financial Protection Bureau ("CFPB") filed enforcement actions alleging racial discrimination, and the DOJ also filed actions to protect the rights of the disabled and servicemembers. The CFPB issued its considerations for rulemaking for lending to small businesses, and the United States Department of Housing and Urban Development finalized the disparate impact rule that it issued in 2019.

Municipal Fair Lending Litigation

In November 2019, Bank of America and Wells Fargo filed two new petitions for certiorari that challenged the Eleventh Circuit's "logical bond" analysis in its remand decision in *City of Miami v. Wells Fargo & Co.*[2] that was discussed in the previous *Annual Survey*.[3] However, immediately after Miami filed its responses to

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1. *See, e.g.*, John L. Ropiequet & L. Jean Noonan, *Fair Lending Developments in the Wake of* City of Miami, 75 BUS. LAW. 2001, 2002–04 (2020) (in the 2020 *Annual Survey*) [hereinafter *Fair Lending 2020*]; 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, 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*) [hereinafter *Fair Lending 2015*].

2. 923 F.3d 1260 (11th Cir. 2019), *cert. granted & judgment vacated*, 140 S. Ct. 1259 (2020) (mem.).

3. Petition for Writ of Certiorari at 9, Bank of Am. Corp. v. City of Miami, No. 19-675 (U.S. Nov. 26, 2019); Petition for Certiorari at 7, Wells Fargo & Co. v. City of Miami, No. 19-688 (U.S. Nov. 27, 2019); *see Fair Lending 2020*, *supra* note 1, at 2002–04.

the petitions in the U.S. Supreme Court, it voluntarily dismissed the cases in the district court.[4] Miami then filed suggestions of mootness with the U.S. Supreme Court that explained that the district court's actions that were not the subject of appeal had significantly narrowed the scope of the city's claims so it decided "that it would not pursue the matter further."[5] The city argued that the Eleventh Circuit's remand decisions should not be vacated.[6] However, the Court disagreed, granting certiorari and vacating the Eleventh Circuit's judgments on remand as moot.[7] This ended litigation that began in 2013.

The Atlanta area case that began the current round of municipal fair lending litigation in 2012, *DeKalb County v. HSBC North American Holdings, Inc.*, was settled and dismissed in July 2020,[8] at the same time that the bank settled a similar case with Cook County, Illinois.[9] The terms of the settlements have not been made public. The Philadelphia case discussed in a previous *Annual Survey* was also settled, in December 2019.[10] Wells Fargo agreed to contribute $10 million for programs that would "promote and preserve home ownership for low- and moderate-income residents" of the city.[11]

Two courts partially upheld the claims made in newer municipal fair lending cases. In *City of Sacramento v. Wells Fargo & Co.*,[12] the district court applied the U.S. Supreme Court's *City of Miami* ruling that the bank termed an "insurmountable pleading-stage barrier" to the city's claims of economic and non-economic damages.[13] Based on the Eleventh Circuit's remand decision, the court had no difficulty finding that the city's claims for reduced property tax revenues allegedly caused by the bank's discriminatory practices were sufficient to meet the Supreme Court's standard for proximate causation.[14] The *Sacramento* court also rejected the argument that this claim was purely derivative of injuries to

4. Order Granting Plaintiff's Unopposed Motion for Dismissal with Prejudice, City of Miami v. Bank of Am. Corp., No. 1:13-cv-24506-WPD (S.D. Fla. Jan. 30, 2020); Order Granting Plaintiff's Unopposed Motion for Dismissal with Prejudice, City of Miami v. Wells Fargo & Co., No. 1:13-cv-24508-WPD (S.D. Fla. Jan. 30, 2020).

5. Suggestion of Mootness at 1, Bank of Am. Corp. v. City of Miami, No. 19-675 (U.S. Feb. 3, 2020) [hereinafter Bank of Am. Suggestion]; Suggestion of Mootness at 1, Wells Fargo & Co. v. City of Miami, No. 19-688 (U.S. Feb. 3, 2020) [hereinafter Wells Fargo Suggestion].

6. Bank of Am. Suggestion, *supra* note 5, at 4–8; Wells Fargo Suggestion, *supra* note 5, at 4–8.

7. Bank of Am. Corp. v. City of Miami, 140 S. Ct. 1259 (2020) (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)); Wells Fargo & Co. v. City of Miami, 140 S. Ct. 1259 (2020). The Eleventh Circuit then issued an order dismissing the appeal as moot. City of Miami v. Bank of Am. Corp., Nos. 14-14543-CC, 14-141544-CC (11th Cir. Mar. 13, 2020).

8. Stipulation of Dismissal with Prejudice, DeKalb Cnty. v. HSBC N. Am. Holdings Inc., No. 1:12-cv-03640-AT (N.D. Ga. July 8, 2020); *see Fair Lending 2015*, *supra* note 1, at 631–33.

9. Cnty. of Cook v. HSBC N. Am. Holdings, Inc., No. 1:14-cv-02031 (N.D. Ill. July 27, 2020) (order); *Fair Lending 2019*, *supra* note 1, at 614–15.

10. Joint Stipulation of Dismissal with Prejudice, City of Phila. v. Wells Fargo & Co., No. 2:17-cv-02203-AB (E.D. Pa. Dec. 16, 2019); *see Fair Lending 2019*, *supra* note 1, at 612–13.

11. Press Release, City of Phila., City of Philadelphia and Wells Fargo Resolve Litigation (Dec. 16, 2019), https://www.phila.gov/2019-12-16-city-of-philadelphia-and-wells-fargo-resolve-litigation/.

12. No. 2:18-cv-00416-KJM-GGH, 2019 WL 3975590 (E.D. Cal. Aug. 22, 2019).

13. *Id.* at *3 (internal quotation marks omitted).

14. *Id.* at *7 (citing City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1280–81 (11th Cir. 2019), *cert. granted & judgment vacated*, 140 S. Ct. 1259 (2020) ("*City of Miami Remand*")).

third-party residential mortgage borrowers and therefore was not a distinct injury suffered by the city.[15] The court further found that the city's allegations about its Hedonic regression analysis were sufficient to show that its damages were capable of being proven without requiring multiple mini-trials for every loan and property.[16] Like the district court in *City of Oakland v. Wells Fargo Bank, N.A.*,[17] the *Sacramento* court held that the claims for the increased cost of municipal police, firefighting, and code enforcement services allegedly needed to "remedy blight and unsafe and dangerous conditions" did not meet the Supreme Court's directness requirements in *City of Miami*.[18] It therefore dismissed those claims.[19]

The *Sacramento* court disagreed with the bank's argument that the city lacked standing to sue for non-economic damages to further its goals of "assur[ing] that racial factors do not adversely affect the ability of any person to choose where to live in the City" and promoting "an integrated society."[20] It found that "[n]on-economic injuries are generally cognizable under the FHA," rejecting the bank's argument that *City of Miami* only allowed such claims with "a causal connection that is economic in nature."[21]

A ruling in another case filed against Wells Fargo by two counties in suburban Maryland also relied on the Eleventh Circuit's remand decision in *City of Miami* not long before the Supreme Court vacated it. In *Prince George's County v. Wells Fargo & Co.*,[22] the court followed the Eleventh Circuit's analysis in holding that "proximate cause in the context of FHA suits, such as the present one, is fairly pled where the injury is directly traceable to the purported violation, without a discontinuity that breaks the connection."[23] Based on that standard, the *Prince George's* court readily found that the counties' out-of-pocket foreclosure processing costs were directly related to the bank's allegedly discriminatory policies, but that their alleged increased fire and police services costs were not.[24] It found that alleged injury to municipal tax bases was "[o]ne of the most discussed and contested issues" in fair lending cases, concluding, unlike the *Sacramento* court, that the counties' pleadings on this issue were "not as specific" as the Miami claims that passed muster in the Eleventh Circuit's decision, and therefore did not meet the plausibility standard unless they could be cured by amendment.[25]

15. *Id.* at *7–8 (citing *City of Miami Remand*, 923 F.3d at 1286–87).
16. *Id.* at *8–9 (citing *City of Miami Remand*, 923 F.3d at 1282–83).
17. No. 15-cv-04321-EMC, 2018 WL 3008538 (N.D. Cal. June 15, 2018).
18. *Id.* at *9–10 (citing *Oakland*, 2018 WL 3008538, at *9–10 (internal quotation marks omitted); *City of Miami Remand*, 923 F.3d at 1286).
19. *Id.* at *10.
20. *Id.* at *10–11 (internal quotation marks omitted).
21. *Id.* at *11 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 376–77 (1982); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 111 (1979); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–10 (1972)).
22. 397 F. Supp. 3d 752 (D. Md. 2019).
23. *Id.* at 760.
24. *Id.* at 760–61.
25. *Id.* at 762–63.

Also lacking in detail were the counties' claims for lost recording fees due to the use of the Mortgage Electronic Registration System and lost utility fees.[26] However, again unlike the *Sacramento* court, it held that the claim for noneconomic damages in the form of "the segregative effects of increased foreclosures on minority homeowners" was "a bridge too far" for the requirements of proximate causation, although the claim could provide a basis for declaratory and injunctive relief.[27] Accordingly, the *Prince George's* court granted the bank's motion in part with leave to amend and denied it in part.[28]

The Ninth Circuit's ruling in *City of Oakland v. Wells Fargo & Co.*[29] in August 2020 was the first post-*City of Miami* municipal fair lending case to reach the appellate level outside of the Eleventh Circuit. After a thorough review of the Supreme Court's holdings in *City of Miami* as well as the language and history of the Fair Housing Act ("FHA"),[30] the court addressed the issues certified by the district court when it denied Wells Fargo's motion to dismiss. The court agreed with the district court that Oakland's damage claim for reduced property tax revenue properly alleged proximate causation, rejecting Wells Fargo's argument that only an "*immediate* result of an alleged statutory violation" would establish proximate cause because such an approach "would require the court to contravene decades of established Supreme Court precedent on standing under the FHA."[31] What mattered instead was whether "there is *continuity* between the plaintiff's alleged injuries and the defendant's alleged misconduct, . . . not how many 'steps' were in between."[32]

Oakland alleged that three sets of regression analyses would prove direct connections from predatory loans to injury to individual borrowers in the form of foreclosures; that those foreclosures consequently caused injury to the city in the form of lost property value; and that lost property value in turn caused property tax revenue losses.[33] These detailed allegations met the directness test by showing "that there is some direct relation and continuity between its reduced property-tax revenues and Wells Fargo's predatory loans."[34] The court took particular note of the fact that "Oakland's claims are aggregate city-wide claims that are well-suited for data-driven statistical regression analysis."[35] The court cautioned that Oakland's regression analyses "would be scrutinized during discovery and at trial before it can be determined that Wells Fargo's conduct more likely than not diminished the City's tax base."[36]

26. *Id.* at 763–64.
27. *Id.* at 764–65.
28. *Id.* at 767.
29. 972 F.3d 1112 (9th Cir. 2020).
30. Fair Housing Act, Pub. L. No. 90-284, tit. VIII, §§ 801–901, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631 (2018)); *see City of Oakland*, 972 F.3d at 1122–30.
31. *City of Oakland*, 972 F.3d at 1130–32.
32. *Id.* at 1132 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139–40 (2014); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 653–58 (2008)).
33. *Id.* at 1132–33.
34. *Id.* at 1133.
35. *Id.*
36. *Id.* at 1136.

However, the *City of Oakland* court found that Oakland's claim for increased municipal expenses for "police forces, firefighting, and safety code enforcement" in dealing with foreclosed properties that lacked "any regression analyses or other statistical support" failed to meet the direct relation test.[37] Thus, "the district court cannot precisely ascertain which increases in municipal expenses are attributable to the foreclosures caused by Wells Fargo's predatory loans to Black and Latino residents."[38] That claim "fails the first *Holmes* factor, which requires Oakland to plausibly plead that it is possible to ascertain with precision what increases in municipal expenses is attributable to Wells Fargo's misconduct."[39]

The Ninth Circuit also addressed whether Oakland's claims for injunctive and declaratory relief did not need to meet the same proximate causation standard as its damage claims. It found that the U.S. Supreme Court held in in its *Lexmark* decision that the same standard applies and that most other recent court decisions addressing this question had also held that the same standard applies.[40]

Other Fair Lending Litigation

A final ruling was made on a motion to dismiss the amended complaint in *National Fair Housing Alliance v. Federal National Mortgage Association*,[41] a case that was the subject of discussion in two previous *Annual Surveys*.[42] The plaintiff community organizations alleged that the defendant ("Fannie Mae") failed to maintain its foreclosed Real Estate Owned ("REO") properties on a nationwide basis in a discriminatory manner.[43] The court reviewed the amended allegations to determine whether previous pleading deficiencies for the plaintiffs' disparate treatment claim had been remedied with "plausible allegations of discriminatory motive necessary to maintain such a claim," the disparate impact claim having survived the previous motion to dismiss.[44]

The *Fannie Mae* court found that repeated iterations of the word "intentional" in connection with conduct that was "not facially discriminatory" was not enough to allege disparate treatment properly.[45] Nor were allegations that Fannie Mae was "aware of" discriminatory impacts from its actions but acted with "deliberate indifference" or "reckless disregard" to them.[46] The plaintiffs' allegations

37. *Id.* at 1121, 1136.
38. *Id.* at 1136.
39. *Id.* (citing Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 238, 269 (1992)).
40. *Id.* at 1137 (citing *Lexmark*, 572 U.S. at 134 n.6; City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1268 (11th Cir. 2019); City of Sacramento v. Wells Fargo & Co., No. 2:18-cv-416, 2019 WL 3975590, at *5 (E.D. Cal. Aug. 22, 2019); City of Phila. v. Wells Fargo & Co., No. 17-cv-2203, 2018 WL 424451, at *1 (E.D. Pa. Jan. 16, 2018)); *but see* Prince George's Cnty. v. Wells Fargo & Co., 397 F. Supp. 3d 752, 765 (D. Md. 2019).
41. No. 16-cv-06969-JSW, 2019 WL 3779531 (N.D. Cal. Aug. 12, 2019) [hereinafter *Fannie Mae*].
42. *See Fair Lending 2020*, *supra* note 1, at 2005–06; *Fair Lending 2019*, *supra* note 1, at 616–17.
43. *Fannie Mae*, 2019 WL 3779531, at *1.
44. *Id.* at *3–4.
45. *Id.* at *4.
46. *Id.* at *5.

of statistical disparities also were insufficient to show disparate treatment.[47] However, their allegations that they had brought their nationwide findings to Fannie Mae's attention before filing suit but that it did nothing about them was the same as making "the intentional decision not to change conduct that it knew full well was causing harm to predominantly minority neighborhoods, even though it could have ended this discriminatory conduct readily," and thus alleged the requisite elements of disparate treatment.[48] The court further found that the Housing and Economic Recovery Act of 2008 did not bar the claims against Fannie Mae because the statute's prohibition of penalties against the Federal Housing Finance Agency as Fannie Mae's conservator did not extend to a potential award of attorney's fees under the FHA if the plaintiffs' claims succeeded.[49]

An amended complaint that made similar allegations against a group of defendants for discriminatorily maintaining a nationwide portfolio of REO properties also survived a motion to dismiss in *National Fair Housing Alliance v. Deutsche Bank National Trust*.[50] After the plaintiffs' database was properly truncated and the pleadings were revised to comply with an earlier ruling, the court reconsidered some of its earlier rulings in light of a subsequent Seventh Circuit decision, *Kemper v. Deutsche Bank AG*,[51] and the Eleventh Circuit's *City of Miami* remand decision.[52] Notably, the *Deutsche Bank* court found that both of those courts rejected the defendants' step-counting process for analyzing direct causation because "'step-counting is self-evidently conducted [by defendants] so as to identify as many steps as possible,'" while a court can find a more direct relationship "by less thinly slicing the 'steps' between Defendant's conduct and Plaintiff's injuries."[53] Instead of counting steps, the assessment should be conducted "holistically and considering tort principles" in line with the Seventh Circuit's instructions.[54]

Under this standard, the court found that the plaintiffs' claims of damage for "their need to divert resources away from existing programs to address Defendants' discriminatory conduct" satisfied "the three foremost factors in a proximate cause analysis: foreseeability, directness, and substantiality."[55] The same was true for their damage claims for taking "counteractive measures" and for frustration of their "organizational mission of eradicating housing discrimination and segregation."[56] However, the plaintiffs' damage claims for the lost value of their own economic investments in neighborhoods affected by "REO blight" were not direct enough, nor were their claims of damage for harms to

47. *Id.*
48. *Id.* at *5–6.
49. *Fannie Mae*, 2019 WL 3779531, at *6–7; *see* 12 U.S.C. § 4617(j)(1), (4) (2018).
50. No. 1:18-cv-00839, 2019 WL 5963633 (N.D. Ill. Nov. 13, 2019).
51. 911 F.3d 383 (7th Cir. 2018).
52. *Nat'l Fair Hous. Ass'n*, 2019 WL 5963633, at *3–4.
53. *Id.* at *5 (quoting *City of Miami Remand*, 923 F.3d at 1277–78).
54. *Id.* at *6 (citing *Kemper*, 911 F.3d at 932).
55. *Id.*
56. *Id.* at *6–7.

the minority neighborhoods they serve from such things as diminished property values, safety, and habitability, which the court found were some of the "ripples" of harm that *City of Miami* cuts off from recoverability.[57]

Governmental Fair Lending Actions

Racial Discrimination Cases

The DOJ reached a settlement with Guaranteed Auto Sales, resolving allegations that the dealership violated the Equal Credit Opportunity Act ("ECOA") by engaging in a pattern or practice of credit discrimination on the basis of race.[58] The DOJ alleged that the dealership offered more favorable terms to white testers than to African-American testers with similar credit characteristics.[59] The dealership's employees allegedly told African Americans that they were required to fund their down payments in a single lump sum but gave white testers an option of paying in two installments and African-American testers were also quoted larger down payments.[60] The dealership was required to develop written policies compliant with the ECOA, post non-discrimination notices, and attend ECOA training by a third party.[61]

In July 2020, the CFPB sued Townstone Financial, Inc. ("Townstone"), a nonbank retail-mortgage creditor, for allegations that it violated the ECOA by discouraging prospective African-American applicants from applying for credit in the Chicago area based on race.[62] Townstone marketed its mortgages through a weekly radio informercial that generated up to 90 percent of its mortgage-loan applications.[63] There were a number of statements on the show, across multiple episodes, that would discourage prospective African-American applicants from applying to Townstone for loans and that would discourage other applicants from applying to it for loans for properties in African-American neighborhoods.[64] Townstone also allegedly made no effort to market directly to African Americans and did not employ any African-American loan offices.[65] Accordingly, Townstone received few applications from African Americans or for properties in African-American neighborhoods.[66] The CFPB found a statistically significant disparity between Townstone and its peers in drawing mortgage-loan

57. *Id.* at *7–8.
58. Complaint at 4, United States v. Guaranteed Auto Sales, No. 1:19-cv-02855 (D. Md. Sept. 30, 2019), https://www.justice.gov/crt/case-document/file/1205741/download.
59. *Id.* at 4.
60. *Id.* at 4–5.
61. Consent Order at 2–7, United States v. Guaranteed Auto Sales, No. 1:19-cv-02855 (D. Md. July 2, 2020), https://www.justice.gov/crt/case-document/file/1291606/download.
62. Complaint at 1, CFPB v. Townstone Fin., Inc., No. 1:20-cv-04176 (N.D. Ill. July 15, 2020), https://files.consumerfinance.gov/f/documents/cfpb_townstone-financial_complaint_2020-07.pdf.
63. *Id.* at 6–7.
64. *Id.* at 7–8.
65. *Id.* at 12.
66. *Id.* at 12–13.

applications for properties in African-American neighborhoods without a legitimate, non-discriminatory reason.[67] This allegedly constituted illegal redlining of African-American neighborhoods.[68] At the time of this writing, the litigation was ongoing.

Disability Discrimination Case

The DOJ alleged that Bank of America violated the Fair Housing Act by implementing policies that routinely denied mortgage and home equity loans to adults with disabilities who were under legal guardianships or conservatorships, even when the applicant provided court orders that granted the guardian or conservator the legal authority to mortgage property on behalf of the individual with a disability.[69] Under the settlement, Bank of America agreed to change its policies, train employees, and pay damages of $4,000 for each identified loan applicant who was denied a mortgage loan as a result of the bank's unlawful policy.[70]

Servicemember Discrimination Cases

The DOJ settled a case with ASAP Towing and Storage Co. ("ASAP") for violating the Servicemembers Civil Relief Act ("SCRA") by engaging in a pattern or practice of enforcing liens on the motor vehicles and other personal property of SCRA-covered servicemembers.[71] The DOJ alleged that a covered servicemember's landlord requested ASAP to tow his car during his deployment.[72] Although ASAP instructed its employees to look for military decals on a vehicle and to inspect the interior for an indication that the car was owned by a military person, they disregarded both a Naval parking decal and a folder on the front seat containing his deployment orders.[73] ASAP auctioned the servicemember's car and its contents without the court order required by the SCRA.[74] The settlement enjoined ASAP from enforcing storage liens on the personal property of SCRA-covered servicemembers without a court order and required it to develop appropriate policies and procedures, to adopt SCRA compliance training, to pay each adversely affected servicemember the trade-in value of the vehicle plus $500, and to pay a civil penalty of $20,000.[75]

67. *Id.* at 12–15.
68. *Id.* at 15.
69. Complaint at 2–4, United States v. Bank of Am., N.A., No. 1:20-cv-03306 (E.D.N.Y. July 23, 2020), https://www.justice.gov/crt/case-document/file/1297401/download.
70. Settlement Agreement at 5–11, United States v. Bank of Am., N.A., No. 1:20-cv-03306 (E.D.N.Y. July 23, 2020), https://www.justice.gov/usao-edny/press-release/file/1297146/download.
71. Consent Order, United States v. ASAP Towing & Storage Co., No. 3:20-cv-01017 (M.D. Fla. Sept. 9, 2020), https://www.justice.gov/crt/case-document/file/1317966/download [hereinafter ASAP Consent Order].
72. Complaint at 2–3, United States v. ASAP Towing & Storage Co., No. 3:20-cv-01017 (M.D. Fla. Sept. 9, 2020), https://www.justice.gov/crt/case-document/file/1316931/download.
73. *Id.* at 2–3.
74. *Id.* at 3, 5.
75. ASAP Consent Order, *supra* note 71, at 2–7.

In another settlement, the DOJ alleged that Shur-Way Moving and Cartage ("Shur-Way") enforced a storage lien and sold a servicemember's personal property without obtaining the required court order.[76] The consent order enjoined Shur-Way from enforcing storage liens on the personal property of SCRA-protected servicemembers without a court order, and it required Shur-Way to develop compliant SCRA policies and procedures, to provide annual SCRA compliance training, to pay the servicemember $20,000, and to pay a $10,000 civil penalty.[77]

The DOJ sued Target Recovery Towing, Inc ("Target") for allegedly failing to obtain a court order before auctioning off a car belonging to a United States Marine Corps sergeant who was deployed overseas, a violation of the SCRA. Target's policies allegedly failed to include checking the Defense Manpower Data Center ("DMDC") database, or using another process to determine a vehicle owner's military status prior to auctioning off their vehicles without court orders.[78] The DOJ sought injunctive relief, damages for the servicemember, and civil penalties.[79] At this writing, the litigation is ongoing.

The DOJ reached a consent order with the City of San Antonio resolving allegations that the city violated the SCRA by illegally auctioning the motor vehicles and personal effects of SCRA-protected servicemembers. San Antonio allegedly did not determine whether the motor vehicles it auctioned, sold, or disposed of were owned by SCRA-protected servicemembers, and that its failure to obtain court orders prevented servicemembers from obtaining court review of whether the lien sales should be delayed or adjusted to account for their military service.[80] San Antonio also had no written policies or procedures regarding SCRA compliance.[81] The complaint identified two servicemembers who had been affected by the city's SCRA shortcomings and at least 227 additional auctioned vehicles owned by SCRA-covered servicemembers.[82] The consent order required the city to pay $47,000 to two named servicemembers, to encumber $150,000 in the city's settlement fund to compensate injured servicemembers, and to pay a $62,029 civil penalty.[83] The city was enjoined from auctioning or enforcing a lien on vehicles or property owned by SCRA-protected servicemembers without a court order, required to develop compliant SCRA policies

76. Complaint at 2–3, United States v. Shur-Way Moving & Cartage Co., No. 1:19-cv-05086 (N.D. Ill. July 29, 2019), https://www.justice.gov/crt/case-document/file/1191841/download.

77. Consent Order at 2–8, United States v. Shur-Way Moving & Cartage Co., No. 1:19-cv-05086 (N.D. Ill. Aug. 2, 2019), https://www.justice.gov/crt/case-document/file/1191786/download.

78. Complaint at 1–5, United States v. Target Recovery Towing Inc., No. 8:20-cv-01918 (M.D. Fla. Aug. 18, 2020), https://www.justice.gov/opa/press-release/file/1305961/download.

79. *Id.* at 6–7.

80. Complaint at 1–2, United States v. City of San Antonio, No. 5:20-cv-01051 (W.D. Tex. Sept. 3, 2020), https://www.justice.gov/opa/press-release/file/1312971/download.

81. *Id.* at 5.

82. *Id.* at 8.

83. Consent Order at 6–10, United States v. City of San Antonio, No. 5:20-cv-01051 (W.D. Tex. Sept. 3, 2020), https://www.justice.gov/opa/press-release/file/1312976/download.

and procedures, and ordered to provide annual SCRA compliance training to all applicable employees.[84]

The DOJ filed a complaint against PR Taylor Enterprises, LLC, a moving and storage company, for SCRA violations for auctioning off the belongings of a covered servicemember who was deployed to Qatar without a court order.[85] The company allegedly did not review the DMDC database or any other commercially available database to determine customers' military status before auctioning off their possessions.[86] The company also did not have policies and procedures in place concerning compliance with the SCRA.[87] At the time of this writing, the litigation is ongoing.

HUD Final Disparate Impact Rule

HUD released its final disparate impact rule in September 2020.[88] Proposed in August 2019,[89] the final rule was the agency's effort to conform its 2013 rule with the Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[90] which held that disparate impact claims were cognizable under the FHA but articulated standards to clarify the plaintiff's burden of proof.[91] The most significant change from the proposed rule was HUD's abandonment of the proposed defenses for algorithmic models.[92] In deleting these defenses in the proposed rule, which it conceded might have been "unnecessarily broad," HUD stated that the substituted defenses provide a fair alternative for them.[93] HUD said that a claim regarding an algorithmic model would be that, if a lender rejects members of a protected class at higher rates than non-members, then the logical conclusion would be that members of the protected class who were approved, having been required to meet an unnecessarily restrictive standard, would default at a lower rate than individuals outside the protected class.[94] Therefore, if the defendant could show that default risk assessment led to fewer loans being made to members of a protected class, but similar members of the protected class who did receive loans actually default

84. *Id.* at 2–6.

85. Complaint at 2–5, United States v. PR Taylor Enters. LLC, No. 1:20-cv-11551 (D. Mass. Aug. 18, 2020), https://www.justice.gov/opa/press-release/file/1305861/download.

86. *Id.* at 4.

87. *Id.*

88. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 25, 2020) (to be codified at 24 C.F.R. pt. 100) [hereinafter Disparate Impact Rule].

89. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100); *see Fair Lending 2020*, *supra* note 1, at 2010–11.

90. 135 S. Ct. 2507 (2015).

91. *Id.* at 2512; *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*).

92. Disparate Impact Rule, *supra* note 88, at 60290.

93. *Id.*

94. *Id.*

more or just as often as similarly situated individuals outside the protected class, then the defendant could show that the predictive model was not overly restrictive.[95] The final rule also added an exception that allows HUD to seek civil money penalties in discriminatory effects cases where the defendant has a history of intentional housing discrimination.[96]

95. *Id.*
96. *Id.*