

AN AGGRIEVED CITY: HOW AN ENTIRE MUNICIPALITY SUED BANK OF AMERICA OVER HOUSING DISCRIMINATION PRACTICES

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ABSTRACT

In 2009, nearly 3 million homeowners received a foreclosure filing in the United States. Multiple foreclosures in a given neighborhood can devastate whole communities, in addition to the individual homeowner. This article is about a Supreme Court case following the foreclosure crisis. Legal topics include fair lending laws, disparate impact and parens patriae.

In the case, the 11th circuit allowed the City of Miami to bring suit as an “aggrieved person” under the Fair Housing Act (FHA). Miami claimed that it was harmed by predatory lending practices conducted by Bank of America resulting in foreclosures in minority neighborhoods. This diminished tax revenue and increased the demand for police, fire, and other municipal services. This article discusses what the 11th Circuit left the lower courts to define, which is the contours of proximate cause under FHA and how that standard would apply to the city’s claims for lost property-tax revenue and increased municipal expense.

I. INTRODUCTION

A low- or moderate-income family can spend significant years saving money to buy their first home. Large banks in the United States such as Wells Fargo and Bank of America have financial services and programs to help low- and moderate-income residents who are looking to purchase a home. These programs include first-time home buyer services, and may offer monetary assistance to customers to help pay a down payment or to help with mortgage lending services. People living in low-income neighborhoods are usually unaware of the myriad of services that banks provide. Without banks engaging in some form of community outreach and marketing, most people would not be aware of all of the financial programs available to low- and moderate-income residents. Community outreach is achieved by going directly into neighborhoods and holding events at local venues such as community centers, churches, or the local bank branch, to discuss homebuyer services.¹ Banks will roll out

1. Ylan Q. Mui, *Ex-loan Officer Claims Wells Fargo Targeted Black Communities for Shoddy Loans* (June 12, 2012), https://www.washingtonpost.com/business/economy/former-wells-fargo-loan-officer-testifies-in-baltimore-mortgage-law-suit/2012/06/12/gJQA6EGtXV_story.html?utm_term=.e399452776a8

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marketing to get people excited about the programs and services available to the community.²

From 2004 to 2012, Bank America continuously targeted the City of Miami with its community outreach and marketing efforts. Rather than targeting low-income neighborhoods, where low-income residents live, Bank of America systematically went into African American and Latino neighborhoods. Residents of many African American and Latino neighborhoods who were low-income and moderate-income homebuyers spent their life's savings on high-cost loans.³ The loans were high in cost due to adjustable interest rates, eventually resulting in unaffordable mortgage payments. The mortgage payments were also unaffordable because the interest rates were excessively high at the time of signing loan agreements.

Lack of access to resources and knowledge about Bank of America's mortgage loans, coupled with misleading business practices, led African American and Latino residents to agree, in writing, to pay unaffordable monthly mortgage payments. Bank of America and its loan officers knew, or should have known, that these families would not be able to afford the monthly mortgage payments. Mortgage loan officers and other bank employees review all income and expense documentation for every homebuyer. Lenders can make basic projections as to whether a borrower will have the ability to pay the mortgage based on the borrower's household income, expenses, and the total price of the mortgage payments, with both adjustable and fixed mortgages.⁴ At the relevant time, Bank of America was one of the top five mortgage lenders in the United States of America. Therefore, one can assume that Bank of America, its loan officers, and other key employees, had the knowledge base to allow for the assumption that Bank of America knew or should have known that these African American and Latino homeowners were committing to agreements with terms that would undoubtedly result in unaffordable mortgage payments.⁵ In fact, "African Americans and Latinos were 30 percent more likely to receive high-rate loans compared with white bor-

2. Mary E. Podmolik, *Illinois Will Receive \$300 Million in Bank of America Settlement*, CHICAGO TRIBUNE (Aug. 21, 2014), <http://www.chicagotribune.com/business/chi-bank-of-america-settlement-20140821-story.html>.

3. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1268 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017).

4. 12 C.F.R. § 1024.17

5. Matthew O'Brien, *Busted: 75% of the Biggest Home Lenders in 2006 No Longer Exist*, THE ATLANTIC (Oct. 22, 2012), <https://www.theatlantic.com/business/archive/2012/10/busted-75-of-the-biggest-home-lenders-in-2006-no-longer-exist/263924/>.

rowers. These practices are estimated to cost African American and Latino families about \$200 billion in assets due to foreclosures between 2006 and 2008.”⁶

After signing these excessive-cost loan agreements, families eventually, and expectedly, defaulted on their mortgage loans. Once the loans went into default, Bank of America continued to discriminate against African American and Latino residents of Miami by disproportionately offering loan modification opportunities to white customers compared to their African American and Latino customers.⁷ Many mortgage-related scams emerged following the influx of defaulted loans, including foreclosure fixing services and attorneys who preyed on victims of predatory lending in Miami by offering solutions where there were none. Miami resident Imogene Hall lost her home after becoming a victim of unscrupulous foreclosure attorneys who promised Hall they could save her home and claimed that they had helped other Miami residents facing foreclosure, similar to her.⁸

In 2009, nearly 3 million homeowners were served with a foreclosure filing in the United States.⁹ During that same year, Florida had the second largest foreclosure filings in the United States with 516,711 foreclosure filed in Florida courts.¹⁰ These foreclosure filings eventually resulted in thousands of families losing their homes. Foreclosed properties became vacant properties. Excessive vacant properties became a nuisance and led to homeless squatters moving into blighted properties.¹¹

On December 13, 2013, the Miami City Attorney, along with outside counsel, filed a lawsuit under a United States Federal Housing Ad-

6. Barbara Reynolds, *Minorities Fall Victim to Predatory Lenders*, WASH. POST (July 16, 2012), https://www.washingtonpost.com/blogs/therootdc/post/minorities-fall-victim-to-predatory-lenders/2012/07/16/gJQAraMYpW_blog.html?noredirect=on&utm_term=.51f2c1b7cbb5.

7. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017).

8. Toluse Olorunnipa, *Think You've Read the Worst About Foreclosures? Read This*, McCLATCHY DC BUREAU (Nov. 21, 2010), <https://www.mcclatchydc.com/news/nation-world/national/economy/article24601387.html>.

9. CNN Money, *Record 3 Million Households Hit with Foreclosure in 2009*, THE RESCUE (January 12, 2010), https://money.cnn.com/2010/01/14/real_estate/record_foreclosure_year/

10. Realty Trac, *Year-End Report Shows Record 2.8 Million U.S. Properties With Foreclosure Filings in 2009- An Increase of 21 Percent From 200 and 120 Percent From 2007*, (Jan. 14, 2007), <https://fcic-static.law.stanford.edu/. . /2010-01-14%20RealtyTrac%20Year-End%20Record>

11. Kate Abbey-Lambertz, *Families Squat In Abandoned Homes As The Housing Crisis Grips Detroit*, (November 14, 2018), https://www.huffingtonpost.com/entry/detroit-housing-crisis-abandoned-homes-squatting_us_5bdc76c8e4b09d43e31e9d72

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ministration (FHA) statute against Bank of America, Countrywide Financial Corporation, Countrywide Home Loans, and Countrywide Bank, all of which were owned by Bank of America Corporation. The brief filed with the United States District Court for the Southern District of Florida claimed that Bank of America conducted predatory lending practices in the City of Miami, practicing redlining, and reverse redlining.¹²

Miami alleged, “that Defendants’ practice of traditional redlining has caused an excessive and disproportionately high number of foreclosures on Defendants’ loans in the minority neighborhoods of Miami.”¹³ Redlining is a process used to implement housing discrimination in a given area. “Redlining is the practice of denying a creditworthy applicant a loan for housing in a certain neighborhood even though the applicant may otherwise be eligible for the loan. . . Redlining on a racial basis has been held by the courts to be an illegal practice.”¹⁴ Reverse redlining is the practice of systematically offering expensive and high-interest home loans by targeting minority customers in specific geographic areas. The purpose of these practices is to push minority buyers into certain neighborhoods with the effect of segregating minority homebuyers from white homebuyers.¹⁵

Once in the foreclosure process, Miami claimed that Bank of America disproportionately denied loan modification opportunities to African American and Latino customers in Miami.¹⁶ The homeowners eventually lost their homes and vacant properties rapidly increased within the city.¹⁷ The City of Miami claimed it was harmed because neighborhoods that were once thriving were now filled with blighted properties. The empty homes attracted vandalism and squatters. Miami further claimed that the city was forced to spend increased funds on city services such as police, fire, and debris clean up to keep control of these blighted properties and minimize the harmful effects of Bank of America’s practices in these neighborhoods.¹⁸ Additionally, Miami claimed to have suffered a loss of property tax revenue as so many of the city’s homeowners had been

12. *Bank of Am.*, 800 F.3d at 1267.

13. *Bank of Am.*, 137 S. Ct. At 1296.

14. *Federal Fair Lending Regulation and Statutes Fair Housing Act*, CONSUMER COMPLIANCE HANDBOOK, (2018), www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf.

15. Scott Rodd, *City Sues Wells Fargo, Alleging Discriminatory Mortgage Lending in Minority Communities*, (February 26, 2018), <https://www.bizjournals.com/sacramento/news/2018/02/26/city-sues-wells-fargo-alleging-discriminatory.html> US DEP’T OF VETERAN AFFAIRS, *Education and Training*,

16. *Id.* at 1305.

17. *Id.* at 1272.

18. *Id.* at 1307.

forced out.¹⁹ The Supreme Court granted standing to the City of Miami allowing them to bring suit as an “aggrieved person” under the Fair Housing Act.²⁰

During the proceedings, both the Plaintiff and Defendant requested the Supreme Court to define the meaning of proximate cause in a case where a municipality sues for a violation of the FHA statute.²¹ The Supreme Court replied, but chose not to clearly define a direct link between predatory lending practices and harm to a city as an aggrieved person. The Court, instead, left to matter to the lower court to determine contours of proximate cause in these situations.²² The Supreme Court’s decision was to reject foreseeability as a tool to measure the proximate cause of Miami’s injuries.²³

This writing examines *Bank of America Corp. v. City of Miami*, a case decided by the Supreme Court on May 1, 2017. This writing also puts forth an argument that foreseeability is a reasonable standard upon which to determine proximate cause under the FHA statute.

Additionally, this writing recommends requirements of a proximate cause claim that the Supreme Court declined to define; discusses how the recommended standard applies to the city’s claims for lost property tax revenue and increased municipal expenses, and; suggests further recommendations for a change in the subject Fair Housing Act statute.

II. CURRENT LAW

The United States Code states that “[d]iscrimination of the sale or rental of housing is prohibited.”²⁴ “Discrimination against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin is prohibited.”²⁵ Furthermore, “[i]t is unlawful to discriminate against any person in residential real estate-related transactions.”²⁶ Prior to making any claim of discrimination under the preceding statute, the plaintiff is required to be an “aggrieved person” as defined by the United States Code.²⁷

19. *Id.* at 1272.

20. *Id.*

21. *Bank of Am.*, 800 F.3d at 1262.

22. *Id.*

23. *Id.*

24. 42 U.S.C.A. § 3604 (West 1988).

25. 42 U.S.C.A. § 3605 (West 1988).

26. *Ave. E. Inv. v. City of Yuma*, 818 F. 3d 493, 501 (9th Cir. 2016).

27. 42 U.S.C.A. § 3613 (West 1988).

III. AN AGGRIEVED PERSON

Under the FHA Statute, “an aggrieved person may commence a civil action. . .to obtain appropriate relief with respect to such discriminatory housing practice or breach.”²⁸ Prior to the case at hand, aggrieved persons have been either individual residents or a group of residents. Residents may be considered aggrieved for reasons such as landlord mistreatment by landlords or suffering a refusal to rent based on discriminatory criteria, amongst other causes.

The City of Miami was permitted to bring its suit as an aggrieved person because the Court was convinced that the injuries claimed by Miami were in the zone of interest of the protections of the FHA statute. Furthermore, there was “a congressional intention to define standing as broadly as is permitted by Article III of the Constitution. With respect to suits brought under the 1968 Act.”²⁹ Granting the City of Miami standing allowed other cities who were harmed by predatory lending practices to bring their own suits.

IV. DISPARATE-IMPACT UNDER THE FAIR HOUSING ACT

Disparate-impact is a judicial contribution to Title VII of the Civil Rights Act of 1964. The Civil Rights Act of 1964 banned segregation in public places stating that “all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”³⁰ Additionally, the Civil Rights Act of 1964 prohibited businesses from discriminating against employees and potential employees on the basis of race, color, religion, national origin, or sex.³¹

Business practices that appear to be neutral on their face, but elicit discriminatory results are unconstitutional.³² In *Griggs v. Duke Power Co.*, African American employees brought suit after being required to take tests that were said to measure intelligence but had no relation to job-performance ability. The Supreme Court stated in *Griggs* that the Civil Rights Act of 1964 intended to “proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”³³

28. *Id.*

29. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

30. 42 U.S.C.A. § 2000a (West 1988).

31. 42 U.S.C.A. § 2000a (West 1988).

32. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

33. *Id.*

A claim of disparate impact places the burden is on the plaintiff to prove that a business practice has a disproportionate or adverse effect resulting from discriminatory implementation.³⁴

After *Griggs v. Duke Power Co.*, the focus on discrimination shifted from the treatment of individuals to the elicited results that followed the discriminatory practices. Disparate-impact is tremendously relevant to housing discrimination. Housing is a sector of the community in which past discrimination has resulted in decades of inequities that are still present today.³⁵ In 1934, as part of the New Deal, President Franklin Delano Roosevelt created Federal Housing Administration loan programs to help American citizens purchase homes.³⁶ The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. The FHA recognized that persistent racial segregation had left predominantly African American urban neighborhoods surrounded by mostly white suburbs. As such, the Act addresses the denial of housing opportunities on the basis of “race, color, religion, or national origin.”³⁷

While the intent of Congress, in adopting the FHA, was to prevent racial segregation, the strategies used to execute the new home loan programs caused racial segregation.³⁸ Redlining was used as a strategy to distribute these home loans.³⁹ The neighborhoods that were defined as “red” were where a majority of African Americans lived. Redlining systematically prevented African Americans from receiving home loans outside of those neighborhoods. Furthermore, the federal government encouraged developers to discriminate against African Americans through restrictive covenants.⁴⁰

34. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

35. NAT'L FAIR HOUS. ASS'N, *THE CASE FOR FAIR HOUS.: 2017 FAIR HOUS. TRENDS REP.*, 51, 77 (2018).

36. *The Federal Housing Administration (FHA)*, U.S. DEPT. OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/housing/fhahistory.

37. *Texas Dept. of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2510 (2015).

38. Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.

39. Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.

40. “RACIAL” PROVISIONS OF FHA UNDERWRITING MANUAL (1936), <http://wbhsi.net/~wendyplotkin/DeedsWeb/fha36.html>.

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Racially restrictive covenants prevented the conveyance of property to minorities.⁴¹ The GI Bill offers a home loan guarantee to veterans.⁴² Racial exclusions—encouraged by the federal government—were also adopted by the Veterans Administration under the GI Bill.⁴³ From 1934 to 1962, more than 98% of home loans that were approved were given to white families.⁴⁴ This hindrance compounded over time. Without the ability to own property, African Americans were not afforded the opportunity to build equity and create generational wealth through homeownership. After government-supported redlining was lifted, African American families were still unable to purchase property due to unaffordability, as property prices had then increased.⁴⁵ The increased price of homes made it difficult for minorities to keep up with the purchasing ability of white citizens, causing many African Americans to remain trapped in poverty. Minorities still experience 4 million instances of housing discrimination per year.⁴⁶

It was not until 2015, the court hearing *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* determined that disparate-impact theory was within the meaning of the Fair Housing Act. In *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project*, a non-profit organization brought suit claiming that the Texas Department of Housing & Community Affairs was disproportionately distributing tax credits to housing developers based on the neighborhoods they were building in. This disproportionate distribution of tax credits resulted in most of Dallas, Texas' low-income housing being built in predominantly African American neighborhoods, and very little low-income housing being built in white neighborhoods. This case was not about the treatment of housing developers, but rather the results that elicited from the treatment of the housing developers.

Section 804(a) of FHA states that it is unlawful “to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to

41. *Shelley v. Kraemer*, 334 U.S. 836, 838 (1948).

42. *Education and Training*, U.S. Dept. of Veterans Affairs, <https://www.benefits.va.gov/gibill/history.asp>

43. *A 'Forgotten History' Of How the U.S. Government Segregated America* <https://www.npr.org/templates/transcript/transcript.php?storyId=526655831>.

44. *Race—The Power of an Illusion. Go Deeper: Where Race Lives*, PBS (April 25, 2018), http://www.pbs.org/race/000_About/002_06_a-godeeper.htm.

45. Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.

46. NAT'L FAIR HOUS. ASS'N, *THE CASE FOR FAIR HOUS.: 2017 FAIR HOUS. TRENDS REP.*, 51, 77 (2018).

any person because of race, color, religion, sex, familial status, or national origin.”⁴⁷ Additionally, Section 805(a) states that “It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”⁴⁸ The Court in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project* determined that the phrase “otherwise make unavailable” demonstrated a Congressional intent to allow analysis of disparate-impact in housing discrimination. The outcome of *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project* allows “lawsuits based on ‘disparate impact’ – that is, allegations that a policy or practice has a discriminatory effect even if it was not necessarily intended to discriminate”^{49,50}

V. APPLING THE AGGRIEVED PERSON STANDARD TO CITIES

One month after the *Texas* decision, Cook County in Illinois filed a lawsuit against Wells Fargo Bank very similar to *City of Miami v. Bank of America*. The County of Cook sought damages for injuries resulting from predatory lending practices, alleging that “[Wells Fargo steered] minority borrowers into loans they could not afford, resulting in higher fees, defaults, and foreclosures than for white borrowers, and rewarding employees with bonuses for offering such loans.”⁵¹ The injuries that Cook County claimed were caused by Well Fargo Bank included urban blight and lost revenue from a reduced property tax base.⁵² The United States District Court in *County of Cook, Illinois v. Wells Fargo & Co* granted Wells Fargo’s motion to dismiss on the grounds that Cook County did not have standing to bring the lawsuit.⁵³ The Court cited Section 804(a) of FHA, stating that it is unlawful “to refuse to sell or rent a dwelling to any person because of race, color, religion, sex, familial status, or national

47. 42 U.S.C. § 3604(a) (2018).

48. 42 U.S.C. § 3605(a) (2018).

49. Amy Howe, *Opinion Analysis: Five Justices Keep City’s Discriminatory Lending Lawsuit Alive*, SCOTUSBLOG (May 1, 2017, 12:38 PM), <http://www.scotusblog.com/2017/05/opinion-analysis-five-justices-keep-citys-discriminatory-lending-lawsuit-alive/>.

50. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2510.

51. Memorandum Opinion and Order, at 4, *County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909, (2015) (No. 14 C 9548), <https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2014cv09548/303723/143/>.

52. *Id.*

53. *County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909, 919 (N.D. Ill. 2015).

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origin.”⁵⁴ The Court specifically focused on the phrase “or otherwise make unavailable” to demonstrate that Cook County was not purchasing or renting a property from Wells Fargo and “Cook County is not a person to whom a “dwelling” can be made unavailable, for it does not ‘dwell’ anywhere.”⁵⁵ This case has since been brought up on appeal and will be further discussed in this writing.

In *Gladstone, Realstone v. Village of Bellwood*, the Village of Bellwood brought suit after discovering racial discrimination was occurring in its neighborhoods. African American customers were systematically led to believe that “no suitable homes within the desired price range” were available to them.⁵⁶ The Court determined that Village of Bellwood had standing to bring suit. In its holding, the court stated

If petitioners’ steering practices significantly reduce the total number of buyers in the Village of Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.⁵⁷

“A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services promoting stable, racially integrated housing.”^{58,59}

The holding in *Gladstone, Realstone v. Village of Bellwood* supported Miami’s claim that discriminatory realty practices cause injuries which reach beyond the individual person. In *Gladstone*, the Village was adversely affected by diminishing tax base, and Miami was adversely affected by increased municipality cost as well as a loss of property tax revenue. *Gladstone, Realstone v. Village of Bellwood* was a pivotal case in shaping the Supreme Court’s opinion that the City of Miami should be granted standing.

VI. USING PARENS PATRIAE AS A STRATEGY TO SEEK REMEDY

Parens patriae is a legal doctrine that gives governmental bodies the power to file suits on behalf of their citizens.⁶⁰ The literal meaning of

54. 42 U.S.C.A. § 3604(a) (West 2018).

55. *Wells Fargo & Co.*, 115 F. Supp. 3d at 919.

56. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

57. *Government of Province of Manitoba v. Zinke*, 273 F. Supp. 3d 145.

58. Paul Hancock & Andrew Glass, *Symposium: The Supreme Court recognizes but limits disparate impact in its Fair Housing Act decision*, SCOTSBLOG (June 26, 2015, 8:58 AM), <http://www.scotusblog.com/2015/06/paul-hancock-fha/>.

59. *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017).

60. BLACK’S LAW DICTIONARY 1144 (10th ed. 2014).

parens patriae the “parent of the country.”⁶¹ “It represents a legal doctrine arising in English common law that recognized the inherent sovereign power and authority of the King to protect persons who were legally unable to act on their own behalf.”⁶² The United States has adopted the concept of parens patriae in its legal system.⁶³ Both Cook County and Miami had the power to file lawsuits against Bank of America and Wells Fargo, but chose to file their lawsuits on behalf of the government bodies themselves. Cook County made it very clear throughout litigation of its suit that it was not suing in the capacity of parens patriae. Both Cook County and City of Miami sought damages for injuries to their respective municipalities, and not the respective city’s residents.

Cook County and Miami, acting in the capacity of parens patriae, could raise the issue of res judicata. Res judicata is the preclusion of a claim on a matter that has already been adjudicated.⁶⁴ It “bars relitigation of matters decided in a prior proceeding.”⁶⁵ The United States Department of Justice (DOJ) investigated claims, and filed multiple lawsuits, against Bank of America and Wells Fargo under the Fair Housing Act.⁶⁶ The Department of Justice investigation revealed that predatory lending practices disproportionately affected African Americans and Latinos nationwide.⁶⁷ “More than 200,000 African American and Hispanic borrowers who qualified for loans were charged higher fees or placed into subprime loans” by Bank of America.⁶⁸

One lawsuit was brought jointly by a federal-state group that entered into an agreement with the nation’s five largest mortgage servicers: Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc.⁶⁹ The state of Florida joined

61. BLACK’S LAW DICTIONARY 1144 (10th ed. 2014).

62. BLACK’S LAW DICTIONARY 1144 (10th ed. 2014).

63. *Id.*

64. Dan Ryan Builders, Inc., v. Crystal Ridge Dev., 803 S.E.2d 519, 529 (W. Va. 2017).

65. Jang v. United Techs. Corp., 206 F.3d 1147, 1149 (11th Cir. 2000).

66. Press Release, Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), available at <https://www.justice.gov/opa/pr/25-billion-mortgage-servicing-agreement-filed-federal-court>.

67. More than 200,000 African American and Hispanic borrowers who qualified for loans were charged higher fees or placed into subprime loans

68. THE UNITED STATES DEP’T OF JUSTICE, *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, (Dec. 21 2011), <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>.

69. *Id.*

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that the joint federal-state suit. The federal lawsuit resulted in a \$25 billion settlement which provided an estimated “\$9.22 billion in relief to Florida homeowners and addresses future mortgage loan servicing practices.”⁷⁰ The Attorney General of Illinois also filed a lawsuit against Wells Fargo which resulted in a settlement for Illinois residents. Residents, who were involved in the Department of Justice lawsuits, of both the City of Miami and Cook County have been remunerated for their injuries resulting from predatory lending practices within their city and county.

It is in the interest of justice for the City of Miami and Cook County to not bring the suit as in the capacity of *parens patriae*. If Bank of America and Wells Fargo targeted African American and Latino neighborhoods to conduct predatory lending practices within the city of Miami and Cook County, and the governmental budgets were injured due to these practices, the governmental bodies should be justly compensated. Additionally, according to the 2010 United States Census, Chicago, located in Cook County, has the second largest population of African Americans of all United States’ cities. Sixty-five percent of African American and Hispanic people who live in Illinois, live in Cook County.⁷¹ Miami metropolitan area has the 6th largest population of African Americans of all metropolitan areas the United States. Latino Americans represent 68% of the City of Miami’s population.⁷²

With the law as it stands now, a bank can check the results of the United States Census and find the cities with the largest populations of African American and Latino people. The bank can then systematically go into those cities to sell African American and Latino people products that will foreseeably cause detrimental outcomes, without raising any possible issues of illegality or constitutionality issues under the Civil Rights Act of 1964. Filing a lawsuit on behalf of the populations does not wholly protect the city from being targeted by banks in the future.⁷³

Systematically going into cities to sell African American and Latino people products that will cause detrimental outcomes does not only affect

70. *State-Federal Foreclosure Settlement*, ATTORNEY GEN. PAM BONDI FLA. OFFICE OF THE ATTORNEY (Apr. 25, 2018), <http://myfloridalegal.com/pages.nsf/Main/94816CAD8E86B0778525799F00595D98>.

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71. *County of Cook v. Wells Fargo & Co.*, 115 F.Supp.3d 909, 912–13 (N.D. Ill. 2015).

72. *QuickFacts Miami-Dade County, Florida*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210> (last visited Apr. 25, 2018).

73. Sonya Rastogi et al., *The Black Population: 2010*, 2010 CENSUS BRIEFS (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

the bank customers who purchased home loans or homeowners who did not receive services after going into foreclosure. The entire country experienced “The Great Recession” due to banks engaging in predatory lending practices.⁷⁴ Americans still have not recovered from the Great Recession. According to Economic Innovation Group, “one in six Americans lives in what the group calls ‘economically distressed communities’ that are ‘increasingly alienated from the benefits of the modern economy.’”⁷⁵

VII. THE PROOF OF THE CLAIM: AN ARGUMENT FOR FORESEEABILITY

Bank of America v. City of Miami determined that the foreseeability that Bank of America’s actions would cause harm to the affected municipalities was not enough to prove that Bank of America was liable for the injuries asserted by Miami. The Supreme Court did not specify a reason for its conclusion, only asserting that foreseeability was not enough to establish proximate cause.⁷⁶ The Court then stated that City of Miami must prove the proximate cause and instructed the lower court to establish the boundaries of proximate cause.⁷⁷

Florida Jurisprudence states that foreseeability is the “the measuring stick by which proximate cause is determined.”⁷⁸ Moreover, under Florida law, “if the consequences of a negligent act were foreseen by the actor, for the purposes of determining proximate cause, it does not matter whether those consequences were immediate or remote; that which a person foresees is, as to him or her at least, natural and probable.”⁷⁹

In the lower court, the *City of Miami v. Bank of America* case determined that the appropriate measure of proximate cause is what is known as the substantial factor test. The Court stated that “[t]he proximate cause requirement does not mean that the defendant’s conduct must be the only proximate cause of the plaintiff’s injury.”⁸⁰ Instead, a proximate cause is “a substantial factor in the sequence of responsible causation.”⁸¹ Miami

74. *County of Cook*, 115 F.Supp.3d at 914.

75. Alana Semuels, *The Places That May Never Recover from the Recession*, THE ATLANTIC (DEC. 29, 2017), <https://www.theatlantic.com/business/archive/2017/12/suburban-poverty-and-recession/549350/>.

76. *Bank of America Corp. v. City of Miami*, Fla., 137 S.Ct. 1296, 1305-06 (2017).

77. *Bank of Am. Corp. v. City of Miami*, Fla., 137 S. Ct. 1296, 1306, 197 L. Ed. 2d 678 (2017)

78. 38. 2d *Negligence* § 61 (2018).

79. *Id.*

80. *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1399, 1399 (11th Cir. 1994).

81. *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1399, 1399 (11th Cir. 1994).

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surely alleged at least that much, as it claimed that the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the city tax revenue and municipal expenditures. "Although there are several links in that causal chain, none are unforeseeable."⁸² Consequently, the Court determined that Bank of America's discriminatory lending practices were, in fact, the substantial factor that led to Miami's injuries. The Supreme Court rejected this decision from the lower court without giving cause.⁸³

In *Bank of America v. City of Miami*, the Court does not mention *Pinchback v. Armistead Homes Corp.* In *Pinchback*, an individual resident brought suit after being denied a rental housing opportunity on the basis of racial discrimination. The Court proclaimed that "[t]o demonstrate proximate cause there must be a showing that the injury was reasonably foreseeable."⁸⁴ The Court found that there was "no doubt that Pinchback's injury was reasonably foreseeable to Armistead. Armistead carried out a discriminatory policy, fully aware that local realtors frequently visited Armistead and interacted with Armistead members, some of whom were members of the Board of Directors. It was quite foreseeable that a realtor such as Dailey, who served as the listing agent for several Armistead homes, would acquire information about Armistead's policy of preventing black members. And it was no less foreseeable that a realtor such as Dailey would convey this information to a prospective black purchaser such as Pinchback."⁸⁵ Armistead was found liable for Pinchback's claims of housing discrimination.

After the City of Miami was granted standing to bring its suit as an aggrieved person, it is reasonable for the court to look to other cases of individuals who were also granted standing to bring such a suit. The word "foreseeable" was spelled incorrectly as "forseeable" four times in the published version of the case. It is a possibility that this case was overlooked.

The substantial factor test has been used to determine the outcome of other cases that involved discrimination of a buyer or renter of a home. In *Meyer v. Bear Road Associates*, Meyer brought suit against a landlord under the Fair Housing Act. "To establish a disparate treatment claim under 42 U.S.C. § 3604(b), plaintiffs-appellants must. . . establish that discriminatory animus was a substantial factor in the decision to adopt the

82. *Miami v. Bank of Am.*, 800 F.3d 1262, 1282 (11th Cir. 2015).

83. *Bank of Am. v. Miami*, 137 S. Ct. 1296 (U.S. 2017).

84. *Pinchback v. Armistead Homes Corp.*, 689 F. Supp. 541, 555 (D. Md. 1988), aff'd in part, vacated in part, 907 F.2d 1447 (4th Cir. 1990).

85. *Id.* at 541.

policy at issue here.”⁸⁶ Therefore, to prove landlord liability, the plaintiff must prove that discrimination was a substantial factor in its decisions that caused the plaintiff’s injuries. Although the substantial factor test was used to disprove the existence of discrimination in *Meyer*, the substantial factor test is still applicable and commonly used as a tool for analysis.

The Supreme Court has previously stated that foreseeability is insufficient to show proximate cause under the FHA statute; however, foreseeability has been used to determine the outcome of the same FHA statute in other cases. Moreover, foreseeability is “the measuring stick by which proximate cause is determined” in the state in which Miami’s claim of injury occurred.⁸⁷ It is unreasonable not consider Bank of America’s responsibility to foresee harm arising from their actions.

Mortgage Loan Officers at Bank of America and all banks operating in the United States are required to comply with the Consumer Financial Protection Bureau and the SAFE Mortgage Licensing Act.⁸⁸ Under the SAFE Mortgage Licensing Act, mortgage loan officers are required to

[m]eet the necessary education requirements, which consist of at least 20 hours of education approved by the Nationwide Mortgage Licensing System and Registry, which must include at least three hours of Federal law and regulations, three hours of ethics (including fraud, consumer protection, and fair lending issues), and two hours of training related to lending standards for nontraditional mortgage products.”⁸⁹ Passing with at least 75 percent of questions answered correctly a written test developed by the Nationwide Mortgage Licensing System and Registry, which examines the applicant’s knowledge of ethics, federal law and regulation as it pertains to mortgage originations, state law and regulation as it pertains to mortgage originations, and federal and state law and regulation as it pertains to fraud, consumer protection, the nontraditional mortgage marketplace, and fair lending issues.⁹⁰

Bank of America was one of the top five mortgage lenders in the United States during the relevant time period; therefore, one can assume that Bank of America knew, or should have known, that many African American and Latino homeowners were signing into agreements with unaffordable mortgage payments. It is also reasonable that Bank of

86. *Meyer v. Bear Road Ass’n*, No 04-282, 2005 WL 545437 *686, *689 (2d Cir. 2005)

87. 38 FLA. JUR 2D *Negligence* § 61 (2018)

88. 12 U.S.C.S. § 5104 (2018).

89. 12 U.S.C.A. § 5104 (2008)

90. 12 U.S.C.A. § 5104 (2008)

America mortgage loan officers would know that taking on an unaffordable mortgage is likely to lead to foreclosure due to the statutory requirement of education under the SAFE Act.⁹¹ Additionally, if a Bank of America customer is in foreclosure and does not receive a loan modification, it is reasonable to assume that the homeowner is likely to lose their home.

VIII. CONTOURS OF PROXIMATE CAUSE

The aforementioned case, *County of Cook, Illinois v. Wells Fargo & Co* was brought up for appeal. On March 27, 2018, Federal Judge Gary Feinerman allowed the case to move forward, but dismissed claims of harm from lost property taxes. Judge Feinerman stated that the claims alleging harm from lost property taxes, the need to combat crime and blight, racial segregation, and other factors were “ripples” that “flow far beyond” Wells Fargo’s alleged misconduct.⁹² In his opinion, Judge Feinerman mentioned the *Miami* case.⁹³ He stated that the Supreme Court required a direct link to the injuries at hand.⁹⁴ Judge Feinerman did not consider foreseeability as a measurement for analysis of proximate cause while the Supreme Court outright rejected foreseeability as a tool for measurement of proximate cause and declined to clearly define a direct link between predatory lending practices and harm to a city as an aggrieved person under FHA after being requested by both the plaintiff and defendant to do so.⁹⁵

Due to the holdings of the Supreme Court in Miami’s case, Cook County’s case was significantly, and negatively, affected. The scope of *County of Cook, Illinois v. Wells Fargo & Co* was narrowed to the “cost of administering and processing a higher number of foreclosures,” which severely diminished the majority of Cook County’s claims.⁹⁶ If the Supreme Court had defined proximate cause and its usage in cases where a municipality seeks remedy from a financial institution for violation of the FHA, Judge Feinerman could have made a comprehensive ruling based on the precedent set by the Supreme Court.

In 1955, Chief Justice Warren delivered the opinion in *Brown v. Board of Education*, stating

91. 12 U.S.C.A. § 5104 (2008), 11 Cal. Real Est. § 36:8 (4th ed.)

92. *Cty. of Cook, Illinois v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 983 (N.D. Ill. 2018).

93. *Cty. of Cook, Illinois v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 987 (N.D. Ill. 2018).

94. *Id.*

95. *Id.* at 2.

96. *Id.* at 982.

[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs. . .⁹⁷

It is clear by the disproportion numbers present in the case, that some inequity occurred within the City of Miami. It is in the interest of justice to attempt to prevent this same inequity from occurring again in other municipalities targeted by banks for utilization of predatory lending practices.

The boundaries of proximate cause can be determined by analysis of the event that occurred. The test to determine if a home loan provider should be held liable in an action brought by a municipality under the Fair Housing Act is if (1) a bank conducts business in a municipality, where the majority of the population is minority, or otherwise vulnerable, to sell residential mortgage loans; (2) a bank offers predatory loans; (3) those loans result in an unreasonable number of loan defaults or foreclosures; (4) there is a foreseeable risk for an increase in vacant properties; (5) and the municipality has qualified as an aggrieved person under the FHA statute. If these five requirements are proven, the municipality has proven a causal link between the actions of the residential home loan provider and the municipality's injuries to prove proximate cause.

The first part of the test is present because, if a home loan provider conducts business in a municipality where the majority of the population consists of minorities or otherwise vulnerable people to sell residential mortgage loans, that neighborhood, city, or county is at risk to become a victim of predatory lending practices. Banks should be more cautious of the potential liability of conducting predatory lending practices once the bank decides to conduct business in the municipality. The first prong of the test raises a red flag for protection under the law for cities with vulnerable populations. If the home loan provider is, in fact, conducting predatory lending practices, the provider should be cautious of the risk of liability.

In the *Miami* case, according to Bank of America's 2007 Annual Report, the "residential mortgage portfolio makes up the largest percentage our consumer loan portfolio at 50 percent of held consumer loans. . ."⁹⁸

97. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

98. BANK OF AMERICA, *2007 Annual Report*, http://media.corporate-ir.net/media_files/irol/71/71595/reports/2007_AR.pdf (last visited Apr. 25, 2018).

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The state of Florida is our second largest concentration and represented approximately eight percent of total managed consumer loans at both December 31, 2007 and 2006, primarily driven by the consumer real estate portfolio. Residential mortgage loans to borrowers in the state of Florida represented six percent and seven percent of the total residential mortgage portfolio at December 31, 2007 and 2006.⁹⁹

Overtown is a neighborhood in Miami, Florida. African Americans and Latinos make of 91% of the population of Overtown. During the time of the accused injuries, there was at least one Bank of America branch providing mortgage lending services to the neighborhood known as Overtown. Miami is a municipality where the majority of the population consists of minorities or otherwise vulnerable people; therefore; and the first portion of the test has been proven.

The second part of the of the test is a step that demonstrates a direct link between damages suffered by the municipality and the practices of banks. This step shows that predatory lending did occur. If predatory lending did not occur, there should be no grounds on which to bring a suit.

Here, Miami demonstrated Bank of America's predatory lending practices in its original complaint by a showing of

data and statistical analysis, as well as statements from Confidential Witnesses to support its claims. For example, a regression analysis that allegedly controls for creditworthiness and other factors is offered to show that an African American Bank of American borrower was 1.581 times more likely to receive a predatory loan than a white borrower, and a Latino borrower was 2.807 times more likely to receive such a loan.¹⁰⁰

The third, fourth and fifth prongs of the test separate a resident's claim from a municipality's claim under the FHA statute. The third portion of the test, stating that the bank or home loan provider's loans resulted in an unreasonable number of loan defaults or foreclosures protects the bank's customers who are residents within the given municipality.

The fourth portion of the test explores foreseeability where loans resulting in an unreasonable number of loan defaults or foreclosures pose a foreseeable risk for an increase in vacant properties. This provides evidence to the Court to show the damages resulting from the predatory lending practices. Although not the sole factor, it makes foreseeability a major contributing factor to the test for determining whether the bank's practices were the proximate cause of the municipality's injuries. The third

99. *Id.* at 70.

100. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1268 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017).

and fourth part of the test provide proof of the disparate-impact claim, placing “the burden is on the plaintiff to prove disproportionate or adverse effects resulting from discriminatory practices.”¹⁰¹

In the case at hand, the City of Miami did not demonstrate facts to support part three and four of the test in its complaint. If the municipality was harmed, they should easily be able to demonstrate these factors. Part three and four may also be demonstrated through the use of expert testimony.

The fifth part of the test is a requirement used to keep test consistent with the FHA statute, stating that “an aggrieved person may commence a civil action. . .to obtain appropriate relief with respect to such discriminatory housing practice or breach.”¹⁰²

In the *Miami* case, the Supreme Court determined that Miami was an aggrieved person under their ruling and, as such, the fifth portion of the test was proven.

Although all of the portions of the test have not be proven, this test offers boundaries that would allow Miami, and other municipalities the opportunity to prove their case.

IX. RECOMMENDATION TO CONGRESS

The Supreme Court determined that municipalities have standing to bring a lawsuit under the Fair Housing Act. The Legislature should change the language within the FHA statute to reflect the decision of the Supreme Court. The language should be changed from an “aggrieved person” to an “aggrieved party,” so the courts time is not wasted on the determination of whether a municipality may bring suit under the FHA.

The FHA also places a statute of limitations allowing for two years to file suit under its provisions, stating that “an aggrieved person may commence a civil action in an appropriate United States District Court or State Court not later than two years after the occurrence or the termination of an alleged discriminatory housing practice.”¹⁰³

The United States legislature writes laws under the FHA allowing for individuals to seek remedies after they have been harmed by discrimination, but many people who live within a minority or otherwise vulnerable population do not have immediate access to attorneys. A two-year statute of limitations is unreasonable. Non-attorneys may not recognize that their experience was potentially unconstitutional and could constitute

101. Ricci v. DeStefano, 557 U.S. 557 (2009).

102. 42 U.S.C.A. § 3613 (LexisNexis 1988).

103. *Id.*

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a valid cause of action if filed within two-years of the incident occurring. These individuals require additional time in order to gain access to legal assistance and obtain the assistance of counsel.

X. CONCLUSION

It was a historic decision for the Supreme Court to hold that a municipality can bring a lawsuit under the Federal Housing Act. Because the *Miami* case was remanded, the courts have been allotted additional time to define the contours of proximate cause and how this concept can be used to prove harm. In the meantime, Cook County serves as an example of a municipality that will not be allowed to sufficiently prove their case because the lower courts do not have a measure of proximate cause for guidance. It does no good to give a plaintiff standing to bring suit without also giving them the ability to prove their claim.

Foreseeability should be a tool to measure the proximate cause of the municipality's injuries. It is a measuring tool for proximate cause under Florida jurisprudence, and has been used to prove other claims under the FHA. Additionally, bank employees must comply with required education standards, so an assumption of their expertise, and their ability to foresee the potential harmful outcomes of their discriminatory and predatory practices, is not unreasonable.

The boundaries of proximate cause can be determined by analysis of the issues that led to Miami's claim of harm. The test to determine if a bank or home loan provider should be held liable against a municipality under the Fair Housing Act is if (1) a bank conducts business in a municipality, where the majority of the population is minority, or otherwise vulnerable, to sell residential mortgage loans; (2) a bank offers predatory loans; (3) those loans result in an unreasonable number of loan defaults or foreclosures; (4) there is a foreseeable risk for an increase in vacant properties; (5) and the municipality has qualified as an aggrieved person under the FHA statute. If these five requirements are proven, the municipality has proven a direct link between the actions of the residential home loan provider and the municipalities injuries to prove proximate cause.

The City of Miami has not proven all of these factors in the case currently at issue, but given the opportunity, Miami would be able to present this information if the harm has truly occurred.

The Legislature should change the language within the FHA statute to reflect the Supreme Court decision that an "aggrieved person" can be any party who has suffered harm under the provision of the statute. The language should be changed from an "aggrieved person" to an "aggrieved party." Furthermore, the statute of limitations should be extended beyond

two years. Two years is not a sufficient amount of time for residents to secure legal advocates and protect themselves from housing discrimination.

XI. CONSIDERATIONS OUTSIDE OF THE SCOPE

While outside of the scope of this writing, it is worthy to mention that predatory lending is not the only way that a business may cause financial harm to a municipality. The Miami case raises the idea that cities and counties with a large minority or otherwise vulnerable population need legal protections from all predatory businesses that may attempt to target cities and counties with various scams or other forms of manipulation.