No. 19-15169

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WELLS FARGO & CO., AND WELLS FARGO BANK, N.A.,
Defendants-Petitioners,
v.
CITY OF OAKLAND, A MUNICIPAL CORPORATION,
Plaintiff-Respondent.

On Appeal from the United States District Court
for the Northern District of California,
No. 1:15-cv-04321-EMC
District Judge Edward M. Chen

RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Barbara J. Parker
Maria Bee
OAKLAND CITY ATTORNEY
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Telephone: (510) 238-6512

Yosef Peretz
Ruth Israely
PERETZ & ASSOCIATES
22 Battery Street, Suite 200
San Francisco, California 94111

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
2117 Leroy Place, N.W.
Washington, DC 20008
Phone: (202) 944-2874
Facsimile: (646) 365-3382
Email: robert.peck@cclfirm.com
Telephone: (415) 732-3777

(Additional Counsel Listed on Inside Cover)

Additional Counsel:

Joel Liberson
TRIAL & APPELLATE
RESOURCES, P.C.
3655 Torrance Blvd., Third Floor
Torrance, CA 90503
Telephone: (917) 848-3218

Attorneys for Plaintiff-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Respondent City of Oakland is municipal corporation created under authority of the State of California.

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INTRODUCTION

Contrary to Wells Fargo's unfounded hyperbole, this case is one of a tiny number of cases, one of just two pending in the state of California[1] and one of six pending nationwide,[2] in which a city has brought an action under the Fair Housing Act, 42 U.S.C. § 3601, *et seq*., alleging discriminatory mortgage lending practices and seeking lost property tax revenues resulting from foreclosures. Neither Oakland's lawsuit, nor the aggregate of these few actions will result in the "massive damages" the Bank imagines by citing an outlier lawsuit based on a different theory.[3]

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[1] Besides this case, *City of Sacramento v. Wells Fargo & Co.*, No. 2:18-cv-00416 (E.D. Cal.), is also pending. In it, Wells Fargo recently informed that court that "no such city has ever received a judgment in any of these parallel FHA cases" or been paid damages. Joint Status Report, *Sacramento*, No. 2:18-cv-00416. ECF No. 69 (filed Oct. 30, 2020).

[2] The others were all filed by Miami Gardens, Florida: *City of Miami Gardens v. Wells Fargo & Co*., No. 20-405 (U.S. Supreme Court), pending on procedural due process issue; *City of Miami Gardens v. Bank of Am. Corp*., 1:14-CV-22202 (S.D. Fla.); *City of Miami Gardens v. Citibank*, 1:14-CV-22204 (S.D. Fla.); and *City of Miami Gardens v. JPMorganChase & Co.,* 1:14-CV-22206 (S.D. Fla.).

[3] *Cobb County v. Bank of Am. Corp*., No. 1:15-cv-04081-LMM (N.D. Ga.), cited in Pet. 16, pleaded massive damages based on "equity stripping," where the borrower only pays interest and the bank charges fees so that the borrower has ever-diminishing equity in the home. *Cty. of Cook v. Wells Fargo & Co*., 314 F. Supp. 3d 975, 980 (N.D. Ill. 2018). The *Cook County* court, where the same claim was made, questioned whether

And no new cases will be filed as Wells Fargo tells this Court these cases challenge long-abandoned lending practices. Wells Fargo Pet. 2.

In *Bank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296 (2017) ("*City of Miami I*"), the Supreme Court held that a municipality had standing under the FHA to sue over discriminatory housing practices that caused it "financial injury … specifically, lost tax revenue." *Id.* at 1303. The holding was based entirely on the unique attributes of the FHA, which, unlike other statutes, evinced a congressional intent to grant broad standing and relief to some indirect victims of discrimination. *Id.* at 1303-04. Still, while cities had standing, retail businesses that lost customers due to discriminatory foreclosures did not. *Id.* at 1304.

The Court chose not to answer a second question, instead asking the lower courts to "define, in the first instance, the contours of proximate cause *under the FHA* and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses," *id.* at 1306 (emphasis added), reflecting solicitude for the singular breadth Congress accorded the FHA.

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equity stripping is an injury that falls within the FHA's zone of interests. *Id.* at 990.

Every court to undertake that task post-*City of Miami I* and review FHA lawsuits similar to Oakland's has denied a motion to dismiss on proximate cause. *See City of Miami v. Wells Fargo & Co.* [*City of Miami II*], 923 F.3d 1260 (11th Cir. 2019), *vacated as moot*, 140 S. Ct. 1259 (2020); *City of Sacramento v. Wells Fargo & Co.,* No. 218CV00416KJMGGH, 2019 WL 3975590, at *4-*9 (E.D. Cal. Aug. 22, 2019); and *City of Philadelphia v. Wells Fargo & Co.,* No. CV 17-2203, 2018 WL 424451, at *5-*6 (E.D. Pa. Jan. 16, 2018).

The uniformity of these decisions by sister courts demonstrates the fallacy of Wells Fargo's assertion that the panel's decision cannot be reconciled with *City of Miami I* or decisions in other circuits. Moreover, Wells Fargo's assertion of a conflict with precedent within the Circuit is also unavailing for the Bank relies on non-FHA cases.

Wells Fargo inaptly contends that every federal statute with common-law foundations adopts the same proximate-cause regime and that the panel deviated from the rigid framework used in RICO by examining the FHA itself and considering its legislative history. *City of Miami I* refutes that argument by mandating proximate cause be examined under the FHA – not some unrelated statute. 137 S. Ct. at 1306

(citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)). Indeed, *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258 (1992), a RICO case relied upon by Wells Fargo, instructs courts to survey each statue's own legislative history to determine the applicable proximate-cause standard. *Id*. at 267. The panel properly did that.

REASONS TO DENY REHEARING

I. THE PANEL'S DECISION IS CONSISTENT WITH PRECEDENT.

A. The Decision Is Consistent with *City of Miami I*.

The panel held that "Oakland plausibly alleges that its decrease in property-tax revenue has some direct relation to Wells Fargo's predatory lending practices," while denying that Oakland satisfied that same standard for its claim for increased municipal expenditures. Wells Fargo Add. ["WF Add."] 33. The two rulings demonstrate the care that the panel took in reading and applying precedent. The holding at issue fully comports with *City of Miami I*, which recognized the propriety of a city's lawsuit to recover lost property taxes due to discriminatory lending practices. 137 S.Ct. at 1305.

City of Miami I also explicitly declined "to draw the precise boundaries of proximate cause under the FHA and to determine on which

side of the line the City's financial injuries fall." *Id.* at 1306. Instead, it asked that the lower courts "define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

Plainly, the Court studiously avoided selecting an applicable standard, although it did provide some general guidance. On proximate cause, its holding only stated that "foreseeability alone is not sufficient." *Id.* at 1305. Otherwise, the Court articulated several general principles that the panel faithfully applied.

Of these considerations, first, *City of Miami I* said proximate cause incorporates "*some* direct relation between the injury asserted and the injurious conduct alleged,"[4] *id.* at 1306 (quoting *Holmes,* 503 U.S. at 268) (emphasis added), but also indicated that the necessary directness was a function of the specific statute's intended reach or "nature," rather than

[4] Tellingly and misleadingly, *Amicus* Chamber of Commerce omits the word "some" when it quotes this passage in order to treat it as a categorical mandate, something the Supreme Court took pains to avoid. *See* Chamber of Commerce Am. Br. 1, 3, & 4.

a one-size-fits-all measurement. *Id*. (citing *Lexmark*, 572 U.S. at 133). *See also* WF Add. 18, 19, 20.

Second, it recognized, that the "general tendency in these cases, in regard to damages at least, is not to go beyond the first step," *id*. at 1306 (citation and internal quotation marks omitted), as it has for more than a century,[5] but also made clear that this reference to a "first step" is not a literal requirement for immediacy. It said "[w]hat falls within that first step depends in part on the nature of the statutory cause of action, and an assessment of what is administratively possible and convenient." *Id*. at 1306 (citations and internal quotation marks omitted).

That approach is consistent with prior Supreme Court holdings that recognize that proximate cause embodies a "flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 272 n.20). Generally, a proximate cause must only be "substantial enough and close enough to the harm to be recognized by law, [and] a given proximate cause need not be, and

[5] This Court first said the "general tendency of the law, in regard to damages at least, is not to go beyond the first step," in *S. Pac. Co. v. Darnell-Taenzer Lumber Co*., 245 U.S. 531, 533 (1918).

frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). *See also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 268 (5th ed. 1984) ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." (emphasis added)).

Indeed, this Court has long recognized that a "causation chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Nat'l Audubon Soc., Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (brackets in orig.)).

It is, then, Wells Fargo's argument, not the panel's decision, that deviates from *City of Miami I* by seeking to impose RICO causation standards on the FHA. If accepted, the argument would undermine the congressional design of the FHA and never permit a municipality to recover for its property-tax injuries due to a bank's systemic discrimination in mortgage lending, despite the clarity with which the

Supreme Court said that the FHA embraces that purpose. *City of Miami I*, 137 S. Ct. at 1303. *See also* WF Add. 21-28.

Simply put, there is no conflict between *City of Miami I* and the panel's decision.

B. The Panel's Decision is Consistent with this Circuit's Decisions.

Wells Fargo contends that the panel's decision cannot be reconciled with two prior decisions of this Circuit. Yet, as the panel itself correctly stated, there is no conflict. WF Add. 42.

First, Wells Fargo argues that *Oregon Laborers-Emp'rs Health & Welfare Tr. Fund v. Phillip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999), categorically rejected the use of "aggregation and statistical modeling" to establish proximate cause. WF Br. 13. That is plainly incorrect. *Oregon Laborers*, a RICO and antitrust case, held that a statistical extrapolation about the efficacy of a smoking-cessation program that never took place was too speculative to identify the amount of money a health fund would have saved on medical expenses for smoking-related illnesses, relying on a similar Third Circuit decision on which Wells Fargo also relies. *Id.* at 965 (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 929 (3d Cir. 1999)).

The panel correctly found *Oregon Laborers* declared no categorical ban, but instead a ban based on speculation about how many members of the Fund would have ceased smoking and then not caused reimbursable medical costs. Unlike Oakland's regression analysis, the panel noted that the model in *Oregon Laborers* "speculated about events that *had not yet occurred*." WF Add. 42 (emphasis added). This approach conjectural approach differed from assessing each members' historic smoking-related expenses, a metric that *Oregon Laborers* declared "'easy to ascertain.'" *See* WF Add. 42-43 (quoting 185 F.3d at 964). The case does not ban regression analysis in support of proximate cause.

Second, Wells Fargo also inaptly asserts a conflict with another RICO case, *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). *Canyon Cty.* held that "government entities that have been overcharged in commercial transactions … can claim injury to their property [under RICO]," but no statutory standing exists for government entities forced to spend money to provide public services. *Id.* at 976-77. Even if standing did exist, *Canyon Cty.* lodged its proximate cause holding in RICO's very different standing regime, which does not permit lawsuits by third parties. *Id.* at 981. Its holding has no bearing on an

FHA lawsuit and does not address the use of regression analyses, which are used appropriately to "assess the effect of competing variables." *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 268 F.R.D. 627, 641 (N.D. Cal. 2010). *See generally* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008).

C. The Asserted Conflicts with Sister Circuits Is Illusory.

Finally, Wells Fargo seeks to justify rehearing based on a handful of post-*City of Miami I* sister circuit decisions, none of which involve the FHA. For example, *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), is a RICO case that cites *City of Miami I* only for *part* of its definition of what constitutes the "first step" and then discusses "[r]elevant administrative difficulties in the civil RICO context." *Id.* at 141. It does not "draw" upon *City of Miami I* to reject proximate cause, as Wells Fargo contends. WF Br. 15. *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489 (4th Cir. 2018), is also a RICO case and does not even mention *City of Miami I* or the FHA.

Wells Fargo's final out-of-circuit case is a state-law public nuisance case that predates *City of Miami I* by 15 years. Plaintiffs there sought to expand the law's reach beyond what Pennsylvania precedent allowed,

something the federal court disclaimed authority to do. The case has no relevance to determining the contours of FHA proximate cause. *See City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002).

Wells Fargo thus fails to demonstrate any relevant conflict between the panel's decision and *any* other case, in or out of this Circuit.

D. The Asserted Conflict in Other Proximate Cause Cases Is Irrelevant.

Wells Fargo also asserts conflicts with other proximate cause cases, largely arising under RICO or antitrust statutes. Yet, statutory proximate cause reflects legislative choices, which is why the Supreme Court has insisted on considering text, legislative history, and who the statute authorizes to sue to determine the applicable proximate cause standard. *See Holmes*, 503 U.S. at 268, 266, 273.

The antitrust and RICO statutes share the same "by reason of" language for proximate cause, and the Supreme Court has assumed that Congress chose those words purposefully, as RICO was adopted long after the Court had established the language's meaning in antitrust cases. *Id.* at 268. The Court also adopted its RICO proximate-cause regime because the "very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover [which] persuades us that RICO should not get such

an expansive reading." *Id.* at 266. As a result, RICO reflects an expectation that "directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Id.* at 269-70.

On the other hand, as the panel acknowledged, WF. Add. 21-28, the FHA's legislative history supports a different approach to proximate cause. Congress enacted the FHA, in response to an urban crisis in which segregated and deteriorating inner cities were centers of unrest, crime, and turmoil that could be traced to residential segregation and unequal housing and economic conditions. *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Proj., Inc.*, 576 U.S. 519, 529 (2015). It sought, in the words of one sponsor, to prevent the "destruction of our urban centers by loss of jobs and business to the suburbs, a declining tax base, and the ruin brought on by absentee ownership of property." 114 Cong. Rec. 2993 (statement of Sen. Mondale).

Amendments in 1988 were intended "to remov[e] barriers to the use of court enforcement by private litigants and the Department of Justice." H.R. Rep. 100-711, 13, 100th Cong., 2d Sess., 1988 U.S.C.C.A.N. 2173, 2174 (Jun. 17, 1988). Congress "expand[ed] the statute of limitations, remov[ed] the limitation on punitive damages [thereby boosting the

private attorney general status of private litigants], and [increased the award of] attorney's fees." *Id.* at 16. Congress explicitly endorsed lawsuits by third-party litigants and by cities seeking to recover lost property taxes by "reaffirm[ing] the broad holdings of [Supreme Court] cases" permitting those who are not discrimination victims to sue. *Id.* at 17 (emphasis added).

This legislative history, which *Holmes* declares the "key to better interpretation," 503 U.S. at 267, denies that other statutes have much to say about proximate cause under the FHA, and the panel properly considered the FHA's text and purpose.

II. THE PANEL'S DECISION IS PROPER AND CORRECT.

The panel's central holding, that "Oakland plausibly alleges that its decrease in property-tax revenue has some direct relation to Wells Fargo's predatory lending practices," WF Add. 33, is unquestionably a proper application of existing precedential guidance and provides no basis for rehearing.

Wells Fargo wrongly ascribes the panel's acknowledgement that more than one step may be alleged and that the district court suggested that there might be as many as five steps, to constitute an admission that

no literal "first step" was employed. Pet. 5. Yet, *Lexmark* demonstrates that more than the first step can comport with the statutory scheme. *See* 572 U.S. at 140 (acknowledging intervening steps but finding no "discontinuity" between the injury to the direct victim and the injury to the indirect victim plaintiff).

Moreover, as *Sacramento* found persuasive, the Eleventh Circuit held that "if the Banks' predatory lending practices injured homeowners and led to foreclosures on a massive scale, . . . [t]here is no discontinuity in this portion of the causal chain, [and] the principles animating the general first-step rule do not support the Banks' calculation of the post-foreclosure causal chain." *City of Sacramento*, 2019 WL 3975590, at *6 (quoting *City of Miami II*, 923 F.3d at 1277–78).

III. THE PANEL DID NOT ERR IN DESCRIBING THE STATUTE OF LIMITATIONS.

Wells Fargo also complains that the panel said the City's complaint "is not subject to the FHA's two-year statute of limitations" in a footnote. Pet. 17 (citing WF Add. 39 n.24). The complaint is meritless. The FHA's statute of limitations provides that an "aggrieved person may commence a civil action ... not later than 2 years after the occurrence *or the termination of an alleged discriminatory housing practice*." 42 U.S.C. §

3613(a)(1)(A) (emphasis added). The provision permits a party to "meld untimely and timely acts into a single timely claim" when the "timely acts injure the same FHA-protected right as the untimely acts." *Alpha III, Inc. v. City of San Diego*, 187 Fed. App'x 709, 710-11 (9th Cir. 2006).

Oakland's case plainly qualifies for treatment under the continuing-violation doctrine, as authorized by the FHA, for it alleges an ongoing discriminatory practice that had not yet ended when its initial complaint was filed and that dated back to 2004. *See, e.g.,* ECF. No. 105, ¶¶ 5, 63, 68, 85. As the case sits at the motion-to-dismiss stage, its factual allegations must be taken as true and construed in the light most favorable to the plaintiff. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009). No adjustment to the panel's opinion is necessitated by its accurate description of the applicable limitations period.

CONCLUSION

The petition for rehearing should be denied.

November 3, 2020

Respectfully submitted,

/s/ Robert S. Peck
Robert S. Peck
Counsel of Record

CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
2117 Leroy Place, N.W.
Washington, DC 20008
Phone: (202) 944-2874
Facsimile: (646) 365-3382
Email: robert.peck@cclfirm.com

Barbara J. Parker
Maria Bee
OAKLAND CITY ATTORNEY
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612
Telephone: (510) 238-6512

Joel Liberson
TRIAL & APPELLATE
RESOURCES, P.C.
3655 Torrance Blvd., Third Floor
Torrance, CA 90503
Telephone: (917) 848-3218

Yosef Peretz
Ruth Israely
PERETZ & ASSOCIATES
22 Battery Street, Suite 200
San Francisco, California 94111
Telephone: (415) 732-3777
Facsimile: (415) 732-379

Attorneys for Plaintiff-Appellee

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,118.

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○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Robert S. Peck **Date** Nov 3, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert S. Peck

Robert S. Peck