CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Winter 2017

From the Desk of the Chairperson

Laissez Les Bon Temps Roulez!

It means, *Let The Good Times Roll*, and for anyone that has ever been to New Orleans, Louisiana, this phrase encapsulates the New Orleans Louisiana (NOLA) experience.

On April 7, the Federal Bar Association's Civil Rights Law Section and New Orleans chapter cordially invite you to let the good times roll at our first, but soon to be annual, Civil Rights *Étouffée* CLE. It's a full day of panels with 7 full credits of CLE for a low cost, ranging from $195 for non-FBA members, to $150 for FBA members, and $95 for FBA Civil Rights Law and NOLA Chapter Members. The panelists who will be joining us in New Orleans are some of the best civil rights practitioners from all over the country. We are so proud to have Elissa Johnson and Eden Heilman join us from the Southern Poverty Law Center; Susan Hutson, the New Orleans Police Independent Monitor; Laura Olson, the Chief of the Department of Homeland Security, Civil Rights Immigration Division; Stan Young of Covington & Burling (who was counsel on the Stop & Frisk case in New York City); Caryl Oberman, the premier attorney in special education rights; Mag. Judge Richard Bourgeois of the Middle District of Louisiana, and so many more.

The event is not just about civil rights, but like a properly produced étouffée, this event will give you a tasty blend of civil rights disciplines: from First Amendment policing, to use of force and 1983 litigation, to the cross section of civil rights with immigration, special education, housing discrimination, impact litigation, forfeiture, marijuana laws and more.

This event would not be possible without the support of the NOLA Chapters Executive Director, C.C. Khar, FBA National guided by Maria Conticelli and Josh Albertson, and the Civil Rights CLE team of Theresa Powell, Stephen Haedicke and Darpana Sheth, along with leaders of each panel, including Jeffrey Feinbloom, Ken Gelburd, Elissa Johnson, Bonnie Kift, and David

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In this Issue:

Overview of the Issues the Civil Rights Conference Will Address in New Orleans

Impact Litigation and Social Justice Warriors

Class-action lawsuits are an important tool to advance civil rights. This panel will focus on the value of impact litigation to advance social justice and civil rights. Attorneys from various jurisdictions will share their experiences in bringing impact litigation related to prison conditions, racial profiling, and other targeted and vulnerable populations. They discuss strategies to continue to use impact litigation as a tool to advance civil rights.

Moderator: TBD
Panel: Elissa Johnson, Southern Poverty law Center; Tracie Washington, Professor, Dillard University & Louisiana Justice Initiative; Stanley Young, Covington Burling

From Training to the Streets: What are the Standards for Street Protest and First Amendment Policing

From Occupy Wall Street to Black Lives Matter to Anti-Ban protest, cities and towns in America have seen an increase in street protest over the past decade, and since January 20, there are almost daily street protests in frequency and volume of participants never before seen in our history. The panel will discuss how criminal laws apply when First Amendment activity is in play, how municipalities can properly train our police forces to properly apply such standards and how protestors and police can work better to ensure expressive speech activities are given the proper constitutional safeguards.

Moderator: Magistrate Judge Richard Bourgeois, Middle District of Louisiana
Panel: Wylie Stecklow, New York City; (represented Occupy Wall Street); Eileen Rosen, Chicago, IL (represents Chicago PD); Tara Johnston, Baton Rouge, LA (represents Baton Rouge Sheriff)

For-Profit Policing: Fines, Fees, and Forfeitures

Reform of the American justice system has captured the attention of the American public. While the discussion has focused on sentencing policies, police accountability, and reentry issues, there is a less-examined, but equally significant issue: Increasingly, our justice system has come to rely on the criminal justice system as a means to create revenue. This panel examines the problems of for-profit policing and the alarming trend of using fines, fees, and forfeitures to fund law-enforcement agencies.

Moderator: [TBD]
Panel: Darpana Sheth, Senior Attorney with Institute for Justice; Sarah Zampierin, Senior Staff Attorney, Southern Poverty Law Center; Alanah Odoms Herbert, Deputy General Counsel, Special Counsel to Chief Justice Bernette J. Johnson, Louisiana Supreme Court; Darpana Sheth, Arlington VA

Pre-Trial detainees v. Post-Conviction prisoners: did the Supreme Court Decision in Kingsley mark a sea change or is it a distinction without a difference?

In *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), the Supreme Court held that a pretrial detainee may prevail on an excessive force claim if he or she shows that the force used was objectively unreasonable, regardless of whether the officer had a subjective intent to cause the detainee harm. In reaching this decision, the Court granted greater protections to pretrial detainees under the 14th Amendment's Due Process Clause than convicted prisoners enjoy under the Eighth Amendment. The Eighth Amendment still requires proof of a subjective intent to cause harm before a violation will be found. The Ninth Circuit has interpreted the *Kingsley* decision to apply to all claims brought by pretrial detainees, not just those based on allegations of excessive force. This panel will explore the ramifications of *Kingsley* and query whether other circuits are likely to follow the Ninth Circuit's expansive reading of *Kingsley.* If so, what will that mean for jail litigation?

Moderator: Stephen Haedicke NOLA
Panel: Liz Cummings NOLA; Jim Mullaly, NOLA; Theresa Powell, Springfield, IL

Use of Force Continuum: Comparing Federal and State Standards

This panel will discuss how local (non-federal) police officers are trained in terms of when it is appropriate to use force, how much force is authorized and the discretion given to law enforcement to make decisions. We will discuss the application, implementation, and law enforcement's understanding of the Use of Force Continuum to compare and contrast relevant cases which address the Court's understanding of reasonableness.

Moderator: Theresa Powell, Springfield, IL
Panel: Bill Mullaly, NOPD Swat; Gary Bizale, NOLA; Susan Hutson, New Orleans Police Department Independent Monitor

"Religious Freedom" vs. LGBT Equality: Legislative Attempts to Empower Anti-LGBT Discrimination

Laws have been passed or proposed on the state and federal level which privilege anti-LGBT religious beliefs and give legal protection to anti-LGBT discrimination. Under the so-called First Amendment Defense Act introduced in the

House of Representatives (HR 2802), federal employees or contractors could refuse service to LGBT citizens or terminate LGBT employees if they professed a religious belief that LGBT people should not be permitted to marry, or that sexual relations outside heterosexual marriage are improper. HR 2802 ironically defines "discriminatory action" as any action taken by the government against a person who discriminates against LGBT people. In 2016, Mississippi passed a nearly identical law: HB 1523. A federal court issued a preliminary injunction enjoining its enforcement. Even if HB 1523 is struck down, it is unlikely to be the last word in the use of claimed "religious freedom" as a means to oppose LGBT equality. This panel, which includes attorneys taking part in the HB 1523 litigation, will discuss the legal issues raised by HB 1523, and will look forward to what might come next.

Panel: David Thompson, NYC; J. Dalton Courson, NOLA; Alysson Leigh Mills, NOLA

Disparate Impact Claims: Recent Case History and Application for Fair Housing Claims

On June 25, 2015, the Supreme Court, by a five-to-four margin, ruled that a disparate impact claim was cognizable under the Fair Housing Act. While upholding disparate impact theory, the Court imposed significant limitations on its application in practice "to protect potential defendants against abusive disparate-impact claims." In particular, the Court held that a racial imbalance, without more, cannot sustain a claim, and directed lower courts to "examine with care" the claims at the pleadings stage. This panel will address the history of this case and other laws affecting housing discrimination claims and how they now form the basis for Fair Housing claims and defenses to them.

Moderator: Cashauna Hill, Fair Housing Action Center, NOLA
Panel: Joy Willing, Jones Walker, NOLA; Toni Jackson, Jones Walker NOLA; Laura Tuggle, ED South East Legal Services

Charters, Cybers and Special Education: Old Wine in New (and Leaky) Bottle

The Individuals with Disabilities Education Act (IDEA) has been around in its various forms for more than forty years. It guarantees a free, appropriate public education to students with disabilities, and that they will be educated to the maximum extent appropriate with their non-disabled peers. The IDEA's core principles, including full access to education, individualized evaluation and prescriptive program development, full parental participation, prior written notice, and parents' opportunity to challenge educational decisions for students with disabilities, have had a profound impact on the lives of children and their families. How will the growing emphasis on school choice initiatives, including charter schools, cyber-charter schools, and school voucher programs, affect those lives? In this panel, experienced counsel from both sides, representing parents and school districts, will explore the foundations of special education law and the impact of those initiatives on access, quality and accountability for today's special education students.

Moderator: Ken Gelbrud, Pennsylvania
Panel: Caryl Andrea Oberman, PA; Eden Heilman, Southern Poverty Law Center; Jaimme Collins, Adams Reese, NOLA

An examination of the use of federal prohibitions on medical marijuana and interstate traveling with medicinal marijuana

The panelists on the marijuana panel will present an overall view of current legal status regarding the growth, production, distribution, and use of marijuana for medicinal and adult use in the new environment across the many states and their potential interaction with federal laws. Specific State laws that have legalized marijuana to various degrees or manners and their practical implications before, and at, trial will also be discussed.

Moderator: Bonnie Kift, Ligonier, PA
Panel: Jerry Goldman, Anderson Kill & Olick, NYC; Sean McCallister, Denver CO

An exploration of the cutting-edge issues at the intersection of civil rights and immigration law

This panel will address key issues at the intersection of civil rights and immigration law. We will discuss the broad nature of the authority of the Department of Homeland Security (DHS) to interrogate, detain and remove non-citizens and how the agency exercises its authority. We will discuss a number of hot topics, including the recent Executive Orders and how they impact the civil rights of non-citizens. Other topics will include the now-defunct NSEERS program and the prospect of a so-called Muslim registry; Fourth Amendment issues and motions to suppress; immigration detainers; and issues affecting immigrant children, including the right to an education. Finally, the Immigration Section Chief from DHS's Office of Civil Rights and Civil Liberties (CRCL) will discuss her office and address how immigrants and their advocates can best utilize it as a resource.

Moderator; Jeffrey A. Feinbloom, NYC
Panel: Laura Olson, Department of Homeland Security, Civil Rights Civil Law, Immigration Division Chief; Kathleen Gasparian, NOLA; Hiroko Kusuda,Professor of Law, Loyola New Orleans Law School

Legal Challenge to Voter-Suppression Law on Trivial Errors seeks Supreme Court Review

by Subodh Chandra and Sandhya Gupta

A voter writes her name in legible cursive, rather than in print, in the name field on a provisional-ballot form. Another voter, 87 years old with macular degeneration, carefully completes her absentee-ballot form from home—but she writes one wrong digit in her social-security number. Yet another voter, on his provisional-ballot form, accidentally writes today's date in the birthdate field instead of his birthdate.

Under Ohio law, and a recent Sixth Circuit decision, these voters would be disenfranchised for technical, trivial errors—even where their county elections boards have sufficient other information on the forms to verify the voters' identity and eligibility to vote, including signatures that match those on file.

Ohio groups have challenged the laws and are currently seeking Supreme Court review. The Supreme Court's decision on whether individuals and private entities can sue to protect the right to vote despite minor, clerical errors comes at a critical time.

The Sixth Circuit upholds Ohio's voting restrictions despite no evidence of fraud

In 2014, as part of a flurry of legislation constricting ballot-box access—with Republican comments suggesting that voter suppression was their goal—Ohio enacted S.B. 205 and S.B. 216. Under these laws, those voting by absentee or provisional ballot must fully and accurately complete all five fields (name, address, identification, birthdate, and signature) on the forms accompanying their ballots, otherwise their votes will not count. In the 2014 and 2015 general elections, thousands of Ohio voters were disenfranchised because of errors or omissions in these fields. The laws continued to disenfranchise voters in the 2016 general election.

The Northeast Ohio Coalition for the Homeless, the Columbus Coalition for the Homeless, and the Ohio Democratic Party (the plaintiffs) sued Ohio and Ohio Secretary of State Jon Husted (the defendants), claiming that the laws violated the Fourteenth Amendment, Section 2 of the Voting Rights Act, and the Materiality Provision of the Civil Rights Act of 1964.

After a 12-day trial, Judge Algenon Marbley of the U.S. District Court for the Southern District of Ohio mostly agreed. The court issued an injunction in the plaintiffs' favor, holding that the perfect-form requirements in four fields—plaintiffs did not challenge the signature requirement— imposed an undue burden on the right to vote and an unlawful disparate impact on minority voters in violation of Section 2 of the Voting Rights Act.

A divided Sixth Circuit panel, however, largely reversed the district court's injunction, agreeing only that errors in the *address* and *birthdate* fields of the *absentee* form should not cause a voter to be disenfranchised.[1] Absentee voters who make mistakes in the *name* or *identification* fields, on the other hand, are out of luck—as are *provisional* voters who make mistakes in any of the fields. (One narrow exception exists for provisional voters who write in the wrong year in their birthdate field, giving elections boards discretion to accept or reject the ballot.)

The panel majority upheld these restrictions over strong dissent and despite acknowledging the complete absence of any evidence of "a legitimate fraud concern."[2] Even the defendants' representative admitted at trial that instances of fraud were "infinitesimal," and that another purported rationale—to aid voter registration—did not justify disenfranchising voters.

A little-known 1964 provision offers a path to the U.S. Supreme Court

After unsuccessful en banc and stay applications, the plaintiffs have turned toward the Supreme Court, relying on a claim that for most of the litigation has stayed in the shadows. This little-cited provision, the Materiality Provision of the 1964 Civil Rights Act, prohibits denying the right to vote for any "error or omission on any record or paper relating to any application, registration or other act requisite to voting, *if such error or omission is not material in determining whether such individual is qualified* under State law to vote in such election."[3]

Under this provision, the challenged laws would fail. The overwhelming record evidence shows that elections boards can determine whether an individual is qualified even with errors and omissions in the four fields—these errors and omissions are thus immaterial and Ohio may not disenfranchise voters because of them.

Neither the district court nor the Sixth Circuit panel ruled on the Materiality Provision claim, however, because Sixth Circuit precedent, *McKay v. Thompson*,[4] holds that no private right of action exists to sue under that provision; only the Attorney General can sue.

While *McKay* failed to conduct any analysis on the issue, luckily, the Eleventh Circuit in *Schwier v. Cox*[5] undertook a robust analysis, leading it to reject *McKay* and adopt the opposite conclusion: individuals and private entities *can* sue under the Materiality Provision. The resulting circuit conflict forms the basis for the plaintiffs' petition for certiorari in *NEOCH v. Husted*.

The Supreme Court's grant of certiorari would be important in any era to promote the enforcement of civil-rights laws. But under President Trump, who has ordered a "major investigation" into supposed voter-fraud and whose attorney-general nominee has long opposed voting rights, the stakes are even higher. A private right of action ensures that voters and their advocates, not just the Attorney General, can act to preserve their most fundamental right to participate in democracy. ■

Subodh Chandra is managing partner, and Sandhya Gupta is of counsel, at The Chandra Law Firm LLC in Cleveland, Ohio.

Endnotes

[1] *NEOCH v. Husted*, 837 F.3d 612, 632–34 (6th Cir. 2016).
[2] *Id.* at 633.
[3] 52 U.S.C. § 10101(a)(2)(B) (emphasis added).
[4] 226 F.3d 752 (6th Cir. 2000).
[5] 340 F.3d 1284 (11th Cir. 2003).

Sixth Circuit Reverses Decades-Old Fees-for-Fees Standard, Yields Immediate Results for Civil-Rights Plaintiffs

by Subodh Chandra and Sandhya Gupta

In *NEOCH v. Husted*,[1] a case our firm litigated, the Sixth Circuit handed down a significant victory to civil-rights plaintiffs when it overturned a 30-year-old ruling that had severely limited those plaintiffs' ability to recover attorneys' fees for the time spent litigating over fees (otherwise known as "fees for fees"), even where they had won.

The *NEOCH* decision means that defendants in the Sixth Circuit can no longer use scorched-earth tactics in fee litigation to force plaintiffs to accept low-ball settlement offers that effectively eat into recovery for their merits success.

The *Coulter* cap

As most civil-rights practitioners know, a key piece of federal civil-rights legislation, 42 U.S.C. § 1988, provides that prevailing civil-rights plaintiffs may recover their reasonable attorneys' fees from losing defendants. With § 1988, Congress sought to incentivize competent attorneys to accept meritorious civil-rights cases—which they otherwise might not be able to do if plaintiffs cannot afford their services—and thereby encourage private suits to enforce the civil-rights laws.

Until recently, however, in the Sixth Circuit, this rule did not fully play out the way Congress intended. Although courts awarded reasonable fees for *merits* work, a 1986 ruling, *Coulter v. Tennessee*,[2] limited *fees-for-fees* recovery —fees for the time spent litigating fees— to just 3% of the total hours spent on the merits case (or 5%, if the case had gone to trial).

The *Coulter* court arbitrarily chose these figures without any basis in law or fact. For example, there was no analysis of how long it takes to prepare a fee petition or whether such preparation is proportional to the merits litigation (it is not), much less proportional at a rate of 3%-5%. The court claimed to be addressing the problem of prolonged fees litigation, but baselessly assumed that plaintiffs, rather than defendants, were to be blamed.

In fact, as the plaintiffs' and amicus briefing pointed out forcefully, the reality was and is quite different from that portrayed in *Coulter*: fee applications are much more strenuous to prepare and support than private fee invoices; and without full compensation as § 1988 contemplates, defendants, not plaintiffs, have an interest in prolonging fees litigation—low-balling fee-settlement offers or, knowing they will face no financial consequences, delaying payment and running up plaintiffs' fees in fees litigation.

Judge Merritt: "I've changed my mind"

While litigants had previously attempted to challenge the *Coulter* cap, the *NEOCH* plaintiffs had a key that previous plaintiffs had not used: a 1990 Supreme Court case in a similar fee-shifting context holding that the fees-for-fees stage of a fees litigation may not be subject to a different standard than the fees-for-merits part of the litigation.

Although the case, *Commissioner v. Jean*,[3] addressed fees recovery under the Equal Access to Justice Act (EAJA), the reasoning applied equally to § 1988. The *Jean* Court observed, "the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items."[4] Moreover, unlike *Coulter*'s 3% and 5%, the case pointed to the traditional *reasonableness* formulation for determining the amount of fees for fees.

The *NEOCH* court found *Jean* as well as the practical-reality arguments persuasive. As it noted, *Jean*'s reliance on the reasonableness formulation "preordains the conclusion that the reasonableness formulation applies to the fees on fees stage of § 1988 too."[5] It further acknowledged that "[b]y not compensating for work seeking fees, the practical effect is to diminish the value of attorneys' fees awarded for the entire case, including the work on the merits."[6]

And it observed that the *Coulter* rule had "create[d] an incentive for defendants (typically governmental agencies) to push the fee litigation beyond the 3% cap and use the prospect of numerous hours of uncompensated time as leverage for a lowball settlement proposal."[7] At oral argument, Judge Merritt—*Coulter*'s author, who happened to also be on the *NEOCH* panel—alluded to the skewed incentives and stated that, after 30 years, "I've changed my mind."

Defendants come to the table

The effect of abrogating *Coulter* was immediate. Upon *NEOCH*'s remand, the defendants agreed to settle the fees-for-fees portion of the case, and specifically asked that the plaintiffs' counsel let them know before starting work on any additional fees-for-fees briefing before the district court.

Thus Congress's intent was restored. Going forward, civil-rights plaintiffs in the Sixth Circuit should be able to recover their attorneys' fees-for-fees under the same reasonableness standard as their merits fees—thus, ultimately, better ensuring their access to the judicial process and to justice. ■

Subodh Chandra is managing partner, and Sandhya Gupta is of counsel, at The Chandra Law Firm LLC in Cleveland, Ohio.

Endnotes

[1]831 F.3d 686 (6th Cir. 2016).
[2]805 F.2d 146, 149 (6th Cir.1986).
[3]496 U.S. 154 (1990).
[4]*Id.* at 161-62.
[5] *NEOCH,* 831 F.3d at 722.
[6]*Id.* at 724.
[7]*Id.*

A Flurry of 2016 Election Eve Lawsuits Seek to Protect the Right to Vote Without Threats or Intimidation

by Steven S. Kaufman and Chad D. Cooper

The 2016 Presidential election cycle, more than any other in recent memory, showed the power of each vote and the pre-eminence of the right to vote. In the run-up to Election Day, tensions heightened and many were concerned about whether voters would be intimidated in their free exercise of their right to vote. Many were concerned that the incivility would intimidate voters and suppress turnout – particularly in targeted neighborhoods. In 2016, the federal court in Cleveland was the forum for perhaps the most significant voter intimidation lawsuit filed in the United States.

On Oct. 30, 2016, the Ohio Democratic Party ("ODP") filed suit against the Ohio Republican Party ("ORP"), Donald J. Trump for President, Inc. ("Trump"), Roger J. Stone, Jr. ("Stone"), and Stop the Steal, Inc. ("Stop"). USDC N.D. Ohio Case No. 1:16-cv-02645-JG. ODP alleged that Defendants worked together to promote voter intimidation efforts targeting African American voters by recruiting "poll watchers" to descend on urban neighborhoods. Vigilante "poll watchers" would be deputized and trained to challenge voters. ODP alleged that Trump provided inspiration, Stone and Stop provided recruiting and training, and ORP facilitated registration of poll observers.

ODP alleged that, because Defendants' efforts were designed to recruit activists who planned to harass and intimidate voters, Defendants had violated Section 2 of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3) and Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b). ODP alleged entitlement to an injunction.

On Nov. 4, 2016, U.S. District Judge James S. Gwin received testimony and argument and issued a Temporary Restraining Order. He decided that ODP was not seeking a generalized "obey the law" injunction (as Trump had argued) and that ODP established grounds for issuance of a TRO and issued an Order against Trump, Stone, and Stop. To be sure all political persuasions were protected, Judge Gwin issued the injunction against the Clinton campaign as well.

The historic injunction barred Trump, Stone, Stop, the Clinton campaign and "other individuals or groups" from engaging in voter intimidation, including such conduct as "Interrogating, admonishing, interfering with, or verbally harassing voters or prospective voters inside polling places, in the buffer zone, or within ten feet of a voter standing in line outside the buffer zone, or training, organizing, or directing others to do the same."

That evening, Trump appealed to the Sixth Circuit US Court of Appeals in Cincinnati, and the next day filed a Motion to Stay the TRO, and a Petition for Initial Hearing En Banc. Trump argued that the TRO infringed the First Amendment, "federalized" Ohio law, and brought non-parties to the action within the scope of the TRO. Opposing the request for en banc review, ODP explained why Judge Gwin's TRO did not violate the First Amendment: the evidence of imminent threats of intimidation was sufficient.

Without providing any opportunity for ODP to brief its opposition, the Sixth Circuit on Monday morning issued the Order granting Trump's Emergency Motion to Stay the TRO. ODP immediately sought review from the United States Supreme Court. Early that afternoon, the Supreme Court issued an Order denying ODP's application to vacate the stay. In a statement, Justice Ginsburg commanded that Ohio law already proscribes voter intimidation and provides that local Boards of Election can deal with the issue.

There is every indication that the highly polarized and aggressive political operations and elements of the electorate will present these threats in the future. The question, never resolved on the merits and remaining for these future problems, is whether the Courts, not Administrative power of local Boards of Election, are best able to protect the fundamental right to vote on Election Day free of threats, interference, and intimidation. Is the bureaucracy, vested with election law powers, sufficient to really protect? Courts and law enforcement are perhaps best situated with the immediate power and authority to act. Once a voter is "denied" access, how do you protect the election itself?

Ultimately, ODP does not believe that the Sixth Circuit came to the right conclusion. Judge Gwin had found on the evidence before him that, on Election Day, the fact that Ohio had a statute on the books prohibiting voter intimidation would not be enough. Nevertheless, ODP believes it achieved a substantial result because the spotlight shone on the activities of Stone and Stop—as encouraged by Trump—resulting in a TRO that had a chilling effect on intimidation activities that had been planned. On Election Day, Ohio's polling places were peaceful. ■

Members of Kaufman & Company, LLC in Cleveland, Ohio and Co-Counsel for the Ohio Democratic Party in this litigation. Kaufman & Company is a litigation boutique with offices in Cleveland, New York, and Washington, DC.

Supreme Court Previews

Provided by Lucia Blacksher Ranier, Professor of the Practice and Director, Civil Litigation Clinic, Tulane Law School

City of Miami v. Bank of America Corp., 800 F.3d 1262 (11th Cir. 2015), cert. granted, 136 S.Ct. 2544 (June 28, 2016)

Local governments were hit hard by the collapse of the housing bubble in 2008 and the ensuing foreclosure crisis. Property tax revenues fell while the need to provide local government services to address blight in foreclosure-ravaged neighborhoods increased. Many local governments have looked to the Fair Housing Act (FHA) for redress, including the state of California; Cook County, Illinois; Dekalb, Fulton and Cobb Counties, Georgia; and the cities of Los Angeles, Birmingham, Alabama, Providence, Rhode Island, Memphis, Tennessee, Baltimore, and Miami. These local governments have sued various lenders, including Bank of America Corp., Citibank Inc. and Wells Fargo & Co., alleging a decades-long practice of redlining and reverse redlining (the practice of extending mortgage credit on exploitative terms to minority borrowers), which allegedly contributed to the foreclosure crisis by leading to more numerous and quicker loan defaults and foreclosures.[1]

In this case the Eleventh Circuit, noting that other lower courts have been "sharply divided," 800 F.3d at 1277, held that the City of Miami's FHA claims survive the Bank's motion to dismiss. It held that the City has established Article III standing by alleging a concrete, particularized injury that is "fairly traceable" to the Bank's actions and can be remedied by requested damages and injunctive relief. Id. at 1272 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). It rejected the Bank's argument that, because of the "myriad of other factors caus[ing] foreclosure and blight" the causal link between its mortgage practices and the City's injury is too attenuated. And it held that mere Article III standing is sufficient to provide the City "statutory standing" as an "aggrieved person" within the "zone of interest" Congress established in the Fair Housing Act. 800 F.3d at 1277-78, relying on *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and other early FHA Supreme Court decisions. The Eleventh Circuit acknowledged that the Supreme Court more recently had construed the same "aggrieved person" language in Title VII more narrowly than what is allowed under Article III, *Thompson v. North American Stainless*, LP, 562 U.S. 170 (2011), but it held it was bound by the early FHA decisions until they are overruled by the Supreme Court.

The questions presented ask the Court to determine whether an "aggrieved person" under the FHA must allege more injury and/or a more direct causal connection with the defendant's actions than is required for Article III standing, that is, whether Congress intended to provide relief to persons or governments who are not the immediate victims of racial discrimination but who have suffered economic harm that is derivative of the discrimination. From a broader perspective, this case may determine whether the abuses of finance capitalism can be challenged under federal civil rights statutes.

This case has been consolidated with *City of Miami v. Wells Fargo & Co.,* 801 F.3d 1258 (11th Cir. 2015, cert. granted, 136 S.Ct. 2545 (June 28, 2016). The Court heard argument in these cases on November 8, 2016. The justices' primary focus was on how to craft a rule limiting tangential, third party claims of injury resulting from systemic housing discrimination. ■

Endnotes

[1]Nicholas S. Agnello, Cities Are Looking To Fair Housing Act To Fight Redlining, Law360 (Nov. 5, 1016).

Chair continued from page 1

Thompson.

And because no trip to the Crescent City would be complete without a good taste of all things New Orleans has to offer, let us help you divert from the tourist experience found on Bourbon Street. On April 6, we will be catching world-famous trumpeter Kermit Ruffins at his Thursday night residency at Bulleits in the Treme. After the CLE Friday, we will be participating in a traditional NOLA 2nd line, dancing our way from our amazing hosts at Adams & Reese back to the Sheraton Hotel. And all weekend long, you can catch the best music in the best music city at the largest free outdoor music festival in this country. The French Quarter Festival is April 7-9 and more information is available online at fqfi.org/frenchquarter/schedule/stage.

If you attend the FBA Civil Rights Étouffée CLE, you will leave with an array of civil rights knowledge smothered in a taste of New Orleans. And you will understand why in New Orleans, we say *Laissez Les Bon Temps Roulez!* ■

Register Now: fbacivilrightsnola17.eventbrite.com
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Questions: FBACIVILRIGHTSLAW@gmail.com
Overview of topics available on page 2.

Wylie Stecklow
FBA Civil Rights Law Section
Chairperson

The Refusal to Insure Section 8 Properties Has Disparate Impact Consequences

by Jean Zachariasiewicz

The willingness of insurance providers to issue policies to landlords who accept tenants using Section 8 vouchers[1] is an issue at the intersection of fair housing and the insurance industry that is gaining prominence. Private investigation and action around this issue has taken place across the country in the last few years, as evidenced by lawsuits in state and federal court, and complaints filed with the federal Department of Housing and Urban Development ("HUD").[2] These federal and administrative complaints allege that, once they become aware of the presence of Section 8 tenants at an insured property, the insurance providers have either canceled the existing property insurance policy or required a higher premium in order to continue coverage, and that these actions have a disparate impact on protected groups, such as racial minorities and people with disabilities, thereby violating the Fair Housing Act ("FHA"). And thus far, the federal courts have agreed.[3]

Despite this new focus on insurance industry practices related to subsidized housing, there is very little information available on the subject. The actuarial statistics utilized by underwriters in measuring the risk presented by Section 8 voucher-holders – if such statistics even exist – are not publicly available. And while much has been written about the reasons landlords refuse to participate in the Section 8 program, no similar studies or commentaries exist regarding similar decisions within the insurance industry. However, it is likely that the insurance industry's attitudes are similar to those of landlords and neighborhood residents, where discrimination against voucher-holders is often the result of intertwined negative stereotypes about poverty and race, rather than actual evidence that voucher-holders bring problems like crime or cause property deterioration.[4]

A refusal to insure properties with Section 8 tenants, or charging higher rates for coverage of such properties, creates potentially costly risks for insurance companies. First, these insurance practices likely violate the FHA under a disparate impact theory of liability, due to the demographic statistics regarding voucher-holders versus the Unites States population as a whole. Therefore, the Supreme Court's 2015 affirmation that disparate impact claims are cognizable under the FHA[5] makes these practices ripe for litigation. Second, such policies open insurance companies up to liability under an ever-changing assortment of state and local laws that prohibit source-of-income discrimination in the rental market.

Based on the reasons landlords and communities give for refusing Section 8 tenants, it is likely that insurance companies are using Section 8 status as a proxy for other forms of discrimination, such that these policies function like traditional red-lining, which has long been illegal under the FHA. Accordingly, the insurance industry would better serve itself, its shareholders and customers, and the goal of integrated housing by utilizing different risk factors when performing risk assessments and making Section 8 underwriting decisions. ■

Jean Zachariasiewicz is an associate at Brown, Goldstein & Levy, LLP, a law firm in Baltimore, Maryland, where she focuses her practice on civil rights law.

Endnotes

[1]The Section 8 Existing Housing Program, also known as the Housing Choice Voucher Program, is a federal rental assistance program operated by the Department of Housing and Urban Development ("HUD"). *See* 42 U.S.C. §§ 1437F and 1437(o). It will be referred to in this article as "Section 8."

[2]*Jones v. Travelers Cas. Ins. Co. of Am.*, No. 5:13-cv-02390-LHK-PSG (N.D. Cal. 2013); *Viens, et al. v. Great American Insurance Group, et al.*, No. 3:14-cv-00952-JBA (D. Ct. 2014); *National Fair Housing Alliance v. Travelers Indemnity Company*, No. 1:16-cv-00928 (D. D.C. May 17, 2016); *Fair Housing Continuum, Inc. v. Lloyd's of London, et al.*, HUD File No. 04-14-0859-8; *Brevard Neighborhood Development Coalition, Inc., et al. v. Lloyd's of London, et al.*, HUD File No. 04-14-0858-8.

[3]*See Viens v. Am. Empire Surplus Lines Ins. Co.*, 113 F. Supp. 3d 555, 572 (D. Conn. 2015) (denying defendant's motion to dismiss and holding that plaintiffs' allegations that defendant insurer's refusal to insure landlords with Section 8 tenants had a disparate impact on racial minorities stated a valid FHA claim); *Jones v. Travelers Cas. Ins. Co. of Am.*, No. C-13-02390 LHK, 2015 WL 5091908 (N.D. Cal. May 7, 2015) (denying defendant's motion for summary judgment where plaintiffs alleged that defendant's refusal to insure properties with Section 8 tenants violated the FHA under, *inter alia*, both disparate impact and disparate treatment theories).

[4]*See* Rebecca Tracy Rotem, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program*, 78 Fordham L. Rev. 1971, 1981 (2010); Lisa M. Krzewinski, *Section 8's Failure to Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. Third World L.J. 315, 322 (2001).

[5]*See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).