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## CFPB and DOJ have badly overreached in the Fairway redlining case

By Paul F. Hancock | November 4, 2024

My career has been dedicated to the fight for civil rights for all. I headed the housing section of the Civil Rights Division of the U.S. Department of Justice. The division filed a record number of housing and lending discrimination cases during my tenure, including the initial claims of redlining. In private practice, I have continued to counsel lenders on proper approaches to compliance and defend those who are challenged unjustly. I am proud of my work in fighting the good fight. Therefore, it pains me greatly to say it, but I believe that the federal government's enforcement of anti-housing discrimination laws has gone awry.

In October, the Consumer Financial Protection Bureau and the DOJ took action to end what the agencies called Fairway Independent Mortgage Corporation's illegal mortgage lending discrimination against majority-Black neighborhoods in the greater Birmingham, Alabama, area. The CFPB and DOJ alleged that Fairway illegally redlined Black neighborhoods.

I had no involvement in this case,



It is nonsensical for the government to sue one of the leading lenders in an underserved minority community as a means of encouraging more lending in that community, writes Paul Hancock, of K&L Gates.

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but the complaint and joint press release by the two agencies lay out a damning case against the lender. Upon first glance, you could walk away from it trusting that the good guys truly got the bad guys. But a closer look at the details of the case, including Fairway's response, uncovers exactly the kind of ill-advised government policies for fighting housing discrimination that could end up harmful to minority house-

holds and good lenders. If we do not push for a more balanced approach, the actions of some regulators will harm the very communities that the government seeks to benefit, as well as good lenders who share the government's objective.

The two agencies say that it was the lender's intentional refusal to provide mortgage loans in minority residential areas that led to their allegations. Remarkably, the

government fails to consider *how many* loans the lender actually originated in minority areas. Neither the complaint, the proposed consent order nor the government press release tells us how many loans Fairway originated in minority areas and how that number compares with other lenders who offer loans in the area. Fairway asserts that it originated a greater number of loans in minority areas of Birmingham than any other nonbank lender with a presence in the area. If that is true, the government should have ended its inquiry and commended the company for its service to minority areas.

Instead of considering the actual number of loans originated in minority areas, the government approach is to evaluate the balance of the company's loan distribution between minority and nonminority communities and compare the percentage with that of other lenders. In the Fairway case, the government asserts that 3.7% of Fairway's loans were in minority areas, while 12.2%

of loans originated by peer lenders were in minority areas; that is the basis for the allegation of redlining. Again, the government does not tell us how many loans Fairway originated in minority areas, and whether that number is greater than or less than the number of loans that peer lenders originated in minority areas. In theory, and as Fairway asserts, it may have been among the largest originators of loans in minority areas as compared to peers, but has a lower racial-balance percentage, simply because it is a large lender in nonminority areas. And, if this is the case, the racial balance problem can be resolved simply by making fewer loans in nonminority areas with no additional lending in minority areas, which is an odd method for resolving redlining.

The government's allegations regarding office locations and advertising may have relevance in explaining why a lender has a low volume of minority-area loans but are irrelevant if the lender actually has a high vol-

ume of minority-area loans.

Demands that all lenders have a similar distribution of loans between minority and nonminority areas are calls for the type of racial balance or quota that violates the Constitution, the Fair Housing Act and Equal Credit Opportunity Act. From a policy perspective, it is nonsensical for the government to refuse to recognize the actual volume of lending in minority areas. Why would the government want to sue the lenders who make the largest number of loans in minority areas with reputational-damaging accusations of racial discrimination? Does the government really believe that this advances civil rights?

Public, private and nonprofit leaders in housing and housing finance must work together to combat government overreach and the dangerous impact that wrong-headed enforcement has on minority communities. We must support vigorous enforcement of civil rights laws, but misguided policies benefit no one.