

Avoid Becoming a Casualty in the Federal Government's Declared War on Redlining: What We Learned from the Trident Settlement

Article By:

Clarence Webster III

The US Department of Justice (DOJ) and Consumer Financial Protection Bureau (CFPB) recently publicized an agreement with Trident Mortgage Company, LP (Trident), to resolve a lawsuit in which DOJ and the CFPB alleged Trident illegally denied mortgage loan services to majority-minority communities in the Philadelphia-Camden-Wilmington, PA-NJ-DE-MD Metropolitan Statistical Area (Philadelphia MSA). The lawsuit is the first action against a non-depository mortgage company and the second largest settlement to redress allegations of redlining. Under the announced agreement, Trident will pay a \$4 million fine, fund an \$18.4 million loan subsidy program, and commit \$2 million toward outreach to minority communities. The settlement was hailed as “part of a renewed effort by federal agencies to combat illegal redlining” and “a powerful message to lenders that they will be held accountable.”^[1]

The message cannot be ignored. Eradicating racial bias and other forms of discrimination in all stages of home buying is a stated policy of the Biden administration.^[2] Attorney General Merrick B. Garland has announced that DOJ plans to open more redlining investigations and that there are “several open redlining investigations” already. To paraphrase CFPB Director Rohit Chopra, federal agencies are looking for new ways to penalize and hold accountable mortgage lenders they believe are not serving all qualified applicants without regard to the demographics of the communities in which they live.

The complaint and consent order filed in the Trident litigation provides valuable insight into how DOJ and the CFPB, in conjunction with other federal and state agencies, built their case against a mortgage lender and illuminates what mortgage lenders should look for when conducting redlining risk assessments.

The Combatting Redlining Initiative

Less than a week after taking office, President Biden indicated his administration would prioritize combating discriminatory housing practices and policies. One of the practices that his January 26, 2021 “Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies” pointed out was redlining. In the context of housing,

redlining is the illegal mortgage lending practice of denying financial services to individuals solely because they reside in a majority-minority neighborhood. The term derives from the federal government practice of outlining on maps in red communities deemed unworthy of participation in New Deal-era homeownership programs.

On October 22, 2021, DOJ launched the Combatting Redlining Initiative (the Initiative). DOJ's Civil Rights Division's Housing and Civil Enforcement Section will lead the Initiative in partnership with US Attorneys' Offices and in coordination with financial regulatory agencies such as the Office of the Comptroller of the Currency and the CFPB. The Initiative's announced purposes are to:

- Utilize US Attorneys' Offices as force multipliers to ensure that fair lending enforcement is informed by local expertise on housing markets and the credit needs of local communities of color.
- Expand DOJ's analyses of potential redlining to both depository and non-depository institutions. Non-depository lenders are not traditional banks and do not provide typical banking services, but they engage in mortgage lending and now handle the majority of mortgages in this country.
- Strengthen DOJ's partnership with financial regulatory agencies to ensure the identification and referral of fair lending violations to DOJ.
- Increase coordination with state attorneys general on potential fair lending violations.

During his remarks at the announcement of the Initiative, Garland proclaimed the Initiative "represents [DOJ's] most aggressive and coordinated enforcement effort to address redlining." He pledged that DOJ "will spare no resource to ensure that federal fair lending laws are vigorously enforced and that financial institutions provide equal opportunity for every American to obtain credit." Assistant Attorney General Kristen Clarke, who leads the Civil Rights Division, added:

We know well that redlining is not a problem from a bygone era but a practice that remains pervasive in the lending industry today. Our new Initiative should send a strong message to banks and lenders that we will hold them accountable as we work to combat discriminatory race and national origin-based lending practices.

Contemporary with the launch of the Initiative, DOJ also announced its first settlement under the Initiative and second redlining settlement in less than two months. That settlement was with Trustmark National Bank and arose out of claims Trustmark "engaged in unlawful redlining in Memphis by avoiding predominantly Black and Hispanic neighborhoods." As support for those claims, the complaint alleged Trustmark branches were concentrated in majority-white neighborhoods, its loan officers failed to serve the credit needs of Black and Hispanic neighborhoods, its outreach and marketing efforts avoided Black and Hispanic neighborhoods, and its internal policies and procedures were inadequate to ensure the bank provided equal access to credit to communities of color. Under the proposed consent order resolving the redlining claims, Trustmark agreed to invest \$3.85 million in a loan subsidy fund, devote \$600,000 to outreach efforts directed toward majority-Black and -Hispanic communities in Memphis, pay a \$5 million fine, and establish a Fair Lending Oversight Committee and designate a community lending manager.

CFPB and USA v. Trident, Case No. 2:22-cv-2936

On July 27, 2022, DOJ and the CFPB filed a complaint and consent order against Trident in the US District Court for the Eastern District of Pennsylvania for violations of the Fair Housing Act (FHA), Regulation B of the Equal Credit Opportunity Act (ECOA), and the Consumer Financial Protection Act of 2010. Between 2015 and 2020, Trident was a non-depository mortgage company licensed to originate mortgage loans in Delaware, New Jersey, Pennsylvania, and Maryland. At one point, Trident was one of the top mortgage loan originators in the Philadelphia MSA. Warren Buffett's Berkshire Hathaway is Trident's ultimate parent company.

According to the DOJ and CFPB's complaint, "Trident engaged in a pattern or practice of unlawful discrimination against applicants and prospective applicants, on the basis of race, color, or national origin, including by redlining majority-minority neighborhoods in the . . . Philadelphia MSA, and engaging in acts and practices directed at prospective applicants that would discourage prospective applicants from applying for credit." The alleged conduct DOJ and the CFPB put forth as evidence of Trident's pattern and practice of redlining included, among other things, (1) concentrating almost all its office locations in white communities; (2) loan officers not serving nonwhite neighborhoods; (3) not hiring nonwhite loan officers or assistant loan officers; (4) not hiring or training loan officers or assistant loan officers to cultivate relationships in majority-minority communities; (5) making virtually no effort to market to majority-minority communities, including using only white models and loan officers in marketing materials; (6) employees exchanging racist or discriminatory emails and photos with Trident's knowledge; (7) Trident having a disproportionately low number of loans in majority-minority communities compared to its competitors; and (8) intentionally failing to improve lending to minority applicants after discovering it was underperforming its peer[s] in majority-minority communities.

To resolve the complaint, in addition to the monetary obligations set forth above, Trident agreed to open at least four offices in majority-minority communities. It also agreed to conduct biannual training on topics including implicit racial bias; conduct that could constitute redlining; how to detect, prevent, and remedy redlining; and the ECOA's Regulation B and the FHA. Trident will also partner with a community-based or governmental organization to create a community development partnership program.

Takeaways from the Trident settlement

DOJ and the CFPB are looking to make examples in the mortgage industry. The agencies have a particular interest in putting nonbank mortgage companies in the hot seat. Clarke has put nonbank mortgage companies on notice, as has Chopra. Nonbank mortgage companies are dominant players in the industry and their lending practices have a significant impact on the availability of credit. DOJ and the CFPB are going to be looking into those practices closely while also looking for novel ways to penalize perceived bad actors.

Mortgage lenders, specifically nonbank mortgage companies, must be proactive. Conducting a redlining risk assessment is an important first step in ensuring compliance with fair housing laws and regulations. That assessment should include a thorough analysis of brick-and-mortar operations and locations, workforce demographics, marketing and outreach strategies, and periodic training protocols. This assessment must take into account the unique characteristics of the company's footprint or service area, and must include intelligence gathering regarding the activities of its peers. A prompt, multipronged response to any identified risks could significantly mitigate any potential redlining claims.

FOOTNOTES

[1] Press Release, “CFPB, DOJ Ordered Trident Mortgage Company to Pay More Than \$22 Million for Deliberate Discrimination Against Minority Families” (Jul. 27, 2022).

[2] “Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies” (Jan. 26, 2021).

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