Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

Barnett Sivon & Natter P.C.
ATTORNEYS at LAW
WASHINGTON, DC

The After Glow of Magner v. Gallagher*

Robert Barnett

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The City of St. Paul asked to withdraw its petition before the U.S. Supreme Court on the 10th of February, just two weeks before the case was scheduled for oral argument before the Court. The landlords who represented the other side of the issue agreed, since that action would reinstate the decision of the 8th Circuit Court of Appeals in their favor. The Court approved the withdrawal of the matter.

The Court had taken the case to consider whether the theory of disparate impact should be followed in cases under the Fair Housing Act, and if so, what the standard should be for the review. In a statement accompanying the announcement of the withdrawal of the petition, the Mayor of St Paul said that the City expected to win the case and that would have created an unfortunate result for the application of disparate impact theory in cases involving the Fair Housing Act. In other words, they withdrew the petition because they feared they would win, a result that would have permitted the United States Supreme Court to say what the law is on these significant issues.

Setting aside that reasoning (one wonders why the city filed a lawsuit if they were afraid they were going to win), that leaves the law where it was before the case was filed and all of the pro-disparate impact amicus briefs were submitted in support of the landlords (described as "slumlords" by the city in earlier statements). The city was supported by a smaller handful of amicus briefs sponsored mainly by financial services trade associations and some think tanks. The clerks of the court dutifully read all of the briefs, and then the case was dismissed.

In the meantime, the Department of Housing and Urban Development had just coincidentally published a proposed rule on disparate impact under the Fair Housing Law and noticed a fairly short public comment period. Had

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it published a final rule before the Court decided Magner, lawyers supporting the landlords would have been better able to argue that the Court should show deference to the rule. Not surprisingly, the rule was based on the belief that the Fair Housing Law provided for disparate impact review. In addition, it concluded that the appropriate review was a "burden shifting" review.

Generally speaking, the Circuit Courts have unanimously decided that disparate impact reviews could be made under the Fair Housing Act, but they have not reached a consensus on the appropriate review to be conducted.

Disparate impact is a theory under anti-discrimination law that says that discrimination can occur whether or not the actor had an intention to discriminate. If the impact or effect of an action taken, benign as it might be in intent, discriminates against a member of a protected group, it is discriminatory. If, however, the actor can show that there was a valid business necessity related to a non-discriminatory purpose in the action, the action will not violate the law. Nevertheless, if the complaining party can then show that there are other actions that the defending party could have taken to achieve the same business purpose without the same disparate impact, the action violated the law.

Magner was poised to address both the basic question of whether or not the theory was appropriate for actions under the Fair Housing Act, and if so, what steps constitute proper process in deciding questions of business necessity.

Under the proposed HUD rule, once the plaintiff has satisfied its burden of proving that the action created a discriminatory effect (often by the use of statistical data), the burden of proof (burden of "persuasion") shifts to the defendant who then must persuade the trier that the action has a "necessary and manifest relationship" to a legitimate nondiscriminatory interest of the defendant. Finally, the plaintiff can trump that defense by showing that those interests can be served by another practice that has a less discriminatory effect.

There is another theory known as the balancing theory that differs from the burden shifting. In the balancing test, courts are expected to consider a variety of factors including the strength of the discrimination claim, whether the action served a bona fide and legitimate purpose, and whether the plain-

tiff seeks affirmative action on the part of the defendant or simply "removing obstacles." Many of the courts adopting the balancing theory base it on a belief that in all matters the plaintiff must persuade the court of all aspects of the allegation, including that defenses are not valid. Under this kind of review, the defendant would only have to produce "some" evidence that the action was for a business necessity — the plaintiff would have to persuade the jury that the production was insufficient or that there were better alternatives.

The Court would have addressed those points and may or may not have endorsed an action that supported the proposed HUD rule, assuming, of course, that it found it appropriate to utilize disparate impact reviews when analyzing facts under the Fair Housing Act. The Court's decision in Wal-Mart v. Dukes, an employment case decided last June, denied class certification in a disparate impact case, and district court cases have followed that in non-employment cases. Whether the Dukes case suggests how the Court might have decided the issues in Magner is, of course, speculative.

But Magner was withdrawn and leaves those questions hanging. So at the present time parties are left with the competing tests for proving disparate impact, and no Supreme Court decision on the question of whether or not the disparate impact theory itself should be addressed under cases based on violations of the Fair Housing Act. The effort made by concerned parties to persuade the City of St. Paul to withdraw its case, however, suggests that there was serious concern that disparate impact, as a theory, at least under the Fair Housing Act, was under severe pressure.

Robert Barnett is a partner with the law firm of Barnett Sivon & Natter, P.C.