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InfoBytes Special Alert: Supreme Court Grants Petition for Writ of Certiorari in Disparate Impact Case

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Yesterday, the Supreme Court granted a petition for a writ of certiorari in the case of *Magner v. Gallagher*, 10-1032, which poses the question of whether disparate impact claims are cognizable under the Fair Housing Act ("FHA").

Under the disparate impact theory of discrimination, a plaintiff can establish "discrimination" based solely on the results of a neutral policy, without having to show any actual intent to discriminate. The seminal disparate impact case is *Griggs v. Duke Power*, 401 U.S. 424 (1971), in which the Court held that a power company's neutral requirement that all employees have a high school education regardless of whether it was necessary for their job was discriminatory under Title VII because it had a disparate effect on African-Americans.

The Supreme Court has never decided whether the FHA permits plaintiffs to bring claims under a disparate impact theory. To date, 11 of 12 federal courts of appeals have held that the FHA permits disparate impact claims. However, each of these appellate court decisions was based on an analysis of the Supreme Court's then-current Title VII jurisprudence-which the appellate courts interpreted as permitting disparate impact claims-and a conclusion that disparate impact claims are consistent with the purposes of the FHA.

A series of Supreme Court opinions, culminating in 2005, calls these courts of appeals decisions into question. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court held that disparate impact claims are grounded in Title VII's statutory text, not merely in the broader purpose of the legislation. In particular, the Court addressed Title VII's two prohibitions against discrimination. The *Jackson* Court explained that the first provision, prohibiting actions that "discriminate against [an individual] . . . because of" the individual's membership in a protected class, requires the plaintiff to prove an intent to discriminate. The Court explained that the second provision, prohibiting actions that "adversely affect [an individual] . . . because of" the individual's membership in a protected class, does not require a showing of intent to discriminate and therefore permits disparate impact claims.

In *Magner*, the City of St. Paul, Minnesota has asked the Supreme Court to consider whether the FHA permits disparate impact claims. Private landlords, seeking to limit the City's "aggressive" enforcement of its housing code, have sued the City for violating the FHA. The landlords argue that the City's attempts to close housing that violates its housing code reduces the amount of affordable housing available to minority renters. The landlords claim that as a result, the City's enforcement efforts have a disparate impact on minority renters in violation of the FHA. Although the District Court ruled for the City, the Eighth Circuit reversed, holding that the landlords had stated a cognizable claim under the FHA. The City petitioned the Eighth Circuit for rehearing en banc, but the court denied the petition.

Magner is the Supreme Court's first opportunity to evaluate whether disparate impact claims can exist under the FHA since *City of Jackson*. Since *City of Jackson*, the courts of appeals have offered almost no guidance as to whether the FHA permits disparate impact claims. Reviewing parallel language in the Equal Credit Opportunity Act in *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) the D.C. Circuit stated in dicta that "[t]he Supreme Court has held that this ["effects"] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language."

For a copy of the *Magner v. Gallagher* docket, please see http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm.