1995

Amicus Curiae Brief, Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996) (No. 94-20386)

F. Willis Caruso
John Marshall Law School, 6caruso@jmls.edu

Michael P. Seng
John Marshall Law School, mseng@uic.edu

John Marshall Law School Fair Housing Legal Clinic

94-20386

CORRECTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-20386

GORDON D. SIMMS

vs.

FIRST GIBRALTAR BANK, FSB,
now known as FIRST MADISON BANK, FSB

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMICUS CURIAE BRIEF

Michael P. Seng
F. Willis Caruso
Ronald D. Haze

AMICUS CURIAE
John Marshall Law School
Fair Housing Legal Clinic
28 East Jackson Blvd., Suite 500
Chicago, Illinois 60604

THE JOHN MARSHALL LAW SCHOOL
FAIR HOUSING LEGAL CLINIC

28 EAST JACKSON BLVD., SUITE 500
CHICAGO, ILLINOIS 60604
Telephone: 312-786-2267
Facsimile: 312-786-1047

April 18, 1995

Mr. Thomas Rodwig
Fifth Circuit Court of Appeals
600 Camp
New Orleans, LA 70130

RE: Simms v. First Gibraltar Bank, et al.
Case No. 94-20386

Dear Mr. Rodwig:

This is to advise you that it was our intent in preparing the brief, *Amicus Curiae*, that the Statement of Interest and Why Filing of Brief of Amicus Curiae Is Desirable was meant to be our Summary of Argument.

Sincerely yours,

F. Willis Caruso

FWC:pl

please staple on inside of Front Cover Thanks

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STATEMENT OF INTEREST AND WHY FILING OF BRIEF BY *AMICUS CURIAE* IS DESIRABLE

Amicus Curiae, The John Marshall Law School Fair Housing Legal Clinic, is a legal clinic of The John Marshall Law School in Chicago, Illinois. The purpose of the Clinic is to provide litigation and dispute resolution training for law students and to provide litigation and dispute resolution assistance to persons who complain of housing discrimination in violation of federal, state and local laws. The Clinic operates under the supervision of the John Marshall Law School Fair Housing Legal Support Center which conducts a national conference and is a national resource for attorneys, agencies, trade associations in the housing, lending and insurance area, and fair housing groups on fair housing law. The Clinic is funded by a grant from the Department of Housing and Urban Development, the Department of Education and private contributions.

The Clinic addresses two issues in its brief:

I. Whether the Court Below Properly Rejected First Gibraltar's Proffered Jury Instruction to Limit Punitive Damages to One Thousand Dollars, Despite the 1988 Amendments to The Fair Housing Act, Which Removed the Cap on Punitive Damages; and

II. Whether the Court Below Properly Instructed the Jury Regarding the Elements of Plaintiff's Case.

As discussed below, *Amicus* believes both these issues present broad questions of policy with significant import for housing discrimination litigants specifically and those charged with administrating the laws generally. These issues concern areas which are not well-delineated in the case law. For these reasons, *Amicus* believes its participation would be of assistance to this Court.

The case law discussing application of statutory amendments that affect damages in causes of action arising prior to amendment has given little clear guidance, despite a great number of decisions which have attempted to delineate workable rules in this area. As pointed out in the dissenting opinion and in the amicus brief, the decision in Landgraf v. USI Film Prods., ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), further confuses matters when dealing with creation of a new cause of action for damages rather than a change in damage amount. Given this lack of clarity and the dicta on the amount of damage issue, *Amicus* believes this issue is of sufficiently broad import to benefit from *Amicus'* perspective and analysis.

Next, the jury instruction issue addressed by *Amicus* deals primarily with the propriety of permissive inference instructions regarding facts from which a jury can find intentional discrimination. This issue arises in virtually every disparate treatment discrimination case, yet there is very little case law to assist the courts in determining when such inference instructions are proper. Appellant in this case has taken a position which would severely limit the use of these instructions. The position adopted by this Court could have an important impact on housing discrimination litigation throughout the country. As a result, *Amicus* believes it is important to fully brief the relevant legal principles, and believes that its participation would be of assistance to the Court.*

* The John Marshall Law School Fair Housing Legal Clinic wishes to recognize the efforts of David Cho, Special Assistant to Director F. Willis Caruso, who is a third year law student at Chicago-Kent College of Law, Chicago, Illinois; Grant Blumenthal and Paul Andrulis, Research Assistants to Professor Michael Seng, who are second year law students at John Marshall Law School.

ARGUMENT

I.

THE COURT BELOW PROPERLY REJECTED FIRST GIBRALTAR'S PROFFERED JURY INSTRUCTION TO LIMIT PUNITIVE DAMAGES TO ONE THOUSAND DOLLARS BECAUSE THE 1988 AMENDMENTS TO THE FAIR HOUSING ACT REMOVED THE CAP ON PUNITIVE DAMAGES.

First Gibraltar has argued for reversal of the decision below on the ground that the trial court erred in refusing to give a jury instruction that would have limited the jury's award of punitive damages to the amount set forth in the 1968 Fair Housing Act, before the 1988 amendments eliminated the one thousand dollar cap on such damages. (Appellant's Brief (hereinafter "Aplt. Br."), at 34-38). It further argues that Landgraf v. USI Film Prods., Inc., denying retroactive effect to a Title VII amendment establishing a new cause of action, should be controlling in this case with respect to events that took place prior to March 13, 1989[1]

First Gibraltar's argument is incorrect as a matter of law. Firstly, the Landgraf suit was brought as an employment discrimination case under Title VII, 42 U.S.C. § 2000e et seq. The only remedy available under the pre-1991 version of Title VII was equitable relief, reinstatement and backpay. The complaint in Landgraf was dismissed because the trial court found the plaintiff was not entitled to either reinstatement or backpay.[2] Landgraf, 114 S. Ct. at 1488. While the Landgraf case was on appeal, Title VII was amended in 1991 to provide a

[1] First Federal addresses neither the issue of discriminatory acts that took place after March 13, 1989, the effective date of the amendments, nor continuing violations.

[2] For the purposes of the decision, the Supreme Court assumed that the plaintiff was the victim of sexual harassment violative of Title VII. Landgraf, 114 S. Ct. at 1489.

new cause of action for compensatory and punitive damages, and a jury trial -- all of which were not available before. 42 U.S.C. § 1981a (1991).

Secondly, the Supreme Court rejected the plaintiff's argument in Landgraf that the 1991 amendments to Title VII, which established a new cause of action, should be applied retroactively. The Court's holding is clearly predicated on the fact that no previous cause of action in law existed for either compensatory or punitive damages under Title VII. The Court observed, "In cases like this one, in which prior law afforded no relief, [§ 102] can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced." Landgraf, 114 S. Ct. at 1506 (emphasis added). The Court later wrote, "The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." Id. (emphasis added). The Court emphasized yet a third time that "Section 102 confers a new right ...." Id. (emphasis added).

Unlike Title VII where a new cause of action was created by an amendment, Title VIII has permitted recovery of both compensatory and punitive damages since its enactment in 1968. Both punitive and compensatory damages were regularly awarded in cases brought under 42 U.S.C. §3612. The matter *sub judice* is not a case like Landgraf where the Court was dealing with a wholly new right or cause of action.

Although the Court alluded to the question of whether a statute that allows an increase in the amount of damages may be applied retroactively, the Court recognized that it has never so directly held. Landgraf, 114 S. Ct. at 1507.[3] Because the Court's decision in

[3] The majority opinion recognized that no U.S. Supreme Court decision has ever actually made such a holding, despite the frequency with which these issues have come before state courts across the country. Landgraf, 114 S.Ct. at 1507.

Landgraf was so clearly based on the fact that the amendment to Title VII created a new cause of action, the observation is dictum and has no precedential value.

Moreover, the decision below in this case that the 1988 amendments are controlling is consistent with regulations issued by the Department of Housing and Urban Development ("HUD") interpreting the Fair Housing Act on this issue.

> The 1988 Amendments create new procedures for the filing, investigation and conciliation of complaints concerning discriminatory housing practices and strengthen the remedies available to victims of housing discrimination by providing for administrative hearings, and by increasing the availability of civil penalties, attorney's fees, etc. Because the new remedies and enforcement procedures do not affect vested rights, retroactive application is entirely appropriate, unless a manifest injustice would result.

24 C.F.R. Ch. 1, Subch. A., App. I, § 103.1 at 909. As the administrative agency charged with implementing and enforcing the Fair Housing Act, HUD's interpretation of this statute is ordinarily entitled to "considerable deference" by the courts. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 107, 99 S. Ct. 1601 (1979) (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 93 S. Ct. 364 (1972)).

The difference between the statutory amendment at issue in Landgraf and the 1988 amendments to the Fair Housing Act is further underscored by a number of other decisions where federal statute amendments increasing potential monetary damages have been applied to litigation pending at time of amendment.

Prior to the 1986 amendments to the False Claims Act, 31 U.S.C. § 3729 ("FCA"), a criminal statute, the government was entitled to recover an award of double damages and a civil penalty of $2,000.00 for each violation of the FCA. The 1986 amendments allowed the government to recover treble damages plus a penalty of $5,000 to $10,000. Id. In Kelsoe

v. Federal Crop Ins. Corp., 724 F. Supp. 448 (E.D. Tex. 1988), the court rejected the defendants' argument that the new provisions providing for treble damages should not be applied to them as Congress passed the amendment authorizing treble damages while their case was still pending. Following the analysis and guidance provided in Bradley v. School Bd. of the City of Richmond, 416 U.S. 694, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974), for determining whether a statute should be applied to pending cases, the court rejected the defendant's argument. The court found, after considering "(a) the nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change in law upon those rights," that application to the case at bar would not result in "manifest injustice." Kelsoe, 724 F. Supp at 450 (citing Bradley, 416 U.S. at 717); accord U.S. v. Stella Perez, 839 F.Supp. 92 (D.P.R. 1993) (collecting cases).

Satisfaction of the first step of the Bradley analysis requires that the action involves more than private interests. That is, the greater the public's interest in this suit, the greater the likelihood of retroactive application. Kelsoe, 724 F. Supp. at 451. The Kelsoe court found that as Congress intended to deter fraud and thus protect the public and the national interest, the action was not one involving only private parties. Similarly, in this case, Congress has explicitly stated, "It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Clearly, an action alleging discrimination in housing concerns more than just the parties to the suit. That Defendant in this case violated a national concern--fair housing--satisfies the first step of the Bradley analysis for application of the amendment.

The second step of the analysis focuses on whether application of the amendment would affect the party's substantive rights--rights that had "matured or become unconditional." Bradley, 416 U.S. at 720. Where the amendment only changes the remedies available but in no way affects a defendant's liability, courts have held that the amendment may be applied to pending cases. In this case, as stated above, the 1988 amendments to the Fair Housing Act did not create a new cause of action. Defendant does not have any right that has "matured or become unconditional" that would be adversely affected by removing the cap.

Finally, the third step of the Bradley analysis examines the defendant's actual conduct giving rise to the cause of action and questions whether defendant would have refrained from such illegal activity, had it known of the amendment. That is, the analysis turns on whether the defendant is unduly prejudiced by the imposition of a new obligation without the benefit of notice. Although a great concern where the amendment would impose obligations and causes of action that the defendant would otherwise be unaware of, such is not the case here. Simply, Defendant was found to have violated a law of national concern. That he would not have violated the laws, if he had known the punitives would not be limited to $1,000, is far fetched and flies in the face of Congress' Declaration of Policy in enacting the Fair Housing Act.

Courts in a variety of other contexts have also readily applied amendments that merely increase the amount of damages of a statute. As reasoned in Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992):

> Because society's valuation of a victim's losses understandably changes over time, it does not seem unfair to force litigating parties to comply with the more recent statutory changes with regard to damages.

Mozee, 963 F.2d at 939. See also Hartford Casualty Ins. Co. v. FDIC, 21 F.3d 696, 701 (5th Cir. 1994) (amendments to statutes which affect remedial rights generally apply to pending cases as along as the change does not deprive the party of its day in court) (citations omitted); U.S. v. Presidio Invs., Ltd., 4 F.3d 805 (9th Cir. 1993) ("it is well established that when a statute is addressed to remedies or procedures and does not otherwise affect substantive rights, it will be applied to pending cases") (citations omitted); U.S. v. Vanella, 619 F.2d 384 (5th Cir. 1980) (holding that although statutes which interfere with antecedent rights will not apply retroactively, statutory changes that are remedial in nature do apply retroactively) (collecting cases).

Moreover, there are other reasons for upholding the judgment below. Unlike Landgraf, wrongful conduct in this case, which supported a finding of punitive damages, occurred after March 13, 1989, the effective date of the amendment removing the punitive damages cap. For example, in October 1989, Simms wrote the President of First Gibraltar in an effort to help the bank find another owner for the apartment building and thereby avoid closing the complex down; this offer was rejected. (Tr. 11: 24-26, 43-44). Similarly, after the bank's unlawful conduct forced Simms into an extremely precarious financial situation, the bank filed an unfavorable credit report when Simms ceased paying on the mortgage. (Tr. 11: 72-74.) Also, after March 13, 1989, Simms obtained a buyer for the property who would have been able to assume his interest and still operate the property, but the bank rejected this proposal in favor of an alternative arrangement with the same buyer that did in fact force a cessation in operations. (Tr. 11: 50-53). All these post-March 1989 acts, as well as the continuing refusal to negotiate, support the jury's punitive damages award.

When there is continuing violation of the Fair Housing Act, plaintiffs may base their claim on events which might otherwise occur outside the limitations period. In Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), the United States Supreme Court held that Title VIII claims would not be barred by the statute of limitations for conduct that continued into the limitations period so long as an action occurred within the limitation period. The continuing unlawful conduct in this case, by analogy, allows Plaintiff to rely on the 1988 amendments. First Gibraltar's conduct after the effective date of the Fair Housing Amendment was a continuation of the same discriminatory behavior it engaged in prior to the effective date--rendering application of the 1988 amendment prospective rather than retroactive.

II.

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN INSTRUCTING THE JURY REGARDING THE ISSUE TO BE PROVED BY THE PLAINTIFFS

First Gibraltar argues that the jury instructions "confused and melded together the different types of proof of a Fair Housing Act violation." (Aplt. Br., at 25). First Gibraltar further objects to an inference instruction which it claims instructed the jury to find discriminatory intent. (Aplt. Br., at 27). It concludes that these allegedly improper instructions were so prejudicial that it is entitled to a new trial on these grounds.

First Gibraltar's position is without merit and should be rejected. The instructions were an accurate statement of the law with respect to Plaintiff's disparate treatment claim, thereby rendering any asserted error regarding the disparate impact claim at most harmless error.

Further, the evidence of disparate impact from the expert witnesses, Garcia, Winnick, Steiner, and Sims, as well as testimony of Mannings and Simms regarding effects upon protected parties and the black community was entirely uncontradicted or opposed by appellant. Disparate impact was proven as a matter of law. The inference instruction complained of was an accurate statement of the law and well within the discretion of the trial court. This instruction was entirely reflective of the relevant reported case law referenced in the brief of appellee. Thus, the judgment below should not be reversed.

While the jury must be properly instructed on the law, courts are given wide latitude in the selection of jury instructions. Palmer v. Lares, 42 F.3d 975, No. 93-7219, 1995 U.S. App. Lexis 1715, at *4 (5th Cir. Jan. 27, 1995) (citing Bender v. Brumley, 1 F.3d 271, 276 (5th Cir. 1993)). In reviewing the propriety of instructions to the jury, the test is whether the allegedly improper charge creates a "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Bender, 1 F.3d at 276. This determination must be made by taking into account the instructions as whole, along with the allegations of the complaint, the evidence presented, and the arguments of counsel. Coughlin v. Capitol Cement Co., 571 F.2d 290, 300 (5th Cir. 1978).

The trial judge is not required to adopt the precise language of the proposed instructions if these instructions are stated in an overly adversarial fashion, and thus do not constitute a fair jury charge. Kayo Oil Co. v. Sammons, 321 F.2d 729 (5th Cir. 1963). Similarly, a district judge has wide discretion to select his own words and to charge in his own style. E.g., De Raine Andry v. Farrell Lines, Inc., 478 F.2d 758, 759 (5th Cir. 1973) (holding trial court's instruction, though colloquial, not reversible).

Neither is a trial judge required to instruct the jury in the precise language of a Supreme Court decision. Wolff v. Commonwealth of Puerto Rico, 341 F.2d 945, 946 n.1 (1st Cir. 1965). As Judge Charles Wyzanski has observed, "The object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to try to make jurors who are laymen understand what you are talking about." Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 900, 907 (D. Mass. 1954); see also J. Weinstein, The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries, 118 F.R.D. 161 (1988). In the context of civil rights cases, it is for this reason that courts have discouraged the use of jury instructions which contain such terms as "prima facie case" and "burdens of proof." Hagelthorn v. Kennecott Corp., 710 F.2d 76, 85 (2nd Cir. 1983).

The jury charge in this case contained a series of instructions relating to Plaintiff's disparate treatment theory, and a separate series of instructions relating to Plaintiff's disparate impact theory. Two separate jury question forms were submitted for each of these two theories, with the jury finding liability under both. First Gibraltar claims instructions on both theories were improper.

The only asserted error raised in connection with the disparate treatment instruction was that the jury was required to find discriminatory intent based on two parts of an allegedly improper inference instruction. The jury was instructed:

> You may infer discriminatory motivation or intent if questionable actions of First Gibraltar are found to be arbitrary and unreasonable. In considering whether actions of First Gibraltar are arbitrary and unreasonable and amounted to a discriminatory practice, you may consider that First Gibraltar was required to give written notice to Simms within 30 days of the rejection stating the reasons for the rejection.

There is nothing improper in instructing a jury that it may infer intentional discrimination from a defendant's arbitrary and unreasonable behavior. In searching for the existence of discriminatory intent in the lead zoning case, the U.S. Supreme Court observed:

> Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977). The Court also considered whether "a clear pattern, unexplainable on grounds other than race" could be found. Id. at 266. Lower courts have also held that racial motivation may be inferred from arbitrary and unreasonable conduct. Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987). Additionally, this Court has upheld the principle that racially discriminatory intent may be inferred from circumstantial evidence. Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1268 (5th Cir. 1981).

There is nothing in Hanson v. Veterans Admin., 800 F.2d 1381 (5th Cir. 1986), relied upon by First Gibraltar (Aplt. Br. at 27), which requires a different result. In Hanson, the complaint was dismissed on multiple grounds after a bench trial. Id. 800 F.2d at 1383. Hanson therefore does nothing to support First Gibraltar's contention that the judgment in this case was in some way caused by improper instructions. Moreover, the evidence of "independent instances of human error" referred to by the Hanson court was of a very limited nature, consisting of errors in housing appraisal reports; some of these errors were found to have had no effect on the actual appraisal value. Id. at 1387. These circumstances are very different

from this case, where the evidence clearly shows a wide range of unlawful conduct sufficient to support the jury's finding of discriminatory intent.

As a matter of federal evidence law, Congress clearly contemplated the use of inference instructions in cases where a rebuttable presumption has been negated by evidence produced by the opponent:

> If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from the proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from the proof of the basic facts.

H.R. Conf. Rep. No. 93-1597, 93d Cong. Sess. at 5-6 (1974). In civil rights cases, where direct evidence of intentional discrimination is very rarely available, this comment regarding FED. R. EVID. 301 shows that inference instructions of the type given here are entirely appropriate.

According to one leading authority, only the following conditions need be met to justify an inference:

> First, the facts established by the evidence or supported by sufficient evidence to enable the jury to find their existence (including the basic fact of the now-vanished presumption) must themselves be a sufficient basis in logic and reason to support a finding of the presumed fact. Second, the adversary's proof of the nonexistence of the presumed fact must not be so strong as to require a finding of its nonexistence as a matter of law.

Louisell, Federal Evidence § 70 at 573. In this case, the jury was instructed that it may infer the existence of discriminatory intent from arbitrary and unreasonable conduct by First Gibraltar. Under Louisell's formulation, such an instruction is proper if there is sufficient evidence to support a finding of arbitrary and unreasonable conduct; if there is a sufficiently strong logical

connection between this conduct and the presumed fact of discriminatory intent; and there is no evidence strong enough to require a finding of its non-existence as a matter of law.

The inference instruction at issue was properly given. First, a factfinder could certainly have concluded from the evidence at trial that First Gibraltar's conduct was arbitrary and unreasonable. Evidence of such arbitrary and unreasonable conduct included evidence that First Gibraltar never inspected the property (Tr. 9:27, 29); never supplied written or verbal reasons for the rejection of Simms' proposal (Tr. 9:39-43, 87; 11:-22-23); provided false information to governmental agencies regarding the condition of the property (Tr. 9:78, 80; 11:35); and turned down a loan restructuring plan that would have offered First Gibraltar higher interest rates, principal reduction, and enhanced collateral. (Tr. 9:186, 189; 12:52-54). There was more than enough evidence from which the jury could find arbitrary and unreasonable conduct.

Second, there is a sufficiently strong logical nexus between this basic fact of unreasonable and arbitrary conduct and the inferred fact of discriminatory intent. The evidence is undisputed that the project was located in a minority area. First Gibraltar knew that various governmental grants intended to assist minority housing projects were being sought. The project at issue was a major project involving large sums of money. Under these circumstances, it defies logic to assume that the many serious improprieties seen in this case were a simple matter of negligent business practices.

Finally, First Gibraltar's evidence regarding the absence of discriminatory intent is not so strong as to require a directed verdict in its favor as a matter of law. The standard is high and the facts must be so overwhelmingly in favor of one party that reasonable persons

could not arrive at any verdict to the contrary. Roberts v. United New Mexico Bank, 14 F.3d 1076, 1078 (5th Cir. 1994). This standard was not met in this case.

The fact that the disparate treatment instructions were proper renders moot any claim that the disparate impact instructions were not[4], and *Amicus* will not further address the issue. Where the jury is instructed on two alternate theories of liability, and one set of instructions is improper but the other is not, the erroneous instructions are not sufficiently prejudicial to require reversal. Bradshaw v. Freightliner Corp., 937 F.2d 197 (5th Cir. 1991). In cases involving incorrect instructions on one of several alternate claims or theories, it has been noted that the use of special verdict forms may be enough to sustain the verdict:

> [The use of special verdict forms] may enable an appellate court to salvage the portions of the verdict on the claims or theories properly submitted, thereby foregoing the unnecessary inconvenience, expense, and burden on the judicial system and the parties that results from having to retry the entire case.

Bone v. Refco, Inc., 774 F.2d 235, 243 n.10 (8th Cir. 1985).

Because the jury in this case was instructed on both disparate treatment and disparate impact theories, and because the jury signed separate jury question forms for each theory of liability, questions regarding the propriety of the disparate impact instructions are rendered moot by the proper disparate treatment instructions.

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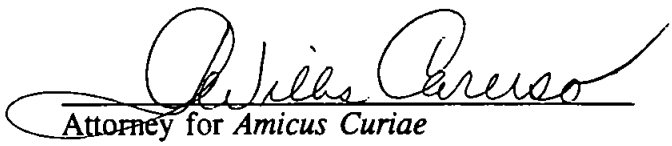
[4] Conversely, the uncontradicted evidence of disparate impact renders moot any question regarding the propriety of jury instructions regarding disparate intent or discriminatory treatment.

CONCLUSION

The judgment of the court below should be affirmed.



Attorney for *Amicus Curiae*

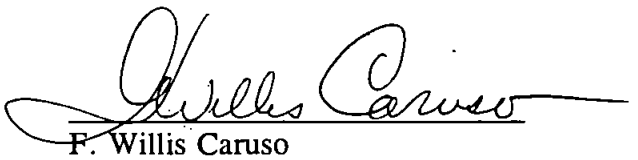
Michael P. Seng
F. Willis Caruso
Ronald D. Haze
John Marshall Law School
Fair Housing Legal Clinic
28 East Jackson Blvd., Suite 500
Chicago, Illinois 60604
(312) 786-2267
FAX (312) 786-1047

CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on March 2, 1995, we shall mail to the following and file with the Clerk of the 5th Circuit Court of Appeals, the attached Motion For Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief. I certify that a copy of the foregoing was served on the following counsel by certified mail, return receipt requested, on this 2nd day of March, 1995.

Ms. Laura Gibson
OGDEN, GIBSON & WHITE
711 Louisiana, Suite 1750
Houston, TX 77002

Mr. Raymond M. Hill
2727 Allen Parkway,Suite 1550
Houston, TX 77019



F. Willis Caruso