

Case Study: First American V. Edwards

Law360, New York (July 11, 2011) -- On June 20, 2011, the U.S. Supreme Court granted the petition for writ of certiorari in *First American Financial Corp. v. Edwards*, No. 10-708 (June 20, 2011), to determine whether a homebuyer had sufficient standing to pursue a putative class action against a title insurer that allegedly violated the Real Estate Settlement Procedures Act of 1974 (RESPA).

In the courts below, the parties disputed whether the plaintiff, Denise Edwards, in the absence of any financial or other actual injury from the alleged RESPA violation, (1) has standing to bring a RESPA claim, and (2) whether, even if she had statutory standing, she had Article III standing to pursue her claim.

The Supreme Court granted the petition to address the Article III standing question. This case tests the limit of standing in the absence of actual injury and could significantly expand the class of potential plaintiffs under RESPA and similar consumer protection statutes.

Case Background

RESPA provides that “[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” 12 U.S.C. § 2607(a). In essence, this section of RESPA prohibits the payment of “kickbacks” for referrals of settlement services, such as title insurance.

Edwards alleges that First American paid a kickback for future referrals to numerous title agencies by purchasing an interest in the agencies for more than their market value, in expectation of future referrals to provide title insurance to the agencies’ clients. Notably, Edwards does not allege that these kickbacks increased the cost of her title insurance or otherwise impacted the quality of services she received from First American.

First American contests Edwards's standing, arguing that a plaintiff must allege financial or other actual injury in connection with the services provided to have standing under both RESPA and Article III. Interestingly, the court did not grant certiorari on the RESPA standing question, but only to address the following question: Whether "a private purchaser of real estate settlement services has standing ... to sue under Article III, § 2" when there is "an absence of any claim that the alleged [RESPA] violation affected the price, quality, or other characteristics of the settlement services provided." [1]

Perhaps the court believes RESPA statutory standing exists in this case, or that the RESPA question is somehow presumed in the Article III question. Regardless, resolution of this case will provide some insight into difficult standing issues that have frequently arisen in class action litigation.

The Circuit Split Over Standing Under RESPA and Article III

As recognized by the district court in Edwards, the question of standing to sue for violations of RESPA "has divided federal courts across the country." *Edwards v. First Am. Corp.*, 517 F. Supp. 2d 1199, 1202 (C.D. Cal. 2007).

RESPA's damages provision provides that a person who pays or accepts a kickback for title insurance referrals is liable to "persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607 (d)(2). Although RESPA clearly creates a private cause of action, it is not clear whether that cause of action creates standing even in the absence of a financial injury to the plaintiff.

Assuming there is standing under RESPA, the court must turn to the question of whether Article III standing exists. A plaintiff must allege "an injury in fact" — an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical — in order to have Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Edwards argues that she satisfies this requirement by virtue of her statutory cause of action under RESPA. First American, however, contends that an economic or other concrete injury is necessary to satisfy Article III, even if such injury were not necessary to satisfy RESPA.

Circuits Finding Standing Under RESPA and Article III Despite Lack Of Traditional Actual Injury

The Third, Sixth and Ninth Circuits have held that RESPA creates a right of action even in absence of concrete economic injury to the plaintiff and that alone is enough to satisfy Article III's requirements. In *Alston v. Countrywide Financial Corp.*, the putative homebuyer class action sought to recover under RESPA for an illegal kickback even though the rate for the services was set by a state regulator and thus there was no overcharge. 585 F.3d 753, 757 (3d Cir. 2009).

The Third Circuit held that RESPA "does not require plaintiffs to allege an overcharge" to be entitled to maintain an action. *Id.* at 759. The court went on to hold that interpreting RESPA to create a cause of action "without a resultant monetary injury" did not violate Article III because receiving "a loan accompanied by a kickback or unlawful referral ... is plainly a particularized injury" sufficient to establish Article III standing. *Alston*, 585 F.3d at 763.

Similarly, in *In re Carter*, the plaintiffs sought to represent a class of all individuals who had purchased settlement services from the same title agent and who were referred by the defendant real estate agency, despite making no allegation that they were overcharged for the title insurance or settlement services they received. 553 F.3d 979 (6th Cir. 2009).

The district court held that plaintiffs lacked standing because they did not allege any financial or other concrete injury. *Id.* at 982. The Sixth Circuit reversed, however, finding “arguable ambiguity” in the statutory language and therefore looked to legislative history and purpose to conclude that RESPA creates a private right of action even where there has been no overcharge. *Id.* at 986. The court found Article III standing because, in its view, Congress “has the authority to create a right of action whose only injury-in-fact involves the violation of [a] statutory right.” *In re Carter*, 553 F.3d at 988.

In *Edwards*, the Ninth Circuit followed the approach of the Third and Sixth Circuits by holding that *Edwards*’s claim could proceed under RESPA and Article III even though she does not allege any financial loss or injury to the quality of services she received. *Edwards v. First American Corp.*, 610 F.3d 514, 516-17 (9th Cir. 2010).

The court held that the existence of a RESPA right of action supplies the necessary Article III injury in fact, reasoning that “[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” 610 F.3d at 517 (quoting *Fulfillment Servs. Inc. v. United Parcel Services Inc.*, 528 F.3d 614, 618 (9th Cir. 2008)).

Circuits Finding No Standing Under Either RESPA or Article III

In contrast, the Fifth Circuit has held that RESPA does not create standing in the absence of concrete economic injury to the plaintiff. In *Moore v. Radian Group Inc.*, the plaintiffs brought a putative class action, alleging that the lenders and private mortgage insurance providers violated RESPA by engaging in a kickback and referral scheme. 233 F. Supp. 2d 819, 819 (E.D. Tex. 2002), *aff’d*, 69 F. App’x 659 (5th Cir. 2003).

Because the plaintiffs did not allege that the violations increased the cost of their primary mortgage insurance, the district court held they lacked standing under RESPA; RESPA does not “allow a private plaintiff to sue for an alleged violation of RESPA’s anti-kickback provision when the plaintiff has not alleged that the referral arrangement increased any of the settlement charges at issue or that any portion of the charge for the settlement service was involved in the kickback violation.” 233 F. Supp. 2d at 824.

The Fifth Circuit affirmed, holding that “the plaintiffs cannot establish standing simply by alleging a violation of the language of [RESPA].” 5th Cir. Slip op. 13. 69 F. App’x 659 (5th Cir. 2003). The Seventh Circuit has similarly held that RESPA permits recovery only of an overcharge — an interpretation which would presumably preclude standing for a plaintiff not alleging a financial injury. *Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183, 1187 (7th Cir. 1994).

The Second and Tenth Circuits, however, have reached the opposite conclusion, holding that the existence of a statutory right of action is insufficient to satisfy Article III standing without some other concrete injury. In *Kendall v. Employees Retirement Plan of Avon Products*, the Second Circuit held that a retirement plan participant lacked Article III standing to sue under the Employment Retirement Income Security Act of 1974 in the absence of an alleged injury in-fact distinct from the statutory violation. 561 F.3d 112, 121 (2d Cir. 2009).

In *Heard v. Bonneville Billing & Collections*, the Tenth Circuit similarly held that a plaintiff lacked Article III standing to sue under the Fair Debt Collection Practices Act in the absence of an allegation that the prohibited fee-splitting arrangement caused her some personal injury. Nos. 99-4092, 99-4100, 99-4202, 2000 U.S. App. LEXIS 14625, *4 (10th Cir. June 26, 2000).

Conclusion

The U.S. Supreme Court's decision in *Edwards* will obviously have a significant impact on the ability of plaintiffs to pursue suits, and particularly class actions, under RESPA and similar statutes. If Article III is not its own barrier under these statutes, and thus there is no need to show even some minimal injury-in-fact beyond a mere statutory violation, the sweep of these statutes will be broad indeed. That will dramatically expand the number of potential plaintiffs who can at least allege a viable claim and it will be an attractive subject area for plaintiffs' class counsel.

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[1] This quotation actually merges portions of the first and second question presented as question two refers back to question one (i.e., "[d]oes such a purchaser[, referring to the description in question one,] have standing").