Dodging A Bullet: First American Financial V. Edwards

Law360, New York (July 12, 2012, 1:06 PM ET) -- On the day the U.S. Supreme Court issued its seminal ObamaCare decision, it dodged what could have been the most significant consumer protection case in a generation. First American Financial Corporation v. Edwards questioned whether Congress could create standing under Article III, § 2 of the United States Constitution for someone who suffers no injury in fact. The court had previously granted a certiorari but later dismissed it as "improvidently granted."

The respondent, Denise Edwards, a homebuyer, claimed her title insurance company, First American, violated the Real Estate Settlement Procedures Act of 1974 (RESPA) by using an illegal, undisclosed fee splitting scheme. Edwards sought to represent a class of plaintiffs seeking a statutory remedy for the alleged violation. Her complaint did not seek actual damages for any particularized injury as that would have jeopardized class certification.

Edwards bought a house in Cleveland in September 2006. Her settlement statement noted a charge for title insurance from First American. According to Edwards, First American purchased small ownership interests in title agencies, including hers, across the country in exchange for the agencies' customer referrals. Such an arrangement arguably constituted an illegal kickback under RESPA, which outlaws payment for business referrals.

First American moved to dismiss, saying Edwards lacked Article III, § 2 standing, which requires "injury, causation, and redressability." Edwards could not, as a matter of law, show that the transaction resulted in her having to pay more for title insurance than she would have paid had the referral been conflict free. This is because Ohio law mandates that all title insurers charge exactly the same price. Whether the referral for insurance was conflict laden mattered not when it came to price, and the alleged fee splitting could not have driven her costs higher. Furthermore, Edwards had not alleged any other economic or noneconomic injury — like poorer service.

The trial court denied First American's motion to dismiss, finding that RESPA provides the "right to be free from referral — tainted settlement services" and that a violation of that right provides a "statutory injury" which creates standing. The Ninth Circuit affirmed, finding that RESPA expressly did not require an actual injury for one to be entitled to the statutory remedy. Standing existed because Congress gave Edwards a statutory cause of action. By extension, Congress created a statutory injury or, at least, it recognized that injury could be inferred whenever there is an undisclosed kickback arrangement.

The Supreme Court granted certiorari in the case last June. Oral arguments were held on Nov. 28, 2011. The core question was whether Congress has the ability to create Article III, § 2 standing in the absence of an injury in fact.

The oral argument generated some interesting hypotheticals. Justice Stephen Breyer asked the petitioner to suppose that Congress passed a law prohibiting telephone calls to consumers between 7:00 a.m. and 7:00 p.m. Any call made outside the allowed time entitles the consumer to $500 as a statutory remedy. Justice Breyer assumed that one call recipient is his grandmother who always complains that no one ever calls her. She loved getting the call and was not harmed by it. Justice Breyer asked whether grandma may sue? In response, First American argued that Congress may not give a cause of action on the basis of a statutory violation where injury is presumed. Injury cannot be created legislatively.

Justice Elena Kagan summarized the counter position: "She's saying: I don't have to prove [injury] because there's been a judgment made that — that these kinds of practices tend to decrease service and tend to increase price, and therefore I do not have to prove those matters." In other words, Congress has determined that conflict-laden referrals cause injury. No more proof is required.

On June 28, the Supreme Court issued a decision that certiorari had been improvidently granted. We do not know why the court so decided. This debate will now rage on in the lower courts without Supreme Court's guidance.

At oral argument, Edwards did not help her case, because her position was unclear. Justice Roberts tried to pin Edwards down to one of three possible arguments:

1.Edwards suffered injury in fact.
2.Congress presumes injury is fact.
3.Injury in fact is not required.

Edwards argued that not only did Congress presume injury but that she had suffered a particularized injury in fact. Justice Roberts noted if that were so, the case did not merit Supreme Court review. Edwards could make her injury in fact proof at trial. Perhaps Edwards' vacillating position is what drove the court's decision, or perhaps the Justices just could not agree. No matter. At least for now, litigants do not know whether this Article III, § 2 standing issue will ultimately work to defeat congressionally created claims without associated injuries in fact. We suspect this battle has just begun.

Consumer protection statutes are rife with legislatively created injuries. For example, the Truth in Lending Act requires lenders to provide borrowers with two copies of a rescission notice when closing certain closed-end loans secured by borrowers' principal residences. The notice advises borrowers of their right to rescind transactions without cause or explanation within three business days. If a borrower is only given one notice which fully informs him of his rights, has he suffered actual injury? The petitioner in First American would say no. One could come up with countless similar examples involving nearly every consumer protection statute.

Like all innovative legal arguments, sometimes they take a while to gain traction. The fact the Supreme Court granted certiorari in the first place tells us this argument could have traction in the right case. We expect that representatives of the financial services industry will now regularly assert standing as defense in cases where the only injury is statutory. For now, the Ninth Circuit's decision that statutory injury alone is sufficient stands.

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