CARLTON FIELDS

Can Congress Create a Right of Action for People Who Have Suffered No Injury?

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The Supreme Court will decide the issue this year.
Any first year law student knows that to bring a lawsuit a plaintiff "must allege a distinct and palpable injury to himself." *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

But what if Congress enacts a law prohibiting certain conduct, and provides that individuals who are the subject of that conduct may sue for its violation even if they suffer no injury? That is the issue in the case of *First American Financial Corp. v. Edwards,* now before the Supreme Court, and argued on November 28, 2011.

The case arises out of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§2601-2617 ("RESPA"). Under RESPA, Congress made it illegal for a title insurer to pay a referral fee in connection with the sale of a title policy. *Id.* § 2607(a). It provided that any insurer who does so is liable to the person who paid for the policy in an amount equal to three times the amount of the charge. *Id.* § 2607(d)(2), (5).

The problem is that in many states the charge for title insurance is set by state law, so the person who pays for the policy (whether a referral fee was paid or not) does not pay anything more than what state law *required* the title insurer to charge. Indeed, in *Edwards,* the person who paid for her title policy not only had to pay that amount because the fee was required by law, but every title insurer in the state was required to charge the same amount.

As such, the plaintiff, who brought her case as a class action, did not claim the alleged referral payment in fact caused her, or anyone else, (1) to pay more for title insurance; (2) to receive lower-quality services; or (3) to incur any other kind of economic, physical or psychological harm.

The Ninth Circuit concluded that, "[b]ecause RESPA gives Plaintiff a statutory cause of action …

Plaintiff has standing." *First American Corp. v. Edwards,* 610 F.3d 514, 518 (9th Cir. 2010).

First American appealed arguing that this conflicts with the principle that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.,* 129 S. Ct. 1142, 1151 (2009). The Supreme Court granted certiorari.

The matter has been receiving national attention. Numerous parties filed *amicus* briefs from automobile manufacturers to Facebook to the Chamber of Commerce of the United States of America. A substantial number urge the court to reverse the Ninth Circuit's opinion, arguing that it gives Congress virtually boundless powers to expand the judiciary's jurisdiction beyond the constitutional limitations of "cases" and "controversies." They raise the possibility of class actions being filed whenever a company has violated a regulation, despite the fact the violation has not caused any person any injury and the plaintiffs will only have been subjected to abstract harm. At oral argument one Justice questioned whether the Constitution permits parties to sue over "philosophical" harm.

Hopefully the Court will resolve this matter consistent with established principles of constitutional law. As First American argues in its brief, "A person who has suffered a legal wrong deserves a forum to vindicate her interest and obtain compensation, and a wrongdoer is fairly held accountable for the harm his wrong inflicts on others. But it is no part of the judicial role to inflict a punishment, and to award a windfall, at the behest of a claimant who has suffered no harm."

Related Practices

Title Insurance