

Supreme Court to hear separation of powers issue within title insurance kickback case

BY DOUGLAS W. SALVESEN

The Supreme Court has agreed to decide whether a homebuyer can sue a title insurer for violation of the Real Estate Settlement Procedures Act of 1974 (RESPA) even though the homebuyer cannot establish that the violation increased the amount she paid for title insurance services.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Denise Edwards bought a three-bedroom home in the North Collingwood section of Cleveland for \$111,000. The settlement agent, Tower City Title Agency, LLC, referred Edwards to First American Title Insurance Co. for her title insurance policy.

At the time of the referral, Edwards was unaware of the commercial relationship between Tower City and First American. In 1998, First American had paid \$2 million to Tower City. First American maintains that the payment was to buy a minority interest in the agency. Edwards insists that the payment was part of a kickback arrangement whereby Tower City agreed to refer all title insurance underwriting business exclusively to First American.

In a class action filed in federal court, Edwards alleged that this exclusive referral arrangement violated RESPA. However, because Ohio law mandates that all title insurers charge the same price, Edwards could not establish that she was overcharged for title insurance services or had suffered any actual injury resulting from the alleged RESPA violation.

First American sought to dismiss the complaint on the grounds that, because Edwards had paid the same amount that every other Ohio resident paid for title insurance, she had no standing under RESPA to sue First American for the alleged RESPA violations.

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The District Court of Southern California, and then the Ninth Circuit, both rejected this argument. Each held that the plain statutory text of RESPA does not require that a consumer be overcharged or demonstrate that she has suffered any actual harm in order to sue on a RESPA violation. Rather, any consumer who is charged for a settlement service that violates RESPA's anti kickback provisions is entitled to three times the amount of any charge paid whether or not the consumer has suffered an injury. The lower courts found that this statutory language was sufficient to provide Edwards with standing to sue First American for its conduct.

SUPREME COURT GRANTS CERTIORARI ON CONSTITUTIONAL ISSUE

Following the adverse decisions by the District Court and the Ninth Circuit, First American filed a petition for certiorari with the Supreme Court. *First American Financial Corporation v. Edwards*, No. 10-708 cert. granted June 20, 2011).

Like the lower courts, the Supreme Court was little impressed by the first issue presented for review by First American – whether Congress had granted standing to consumers who have not suffered an economic injury to sue in the federal courts for violations of RESPA. However, First American's petition presented a second, meta-

issue concerning whether Congress could grant such standing and the extent of power granted to each branch of government under the Constitution.

In its petition, First American asserted that Article III of the Constitution requires that an individual seeking relief from the Judicial Branch have suffered an actual injury. An individual is not permitted to file an action against a defendant alleging a general violation of the laws unless that individual has suffered or will suffer some actual harm as a result of the defendant's conduct. Violations of the law that harm the public generally but do not harm any specific person may be prosecuted only by the Executive Branch.

First American contends that this power to enforce the laws generally resides in the Executive Branch alone and that Congress has no power under the Constitution to authorize private individuals who have not suffered any injury-in-fact to bring such enforcement actions.

The Supreme Court grant of certiorari on this separation of powers issue goes far beyond RESPA. There are thousands of cases filed each year in federal courts by plaintiffs who have suffered no actual damages but have a right to statutory damages and attorney's fees under the Truth in Lending Act, the Telephone Consumer Protection Act, and similar consumer-oriented laws. A decision that only persons who have suffered actual injuries have standing to sue for statutory violations would have far-reaching consequences well beyond RESPA.

A decision from the Supreme Court will not be forthcoming until sometime next year.

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Co-chair of REBA's litigation committee, Doug Salvesen has served for 20 years as counsel to the association's committee on the practice of law by non-lawyer. He is the architect of REBA's success in the recent SJC decision, *REBA vs. NREIS*. Doug can be contacted by email at dws@bizlit.com.