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Standing to Challenge Statutory Violations of Privacy Laws After *First American Finance Corporation v. Edwards*

BY EDWARD R. MCNICHOLAS AND JONATHAN P. ADAMS

Perhaps overlooked in the shadows of the Patient Protection and Affordable Care Act decision,[1] the U.S. Supreme Court June 28 dismissed its writ to review a case that had the potential to deter privacy and other litigation that is based merely on technical statutory violations (11 PVLR 1060, 7/2/12).[2] In dismissing the writ of certiorari in *First American Finance Corporation v. Edwards* as improvidently granted, the Supreme Court declined to rule on whether Congress may provide statutory standing for plaintiffs lacking an injury-in-fact as required under Article III of the Constitution, leaving in place the U.S. Court of Appeals for the Ninth Circuit's interpretation that a statute may create Article III standing. This brief article examines this decision and the state of the law after it.

The *Edwards* Litigation

Denise P. Edwards, a Cleveland, Ohio, homeowner, filed suit on behalf of a nationwide class alleging that her title insurer, First American, had engaged in a scheme to provide millions of dollars to her title agency to steer business, including title closings, its way. Edwards centered her complaint on allegations that First American, through its payments, violated the Real Estate Settlement Procedures Act (RESPA) of 1974,[3] a statute aimed at providing transparency in the homeownership lending process. Under RESPA, title insurers, like First American, and other mortgage industry participants are prohibited from making certain payments to secure business, and consumers may seek to recover statutory damages and attorney's fees.

Significantly, Ohio regulates the cost of title insurance, and so Edwards did not pay any premium relative to other customers. Edwards did not even allege any actual harm; she acknowledged that she did not pay more to First American as a result of the alleged kickbacks, and she did not allege any other economic or noneconomic injury. Nonetheless, she sought monetary damages for herself and for her purported class. First American, for its part, argued that Edwards did not have Article III standing because she did not allege any injury-in-fact that would entitle her to relief.

The U.S. District Court for the Central District of California denied First American's motion to dismiss for lack of subject matter jurisdiction, which sought the dismissal of all of Edwards' claims on the basis of a lack of Article III standing.[4] The Ninth Circuit, in addressing the question of Edwards's standing, found that Edwards could proceed with her litigation on the basis that First American's alleged acts violated RESPA and that this putative violation conferred sufficient statutory standing upon Edwards for her claims to proceed.[5] In the Ninth Circuit's view, statutory standing equated to Ar-

[1] *Nat'l Fed'n 0fIndep. Bus. v. Sebelius*, No. 11-393, 567 U.S. ___ (2012).

[2] *First Am. Fin. Corp. v. Edwards*, U.S., No. 10-708, *dismissed as improvidently granted*, 6/28/12.

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[3] Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617, Pub. L. 93-533, 88 Stat. 1724, as amended.

[4] *Edwards v. First Am. Corp.*, 517 F. Supp. 2d 1199 (C.D. Cal. 2007).

[5] *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted* 113 S. Ct. 3022 (2011). The decision is available at http://op.bna.com/pl.nsf/r?Open=byul-8wcu3d.

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ticle III standing for the purpose of Edwards' suit: ''[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' ''[6] Thus, ''[b]ecause the statutory text [of RESPA] does not limit liability to instances in which a plaintiff is overcharged,'' the Ninth Circuit held that Edwards had ''established an injury sufficient to satisfy Article III,'' even if that injury existed solely in the violation of the statutory right.[7] First American sought review by the Supreme Court, which granted certiorari in June 2011.

Edwards at the Supreme Court

At the Supreme Court, *First American Financial Corp. v. Edwards* attracted the attention of a wide range of interest groups that saw the potential for either repudiation or validation of long-simmering debates over whether violations of statutory rights constitute sufficient injury to satisfy Article III standing requirements. More than two dozen amicus briefs were filed with the Court, representing the Obama administration, several states, law professors, technology and other industry groups and corporations, plaintiffs' groups, and legal foundations. At this juncture, the potential significance of the Supreme Court's view in *Edwards* to privacy litigants became quite clear, with social media and internet companies (including Facebook Inc., LinkedIn Corp., Yahoo! Inc., and Zynga Inc. filing a brief) in support of First American, and the Electronic Privacy Information Center (EPIC) filing a brief on behalf of Edwards and noting that the statutory damages questions presented in *Edwards* ''are central to the protection of privacy.'' These privacy stakeholders correctly understood the potential impact of *Edwards* on pending and future litigation.

The Supreme Court heard arguments in *Edwards* Nov. 28, 2011. During the arguments, Chief Justice John G. Roberts Jr. seemed to be inclined toward evaluating the various contexts under which a violation of statutory rights could confer Article III standing. In the end, it is possible that the court discovered some defect in the record or became so hopelessly gridlocked that the case lost its backing among those justices who had voted to review it. It seems more likely, however, that the court wanted a different case to consider the statutory standing question. In the end, the court dismissed its writ of certiorari as improvidently granted June 28 in a one sentence decision, leaving observers to speculate as to the court's rationale for taking, hearing argument, and then dismissing its review. On a formal basis, this action simply leaves the decision of the court of appeals in place, as if review had never been granted.

Implications for Privacy Litigation

Although the Supreme Court's focus on the case is past, the question of whether a violation of a statutory right suffices for Article III standing in instances where no actual ''harm,'' ''damages,'' or ''injury'' results continues to arise with increasing frequency in privacy litigation. As the amicus briefs Facebook et al. and EPIC filed in *Edwards* highlight, privacy litigation arising from alleged online tracking, data loss, cookie deployment, and other highly technological areas frequently involves claims of violations of statutory rights, but very little in the way of factual allegations of damages. For instance, in claims for damages under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2511 or various state privacy statutes, plaintiffs often allege that defendants' actions caused them harm by virtue of violating statutory rights, and not necessarily by causing any economic or cognizable nonpecuniary loss.

In a certain light, the logic in these complaints is sensible: It can be very difficult to demonstrate an actual injury for many individuals whose statutory rights to some form of privacy may have been violated. In these circumstances, standing can pose an insurmountable hurdle for privacy claims. Even Samuel D. Warren and Louis D. Brandeis observed that the type of damages common to privacy injuries would not commonly not be economic but rather compensation for ''injury to feelings as in the action of slander or libel.''[8] By adhering to this more common law tort approach and expanding notions of what constitutes an ''injury'' under Article III in the context of statutory violations, however, the Ninth Circuit does make it more challenging for itself to separate the wheat from the chaff, as many complaints alleging statutory violations still fail at summary judgment. This ultimately adds to the burden on technology and other firms, where the specter of privacy litigation hovers over many new technologies, and drains resources from the federal court system. More fundamentally, it threatens to force the judiciary into what amounts to a policy debate about the appropriateness of new technologies—even when there is no specific harm. More significantly, it creates the prospect of a federal judiciary willing to use a common law approach to expand its own jurisdiction—a trend that could certainly raise both separation of powers and federalism concerns if left unchecked.

In general, however, privacy cases have gone largely in the opposite direction, and have held that a mere technical violation regarding personal information is not sufficient to support a cause of action. Thus, although legislatures have recognition of new forms of harms unknown at common law, the courts have generally demanded some specific quantum of harm. Seminal to this approach is the decision in *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), in which the U.S. Court of Appeals for the Second Circuit held that transfers of personal information, although potentially in violation of privacy statute, do not necessarily give rise to cognizable damages. There, the court entertained no presumption of emotional distress or other similar damages from the disclosure of personally identifiable information, absent some concrete evidence of demonstrable harm. Thus, the corporate defendant prevailed over plaintiffs who claimed it had improperly distributed their customer proprietary network information to a credit card affiliate in order to assist in debt collection.

Following the Supreme Court's dismissal of *Edwards*, however, privacy litigants are left with uncertainty as to whether Article III self-restraint will defeat efforts to vindicate congressionally established rights in instances where no harm resulted from a defendant's actions. Even in the Ninth Circuit, certain courts have still

[6] *Id.* at 517 (quoting *Fulfillment Servs. Inc. v. UPS*, 528 F.3d 614, 618-19 (9th Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))).

[7] *Id.* at 517.

[8] Samuel D. Warren & Louis D. Brandeis, ''The Right to Privacy,'' 4 *Harv. L. Rev.* 193, 219 (1890).

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maintained a distinction between statutory violations and injury-in-fact sufficient to confer Article III standing. Citing to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), these courts have emphasized to litigants the necessity for ''actual or imminent'' injury in cases subject to federal subject matter jurisdiction.[9] Following *Edwards*, it is likely that the statutory rights versus Article III quandary will play an outsized role in defendants' motions to dismiss claims of privacy rights violations.

What Comes Next?

Unfortunately, the Supreme Court's decision not to address the sufficiency of statutory violations as injuries for Article III purposes leaves the issue unresolved. Although the Ninth Circuit and some other courts continue to assert that statutory violations suffice for jurisdiction, other courts hew more closely to decisions from the Supreme Court and other circuits that suggest that Congress cannot remove injury requirements by statute,[10] and that the absence of injury, even in the context of an alleged violation of a statutory right, is a barrier to Article III standing.[11] By declining to clarify this issue in *Edwards*, the Supreme Court has decided only to address the issue another day. When it reappears in the future, it is quite possible that the Court will evaluate the sufficiency of harmless statutory violations in the context of privacy litigation.

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[9] *See, e.g., Robins v. Spokeo, Inc.*, No. 10-05306, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) (10 PVLR 296, 2/21/11) (allegation of violation of statutory right is insufficient to confer standing absent an allegation of ''actual or imminent'' harm); *Lee v. Chase Manhattan Bank*, No. 07-04732, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14, 2008) (''[T]he mere allegation of a violation of a California statutory right, without more, does not confer Article III standing. A plaintiff invoking federal jurisdiction must also allege some actual or imminent injury resulting from the violation.'') (citing *Lujan*, 504 U.S. at 560-61).

[10] *E.g., Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (''It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.''); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) (''Neither the Administrative Procedure Act, nor an other congressional enactment, can lower the threshold requirements of standing under Art. III.''); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (''In no event, however, may Congress abrogate the Art. III minima: [a] plaintiff must always have suffered a distinct and palpable injury to himself, that is likely to be redressed if the requested relief is granted.'').

[11] *E.g., Doe v. Nat'l Bd. Of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (''The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.'')