No. 10-708

DEC 30 2010

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
Successor in Interest to the First American Corporation,
and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and
on Behalf of all Others Similarly Situated,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMERICAN LAND TITLE ASSOCIATION; FIDELITY NATIONAL FINANCIAL, INC.; STEWART INFORMATION SERVICES CORPORATION; AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Amici are the national trade organization for the title insurance industry and three of the nation's four largest title insurers.

Since 1907, the American Land Title Association ("ALTA") has been the national voice for the abstract and title insurance industry. Its members consist of more than 3,800 title agents, abstracters, and title insurance companies. These businesses search, review, and insure land titles to protect home buyers, real estate investors, and mortgage lenders who invest in real estate. Other real estate professionals (like attorneys, developers, builders, lenders, brokers, and surveyors) also belong to ALTA, as associate members.

Fidelity National Financial, Inc., is the largest title insurance company in the United States. It is also a leading provider of other services for real estate transactions, such as escrow. During 2008, Fidelity's title insurance companies held a 45.7% share of the U.S. title insurance market. Fidelity's

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[1] Counsel of record for all parties received 10 days' written notice of Amici's intent to file this brief, and they have consented thereto. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no person or entity other than Amici made a monetary contribution intended to fund the preparation or submission of this brief.

customers are served by over 1,600 direct residential title offices and nearly 7,500 agents.

Stewart Information Services Corporation and its predecessors have been in the title insurance business since 1893. Today, Stewart is a technology-driven, strategically competitive real estate information and transaction management company. It provides title insurance through a network of 8,500 offices and agencies around the United States and abroad.

Old Republic National Title Insurance Company traces its beginnings to the early 1900s. Today, its parent company is one of the nation's 50 largest shareholder-owned insurance businesses. Old Republic's title insurance services are sold through a network of 242 company offices and nearly 10,000 title agents.

SUMMARY OF ARGUMENT

The petition for writ of certiorari poses questions that, if answered, would definitively resolve an important issue of federal law that has sharply divided courts around the country. Amici conduct business in nearly every jurisdiction in the nation. The current split among courts confounds Amici's efforts to comply with RESPA on a national basis.

Also, the decision below threatens with enormous, unforeseen liability two types of business

arrangements that are common in the title industry: shared-ownership entities and exclusive agents. State and federal authorities have long permitted and regulated these types of arrangements. In the wake of the Ninth Circuit's ruling, the title industry is uncertain about the on-going viability of these arrangements. Certiorari review would clarify the matter.

Finally, the Ninth Circuit's ruling reprises a lingering question of statutory construction under RESPA: whether that law confers standing on someone who suffers no monetary harm. That question looms large in the minds of real estate professionals, who could face massive liability depending on the answer.

For these reasons, Amici urge the Court to grant the petition.

ARGUMENT

I. TITLE INSURANCE IS VITAL TO THE U.S. REAL ESTATE INDUSTRY.

For nearly 150 years, title insurance has protected homeowners, lenders, and real estate investors from title defects that impair title to land. A title policy indemnifies a policy-holder "for losses caused by either on-record or off-record defects that are found in the title or interest in an insured property to have existed on the date on which the policy is issued."

BARLOW BURKE, LAW OF TITLE INSURANCE § 2.01 (3d ed. 2000).

Before a title policy is issued, a title agent searches public records for matters that may cloud ownership of the property. The search could reveal mortgages, judgments, street assessments, taxes, and the like. In nearly every real estate transaction, the title search turns up a defect that, if not corrected, would hinder the transaction. In addition, thirty-five percent of transactions require title professionals to correct errors in the public record before insuring title.

Once a title professional corrects any existing title defects and other conditions are met, a title insurance company will issue a policy. Two types of title insurance exist: owners' coverage and lenders' coverage. An Owner's Policy protects homeowners and investors from prior title defects. A Loan Policy covers a lender's interest, often a mortgage, in a piece of real estate. The policy assures the lender of the validity, priority, and enforceability of its lien. Given the desirability of that type of protection, most lenders protect their mortgages with title insurance.

After World War II, returning military personnel began to buy homes in large numbers. Title insurance grew as an industry because it gave lenders confidence in the state of title for mortgaged properties. That fueled increased investment in mortgages and led to the creation of a secondary mortgage market, through which mortgages can be bought and sold.

Today, mortgage loans on all types of real property constitute the nation's largest single category of institutional investment. By reducing the risk associated with title defects, the title insurance industry fostered that growth.

Moreover, the sheer size of the title industry makes it relevant to the national economy. For instance, in 2008, the total operating income for the entire U.S. title insurance industry was $11.3 billion.

II. STRICT REGULATIONS CONTROL MANY ASPECTS OF THE TITLE INSURANCE BUSINESS.

Virtually every state regulates title insurance extensively. For example, some states regulate title insurers through supervisory agencies with broad administrative powers. In some states, that agency will set the rates that title insurance companies can charge. *See, e.g.*, TEXAS INS. CODE ANN. § 2551.003. In other states, title insurance companies must submit rates for official approval. For example, in this case, First American Title Insurance Company charged the plaintiffs the rate mandated by an approved schedule of rates in Ohio. *See* OHIO REV. CODE § 3935.07.

That fact poses a vexing problem for a significant portion of the title industry. The plaintiffs accuse First American of inflating premiums through improper referrals in violation of RESPA. But, under Ohio law, First American had no discretion to charge

different rates. So referrals had nothing to do with the premiums that the plaintiffs paid.

Also, since the plaintiffs received the insurance that they paid for, they suffered no harm. So, even though First American charged the proper rates and issued the correct policies, it still stands accused of violating RESPA. As a result of the Ninth Circuit's ruling, other title businesses will surely be accused of the same.

III. TITLE INSURERS OFTEN INVEST IN EXISTING TITLE AGENCIES AND CREATE EXCLUSIVE RELATIONSHIPS.

In this case, the plaintiffs complain of a title insurance company's owning part of the title agency that issued the plaintiffs' title insurance policies. The plaintiffs also complain about the applicable agency contract. That contract, the plaintiffs claim, improperly called for the agent to issue policies exclusively for one title insurance company.[2]

In the title insurance industry, insurer-owned agents abound. Indeed, for over 20 years now, title insurers have routinely bought interests in existing title agencies. For instance, at one point, a subsidiary of one of the Amici, Stewart Title, tried to buy part of

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[2] In briefing below, First American has denied that the agent's contract called for exclusivity in the way that the plaintiffs allege.

the title agency that issued the plaintiffs' title insurance policies in this case. Hundreds of other title agencies are partially or wholly owned by title insurers.

No state or federal agency has ever barred insurers from investing in existing title agencies. Rather, the U.S. Department of Housing and Urban Development ("HUD") has openly endorsed the practice. An insurer's ownership interest complies with RESPA, HUD says, as long as the insurer "pays a fair value contribution for its ownership share and receives a return on its investment that is not based on referrals of business." HUD STATEMENT OF POLICY 1996-2, 61 Fed. Reg. 29,258, 29,264 (June 7, 1996). Also, owning parts of existing insurance agencies is so common that the National Association of Insurance Commissioners created a form for insurers to report income from those arrangements.

Nor has any entity ever prohibited insurer-owned agencies from entering into an "exclusive" agency arrangement. According to HUD, "there appears to be nothing impermissible about . . . referrals of title business" in those situations. *Id.* Leading scholars have noted that insurance agents "generally serve a single insurance company – whether employed by the insurer *or exclusively contracted to it*[.]" 1 JEFFREY E. THOMAS, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 2.03[1] (2009) (emphasis added). In this way, the Ninth Circuit's ruling threatens a common form of business arrangement that has been accepted for decades.

IV. THE NINTH CIRCUIT'S RULING VASTLY COMPLICATES AMICI'S EFFORTS TO COMPLY WITH RESPA ON A NATIONAL BASIS.

For entities that operate nationally, the decision below only sows more uncertainty into an area of law that was already muddled. Federal courts pointedly disagree about the controlling issue in this case: whether people who suffer no financial harm have standing under RESPA.

That split of authority means some title insurance businesses operate in jurisdictions in which the local circuit court has ruled *in favor of* such standing. *See, e.g.*, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 760-61 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009). Other title businesses operate in jurisdictions in which the federal circuit court has ruled the other way. *See, e.g.*, *Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf;[3] *cf. Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183, 1188 (7th Cir. 1994) (finding "no basis" for argument that RESPA liability included anything except alleged overcharge).

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[3] Even though *Moore* is an unpublished decision, it still exemplifies the circuit split. "[A]n unpublished or summary decision on a subject over which courts of appeals have split" signals "a persistent conflict." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 263 (9th ed. 2007).

In some areas, only district courts have addressed the issue. *See, e.g.*, *Mullinax v. Radian Guar. Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004) (finding that plaintiffs "lack standing to pursue their RESPA claims"); *cf. Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1427-28 (S.D. Fla. 1997) (rejecting argument that RESPA "allows recovery of the entire title insurance and title evidence charges"). While district court rulings do not bind other federal courts, the "contrary voices of district courts obviously add to the confusion[.]" EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 257 (9th ed. 2007).

Amici, their subsidiaries, and members operate in almost every jurisdiction in the country. With federal courts reaching different conclusions about the same issue, national companies find themselves facing potential RESPA liability in some jurisdictions but not in others – for the same acts. This Court's definitive ruling would end that arbitrary disparity.

V. THE RULING BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS THIS COURT'S ATTENTION.

Whether unharmed people have standing to sue under RESPA represents "an important issue of federal law that has not been, but should be, settled by this Court[.]" SUP. CT. R. 5(c). In its petition, First American explained the import of that issue in

several ways. Here, Amici offer the perspective of the entire title insurance industry.

The question of whether a party has standing under a federal law absent "actual damages" presents "an important question of statutory construction[.]" *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., and Alito, J., concurring) (discussing 18 U.S.C. § 2724(b)(1)). Indeed, "a strong factor in deciding whether to grant certiorari" is whether "enormous potential liability . . . turns on a question of federal statutory interpretation[.]" 547 U.S. at 1051; *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 269 (9th ed. 2007) (noting tendency to grant certiorari when "especially large amounts of money are involved in litigation over the issue of statutory construction").

Here, the Ninth Circuit's ruling presents the very real danger of enormous liability. The plaintiffs seek treble statutory damages, which the Ninth Circuit held to be the plaintiffs' *entire* title premiums, in connection with tens of thousands of transactions. For the title industry as a whole, the decision could endanger untold millions of transactions.

Moreover, any real estate business with shared ownership – lenders, attorneys, law firms, brokers, realtors, builders – could be ensnared. In each transaction, the business would have to turn over three times its fees, plus attorneys' fees. All this potential liability rests on one question of statutory construction.

The prevalence of shared-ownership entities and exclusive agency agreements also weighs in favor of certiorari. These are "important and increasingly popular" forms of business arrangements. *Texaco, Inc. v. Shell Oil Co.*, 547 U.S. 1, 4 (2006) (noting that certiorari granted "to determine the extent to which [an anti-trust rule] applies to an important and increasingly popular form of business organization, the joint venture"); *see also Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (noting that certiorari granted due to "the importance of the issue for the agricultural community"). As a result, the issue is of considerable concern to title professionals, if not the entire real estate industry.

Finally, lower courts' split over this issue elevates the importance of certiorari review. This Court has used certiorari to resolve "conflicting views in the courts of appeals and the district courts[.]" *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964); *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 257 (9th ed. 2007) ("[T]he importance of an issue for certiorari purposes can sometimes be identified by the degree of diverse and conflicting views that lower courts . . . have expressed."). Here, faced with the same legal issue, federal courts have reached irreconcilable and diametrically-opposed results. That degree of conflict makes the issue important.

CONCLUSION

For these reasons, Amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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