And After All That Work!: The Dreaded U.S. Supreme Court "DIG"

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In the last days of the 2011 Term, fresh off its decisions in the Patient Protection and Affordable Care Act cases, the Supreme Court dismissed a case many observers believed to be one of the most important "sleeper" cases of the Term. Indeed, according to SCOTUSblog, "[t]he case was regarded as quite a big deal when it was argued, with massive potential implications for Congress's power to define injury." Twenty-six *amicus* briefs in total were filed, including one by the Solicitor General of the U.S. The case, *First American Financial Corp. v. Edwards*, No. 10-708, raised the question of what limits Article III of the Constitution places on Congress's power to create private rights of action.

Cleveland home buyer Denise Edwards sued First American Title Insurance for paying an allegedly improper fee to a title agency that agreed to sell First American policies exclusively. Her claim was founded on the Real Estate Settlement Procedures Act (RESPA), which prohibits title insurers and other real-estate-related companies from participating in such payment or "kickback" schemes related to real estate closings. Under RESPA, a consumer who discovers an improper payment related to her closing can sue to recover statutory damages without having to prove that the violation caused her any financial injury or any diminution in the quality of services. First American argued that the plaintiff had suffered no discernible injury from the alleged illegal fee because the rates charged the plaintiff were set by state law and did not change as a result of the title agency's relationship with First American. Accordingly, First American asserted, Congress was prohibited from authorizing suit against it. The Court granted certiorari, after the lower courts rejected First American's argument. Oral argument took place and, from the comments made by the Justices, the Court appeared poised to establish new Article III limitations on Congress's power to create private statutory rights of action.

Seven months passed. And then, rather than issue an opinion, the Court dismissed the case on the ground that review had been improvidently granted. Such a dismissal order, commonly known as a "DIG," is usually issued when, after briefing, oral argument, or further study of a case, the basis on which review was originally granted appears problematic to the Court. Full consideration of a case on the merits may "shed more light on [a] case than in the nature of things was afforded at the time the petition for certiorari was considered." *Belcher v. Stengel*, 429 U.S. 118, 119 (1976). Indeed, "[e]xamination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

One survey of the Court's DIG practices found that, between 1954 and 2005, the Court dismissed 155

cases on grounds they were improvidently granted, at a rate of about three per term. *See* M. Solimine & R. Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis. L. Rev. 1421, 1434. Our own study of the 1990 to 2011 terms shows a slightly decreased rate of DIGs – 39 in total, at the rate of about 2 a year. *See* Table of Dismissals for Cases that were "Improvidently Granted. The average time from argument to dismissal in the 2000 to 2011 terms was 62 days, much less than the 7 months that elapsed before the DIG in the *First American Financial Corp. v. Edwards* case.

It is often difficult to determine the reasons for a DIG where, as in the *Edwards* case, the DIG order provides no explanation for the dismissal. However, a review of the DIG orders from the 1990 to 2011 terms that do offer an explanation for dismissal generally fall into one of two categories: review of the record showed that the issue the Court agreed to review was not preserved or squarely presented on the factual record, or the issue was otherwise mooted out by subsequent events. *See* Table of Dismissals for Cases that were "Improvidently Granted," linked here. Earlier DIG orders reveal a host of other discrete reasons for dismissal, including: lack of conflict in the case law, an inability to reach the question accepted for review without first reaching a threshold issue not presented by the petition, an adequate state ground and lack of a substantial federal question, or an intervening court decision or change in statute. *See* E. Gressman, K. Geller, et al., Supreme Court Practice, § 5.15, pp. 359-362 (9th ed. 2007). But the Court's approach to such jurisdictional concerns is not uniform. "[S]ometimes the Court will [DIG] a case with jurisprudential problems and other times will go ahead and resolve it on some technical issue . . . . And in still other instances, the Court will skip over jurisprudential problems quite cavalierly." Id. at 358 (quoting H.W. Perry, Jr., Deciding to Decide 106, 107 (1991)).

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