



Civil Practice and Procedure

Donald Patrick Eckler and Calvin A. Townsend II
Pretzel & Stouffer, Chartered, Chicago

I'm Still Standing? Development of Standing Doctrine in Illinois Consumer Protection Class Actions

Under federal law, standing is strictly an issue of jurisdiction that is limited by the authority granted federal courts under the United States Constitution. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546-47 (2016). Article III of the United States Constitution specifies that the judicial power extends only to actual cases or controversies. To satisfy the case and controversies requirement and establish standing, the United States Supreme Court has held that a plaintiff must have (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo*, at 1547.

The United State Supreme Court has recently emphasized the importance of the reasoning in *Spokeo*, in its *per curiam* decision in *Frank v. Gaos*, 2019 U.S. LEXIS 2089 (March 20, 2019). In *Frank*, the Court remanded a case that it took to review the propriety of a complete *cy pres* class action settlement, but found that there were issues of standing of the named class members. *Frank*, 2019 U.S. LEXIS 2089, *1. The plaintiffs alleged that Google violated the Stored Communications Act (“SCA”) by providing a referrer header, which is when Google’s search engine provided the search terms used to find the website to the server on which the page clicked on was located. *Id.* at *1-2. The named class members alleged that they could be identified by the referrer header and alleged a violation of the SCA, but there was a question as to whether they suffered an actual injury thereby. *Id.* at *2. Following a request for additional briefing on the standing issue and oral argument the Court remanded the case back to the Ninth Circuit for further proceedings to review the standing issue. *Id.* at *8-9. The *Spokeo* decision was handed down while the matter was pending in the Ninth Circuit and the Ninth Circuit did not address the standing issue. *Id.* at *6

In contrast to what the federal courts require, what must a plaintiff show to have standing to bring suit in Illinois state courts? Should Illinois courts follow the same “cases or controversies” requirement that federal courts do? Should a different standing standard in Illinois state courts be used if a plaintiff brings suit under a federal statute? Are Illinois courts required to follow federal law on standing issues when considering cases brought under federal statutes? These questions and more, are triggered in the following sets of cases: *Paci v. Costco Wholesale Corp.*, 2018 IL App (1st) 180164-U; *Duncan v. Fedex Office and Print Services, Inc.*, 2019 IL App (1st) 180857; and *Rosenbach v. Six Flags Entm’t Corp.*, 2019 IL 123186.

Paci v. Costco Wholesale Corp.

The Fair and Accurate Credit Transactions Act of 2003 (FACTA), prohibits a merchant who accepts credit cards or debit cards from printing more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction. 15 U.S.C. § 1681c(g)(1).

On January 3, 2016, the plaintiff made certain purchases at the defendant's establishment in Niles, Illinois. *Paci*, 2018 IL App (1st) 180164-U, ¶ 4. While attempting to exit, an employee asked the plaintiff for proof of purchase. *Id.* The plaintiff discovered that she had lost the receipt and requested a replacement, from the store supervisor. The supervisor printed a "summary journal" report of the transaction. *Id.* The plaintiff displayed the summary journal report to the employee near the exit and left the store. *Id.* After she exited the store, the plaintiff noticed that the summary journal report had the first six digits of her credit card number printed on it. *Id.*

The plaintiff initially filed her complaint in federal court in the District Court, Northern District of Illinois, alleging the defendant willfully printed more than the last five digits of her credit card number on a receipt, in violation of FACTA. *Id.* ¶ 6. The plaintiff sought statutory damages under FACTA. *Id.*

The defendant filed a motion to dismiss for failure to state a claim upon which the plaintiff could receive relief. *Id.* The district court denied the motion to dismiss, finding that the allegations at least suggested that the plaintiff's receipt displayed too many credit card digits in violation of federal law. *Id.* The parties proceeded to the discovery phase of litigation. The plaintiff and the defendant then filed separate motion for summary judgments after the deposition of one of the defendant's employees. *Id.* ¶¶ 7-8. The district court dismissed the matter because the plaintiff lacked Article III standing and thus the court lacked jurisdiction. *Id.* ¶ 8. The district court never ruled on the merits of the parties' summary judgment motions. *Id.*

The plaintiff then filed suit in the Circuit Court of Cook County. The defendant filed a combined motion to dismiss claiming that the plaintiff failed to state a claim for relief, and raised the affirmative defense that plaintiff lacked standing to bring suit. *Id.* ¶ 9. The plaintiff argued in order to have standing in Illinois state courts to sue for statutory damages, actual injury was not required. *Id.* The plaintiff further argued that Illinois courts are not bound by Article III of the Constitution. *Id.* Unpersuaded by the plaintiff's argument, the trial court granted the motion to dismiss and found that the plaintiff lacked standing because she did not suffer any actual harm. *Id.* Relying on *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016), the trial court concluded that a violation of FACTA was not sufficient to provide the plaintiff with a distinct and palpable injury sufficient to confer standing to maintain a lawsuit. *Id.* The plaintiff appealed the order granting the defendant's motion to dismiss for lack of standing. *Id.* ¶ 11.

On review, the Illinois Appellate Court First District found that standing requires some injury in fact to a legally cognizable interest. *Paci*, 2018 IL App (1st) 180164-U, ¶ 14. The issue on appeal was whether the plaintiff faced or suffered a distinct and palpable injury when the defendant printed the first six digits of her credit card number in violation of FACTA. *Id.* The plaintiff argued that Illinois courts are not required to follow federal law on issues of justiciability and standing. *Id.* ¶ 16. Relying on *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462 (1988), the appellate court found that Illinois courts are not required to follow federal law on issues of standing; a plaintiff will only have standing if they have a distinct and palpable injury, meaning there must be an actual controversy between the adverse parties. *Id.* ¶ 17. The court determined that although federal law is not determinative of Illinois standing doctrine, the Illinois Supreme Court has utilized federal standards for an injury-in-fact being actual or threatened. *Id.*

The *Paci* court analyzed the United States Supreme Court case of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Id.* ¶ 18. The *Spokeo* case involved a plaintiff who brought a complaint in federal district court alleging the defendant posted inaccurate information about the plaintiff on its website, in violation of the Fair Credit Reporting Act of 1970 (FCRA). *Id.* The district court dismissed the action for lack of standing and the Court of Appeals, Ninth Circuit reversed, finding that the plaintiff had alleged an injury in fact because the statutory violation was particular to the plaintiff. *Id.* The Supreme Court vacated the Ninth's Circuit's ruling and remanded the matter, finding that the Ninth Circuit only

considered whether the plaintiff's injury was particular, but failed to determine whether the plaintiff's injury was concrete. *Id.*

The *Paci* court found that since the ruling in *Spokeo*, different circuits of the United States Court of Appeals have adopted opposing stances when presented with cases brought by plaintiffs claiming a statutory violation, while seeking only to recover statutory damages. *Id.* ¶ 20. For example, in *In re Horizon Healthcare Services, Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017), the Court of Appeals, Third Circuit determined that Congress elevated the unauthorized disclosure of information to an injury a plaintiff could sue to enforce without suffering some other harm. *Paci*, 2018 IL App (1st) 180164-U, ¶ 22. The *Horizon* court found that the Supreme Court in *Spokeo* made clear that Congress has the power to define injuries and that all but a mere technical violation of a statute will be sufficient to confer standing. *Id.* ¶ 23. However, the court recognized that the plaintiffs in *Horizon* did not alleged a mere technical or procedural violation of FCRA, but instead alleged unauthorized dissemination of their own private information, the very injury FCRA was intended to prevent. *Id.* In *Gennock v. Kirkland*, No. CV 17-454, 2017 WL 6883933 (W.D. Pa. Nov. 29, 2017), the plaintiffs made repeated purchases at the defendant's store and each time the receipt printed at the cash register contained both the first six and last four digits of their credit card numbers. *Id.* ¶ 27. Relying on the *Horizon*, the District Court, Western District of Pennsylvania found that the plaintiffs had standing to bring their claim and that they did not raise a mere technical statutory violation. *Id.*

In *Paci*, the appellate court found that the plaintiff had not alleged the receipts printed during her transaction included any information in violation of FACTA. *Id.* The court found that the plaintiff's argument amounted to a claim that FACTA was technically violated because the summary journal report contained the first six digits of her credit card number. *Id.* The court found that after the report was generated, the plaintiff placed it in a secured place and did not suffer an increased risk of identity theft. *Id.*

The court further found that the plaintiff had not alleged the kind of violation of FACTA that the plaintiffs in *Gennock* alleged because she did not allege that the receipt that she received after she made the purchase listed more than the last five digits of her credit card number. *Id.* Instead, the plaintiff only alleged that the defendants violated the FACTA by printing a summary journal report that included the first six digits of her credit card number. *Id.* The plaintiff had not given any indication that the defendant displays credit card information on receipts, printed from cash registers, in violation of FACTA. *Id.* Therefore, the court found that the plaintiff lacked standing because she only raised a technical violation of FACTA and had not pleaded a distinct and palpable injury. *Id.* ¶ 31.

Duncan v. Fedex Office and Print Services, Inc.

The plaintiff filed a one-count complaint alleging that the defendant issued a printed receipt in violation of FACTA, similar to the plaintiff in *Paci*. *Duncan*, 2019 IL App (1st) 180164-U, ¶ 6. The plaintiff's claim arose when she conducted a transaction at the defendant's retail location in Oak Lawn, Illinois. *Id.* The plaintiff alleged the defendant issued a receipt that listed the first two and last four digits of her credit card numbers after she used her personal credit card. *Id.* The plaintiff alleged that not only herself, but thousands of other customers who complete transactions with the defendant, have been placed with the burden of a heightened risk of payment card fraud and identity theft. *Id.*

The defendant filed a combined motion to dismiss the complaint under section 2-619.1 of the Illinois Code of Civil Procedure. *Id.* ¶ 7. The defendant argued that the plaintiff lacked standing because she failed to allege any injury beyond

the improper disclosure of the first two digits of her credit card number. *Id.* The defendant also argued that the plaintiff failed to allege facts which proved that the defendant willfully violated the FACTA in issuing her receipt. *Id.*

The trial court granted the defendant's motion to dismiss based on a lack of standing, although the court believed there was a basis for a claim, in the absence of actual damages, based on the statutory framework. *Id.* ¶ 8. In reaching its decision, the trial court used certain federal Courts of Appeals cases which determined that the consumer whose expiration date is printed on a receipt cannot bring a claim under FACTA in the absence of actual damages. *Id.*

On review, the *Duncan* appellate court, in contrast to the *Paci* court, looked at different federal cases to determine whether a plaintiff has standing to bring suit under FACTA. In *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016), the court found that there was no standing for plaintiffs who claimed their receipts improperly showed their card's expiration date because it is hard to imagine how the expiration date's presence increased the risk that the customer's identity would be compromised. *Duncan*, 2019 IL App (1st) 180164-U, ¶ 18. In *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261, 1266 (S.D. Fla. 2016), the District Court, Southern District of Florida found that the harm from a FACTA violation is concrete as soon as a company prints the offending receipt. *Duncan*, 2019 IL App (1st) 180164-U, ¶ 19.

The defendant argued that the court should follow the federal cases that require the plaintiff to show that he or she suffered a concrete injury in addition to a procedural violation of FACTA. *Id.* ¶ 20. Although considerable weight to federal courts' interpretation of federal law is given, if there is a split in the federal system, the appellate court held that Illinois courts may follow the decisions it believes are better reasoned. *Id.* ¶ 20. The court found that the reasoning in *Guarisma* was more persuasive. *Id.* The court further found that Illinois courts are not required to follow federal law on issues of justiciability and standing. *Id.* ¶ 25. Under federal law, standing is grounded in the jurisdictional "case and controversy" requirement imposed by Article III, whereas standing in Illinois is not jurisdictional. *Id.*

The court found that when a plaintiff alleges a statutory violation, no additional requirements are needed for standing. *Id.* ¶ 23. The court found that the plaintiff had standing to bring her FACTA claim under Illinois law. *Id.* ¶ 25. By enacting FACTA, Congress elevated intangible harms associated with the printing of more than the last five digits of a person's card number to the status of a legally cognizable injury. *Id.* Illinois federal courts have acknowledged that Illinois state courts could find that a procedural violation of FACTA is "sufficient to confer standing in state court." *Id.* As the Court of Appeals, Seventh Circuit recognized, "a state's standing doctrine is 'the business' of its own courts and 'it is not for federal courts to venture how the case would there be resolved.'" *Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018) (quoting *Smith v. Wisconsin Dep't of Agriculture*, 23 F. ed 1134, 1142 (7th Cir. 1994)).

Rosenbach v. Six Flags Entm't Corp.

The Biometric Information Privacy Act (Act) imposes certain restrictions on private entities in how they collect, retain, disclose, and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of face geometry, or in this case scans of the hand; specifically scans of the thumbprints. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 1; *see also* 740 ILCS 14/1 *et seq.*

In *Rosenbach*, the defendants operated a Six Flags Great America amusement park in Gurnee, Illinois. *Rosenbach*, 2019 IL 123186, ¶ 4. In May or June 2014, Alexander Rosenbach, a minor, visited the amusement park on a school field trip. *Id.* ¶ 5. The defendants sell repeat-entry passes to its park and since 2014, have implemented a fingerprinting process when issuing these passes. *Id.* Alexander's mother, Stacy Rosenbach, purchased a season pass for Alexander online prior

to his visit. *Id.* Stacy provided certain personal information for Alexander on the defendant’s website; however, Alexander had to complete the sign-up process in person. *Id.*

The process was two-fold: (1) Alexander would have to go to a security checkpoint where he would scan his thumb into the defendant’s biometric data capture system; (2) then, Alexander would be directed to a nearby administrative building where he would obtain a season pass card. *Id.* ¶ 6. The card and his thumbprint enabled him access to the park when used together. *Id.* After Alexander returned home, Stacy asked for the booklet or paperwork he was given in connection with the season pass; however, Alexander advised her that he did not receive any paperwork. *Id.* Alexander’s school field trip was the last visit to the defendant’s amusement park; however, the defendants have retained Alexander’s biometric identifiers (thumbprints) and information since. *Id.* ¶ 9.

Stacy filed a complaint on Alexander’s behalf in the Circuit Court of Lake County, Illinois. *Id.* ¶ 10. The complaint sought damages on the grounds that the defendants violated Section 15(b) of the Act and requested injunctive relief to compel the defendants to make disclosures pursuant to the Act’s requirements and to prohibit the defendants from violating the Act going forward. *Id.* ¶ 11.

In response, the defendants filed a motion to dismiss, arguing that the plaintiff had no actual or threatened injury and therefore lacked standing to sue, and that the plaintiff’s complaint failed to state a cause of action for violation of the Act. *Id.* ¶ 12. The circuit court denied the motion as to counts for damages and injunctive relief under the Act. *Id.*

The defendants sought an interlocutory review of the circuit court’s ruling under Illinois Supreme Court Rule 308, which involved the following questions:

Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, and may seek statutory liquidated damages authorized under §20(1) of the Act when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected his biometric information without providing him the required disclosures and obtaining his written consent as required by §15(b) of the Act; and

(1) Whether an individual is an aggrieved person under §20 of the Illinois Biometric Information Privacy Act, and may seek injunctive relief authorized under §20(4) of the Act, when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected

Id. ¶ 14.

The appellate court granted review of the circuit court’s order and answered both questions in the affirmative. *Id.* ¶ 15. The appellate court determined that a plaintiff is not “aggrieved” within the meaning of the Act and may not pursue either damages or injunctive relief under the Act based solely on the defendant’s violation of the statute. *Id.* The appellate court further reasoned that the injury or adverse effect does not have to be pecuniary, but it must be more than a technical violation of the Act. *Id.*

Is Something More Than a Technical Violation of the Statute Required?

On review, the Illinois Supreme Court determined that the Biometric Privacy Information Act was enacted to help regulate “the collection, use, safeguarding, handling, storage, retention and destruction of biometric identifiers and information.” *Rosenbach*, 2019 IL 123186, ¶ 19. The court found that it was undisputed that the thumbprint collected

by the defendants from Alexander constituted a biometric identifier subject to the Act’s provisions and that the electronically stored version of the thumbprint constituted biometric information within the meaning of the law. The court found that the defendants’ belief that the Act limits a plaintiff’s right to bring a cause of action to circumstances where he or she has suffered “actual damage” beyond the violation of the rights conferred by the statute as the result of the defendant’s conduct is contrary to what the legislature intended. *Id.* ¶ 25. Section 20 of the Act provides that “any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. *Id.* ¶ 27. The court found that when a private entity fails to comply with Section 15’s requirements, that violation constitutes an invasion, impairment or denial of the statutory rights of any person whose biometric identifier or biometric information is subject to breach. *Id.* ¶ 33. The court determined that such a person or customer would clearly be aggrieved within the meaning of the Act. The court made this finding irrespective of whether the biometric data had been improperly shared or otherwise misused. *Id.* ¶ 34.

Conclusion

The standing doctrine in Illinois as opposed to Article III of the United States Constitution allows an “aggrieved” person to bring suit in Illinois state courts. This term “aggrieved” means anyone whose statutory rights are violated. Prior to *Duncan* and *Rosenbach*, Illinois seemed to require more than a technical violation of a statute to confer standing. However, following the *Duncan* and *Rosenbach* decisions, Illinois courts seem to be turning toward the position that plaintiffs have standing to sue as soon as their rights are violated and do not have to prove actual damages or injury to continue their suit. This will likely lead to far more plaintiffs filing claims for statutory violations in state court where standing is likely to be more easily found.

About the Authors

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Calvin A. Townsend II is an Associate Attorney at *Pretzel & Stouffer, Chartered*. Mr. Townsend has been a practicing attorney since 2011, and primarily focuses on premises liability, legal malpractice, and commercial litigation matters. When Mr. Townsend is not engaging in the practice of law, he enjoys spending time with family.

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