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Standing: The issue du jour

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At the current pace and scope of decisions, evaluation of the plaintiff's standing by defense counsel will occur in the initial file review right along with determinations of whether there is personal jurisdiction, adequacy of service, propriety of forum and venue, and availability of removal to federal court.

Taking the lead from the U.S. Supreme Court and its decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), Illinois courts of review and the 7th U.S. Circuit Court of Appeals have issued a swath of decisions addressing standing in a variety of contexts. With the acceptance of the petition for leave to appeal by the Illinois Supreme Court in *Soto v. Great America* and the forthcoming decision in *Berry v. City of Chicago*, there are two more decisions to come in the near term. In addition, at the oral argument in *Protect Our Parks, Inc. v Chicago Park District*, judges of the 7th Circuit questioned the plaintiff closely on whether there was standing to their challenge to the construction of the Obama Center.

Many standing cases have addressed whether the plaintiff has suffered injury in the context of federal and state consumer protection statutes, such as Biometric Information Privacy Act and Fair and Accurate Credit Transactions Act. For example, in *Frank v. Gaos*, 139 S.Ct. 1041 (2019), the court was to address whether cy pres settlements in class actions were proper, but instead the court remanded the case to the 9th Circuit to address the question of whether the plaintiff had standing in the first instance to bring a claim under Stored Communication Act.

In addition, in the last year standing has been addressed by the Supreme Court in an Establishment Clause case (*American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019)), a FOIA case (*Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019)), a racial gerrymandering case (*Virginia House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945 (2019)), and most recently, an ERISA case (*Thole v. U.S. Bank*¸ 2020 U.S. LEXIS 3030 (2020)). In addition, the changed format of oral arguments before the Supreme Court has heard Justice Clarence Thomas consistently ask questions, many of which require the advocates to address standing.

The requirements for standing are different in federal court than in Illinois state court.

To establish standing under Article III of the Constitution for standing in federal court, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete,

particularized, and actual or imminent (2) that the injury was caused by the defendant and (3) that the injury would likely be redressed by the requested judicial relief.

In contrast, Illinois courts have found that when a plaintiff alleges a statutory violation, such as a violation of FACTA, no additional requirements are likely needed to establish standing. *Duncan v. Fedex Office and Print Services, Inc.*, 2019 IL App (1st) 180857 ¶ 23. In *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, the Illinois Supreme Court held that merely being "aggrieved" as defined under BIPA conferred standing on the plaintiff.

Despite this seeming divergence between federal and state courts, there is not as bright a line as it would appear. Were it, the Illinois Supreme Court would likely not have taken *Soto* (FACTA claim) and *Berry* (inverse condemnation and negligence claims). Further, in *Bryant v. Compass Group, USA, Inc.*¸2020 U.S. App. LEXIS 14256, the 7th Circuit recently held that claims under Section 15(b) of BIPA do confer Article III standing, but there is not standing for claims under Section 15(a) of BIPA. The 9th Circuit held similarly in *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019). The *Bryant* court contrasted its holding with the 2nd Circuit's ruling in *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017), which found no such standing, but which is an unpublished decision, so there is no circuit split that could lead to a chance that the Supreme Court could hear the issue.

The 7th Circuit has held in the Medicare secondary payer context that the plaintiff did not have standing because one of the entities in the chain of assignments seeking recovery from the defendant was not a Medicare Advantage Organization that was permitted to seek such recovery. *MAO-MSO Recovery II v. State Farm*, 935 F.3d 573 (7th Cir. 2019).

Illinois courts have also applied standing doctrine to limit claims such that it is clear that not every claim alleges an injury sufficient to confer standing in Illinois state court. In *Sassano v. Nelson*, 2020 IL App (4th) 190147-U, the court held that because the non-settling defendants did not file a counterclaim for contribution, they did not have standing to challenge a good-faith finding reached by the settling defendants that the non-settling defendants contended contained an improper allocation that prejudiced their right to a setoff.

The law related to standing will likely continue to develop, and defense counsel should be on the lookout for opportunities to challenge the plaintiff's right to sue.
