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More standing, more BIPA

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Consequentialist arguments are not usually nearly as persuasive to most people under most circumstances as those arguments grounded in principle. In the law, when the two converge though and combined with constitutional arguments, there is likely to be a powerful and compelling position.

Such is the case for standing to be a threshold determination.

As any system of civil justice is designed to put the plaintiff back in the position they would have been but for the wrongdoing of the defendant, it presupposes that the plaintiff was harmed in the first instance. It is for this reason that standing is a fundamental issue and, in federal court pursuant to Article III of the Constitution, it is a jurisdictional one that cannot be waived and can be raised at any time and, often is sua sponte, by the court.

The self-described jurisdiction hawks of the 7th U.S. Circuit Court of Appeals (*Lowrey v. Tilden*, 948 F.3d 759 (7th Cir. 2020)) lived up to their reputation recently and issued a series of decisions on standing. It found that several Fair Debt Collection Practice Act cases did not belong in federal court because there was no concrete injury sufficient to satisfy the standard set forth by the Supreme Court as it has developed its standing doctrine in cases as diverse in subject matter as *Clapper v. Amnesty International*, 568 U.S. 398 (2012), *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and *Thole v. US Bank*, 140 S.Ct. 1615 (2020).

Standing was the subject in this space on June 24, 2020, and several of these decisions were discussed in Jay Judge's recent column including *Nettles v. Midland Funding, LLC*, 2020 U.S. App LEXIS 40012 (7th Cir. 2020), *Larkin v. Finance System of Green Bay, Inc.*, 983 F.3d 1060 (7th Cir. 2020), and *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019). In addition to the *Nettles* and *Larkin* decisions issued last month, the court also issued *Bazile v. Finance System of Green Bay, Inc.*, 2020 U.S. App. LEXIS 39433 (7th Cir. 2020), *Gunn v. Thrasher, Buschman & Voelkel, P.C.*, 982 F.3d 969 (7th Cir. 2020), *Spuhler v. State Collection Service, Inc.*, 2020 U.S. App. LEXIS 39434 (7th Cir. 2020), and *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020).

In each case, there was mere alleged violation of the FDCPA without actual injury, and the court held that such was insufficient to support standing and dismissed them for lack of subject matter jurisdiction. This seems consistent with the 11th Circuit, but in contrast to the holdings in other circuits. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3rd Cir.2016) (concluding the "unlawful disclosure of legally protected information" in and of itself constitutes a "de facto injury"); *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85 (2nd Cir. 2019).

In a convergence of the recent focus on standing in federal courts and a claim under the Biometric Information Privacy Act likely the most commonly filed Illinois statutory claim at the moment, the 7th Circuit heard oral argument on Jan. 4 in *Thornley v. Clearview, AI*. The plaintiff filed a putative class action in Illinois

state court claiming violation of Section 15(c) of BIPA that provides that "[n]o private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information." The defendant removed the case to federal court, and the plaintiff moved to remand to state court claiming that there was a lack of standing.

At oral argument, the court wrestled with what the correct source of determining standing was: the plaintiff's complaint, which the district court held controlled in finding the plaintiff as the master of the complaint did not plead actual injury, or the removal petition, which Judge Frank H. Easterbrook asserted was the document that conferred federal jurisdiction and wherein the defendant contended there was an actual injury. Judge David F. Hamilton pointed out that in *Standard Fire v. Knowles*, 133 S.Ct 1345 (2012), the U.S. Supreme Court held that prior to class certification a class representative cannot limit damages for the other class members as a means to deprive a federal court of jurisdiction.

But the most pointed questioning occurred when counsel for the plaintiff asserted that there was no biometric data in Illinois kept by the defendant, that there was no disclosure of biometric data, that the only thing disclosed were photographs that are publicly available and that were expressly not protected by BIPA, that there was no invasion of privacy, and that there was no extraterritorial application of the statute, to which Judge Diane P. Wood asked, "I wonder if you have tried so hard to allege no injury, that if you go back to Illinois you may find yourself with nothing to litigate."

It is not often that the defendant argues for injury and the plaintiff asserts none, but such is the distinction between the standing doctrine in Illinois state court, where a "aggrieved" party with a mere statutory violation likely has standing, and federal court (at least in the 7th Circuit), that a plaintiff requires a showing of "concrete, particularized injury" to have standing.

If the plaintiff is correct, and there truly is no injury from a violation of Section 15(c) of BIPA in this case, one should consider what the purpose of such a provision of law is and if there is no redressable wrong why would any court spend time addressing it.
