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APRIL 13, 2020

Yet another thing to worry about: The evolving law of standing in state courts when federal standing is lacking

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The 2016 decision by the United States Supreme Court in *Spokeo, Inc. v. Robinson* was a boon to companies defending against claims under statutes that do not seem to require that plaintiffs even suffer an injury before suing. 136 S. Ct. 1540 (2016). In its opinion, the Court reemphasized the importance of standing under Article III of the United States Constitution—and its requirement of a concrete and particularized injury in fact—as a jurisdictionally necessary part of any case in the federal courts, no matter what a statute might say. *Id.* at 1547–48.

But there was a hidden problem for defendant businesses in *Spokeo*. What would happen if the same plaintiffs could still have standing for the same claims in a state court, where Article III of the federal Constitution would not apply?

The Illinois Appellate Court's opinion in *Soto v. Great America LLC*[1] is a new, and notable, addition to the increasingly less-comforting answer to that question. In *Soto* the court noted that the concept of standing under the Illinois Constitution is broader than under Article III—and not jurisdictional—and, therefore, a plaintiff whose Fair and Accurate Credit Transactions Act (FACTA) claim could not survive a standing attack in federal court can survive that same attack in Illinois state court. [2]

Background

As we noted in 2016, federal trial courts (the first ones to do so being in Illinois) were quick to apply the new *Spokeo* decision to cases where Article III standing might be an issue for plaintiffs

[1] *Soto v. Great America LLC*, 2020 IL App (2d) 180911 (Ill. App. Ct. 2020)

[2] FACTA, enacted as an amendment to the Fair Credit Reporting Act, precludes any merchant accepting credit or debit cards from printing a card's last five digits or expiration date on any receipt provided to a customer. 15 U.S.C.A. § 1681c(g)(1). Each willful violation of FACTA entitles a customer to recover either actual damages or statutory damages of $100 to $1,000. Id. § 1681n(a). Obviously this creates huge potential class action risks—and FACTA is not the only federal statute of this kind. See, e.g., Driver's Privacy Protection Act, 18 U.S.C.A. § 2724; Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 277; Video Privacy Protection Act, 18 U.S.C.A. § 2710.

under statutes not clearly requiring proof of an injury in fact. *See* our blog post, "Seventh Circuit addresses Spokeo standing issue in FACTA case" (analysing *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016), *cert denied*, 137 S. Ct. 2267 (2017)). For claims begun in federal court, the result was typically a dismissal. However, for claims begun in state court and then removed to federal court, the result was different.

In 2018, for example, several United States Courts of Appeals held that, in cases removed from state court to federal court involving statutes which, on their face, apparently did not require any concrete injury in fact, a plaintiff who lacked Article III standing should have his, her, or its case remanded to state court for further proceedings rather being dismissed. *See Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018) (remanding FACTA case); *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500, 505 (8th Cir. 2018) (remanding TCPA case). Soon after the *Collier* decision, the federal District Court in Illinois handling the *Soto* case followed *Collier* by remanding *Soto* to state court as well. *See Soto v. Great America LLC*, No. 17-CV-6092, 2018 WL 2364916, at *4 (N.D. Ill. May 24, 2018).

The district court in *Soto* was hardly alone in its choice, and similar remands were not limited to cases under federal statutes either. For example, a number of courts applying *Spokeo* to deny Article III standing to plaintiffs in removed cases under the Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. Ann. 14/10, *et seq.* (West 2020)—another statute with no requirement on its face of a concrete and particularized injury in fact—remanded those cases rather than dismissing them. *See, e.g., Aguilar v. Rexnord, LLC*, No. 17-cv-9019, 2018 WL 3239715 (N.D. Ill. July 3, 2018); *Goings v. UGN*, No. 17-cv-9340, 2018 WL 2966970 (N.D. Ill. June 13, 2018); *Howe v. Speedway LLC*, No. 17-cv-07303, 2018 WL 2445541 (N.D. Ill. May 31, 2018); *Kiefer v. Bob Evans Farms, LLC*, No. 17-cv-01544-JES-JEH, 2018 WL 2329787, at *2 (C.D. Ill. May 23, 2018).

The question now was what would happen to a remanded case, particularly one under a federal statute. Would a state court permit such a case to proceed, even though there had been no federal standing?

The difference in state court standing

On remand, the trial court in *Soto* decided that a plaintiff in Illinois state court making a FACTA claim without pleading a concrete injury in fact equivalent to that under Article III of the United States Constitution is subject to dismissal. *See Soto*, 2020 IL App (2d) 180911, at ¶¶ 34–38. But the Illinois Appellate Court did not agree with this conclusion. Instead it held that such a plaintiff does not—unlike in federal court—face a jurisdictional problem. *See Soto*, 2020 IL App (2d) 180911, at ¶ 20.

Instead of being a jurisdictional prerequisite, "[s]tanding in Illinois . . . is an affirmative defense that the defendant must plead and prove." *Id.* (citing *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 685 N.E. 2d 1370, 1377 (Ill. 1997)). Indeed, even though both Illinois and federal courts use an "injury in fact" test, that "does not necessarily mean that both forums define that requirement in the same way." *Id.* at ¶ 21 (quoting *Soto*, 2018 WL 2364916 at *5). The Appellate Court in *Soto* therefore found that "plaintiffs had standing to pursue their statutory claims without pleading an actual injury beyond the violation of their statutory rights" under FACTA. *Id.* at ¶ 21. The court reasoned that "[b]ecause we are not required to follow federal law on issues of standing, we need not consider the inconsistent positions of the federal courts" on that issue. *Id.* at ¶ 22 (citation omitted).

After addressing standing generally, the Appellate Court also considered and rejected as unsupported at the stage of the case before it (an appeal from a motion to dismiss) the defendants' argument that doing no more than printing forbidden credit card digits on a customer's receipt is actually, without more, entirely harmless. *Id.* at ¶ 25. As the court further noted, "[e]ven if we were to consider defendants' harmless-violation theory, it would not impact our disposition of the standing issue, as plaintiffs are not required under Illinois law to plead an injury other than a willful violation of their statutory rights to pursue their claims of statutory damages under FACTA. *Id.* at ¶¶ 25–26. In reaching this conclusion, the court in *Soto* extended to litigated cases a similar conclusion previously announced in *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033 at ¶¶ 64–68 (Ill. App. Ct. 2019), with respect to settlements. *See Soto,* 2020 IL App (2d) 180911, at ¶ 26 (deeming *Lee* "correctly decided" in general, not just for purposes of settlement).

Why decisions like *Soto* matter

The conclusion in *Soto*, a case involving a federal statute, adds to growing concerns about such claims being permitted to proceed in state court when they could not proceed in federal court. *See, e.g., Baskin v. P.C. Richard & Son, LLC,* No. A-2662-18T1, 2020 WL 989191, at *2–3, 11 (N.J. Super. Ct. App. Div. Mar. 2, 2020) (permitting individual claim by New Jersey resident in New Jersey state court under FACTA despite no actual injury, and only "increased risk" of identity theft, where same case, *see O'Shea v. P.C. Richard & Son, LLC,* No. 15-cv-9069, 2017 WL 3327602, at *7–8 (S.D.N.Y. Aug. 3, 2017) was previously dismissed on Article III standing grounds). It also magnifies the importance of similar case law under state statutes, such as BIPA, *see, e.g.*, *Rosenbach v. Six Flags Entm't Corp.,* 129 N.E. 3d 1197, 1207 (Ill. 2019); *Sekura v. Krishna Schaumburg Tan, Inc.*, 115 N.E. 3d 1080, 1092 (Ill. App. Ct. 2018), in which state courts refuse to dismiss claims that would never pass Article III muster in federal court.[3]

Of course, the difference between state and federal standing is not itself a new concept. *See, e.g.*, *Sekura*, 115 N.E. 3d at 1097 n.8 ("when reading a federal decision, we must keep in mind the differences, such as that federal courts are subject to article III in the federal constitution, while state courts are not"); *Weatherford v. City of San Rafael*, 395 P.3d 274, 278 (Cal. 2017) ("Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine."); *Weld v. Glaxo Wellcome Inc.*, 746 N.E. 2d 522, 529 (Mass. 2001) ("State courts, however, are not burdened by the[] [federal court's] jurisdictional concerns and, consequently, may determine, particularly when class actions are involved, that concerns other than standing in its most technical sense may take precedence."). The newest problem is the increased use of such differences in cases that in the past would have been brought in or removed to federal court.

Conclusion

The increasing number of decisions like *Soto* permitting claims in state courts that would be barred by a lack of standing in federal court—even when the underlying claim is based on a federal statute or would otherwise typically be brought in or removed to federal court—creates significant problems for businesses, particularly those that are multi-state. This in turn increases the importance of making wise decisions about venue selection, arbitration, and choice of law (where it

[3] For additional information on standing under BIPA, see our alert, "Illinois Supreme Court decision allows for biometric privacy claims to proceed without a showing of actual harm."

is possible to choose those in advance) to mitigate issues of loose standing criteria in state courts. Businesses should carefully consider their risks accordingly.

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