

The Consumer Finance Podcast – Illinois Supreme Court Tightens Standing for No-Injury Consumer Claims

Host: Chris Willis

Guests: Louis Manetti

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Chris Willis (00:05):

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services regulatory practice. And today we're going to be talking about a very important recent decision by the Illinois Supreme Court on the issue of standing for plaintiffs that don't have an out-of-pocket monetary injury. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanFinancialServices.com](#) and [ConsumerFinancialServicesLawMonitor.com](#). And don't forget about all of our other podcasts, the [FCRA Focus](#), [The Crypto Exchange](#), [Payments Pros](#), and [Moving the Metal](#). All of those are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on the podcast platform of your choice and tell us how we're doing. Now, as I said, today we're going to be talking about an issue that in the federal system has occupied our attention in private litigation for years now.

(00:59):

And that is the issue of what exactly a plaintiff has to show to have Article III standing for federal court jurisdiction. And there's always been the problem of if you get a case dismissed out of federal court, what's the state standing requirement going to be and is it going to be different? And here we're going to be talking about a recent pronouncement by the Illinois Supreme Court about standing in Illinois state courts. And joining me to talk about that today is my colleague Lou Manetti. Lou is one of our consumer financial services litigators housed in our Chicago office, and of course because of that is very familiar with this issue. So Lou, welcome back to the podcast. Thanks for coming back on.

Louis Manetti:

Thanks for having me, Chris.

Chris Willis:

if you don't mind, just give the audience some background about what this new decision from the Illinois Supreme Court says and how it relates to what we've come to understand from federal standing jurisprudence following US Supreme Court cases like *Ramirez*.

Louis Manetti (01:51):

Sure. So under this new ruling by the Illinois Supreme Court, plaintiffs bringing certain statutory claims are going to face a standing analysis that looks a lot like federal Article III standing scrutiny. This represents a sea change in how Illinois courts are going to approach standing at least initially for a certain subset of cases. So this has been a flashpoint, as you alluded to for years now, beginning with the *Spokeo* and *Ramirez* cases from the United States Supreme Court, they made a renewed focus of an injury in fact, that a plaintiff has to suffer to bring a case and specifically the concrete injury component of that notion of standing. So in *Spokeo*, it was a FCRA case Fair Credit Reporting Act, the plaintiff alleged that people search engine presented false information about him and that it was impacting his life and he sued under FCRA.

(02:48):

And this pronouncement by the United States Supreme Court, they explained that not all inaccuracies cause harm and that a violation of one of FCRA's procedural requirements may result in no harm and they remanded it for proceedings consistent with that explanation. And similarly in *Ramirez*, it was another FCRA case. The plaintiff in that case alleged that when he went to go get a car loan, that his credit report was showing that he was on a terrorist watch list or at least had the same name as someone who was, and that this was disseminated to the car company. And the Supreme Court went through their analysis and they said that he had standing to bring his claim. But it was a class action and the class members who did not have their credit information viewed, didn't have a concrete injury. They likened it to writing a defamatory letter and leaving it in a drawer where no one saw it.

(03:37):

So you see this renewed focus on concrete injury, particularly with consumer protection statutes like the FDCPA and the guiding principle since *Spokeo* and *Ramirez* has been that a bare procedural violation divorced from any harm does not satisfy the injury in fact requirement for standing. But this was limited to federal notions of standing. Under the US Constitution, the trial courts have jurisdiction over cases and controversies. Illinois has always been different. The Supreme Court has repeatedly said they've always been different. Trial courts in Illinois under our constitution have jurisdiction over all justiciable matters. And this has been interpreted by the Supreme Court as being more broad or robust than federal jurisdiction. The Supreme Court of Illinois has said that to the extent that state law of standing varies from federal law, it tends to vary in direction of greater liberality. So you have this notion that Illinois standing is more robust and plaintiffs don't have as heavy a lift to establish standing in Illinois.

(04:38):

This recent Illinois Supreme Court decision directly applied the concrete injury requirement to a lawsuit based on a federal statute. The decision is *Fausett*. And again, with these cases going towards standing, it's a Fair Credit Reporting Act case. The FCRA prohibits retailers who accept either credit or debit cards from printing more than the last five digits of the card being used on the receipt. The store in this case printed the first six and the last four numbers on the receipt. This was a technical violation of FCRA, but the court concluded that it was a no injury case. The plaintiff's identity was not stolen, credit was not impacted. she was at no increased risk of

identity theft, so it was a no injury case as the court took it. She filed a class action lawsuit in Illinois and the trial court certified her class. And in doing so, it rejected the defendant's argument that the plaintiff had not shown standing because she didn't allege a concrete injury.

(05:38):

And the appellate court affirmed so it got to the Supreme Court. The Supreme Court in their decision immediately stressed that Illinois notions of standing are still distinct from federal notions of standing. It's not like they had a wholesale adoption of Article III notions of standing and they wanted to make that clear. For instance, in federal court standing is a requirement of jurisdiction. Whereas, in Illinois it's an element of justiciability, but it doesn't go towards the court's jurisdiction. It's an affirmative defense that can be waived if the defendant doesn't timely raise it. So the Supreme Court of Illinois goes on and explains, but there are two different notions of standing in Illinois. There is common law standing, which requires an injury in fact to a legally recognize interest, which is the formulation of standing that I think most people are familiar with. And under Illinois law that injury must be distinct and palpable.

(06:32):

The Supreme Court says there's also a statutory notion of standing or statutory standing. This requires the fulfillment of statutory conditions to sue for legislatively created relief. They put it a different way and say it's in circumstances where the Illinois legislature created a right of action and determined who shall sue and the conditions under which a suit may be brought. The Supreme Court held that the plaintiff's claims in this case invoked common law standing. So they went through FCRA and they said FCRA's liability provisions failed to include standing language, and the Congress did not expressly define the parties who have the right to sue for statutory damages established in FCRA. And they gave two examples of this statutory standing that they were thinking of. When the legislature creates standing in the law itself, they cite BIPA, which is the Illinois Biometric Information Privacy Act. It's the regulation that governs how you take and store biometric information from a person.

(07:35):

That statute says that any person aggrieved by a violation of this act shall have a right of action and that the prevailing party may recover for each violation either for \$1,000 or for \$5,000. Secondly, they pointed to the Illinois Probate Act in its section on will contests. That part of the probate act in Illinois says any interested person, which is a statutorily defined term, which includes heirs, that any interested person may file a petition in the proceeding. And the Supreme Court said FCRA is not like these other statutes. It says in FCRA in the damages section, any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in the amount of statutory damages between \$100 and \$1,000. And the jurisdictional section of FCRA says, an action to enforce any liability created under this subchapter may be brought in any appropriate US district court.

(08:39):

So neither of these FCRA provisions, the Illinois Supreme Court points out state that a consumer may file a cause of action. The statute is simply silent as to who has the right to bring an action for damages. So it holds that because the plaintiff could not base her FCRA claim on statutory standing because the language was absent. It looked to common law standing. And for common law standing, the Illinois Supreme Court specifies the injury must be concrete. A plaintiff alleging only a speculative future injury or no immediate danger of sustaining a direct injury doesn't demonstrate standing. And it affirmed that there was no real injury here, no actual injury. There was no risk of harm to the plaintiff's credit or her identity. It says at one point the only people who ever saw this receipt that had the violating numbers on it were the plaintiff, the cashier, and her attorneys. And so because the plaintiff in *Fausett* didn't articulate a concrete injury, the Supreme Court directed that her class action be dismissed. Interestingly, it reserved the question of whether or not a concrete injury is also required when we're talking about statutory standing. So it left that question open for another day.

Chris Willis (09:55):

That's very interesting, Lou. And I think first, as an aside, this feels like kind of a blast from the past. I don't think I've heard about a credit card receipt truncation class action in about 20 years because there was a huge wave of that when that provision was added to the FCRA by FACTA, I think in 2003. But I thought that had died down a long time ago. But I guess they're still alive and well, or at least one was until it was dismissed in the *Fausett* case.

Louis Manetti (10:19):

Yes. And you had at least during oral argument, this level of the argument didn't make it into the decision itself, but at oral argument there was the defendant's counsel essentially saying that there was a bit of forum shopping going around here. And he basically put the question to the Supreme Court justices, if you go the wrong way on this, do you really want to be the one-stop shop for no injury FCRA claims?

Chris Willis (10:41):

Yeah. Well that makes sense. And so it sounds like a pretty favorable decision as far as it goes, Lou. So what do you think, I mean, you're an Illinois consumer finance litigator, this is your area and that is a high population state with a lot of consumer litigation. What do you think the implications will be of this *Fausett* case for future litigation in Illinois state courts?

Louis Manetti (11:01):

Certainly for state level litigation, a plaintiff can no longer simply point to a procedural violation of a federal statute and assume that they're going to meet the requirements for standing in Illinois. And certainly it's a closed question now, specifically regarding FCRA. They are going to have to allege a concrete injury under FCRA because the Illinois Supreme Court explicitly said, you don't have statutory standing to sue. And as a corollary, the holding of *Fausett*, a FCRA case, it can be expanded logically enough to other consumer protection statutes that have

similar language to FCRA. Again, the Supreme Court looked at the damages and jurisdiction section of FCRA and said, in neither one of those sections does it say a consumer may bring a lawsuit. It speaks in terms of claims and violations, but it doesn't establish statutory standing. And, perhaps unsurprisingly, very similar jurisdiction and damages language occurs in other consumer protection statutes at the federal level. I'm thinking about the FDCPA, TILA and RESPA. They all share that kind of discussion about damages and jurisdiction that is very similar to FCRA.

(12:10):

So it's not going to be a heavy lift to say those statutes as well will not provide complaining plaintiffs with statutory standing. Additionally, this opens up a new arena for defense arguments where federal authority about what a concrete injury is and isn't is going to be persuasive. For example, there's been an avalanche of consumer finance litigation cases in the Seventh Circuit and the Illinois district courts and Seventh Circuit district courts that have hashed out what doesn't constitute a concrete injury when people are bringing these claims. And it's happened most explicitly in the seventh circuit for FDCPA violations. You have a lot of FDCPA litigation since *Spokeo* and since *Ramirez* and the following things have been held to not demonstrate a concrete injury. Things like anxiety, embarrassment, stress, being annoyed, being frustrated, being intimidated, being confused, being worried, fear, an increased heart rate, difficulty sleeping, put it at its most broadly under the Seventh Circuit analysis, stress by itself with no physical manifestations and no qualified medical diagnosis. All of these things have been examined in the Seventh Circuit, and the courts have said, this does not articulate a concrete injury. So to the extent that that analysis has already been done and a federal statute does not articulate statutory standing, so a plaintiff needs to show a concrete injury, defendants can point to this prior analysis from federal court and say, well, they held that wasn't a concrete injury there. And the analysis now is essentially the same.

Chris Willis (13:53):

I'm very glad, by the way, Lou, that the federal courts in the Seventh Circuit have been there for us to inform us that being annoyed is not sufficient to confer Article III standing. That's kind of funny. But on a more serious note, now that we have *Fausett*, what does it say to us as defendants and defense counsel in terms of our strategies and actions in future consumer litigation under statutes like the FCRA or the FDCPA that happen to find themselves in Illinois state courts?

Louis Manetti (14:22):

So initially, when defending these consumer protection lawsuits in Illinois now that are based on federal statutes, the statutory language needs to be scrutinized to see if a standing argument can be raised. As a related point to that, when defending a consumer protection lawsuit in federal court, the danger that a motion to dismiss for lack of standing under 12(b)(1) will just result in the plaintiff filing the exact same claim in Illinois state court has been lessened. Because if the analysis is going to be the same, they can't insulate themselves from a lack of standing dismissal simply by going to Illinois state court anymore. So motions to dismiss even in Illinois state court, for lack of standing, are much more viable now. Again, there would need to be similar language in the statute as this analysis under FCRA, and that's just crucial. Can the

plaintiff possibly invoke statutory standing to salvage the claim or are they going to be forced to articulate common law standing.

(15:25):

And put another way is the language of the statute at issue more like BIPA and the Probate Act section about will contests? And again, that's very specific language about the plaintiff having a right to bring a lawsuit. Or is it more like FCRA when it speaks in terms of violations and damages? And that would have to be checked against the actual claims that the plaintiff is bringing about what their injury is. Again, where are they on the spectrum? Are they actually alleging that money was improperly paid that wasn't owed? Or are they just saying that they violated this section of the FDCPA and I had anxiety? So those need to be factored in when defending these cases still, but a whole world of opportunities has been opened up when defending these claims in Illinois state court.

Chris Willis (16:18):

Well, thanks, Lou. I'm really thankful to have you and our other litigation colleagues in the firm and such a strong CFS litigation presence in Chicago, which again is a high population state with a very active plaintiff's bar. But it'll also be interesting to see how they adapt to this new decision because they will be not ignorant of it either, even if they don't listen to this particular podcast. So anyway, thank you, Lou for being on the show. And thanks to our listeners for tuning in today as well. As I reminded you at the beginning of the show, don't forget to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're at it, why not visit us on the web at troutman.com? That way you can add yourself to our Consumer Financial Services email list, and that way we can send you copies of the alerts and advisories that we release from time to time as well as invitations to our industry only webinars. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.

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