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Illinois Appellate Court Employs Spokeo-type Reasoning to Hold Biometric Data Class Action Should be Dismissed for Lack of Actual Injury

By Ron Raider and Allen Garrett

The desire to avoid *Spokeo*'s standing requirements constitutes yet another reason for class action plaintiffs' counsel to seek to litigate in state courts, as state courts may not require a *Spokeo* injury-in-fact test to establish standing. But while *Spokeo* and Article III standing limitations may not apply directly in state court, many states utilize a similar "injury" analysis to determine whether a consumer class action may proceed. KT recently blogged about a North Carolina trial court utilizing *Spokeo*-type reasoning in dismissing a no-injury class action [link to http://blognetwork.kilpatricktownsend.com/classaction/2017/12/04/following-federal-courts-lead-north-carolina-superior-court-dismisses-no-injury-class-action-for-lack-of-standing/]

An Illinois appellate court has now followed suit in a closely-watched class action under Illinois' Biometric Information Privacy Act (the "Act"), which governs the collection, use, and destruction of biometric information such as fingerprints, retina or iris scans, voiceprint, and face or hand geometry scans. In *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App. (2d) 170317, ___ N.E.3d __ (2017), Rosenbach filed a class action against Six Flags alleging violations of the Act. Rosenbach's son had purchased a season pass for the Six Flags park in Gurnee, Illinois. In making the purchase, the son provided a fingerprint scan to use in conjunction with the season pass to gain access to the park. After purchasing the season pass, the son did not use the season pass.

The Act requires private entities to develop written policies concerning the collection, storage, business uses, retention period, and destruction of biometric information. The private entity must provide copies of the written policies to the individual and obtain written consent to the collection before biometric information is collected. The Act provides that "any person aggrieved" by a violation of the Act has a right of action in state court, but does not define "aggrieved" or "person aggrieved." Rosenbach argued that his son's right to privacy had been adversely affected by the collection of biometric information without proper notice and consent.

The trial court denied Six Flags' motion to dismiss but certified questions to Illinois' Second District Appellate Court, asking whether a "'person aggrieved by a violation of the Act' must allege some actual harm." 2017 IL App (2d) 170317, at *1. The appellate court considered the definition of the word "aggrieved" in *Black's Law Dictionary* and similar sources, concluding it meant an adverse impact on legal rights or harm from an infringement of legal rights. Consistent with *Spokeo*, the court concluded

"these definitions also suggest that there must be an actual injury, adverse effect, or harm in order for a person to be 'aggrieved.'" *Id.* at *3.

The court then considered other state and federal court rulings as to whether a technical violation of a statute granting a right of action to a "person aggrieved" sufficed to create standing. In all the cited cases – from the Northern District of Illinois, the Southern District of New York, the Wisconsin appellate courts, and the Hawaii Supreme Court – the courts concluded victims of mere technical violations of the pertinent statutes did not constitute aggrieved persons. 2017 IL App (2d) 170317, at *4.

Turning to Rosenbach's cited authorities, the court found all of them distinguishable, either based on the nature of the statutory right or the particular language of the statute. And the court refused to consider Rosenbach's argument that his son had suffered an "actual injury," finding that argument to be outside the scope of the certified questions. 2017 IL App (2d) 170317, at *5. Turning to the specific questions themselves (which separately addressed the liquidated damages and injunctive relief remedies available under the Act), the court concluded: "If a person alleges only a technical violation of the Act without alleging any injury or adverse effect, then he or she is not aggrieved and may not recover under any of the provisions" of the Act. *Id.*

Takeaway: The *Rosenbach* decision again shows that defendants may find success with *Spokeo*-type arguments in state court challenging no-injury class actions. This decision may be of particular value to a defendant defending a class action where the underlying statute grants a right of action only to "persons aggrieved" by a violation of the statute. Even where a defendant cannot remove a no-injury class action to federal court, a standing challenge should be evaluated carefully in light of the specific statutory language involved and the state's own standing jurisprudence.