CIVIL PRACTICE & PROCEDURE

IDC Defense UPDATE

May 2017
VOL. 18 NO. 1

A publication generated by the Illinois Association of Defense Trial Counsel **Civil Practice Law Committee**

Coleman v. East Joliet Fire Protection District: Abolishing the Public Duty Doctrine in Illinois

by Megha Shah
Greensfelder, Hemker & Gale, P.C.

In *Coleman v. East Joliet Fire Protection District*, the Illinois Supreme Court reversed the Will County Circuit Court's summary judgment ruling in favor of the emergency responder defendants, which was affirmed by the appellate court, thereby abolishing the public duty rule and its special duty exception in Illinois. *Coleman v. E. Joliet Fire Protec. Dist.*, 46 N.E.3d 741 (Ill. 2016).

Coretta Coleman lived in an unincorporated area of Will County with her husband. Police emergency calls in that area were handled by the Will County sheriff's office, and fire and medical emergency services were provided by the East Joliet Fire Protection District, which contracted with the Orland Fire Protection District to dispatch those services. One evening in June 2008, Mrs. Coleman made a 911 call requesting medical assistance as she was experiencing difficulty breathing. Her call was transferred by the Will County 911 operator to Orland Central Dispatch. The Will County operator hung up after transferring the call, though the written procedures required her to stay on the line and explain the situation to the Orland Central Dispatch operator. After the call was transferred, the Orland Central Dispatch operator heard only silence on the line, presumed the caller hung up, and tried to call Mrs. Coleman twice, receiving a busy signal each time. Although the operators are trained to call the agency that transferred a 911 call if additional information is required, the Orland Central Dispatch operator did not, instead identifying the nature of the call as an unknown medical emergency. The operator also placed a call for an ambulance to be dispatched. All of this occurred within three minutes of the call placed by Mrs. Coleman.

Three minutes later, an East Joliet Fire Protection District ambulance was dispatched to Mrs. Coleman's home. The paramedics arrived at the Coleman residence in approximately three minutes, but were unable to obtain an answer to their reasonable efforts to alert anyone inside to their presence. The paramedics encountered the Colemans' neighbors, who did not have the Colemans' phone number, and the paramedics told them they could not enter by force without a police officer present. They asked the neighbors to call the police and request a forced entry. The paramedics then called their supervisor, who ordered them to leave and go back into service. They left about five minutes after arrival. This unfortunate series of events culminated in Mrs. Coleman's unresponsive body being found over 41 minutes after she placed the initial 911 call. She was pronounced dead upon arrival at the hospital.

Coleman's estate filed wrongful death and survival actions against the East Joliet Fire Protection District, its ambulance crew, its 911 operator, the Orland Fire

■ *Continued on next page*

On the inside

Protection District, and its emergency medical dispatcher. Plaintiff alleged willful and wanton conduct and negligence (to preserve the record in the event the law that prohibited recovery were to change). Defendants filed motions to dismiss claiming that they owned no duty, and even if they did, they were immune from civil liability. The circuit court granted the defendants' motions to dismiss the negligence claims but denied the motions as to plaintiff's willful and wonton conduct claims.

Defendants later filed motions for summary judgment arguing that they owed no duty to Mrs. Coleman under the public duty rule and further arguing that they were immune from liability if they did owe a duty under sections of the Emergency Medical Services Systems Act and the Emergency Telephone System Act. The circuit court granted summary judgment in favor of all defendants on the willful and wanton counts under the public duty rule, holding that the "special duty" exception to the public duty rule did not apply to any of the defendants because the decedent "initiated the contact with the municipality and was not under the direct or immediate control of any of the defendants." *Id.*, at ¶ 15. The appellate court affirmed, and the Supreme Court reviewed the viability of the public duty rule *de novo*.

In beginning its analysis, the Supreme Court noted, "[t]he continued viability of the public duty rule depends on the interplay between the public duty rule and governmental tort immunity." *Id.*, at ¶ 22. The Supreme Court analyzed the doctrine of state governmental immunity which extends to state agencies and derives from the English common law doctrine of sovereign immunity, whereby no suit can be maintained against the State without its consent. *Id.*, at ¶ 24. The State Lawsuit Immunity Act replaced state sovereign immunity by statute, and such local governmental tort immunity has long been recognized in Illinois. *Id.*, at ¶ 30, (citing *Hedges v. County of Madison*, 6 Ill. 567 (1844) (holding a county immune from liability for failing to maintain a bridge in a safe condition)). "The rationale was that protecting counties from liability preserved public funds for public purposes." *Id.*, at ¶ 31.

Initially, local governmental tort immunity was extended to townships, drainage districts, and school districts, classifying them as quasi-corporations. *Id.* Municipalities acting in a proprietary capacity, (as opposed to a traditional governmental activity), were held liable for common law torts. *Id.*, at ¶ 32. However, in *Molitor v. Kaneland Community Unit Dist. No. 32*, the Illinois Supreme Court essentially abolished all governmental tort immunity. 18 Ill.2d 11, 163 N.E.2d 89 (1959). The legislature enacted the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) as a response to the court's decision.

> "The Tort Immunity Act provides that its purpose "is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses." 745 ILCS 10/1–101.1 (West 2014). The Tort Immunity Act applies to "[l]ocal public entit[ies]," including counties, fire protection districts, and other local governmental bodies. 745 ILCS 10/1–206 (West 2014). "The Tort Immunity Act adopted the general principle that local governmental units are liable in tort, but limited this liability with an extensive list of immunities based on specific government functions." *In re Chicago Flood Litigation,* 176 Ill.2d 179, 192, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997)."

Coleman, at ¶ 34. The legislature has additionally enacted other legislation providing immunity for emergency services through the Emergency Medical Services Systems Act and the Emergency Telephone Systems Act.

"The common-law 'public duty rule' provides that local governmental entities owe no duty to individual members of the general public to provide adequate government services, such as police and fire protection." *Id.*, at ¶ 37. "The long-standing public duty rule is grounded in the principle that the duty of the governmental entity to 'preserve the well-being of the community is owed to the public at large rather than to specific members of the community.'" *Id.*, at ¶ 38. Since governmental sovereign immunity stood as an absolute bar to the enforcement of

■ *Continued on next page*

any civil claim arising from a breach of duty, the public duty rule was in abeyance until *Molitor* abolished sovereign immunity. While both sovereign immunity and the public duty rule are derived from common law, the public duty rule developed and exists independently of sovereign immunity. *Id.*, at ¶ 45. ("The public duty rule is not rooted in sovereign immunity nor did the public duty rule develop from any concepts of government immunity from suit.")

Determining whether a duty is owed is a separate issue from whether the defendant is entitled to the defense of governmental immunity. The Court emphatically defended the existence of the public duty rule as one separate and distinct from the abolished common law sovereign immunity rule. In upholding the continued vitality of the public duty rule, the Court noted only six states do not follow the public duty rule by either common law or statute. *Id.*, at ¶ 50. The primary rationale for abolishing the public duty rule in those states conflated the public duty rule with the sovereign immunity rule, which the Illinois Supreme Court held must be treated independently.

Notwithstanding its conclusion that the public duty rule survived the abolition of common law sovereign immunity, the Illinois Supreme Court abolished the public duty rule and its special duty exception:

> We believe that departing from *stare decisis* and abandoning the public duty rule and its special duty exception is justified for three reasons: (1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete.

Id., at ¶ 54. First, the court noted that the duty and immunity analysis are often transposed. "Obviously, a duty analysis is irrelevant where immunity applies, and the inverse is also true: immunity is irrelevant when there is no duty in the first place. However, putting the "immunity cart" before the "duty horse" caused applications of these concepts to become muddled, confusing, and unduly complicated." *Id.*, at ¶ 56. Illinois jurisprudence aims for efficiency in dispute resolution by identifying whether a public entity is immune before determining whether it owes a duty. Adding the application of the special duty exemption to the mix further muddles the application of the public duty rule because it cannot override a statutory immunity. "Accordingly, the public duty rule and its special duty exception [have] proved difficult in its application when statutory immunity or limited statutory immunity applies." *Id.*, at ¶ 57.

Second, the court noted that the legislature permits recovery in cases of willful and wanton misconduct. The public duty rule, however, precludes a plaintiff from pursuing such a cause of action and prevents a recovery that the legislature intended to be available to a plaintiff.

Finally, the court noted that the legislature determines public policy and the "legislature's enactment of statutory immunities has rendered the public duty rule obsolete." *Id.*, at ¶ 59. The judicially created public policy behind the public duty rule has been "supplanted" by the legislature. As a result, the Supreme Court abolished the public duty rule and the special duty exemption, finding that the purpose of the public duty rule is "better served by an application of conventional tort principles and the immunity protection afforded by statutes rather than by a rule that precludes a finding of a duty on the basis of the defendant's status as a public entity." *Id.* at ¶ 61. The Coleman estate was therefore allowed to pursue its willful and wanton allegations set forth in its complaint. ■

Connectivity Issues: Discovery Within the Social Network

by Thomas V.P. Draths
Pretzel & Stouffer, Chartered

In the social media age, it has become common for defense attorneys to comb through an opponent's or witness's Facebook, Twitter, and Instagram pages in the hope of finding that critical piece of evidence – a statement, a message, a communication, or a photograph—that can change the landscape of the case. Many defense practitioners will happily tell you success stories about that one, short-sighted, personal injury plaintiff who doomed his own case with a publicly-available social media posting. But what about the well-counseled plaintiff, the one who deactivates his or her social media accounts before filing suit? What happens when you are faced with a plaintiff who has his or her social media account set on "private?"

As illustrated in a recent decision from the United States District Court for the Northern District of Illinois, traditional discovery means may be ineffective in yielding the desired evidence to support a defense. Magistrate Judge Jeffrey Gilbert's analysis in *Ye v. Viessman*, 2016 U.S. Dist. LEXIS 28882 (N.D. Ill. March 7, 2016), provides an example of the type of balancing test a court may employ when evaluating the scope of a party's discovery request for its opponent's social media activity. The *Ye* case also provides a guideline for assisting defense attorneys in preparing discovery requests in a narrowly-tailored manner to generate relevant evidence from the opponent's social media account.

Because the decedent's family members testified that they used social media to communicate with the decedent, the defendant asserted it was entitled to a complete download of the archives of the decedent and her family.

In *Ye*, a truck-versus-pedestrian wrongful death case, the defendant trucking company issued production requests to the plaintiff seeking a "full archive" of the decedent's, and her next of kin's, social media account and Facebook activity in the six years preceding the incident at issue. *Ye*, 2016 U.S. Dist. LEXIS at *2-3. Plaintiff objected to the requests as "unlimited in scope, non-specific, vague, and overburdensome." *Id* at *3. Defendant subsequently moved to compel responses to the production requests related to the decedent's and her family's social media activity. *Id*. Defendant argued the full archive of the requested Facebook accounts was relevant to determine the next of kin's purported pecuniary losses from the loss of the decedent. *Id*. at *6-7. Because the decedent's family members testified that they used social media to communicate with the decedent, the defendant asserted it was entitled to a complete download of the archives of the decedent and her family. *Id*. at *8.

In ruling on the Motion to Compel, Magistrate Judge Gilbert began his analysis by noting that "Facebook and other repositories of social media content present unique challenges for courts." *Id*. at *4. This "challenge" was based on the vast amount of information potentially subject to production and the length of time that social media providers retains data. *Id*. Accordingly, the "substance" of the social media content governed its relevance. *Id*. at *9.

Although Magistrate Judge Gilbert conceded that there was "no dispute that *some* of the decedent's and her next of kin's social media profiles" contained relevant information, the Court ultimately determined that the defendant's production requests were not properly limited in scope or time period. *Id*. at *8-9. Equating defendant's requests to an attempt to gain "unfettered access" to the decedent's and her family's Facebook archives, Magistrate Judge Gilbert held that the defendant failed to limit its requests to content that was relevant to their defenses to

■ *Continued on next page*

liability or damages. *Id*. at *9-10. "Courts are reluctant to compel all-encompassing social media requests unless they are limited in scope to content that is relevant to a claim or defense in the case." *Id*. at *9-10. According to Magistrate Judge Gilbert, these types of discovery requests may be in harmony with the Federal Rules of Civil Procedure when they are sufficiently tailored to content or communications between specific parties about particular subject matters. *Id*. at *10. Finding that it was "possible to imagine" requests more narrowly-tailored than those defendant issued, the Court denied the Motion to Compel without prejudice. *Id*. at *13-14.

Courts are reluctant to compel all-encompassing social media requests unless they are limited in scope to content that is relevant to a claim or defense in the case.

Magistrate Judge Gilbert's ruling in *Ye* mirrored his prior analysis in *Trujillo v. American Bar Association*, 2014 U.S. Dist. LEXIS 151480 (N.D. Ill. October 24, 2014). In *Trujillo*, as in *Ye*, Magistrate Gilbert held that a defendant's request for a complete printout of the plaintiff's Facebook profile was overbroad on its face. *Trujillo*, 2014 U.S. Dist. LEXIS at *5-6. He held that, until defendant came forward with "more of an explanation" to establish the information sought was relevant to a claim or defense, the plaintiff was not obligated to respond to the request for the complete Facebook profile. *Id*. at *6.

The *Ye* and *Trujillo* cases demonstrate the obstacles defense attorneys will face in attempting to use traditional discovery devices to conduct a thorough investigation of their opponents' social media activity. Not only will plaintiffs' attorneys resist such discovery requests, but courts will also require a threshold showing of relevance before compelling a plaintiff to respond to social media-related discovery requests. This may be a difficult threshold to satisfy, as defendants will have limited – if any – access to the social media pages subject to the requests, making it nearly impossible to articulate what types of communications or content the discovery requests are reasonably likely to yield.

For example, in *Ye*, Magistrate Judge Gilbert acknowledged that social media communications between the decedent and her family in the time period preceding the subject incident could be relevant to damage issues, including the next of kin's purported emotional or mental suffering. *Ye*, 2016 U.S. Dist. LEXIS at *12. As the Court saw it, however, the defendant's request was not properly limited in scope because it sought to discover all of those social media communications in the six years before the decedent's death. *Id*. In *Trujillo*, the Court again hinted that production requests that were limited to the plaintiff's social media activity with regard to her employment with the defendant could be relevant. *Trujillo*, 2014 U.S. Dist. LEXIS at *5-6. Defendant's generic request for the "printout of plaintiff's complete profile" on Facebook did not fulfill the relevancy requirement.

In sum, defendants should expect resistance to generic or "stock" social media-related discovery requests that are issued in every case regardless of the liability theories or damage issues. To circumvent these types of conflicts preemptively, defense practitioners should be prepared to craft specific discovery requests tailored to generate relevant information about the particular issues in the case at bar. These requests should include a precise description of the content sought and an explicit limitation to a reasonable time period. ■

Klesowitch v. Smith: Clarity from Chaos Regarding Introduction of Medical Bills at Trial

by Matthew Reddy
Pretzel & Stouffer, Chartered

In the second quarter of 2015, I noted in the *Illinois Association of Defense Trial Counsel Quarterly* that there remained significant confusion among the bench and bar regarding the admission of medical bills into evidence in cases in which the plaintiff's medical bills were settled for less than the billed amount. In that article, I noted that the all-too-common practice of submitting the entire billed amount to the jury, based only on the foundation of partial payment, is a misapplication of the law. The seminal cases on this issue are two Illinois Supreme Court cases: *Arthur v. Catour*, 216 Ill. 2d 72, 74 (2005), and *Wills v. Foster*, 229 Ill. 2d 393 (2008). However, to a large extent a thorough understanding of this evidentiary issue requires a close reading of both *Arthur* and *Wills*, to distinguish the substantive concept that a plaintiff is entitled to enter into evidence the total billed amount from the evidentiary concept of the foundational requirements to do so. Fortunately, the Appellate Court for the First District of Illinois has brought a great deal of clarity to this important trial practice issue.

In *Klesowitch v. Smith*, the defendant asked plaintiff in an interrogatory to state the amount of his medical bills incurred as a result of his personal injuries. 2016 IL App (1st) 150414, ¶ 5. The plaintiff responded with a list of medical providers and attached a "medical specials list." *Id*. However, at trial, the defendant's attorney asserted that the bills he received from plaintiff's counsel did not reflect any specific payment. *Id.*, at ¶ 14. The plaintiff testified that the bills were "paid," and provided documentation demonstrating that the bills were "zeroed out."

Plaintiff sought, *in limine*, to bar all evidence that his hospital bills were paid for by the federal government or that his medical bills or expenses were paid by any collateral source. *Id.*, at ¶ 10. Defendant sought, *in limine*, to bar medical bills without competent medical evidence as to the reasonableness and necessity of said bills. *Id.*, at ¶ 13. In her memorandum of law, the defendant argued that if a plaintiff intends to claim the full amount of bills in excess of what his health insurance actually paid, there must also be a foundation concerning the usual and customary amount. *Id*. Therefore, the defendant requested an order barring the plaintiff from claiming a bill above what was actually paid absent competent testimony as to the usual and customary amount to establish reasonableness. *Id*.

Given the above, the trial court stated that: "if the evidence is that the bills are paid and there are no outstanding balances, that's *prima facie* evidence that the services that were provided were fair and reasonable and the amounts that were billed are fair and reasonable." *Id.*, at ¶ 8. However, as pointed out by the defense attorney, the bills reflected adjustments had been made to the bills, including write-offs by the medical providers. *Id*. The fact that there was no remaining balance on the bill did not itself evidence that the entire billed amount had been affirmatively paid. *Id*. In the absence of evidence of payment, the defendant argued that the plaintiff was required to tender evidence through competent testimony for the foundational requirements as to the balance between the paid amount and billed amount. Nevertheless, the trial court admitted evidence of the total amount of the medical bills over the defendant's objection, even though the bills showed substantial portions had been written off. The plaintiff did not call a witness with the requisite knowledge to testify the total bills were fair and reasonable. *Id.*, at ¶ 47.

The appellate court, in reviewing the instant matter, relied on the Supreme Court's decisions in *Arthur* and *Wills.* The court reiterated that Illinois follows a "reasonable-value approach," which states that the plaintiff may seek to recover the amount originally billed by the medical provider. *Id.*, at ¶ 44 (citing *Wills*, 229 Ill. 2d. at 410). However, the mere fact that a plaintiff may recover the full billed amount does not relieve that plaintiff of the eviden-

■ *Continued on next page*

tiary foundational requirements to do so. In Illinois, the plaintiff may place the entire billed amount into evidence, provided that the plaintiff establishes the proper foundational requirements to show the bill's reasonableness. *Arthur*, 216 Ill. 2d at 81-83. When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is *prima facie* reasonable. *Id.*, at 82. This statement in *Arthur* alone appears consistent with the statement by the trial judge in *Klesowitch* that: "if the evidence is that the bills are paid and there are no outstanding balances, that's *prima facie* evidence that the services that were provided were fair and reasonable and the amounts that were billed are fair and reasonable." However, there is a subtle, but important distinction made by the Supreme Court. Where, as in *Arthur*, the medical bills are discounted, plaintiff cannot make a *prima facie* case of reasonableness based on the bill alone, because she cannot truthfully testify that the total amount has been paid. Instead she must establish the reasonable cost by other means—just as she would have to do if the services had not yet been rendered, *e.g.*, in the case of required future surgery, or if the bill remained unpaid. *Arthur*, 216 Ill. 2d at 83. Based on this analysis, the appellate court held that the trial court improperly admitted the written-off or settled portions of the plaintiff's medical bills into evidence and the jury awarded damages based on the improperly admitted medical bills. *Klesowitch*, at ¶ 47.

When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is *prima facie* reasonable.

Conclusion

Practitioners should be aware of this evidentiary issue, and should be prepared to use that knowledge when strategically appropriate. Strong considerations may militate toward using this case law as a tool at trial. Equally strong considerations may dictate that the practitioner stipulate to the medical bills depending on the factors in the individual case. Nevertheless, this decision makes clear in a concise case what the state of the law has been in Illinois for quite some time. Given the continuing practice of a medical bill being "satisfied" for a small fraction of the total billed amount, the appropriate use of this evidentiary rule can provide significant benefit to the defendant. ■

What is the Injury?
An Examination of Standing in Data Breach Litigation

by Daniel P. Kramer
Swanson, Martin & Bell, LLP

With data breach litigation on the rise, courts in Illinois have examined the issue of standing in the context of data breach cases. Despite applying similar principles, state and federal courts have come to different conclusions with respect to what plaintiffs must plead in order to establish standing and avoid dismissal at the pleading stage. At the heart of these cases is whether courts will find that the breach itself is enough to create a viable cause of action or if there must be an additional "injury" alleged, such as identity theft. This article will examine two recent decisions to illustrate the distinctions courts have drawn on this issue.

Maglio v. Advocate Health & Hospitals Corporation, et al.

In *Maglio v. Advocate Health & Hospitals Corporation, et al.*, 2015 IL App (2d) 140782, the Appellate Court for the Second District of Illinois examined the issue of standing in a consolidated case stemming from a burglary at Advocate's administrative building in Park Ridge, Illinois. *Id.* at ¶3. The plaintiffs filed putative class actions against Advocate in Lake County and Kane County circuit courts. *Id.* at ¶1. Plaintiffs brought claims of negligence, violations of the Personal Information Protection Act, 815 ILCS 530/1, *et seq.*, the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* and invasion of privacy. *Id.* Plaintiffs, who were patients or former patients of Advocate, alleged that personal information, such as dates of birth, Social Security numbers, and insurance data, was taken from Advocate's computers stolen in the burglary. *Id.* at ¶5. However, the plaintiffs did not allege that anyone had improperly accessed or used the information on the stolen computers or that they suffered identity theft as a result of the burglary. *Id.*

> [T]o establish standing under Illinois law, the claimed injury can be actual or threatened, and must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions and (3) substantially likely to be prevented or redressed by the grant of the relief requested.

Advocate filed a motion to dismiss all of plaintiffs' claims, arguing that they lacked standing because they did not suffer the requisite injury-in-fact. *Id.* at ¶10. The plaintiffs had alleged that the theft posted an increased risk of identity theft. *Id.* In moving to dismiss the complaints, Advocate argued that the claimed injury (i.e. the increased risk of identity theft) was speculative and insufficient to confer standing. *Id.* The trial court agreed and granted Advocate's motions to dismiss both cases, finding that the allegations of "future injury" were insufficient to establish standing. *Id.* at ¶11.

In affirming the trial court, the Second District first noted that to establish standing under Illinois law, the claimed injury can be actual or threatened, and must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions and (3) substantially likely to be prevented or redressed by the grant of the relief requested.

■ *Continued on next page*

Id. at ¶22, citing *Carr v. Koch*, 2012 IL 113414, ¶27. The appellate court cited the "distinct and palpable" element to conclude that the plaintiffs' allegations of injury were speculative and that they lacked standing to bring suit. *Id*. at ¶24. Plaintiffs' claim that they faced an increased risk of identity theft was speculative, as no such identity theft had occurred. *Id*.

In reaching this decision, the court also examined standing principles in federal court, which are similar to those in Illinois, and suggested that the same result would follow under federal law. *Id*. at ¶25. In federal court, a plaintiff must establish the existence of an injury that is: (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling. *Clapper v. Amnesty International USA*, 133. S. Ct. 1138. As to the first prong, an "allegation of future injury may suffice if the threatened injury is "certainly impending" or there is a "substantial risk" that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341. In *Clapper*, the Supreme Court noted, however, that allegations of possible future injury are not sufficient. *Clapper*, 133 S. Ct. at 1147.

The plaintiffs in *Maglio* relied on *Pisciotta v. Old National Bankcorp*, 499 F.3d 629 (7th Cir. 2007), to argue that a mere increased risk of harm is sufficient to serve as the basis for an injury-in-fact and confer standing. *Id*. at 634. The *Maglio* court rejected this argument and noted that *Clapper* and *Susan B. Anthony* were the Supreme Court's most recent pronouncements on standing that address the injury-in-fact requirement. *Maglio* at ¶26. Since the plaintiffs had not alleged that their personal information had actually been used or that they had been victims of identity theft or fraud, the arguably increased risk of such acts as a result of Advocate's data breach was insufficient to confer standing as that concept is applied in federal cases. *Id*.

Lewert v. P.F. Chang's China Bistro, Inc.

The Seventh Circuit reached a different conclusion in *Lewert v. P.F. Chang's China Bistro, Inc.*, 2016 U.S. App. LEXIS 6766. *Lewert* involved a data breach claim arising out of breach of credit and debit card data from the P.F. Chang's Chinese restaurant's computer system. *Id.* at 2. One of the plaintiffs, Lucas Kosner, discovered four fraudulent transactions on his debit card following the breach. He purchased a credit monitoring service for $106.89. *Id.* at 3. The other plaintiff, John Lewert, did not have fraudulent charges or other costs. *Id*. The district court dismissed the putative class action suit filed by Kosner and Lewert, concluding that they had not suffered the requisite personal injury to establish standing. *Id.* at 1.

The Seventh Circuit reversed, relying on another recent data breach case, *Remijas v. Neiman Marcus Grp, LLC*, 794 F.3d 688 (7th Cir. 2015). In *Remijas*, the department store Neiman Marcus experienced a data breach that potentially exposed the payment card data of all customers who paid with cards during the previous year. *Id*. at 690. In that case, the Seventh Circuit concluded that the increased risk of fraudulent credit or debit card charges and the increased risk of identity theft were concrete and particularized enough to support standing. *Id.* at 691-94. As the *Remijas* court noted, "these were not mere "allegations of future injury," but were the type of "certainly impending" future harm that the Supreme Court requires to establish standing." *Id*. at 692, (quoting *Clapper v. Amnesty Int'l USA,* 133. S. Ct. 1138, 1147 (2013)). Notably, the *Remijas* court stated "the plaintiffs should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class stand-

■ *Continued on next page*

ing, because there is an objectively reasonable likelihood that such injury will occur." *Remijas*, 794 F.3d at 693. *Remijas* also found injuries sufficient for standing in the time and money the class members predictably spent resolving fraudulent charges. *Id*.

The court in *Lewert* held that the alleged injuries fit within the categories delineated in *Remijas. Lewert* at ¶7. The increased risk of fraudulent charges and identity theft were concrete enough to support a lawsuit. *Id*. A substantial risk of harm could be inferred from the date breach because a primary incentive for hackers is "sooner or later to make fraudulent charges or assume those consumers' identities." *Id*. (quoting *Remijas*, 794 F.3d at 693).

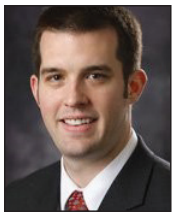
Conclusion

Practitioners should be aware of the fluid concepts of standing that are present in data breach cases. While standing principles in Illinois state and federal courts are similar, these cases show that an alleged increased risk of identity theft or other future injury may not always be sufficient to confer standing. For those assigned to defend a data breach lawsuit, knowing the jurisdiction and defining the scope of injury at the pleading stage is critical. As data breaches become more common and widespread, an understanding of these principles can be valuable in obtaining a dismissal of costly litigation at the pleading stage. ■

The Illinois Association of Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional, and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at **www.iadtc.org**.

This publication was generated by the **IDC Civil Practice Law Committee** – **Adam C. Carter,** *Cray Huber Horstman Heil & VanAusdal LLC,* Chicago, **Chair**, and **Donald Patrick Eckler**, *Pretzel & Stouffer, Chartered,* Chicago, **Vice Chair**.

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, **idc@iadtc.org**



Thomas V.P. Draths is an associate attorney with *Pretzel & Stouffer, Chartered*. His practice focuses on civil defense litigation, specifically professional liability claims, commercial litigation, and tort defense. From more simple automobile accidents and trip-and-fall cases to complex litigation involving accountants, attorneys, pharmacists, insurance producers, doctors and dentists, Mr. Draths defends his clients in all phases of litigation in State and Federal Courts. In addition to his legal work, Mr. Draths serves on the Executive Board of the Notre Dame College Prep Alumni Association.

Daniel P. Kramer is an associate at *Swanson, Martin & Bell, LLP* where he handles a wide variety of civil litigation matters. His practice areas include medical and health care liability, construction litigation and the defense of retail and other businesses in premises liability and general litigation matters.

Matthew A. Reddy is a trial attorney with *Pretzel & Stouffer, Chartered.* Prior to joining the firm, Mr. Reddy worked at the City of Chicago's Department of Law, where he tried numerous Cook County Law Division jury trials, including cases involving claims of malicious prosecution, battery, and false imprisonment against Chicago Police Department officers. He also tried numerous cases involving premises liability and motor vehicle collisions. While at the City, Mr. Reddy additionally handled a substantial caseload of worker's compensation and administrative review files.

Megha Shah, an associate with *Greensfelder, Hemker & Gale, P.C.* in St. Louis, focuses her practice on complex commercial litigation involving class actions, defending clients against alleged violations of securities laws or industry regulations in litigation, and assisting in transactional drafting and advising of securities offerings. Ms. Shah is the Vice Chair of the IDC Commercial Law Committee and a member of the American Bar, Illinois State Bar and Chicago Bar Associations. In addition, Ms. Shah is a member of the Bar Association of Metropolitan St. Louis.