7th Circ. Ruling Highlights Continuing BIPA Questions

By **Christopher Ward and Aaron Wegrzyn** (January 27, 2021)

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Earlier this month, the U.S. Court of Appeals for the Seventh Circuit issued its fourth opinion in two years addressing Article III standing in the context of Illinois' Biometric Information Privacy Act.

The court handed the plaintiff in Thornley v. Clearview AI Inc.[1] a "win," concluding she lacked Article III standing to pursue her BIPA claims in federal court and, therefore, affirming the district court's decision to grant her motion to remand the case back to state court.

Given the recurring nature of the topic, the evolving standards and strategies at issue in BIPA cases, and the potentially broader implications for consumer protection litigation in the circuit, a brief recap is in order.

BIPA — A Recent Hotbed of Class Action Litigation

Adopted in 2008, BIPA regulates "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information" (i.e., fingerprints, iris scans, voiceprints).

BIPA prohibits private parties both from collecting biometric identifiers and generating individual profile information derived from biometric identifiers without first notifying the individuals whose information is being collected, obtaining their consent and making specific disclosures to them.

The statute also requires private parties to publish detailed information regarding their data retention and destruction policies, and it prohibits them from profiting off the biometric identifiers collected.

About two years ago, the Illinois Supreme Court issued a critical ruling in Rosenbach v. Six Flags Entertainment Corp.[2] The state high court held that a plaintiff who alleges a technical violation of BIPA's requirements, without otherwise alleging actual injury or harm, constitutes an aggrieved person authorized to bring a private right of action under the statute.

The Illinois Supreme Court concluded that a statutory violation that "constitutes an invasion, impairment, or denial of the statutory rights" of the person whose biometric information is collected is "sufficient to support the individual's or customer's statutory cause of action."

The tide of novel BIPA class actions filed in state court swelled significantly following the Rosenbach decision, typically arising from an employer's use of finger- and hand-scan time clocks or a business's use of similar point-of-sale technology.

As many had done before Rosenbach, defendants continued looking for opportunities to remove the cases to federal court. Several of those actions have percolated up to the Seventh Circuit to address questions of Article III standing and federal subject matter jurisdiction.

What the Seventh Circuit Decided in Thornley

According to the allegations in the plaintiff's complaint, Clearview AI employs a facial recognition tool to scrape publicly available photographs from social media websites. It then compiles those facial scans and associated metadata into a centralized database to which Clearview then sells access, often to law enforcement agencies, through its mobile app.

The issue is Section 15(c) of the BIPA, which makes it illegal for private entities to "sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier."

The plaintiff alleged that the defendant's conduct violated Section 15(c) but that it was a "bare procedural violation, divorced from any concrete harm," quoting the U.S. Supreme Court's language in Spokeo Inc. v. Robins.[3]

When Clearview attempted to remove the case from the Circuit Court of Cook County, Illinois, to the U.S. District Court for the Northern District of Illinois, the plaintiff filed a motion to remand, which the district court granted. The Seventh Circuit then granted Clearview's petition to appeal the remand order under Title 28 of U.S. Code, Section 1453(c).

The Seventh Circuit, in an opinion written by Judge Diane Wood and joined by Judge Frank Easterbrook and Judge David Hamilton, gave substantial weight to the class definition plead in the complaint — which was expressly limited to individuals who had sustained no injury from the alleged Section 15(c) violation — and concluded that the plaintiff had not sustained an Article III injury as a result of the defendant's arrangement to profit from her biometric identifiers.

Drawing on constitutional decisions interpreting the federal legislature's powers under the commerce clause and the limitations imposed by the First Amendment, the court reasoned that Section 15(c) was designed to eliminate the market for biometric identifiers, by making the supply of such identifiers illegal.

From there the court analogized Section 15(c) of BIPA to Section 15(a) — addressed in one of its previous BIPA decisions — which prohibits the collection of biometric identifiers without publicly listing the applicable data retention and destruction policies.[4]

The Seventh Circuit concluded that violating Section 15(a) by profiting from individual's biometric identifiers breached a duty owed to the public writ large, not to the individual plaintiff, at least absent some affirmative allegation of particularized injury by the plaintiff. As a result, the Seventh Circuit affirmed the district court's order remanding the case to state court.

Takeaways

As highlighted by Judge Hamilton's concurring opinion, it is somewhat difficult to distill the Seventh Circuit's recent BIPA decisions into a clear rule governing Article III standing in cases regarding alleged intangible harms arising from purported violations of consumer protection statutes.

The Seventh Circuit's existing BIPA decisions turn not only on technical interpretations of the statute's various provisions but also on the particular allegations crafted by the named plaintiff with respect to his or her injury. The results can appear to be almost counterintuitive.

For example, federal courts in the Seventh Circuit have subject matter jurisdiction to hear claims that a plaintiff's biometric identifiers were collected or retained without the disclosures or consent required by Section 15(b) of BIPA,[5] or by failing to comply with the required data retention or destruction requirements of Section 15(a).[6]

Yet, under Thornley the federal courts cannot hear a claim that the same plaintiff's biometric identifiers were sold to a third party in violation of Section 15(c), at least absent some affirmative allegation by the plaintiff that he or she was directly harmed as a result.

The apparent incongruities are not limited to BIPA itself, as Judge Hamilton stressed in discussing the Seventh Circuit's recent decisions rejecting Article III standing in cases alleging informational injuries under the Fair Debt Collection Practices Act.

Post-Spokeo, the Supreme Court's most recent high-profile ruling on the interplay between Article III and alleged violations of consumer protection statutes, the issue of how to handle Article III standing in cases involving consumer protection statutes remains hotly contested, and it may attract the Supreme Court's attention again in the not-too-distant future.

At a more macro level, the Seventh Circuit's recent standing decisions, and the lack of practical clarity one can pull from them, is indicative of just how underdeveloped the BIPA legal landscape remains and how many legal questions can be expected to continue surfacing in future litigation.

Among such questions remain the applicable statute of limitations and what degree of actual harm a plaintiff must show to have a valid claim creating liability on the merits, as opposed to what a plaintiff must merely plead at the outset to avoid preemptive dismissal.

Given that we can expect BIPA litigation to retain a Wild West character for years to come, the best practical advice available to any employer or business leveraging technology to identify employees or facilitate customer transactions remains to explore proactive risk management strategies, rather than ending up on the reactive side of allegations of BIPA violations.

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[1] Thornley v. Clearview AI, Inc. , No. 20-3249, -- F.3d --, 2021 WL 128170 (7th Cir. Jan. 14, 2021).

[2] Rosenbach v. Six Flags Entm't Corp. , 129 N.E.3d 1197 (Ill. 2019).

[3] Spokeo, Inc. v. Robins , 136 S. Ct. 1540 (2016).

[4] Bryant v. Compass Grp. USA, Inc. , 958 F.3d 617 (7th Cir. 2020).

[5] Bryant, 958 F.3d at 626.

[6] Fox v. Dakkota Integrated Sys., LLC , 980 F.3d 1146 (7th Cir. 2020).