



CLIENT BULLETIN

BIPA Bites Back: Illinois' Biometric Privacy Law Still Has Teeth

Two recent decisions shed light on whether a plaintiff has Article III standing to pursue claims alleging procedural violations of the Illinois Biometric Information Privacy Act (“BIPA”) in federal court. Last year we reported on the Illinois Supreme Court’s holding in *Rosenbach v. Six Flags et al.* that “actual harm” is not required to state a claim under the Illinois Biometric Information Privacy Act (“BIPA”). On January 21, 2020, the United States Supreme Court denied Facebook’s Petition for Writ of Certiorari, *Facebook v. Patel*, - - S. Ct. --, 2020 WL 283288 (Jan. 21, 2020), leaving undisturbed the Ninth Circuit’s 2019 decision in *Patel v. Facebook*, 932 F. 3d 1264 (9th Cir. 2019), which allowed a class action to proceed after holding that the plaintiffs’ claims for procedural violations of BIPA alleged injuries-in-fact and, therefore, the plaintiffs had standing to pursue their claims in federal court. On January 29, 2020, Facebook announced it had reached an agreement to pay \$550 million to settle the case. This announcement came only one day after a court in the Northern District of Illinois concluded *Patel* was distinguishable on its facts and held that the plaintiff in the case before it *lacked* Article III standing.

I. Certiorari Denied in *Patel v. Facebook*

Plaintiffs in *Patel* alleged Facebook violated BIPA by collecting, using and storing their biometric identifiers (including scans of “face geometry”), without obtaining a written release or complying with other BIPA requirements, when it implemented a feature that used facial recognition technology to recognize users’ faces and suggest their names for photo “tagging.” Facebook moved to dismiss, arguing that plaintiffs lacked Article III standing because they alleged no concrete injury-in-fact as a result of Facebook’s

tagging suggestions. While that motion was pending, plaintiffs moved for class certification; the district court denied Facebook’s motion to dismiss and certified a proposed class of Illinois Facebook users for whom Facebook stored a “face template” after June 7, 2011. The Ninth Circuit affirmed. *First*, the court recognized plaintiffs’ Article III standing, holding that BIPA’s provisions “were established to protect an individual’s ‘concrete interest’ in privacy.” *Second*, the court found that Facebook’s alleged collection and storage of users’ biometric data necessarily constituted an alleged violation of users’ “substantive privacy interests.” The court concluded that plaintiffs alleged “a concrete and particularized harm, sufficient to confer Article III standing.” The court also rejected Facebook’s argument that the Illinois legislature did not intend for BIPA to have “extraterritorial effect” such that individual issues of whether violations occurred in Illinois would predominate, holding that “threshold questions of BIPA’s applicability can be decided on a class-wide basis.”

Facebook’s Petition asked the Court to consider three issues: (1) whether a court can find Article III standing based on its conclusion that a statute protects a concrete interest, without determining that a plaintiff suffered a personal, real-world injury from the alleged statutory violation; (2) whether a court can find Article III standing based on a risk that a plaintiff’s personal information could be misused in the future, without concluding that the possibility of misuse is imminent; and (3) whether a court can certify a class without deciding a question of law that is relevant to determining whether common issues predominate under Rule 23.



In its petition, Facebook reiterated its belief that although plaintiffs claimed that their privacy interests had been violated, they had not shown that they would have done anything differently, or that their circumstances would have changed in any way, if they had received the kind of notice and consent they alleged that Illinois law requires, rather than the disclosures that Facebook actually provided to them.

II. *Patel* is Distinguishable: Not All Procedural Violations of BIPA Give Rise to an Injury-in-Fact

A recent decision in the Northern District of Illinois suggests the analysis and holding in *Patel* depends on the facts of the case. The plaintiff in *Bryant v. Compass Group USA, Inc.*, Case No. 19-cv-6622, -- F. Supp. 3d --, 2020 WL 433868 (N.D. Ill. Jan. 28, 2020), complained that the defendant violated BIPA when it required her to provide a fingerprint scan before purchasing items from the defendant's vending machine. According to the plaintiff, that violated BIPA's prohibition on collecting biometric data without her written consent. The defendant further violated BIPA, the plaintiff asserted, because it did not have a written retention schedule and guidelines for destruction of such data, as BIPA requires. The defendant removed the action to federal court and the plaintiff moved to remand, arguing the district court lacked jurisdiction because she did not allege a "concrete" injury sufficient to provide federal standing under Article III.

The critical factor that distinguished the claims in *Patel* and *Bryant* was that Facebook "used the plaintiffs' images in ways the plaintiffs had no reason to anticipate when they uploaded images of themselves to the Facebook platform." *Id.* at *6. Using the plaintiffs' images in that fashion "constituted an invasion of [the plaintiffs'] private affairs and concrete interests." *Id.* In contrast, the plaintiff in *Bryant* understood when she scanned her fingerprint that the defendant would use the information to identify her in the future.

Furthermore, she did not allege the defendant shared her biometric information with third parties or that the defendant's collection of that information created an immediate risk that her data would fall into the hands of third parties.

Because the plaintiff knew her data was being collected, the defendant's failure to abide by BIPA's procedural formalities did not give rise to an "appreciable risk of harm" to the plaintiff's privacy interests. Her alleged "injuries," therefore, were not "injuries-in-fact" and the court remanded the action to the Circuit Court of Cook County, Illinois.

The holding in *Bryant* that Article III standing is a fact-specific inquiry is unlikely to dissuade BIPA defendants from attempting to remove those actions to federal court. And what *Patel* shows is that BIPA still has teeth. Not surprisingly, Google was hit with a similar BIPA class action suit on February 6, 2020, and on February 7, 2020 the judge overseeing the Facebook class settlement questioned whether the proposed settlement figure would adequately compensate individual class members, particularly if the settlement will pay out less than the statutory amount.

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