



# CLIENT BULLETIN

## Seventh Circuit Examines Standing Requirements Under Section 15(c) of the Illinois Biometric Privacy Act

A recent decision sheds light on whether a plaintiff has Article III standing to pursue claims alleging violations of a general provision contained in the Illinois Biometric Information Privacy Act (“BIPA”) absent allegations showing concrete and particularized harm to the plaintiff.

In *Thornley v. Clearview AI, Inc.*, No. 20-3249, 2021 WL 128170 (7<sup>th</sup> Cir. 2021), plaintiffs, on behalf of themselves and a putative class, sought relief against Clearview for violation of Section 15(c) of BIPA, 740 ILCS 14/15(c). As the Seventh Circuit opinion explains, Clearview is in the business of “scraping” photographs of individuals from social media sites and harvesting the biometric facial scan and other metadata from the photographs. That information is stored in Clearview’s database. Users of Clearview may submit a photograph of an individual to Clearview, and if Clearview detects a match to any photographs in its database, it informs the user of the social media sites which were the source of the matched photographs.

Section 15(c) of BIPA provides that “[n]o private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person’s or a customer’s biometric identifier or biometric information.” 740 ILCS 14/15(c). Plaintiffs, who maintained accounts on various social media sites, filed an action on behalf of themselves and a class of “[a]ll current Illinois citizens whose biometric identifiers or biometric information were [*sic*], without their knowledge, included in the Clearview AI Database . . . and who suffered no injury from Defendants’

violation of Section 15(c) . . . other than statutory aggrievement.”

The plaintiffs initially filed the case in Illinois state court in the Circuit Court of Cook County. Clearview removed the case to federal court under 28 U.S.C. § 1441. The plaintiffs then voluntarily dismissed the action without prejudice and refiled in the Circuit Court of Cook County with a new, narrower class definition, specifically alleging that neither the named plaintiffs nor putative class members “suffered any injury as a result of the violations of Section 15(c) . . . other than statutory aggrievement.” (This modification of the complaint was apparently intended to preclude Article III standing and ensure remandment of the case to Illinois state court. The case was likely to survive there because of Illinois’ more permissive standing requirements.) Clearview again removed the case to federal district court, arguing that the plaintiffs had met the Article III standing requirements. The district court remanded the case to state court, explaining that the plaintiffs had only alleged “a bare statutory violation, not the kind of concrete and particularized harm that would support standing,” under Article III’s more stringent standing requirements. Clearview sought permission to appeal this decision to the Seventh Circuit under the Class Action Fairness Act, 28 U.S.C. §1332(d) (“CAFA”). The Seventh Circuit granted Clearview’s petition and affirmed the district court’s order of remand, holding that, because the plaintiffs had alleged only a general, regulatory violation, the complaint did not establish



a particularized or concrete injury as is necessary under Article III's standing requirements.

On appeal, the Seventh Circuit considered three issues. First, the court addressed which party bears the burden of establishing whether the plaintiffs have Article III standing. The Court noted that the party seeking to establish federal jurisdiction has this burden, and that ordinarily that party is the plaintiff. In the particular circumstances of *Thornley*, however, *Clearview* sought to establish federal jurisdiction to avoid remandment to state court and therefore assumed the burden to establish the federal court's authority.

Citing *Thole v. U.S. Bank, N.A.*, -- U.S. --, 140 S. Ct. 1615 (2020), the Court explained that, in order to establish Article III standing, *Clearview* must prove: (1) the plaintiffs suffered an injury in fact that is concrete, particularized, actual or imminent; (2) the injury was caused by *Clearview*; and (3) the injury would likely be redressed by the requested relief. The Court noted there was no dispute concerning the sufficiency of the allegations to establish prongs two and three, but that prong one required further analysis. The Court noted that BIPA §15(c) is a general rule that prohibits private entities from selling, leasing, trading, or otherwise profiting from possessing a person's biometric information or biometric identifiers. The Court interpreted §15(c) similarly to the manner in which it interpreted BIPA §15(a) in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7<sup>th</sup> Cir. 2020). Like in *Bryant* the *Thornley* Court held that §15(c) was merely a general regulation, and that for a plaintiff to have standing to recover for violations of that provision it must assert a particularized injury resulting from the commercial transaction at issue. Therefore, the Court explained that the plaintiffs had alleged a general violation of BIPA §15(c) in the complaint but did not allege they had sustained a particularized or concrete injury as a result of the violation that is necessary under Article III's standing requirements.

Lastly, the Court considered whether the assertion of a new, narrower proposed class definition was inconsistent with the Supreme Court's holding in *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588 (2013). In *Standard Fire*, a putative class action had been removed to federal court under CAFA, but in order to preclude the application of CAFA (and avoid federal jurisdiction), the plaintiff filed a statement stipulating that he and the class would not seek recovery in excess of \$5,000,000. Because a class had not yet been certified, the Supreme Court held that this "stipulation" could not bind the class and therefore could not in itself defeat removal. The Supreme Court remanded the case to the district court for further proceedings because the district court had not evaluated the adequacy of the amount in controversy independently from the stipulation filed by the plaintiff. The Seventh Circuit held that *Standard Fire* is distinguishable from the situation in *Thornley* because, in *Thornley*, plaintiffs did not contest that more than \$5,000,000 is at stake but merely proposed a class definition that could have been written more broadly. Moreover, the Court explained, there was no reason to believe that the district court, on its own initiative, would certify a different or a broader class.

*Thornley* shows that the Seventh Circuit carefully considers allegations of BIPA violations to determine whether the complaint contains sufficient allegations to show a concrete, particularized injury to the plaintiff. *Clearview AI, Inc.* has recently had a slew of similar lawsuits filed against it in other federal jurisdictions. It is likely that federal courts will continue to shape BIPA-related litigation in the coming years as technology, such as *Clearview AI's* facial recognition technology, continues to rapidly evolve, and as legislatures seek to regulate the field.



Chittenden, Murday & Novotny LLC will continue to monitor developments on this issue and report on opinions from the remaining circuits as they arise.

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*If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.*

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