

CLIENT ALERT

Ninth Circuit Rejects Facebook’s Article III Argument; Biometric Lawsuit Will Proceed

Aug.16.2019

On August 8, 2019, the U.S. Court of Appeals for the Ninth Circuit issued yet another decision adopting relaxed standing requirements in privacy litigation, this time in a decision permitting a plaintiff to pursue claims under Illinois’s Biometric Information Privacy Act (BIPA). In *Patel v. Facebook*, the Ninth Circuit rejected arguments from Facebook Inc. (Facebook) that claims under the BIPA require assertions of real-world harm, and that BIPA claims only apply to conduct within Illinois. The ruling creates a circuit split on the standard for establishing Article III standing in BIPA litigation, which could prompt the U.S. Supreme Court to take up the issue.

Background

Facebook permits users to “tag” their Facebook friends in uploaded photos. A feature Facebook launched in 2010, “Tag Suggestions,” uses facial-recognition technology to determine which of a user’s Facebook friends are in a particular photo. Based on these suggestions, users can choose to “tag” or identify their friends in the photo. Facebook does this by analyzing faces in the photo and creating face signatures based on, for example, the distance between the eyes, nose, and ears. It then compares these “face signatures” to those previously collected and stored in a database to generate Tag Suggestions.

The lawsuit began in 2015 when Facebook users living in Illinois filed a complaint alleging that Facebook subjected them to facial-recognition technology in violation of BIPA. BIPA generally prohibits any private entity from collecting, capturing, purchasing, receiving through trade, or otherwise obtaining a person’s biometric identifier or biometric information unless the entity first:

- Informs the subject in writing that a biometric identifier or biometric information is being collected or stored.
- Informs the subject in writing of the specific purpose and length of term of that collection, storage, and use.
- Receives a written release from the subject.

BIPA claims are popular with the plaintiffs’ bar because BIPA provides a private right of action for anyone “aggrieved” by a violation of the statute, as well as statutory damages—\$1,000 per negligent violation and \$5,000 per intentional or reckless violation—that plaintiffs argue apply even if no damages have been incurred.

The primary issue on appeal was whether the plaintiffs established Article III standing based on Facebook’s collection, use, and storage of their biometric information. Facebook had moved to dismiss the complaint for lack of Article III standing, arguing that the plaintiffs failed to allege any concrete injury because they merely alleged violations of BIPA’s procedural requirements and failed to specify how they were harmed by these alleged statutory violations. Plaintiffs opposed the motion, and then moved to certify a class. The district court rejected Facebook’s motion and granted plaintiffs’ motion for class certification.

To establish Article III standing, a plaintiff generally must have suffered an injury in fact that is concrete and particularized, as well as actual or imminent. The alleged injury must not be conjectural or hypothetical. As established in *Spokeo, Inc. v. Robins*,

violation of a statutory right does not automatically establish Article III standing on its own. Instead, Ninth Circuit uses a two-step approach and analyzes whether (1) the statutory provisions at issue were established to protect the plaintiff's concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged actually harm, or present a material risk of harm to, such interests.

The Ninth Circuit's Decision in *Patel v. Facebook*

Using this two-step approach, the Ninth Circuit affirmed the lower court's ruling and held that the plaintiffs alleged a concrete and particularized harm sufficient to confer Article III standing. The court looked to the common law roots of the right to privacy and asserted that "an invasion of an individual's biometric privacy rights 'has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.'" The court was also persuaded by BIPA's legislative history and the Illinois Supreme Court's interpretation of the BIPA in *Rosenbach v. Six Flags Entertainment Corp.* (see our client alert [here](#)) to conclude that the statutory provisions at issue were established to protect concrete interests instead of procedural rights, and their violation actually harms or poses a material risk of harm to those privacy interests.

Along with its Article III standing argument, Facebook argued that BIPA was not intended to have extraterritorial effect, requiring a court to consider whether the events at issue occurred in Illinois. Facebook argued that the district court erred in certifying the class because Facebook's collection and use of biometric information occurred in servers outside Illinois, and therefore each class member should have to provide individualized evidence that the events in her case occurred primarily and substantially in Illinois. The Ninth Circuit rejected this extraterritoriality argument, finding it "reasonable to infer that the [Illinois] General Assembly contemplated BIPA's application to individuals who are located in Illinois, even if some relevant activities occur outside the state."

Finally, in a ruling that should concern the defense bar, the Ninth Circuit refused to decertify the class, ruling that whether potentially enormous liability can justify denying a class certification depends on legislative intent, and "[w]here neither the statutory language nor legislative history indicates that the legislature intended to place a cap on statutory damages, denying class certification on that basis would 'subvert [legislative] intent.'" Here, the court found that nothing in BIPA or its legislative history showed that a large damages award would contravene the legislature's intent.

Circuit Split

Ninth Circuit's ruling in *Patel* puts it directly at odds with the Second Circuit's 2017 decision in *Santana v. Take-Two Interactive Software, Inc.* There, the Second Circuit rejected BIPA claims from players of NBA 2K video games, holding that the players were not injured enough by the video game's scans of their faces to confer Article III standing. This Circuit split increases the possibility that the U.S. Supreme Court will take up the standing issue yet again to decide whether arguably unharmed plaintiffs are permitted to bring claims in federal court.

Takeaways

The case will now go back to the lower court for a possible trial, unless Facebook seeks review by the Supreme Court. If the ruling stands, it is likely to embolden more plaintiffs to bring BIPA cases now that the challenge of establishing Article III standing has been mitigated, at least in the Ninth Circuit, which is of major significance as many major technology companies are subject

to suit within the Ninth Circuit. The Ninth Circuit also has signaled that it is not concerned about runaway statutory damages awards in privacy litigation. Companies that collect biometric information on Illinois residents, whether for commercial purposes or employment purposes, should carefully assess their practices with respect to biometric information against BIPA requirements to reduce the risk of potentially costly litigation. BIPA lawsuits have become extremely attractive to plaintiffs' lawyers given businesses' widespread collection of biometric information and the potentially enormous statutory damages available under BIPA.

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