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BIOMETRICS

Big Questions for BIPA Case Law in 2021

By Matt Fleischer-Black, *Cybersecurity Law Report*

Over 750 class actions alleging violations of Illinois's Biometric Information Privacy Act (BIPA) have poured into federal and state courts. The docket continues to grow – plaintiffs filed another 55 BIPA lawsuits in January 2021, according to Ankura Consulting Group.

Now, two years after the Illinois Supreme Court's *Rosenbach* decision eased the way for plaintiffs by permitting BIPA claims to proceed without requiring plaintiffs to allege damage to them, several recent rulings are giving litigants direction on key BIPA legal questions, with more clarification ahead. In 2021, appellate courts will hear arguments on BIPA's statute of limitations, what counts as a BIPA violation for damages and its preemption by labor laws, said Winston & Strawn partner Sean Wieber.

These upcoming case law developments could breathe fresh life into many aging lawsuits and prompt settlements, Wieber noted. "A sizable number of cases that either have been stayed, or are just meandering through the process, will have more guideposts in 2021 or early 2022 to lead to a potential resolution," he said.

See our three-part series on the rise of facial recognition technology: "Uses and Risks" (Jan. 22, 2020); "Mapping the Legal Framework" (Jan. 29, 2020) and "Mitigating Risk" (Feb. 5, 2020).

Threshold Issues for Early Motions

Statute of Limitations

BIPA does not specify a statute of limitations, but trial courts have consistently set five years as the time limit for claims, following Illinois' general limit. Defendants argue that BIPA violations, like other privacy breaches, should carry a one-year limit. Alternatively, the limit for personal injury claims is two years.

Two intermediate appellate courts in Illinois, the first and third districts will consider these arguments in 2021, Wieber said. If either decides on a shorter limit, he expected "that divergence would quickly go to the Illinois Supreme Court to get guidance."

"We do most settlements under a five-year statute of limitations," reported Lewis Brisbois partner Mary Smigielski. After an early decision in Cook County established a five-year limit, a dozen other courts echoed it with minimal analysis, so the question deserves appellate review, she added.

Territoriality

Illinois precedents only allow claims for events occurring "primarily and substantially" in Illinois. An extraterritoriality defense is unlikely

to help obtain an initial-stage case dismissal. In an August 7, 2020, decision involving Flickr's facial recognition tools, the U.S. District of Illinois in August ruled against IBM, the app owner, concluding that the issue required "a highly fact-based analysis generally inappropriate to the motion to dismiss stage."

The court said that it would need discovery to know more about where Flickr conducted its face scans and created its data set.

Over 90 percent of class actions so far have targeted Illinois employers for timekeeping scans, seizing on the rapid and widespread adoption by businesses of all sizes of an inexpensive, convenient technology to prevent worker time theft. "Some of these systems cost $60 on Amazon," said Smigielski. Few companies, though, adopted BIPA compliance along with the devices.

Moving into 2021, said Nixon Peabody partner Rich Tilghman. "We are starting to see a different generation of BIPA claims being filed. Recently we have seen more facial recognition and voice recognition cases," he reported. New defendants include retailers using these scans for security purposes and companies providing technology to websites to identify visitors.

Extraterritoriality will become a defense in many of these cases, particularly those involving third-party companies scanning a person's face online under a service or marketing contract, Tilghman said. "Companies that do not have direct contractual relationships with users" will ask courts to rule on whether they were substantially in Illinois.

Plaintiffs have filed several BIPA class actions in federal courts in Georgia, Delaware, California, New York and Washington. In *Patel v. Facebook*, the U.S. Court of Appeals for the Ninth Circuit found that the trial court could decide the issue of extraterritoriality on a class-wide basis rather than requiring mini-trials for individual plaintiffs. The Facebook class included 1.6 million Illinois residents.

Strict Liability for a Violation

BIPA violations have become effectively strict liability, said Wieber. "If the plaintiff has a viable claim under any parts of Section 15, the company will be found negligent *per se*," he explained. BIPA's Section 15 imposes requirements for collection, retention, disclosure and destruction of biometric identifiers.

An August 2020 decision in the U.S. District Court for Northern Illinois shows the strict approach to liability, holding that Little Caesar Enterprises' awareness that it was not in compliance plausibly suggests "that, at a minimum, Defendant was negligent for its earlier failures to comply with BIPA."

With this plaintiff-friendly standard, some lawyers scarcely investigate the details of a company's BIPA compliance before filing their class action. "Plaintiffs might not have a lot of insight when they bring cases as to what biometric activity was happening," said Wieber. Instead, they include counts that include each possible BIPA violation, and rely on the likelihood that a company not complying with one BIPA requirement was not complying with any.

Arbitration and Preemption

Defendants have been enthused that the U.S. District Court for the Northern District of Illinois (NDIL) has issued a trio of decisions in 2020 and 2021 sending BIPA claims to arbitration. These included both workplace and consumer-technology class actions.

The most recent decision benefitted Amazon. Users of Alexa devices accused the company of collecting their voiceprints without consent and on Feb. 5, 2021, a judge in the NDIL granted Amazon's motion and ordered the adult class of plaintiffs to take their claims individually to arbitration, as Amazon's terms of use stipulated. The judge concluded that even if the named plaintiff did not have constructive notice of Amazon's terms through its music app or via Alexa, he had it through purchases on Amazon.com. (The judge is continuing to hear arguments for the class of minors.)

Another NDIL judge in May 2020 compelled arbitration, stopping Shutterfly users' classwide claims alleging illegal facial recognition practices.

In another case in the NDIL, the judge sent the employee plaintiffs in a putative class action, *Crooms v. Southwest Airlines*, to arbitration in May 2020, and dismissed their case, noted Blank Rome partner Jeffrey Rosenthal.

Arbitration defenses have helped a few companies avoid the costs of BIPA, Tilghman noted, "but it is even easier for the company to supply the notice and have a written, publicly available policy that provides transparency, compared to relying on a class action waiver. It is also better for customer relations or with employees."

Airlines and a few unionized companies have succeeded with federal pre-emption defenses, with courts ruling that collective bargaining laws override BIPA workplace claims. Meanwhile, on January 27, 2021, the Illinois Supreme Court accepted an appeal to decide whether exclusivity provisions of the state Workers' Compensation Act bar a BIPA claim.

See "Implications of the Illinois Supreme Court's BIPA Holding Against Six Flags" (Feb. 20, 2019).

BIPA Forum Shopping Grows Tangled

Seventh Circuit Allows Plaintiffs to Split Claims

Over the past nine months, the U.S. Court of Appeals for the Seventh Circuit made three decisions on standing that ostensibly made it easier for BIPA defendants to remove cases to federal court, but also concluded that "plaintiffs are the master of their pleadings" and can tailor them for different courts, said Tilghman. The decisions distinguished 15(a) BIPA claims from others on Article III standing.

In the first of the three, *Bryant v. Compass Group*, the Seventh Circuit ruled in May 2020 that a defendant's alleged failure to get consent (a violation of 15(b)) for finger scans by a vending machine sufficed for federal court standing. But its alleged failure to publish and follow a data retention schedule (15(a) claim) was not particular and concrete enough and belonged in state court.

In November, in *Fox v. Dakkota Systems*, the Seventh Circuit made a finer distinction among 15(a) claims. This defendant employer allegedly kept the lead plaintiff's fingerprints after she left her job, a sufficiently concrete private harm, the court ruled.

Then, on January 14, 2021, the Seventh Circuit declined to give federal standing to a putative class action against Clearview AI. It was the plaintiffs' second try. After Clearview removed the original case into federal court,

they voluntarily dismissed it. The Seventh Circuit accepted the plaintiffs' contention that their second, narrowly framed action lacked federal standing, as they had alleged only "bare procedural violation[s], divorced from any concrete harm." Clearview has petitioned for rehearing.

BIPA's structure, Wieber noted, inspired the oddity of *the defendant company* arguing that it had injured somebody. "You never argue that. It does not compute," he marveled. Clearview AI's lawyers can justify this argument to get into federal court, Wieber added, because "ultimately, these are all just allegations to take to get into the forum they want. 'Then we'll defeat the underlying claim.'"

The Costs of Litigating in Two Courts

In the wake of these verdicts, Smigielski said, "plaintiffs are modifying pleadings to work around the law as it develops," prompting arduous and costly tussles crossing state and federal courts. For example, her partner Josh Kantrow removed a lawsuit in 2020 to federal court, which remanded it to state court with a single BIPA claim. After a Seventh Circuit ruling, "we went to state court and removed the claim again. The plaintiffs again moved in federal court to remand, and asked to sanction us for removing it twice," Kantrow said.

The district courts, Kantrow continued, have been "really struggling with standing and what case belongs in state court. Sometimes they make fine distinctions and it's difficult to see why." Apple may agree: it recently appealed a 2020 U.S. District Court for Southern Illinois decision sending several BIPA allegations to state court over its "Photos" app's collection and use of facial data, while the Court kept 15(b) claims over improper notice and consent. Technology companies, big-box stores and other deep-pocketed defendants, Wieber said, may be yanked into two courts from the start. The Seventh Circuit rulings have freed plaintiffs' lawyers to file narrow state-court pleadings, like the one in Clearview, to plant a distinct claim for statutory damages even though others filed first.

Litigating in two forums, under different procedural rules, is costly and nerve wracking. "If the state court judge certifies the class under 15(a), what happens if you have a certified federal class under 15(b)? Are they entitled to separate relief? Is that doubling your damages?" Wieber observed.

Standing questions, Tilghman cautioned, are "interesting to practitioners, but of less ultimate consequence to clients' potential liability than other issues. Even if a case does not have standing in federal court, it will still go ahead in state court," he said.

See "Defense and Plaintiff Perspectives on How to Survive Data Privacy Collateral Litigation" (Mar. 8, 2017).

An Advantage to State Court?

The defense bar's traditional preference for federal court, with unelected judges and streamlined procedural rules, makes sense for only some BIPA class actions, Wieber said. "If you think you will end up in a class-wide settlement posture, state court offers advantages," he noted. "There can be more ingenuity and creativity available in the state court practice for settlements than in the federal court," because, under Rule 23 class certification rules, "federal judges become highly involved in the class action administration for

preliminary and final approvals." Also, much BIPA law is developing through state judges familiar with it, Wieber added.

For one recent settlement with unusual provisions for leftover funds, Kantrow said, the parties "all agreed to remand it back to state court for the approval."

See "Illinois Appellate Decision Creates Split on Standing to Sue Under BIPA" (Dec. 12, 2018).

BIPA Liability Developments

What Counts as a BIPA Violation?

Nothing will shape companies' BIPA liability more than the success of plaintiffs' "violation-per-scan theory," Smigielski said. The law is silent on what counts as a violation and how violations accrue. If each time an employee scans her finger constitutes a violation, the result could be $4,000 per person per day if negligent (or $20,000 per day for violations deemed reckless).

In settlement discussions recently, Smigielski said, most plaintiffs' lawyers propose damages for each of the BIPA requirements, "one for not having consent, one for not having a public policy, one for disclosing"– a demand of $5,000 per plaintiff.

The 2020 Facebook facial-tagging settlement provided $346 per plaintiff. Per-plaintiff settlements with large classes have ranged from $200 to $700, Tilghman said. Yet, with the current case law now favoring plaintiffs in several ways, Kantrow reported, "anything under $1,000 per class member is tough to find."

The Seventh Circuit will soon address this monumental issue when it hears White Castle's appeal of an NDIL judge's August 2020, ruling that BIPA's language was dispositive proof for the per-scan definition. "The only possible conclusion is that White Castle violated Section 15(b) repeatedly when it collected her biometric data without first having obtained her informed consent," the court wrote. A per-scan definition is not necessarily "absurd, as White Castle insists" because Illinois' legislature chose "to subject private entities who fail to follow the statute's requirements to substantial potential liability" for each violation of the law as a principal way to protect biometric information, the Court concluded.

Testing the Definition of Biometric Technology

Courts have yet to consider whether BIPA's categories even cover the information that most companies collect. Often, said Tilghman, the collected data are placeholder digits that neither can convey nor recreate a person's unique geometries.

This gap in the case law is frustrating, Wieber said, "because those details are the prerequisites for getting the case within the statute." Making case law on this question will require a defendant to first spend extensively on substantial discovery and expert arguments, he noted.

Defense lawyers are talking about how to push forward with the argument, Smigielski said. "A lot of companies have the wealth to fight what they view as frivolous litigation," she said. They are waiting to find "the right technology and right judge," she said.

Class Certification Challenges in Consumer Cases

Part of the story of BIPA litigation has been that employee classes are easy to find and certify, because a company's policy similarly applied to all of them.

While the Facebook class was certified, purported consumer classes for biometrics will be more vulnerable to challenges than with employee classes, Wieber said. "The way that people interface with the products might differ. How did you interface with the company when you purchased the product? Were you using it, or was your son? Who provided the content?" Changing versions of the terms of service, for instance, could persuade courts to separate sub-classes.

Sizing Up Settlement Possibilities

Amidst the BIPA uncertainties, Wieber said that he has seen "three out of every four cases ultimately ending in some negotiated resolution on a class-wide basis." Companies need to initially consider the worst-case scenario for their BIPA suit, he said, "which is disheartening with a new client." There are few escape hatches from the "draconian statutory damages" and proceeding means the company effectively is "buying a ticket for a one-and-a-half to three-year ride," he noted.

How to approach the lawsuit depends on the company's appetite for litigation and its tolerance for the resulting disruptions.

Some insurers encourage settlements, while others have asked panel counsel to push the plaintiffs' bar, Wieber said. "The carrier wants arguments A, B, C and D to be made in every case. The case might settle on Step F, but it goes through its paces" to test the claims, he said. Thus, "some cases that may be ripe for a pragmatic resolution have not been resolved yet," he noted.

Some clients want to get rid of BIPA's risks as quickly as possible, Wieber continued, while others, "say this statute is extortion, and hell or high water, I want to be a first actor" to advance arguments and stop it. A third group of companies want to see whether the case law changes before they pay to settle, he added.

Defense lawyers are nervously awaiting the upcoming appellate decisions on damages and the statute of limitations, Wieber said. "Clarification would be helpful for everybody. But it is a double-edged sword," he noted. The appellate decisions may fall pro-plaintiff. And the status quo has benefits. "Disputed areas allow a pragmatic approach to litigation, and show that both sides have risks," he said, adding: "If the courts put the power on one side, this litigation will end up winner-take-all, not with a reasoned resolution."