Defending Ill. Biometric Privacy Suits After Rosenbach

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Companies that collect biometric information in Illinois or from Illinois residents — such as employees, customers and product users — must comply with the Illinois Biometric Information Privacy Act[1] in collecting, storing and using that biometric data.

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Enacted in 2008, BIPA[2] makes it unlawful for private entities to collect, store or use biometric information — such as retina scans, face scans or fingerprints — without obtaining written, informed consent and taking precautions to secure the information. BIPA violations carry substantial penalties of $1,000 liquidated damages for a negligent violation or $5,000 for an intentional or reckless violation, actual damages if they are greater than liquidated damages, attorney fees and costs, and injunctive relief.

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Lawsuits against companies that collect biometric information have been spilling into Illinois state courts and federal courts across the country, against social media websites (Facebook, Snapchat, Shutterfly), employers (Southwest Airlines), and others (Google, LA Tan, Six Flags). These companies have argued that the mere collection and storage of biometric data, without more, does not constitute an injury sufficient to impose liability for a technical violation of BIPA.

A recent decision by the Illinois Supreme Court struck a serious blow to this argument. However, defenses still remain for companies seeking to minimize their liability in the face of an alleged violation of BIPA and the significant penalties that accompany it.

The Illinois Supreme Court's Decision in Rosenbach

In Rosenbach v. Six Flags Entertainment Corp., the Illinois Supreme Court held[3] that a plaintiff need not plead an actual injury beyond a per se statutory violation in order to state a

claim for statutory liquidated damages or injunctive relief under BIPA. Injury to the privacy rights conferred by the statute is enough to establish liability. No “actual” harm is required.

Rosenbach is the Illinois Supreme Court's first word on BIPA, and constitutes the definitive interpretation of BIPA as an Illinois state law. Rosenbach effectively forecloses the argument that a plaintiff lacks statutory standing under BIPA because she has not suffered any actual harm from the alleged BIPA violation. But other defenses to BIPA claims remain.

In light of Rosenbach, how can companies that collect and use biometric data minimize the risk of significant financial penalties for even the smallest technical violation of BIPA? And how can attorneys representing companies faced with BIPA lawsuits mitigate potential damages?

How to Minimize Risk in a BIPA Lawsuit

The best way to avoid BIPA penalties is to comply with BIPA’s requirements, particularly those requiring specific disclosures and receipt of a written release prior to collection of biometric data. But if a lawsuit has already been filed, and a company is faced with allegations that it has not complied with the letter of BIPA, several strategies may help minimize the potential damages, or remove the risk of liability entirely.

1. Regardless of the forum, challenge the applicability of BIPA and the nature of the violation.

There are many remaining avenues for challenging the applicability of BIPA to the alleged conduct, including whether the data in question constitutes biometric information; whether the conduct occurred in Illinois; and whether the plaintiff provided any form of consent to the collection of the information. The contours of BIPA remain largely unlitigated, so defenses such as implied consent may be viable.

An obvious opportunity to dismiss a BIPA lawsuit lies in its geographic limitation. BIPA applies only to conduct that occurs primarily and substantially within Illinois, looking at all of the circumstances related to the conduct. If the plaintiff is not an Illinois resident, or the biometric information was collected outside of Illinois, there may be an extraterritoriality defense to the BIPA claim.

Companies shouldn't hang their hats on technicalities, though. One avenue for challenging the applicability of BIPA that has not gained any traction thus far is the source of the biometric data. Defendants in BIPA cases have been largely unsuccessful in arguing that collecting information derived from biometric identifiers, rather than the identifiers themselves, is exempt from BIPA. Accordingly, defendants should look to other ways to distinguish their collection and use of data from what BIPA regulates.

If BIPA does apply, companies can mitigate damages by arguing that any violation was negligent, rather than reckless or intentional. This subjects the defendant to a significantly smaller statutory damages award.

2. If the lawsuit is in federal court, challenge the plaintiff's Article III standing.

Before the Illinois Supreme Court's decision in Rosenbach, the majority of federal courts to consider BIPA claims in the absence of actual harm held that the plaintiff did not have Article III standing to pursue a BIPA claim, because he or she did not satisfy the injury-in-fact requirement. As a result, these courts either dismissed BIPA complaints without prejudice or remanded to state court in the case of removed actions.

Whether a plaintiff has suffered an Article III injury-in-fact is a constitutional prerequisite to pursuing a claim in federal court, and is distinct from the question of whether the plaintiff has been "aggrieved" under BIPA.[4] In Spokeo v. Robins, the U.S. Supreme Court held that a plaintiff must suffer an injury-in-fact that is concrete and particularized in order to satisfy the constitutional standing requirement. A "bare procedural violation, divorced from any concrete harm," does not cut it.[5]

Before Rosenbach, at least three federal courts — the U.S. District Court for the Northern District of Illinois, the U.S. District Court for the Southern District of New York, and the U.S. Court of Appeals for the Second Circuit — took the position that a state statute like BIPA cannot confer federal standing, and therefore, even if the plaintiff were considered an "aggrieved" person under BIPA, he or she could lack the requisite federal constitutional standing.[6] Other courts, like the judge of the Northern District of California handling the BIPA class action against Facebook, reached the same conclusion as Rosenbach that BIPA does not require "actual" injury beyond an invasion of privacy.

Post-Rosenbach, it remains to be seen how the federal courts will handle the constitutional standing question. Rosenbach is likely to foreclose an Article III standing argument where federal courts look to the language of BIPA — and the Illinois Supreme Court's interpretation of it — to guide the standing analysis. Nonetheless, some federal courts have shown that they consider Article III standing to be separate from statutory standing, and thus consider state statutory interpretation not wholly determinative of standing in federal court.

These courts may continue to distinguish between constitutional Article III standing and statutory standing, and apply Spokeo to require an injury-in-fact beyond a per se statutory violation, despite Rosenbach's interpretation of the "aggrieved person" requirement for a BIPA claim. At a minimum, some federal courts like the Northern District of Illinois and the Southern District of New York are likely to maintain their position that a plaintiff has suffered no invasion of privacy, and therefore has no standing in federal court, where the plaintiff knew that her biometric data would be collected before she accepted the defendant's services.

An impending oral argument and decision from the U.S. Court of Appeals for the Ninth Circuit may shed some light on how federal courts will apply (or not apply) Rosenbach. This issue is currently before the Ninth Circuit in Patel v. Facebook, and its decision will likely be instructive to — but not binding on — other circuits. In the meantime, Article III standing continues to be a viable basis for dismissing a BIPA complaint in the absence of any harm beyond an invasion of the privacy right conferred by the statute. But in light of the uncertainty of this challenge post-Rosenbach, companies would be wise to have additional bases for challenging BIPA claims.

If the plaintiff seeks to represent a class, challenge the scope and certification of the class.

3. Limit the scope of the class: geography and time.

The Facebook litigation and other ongoing BIPA class actions highlight how defense counsel can narrow proposed classes to minimize potential damages.

First, because BIPA applies only to conduct within Illinois, any proposed class must be limited geographically. If the defendant is based in Illinois, this presents a more complicated issue, but for the majority of nonresident defendants, the scope of the class and the claims

will come down to whether “the bulk of the circumstances” occurred within Illinois. In the Facebook litigation, the class was limited to Facebook users located in Illinois for whom Facebook created and stored a face template after a certain date.

Second, the class should be limited temporally, as a matter of both fact and law. The statute of limitations applicable to BIPA claims remains an open question, but a strong argument can be made that it is one or two years at a maximum, by relying on the statutory one-year limitations period for privacy claims such as slander, libel and publication of matters violating the right to privacy (735 ILCS 5/13-201), or the statutory two-year limitations period for statutes which provide a statutory penalty (735 ILCS 5/13-202). Arguing for a one- or two-year statute of limitations period can drastically reduce the size of the proposed class.

Rule 23 Requirements

Several of the Federal Rule of Civil Procedure 23 requirements for class certification provide opportunities for challenging a proposed BIPA class as well.

- Typicality: Does the named plaintiff have any facts that distinguish him or her from the proposed class? For example, did the named plaintiff — or any group of class members — expressly allow the defendant to collect the biometric data at issue? If so, the named plaintiff’s claims may not be typical of those of the class, and certification, at least as the class is originally proposed, can be defeated on this ground.

- Predominance: Individualized issues of Article III standing and of extraterritoriality may preclude class certification. Facebook’s pending appeal to the Ninth Circuit presents both of these arguments. First, Article III’s injury-in-fact requirement may present individualized issues precluding class certification, even if BIPA does not require actual injury. Second, BIPA’s territorial limitation may also present overwhelming individualized issues. Before the Ninth Circuit, Facebook contends that each class member must show that the “majority of circumstances related to” her claim occurred in Illinois. This requires a fact-intensive, individualized showing incapable of classwide resolution. Regardless of how the Ninth Circuit decides these issues, both arguments remain available in other circuits.

Assert a Federal Due Process Violation

For putative class actions in federal court, defendants may be able to argue that the exorbitant damages awards that would result from classwide liability are unconstitutional. In the case before the Ninth Circuit, Facebook contends that a BIPA class action would violate federal due process, because it could result in a huge statutory damages award untethered to any injury, and inconsistent with BIPA's legislative intent. If Facebook succeeds in this argument, it will open the door to other defendants doing the same.

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[1] http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57

[2] https://www.mintz.com/insights-center/viewpoints/2826/2017-11-law-unintended-consequences-bipa-and-effects-illinois-class

[3] https://epic.org/amicus/bipa/rosenbach/Rosenbach-v-Six-Flags-Ill-Supreme-Court-Opinion.pdf

[4] See Howe v. Speedway LLC, 2018 U.S. Dist. LEXIS 90342 (N.D. Ill. May 31, 2018).

[5] See McGinnis v. United States Cold Storage, Inc., 2019 U.S. Dist. LEXIS 848 (N.D. Ill. Jan. 3, 2019).

[6] See McCollough v. Smarte Carte Inc., 2016 U.S. Dist. LEXIS 100404 (N.D. Ill. Aug. 1, 2016); see also Vigil v. Take-Two Interactive Software Inc., 235 F. Supp. 3d 499

(S.D.N.Y. 2017), aff'd in part and rev. in part, sub nom. Santana v. Take-Two Interactive Software Inc., 717 Fed. Appx. 12 (2d Cir. 2017).