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Facebook Biometric Privacy Ruling Offers Plaintiffs On-Ramp

By **Allison Grande**

Law360 (March 9, 2018, 9:04 PM EST) -- A California federal court last week refused to find that real-world harm was required for Facebook users and non-users to move forward with their claims under Illinois' unique biometric privacy law, backing a lower threshold for entry and giving plaintiffs at least a short-term boost, attorneys say.

The **separate but related rulings** handed down by U.S. District Judge James Donato in a dispute that is widely viewed as one of the first major tests of the scope and reach of the Illinois Biometric Information Privacy Act piled onto the uncertainty surrounding what types of harm can support claims under the statute by giving a temporary lift to plaintiffs' argument that a failure to follow the statute's notice and consent procedures was enough on its own to establish Article III standing under the U.S. Supreme Court's 2016 ruling in Spokeo v. Robins.

That line of thinking had suffered a **major blow in December**, when an Illinois appellate court in an unrelated case found that plaintiffs must claim some actual, real-world harm in order to be considered an "aggrieved person" covered by BIPA. While the Facebook disputes are far from over, a rejection at this early stage of Facebook's actual harm argument cracks the door back open for millions of Illinois-based users and nonusers that have a potential stake in claims that, so far, can only be brought in the state, attorneys say.

"This is the next chapter in the continuing and unresolved debate over whether a procedural or technical violation of a statute is enough, by itself, to confer standing," said Craig A. Newman, a partner with Patterson Belknap Webb & Tyler LLP and chair of the firm's privacy and data security group. "Judge Donato's ruling keeps open the door to other plaintiffs seeking to recover for BIPA violations, especially as biometric technology continues to develop."

Concrete Injury

With BIPA being one of only three state laws of its kind on the books — and the only one with a private right of action — plaintiffs in recent years have flooded the state's courts with suits against businesses such as Facebook, Google, Bob Evans and Aramark for allegedly collecting fingerprints, retina scans and other types of biometric information both for commercial purposes and for employee time clocks without proper notice or consent in violation of the statute, which allows for the recovery of damages of $1,000 to $5,000 per violation.

The Facebook cases, which date back as far as 2015 and were originally filed in Illinois courts before being transferred to California, are being closely watched to discern "which of Facebook's defenses might hold sway with a court," according to Jeffrey D Neuburger, co-head of the technology, media and communications group at Proskauer Rose LLP.

"While the ultimate outcome of this case is uncertain, as many substantive issues have yet to be fully aired, the ruling [by Judge Donato] was a clear victory for privacy advocates, particularly those who have cautioned that facial recognition and authentication techniques that employ biometrics implicate important privacy and data security concerns," Neuburger said.

Judge Donato's conclusion that both the users and nonusers had alleged a concrete injury sufficient

to establish Article III standing relied heavily on the Illinois Legislature's intent in enacting BIPA in 2008. According to the judge, the plain text of the statute leaves little question that the Legislature codified a right of privacy in personal biometric information, and there was "equally little doubt about the legislature's judgment that a violation of BIPA's procedures would cause actual and concrete harm."

"BIPA vested in Illinois residents the right to control their biometric information by requiring notice before collection and giving residents the power to say no by withholding consent," the judge wrote. "Consequently, the abrogation of the procedural rights mandated by BIPA necessarily amounts to a concrete injury."

The judge added that this injury is "worlds away" from the "trivial harm" of a ZIP code or credit card receipt being mishandled but never being exposed. The ZIP code situation was specifically flagged by the Supreme Court in Spokeo as one that was unlikely to meet the harm threshold for Article III standing, and for the most part federal courts — **including the Ninth Circuit** —have been unwilling to entertain the idea that the printing of excess credit card information on receipts that is never publicly disclosed is a sufficiently concrete injury.

"It may be that, with identifiers tied to immutable, personal traits, courts will be more likely to recognize the seriousness and permanence of certain kinds of invasion of privacy," plaintiffs' attorney Dave Stampley of KamberLaw LLC said.

Judge Donato's decision comes closer to the line of post-Spokeo rulings that have found concrete privacy rights embedded in statutes such as the Telephone Consumer Protection Act and the Video Privacy Protection Act. In one such case, the Ninth Circuit in November found that an ESPN app user **had standing to sue** for violations of the VPPA because the statute "generally protects a consumer's substantive privacy interest in his or her video viewing history," although the appellate court ultimately dismissed the suit on the grounds that the shared information at issue was not "personally identifiable" as required to bring a claim under the statute.

Attorneys who closely follow BIPA litigation said the Facebook case could still experience a similar fate, where the court finds that the plaintiffs' allegations meet the Article III standing bar but don't clear the higher threshold for what's required to be pled under the statute.

"The Facebook cases bolster the notion that Article III standing is always a threshold issue, and it's a low threshold to clear," Benesch Friedlander Coplan & Aronoff LLP partner David Almeida said.

"Aggrieved Consumer"

The Facebook litigation still has several outstanding issues that Judge Donato said were improper to resolve at the motion-to-dismiss stage, including whether BIPA can be applied to out-of-state defendants who store their data outside Illinois; whether it applies where a person's face appears in a photo, even if no data is obtained from the photo; and whether BIPA's "aggrieved consumer" statutory requirement is stricter than Article III's injury-in-fact requirement, said Steptoe & Johnson LLP partner Stephanie Sheridan.

The "aggrieved consumer" issue is one that attorneys and litigants will likely be tracking the most closely and could have the most immediate impact, given the Illinois appellate court decision from December, in Rosenbach v. Six Flags Entertainment Corp.

That decision, which Judge Donato did not cite in his recent opinions, held that in order to meet the definition of an aggrieved person under the statute, plaintiffs must claim some actual, real-world harm and cannot rely on merely technical violations of the statute's notice and consent provisions, which require companies to obtain written consent and disclose their plan for the collection, storage, use or destruction of his biometric identifiers or information.

"These cases really highlight for us the argument that there is a difference between Article III standing and what it takes to plead an injury to be an 'aggrieved party' under BIPA," said BakerHostetler partner Melissa Siebert.

The distinction makes sense, according to Shook Hardy & Bacon LLP data security and privacy group

chair Al Saikali, because "to not require more than a violation of the statute would be to make the phrase 'aggrieved by' meaningless."

"The purpose of BIPA was to prevent the misuse of biometric information to commit fraud," Saikali said. "A mere lack of a BIPA policy and consent alone do not create this risk; there must be some breach or other unauthorized disclosure of the information for the risk to exist."

However, it remains to be seen whether the Facebook court and others will embrace the distinction between Article III standing and statutory standing recognized by the Illinois appellate court — which has already been cited by a pair of Illinois state courts, where there is no Article III standing requirement, in the recent dismissals of biometric privacy suits brought against Krishna Schaumburg Tan and Palm Beach Tan for allegedly unlawfully collecting members' fingerprints.

Higher Threshold

One clue flagged by experts to how the Facebook dispute might turn out is the way Judge Donato chose to distinguish Facebook's arguments at the dismissal stage from recent rulings in cases involving Smarte Carte Inc.'s collection of fingerprints from locker rental customers and Take-Two Interactive Software's gathering of face scans to enable video game players to make avatars.

According to Judge Donato, the **dismissal of the Smarte Carte case** by the Northern District of Illinois and the **affirmation of the toss** of the Take-Two case by the Second Circuit turned on circumstances that were "a far cry from the ones alleged here." The judge noted that in those earlier cases, the plaintiffs "indisputably knew" that their biometric data would be collected before they accepted the services offered by the businesses involved, while the plaintiffs in the Facebook case claim that they had no such prior knowledge and no opportunity to say no.

"His discussion of injury [in the opinion in the Facebook user case] certainly does not bode well for Facebook's argument that the plaintiffs in both cases are not aggrieved, especially given that the court spent several paragraphs distinguishing cases where courts have found lack of standing," Sheridan said.

However, Sheridan and others added that while the judge distinguished the Take-Two and Smarte Carte cases, he also seemed to agree with the conclusions there that the plaintiffs had not suffered concrete harm based on the facts. And he left the door open to reach a similar conclusion at a later stage in the Facebook cases by noting that the earlier decisions were of "little value" at the dismissal stage but not necessarily the merits stage, according to attorneys.

"The court may or may not find that plaintiffs had no notice and no opportunity to say no to their biometric data collection, which Facebook disputes, but that's a merits issue, and the judge was clear that it's an issue that wasn't in front of him at this stage," BakerHostetler counsel Erin Bolan Hines said.

Even if any of the Facebook plaintiffs are able to prove after discovery that they qualify as an aggrieved party under BIPA, proving this type of harm classwide could be tricky, especially when it comes to nonusers who may be difficult to find or identify, Almeida noted.

"The actual harm threshold could be what curtails some of these cases," Almeida said. "Plaintiffs' lawyers right now are doing what they can to try to come up with some way to articulate this as actual harm, and the more work you have to do to articulate actual harm, the more unique that harm is going to be. Plaintiffs' lawyers may start with generic privacy harms, but once they start trying to come up with some actual harm that their plaintiffs suffered, maybe they're able to reach actual harm, but they certainly can't get class certification."

As the Facebook cases and the scores like them that have been filed primarily in Illinois move past the Article III standing stage, resolving these types of merits-based questions will be important to watch, as it's likely to determine the ebb and flow of what has become a popular topic for the plaintiffs bar, attorneys say.

"We suspect that the plaintiffs' bar is awaiting the court's class certification and summary judgment decisions, which could answer significant questions about the statute and either open or close doors

for more claims," Sheridan said.

Saikali noted that last fall, before the Six Flags decision came out, there were roughly two or three BIPA cases filed per week. But since then "the plaintiff firms have essentially stopped filing these lawsuits," he said, although that is unlikely to last if courts decline to follow the Six Flags ruling.

"If the Illinois Supreme Court or a federal appellate court were to reverse the current line of legal authority, [that] would in turn reopen the floodgates of litigation and potential liability for companies doing business in Illinois," Saikali said.

The Facebook users are represented by Jay Edelson and Benjamin H. Richman of Edelson PC, Shawn A. Williams, John H. George, Paul J. Geller, Stuart A. Davidson, and Christopher C. Gold of Robbins Geller Rudman & Dowd LLP and Corban S. Rhodes, Joel H. Bernstein and Ross M. Kamhi of Labaton Sucharow LLP.

Frederick William Gullen, the lead plaintiff in the non-user case, is represented by Frank S. Hedin and David P. Milian of Carey Rodriguez Milian Gonya LLP.

Facebook is represented in both actions by John Nadolenco and Lauren R. Goldman of Mayer Brown LLP.

The cases are In re: Facebook Biometric Information Privacy Litigation, case number 3:15-cv-03747, and Gullen v. Facebook Inc., case number 3:16-cv-00937, both in the U.S. District Court for the Northern District of California.

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