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Pending Federal Cases Could Have Implications for Future Litigation under the Illinois Biometric Information Privacy Act

In two recent, related decisions, U.S. District Judge James Donato from the Northern District of California allowed plaintiffs to proceed on claims against Facebook under the Illinois Biometric Information Privacy Act (“BIPA”), finding that non-compliance with BIPA’s notice and consent requirements provided sufficient injury for federal Article III standing. The decisions are *Patel v. Facebook Inc.*, 2018 U.S. Dist. LEXIS 30727 and *Gullen v. Facebook, Inc.*, 2018 U.S. Dist. LEXIS 34792. While these decisions add another arrow in the quiver of plaintiffs’ attorneys filing BIPA class actions, as federal courts continue to reach different conclusions about the sufficiency of such allegations for Article III standing purposes, the fact that the plaintiffs do not allege any tangible injuries may still prove problematic for them as the cases progress.

BIPA is intended to protect Illinois residents’ biometric information, defined as information derived from “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” Companies collecting such information must, among other requirements, provide notice to residents that the information is being collected and explain how it will be used and how long it will be stored. The company must obtain a written release from the resident for collection and subsequent use. BIPA provides residents with a private right of action whereby individuals can seek liquidated damages of \$1,000 per negligent violation or \$5,000 for intentional or reckless violations. Since 2008, there have been several federal and state cases filed by plaintiffs with mixed results, including on the question of whether alleged non-compliance with BIPA’s notice and consent provisions are sufficient “injuries in fact” for Article III standing. Courts finding that such allegations are not sufficient include *McCullough v. Smarte Carte, Inc.*, No. 16 C 03777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016) and *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 513 (S.D.N.Y., 2017). In *McCullough*, the court reviewed allegations that the defendant failed to notify or receive consent prior to scanning fingerprints used to lock and unlock a storage locker. The court found that allegations about such technical violations were not sufficient and that there would be no injury if the company held the fingerprints for longer than the duration of the rental, unless such data was disclosed or at risk of disclosure. The court in *Vigil* reached a similar conclusion, finding that plaintiffs did not allege injury in fact where they scanned and uploaded their faces to create an online avatar for a video game but did not receive notice that the facial scans would be stored.

In rejecting Article III standing in both cases, the courts described the purpose of the statute to protect against misuse or disclosure of biometric information. Conversely, an Illinois federal judge granted Article III standing to a plaintiff in *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017), characterizing the purpose of the statute as preventing invasions of privacy (as opposed to misuse or disclosure). The court found the plaintiffs’ allegations sufficient because Shutterfly allegedly collected biometric information from a photo uploaded by a third party without the plaintiff’s consent.

Facebook Cases

The Facebook cases, filed and consolidated in the past few years, involve allegations that Facebook’s “Tag Suggestions” feature for photographs uploaded to Facebook collects and stores biometric information without providing notice to the users or seeking their consent to collect and store such information. The complaints also

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allege that Facebook failed to inform the plaintiffs of the specific purpose or length of time such information would be stored and did not provide a retention schedule or guidelines for storage.

In late February and early March 2018, U.S. District Judge James Donato decided that plaintiffs in the Facebook cases met Article III standing requirements. The court found that BIPA's statutory provisions at issue were established by the state legislature to protect the plaintiffs' concrete interest. As such, the alleged procedural violations of Facebook infringed the privacy rights of the plaintiffs bestowed by the Illinois legislation resulting in an intangible harm that constitutes a concrete injury in fact. The court distinguished this case from other decisions involving personal information by stating that biometric information is unique in that, if misused, a resident cannot take measures to mitigate such risk given that it has information unique to that individual.

Statutory Standing

The Facebook decisions, notably, do not implicate the Illinois appellate court's December 2017 holding in *Rosenbach v. Six Flags & Great America*, 2017 IL App (2d) 170317, that any private plaintiff bringing a BIPA claim must prove "actual harm or adverse consequences" beyond technical statutory violations. Ropes & Gray issued a prior Alert on the *Six Flags* case, which is available [here](#). Meeting the "aggrieved" person standard in *Six Flags* could be a higher bar than what is required for Article III standing. Indeed, on March 16, 2018, Facebook took this exact position in its motions for summary judgment, arguing that the court should enter judgment in its favor because the plaintiffs failed to prove that they were aggrieved by the alleged violations of BIPA. Should the court reach a decision on the question of whether the bar for statutory standing under BIPA is higher than the bar set by Article III, it would likely be the first court to do so, and as such, the court's decision could have significant implications for BIPA litigation going forward. Ropes & Gray will continue to closely monitor litigation developments.

Regardless of outcome of the Facebook cases, companies should take measures to comply with BIPA given the increased threat of litigation and potential large classes of individuals.

For more information regarding BIPA, recent federal litigation, or to discuss privacy or cybersecurity practices generally, please feel free to contact a member of Ropes & Gray's leading [privacy & cybersecurity](#) or [health care](#) team.