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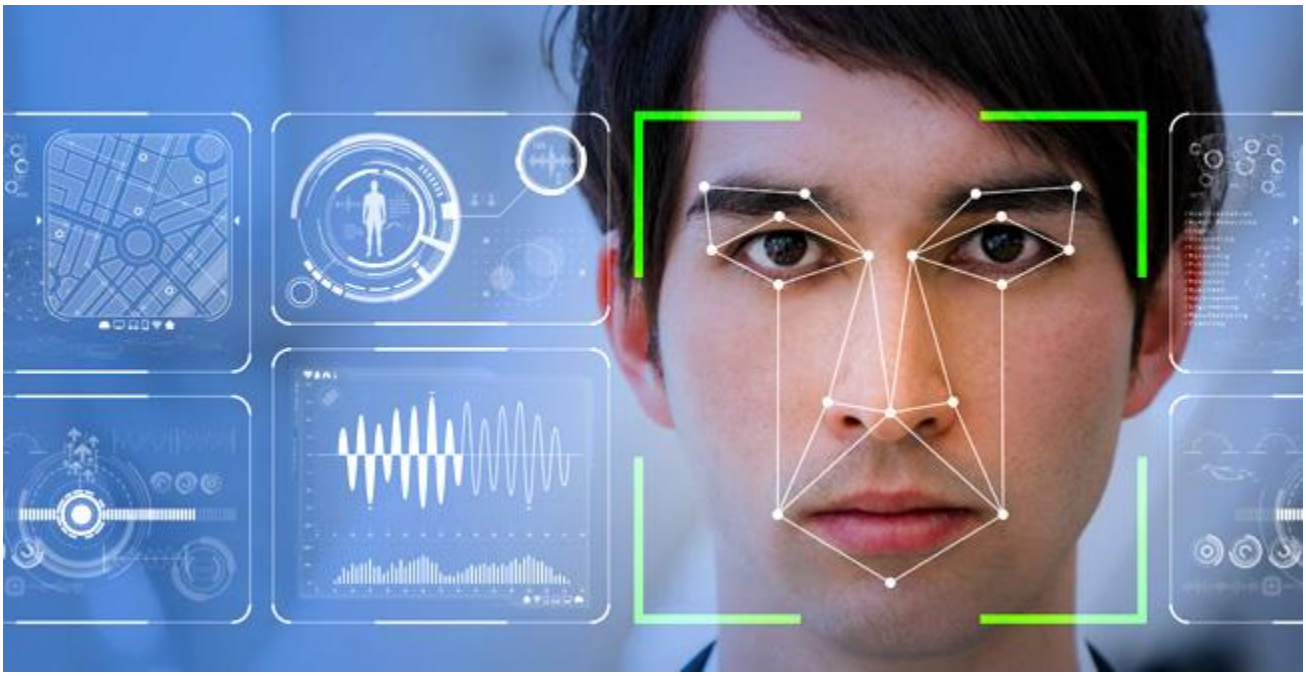

Standing and the Right to Sue Under Illinois' Biometric Information Privacy Act

By Brett M. Doran

The Illinois Biometric Information Privacy Act (BIPA) requires prior written consent for the collection of individual biometric information (such as facial feature, fingerprint, and retina information) and prior notification of the purpose for the collection and the length of time that the information will be stored.

Despite growing public attention to the privacy and data security implications of collecting biometric information, the now decade-old BIPA is the only biometrics privacy statute providing for a private right of action. Indeed, only two other states—Texas and Washington—presently have biometric statutes on the books, but only those states' attorneys general can pursue enforcement.

A large and growing number of BIPA class action lawsuits are being filed, often taking aim at large corporations doing business in Illinois. Defendants often challenge the plaintiffs' standing or right to sue, particularly when actual damages are not alleged. These challenges have met with mixed results from the courts.

Several courts have focused on BIPA's language providing for the right of action: "Any person *aggrieved* by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." 740 Ill. Comp. Stat. 14/20 (emphasis added). The Illinois Appellate Court recently examined this language in *Rosenbach v. Six Flags Entm't Corp.*, No. 2-17-0317, 2017 WL 6523910 (Ill. App. Ct. Dec. 21, 2017). The court observed that the inclusion of "aggrieved" indicates that only parties who suffer an "actual injury, adverse effect, or harm" can assert a claim. The word "aggrieved" would be superfluous, the court found, if a mere technical violation

were actionable. *Id*. at *3. ("[I]f the Illinois legislature intended to allow for a private cause of action for every technical violation of the Act, it could have omitted the word 'aggrieved' and stated that every violation was actionable.").

The U.S. District Court for the Northern District of Illinois reached the same conclusion in *McCollough v. Smarte Carte, Inc.*, No. 16 C 03777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016), finding that "by limiting the right to sue to persons aggrieved by a violation of the act, the Illinois legislature intended to include only persons having suffered an injury from a violation as 'aggrieved.'" *Id*. at *4. The court also considered whether the plaintiff had Article III standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (clarifying when an intangible harm such as a statutory violation is sufficiently concrete for Article III standing). On the facts at issue, the plaintiff alleged that the defendant violated BIPA by failing to obtain consent to retain fingerprint data or to inform the plaintiff how long it would be retained. The court found that this did not constitute an intangible harm under *Spokeo*, and a mere technical violation of BIPA would not confer standing when the plaintiff had not alleged that her information had been disclosed or misused. *Id.* at *4.

Similarly, in the only federal appellate decision addressing BIPA, the Second Circuit upheld a U.S. District Court for the Southern District of New York decision finding no Article III standing when plaintiffs knowingly provided a face scan (without written consent and notice) but did not allege misuse or disclosure.*Santana v. Take-Two Interactive Software, Inc.*, 717 Fed. Appx. 12, 16–17 (2d Cir. 2017).

Other courts have reached different results. In *Monroy v. Shutterfly*, No. 16 C 10984, 2017 WL 4099846, at *9 (N.D. Ill. Sept. 15, 2017), the court ignored BIPA's reference to "aggrieved" parties and concluded instead that BIPA had no language requiring actual damages—though it acknowledged that its finding was "not free from doubt." The court distinguished *McCollough*'s finding that BIPA required actual damages by suggesting that finding was dicta. *Id*. at n.5. But notably, the *Monroy* court did not address *McCollough*'s reasoning and reliance on BIPA's use of the term "aggrieved." *Monroy* also concluded that the plaintiff had Article III standing because the plaintiff alleged that the defendant violated his right of privacy by collecting and storing his facial scan without his knowledge or consent. *Id.* at *9. This, the court reasoned, further distinguished*McCollough* and *Take-Two*, both of which involved alleged technical BIPA violations despite the plaintiffs voluntarily providing their biometric information.*Id*.

In two putative class actions against Facebook, the U.S. District Court for the Northern District of California recognized Article III standing for both users and non-users of Facebook for alleged violations of BIPA in connection with Facebook's photo face-recognition technology. *Patel v. Facebook Inc.*, No. 3:15-cv-03747-JD, 2018 WL 1050154 (N.D. Cal. Feb. 26, 2018); *Gullen v. Facebook, Inc.*, No. 3:16-cv-00937-JD, 2018 WL 1989497 (N.D. Cal. Mar. 2, 2018). The court reasoned that BIPA "codified a right of privacy in personal biometric information," specifically, the right to refuse consent to the collection and storage of such information. *Patel*, 2018 WL 1050154, at *4. Because a violation of one's right of privacy is "a harm that has traditionally been regarded as providing a basis for a lawsuit" (*Spokeo*, 136 S. Ct. at 1549), the court concluded that a procedural violation of BIPA is sufficient for standing when it implicates a privacy interest. The court stopped short of finding that *any* technical violation of BIPA would confer standing. Instead, the court harmonized its finding with*McCollough* and *Take-Two* by noting that in those cases the plaintiffs had an opportunity to decline providing their biometric information, while the Facebook plaintiffs alleged to have had no such opportunity. *Id*. at *5.

Just as in *Monroy*, the court in *Patel* and *Gullen* inexplicably ignored BIPA's express qualification of its statutory right of action to "aggrieved" persons. Courts examining this language have concluded that BIPA requires an allegation of actual damages to bring a claim. Moreover, courts considering Article III standing have reached different results but on materially different facts. As more BIPA class actions work through the courts, we expect the case law continue to develop.

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