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Facebook Ruling Extends Life Of Ill. Biometric Privacy Claims

By **Allison Grande**

Law360 (August 12, 2019, 4:28 PM EDT) -- The Ninth Circuit's decision to allow biometric privacy claims against Facebook to proceed to trial is likely to make it easier for plaintiffs to prop up similar class actions across the country.

The Ninth Circuit on Thursday rejected Facebook Inc.'s arguments that users alleging the company's face-scanning practices violate Illinois' Biometric Information Privacy Act had failed to assert the type of concrete injury necessary to establish Article III standing.

The three-judge panel also refused to find that questions over whether there was a uniform way to determine that class members were Illinois residents and concerns over the size of a potential multibillion-dollar statutory damages award were enough to decertify the class.

The ruling is likely to widen the path for plaintiffs pursuing BIPA class actions by making it easier to get their claims into court and to certify their proposed classes. It also creates a circuit split on what type of harm is required for standing that could lead to a U.S. Supreme Court review, attorneys say.

"The takeaway from this ruling is that BIPA is alive and well in California federal court just as it is in Illinois and basically everywhere else in the country," said John Ropiequet, of counsel at Saul Ewing Arnstein & Lehr LLP. "This decision will really give plaintiffs a leg up to bring these cases really anywhere in the country."

In allowing Patel v. Facebook to proceed to trial intact, the Ninth Circuit dealt a blow to defendants that argue that BIPA's requirements — which include obtaining written permission before capturing biometric data and establishing a retention and destruction schedule for it — are merely procedural and don't protect any substantive rights that would produce the concrete harm necessary for standing.

The court also made it harder for defendants to quickly shake these types of claims by endorsing a "certify first, ask questions later" approach to the questions raised about the users' ability to prove on a classwide basis that they had strong enough connections to Illinois to be covered by the state's privacy law, defense attorneys said.

"Every BIPA case that survives a motion to dismiss or opposition to class certification creates more optimism on the plaintiffs' side of the equation and more filings as a result," said Melissa Siebert, director of the biometric privacy task force at Shook Hardy & Bacon LLP.

Co-counsel for plaintiffs in the Facebook case said that they were looking forward to pressing forward with a trial that had been scheduled at the district court before the Ninth Circuit stepped in. Along with consumer advocacy groups such as the American Civil Liberties Union and the Electronic Frontier Foundation, they also applauded the Ninth Circuit for recognizing the importance of allowing consumers to go after companies that collect their biometric data without proper permission or appropriate safeguards.

"The Ninth Circuit's opinion further confirms availability of legal redress for the growing privacy intrusions by large corporations surreptitiously amassing mountains of personal information from consumers," said Shawn A. Williams, a partner at Robbins Geller Rudman & Dowd LLP, which serves as co-lead class counsel.

Electronic Privacy Information Center President Marc Rotenberg — whose group filed an amicus brief arguing that the violation of the biometric privacy law was sufficient for Facebook users to sue the company — added that the Patel decision was particularly important in light of the growing need for courts and legislatures to grapple with concerns about biometric information and how advances in technology can increase the potential for unreasonable intrusions into personal privacy.

"After Patel, it will be easier to address this emerging privacy challenge," Rotenberg said.

However, while the Ninth Circuit's decision gives a clear edge to plaintiffs, the court did leave the door open for companies to bat down such actions as the case proceeds to more advanced stages of litigation, including trial, defense attorneys noted.

Facebook had argued that common issues don't predominate because each of the millions of class members would have to make a fact-intensive showing that the alleged statutory violation occurred in Illinois.

The Ninth Circuit said this argument wasn't enough to doom certification, since it was reasonable to assume that Illinois lawmakers had intended BIPA to apply to those in Illinois, "even if some relevant activities occur outside the state," and that if the violation of BIPA occurred when class members used Facebook in Illinois, then the issue could be resolved classwide.

However, the court did note that if the violation of BIPA is found to have taken place when Facebook created the face template, which is stored at nine data centers outside the state, then it was up to the district court to determine whether the statute still applied to class members. It added that "if future decisions or circumstances lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can decertify the class."

This opening should encourage companies like Facebook to focus on developing a more complete factual record about the individualized issues with respect to class members' location at the time of the alleged BIPA violation, attorneys say.

"This ruling has heightened the standard that defendants are going to have to meet to defeat class certification, and will definitely require a lot more rolling up the sleeves and delving into the weeds to find individual issues to present to the court as to why it can't be determined on a classwide basis whether someone is an Illinois resident or not," said Brian Hays, a partner at Locke Lord LLP.

By not creating a definitive standard for determining the reach of BIPA, the Ninth Circuit left the door open for plenty of future fights over whether plaintiffs can band together to sue for "the many permutations of Illinois and non-Illinois conduct [that courts] will inevitably be presented with as the use of biometric technology grows and these claims continue to get filed," said Winston & Strawn LLP partner Sean Wieber.

"The flexible, fact-intensive 'primarily and substantially' standard provides fertile ground for zealous advocacy on both sides of the bar as to whether the conduct in each case has enough of a connection to Illinois such that it falls within the act's scope," Wieber said.

Some criticized the Ninth Circuit for not setting a definitive standard for determining the geographical reach of BIPA. Mark Eisen, an attorney at Benesch Friedlander Coplan & Aronoff LLP, noted that the issue of extraterritoriality "isn't nearly as simple as just repeating that BIPA applies to somebody located in Illinois." That conclusion fails to consider factors such as how long that person needs to be physically present in the state, the borderless nature of the internet and the way emerging biometric technologies work, Eisen said.

The relatively little ink that the Ninth Circuit devoted to this complex issue is likely to not only fuel the filing of cases against companies that are based outside Illinois but also present issues down the road in the Facebook case.

"At some point, someone will have to assess who is in, who is out and how much damages there will be, and this question of what being located in Illinois means is pretty crucial to these inquiries," Eisen said.

The issue of standing, which the Ninth Circuit gave substantially more space to in Thursday's opinion, is also likely to boost litigation over the collection of biometric data for both commercial and employee timekeeping purposes, attorneys say.

U.S. District Judge James Donato certified the disputed class in April 2018. It consists of Illinois users for whom Facebook created and stored facial recognition algorithms after June 7, 2011, the date the social media giant launched a Tag Suggestions feature that the plaintiffs claimed gathered face scans without satisfying BIPA's consent or retention requirements.

Facebook then urged the Ninth Circuit to overturn the decision on the grounds that the plaintiffs had failed to show that the company's alleged conduct caused the type of concrete injury necessary to establish standing under the standard set by the Supreme Court in Spokeo v. Robins.

But the Ninth Circuit found that Facebook's alleged missteps violated the substantive consumer privacy interests that the Illinois Legislature intended to be protected by the statute, even though plaintiffs' biometric information hadn't been disclosed or misused.

The ruling aligned with the Illinois Supreme Court's January holding in Rosenbach v. Six Flags. The decision, which the Ninth Circuit cited, held that plaintiffs could bring claims for violations of the statute's notice and consent requirements without alleging a separate, real-world harm.

"The decision in the Facebook case seems to be the logical next step after Rosenbach, and it didn't seem like the Ninth Circuit had much wiggle room based on the Illinois Supreme Court's ruling," Hays said.

However, not all courts have agreed that real-world harm isn't required to mount BIPA litigation.

The Second Circuit in November 2017 found in Santana v. Take-Two Interactive that NBA 2K players lacked standing to pursue BIPA claims because they weren't actually injured by the video game's collection and retention of their face scans.

An Illinois federal judge adopted similar reasoning in his December ruling in Rivera v. Google. In that case, U.S. District Judge Edmond E. Chang held that Google Photo users suing the tech giant over its creation of face templates had failed to meet the Spokeo standing bar because they hadn't shown how Google caused them concrete harm. That decision is being reviewed by the Seventh Circuit.

"We may very well soon have three circuit court decisions with slightly different interpretation of what Spokeo means for BIPA cases, and that could provide a powerful reason for the Supreme Court to take up the issue," said Justin Kay, a partner at Drinker Biddle & Reath LLP.

Kay added that since the Take Two ruling, plaintiffs have been moving toward filing their biometric privacy claims in Illinois state court to avoid the Article III standing issue.

But now, with the Ninth Circuit coming out the opposite way, more of these cases — particularly those against big tech companies accused of unlawfully deploying biometric technology for commercial purposes — may be brought outside Illinois "now that plaintiffs are likely to feel more comfortable with regard to standing," Kay said.

The standing portion of the ruling may also end up helping companies limit their statutory damages exposure.

BIPA doesn't include a statute of limitations, so litigants must contest what time period should apply to these disputes. Illinois law allows for a one-year statute of limitations for actions for slander, libel or publication of matters violating the right of privacy; a two-year window for actions for a statutory penalty; and a five-year period for all other civil actions.

In one of the few decisions to date to tackle this question directly, Illinois' Cook County Circuit Court on July 31 held that the five-year statutory limitation period applied to a class action over Hostmark Hospitality Group and Raintree Enterprises Mart Plaza's collection and storage of employees' fingerprints for timekeeping purposes.

However, the Ninth Circuit's conclusion that a BIPA violation is analogous to an invasion of privacy provides strong support for the application of the one-year statute of limitations to these actions going forward, according to Shook Hardy partner Gary M. Miller.

"If the statute of limitations is limited to one year, that would drastically reduce the size of the potential class," Miller said.

While Thursday's ruling was significant for both sides of the bar, the dispute is far from over. Facebook on Friday asked the Ninth Circuit to give it until Sept. 5 to file a petition for rehearing, and an appeal to the Supreme Court could follow.

"If the Supreme Court takes up this case, we could get a lot of clarity on the issue of extraterritoriality as it applies to class actions, the issue of annihilating damages that are possible under the statute, or just get more clarity on Spokeo, which has resulted in very educated judges reaching polar opposite

conclusions on standing," Eisen said.

U.S. Circuit Judges Ronald M. Gould and Sandra Segal Ikuta and U.S. District Judge Benita Y. Pearson sat on the panel for the Ninth Circuit.

The Facebook users are represented by John Aaron Lawson and Rafey S. Balabanian of Edelson PC, Susan K. Alexander, Shawn A. Williams, Paul J. Geller, Stuart A. Davidson, Lucas Olts, Christopher C. Gold and John H. George of Robbins Geller Rudman & Dowd LLP, and Michael P. Canty and Corban S. Rhodes of Labaton Sucharow LLP.

Facebook is represented by Lauren R. Goldman, Andrew J. Pincus and Michael Rayfield of Mayer Brown LLP.

The case is Nimesh Patel et al. v. Facebook Inc., case number 18-15982, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Brian Baresch and Jack Karp.

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