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BIPA class actions: Seventh Circuit endorses pleading strategy calculated to avoid removal to federal court

by James F. Bogan III

Takeaway: As Judge Diane Wood of the Seventh Circuit recently observed in a putative class action alleging violations of Illinois's Biometric Information Privacy Act (BIPA), "allegations matter" and "a plaintiff is the master of her own complaint." *Thornley v. Clearview AI, Inc.*, --- F.3d. ---, No. 20-3249, 2021 WL 128170, at *4-*5 (7th Cir. Jan. 14, 2021). There is nothing wrong with putative class plaintiffs advancing allegations devoid of Article III injury "to steer clear of federal court." *Id*. at *6. As demonstrated by the Seventh Circuit cases discussed in *Thornley*, BIPA creates an opportunity for such a strategic choice, given that it provides a right of action for certain violations that give rise to an Article III injury-in-fact, as well as certain violations that do not – namely, specific BIPA violations that are nothing more than "bare procedural violation[s], divorced from any concrete harm." *Id.* at *2 (quoting *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549 (2016)). Ultimately, the *Thornley* court endorsed the class plaintiffs' strategic pleading to avoid federal court by affirming the district court's order remanding a BIPA class action to Illinois state court. From a forum standpoint, the result is significant. The Class Action Fairness Act authorizes the removal of class actions where more than $5 million is at stake. BIPA provides for the recovery of a $1,000 penalty for each negligent violation and a $5,000 penalty for each reckless or intentional violation, even if the violations are nothing more than "bare procedural violations." See 740 ILCS 14/20(1), (2)). The end result is that class counsel are able to keep in state court a class action seeking damages of well in excess of $5 million.

Thornley is a case study in procedural maneuvering. The class plaintiffs initially filed a putative class action in Illinois state court. The initial complaint alleged violations of three subsections of BIPA. Clearview AI, the class defendant, removed the case to federal court under the Class Action Fairness Act. But shortly after the removal, the class plaintiffs voluntarily dismissed the complaint without prejudice.

Soon thereafter, the class plaintiffs filed a new and narrower complaint in Illinois state court, this time alleging violation of only one BIPA subsection and (invoking *Spokeo*) further describing the violation in their allegations as a "bare procedural violation, divorced from any concrete harm." *Id*. at *2. Clearview AI again removed the case to federal court, and the class plaintiffs moved to remand. The district court agreed with the class plaintiffs that their allegations did not give rise to an Article III injury-in-fact and remanded the case to state court.

Clearview AI sought leave to appeal the district court's order, which the Seventh Circuit granted. *See* 28 U.S.C. § 1453(c). The Seventh Circuit then affirmed the district court's remand order.

The complaint alleged only one claim under BIPA, a claim under 740 ILCS 14/15(c). Subpart 15(c) provides that "[n]o private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profits from a person's or a customer's biometric identifier or biometric information."

Id. at *5. Moreover, the class was defined in terms of class members who had suffered *no* injury: "All current Illinois citizens whose biometric identifiers or biometric information were [*sic*], without their knowledge, included in the Clearview AI Database at any time [during the class period] *and who suffered no injury from Defendant's violation of Section 15(c) other than a statutory aggrievement …" Id*. (emphasis added).

The Seventh Circuit agreed with the district court that the allegations did not give rise to an Article III injury-in-fact. With no such injury, the class plaintiffs were without standing to pursue their claims in federal court, and the district court lacked jurisdiction to adjudicate them. The *Thornley* plaintiffs thus succeeded in their effort to allege claims that could be resolved only in Illinois state court. As Judge Wood recognized, a case may be resolved by a federal court "only if the more stringent federal standards for standing can be satisfied; Illinois (as is its right) has a more liberal attitude toward the kinds of cases its courts are authorized to entertain." *Id*. at *1.