

BIPA Suits Against 3rd-Party Vendors Face Numerous Hurdles

By **Karen Borg and Al Fowerbaugh** (August 11, 2020)

The Illinois Biometric Information Privacy Act[1] imposes a number of requirements upon those who obtain the biometric data of others, including:

- Developing a publicly available written policy regarding the retention and destruction of biometric data in their possession;[2]
- Providing required disclosures, and obtaining written releases, before obtaining biometric data;[3]
- Prohibiting the sale of biometric data;[4] and
- Prohibiting the disclosure of biometric data without obtaining prior consent.[5]



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Anyone who violates these requirements is liable for statutory damages up to \$5,000 for each willful violation.[6]

As a result, hundreds of class actions have been filed, predominantly against those who directly collected the biometric data from the plaintiffs, such as employers who collect their employees' fingerprints or facial geometries for timekeeping purposes.

Recently, plaintiffs have asserted claims under BIPA against vendors who sold the biometric timekeeping equipment to their employers. In these cases, the plaintiffs do not allege that they had any direct contact with the vendor defendants, but rather allege that these vendors provided the plaintiffs' employers with the biometric timekeeping systems and, in some cases, obtained biometric data from the employers without complying with BIPA's requirements.

The lawsuits against vendors present a number of issues not raised in the typical BIPA lawsuits brought against those who directly obtain the plaintiffs' biometric data. Two recent Illinois federal district court opinions involving these vendors address issues of personal jurisdiction and standing under BIPA, raising questions about the jurisdictional reach of BIPA outside of Illinois, and the issue of whether disclosure of biometric information to a third-party vendor constitutes actual injury. This article will identify and discuss some of those issues.

Plaintiffs may lack standing to assert claims under Section 15(a) in federal court.

A plaintiff may commence any action under BIPA in an Illinois state court.[7] The Illinois

Supreme Court held in *Rosenbach v. Six Flags Entertainment Corp.* that plaintiffs "need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act." [8]

An action under BIPA may also be brought in federal court if the diversity of citizenship and amount-in-controversy requirements are met. However, unlike state court, claims arising from a "bare procedural violation, divorced from any concrete harm" is insufficient to establish federal standing. [9]

Rather, in order to maintain a BIPA claim in federal court, a plaintiff must also allege: (1) he or she suffered an actual, concrete injury in fact; (2) a causal connection between the injury and conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. [10]

The differences between the state and federal standing requirements were recently highlighted in the U.S. Court of Appeals for the Seventh Circuit's decision in *Bryant v. Compass Group USA Inc.*, [11] where the plaintiffs' BIPA claims included one under Section 15(a) for defendants' alleged failure to maintain a publicly available biometric data retention and destruction policy.

The plaintiff did not allege that she suffered any injury arising from this alleged violation, and the Seventh Circuit held that she could not, as a matter of law, make such an allegation because Section 15(a)'s requirements were owed to the public generally and not directly to the plaintiff or any other particular individual. [12]

As a result, the Seventh Circuit held that the plaintiff lacked standing to assert her claim under Section 15(a) in federal court.

Plaintiffs bringing a Section 15(a) claim against a vendor in federal court will likewise have to address the issue of standing. This is demonstrated by the recent decision in *Figueroa v. Kronos Inc.*, [13] where the U.S. District Court for the Northern District of Illinois addressed the issue of standing to assert a Section 15(a) claim against a vendor.

The plaintiffs originally filed this class action in state court asserting claims under Sections 15(a), 15(b) and 15(d) of BIPA, but defendant removed it to federal court and then moved to dismiss the complaint, in part arguing that the plaintiffs lacked standing to assert those claims.

The court ultimately held that the plaintiffs had standing to assert claims under Sections 15(b) and 15(d) but concluded that they lacked standing to assert claims under Section 15(a).

In reaching its ruling, the court relied on the Seventh Circuit's ruling in *Bryant*. Like the plaintiffs in *Bryant*, the plaintiffs in *Figueroa* did not allege that Kronos's failure to publicize its retention policy injured them.

However, unlike the plaintiffs in *Bryant*, the plaintiffs in *Figueroa* asserted a separate violation of Section 15(a), alleging that the vendor defendant failed to comply with the terms of the biometric data retention and destruction policy by disclosing the biometric data of the class members to data centers that hosted the data.

The plaintiffs argued that these allegations demonstrated the existence of a particularized injury in fact, establishing their standing to assert that claim in federal court. While the

district court stated that this claim was a closer call, it nonetheless held that the plaintiffs lacked standing to assert this claim because the plaintiffs' allegations did not establish the existence of a real risk of further harm.[14]

The court reached this conclusion even though it found that the same alleged disclosure established standing for the plaintiffs' claim under Section 15(d) for improper disclosure of biometric data.[15]

Does the court have personal jurisdiction over an out-of-state vendor?

It is a fundamental requirement that a court have personal jurisdiction over each defendant. Under Illinois' long-arm statute, state courts can exercise personal jurisdiction to the same extent permitted under the U.S. Constitution.[16]

Thus, a state or federal court can exercise jurisdiction over a vendor in connection with a BIPA claim if the vendor either maintained continuous and systematic contacts with Illinois, i.e., general jurisdiction, or if the claims against the vendor arise from its contacts with Illinois, i.e., specific jurisdiction.[17]

If the vendor is located in the forum state, then jurisdiction likely will not in be in dispute. However, many vendors sell their biometric timekeeping systems to customers throughout the country, and a plaintiff may therefore have to address the issue of whether the court has specific personal jurisdiction over the vendor.

This issue was presented to U.S. District Court for the Central District of Illinois in *Bray v. Latham Time Co.*,[18] where the plaintiff alleged that the defendant sold facial recognition time-keeping technology to the plaintiff's employer and that defendant violated BIPA by collecting, storing, using, and/or disclosing the facial recognition data without giving the notices and obtaining the consents required by BIPA.[19]

The plaintiffs alleged no dealings with defendant, and the defendant was located in Georgia although sued in Illinois.[20] In determining whether specific jurisdiction existed, the court looked to whether the defendant's contacts show that it "purposefully availed itself of the privilege of doing business" in Illinois and that the plaintiffs' alleged injury arose "out of the defendant's forum-related activities." [21]

In this case, the court found there were no contacts between the defendant and Illinois; the timekeeping equipment sold by defendant was actually sold to an affiliate of the plaintiffs' employer located in Arkansas and it was the employer, not defendant, who transferred the equipment to Illinois.[22] Further, the plaintiffs had no contact with defendants. Under these facts, the court concluded that it lacked personal jurisdiction over the defendant the defendant vendor.[23]

Does BIPA apply to conduct occurring outside Illinois?

In addition to jurisdictional issues, the fact that vendors may be located in other states raises the question of whether BIPA applies to conduct occurring outside of Illinois.

It has long been the rule in Illinois that a "statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute." [24] If the statute is not given extraterritorial effect, it is "operative only as to persons or things within Illinois." [25] An alleged violation of BIPA will be determined to have occurred in Illinois "if the circumstances relating to the transaction occur primarily and substantially" within

Illinois.[26]

There is nothing in BIPA that expressly states that it was intended to apply to actions taken outside of Illinois. To the contrary, the legislative findings included in BIPA suggest the General Assembly was concerned with the use of biometric information within Illinois:

Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.[27]

Although the plaintiffs and the purported class members in the cases against vendors typically are Illinois residents, the vendor defendants may not be Illinois citizens. Further, the vendor's conduct which allegedly violated BIPA, such as obtaining, storing or disclosing biometric data without obtaining the required consents or providing the required disclosures, may have occurred outside of Illinois.

For example, while plaintiffs may allege their employers scanned their fingerprints in Illinois, the vendor may have received that data, and stored that data on computer servers, located in another state. Plaintiffs bringing claims against out-of-state vendors may have to address the issue of whether BIPA has extraterritorial effect.

Conclusion

Vendors of fingerprint and facial recognition technology are increasingly becoming targets of class actions under BIPA. These vendors typically do not have any direct dealings with the plaintiffs and in many instances are located in other states. These facts raise a number of issues, such as jurisdiction and extraterritorial effect of BIPA, that plaintiffs may not have previously addressed when bringing claims against employers. Likewise, vendors may dispute the plaintiff's standing to assert certain claims under BIPA. Courts may soon have to resolve these issues as the number of suits against vendors increases.

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[1] 740 ILCS 14/1 et seq.

[2] 740 ILCS 14/15(a).

[3] 740 ILCS 14/15(b).

[4] 740 ILCS 14/15(c).

[5] 740 ILCS 14/15(d).

[6] 740 ILCS 14/20.

[7] Id.

[8] *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶40 (2019),

[9] *Spokeo Inc. v. Robins*, 136 S.Ct. 1540, 1548-49 (2016).

[10] *Bryant v. Compass Group USA, Inc.*, 2020 U.S. App. LEXIS 14256, *6 (7th Cir. May 5, 2020), citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992).

[11] *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020).

[12] Id., *21.

[13] *Figueroa et al. v. Kronos, Inc.*, 2020 U.S. Dist. LEXIS 131093 (N.D. Ill., No. 19 C 1306).

[14] Id., *13.

[15] Id.

[16] 735 ILCS 5/2-209(c).

[17] *Daimler AG v. Bauman*, 134 S. Ct. 756, 751 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

[18] *Bray v. Lathem Time Co.*, 2020 U.S. Dist. LEXIS 53419 (C.D. Ill., No. 19-3157).

[19] Id., *1.

[20] Id., *4.

[21] Id., *6, quoting *Lexington Ins. Co. v. Hotai Ins. Co., Ltd.*, 938 F.3d 874, 878 (7th Cir. 2019).

[22] Id., *8-*9.

[23] Id., *12-*13.

[24] *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 184-185 (2005).

[25] *Stroman Realty, Inc. v. Allison*, 2017 IL App (4th) 150501-U, ¶59.

[26] *Avery*, 216 Ill. 2d at 186.

[27] 740 ILCS 14/5(b).