BIPA Dismissal is a Small Defense Victory

Article By Lauren Kitces
Squire Patton Boggs (US) LLP
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Neither Consumer Privacy World nor the court really knows what happened in this BIPA class action because the Plaintiff’s complaint was so factually bare. In Kloss v. Acuant, 2020 U.S. Dist. LEXIS 89411 (N.Dist.Ill. May 21, 2020), Ms. Kloss alleged that Acuant captured, collected, and stored her facial geometry without her consent and then subsequently disseminated it to someone – nobody really knows who – also without her consent. To top it off, Acuant allegedly failed to post a publically accessible retention policy in violation of BIPA. A case that started in state court, that was removed to federal court, now finds itself partly dismissed and partly remanded back to state court.

So what happened?

BIPA 15(a) allegation - the public retention policy, back to state court it goes.

Relying on the Seventh Circuit’s Bryant v. Compass Grp. USA, Inc., No. 20-1443, 2020 U.S. App. LEXIS 14256 (7th Cir. May 5, 2020), the district court in Kloss concluded that it lacked subject matter jurisdiction and remanded the 15(a) claim back to state court. In doing so, the court applied the holding reached in Bryant. (You can read a detailed analysis of Bryant here.) In Bryant, the Seventh Circuit considered whether
a Plaintiff alleges an injury-in-fact when it pleads a pure violation of BIPA section 15(a), which requires a publicly available retention schedule. The Seventh Circuit assessed whether this violation was “sufficiently substantive” to meet standing under Article III. The court concluded that the duty in 15(a) was to the public, and not an individual. Therefore, the violation of 15(a) does not invade “personal privacy rights in a concrete manner” and there is not a concrete and particularized harm for violations of it. *Bryant* at 16. Applying this analysis to Kloss, the court determined that they did not have subject-matter jurisdiction over this claim under Article III, and remanded it back to state court. *Kloss* at *4.

**BIPA 15(b) and (d) allegations - if light on facts, away you go.**

The court then turned to the allegations regarding a lack of proper consent under BIPA sections 15(b) (*requiring a private entity obtain consent to obtain biometric information*) and 15(d) (*requiring a private entity obtain consent to disclose biometric information*). While *Bryant* concluded that non-compliance with section 15(b) of BIPA “leads to an invasion of personal rights that is both concrete and particularized,” *Bryant* at 2, the court in *Kloss* never reached this analysis. Instead, the court looked to the facts as pled and held that the plaintiff did not provide sufficient facts to support her claims of violations of 15(b) and 15(d). It pointed to the lack of a specified time of her use of Acuant’s technology and the lack of details demonstrating a direct relationship between Kloss and Acuant. (I mean, was there even a relationship?) *Kloss* at *7. In doing so, the court concluded that “[s]uch barebone factual support and recitation of statutory language is not enough to put Acuant on notice of Kloss’s claims in order to properly investigate or prepare a defense.” *Id.*

*Bryant* held the door open for the pursuit of at least some BIPA claims at a federal level, but *Kloss* reminds us that there are still critical facts that must be included when making such claims. Defendants should take care to examine the factual support for claims presented by plaintiffs regarding notice and consent under BIPA. **Weak facts get cases dismissed.**

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