7th Circ. Privacy Ruling Could Expand Article III Standing

By **Doug Meal, Michelle Visser and Nicole Gelsomini** (January 8, 2021, 4:43 PM EST)

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The U.S. Court of Appeals for the Seventh Circuit's recent decision in Fox v. Dakkota Integrated Systems LLC[1] answers the question it left unaddressed in Bryant v. Compass:[2] whether an alleged failure to comply with a retention schedule for biometric data, as required by Section 15(a) of the Illinois Biometric Privacy Act, suffices to plead an injury in fact for purposes of Article III.

By answering that question in the affirmative, Fox furthers the trend of bolstering federal court standing in Biometric Information Privacy Act, or BIPA, cases — and, in so doing, making it easier for defendants to remove such cases to federal court. The implications of the Seventh Circuit's standing analysis in Fox, moreover, may extend far beyond Section 15(a) unlawful retention claims.

Background

The plaintiff in Fox alleged that her former employer, Dakkota, required its employees to scan their hands in order to clock in and out of work.[3] She claimed that Dakkota failed to develop, publicly disclose or implement a retention schedule for its employees' biometric data, and further that Dakkota failed to destroy her biometric data when she left the company — all in violation of Section 15(a) of BIPA.[4]

The Seventh Circuit held that, unlike the alleged Section 15(a) violation at issue in Bryant — failure to publicly disclose a retention schedule coupled with no allegations of particularized harm flowing from that violation — the much broader alleged Section 15(a) violation at issue in Fox sufficed to confer Article III standing.[5]

Article III standing requires the plaintiff to have suffered an injury in fact that is both particularized and concrete. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way."[6] A concrete injury is one that "actually exist[s]."[7] To determine whether an intangible injury is concrete, courts look to legislative judgment and the proximity of the claimed harm to a harm that has traditionally provided a basis for a suit at common law.[8]

The Seventh Circuit found under Bryant that the alleged Section 15(a) violation in Fox sufficed to plead a particularized injury for Article III purposes, and further found for two independent reasons — one an application of Bryant and the other an application of Miller v. Southwest Airlines Co.[9] — that the claimed injury was also sufficiently concrete to satisfy Article III.

Bryant v. Compass — Public Versus Private Rights

The dispute in Bryant arose out of vending machines in the plaintiff's workplace that required users to scan their fingerprints in order to make purchases.[10] The plaintiff alleged that the defendant, the owner and operator of the machines, had violated Section

15(a) by failing to publicly disclose a retention schedule and Section 15(b) by failing to obtain written consent before collecting her biometric data.[11]

In concluding that the alleged Section 15(b) violation satisfied Article III's injury-in-fact requirement but the alleged Section 15(a) violation did not, the Seventh Circuit relied on Justice Clarence Thomas' concurrence from Spokeo Inc. v. Robins.[12]

According to Justice Thomas, a plaintiff seeking to vindicate a private right, e.g., in a trespass action, need not allege actual harm beyond the invasion of that private right in order to plead injury in fact.[13] But a plaintiff seeking to vindicate a public right, e.g., in a public nuisance action, must allege that the violation caused the plaintiff a concrete and distinct harm.[14]

Applying that rubric in Bryant, the Seventh Circuit reasoned that the plaintiff's Section 15(b) claim asserted "a violation of her own rights — her fingerprints, her private information," which was "enough to show injury-in-fact without further tangible consequences."[15]

As to the Section 15(a) claim, however, the Seventh Circuit found that the duty to disclose is owed to the public generally, and that the plaintiff had not alleged any particularized harm resulting from the alleged Section 15(a) violation.[16]

Following a petition for rehearing, the Seventh Circuit expressly cabined its analysis to the Section 15(a) provision at issue there: the duty to publicly disclose a retention schedule.[17]

Fox presented the issue that the Seventh Circuit reserved in Bryant.

In Fox, the Seventh Circuit held that the unlawful retention of biometric data inflicts a particularized and concrete harm on the plaintiff in the same way that the unlawful collection of biometric data does: Both constitute an "invasion of a 'private domain, much like an act of trespass would be,'" thus making the harm particularized by reason of its affecting the plaintiff in a personal and individualized, and also making that harm concrete even though it is intangible.[18]

In so holding, the Seventh Circuit distinguished its prior decision in Gubala v. Time Warner Cable Inc.[19] on the grounds that Gubala did not involve immutable biometric data or allegations of unlawful sharing of data.[20]

Miller v. Southwest Airlines — Material Improvements

In Miller, unionized airline employees claimed that their employers had violated Section 15(a) by failing to maintain and publicly disclose retention schedules.[21] The Seventh Circuit held that the plaintiffs' union membership made those violations Article III injuries.[22]

Because the collection, use and retention of biometric data are topics for collective bargaining, a union could trade biometric data practices in exchange for concessions in other areas like wages. That "prospect of a material change" gave the suits a "a concrete dimension."[23]

The Seventh Circuit found the exact same analysis applied in Fox. The plaintiff there was also represented by a union, so her union also could have used biometric data retention practices as a bargaining chip in negotiations with her employer, making concrete the

plaintiff's harm from her employer's violative biometric data retention practices.[24]

Notably, while it could have stopped there, the Seventh Circuit went on to suggest that people whose claims arise in other contexts, like Bryant's, may also have "a prospect of material improvements" in the defendant's treatment of their biometric data and thus may also suffer a concrete harm from the defendant's having violated BIPA by the manner in which it treated their biometric data.[25]

Implications

Fox represents yet another step, after Miller and Bryant, toward making it easier for defendants to remove BIPA actions to federal court.

Fox also brings the Seventh Circuit more in line with the U.S. Court of Appeals for the Ninth Circuit — which held in Patel v. Facebook Inc.[26] that a failure to maintain a retention schedule under Section 15(a) would create injury in fact — without directly contradicting the U.S. Court of Appeals for the Second Circuit's nonprecedential holding in Santana v. Take-Two Interactive Software Inc.[27] that an alleged Section 15(a) violation did not suffice to plead injury in fact where the plaintiff in that case did not allege that the defendant did not have or did not comply with an adequate retention schedule.

However, neither the Ninth nor Second Circuits have drawn the distinction between different types of alleged Section 15(a) violations that the Seventh Circuit now has, so as matters now stand the circuit courts have enunciated three different, and mutually inconsistent, standards by which Section 15(a) claims are to be evaluated for Article III purposes.

While Fox's underlying analysis in applying Bryant may logically extend to other contexts, parties advocating for an extension of Fox's application of Bryant outside the BIPA context may face an uphill battle given the pains the Seventh Circuit took to distinguish Gubala.

The Seventh Circuit did not, however, explain how either of the facts purportedly distinguishing Fox from Gubala — the immutability of biometric data and alleged unlawful disclosure — would lead to a different outcome under the public versus private rights analysis.

Indeed, a plaintiff alleging the unlawful retention of personally identifiable, yet mutable information like a credit card number would arguably be asserting "a violation of her own rights" in the same way that a plaintiff alleging the unlawful retention of her biometric data would be.

And if that is the case, whether or not the retained data was unlawfully shared should not matter under Justice Thomas' rubric, where a plaintiff asserting "a violation of her own rights" need not allege "any further tangible consequences" in order to show injury in fact.

Fox's application of Miller, however, may more readily lend itself to further expansion of Article III injury in fact. By raising, but not resolving, the potential for extension of the Miller rationale to confer Article III standing outside the union or employment context, Fox invites future parties to test the limits of that rationale.

One can imagine a number of scenarios in which a plaintiff might theoretically have an opportunity to bargain over privacy practices and thus might theoretically suffer a concrete harm where the defendant's privacy practices eliminated that theoretical opportunity. For example, critics of the just passed California Privacy Rights Act argued that it allows what

they called "pay-for-privacy schemes" in which businesses charge their users more money when the users opt out of sharing information.

Fox's reference to Bryant, which involved merely a relationship between a vending machine company and its customer, suggests that the Seventh Circuit may not limit Miller's application to cases involving traditional negotiations like those between unions and management.

It also appears that, if it were to extend Miller's application, the Seventh Circuit would not require specific allegations of the prospect of "material improvements" to appear on the face of the complaint in order for that prospect to support a finding of concrete harm for Article III standing purposes.

The plaintiff in Fox did not even allege that she was part of a union,[28] much less that the union would have bargained over retention of her biometric data. It thus should be open to defendants seeking to extend Miller in this fashion to support their Article III standing argument based on evidence extrinsic to the plaintiff's complaint.

Accordingly, even beyond the impact of Fox's holding on the issue of Article III standing for Section 15(a) unlawful retention, Fox leaves the door open for significant expansion of defendants' ability to remove other claims involving intangible harms to federal court.

The unsettled nature of Article III standing in BIPA actions reflects the unsettled nature of Article III standing in actions involving intangible statutory violations more broadly. In the four years since the Supreme Court's Spokeo decision, lower courts have come to divergent conclusions on what it means to have suffered a "concrete" injury when the purported injury is intangible, like an alleged privacy or cybersecurity harm.

Although the Supreme Court has avoided that question since Spokeo, it recently granted certiorari in TransUnion LLC v. Ramirez to consider the application of Article III and Rule 23 to a class action involving alleged Fair Credit Reporting Act violations where, as the petitioner put it, "the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."[29]

Ramirez thus could offer a vehicle for the Supreme Court to provide much-needed guidance on Article III's concreteness threshold.

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[1] Fox v. Dakkota Integrated Sys., LLC, 2020 WL 6738112 (7th Cir. Nov. 17, 2020).

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

[3] 2020 WL 6738112, at *2.

[4] Id. at *3.

[5] Id. at *6.

[6] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

[7] Id. at 1548.

[8] Id. at 1549.

[9] Miller v. Sw. Airlines Co., 926 F.3d 898 (7th Cir. 2019).

[10] 958 F.3d at 619.

[11] Id.

[12] Id. at 624.

[13] Spokeo, 136 S. Ct. at 1553.

[14] Id.

[15] 958 F.3d at 624.

[16] Id. at 626.

[17] Id.

[18] 2020 WL 6738112, at *7 (quoting Bryant, 958 F.3d at 624).

[19] Gubala v. Time Warner Cable, Inc., 846 F.3d 909 (7th Cir. 2017).

[20] Fox, 2020 WL 6738112, at *7.

[21] Id. at *5.

[22] Miller, 926 F.3d at 902.

[23] Id.

[24] Fox, 2020 WL 6738112, at *8.

[25] Id.

[26] Patel v. Facebook, Inc., 932 F.3d 1264 (9th Cir. 2019).

[27] Santana v. Take-Two Interactive Software, Inc., 717 F. App'x 12 (2d Cir. 2017).

[28] Fox, 2020 WL 6738112, at *2.

[29] Petition for Writ of Certiorari, TransUnion LLC v. Sergio L. Ramirez (U.S. Sept. 2, 2020), at i.