

Professional Perspective

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# Personal Jurisdiction Challenges in BIPA Class Actions

Contributed by [David J. Oberly](#), Blank Rome

Potential exposure to lawsuits alleging violations of the [Illinois Biometric Information Privacy Act \(BIPA\)](#) has increased in the wake of the Illinois Supreme Court's seminal decision in *Rosenbach v. Six Flags Ent. Corp.*, [129 N.E.3d 1197](#) (Ill. 2019), but personal jurisdiction has emerged as key defense for defendants.

Several district court opinions underscore the efficacy of the personal jurisdiction defense in BIPA class action litigation, and a recent case—*Stein v. Clarifai, Inc.*, [2021 BL 94464](#) (N.D. Ill. Mar. 16, 2021)—provides important takeaways for out-of-state defendants with negligible connections to Illinois.

## Background

Jordan Stein, an Illinois resident, sued New York-based technology company Clarifai after learning that it had accessed her profile pictures from OKCupid, a dating website. Stein alleged that Clarifai built its database of facial recognition templates by scanning biometric information contained in her profile photos and those of other OKCupid users. Stein asserted claims for violations of BIPA Sections 15(a), (b), and (c).

Clarifai filed a motion to dismiss on grounds that it was not subject to personal jurisdiction.

The court granted the motion and dismissed the action without prejudice. Because Stein failed to show that Clarifai had targeted Illinois or its residents in any way, or that Clarifai had otherwise developed any relationship with Illinois, the court held that it lacked specific personal jurisdiction over Clarifai.

## Analysis & Takeaways

The *Stein* case is by no means the first BIPA action to be dismissed for lack of personal jurisdiction. Illinois federal courts have also dismissed each of the following BIPA actions on personal jurisdiction grounds: *McGoveran v. Amazon Web Services, Inc.*, [48 F.Supp.3d 714](#) (S.D. Ill. 2020); *Salkauskaite v. Sephora USA, Inc.*, [2020 BL 201640](#) (N.D. Ill. May 30, 2020); *Bray v. Latham Time Co.*, [2020 BL 115037](#) (N.D. Ill. Mar. 27, 2020); and *Gullen v. Facebook.com, Inc.*, [2016 BL 16035](#) (N.D. Ill. Jan. 21, 2016).

What the *Stein* decision exemplifies, however, is the successful use of the personal jurisdiction defense where the conduct allegedly giving rise to a BIPA violation occurs outside Illinois.

### **General v. Specific**

For personal jurisdiction to exist, there must be either “general” or “specific” jurisdiction over the defendant. Absent special circumstances, a corporation is only subject to general personal jurisdiction in the state where it is incorporated or has its principal place of business. For specific jurisdiction to exist over a defendant, there must be an affiliation between the forum and the underlying controversy; principally, an activity or occurrence involving the defendant that takes place in the forum state and therefore subjects the defendant to the state's regulation.

For defendants incorporated and headquartered outside of Illinois, general jurisdiction will almost always be absent. So dismissals based on a challenge to personal jurisdiction will turn on whether the defendant is subject to specific jurisdiction in Illinois.

On this issue, Stein contended that Clarifai's contractual relationship with a Chicago-based venture capital fund—which had invested in OKCupid—created sufficient contacts to confer personal jurisdiction in Illinois. The court, however, rejected that argument, noting that the defendant's contacts with Illinois must originate from its suit-related activity in the forum state—not from the activity of a third party—to confer jurisdiction.

The court also rejected Stein's argument that Clarifai's operation of its website and its sales activity—generating a mere seven cents of revenue from transactions with two Illinois customers—created the required minimum contacts with Illinois. The court found that this “miniscule” activity was insufficient to show that Clarifai targeted Illinois, particularly where the plaintiff failed to put forth any facts to contradict Clarifai's assertion that it did not target its marketing, sales, commercial activity, or deploy its technology toward Illinois.

Moreover, Stein failed to rebut Clarifai's representation that it did not develop or train facial recognition or artificial technology in Illinois or that it had no knowledge of where OKCupid users whose information it used resided.

Taken together, in the absence of any evidence that Clarifai directed its suit-related actions at Illinois so as to subject it to the court's jurisdiction, the court dismissed the complaint for lack of personal jurisdiction.

## Practical Tips & Best Practices

### ***Develop Factual Support***

Challenging personal jurisdiction is a particularly powerful tool that can be utilized at the pleading stage to procure an early dismissal from costly BIPA class action litigation. Importantly, however, to be in a position to leverage this defense in BIPA litigation, companies must be able to show that plaintiffs' claims arise out of biometric-related activities that took place exclusively beyond the borders of Illinois.

For this reason, it is critical that all companies using biometric data in their business operations conduct thorough data mapping and inventory exercises. Completing these exercises will allow companies to develop a comprehensive understanding not only of where their collection of biometric data takes place, but also of how the data passes through the organization, where it is used, and where it is stored thereafter. A data flow diagram and data storage inventory can then be used to provide persuasive support for a personal jurisdiction challenge in the event the company's biometrics practices are challenged in litigation.

### ***Evaluate Defense***

In the event a company is sued for purported BIPA violations, the organization and its biometric privacy counsel must undertake a prompt evaluation to determine whether personal jurisdiction can be raised to facilitate a quick exit from the litigation through an early motion to dismiss.

In completing this analysis, both general and specific personal jurisdiction must be considered. Assuming the BIPA action is filed in Illinois, general personal jurisdiction is lacking where the defendant is not "at home" in Illinois—i.e., where Illinois is not the defendant's state of incorporation or the location of its principal place of business. Specific personal jurisdiction is lacking where the entity can establish that the defendant's biometric-related activities that serve as the basis for the plaintiff's BIPA claims took place exclusively beyond the borders of Illinois.

## Conclusion

Companies that collect, use, and store biometric data can expect a continuation of BIPA class actions for the foreseeable future. With that said, as the Stein decision shows, personal jurisdiction challenges can play a powerful role in defeating a wide variety of class action suits filed for purported violations of Illinois' biometric privacy law.