9th Circ. Sends Facebook Face-Scan Class Action To Trial

By **Allison Grande**

Law360 (August 8, 2019, 12:08 PM EDT) -- The Ninth Circuit on Thursday cleared the way for trial in a certified class action alleging Facebook's face-scanning practices violate Illinois' unique biometric privacy law, ruling that the plaintiffs have alleged a sufficiently concrete injury to support their class claims.

The Ninth Circuit on Thursday refused to decertify a class of Facebook users accusing the company of violating Illinois law with its face-scanning practices. (AP)

In a 24-page published opinion, the three-judge appellate panel unanimously **rejected Facebook's argument** that the lower court's certification decision should be overturned because the plaintiffs had failed to allege the type of concrete injury necessary to establish Article III standing under the standard set by the U.S. Supreme Court's decision in Spokeo v. Robins 🔴 .

The panel found that the plaintiffs' pleadings met this standing bar because Facebook's alleged development and use of facial recognition technology without users' consent — in violation of Illinois' Biometric Information Privacy Act — constituted an invasion of individuals' private affairs and concrete privacy interests.

"Facebook's alleged collection, use and storage of plaintiffs' face templates here is the very substantive harm targeted by BIPA," U.S. Circuit Judge Sandra Segal Ikuta wrote for the panel. "Because we conclude that BIPA protects the plaintiffs' concrete privacy interests and violations of the procedures in BIPA actually harm or pose a material risk of harm to those privacy interests, the plaintiffs have alleged a concrete and particularized harm, sufficient to confer Article III standing."

The panel also shot down Facebook's contention that the district court had abused its discretion in certifying the class. The social media giant had argued that Illinois'

extraterritoriality doctrine precluded the California district court from finding predominance and that a class action was not superior to individual actions due to the potential for a staggering and enormous statutory damages award in this case.

Because the threshold question of exactly which consumers BIPA applies to can be decided on a classwide basis, predominance is not defeated, according to the panel.

"If the violation of BIPA occurred when the plaintiffs used Facebook in Illinois, then the relevant events occurred 'primarily and substantially' in Illinois, and there is no need to have mini-trials on this issue," the panel said. "If the violation of BIPA occurred when Facebook's servers created a face template, the district court can determine whether Illinois' extraterritoriality doctrine precludes the application of BIPA ... And of course, if future decisions or circumstances lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can decertify the class."

The panel also found that the potential for the certified class — which is expected to include millions of Facebook users — to recoup uncapped statutory damages of between $1,000 and $5,000 per violation was not a reason to decertify the class.

"Where neither the statutory language nor legislative history indicates that the legislature intended to place a cap on statutory damages, denying class certification on that basis would 'subvert [legislative] intent,'" the panel ruled. "Here, nothing in the text or legislative history of BIPA indicates that a large statutory damages award would be contrary to the intent of the General Assembly."

Counsel for the plaintiffs on Thursday applauded the ruling and said they were looking forward to the case being remanded to the district court and for a trial to begin.

The Ninth Circuit's decision to review the class certification decision put on hold a trial in the case, which had been scheduled to begin on July 9, 2018, but the plaintiffs' attorneys said Thursday that, barring additional appellate review, they expected the case to soon be set on U.S. District Judge James Donato's trial calendar.

"The collection and potential misuse of biometric information is the primary battleground around which the key consumer privacy fights are currently being waged," Edelson PC founder Jay Edelson, whose firm is among those representing the plaintiffs, said in an emailed statement. "We are, thus, intensely gratified by the Ninth Circuit's ruling and are excited to try what will be both the most significant and the largest consumer privacy case to go before a jury."

A Facebook spokesman said Thursday that the company is planning to seek further review of the decision.

"We have always disclosed our use of face recognition technology and that people can turn it on or off at any time," the spokesman added.

U.S. Circuit Judges Ronald M. Gould and Sandra Segal Ikuta and U.S. District Judge Benita Y. Pearson, sitting by designation, sat on the panel.

The Facebook users are represented by John Aaron Lawson and Rafey S. Balabanian of Edelson PC, Susan K. Alexander and Shawn A. Williams, Paul J. Geller, Stuart A. Davidson, Lucas Olts, Christopher C. Gold and John H. George of Robbins Geller Rudman & Dowd LLP and Michael P. Canty and Corban S. Rhodes of Labaton Sucharow LLP.

Facebook is represented by Lauren R. Goldman, Andrew J. Pincus and Michael Rayfield of Mayer Brown LLP.

The case is Nimesh Patel et al. v. Facebook Inc., case number 18-15982, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Katherine Rautenberg

Update: This article has been updated to add additional details about the decision and comment from the parties.