

Ruling against Facebook could propel additional biometric lawsuits, Business Insurance, ft. Stefan Dandelles

Stefan Dandelles, co-managing partner of the Kaufman Dolowich Voluck LLP Chicago office and chair of KD's fidelity and surety practice group, was quoted in a Business Insurance article written by Judy Greenwald - August 20, 2019.

A federal appeals court decision allowing a class action lawsuit accusing Facebook of violating Illinois' biometric law through its facial recognition technology to proceed could trigger more litigation, experts say.

An increase in biometric-related lawsuits could create significant liabilities for policyholders and their insurers under commercial general liability and professional liability policies, according to one policyholder attorney.

The 9th U.S. Circuit Court of Appeals in San Francisco affirmed a lower court ruling when it held in its Aug. 8 decision in Nimesh Patel v. Facebook Inc. that plaintiffs could proceed with their litigation on the basis that they had alleged "concrete and particularized harm" sufficient to confer standing under Article III of the Constitution, when Facebook used its facial-recognition technology to have its users' Facebook friends tagged without their consent.

The 9th Circuit ruling follows a January ruling by the Illinois Supreme Court in Rosenbach v. Six Flags Entertainment Corp., which unanimously held plaintiffs can sue firms under Illinois' Biometric Information Privacy Act for allegedly failing to properly notify people about their policies, even if no actual harm is claimed.

"Ultimately, the 7th Circuit is likely, perhaps in the long term, to decide whether it agrees with the 9th as it relates to the violations of BIPA being enough to constitute a concrete injury under Article III, although this is obviously hard to predict," said Stefan R. Dandelles, Chicago-based chair of Kaufman Dolowich & Voluck LLP's fidelity and surety practice group. "I don't think it creates a nationalization of any particular standard. Other circuits may disagree."

"It's also a situation where, in my opinion, not all BIPA violations are created equal as it relates to Article III standing," he said.

In the Facebook case, Facebook was using the facial recognition data as part of its social media platform, not just collecting it.

"That's different, arguably, than a violation where someone stores or collects biometric information but doesn't use it," he said. "I think courts will have to look at each situation on a case-by-case basis."