

III. Ruling Could Be Watershed Moment For BIPA Cases

By **David Poell** (December 14, 2022)

Last month, the Appellate Court of Illinois, Second District, issued the first precedential decision to clarify the requirements for filing suit under Section 15(a) of Illinois' Biometric Information Privacy Act in *Mora v. J&M Plating Inc.*[1]



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Section 15(a) of BIPA generally mandates that private entities in possession of biometric data develop, publish and comply with a written policy for retaining and destroying such data.[2]

But Section 15(a)'s text contains no time limits by which an entity must establish a retention-and-destruction policy for biometric data. So, crucial questions lingered.

Can a company violate Section 15(a) if it collects individuals' biometrics without such a policy in place? Relatedly, how long can a company wait to roll out a policy?

The Mora Decision

Enter *Mora v. J&M Plating*. In *Mora*, the defendant employer first collected its former employee's biometric fingerprint, for timekeeping purposes, in 2014, but the employer waited until 2018 to publish a written retention-and-destruction schedule for its employees' biometrics.

The former employee alleged the defendant's four-year delay violated Section 15(a), and the appellate court agreed. Reversing the trial court's summary judgment ruling in favor of the defendant, *Mora* held that Section 15(a) requires companies to establish a retention-and-destruction schedule immediately upon their possession of biometric data.[3]

To ensure compliance with BIPA's Section 15(a), a company should have a retention-and-destruction policy in place on the day it begins collecting individuals' biometric information.[4]

After *Mora*, any company that delays establishment of a written policy risks a potential lawsuit alleging a Section 15(a) violation.

Section 15(a) Claims and Article III Standing

But *Mora*'s effect on BIPA litigation could transcend the discrete question of when a private entity must implement a written biometric policy. *Mora* also calls for reexamination of the doctrinal foundations for barring certain Section 15(a) claims from federal court on jurisdictional grounds.

Specifically, the *Mora* decision could portend an expansion of federal jurisdiction over Section 15(a) claims arising out of an entity's failure to develop or publish a written biometric policy.

The U.S. Court of Appeals for the Seventh Circuit's 2020 decision in *Bryant v. Compass Group USA Inc.* found no Article III injury for such claims because "the duty to disclose

under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects." [5]

For this reason, Bryant concluded BIPA plaintiffs lack Article III standing to bring a Section 15(a) claim based on "a mere failure to publicly disclose a data-retention policy," according to Fox v. Dakota Integrated Systems LLC in the Seventh Circuit in 2020. [6]

The Seventh Circuit's ruling in Fox v. Dakota recognized Article III standing for Section 15(a) claims based on the unlawful retention of biometric data, finding that unlawful retention does inflict a privacy injury on the plaintiff. [7]

The Bryant-Fox holdings therefore created two categories of Section 15(a) violations: Those that give rise to Article III standing, i.e., failure to comply with a retention policy, and those that do not, i.e., failure to develop or publish a policy.

So not all Section 15(a) claims are created equal for Article III standing purposes under controlling Seventh Circuit law. [8] BIPA plaintiffs in federal court can only vindicate violations of those private rights protected by BIPA.

In contrast, an alleged violation of BIPA's public rights does not result in a concrete and particularized injury under the Bryant-Fox rubric. [9]

Reexamining Federal Standing for Section 15(a) Violations After Mora

As the first Illinois state appellate court decision to construe Section 15(a)'s requirements, Mora deserves close attention.

A core purpose of Section 15(a), identified in Mora, is to notify any individual whose biometric data is in an entity's possession that the entity has a retention-and-destruction schedule for the individual's stored biometric data. [10]

And that means Section 15(a)'s notification duty does not only apply to the public at large — it also applies to every individual who provides their biometric data to a private entity.

Per Mora, if a company collects an individual's biometrics without first implementing a biometric policy, it violates the individual's statutory right conferred by Section 15(a). [11]

Bryant's narrow conception of Section 15(a) — protecting only public rights — is not easily reconciled with Mora's holding. Mora makes clear that Section 15(a) protects the private rights of all individuals who provide biometric data to a private entity.

Mora also indicates that a BIPA plaintiff who asserts a Section 15(a) violation based on an entity's failure to develop and publish a policy alleges a violation of a personal right to know basic information about the entity's retention and destruction practices governing his or her stored biometric data.

Indeed, the Mora opinion sought to harmonize Sections 15(a) and 15(b) by requiring disclosure of the retention-and-destruction policy at the same time the company seeks informed consent to collect an individual's biometric data. [12]

The Article III standing analysis applied in Bryant further demonstrates how the individualized harm inflicted by a failure-to-publish violation could qualify as a concrete and particularized injury post-Mora.

Applying the public-private rights rubric espoused by U.S. Supreme Court Justice Clarence Thomas in a 2016 concurring opinion in *Spokeo Inc. v. Robins*, Bryant found the plaintiff's Section 15(b) claim asserted

a violation of [the plaintiff's] own rights — her fingerprints, her private information — and that this is enough to show injury-in-fact without further tangible consequences.[13]

By the same token, Mora's Section 15(a) claim asserted a violation of his own private right to statutorily mandated information in the form of a biometric retention-and-destruction policy. In short, the violation of any private right — whether under Section 15(a) or Section 15(b) — should suffice for standing under Bryant's analytical framework.

Even if the Seventh Circuit were to reconsider Bryant, reject Justice Thomas' rubric[14] and instead analyze a failure-to-publish claim as a type of informational injury, the Section 15(a) violation could still be enough to establish standing in a post-Mora landscape.

Bryant explained the "injury inflicted by nondisclosure is concrete if the plaintiff establishes that the withholding impaired her ability to use the information in a way the statute envisioned." [15] And Mora concluded that the duty to develop a written policy upon possession of an individual's biometric data furthers BIPA's preventative and deterrent purposes.[16]

An entity thus undermines these purposes by collecting individuals' biometric data without a published retention-and-destruction policy.

What's more, an entity that withholds substantive information it must disclose also deprives individuals of information to which they are entitled under Section 15(a) — i.e., the contents of a written policy.

Such deprivation could reasonably constitute a concrete injury particularized to each individual whose biometric data has been unlawfully collected.

Practical considerations also warrant reconsidering federal standing for Section 15(a) violations. Finding Article III standing for failure-to-publish claims would likely prevent BIPA plaintiffs from remanding those claims to state court following removal to federal court.

In the years since Bryant, federal courts have repeatedly remanded Section 15(a) claims to state court — for lack of standing — despite keeping Section 15(b) claims pending in the same lawsuit in federal court.[17]

As a result of this procedural quirk, parties are increasingly forced to litigate a single BIPA action in two forums.

And because Article III standing is always a threshold jurisdictional question, federal courts must parse BIPA complaints to figure out whether the plaintiff has alleged only a failure-to-publish claim — no standing per Bryant — or alternatively, a failure-to-comply claim for which standing exists under Fox.

Needless to say, piecemeal litigation of BIPA claims in state and federal courts is not a model of efficiency. Recognizing federal standing for failure-to-publish claims could conceivably end this nettlesome practice.

Conclusion

Is Mora a watershed case that will open the doors of the federal courthouse to Section 15(a) claims predicated on an entity's failure to publish a written biometric policy?

Time will tell, but the Mora opinion provides a road map for doing precisely that.

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[1] Mora v. J&M Plating, Inc., 2022 IL App (2d) 210692 (Nov. 30, 2022).

[2] See 740 ILCS 14/15(a).

[3] See 2022 IL App (2d) 210692, ¶ 40 ("The duty to develop a schedule is triggered by possession of the biometric data."); id. ¶ 38 ("The explicit trigger for the development of the written policy (i.e., the retention-and-destruction schedule) is the private entity's possession of biometric data.").

[4] See id. ¶ 39.

[5] Bryant v. Compass Group USA Inc., 958 F.3d 617, 626 (7th Cir. 2020).

[6] Fox v. Dakkota Integrated Sys. LLC, 980 F.3d 1146, 1154 (7th Cir. 2020) (discussing Bryant).

[7] See Fox, 980 F.3d at 1154-55. Section 15(a) imposes three related obligations. See, e.g., Mora, 2022 IL App (2d) 210692, ¶ 38 ("[S]ection 15(a) specifies that a private entity in possession of biometric data must (1) develop a written policy, (2) publish it, and (3) comply with it.") (internal quotations omitted).

[8] Bryant also held that an alleged violation of BIPA's section 15(b) constitutes a concrete and particularized injury sufficient for Article III standing. See 958 F.3d at 626 (finding defendant "withheld substantive information to which Bryant was entitled and thereby deprived her of the ability to give the informed consent section 15(b) mandates"). But Mora only concerns section 15(a).

[9] See Bryant, 958 F.3d at 626 (holding plaintiff "did not suffer a concrete and particularized injury as a result of Compass's violation of section 15(a)").

[10] Mora, 2022 IL App (2d) 210692, ¶ 40. Section 15(a)'s other purpose is to require private entities to comply with the retention-and-destruction schedule—assuming such schedule exists. Id.

[11] See id. ¶ 39 ("[W]e also conclude that the duty to develop a schedule upon possession of the [biometric] data necessarily means that the schedule must exist on that date, not

afterwards.").

[12] See *id.* ("We can discern no rational reason for the legislature to have intended that a private entity 'develop' a 'retention schedule and guidelines for permanently destroying' (*id.* § 15(a)) biometric data at a different time from that specified in the notice requirement of section 15(b), which itself must inform the subject of the length of time for which the data will be stored (i.e., retained), etc.").

[13] *Bryant*, 958 F.3d at 624. Justice Thomas originally drew the distinction between private rights and public rights in his concurrence in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 343–48 (2016) (Thomas, J., concurring). Since the *Bryant* decision, however, Justice Thomas has failed to persuade a majority of justices to adopt his proposed private–public rights framework for analyzing Article III standing. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting) ("The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is not—and never can be—an injury sufficient to establish standing."). Justices Breyer, Kagan and Sotomayor joined Justice Thomas's *TransUnion* dissent.

[14] See note 13, *supra*. Interestingly, though, four Seventh Circuit judges in active service recently pressed for adoption of the public–private rights structure notwithstanding its rejection by the *TransUnion* majority. See, e.g., *Pierre v. Midland Credit Mgmt., Inc.*, 36 F.4th 728, 735 n.2 (7th Cir. 2022) (Hamilton, J., joined by Rovner, Wood & Jackson-Akiwumi, JJ., dissenting from denial of petition for reh'g en banc) ("One path toward more specific guidance for lower federal courts for these [standing] problems would be to embrace the distinction between private rights and public rights, at least as regards consumer-protection statutes.").

[15] *Bryant*, 958 F.3d at 624 (citing cases).

[16] See *Mora*, 2022 IL App (2d) 210692, ¶ 39.

[17] See, e.g., *Kashkeesh v. Microsoft Corp.*, No. 21-cv-3229, 2022 WL 2340876, at *2-3 (N.D. Ill. June 29, 2022) (remanding section 15(a) claim where plaintiffs only alleged that Microsoft failed to disclose its retention and destruction policy); *Garner v. Buzz Finco LLC*, No. 3:21-cv-50457, 2022 WL 1085210, at *3 (N.D. Ill. Apr. 11, 2022) (severing and remanding section 15(a) claim to state court because plaintiff did not allege defendants failed to comply with a data retention schedule); *Woods v. FleetPride, Inc.*, No. 1:21-cv-01093, 2022 WL 900163, at *5 (N.D. Ill. Mar. 27, 2022) (severing and remanding section 15(a) claim predicated "only on the failure to publish a retention and destruction policy").