Washington Legal Foundation

September 22, 2017

On the Merits:

HADIT SANTANA,

Plaintiff,

and

VANESSA VIGIL & RICARDO VIGIL,

Plaintiffs-Appellants,

v.

TAKE-TWO INTERACTIVE SOFTWARE, INC.,

Defendant-Appellee.

No. 17-303-cv

US Court of Appeals for the Second Circuit

Question Presented: Whether the district court correctly dismissed Plaintiffs' putative class action for lack of a concrete injury under Article III.

Summary of the Case: Plaintiffs Vanessa and Ricardo Vigil are siblings who bought and played a basketball video game made by defendant Take-Two. The game includes an interactive feature that allowed the Vigils to take scans of their faces to create personalized virtual basketball players, which the Vigils then voluntarily used while playing the game with others via the Internet. The Vigils are the lead plaintiffs in this putative class action raising claims against Take-Two under the Illinois Biometric Information Privacy Act ("BIPA"), 740 Ill. Comp. Stat. 14/1 *et seq.* (2008).

Plaintiffs claim that their use of the game's face-scan feature caused Take-Two to obtain their protected "biometric information," and that Take-Two violated BIPA by failing to establish and publish biometric data retention and destruction policies; failing to store, transmit, or protect their biometric information in an appropriately secure way; and collecting and using their biometric information without express written consent. The district court dismissed Plaintiffs' complaint for lack of Article III standing, finding that Plaintiffs had failed to adequately allege a "concrete" injury as required under *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

On the Merits:
Judgment for Defendant-Appellee
Patrick Carome & Eric Fletcher
WilmerHale

To establish Article III standing, Plaintiffs must show that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). An "injury in fact" must be both "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The Supreme Court's recent *Spokeo* decision and our recent decision in *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016), have elaborated upon the "concrete" injury requirement. As we explained in *Strubel*, "tangible harms are most easily recognized as concrete injuries." 842 F.3d at 188. Here, Plaintiffs do not allege any "tangible" injuries, *i.e.*, that Take-Two improperly disclosed or misused their biometric information or that the manner in which their information was transmitted or stored has led to its theft or misuse.

That, however, does not end the inquiry. *Spokeo* teaches that "'[c]oncrete' is not … necessarily synonymous with 'tangible,'" and that certain "intangible injuries can … be concrete." 136 S. Ct. at 1549. Specifically, the Court recognized that Congress (and, here, we assume for the sake of argument, state legislatures) can elevate "*de facto* injuries" to make them legally cognizable. *Ibid*.

But not every statutory violation automatically crosses the Article III threshold. For example, a "bare procedural violation" of a statute that is "divorced from any concrete harm" and which does not create "the real risk of harm" is insufficient to show a concrete injury-in-fact. *Ibid*. When assessing intangible harms, federal courts should (1) look to "both history and the judgment of [the Legislature]," *ibid.*, to identify the core interest protected by the statute and then (2) determine whether the particular statutory violation alleged by the plaintiff poses "a real risk of harm" to that interest, *Strubel*, 842 F.3d at 190.

Thus, we first look to the statute to determine what interest it was designed to protect. Plaintiffs contend that BIPA was intended to create a broad substantive privacy right in biometric information, but this contention finds no meaningful support in the statute. Instead, as the district court recognized, BIPA was enacted to protect biometric information from misuse or theft. *See generally* 740 Ill. Comp. Stat. 14/5. More specifically, the legislative findings establish the Legislature's desire to encourage the use of biometric information in transactions, while also (1) reducing the risk of identity theft posed by unregulated storage and transmission of this data and (2) preventing misuse of biometric information for purposes not related to the underlying transaction. *Ibid*.

Spokeo also teaches that we should "consider whether an intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit." 136 S. Ct. at 1549. Here, the district court rightly recognized that the alleged harm to the broad substantive privacy right Plaintiffs claim to find in BIPA goes far beyond the most analogous common-law right. *See Lawlor v. N. Am. Corp. of Ill.*, 983 N.E.2d 414, 424 (Ill. 2012).

The remaining question is whether Plaintiffs have shown that the technical violations of BIPA they allege pose "a real risk of harm" to the statutorily-protected interest of protecting biometric information from misuse or theft. *Strubel*, 842 F.3d at 190. They have not. Plaintiffs knowingly and voluntarily sat for lengthy face scans so they could use the game feature at issue; they fail to explain how a more detailed consent form would have reduced any risk of harm presented by the collection of their information. Likewise, Plaintiffs fail to explain how their voluntary disclosure of their personalized avatars to other players while playing the game created any real risk of harm. And Plaintiffs offer no reason to think that Take-Two's failure to publish a data retention policy causes an impending risk of harm. While one may speculate about the theoretical—but here unrealized—possibility of a data breach or other theft, Article III standing requires more. Speculation or fear about future actions of others "is insufficient to create standing." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 417 (2013); *Lujan*, 504 U.S. at 569 (holding that "conjectural or hypothetical" harms are insufficient to create standing).

For the foregoing reasons, we affirm district court's well-reasoned decision to dismiss the action for lack of injury-in-fact standing under Article III.

Dissenting View:
John Davisson
Electronic Privacy Information Center (EPIC)

Because the district court erred in applying the elements of Article III standing, the decision below should be reversed.

To establish an "injury in fact" sufficient for Article III standing, Plaintiffs need only allege "an invasion of a legally protected interest" that is (1) particularized, (2) concrete, and (3) actual or imminent. *Spokeo*, 136 S. Ct. at 1548. "Concrete" is not synonymous with "tangible"; many intangible injuries—such as violations of privacy rights—qualify as concrete according to "both history and the judgment" of legislators. *Id*. at 1549.

The district court misapplied this standard in several key respects. First, the district court wrongly cast Plaintiffs' injuries as "speculative" and "remote." Plaintiffs' allegations, taken as true, leave nothing to speculation: Take-Two violated Plaintiffs' statutory privacy rights the moment it unlawfully collected their biometric data. By acquiring Plaintiffs' facial scans without satisfying its BIPA obligations, Take-Two illegally deprived Plaintiffs of control over their personal information. Defendant thus invaded Plaintiffs' "right to privacy in their personal biometric data"—precisely the concrete interest that BIPA was enacted to protect. *In re Facebook Biometric Info. Privacy Litig.*, No. 15-CV-03747-JD, 2016 WL 2593853, at *10 (N.D. Cal. May 5, 2016).

Plaintiffs also contend that Take-Two illegally disseminated their facial scans to other NBA 2K15 players—allegations which further reinforce Plaintiffs' Article III standing. But even if Take-Two were the sole party to have accessed Plaintiffs' biometric data, Plaintiffs would still have standing. Article III recognizes no distinction between the unlawful collection of private information by one party and the unlawful dissemination of that information to multiple parties. Both are injuries in fact.

Second, the lower court wrongly concluded that Plaintiffs must allege some "additional harm" beyond the legal injury they have identified. But Article III requires only an *injury in fact* to establish standing—not a showing of consequential harm. *See Spokeo*, 136 S. Ct. at 1548; *compare "Injury," Black's Law Dictionary* (10th ed. 2014) (defining legal injury as the "violation of another's legal right, for which the law provides a remedy"), *with "Harm," id.* (defining harm as "material or tangible detriment").

As this Court explained in *Strubel v. Comenity Bank*, the violation of a statutory right is an injury in fact *"by itself,"* so long as that right exists "to protect a plaintiff's concrete interests" and the "violation presents a 'risk of real harm' to that concrete interest." *Strubel*, 842 F.3d at 190 (emphasis added). Where, as here, Plaintiffs contend that defendants have *already* invaded their concrete privacy interests, the injury-in-fact requirement is clearly satisfied. Courts may weigh damages and consequential harm in a merits analysis, but these considerations are irrelevant to Plaintiffs' Article III standing.

Third, the district court adopted an artificially narrow view of informational injury, then wrongly rejected Plaintiffs' standing on those grounds. An informational injury occurs whenever a plaintiff is denied information due to it under statute, which is precisely what Plaintiffs allege here. *FEC v. Akins*, 524 U.S. 11, 21 (1998). "[A plaintiff's] circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006).

It is not for courts to second guess Illinois law by deciding whether BIPA's required disclosures feel too "minimal" or whether they sufficiently advance the "core object" of the statute. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 901 (1985) (explaining that the judiciary may not "sit as superlegislature to judge the wisdom or desirability of legislative policy determinations"). The Illinois Legislature granted consumers a right to certain

disclosures prior to collection of their biometric data—a right which Take-Two violated. Plaintiffs need allege nothing more to establish an informational injury in fact.

Finally, it is no answer to say that Plaintiffs consented to the collection or dissemination of their biometric data by Take-Two. The question of consent, if relevant, might go to the *merits* of plaintiffs' claims, but it has no bearing on the constitutional sufficiency of the injuries they allege. And even if it were relevant to Article III standing, any "consent" that Take-Two obtained from plaintiffs was legally insufficient under BIPA because it was not obtained in writing.

Because plaintiffs have adequately alleged a concrete violation of their legally protected privacy interests, I would reverse the decision below. I respectfully dissent.

Patrick Carome is a Partner in the Washington, DC office of Wilmer Hale, where his practice focuses on representing communications and media companies in high-stakes litigation; **Eric Fletcher** is a Senior Associate in the Washington, DC office of Wilmer Hale. **John Davisson** is Appellate Advocacy Fellow at the Electronic Privacy Information Center (EPIC), a public-interest research center in Washington, DC that focuses public attention on emerging privacy and civil-liberties issues.

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