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Designing a BIPA Defense: Using Arbitration Agreements and Class Action Waivers to Limit BIPA Liability

By Jeffrey N. Rosenthal and David J. Oberly*

Over the last 18 months or so, companies that utilize fingerprint scanners and other biometric technologies have faced a relentless wave of class action litigation filed in connection with purported violations of Illinois' Biometric Information Privacy Act ("BIPA").

2019 was a rough year for BIPA defendants, as courts issued a string of plaintiff-favorable decisions that greatly expanded the scope of potential BIPA liability, while limiting many of the major defenses. As just one example, after several significant setbacks, Facebook agreed to pay $550 million to settle a longstanding BIPA dispute over allegations the social media giant improperly used facial recognition technology to support its photo "tagging" feature.

In 2020, however, the tide may have started to turn – at least for now – in favor of BIPA defendants. One of the more significant decisions is *Miracle-Pond v. Shutterfly, Inc.*,[1] in which a federal court held a plaintiff was required to pursue her BIPA claims in individual arbitration, despite the fact the arbitration provision was not added to the company's Terms of Use until a year *after* the plaintiff originally agreed to them. The *Shutterfly* decision is a significant win for BIPA defendants and demonstrates how arbitration agreements and class action waivers can be utilized as a key strategy for mitigating BIPA liability.

OVERVIEW OF THE ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

BIPA is generally considered the most stringent of all biometric privacy laws currently in effect. BIPA is also the only biometrics law to offer a private right of action, which permits the recovery of statutory damages of $1,000 for negligent violations and $5,000 for intentional/reckless violations. These statutory damages – which the Illinois Supreme Court has made clear can be recovered even where no actual harm or damage is sustained

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[1] N.D. Ill. May 15, 2020.

– combined with the ability to recover attorney's fees, provide noteworthy incentives for plaintiffs' attorneys to pursue class actions. This mix of uncapped statutory damages and a low bar for establishing harm led to an explosion of bet-the-company BIPA class litigation in 2019, which continued apace into 2020 – until very recently.

DISTRICT COURT SENDS FEDERAL BIPA SUIT TO BINDING ARBITRATION

In *Miracle-Pond v. Shutterfly, Inc.*, two individuals sued Shutterfly claiming the company's use of its facial recognition technology violated BIPA. Of the two plaintiffs, only Vernita Miracle-Pond maintained an account with Shutterfly, which was created in 2014. To complete the registration process, Miracle-Pond had to agree to Shutterfly's Terms of Use, which included both a revision clause and a class action waiver.

Significantly, the revision clause stated Shutterfly "may revise these Terms from time to time by posting a revised version" and explained a user's continued use of the app subsequent to any such revisions constituted the user's acceptance of the changes. The revision clause did not require notice of revisions to Shutterfly users beyond posting the new terms.

The 2014 Terms did not, however, include an arbitration provision; this provision was added to Shutterfly's Terms of Use in 2015 and was thereafter included in every later version of the Terms.

After the filing, Shutterfly moved to compel arbitration and stay the federal litigation pending the outcome. In so doing, Shutterfly argued that, as a user of the app, Miracle-Pond had agreed to Shutterfly's Terms of Use – including the provision mandating individual arbitration. The District Court agreed with Shutterfly, granting its motion to compel arbitration for Miracle-Pond and staying the federal court proceedings.

In its opinion, the court first addressed the parties' dispute over whether the alleged agreement between Miracle-Pond and Shutterfly was a "clickwrap" or "browsewrap" agreement. A clickwrap agreement is formed when a website user clicks a button or checks a box that explicitly affirms their acceptance of the terms after having the opportunity to scroll through the terms posed on the website. A browsewrap agreement does not require such affirmative acceptance.

The court rejected Miracle-Pond's argument that the Terms of Use were merely a browsewrap agreement, finding instead that it was a valid and enforceable clickwrap agreement. The court highlighted that Shutterfly's page presented the Terms of Use for viewing, stated that clicking "Accept" would be considered acceptance of the Terms of Use, and offered both "Accept" and "Decline" buttons. Thus, Miracle-Pond agreed to be bound by Shutterfly's Terms of Use when she created her account.

The court also rejected Miracle-Pond's argument that even if a contract was formed between her and Shutterfly, she could not be forced to arbitrate her claim because the 2014 Terms of Use did not include an explicit arbitration provision and arbitration clauses subject to unilateral modification are illusory.

In particular, the court found this contention lacked merit due to the inclusion of a valid change-in-terms provision in the 2014 Terms of Use. Pursuant to this change-in-terms provision, Miracle-Pond agreed her continued use of Shutterfly's services would communicate her assent to the most recent version of the Terms posed online at the time of her use. Because Miracle-Pond continued to use her account after Shutterfly posted its amended Terms in 2015, she accepted those modifications, including the inclusion of the 2015 arbitration clause.

Lastly, the court rejected Miracle-Pond's argument she could not be forced to arbitrate her claim because Shutterfly failed to provide notice of the 2015 modification and she was never informed of the change. Here, the court highlighted the fact that under Illinois law, when an agreement expressly reserves the right of the drafter to unilaterally modify the terms and conditions of the agreement, at any time, and without notice – and the customer accepts this condition by signing the agreement – the drafter's right to subsequently modify the arbitration provision in that agreement ends only with its termination.

Further, when parties agree in advance to allow unilateral modifications to contractual terms, subsequent modifications are binding regardless of whether the other party later "accepts" the change. Here, Miracle-Pond was thus bound to the 2015 modifications, as Shutterfly had posted the modified terms on its website in 2015 and Miracle-Pond indicated her acceptance thereof by continuing to use Shutterfly's services.

As such, the court held Miracle-Pond had entered into a valid arbitration agreement, thus compelling the court to grant Shutterfly's motion to compel arbitration.

TIPS AND BEST PRACTICES

The expansive risk posed stemming from the alleged improper collection, use, storage, and dissemination of biometric data has given all businesses utilizing such technologies cause for concern.

Fortunately – as the *Shutterfly* decision demonstrates – one key strategy to minimize the risk of becoming embroiled in high-stakes class litigation is through mandatory arbitration provisions and class action waivers (including in employment and Terms of Use agreements).

To maximize the ability to compel arbitration of BIPA lawsuits, companies should consider the following tips:

- Avoid trying to "hide the ball" when including arbitration provisions in larger agreements; rather, provide notice at the beginning of the agreement that highlights the inclusion of an arbitration provision, direct the reader to where he/she locate the provision, and place the arbitration provision itself clearly and conspicuously at the beginning of the agreement;

- Incorporate the use of broad language in the arbitration provision to cast a wide net in terms of the scope of claims subject to arbitration and ensure the provision encompasses any potential claims or disputes that may arise under Illinois's biometric privacy statute;

- Where applicable, specify that the Federal Arbitration Act ("FAA") and federal arbitration law applies to the issue of arbitration, and provide an easy-to-read description of what arbitration entails and the rights the individual is relinquishing by agreeing to arbitration;

- Specify that "gateway" issues, such as disputes about arbitrability – or, in other words, whether the parties agreed to arbitrate a dispute – will also be decided by an arbitrator, and not a court; and

- Ensure all class action waivers include explicit language that makes clear that – in addition to precluding class action litigation – class arbitration is also barred under the agreement as well – to remove any doubt that arbitrations must be conducted on an individual basis.

Ultimately, the use of arbitration agreements and class action waivers is a vital risk mitigation strategy that should be incorporated whenever appropriate to limit BIPA risk. Companies that do not currently have arbitration provisions/class action waivers in their agreements should work closely with experienced counsel to revise their agreements to include this key tool.

At the same time, those companies whose agreements currently contain arbitration provisions and class action waivers are also well advised to consult with counsel to evaluate the efficacy of their existing agreements under the shifting body of case law surrounding arbitration agreements. This includes ensuing companies are compliant with the current state of the law to avoid any unexpected pitfalls resulting from improper or outdated language that could lead a court to invalidate the provision.