Saint Louis University Law Journal

Volume 67
Number 2 *General Issue (Winter 2023)*

Article 8

2023

Preventing Gamesmanship: BIPA Class Action Litigation in the State and Federal Forums

Mary Fletcher
mary.fletcher@slu.edu

PREVENTING GAMESMANSHIP: BIPA CLASS ACTION LITIGATION IN THE STATE AND FEDERAL FORUMS

ABSTRACT

Since the passing of Illinois's Biometric Information Privacy Act (BIPA) in 2008, there have been many class action lawsuits filed by plaintiffs seeking relief for violations that occur as a result of companies improperly collecting, storing, or transferring biometric information. Although the Class Action Fairness Act (CAFA) would allow many of these class action plaintiffs to file their lawsuits in federal court, it appears that these plaintiffs prefer the state forum, usually filing their complaints in Illinois state courts. Defendants, on the other hand, typically attempt to remove such cases to federal court, applying the provisions of CAFA to do so. As a result of these dynamics between the parties, class action plaintiffs have started tailoring their complaints to avoid removal to the federal forum altogether through utilizing the Supreme Court's decision in Spokeo v. Robins, Inc. *In that case, the Supreme Court held that, to have an injury-in-fact for Article III standing, a plaintiff must allege more than merely a technical violation of a statute. In contrast, the Supreme Court of Illinois held that, in relation to BIPA lawsuits, such technical violations were acceptable for standing purposes in Illinois state court. Thus, to avoid removal, the class action plaintiffs have begun tailoring their complaints, minimizing their injuries to "bare procedural violations," such that they cannot meet the standing requirements for federal court, but can meet the requirements for standing in state court. In response, the defendants must argue that the plaintiffs' injuries are more than mere technical violations if they want to remain in federal court; moreover, defendants appear more willing to engage in this role reversal between the parties than to simply remain in state court. This comment will analyze the role reversal occurring between the class action plaintiffs and the defendants in the BIPA class action cases that arrive before the federal courts, and will argue that the* Spokeo *holding, which is being used as the mechanism for gamesmanship between the parties, should be reconsidered by the Supreme Court.*

INTRODUCTION

The Biometric Information Privacy Act (BIPA) was passed by the Illinois General Assembly on October 3, 2008, making Illinois the first state to regulate biometric information.[1] BIPA limits what businesses can do with data such as face-scans and fingerprints so as not to infringe on the privacy rights of the individual.[2] The intention of BIPA was to protect residents of Illinois against the unlawful collection, use, and transfer of biometric information through the creation of a private right of action with statutory damages for violations.[3] With the continued advancement of technology, the need to protect the individual's biometric information is becoming more apparent to lawmakers, especially as other states move to adopt BIPA-modeled legislation.[4]

Since the passing of BIPA, there has been a substantial amount of litigation surrounding whether plaintiffs have the right to bring their cause of action in federal court and whether defendants can remove such cases; specifically, there has been a question of whether plaintiffs have Article III standing.[5] *Spokeo, Inc. v. Robins* remains the standard set by the Supreme Court: a plaintiff cannot satisfy the demands of Article III by alleging "a bare procedural violation."[6] *Spokeo* has long been criticized as doing nothing more than creating an additional hurdle for plaintiffs to clear.[7] However, in the context of BIPA, *Spokeo* is being utilized in a strange way: to avoid litigation in the federal forum.

This is especially true in relation to class action lawsuits: approximately 80% of the class actions asserting claims under the BIPA are originally filed in state court.[8] Additionally, there appears to be a particular favorite state forum of class action plaintiffs: Cook County Circuit Court.[9] With more than three

1. *See* Kathryn E. Deal et al., Rosenbach v. Six Flags—*Illinois Supreme Court Takes Expansive View of Statutory Standing under the Biometric Information Privacy Act*, 31 NO. 4 INTELL. PROP. & TECH. L.J. 17, 17–18 (2019).

2. Shira Ovide, *The Best Law You've Never Heard Of*, N.Y. TIMES (2021), https://www.nytimes.com/2021/02/23/technology/the-best-law-youve-never-heard-of.html [https://perma.cc/L4AS-GWKL].

3. Deal, *supra* note 1, at 19.

4. *Id.* at 18.

5. *Id.*

6. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016); *See* Vanessa K. Ing, Spokeo, Inc. v. Robins*: Determining What Makes an Intangible Harm Concrete*, 32 BERKLEY TECH. L.J. 503, 504 (2017).

7. *See* Joshua Scott Olin, *Rethinking Article III Standing in Class Action Consumer Protection Cases Following* Spokeo v. Robins, 26 U. MIAMI BUS. L. REV. 69, 72 (2017).

8. Alison Frankel, *7th Circuit Won't Stay Remand in BIPA Class Action, Offering Road Map to State Court*, REUTERS (2021), https://www.reuters.com/article/legal-us-otc-bipa/7th-circuit-wont-stay-remand-in-bipa-class-action-offering-road-map-to-state-court-idUSKBN2B22N6 [https://perma.cc/K4C7-H54J].

9. *Id*.

hundred BIPA class actions filed in 2019 alone,[10] Cook County Circuit Court has become a magnet for BIPA class action lawsuits largely due to judges who allow wide-ranging discovery, a plaintiff-friendly jury pool, and relaxed standards of class certification.[11] It makes sense, then, why class action plaintiffs have a preference for this state forum, where these factors weigh in favor of a plaintiff's victory.

It also follows, given the adversarial system, that defendants in these class action lawsuits might choose to remove BIPA class actions to the federal forum. The Class Action Fairness Act (CAFA) grants defendants the ability to remove class action lawsuits that are filed in state court to federal court, "as long as the cases involve at least one hundred plaintiffs, one of whom must be from outside of the defendant's home state, and potential liability of at least five million dollars."[12] CAFA, which was enacted in 2005, sought to expand federal diversity jurisdiction over large class action lawsuits in response to the perceived abuses of the class action device in state courts.[13]

However, despite the policy goals of CAFA, class action plaintiffs are using *Spokeo* and carefully characterizing their injuries as "bare procedural violations" in order to avoid removal to the federal forum. Thus, when defendants attempt to remove the BIPA class action to federal court, plaintiffs will often argue that, applying *Spokeo*, they do not have Article III standing given that they are only suffering "bare procedural violations," with the aim to get the case remanded back to the state forum.[14]

As a result of *Spokeo*, a role reversal between the parties is occurring once a BIPA case arrives in the federal forum: in an effort to be remanded back to state court, plaintiffs are minimizing their injuries to "bare procedural violations," and defendants, in an effort to stay in federal court, are left to "champion" the plaintiffs' right to sue in federal court, arguing that the plaintiffs' injuries are greater and different than what the plaintiffs have alleged.[15] This type of gamesmanship directly violates the purpose of CAFA; to stop abuses of the class action device.[16]

10. *Cook, Madison and St. Clair Counties, Illinois*, ATR FOUNDATION (2021), https://www.judicialhellholes.org/hellhole/2021-2022/cook-madison-and-st-clair-counties-illinois/ [https://perma.cc/2T2P-YWA6].

11. Frankel, *supra* note 8 (citing a 2019 Seyfarth Shaw study).

12. *Id.*

13. *Class Action Fairness Act of 2005: Early Judicial Interpretations*, EVERYCRSREPORT (2006), https://www.everycrsreport.com/reports/RL33507.html [https://perma.cc/3DR7-XJN7].

14. *See* Thornley v. Clearview AI, Inc., 984 F.3d 1241, 1243 (7th Cir. 2021); *see also* King v. PeopleNet Corp., 2021 WL 5006692, at *4 (N.D. Ill. 2021).

15. *See* Thornley v. Clearview AI, Inc., 984 F.3d 1241, 1242 (7th Cir. 2021); *see also* Bryant v. Compass Grp. USA, Inc., 958 F.3d 617, 620 (7th Cir. 2020); *see also* King v. PeopleNet Corp., 2021 WL 5006692, at *4 (N.D. Ill. 2021).

16. EVERYCRSREPORT, *supra* note 13.

This Note explores the new legal landscape presented by BIPA class action litigation and the need to address the current gamesmanship that is occurring. Part I of this Note examines the history and background of BIPA, CAFA, and *Spokeo*. Part II delves into the role reversal occurring in the federal forum and how plaintiffs are using *Spokeo's* holding as a tool to remain in state court. Finally, Part III considers a potential solution through the Supreme Court revisiting *Spokeo*, thereby preventing such gamesmanship.

I. HISTORY AND BACKGROUND

A. BIPA

In 2008, The Illinois legislature sought to address concerns relating to identity theft and misuse of the unique biometric identifiers that are tied to a person's finances and personal information.[17] As opposed to other identifiers, such as social security or credit card numbers, people are not able to change biometric data when such data is compromised; as a result, infringement of biometric identifiers presents a more unique and dangerous avenue for people to suffer at the hands of identity theft.[18] Illinois became the first state to enact a law, BIPA, which regulates the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.[19] BIPA defines biometric identifiers as: (1) a retina or iris scan, (2) fingerprint, (3) voice-print, or (4) a scan of hand or face geometry.[20]

Notably, through the mechanism of the private right of action, BIPA attempts to stop businesses from obtaining individuals' biometric data without both providing notice to the individual and acquiring that individual's informed consent through the use of a written release.[21] BIPA also creates safeguards by prohibiting the selling, leasing, or trading of biometric data.[22] In creating strict guidelines for the collection, storage, and retention of biometric information, BIPA pushes businesses and other entities that obtain biometric data to adequately protect the privacy rights of the individual.[23] Perhaps the best part of

17. Rachel Nevarez, *The Biometric Information Privacy Act: Important Regulatory Safeguard or a Class Action Boon?*, DCBA (2019), https://www.dcba.org/mpage/v30rachelnevarez [https://perma.cc/8BP4-S33W].

18. *Id.*

19. Niya T. McCray, *Sensitive to the Touch: The Evolution of U.S. Biometric Privacy Law*, BRADLEY ARANT BOULT CUMMINGS LLP (May 2018), https://www.bradley.com/insights/publications/2018/05/the-evolution-of-us-biometric-privacy-law [https://perma.cc/GM6Q-LTN3].

20. McCray, s*upra* note 19; BIPA, 740 ILCS 14/10 (2008).

21. McCray, s*upra* note 19; BIPA, 740 ILCS 14/15 (b) (2008).

22. McCray, s*upra* note 19; BIPA, 740 ILCS 14/15 (c)-(d) (2008).

23. McCray, s*upra* note 19; BIPA, 740 ILCS 14/15 (a), (e)(2) (2008).

BIPA, at least from the lens of the consumer-plaintiff, is the private right of action for individuals alleging biometric data privacy violations.[24]

However, BIPA's statutory penalties of one thousand dollars for negligent violations and five thousand dollars for intentional or reckless violations have made the statute the "bane of corporate defendants."[25] Often, businesses and other private entities that are sued for BIPA violations complain that the statute does nothing more than create multi-million-dollar settlements for "non-existent injuries."[26] On the other hand, advocates of BIPA, including the plaintiffs' bar, note that "the infringement of an individual's privacy right is a real injury in itself worthy of vindication through statutory damages."[27]

In an employment context, BIPA has become incredibly impactful. For example, many employers have transitioned to the use of biometric data collection to track employee timecards in lieu of identification badges.[28] In addition, employers sometimes opt to use biometrics to secure business areas or devices, control access to information, trace employee trainings, and to track employees' attendance in wellness programs.[29] BIPA commands that employees consent to the employer's collection, retention, or storage of biometric data through a written release,[30] and employee plaintiffs typically sue employers for violating this informed consent requirement.[31] Interestingly, courts in Illinois have also started applying BIPA to third party vendors who have no direct relationships with plaintiffs, but "whose products are used by plaintiff's employees or in other settings to collect plaintiff's biometric data."[32] Thus, the injecting of products that collect biometric data into the stream of commerce will not necessarily serve to immunize manufacturers of such products from BIPA lawsuits.[33]

24. McCray, s*upra* note 19.

25. Charles N. Insler, *The Biometric Information Privacy Act (BIPA) Is Back Before the Illinois Supreme Court,* HEPLERBROOM LLC (Feb. 9, 2021), https://www.heplerbroom.com/blog/biometric-information-privacy-act-bipa-is-back-before-illinois-supreme-court/ [https://perma.cc/2VQT-UYUD].

26. Abby L. Risner & Lauren A. Daming, *SCOTUS Decision in* TransUnion LLC v. Ramirez *Raises Hurdle for Establishing Standing in Class Action Claims Under the Illinois Biometric Information Privacy Act and Other Data Privacy and Consumer Protection Statutes*, WESTLAW TODAY (July 13, 2021), https://www.greensfelder.com/media/event/583_Risner_Daming_Westlaw%20Today.pdf [https://perma.cc/UR4J-JAVE].

27. *Id.*

28. Gabrielle Neace, *Biometric Privacy: Blending Employment Law with the Growth of Technology*, 53 UIC J. MARSHALL L. REV. 73, 91 (2020).

29. *Id.* at 92.

30. McCray, s*upra* note 19.

31. Neace, *supra* note 28.

32. *BIPA Suits Against Third Parties: An Emerging Trend*, BECKAGE (Aug. 24, 2021), https://www.beckage.com/privacy-law/bipa-suits-against-third-parties-an-emerging-trend/ [https://perma.cc/5EBY-R6Z4].

33. *Id.*

B. CAFA

On February 18, 2005, President Bush signed CAFA into law, thereby amending Title 28 of the United States Code.[34] The purpose of CAFA was to "expand federal diversity jurisdiction over large class action lawsuits, in response to the perceived abuses of the class action device in state courts."[35] Through passing CAFA, Congress worked to correct a provision in federal jurisdiction law that prevented many class actions, particularly class actions national in scope, from being litigated in federal courts.[36]

In articulating the intention of CAFA, legislators noted the need to remedy past injustices causing harm both to those class action plaintiffs with legitimate claims and to those corporate defendants who have acted responsibly; in such cases, legislators wanted to ensure that class members did not receive unjustified rewards.[37] Thus, "Section 2(b) declares that the purposes of CAFA are to: 'assure fair and prompt recoveries for class members with legitimate claims,' and 'benefit society by encouraging innovation and lowering consumer prices.'"[38]

Before CAFA was signed into law in 2005, "complete diversity" of citizenship between all named plaintiffs and all named defendants was required in order for a defendant to properly remove a class action lawsuit to federal court based on diversity jurisdiction.[39] Complete diversity in a class action context meant that every plaintiff within the class had to be diverse from—or from a different state than—every named defendant.[40] However, under CAFA, complete diversity is not needed for a class action lawsuit to be removed to the federal forum based on diversity jurisdiction; rather, all that is needed is diversity between any class member and any defendant, in addition to an amount in controversy exceeding five million dollars.[41] CAFA also allows for individual

34. EVERYCRSREPORT, *supra* note 13.

35. Tim Barham*, Class Action Water Crisis: Resolving Flint's New Split over CAFA's Local Controversy Exception,* 70 BAYLOR L. REV. 149, 149–50 (2018).

36. EVERYCRSREPORT, *supra* note 13.

37. David Inkeles, In Re Deepwater Horizon *and the Need to Clean Up Rule 23(b)(3) Certification Jurisprudence Through Legislation*, 23 J.L. & POL'Y 741, 752 (2015); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified as amended at 28 U.S.C. § 1711).

38. Inkeles, *supra* note 37, at 752; *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (codified as amended at 28 U.S.C. § 1711).

39. Michael R. Pennington & Robert J. Campbell, *The Class Action Fairness Act: Just Because You Can Remove Doesn't Mean You Should,* BRADLEY ARANT BOULT CUMMINGS LLP 1, https://www.bradley.com/-/media/files/insights/events/2010/10/removal-and-forum-selection-issues-in-class-acti__/files/white-paper/fileattachment/cumberland_2010_seminar_cafa.pdf [https://perma.cc/BN7C-K6LC].

40. *See generally* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), *overruled on other grounds by* Louisville, C. & C.R. Co. v. Letson, 43 U.S. 497, 11 L. Ed. 353 (1844).

41. 28 U.S.C. § 1332(d)(2).

class members' claims to be aggregated to determine if the amount in controversy requirement is satisfied.[42] CAFA's purpose of expanding federal diversity jurisdiction over class action lawsuits is illustrated clearly through the relaxing of the complete diversity standard and through allowing individual class members' claims to be aggregated, essentially creating a path whereby most class actions can enter the federal forum so long as they meet these bare requirements.[43]

In many BIPA class actions, CAFA would allow for plaintiffs to file their complaints in federal court so long as they meet the diversity and amount in controversy requirements. However, as will be explored later in this Note, it is becoming increasingly obvious that plaintiffs have a preference for the state forum over the federal forum. It is likely not a coincidence that more than 80% of the class actions asserting claims under BIPA are originally filed in state court, and it is not until corporate defendants attempt to remove that the case comes before a federal court.[44]

C. Spokeo, Inc. v. Robins *and the Standing Doctrine*

Although Congress has the power to define and limit subject-matter jurisdiction, as through the enacting of CAFA, Article III standing creates an obstacle that Congress cannot simply override or relax.[45] Article III of the Constitution grants federal courts power over cases or controversies.[46] Standing is a judge-made doctrine based on the case or controversy requirement which determines whether a litigant is entitled to have a court rule on the merits of a dispute.[47] A plaintiff must have standing to bring a lawsuit, and the state and federal courts have different requirements that must be satisfied in order to prove that a plaintiff does, in fact, have standing to be in court. In order to establish Article III standing, the requisite standing to have a claim heard in federal court, a plaintiff must meet three requirements: "(1) the plaintiff must have suffered an injury-in-fact, (2) this injury in fact must be traceable to the actions of the defendant, and (3) the injury must be likely to be redressed by a favorable judicial decision."[48] This note will focus on the injury-in-fact requirement, as this is the element discussed in the landmark case *Spokeo, Inc. v. Robins*, which

42. EVERYCRSREPORT, *supra* note 13; 28 U.S.C. § 1332(d)(3).

43. EVERYCRSREPORT, *supra* note 13.

44. Frankel, *supra* note 8.

45. *See generally* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1778 (2020).

46. U.S. CONST. art. III, § 2 (The "Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States . . . .").

47. Ing, *supra* note 6, at 505.

48. *Id*.

remains the precedent for intangible harms in the form of privacy-related injuries.[49]

A plaintiff can establish an injury-in-fact by demonstrating that the harm experienced by the plaintiff is both "actual or imminent," and that the injury is "concrete and particularized."[50] Proving that a harm is "actual or imminent" means showing that the injury is not merely "conjectural or hypothetical," but rather something real that has caused or will imminently cause the plaintiff harm, whereas showing that an injury is concrete and particularized means both that the injury "actually exists," and that a plaintiff has a "personal stake in the outcome of the controversy."[51] It is important to note that a concrete injury can be either tangible or intangible, so long as the harm satisfies the injury-in-fact requirement;[52] however, this Note will focus on intangible harms that are constituted by the unlawful collection, use, retention, and transfer of an individual's biometric information.

Spokeo arose under the Fair Credit Reporting Act of 1970 (FCRA) and the central issue of the case was whether the plaintiff had Article III standing in alleging a violation under the FCRA.[53] The FCRA mandates that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" consumer reports and imposes liability on "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any" individual.[54] The petitioner, Spokeo, Inc., an alleged consumer reporting agency, operated a "people search engine," which searched over a wide spectrum of databases, gathering and providing personal information about individuals to a variety of users, including employers wanting to evaluate prospective employees.[55] After Thomas Robins, the respondent, discovered that his Spokeo-generated profile contained information which was inaccurate, he filed a class action lawsuit in federal court against Spokeo, alleging that Spokeo willfully failed to comply with the FCRA's requirements.[56] The district court dismissed Robins's complaint for lack of standing; however, a panel of the Ninth Circuit reversed.[57]

When the case arrived before the Supreme Court, Justice Alito, writing for the majority, noted that the case primarily concerned the injury-in-fact requirement: the "first and foremost of standing's three elements."[58] In

49. *Id.*
50. *Id.* at 506.
51. *Id.*
52. Ing, *supra* note 6, at 507.
53. Spokeo, Inc. v. Robins, 578 U.S. 330, 330 (2016).
54. 15 U.S.C. § 1681e(b); *see also id.* § 1681n(a).
55. *Spokeo*, 578 U.S. at 333, 336.
56. *Id.* at 333.
57. *Id.*
58. *Id.* at 338.

emphasizing the importance of this element of Article III standing, Justice Alito wrote that "[i]njury-in-fact is a constitutional requirement, and 'it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'"[59]

Although the *Spokeo* Court found that the Ninth Circuit was correct in its holding that Robins's injury was "particularized," in the sense that Robins was affected in a personal and individual way, the Court held the Ninth Circuit failed in the concreteness analysis.[60] In determining a concrete injury, the Court stated that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[61] Notably, the Court also reasoned that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[62]

In order to find a concrete injury for this intangible injury, the Court noted, Robins cannot simply allege "a bare procedural violation" because it is possible that a violation of one of the FCRA's procedural requirements may result in no harm at all.[63] A plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[64] Rather, a plaintiff must show something *more* than a simple violation of a statute for the plaintiff to have their claim heard in federal court.[65] Thus, the Court vacated the judgment of the Ninth Circuit and remanded for proceedings consistent with the *Spokeo* opinion.

In a dissenting opinion, Justice Ginsburg disagreed with the Court's concreteness analysis, arguing that the plaintiff's allegations "carry him across the threshold."[66] "Concreteness as a discrete requirement for standing," Justice Ginsburg described, "refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible."[67] Congress, through the FCRA's procedural requirements, intended to prevent the precise harm sustained by the plaintiff, and Congress possesses the necessary authority to characterize claims for relief where no such claims have existed before.[68] In emphasizing the

59. *Id.* at 339.
60. *Id.* at 339–40.
61. *Id.* at 341.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 352 (Ginsburg, J., dissenting).
67. *Id.*
68. *Id.* at 350–51, 354.

significance of Congress's judgment, Justice Ginsburg concludes that Robins's complaint already conveys a concrete injury.[69]

The *Spokeo* holding was re-affirmed in 2021, also in relation to a violation of the FCRA.[70] In *TransUnion v. Ramirez*, a class of consumers brought suit against TransUnion, a credit reporting agency, for using a third-party software that placed each of the consumers as a possible match to name on a list maintained by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals.[71] TransUnion placed an alert on each consumer's credit report, marking that the consumer was a "potential match" to a name on OFAC's list when a particular consumer's first and last name matched the first and last name on OFAC's list.[72] The class that filed suit alleged that TransUnion failed to use reasonable procedures under the FCRA to make sure that the credit files were accurate.[73] Writing for the majority, Justice Kavanaugh wrote that the class of 8,185 plaintiffs are required to demonstrate that they suffered a concrete harm for purposes of the injury-in-fact analysis.[74] Noting *Spokeo's* continued applicability, the Court assessed whether the asserted harm had "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts;" in describing such harms, Justice Kavanaugh noted that intangible harms can include "reputational harms, disclosure of private information, and intrusion upon seclusion."[75] Making it even more evident that the Court would not alter *Spokeo's* holding in relation to intangible injuries, Justice Kavanaugh stated, "No concrete harm, no standing."[76]

Although addressing the FCRA, *Spokeo* has affected putative privacy class actions brought under a wide array of federal laws, including the Video Privacy Protection Act (VPPA) and the Telephone Consumer Protection Act (TCPA), which both provide for a private right of action and statutory damages.[77] *Spokeo* has interestingly also had implications for BIPA, despite its status as a state law and not a federal statute.[78]

69. *Id.* at 354.

70. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

71. *Id.* at 2197.

72. *Id.*

73. *Id.*

74. *Id.* at 2200.

75. *Id.* at 2200, 2204.

76. *Id.* at 2200.

77. John Seiver & Bryan Thompson, *Supreme Court's "Standing" Ruling in* Spokeo *and Its Impact on Pending and Future Litigation*, DAVIS WRIGHT TREMAINE LLP (June 9, 2016), https://www.dwt.com/insights/2016/06/supreme-courts-standing-ruling-in-spokeo-and-its-i [https://perma.cc/FQL8-D25P].

78. Daniel Solove, *The Trouble with Spokeo: Standing, Privacy Harms, and Biometric Information*, TEACHPRIVACY (Jan. 6, 2019), https://teachprivacy.com/trouble-with-spokeo-standing-privacy-harms-and-biometric-information/ [https://perma.cc/4NMJ-QLUU].

The rigid *Spokeo* standard has been called into question as an authorization for courts to override legislatures' determinations of a cognizable privacy harm under a legislature's own statute.[79] *Spokeo,* it is argued, creates an obstacle for consumer plaintiffs: as a result of the holding, consumers face great hardship in successfully demonstrating injury in federal court, particularly in those cases, such as BIPA, where there are state statutes designed to provide protection, leaving injured consumers with little chance of receiving redress.[80] Nevertheless, *Spokeo* has remained the standard used in determining whether there is Article III standing for BIPA cases in federal courts.

However, what is strange about *Spokeo* in relation to Article III standing in BIPA cases is how it is being used as a tool by class action plaintiffs to get out of federal court altogether. Although it has been feared that *Spokeo* would create significant leeway for corporations and agencies that violate consumer protection statutes,[81] in the context of BIPA cases, it is actually being used as the tool by class action plaintiffs. Class action plaintiffs in BIPA cases use *Spokeo's* holding as a mechanism to get into their preferred forum through a type of gamesmanship which directly violates the policy goals of CAFA.

II. GAMESMANSHIP

A. Precedent Set by the State of Illinois

The Supreme Court's standing decisions are interpretations of the limits of the Article III judicial power of the federal courts and are binding on federal courts; however, such decisions are not binding on state courts.[82] In other words, the Seventh Circuit must apply the *Spokeo* standard when addressing whether the plaintiffs have suffered a concrete injury-in-fact in BIPA cases; however, Illinois courts need not apply *Spokeo* at all in determining standing. Illinois state courts can, and do, use a different standard when determining whether a plaintiff has the right to sue in state court.[83]

In 2019, the Illinois Supreme Court issued a critical ruling in *Rosenbach v. Six Flags Entertainment Corp.*, holding that a plaintiff who alleges a technical violation of BIPA's requirements, without otherwise alleging actual injury or harm, constitutes an "aggrieved person" authorized to bring a private right of action under the statute.[84] There, the defendant theme park used a fingerprinting

79. *Id.*

80. Olin, *supra* note 7, at 86.

81. *Id.*

82. *See* Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1163 (2018).

83. *See* Deal, *supra* note 1, at 18.

84. Rosenbach v. Six Flags Ent. Corp., 129 N.E.3d 1197, 1200, 1207 (Ill. 2019).

process when issuing passes into the park.[85] The defendant's system scanned pass holders' fingerprints, collected and recorded biometric identifiers and information taken from the fingerprints, and then stored that data in order to quickly verify customer identities before entering the theme park.[86] Plaintiff, on behalf of her fourteen year-old son, alleged that this collection and storage of information violated BIPA as neither mother nor son consented in writing to the taking of the fingerprint.[87] The Illinois Supreme Court concluded that a violation of BIPA, in and of itself, and with no other injury to the plaintiff, constitutes an invasion, impairment, or denial of the statutory rights of the person whose biometric information is collected, and thus is sufficient to support a statutory cause of action.[88]

Since this ruling, there has been a flood of new BIPA cases, many of which are class actions, entering the state forum.[89] Where possible, defendants have responded by removing to federal court.[90] In reviewing the dockets of Illinois federal district courts from November 2020 to January 2021, merely twelve BIPA complaints were filed in state court, although approximately thirty-six BIPA cases were removed from federal court to state court, suggesting that "defendants are steering cases to federal court more often than plaintiffs are filing them there."[91] Both the filing in state court by plaintiffs as well as the removal by defendants are largely motivated by *Spokeo*.

B. Role Reversal

In a class action context, where CAFA would make it easier for class action plaintiffs to file suit in federal court, plaintiffs are still choosing the state forum; and, perhaps more interesting, is the exact state forum most often being chosen: Cook County Circuit Court.[92] In 2019 alone, more than three hundred BIPA class actions were filed in Cook County.[93] Of these three hundred BIPA class actions, a vast majority were "no-injury" cases, in the sense that there were mere technical violations brought by employees against employers, whereby the class action plaintiffs tailored their complaints to specifically allege "bare procedural

85. *Id.* at 1200.

86. *Id*.

87. *Id.* at 1201.

88. *Id.* at 1206.

89. Christopher Ward & Aaron R. Wegrzyn, *BIPA in Review: Recapping the Seventh Circuit's Article III Standing Decisions*, FOLEY & LARDNER LLP (Jan. 21, 2021), https://www.foley.com/en/insights/publications/2021/01/bipa-review-recapping-seventh-circuits-article-iii [https://perma.cc/Y5Q6-VKSL].

90. *Id.*

91. Jennifer Marsh, *ANALYSIS: 7th Circuit's BIPA Rulings Provide State Court Roadmap*, BLOOMBERG LAW (Feb. 18, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-7th-circuits-bipa-rulings-provide-state-court-roadmap [https://perma.cc/YW9V-LY7C].

92. Frankel, *supra* note 8.

93. *Cook, Madison and St. Clair Counties, Illinois*, *supra* note 10.

violations,"[94] allowed by *Rosenbach* in state court, but not by *Spokeo* in federal court. Class action plaintiffs want to be in state court, often in Cook County, because of the wide-ranging discovery allowed, a plaintiff-friendly jury pool, and relaxed standards of class certification,[95] all of which weigh in favor of the plaintiffs' victory in the case.

Thus, it follows that the defendants in these class action BIPA cases often utilize CAFA to remove the case from a state forum like Cook County to federal court, in what they likely believe will be a more neutral forum.[96] Of course, defendants can only remove a case in which the requirements of CAFA are met: diversity between any class member and any defendant and the amount in controversy exceeding five million dollars.[97] However, while the filing of a class action BIPA lawsuit in a forum like Cook County, as well as the removal to federal court by the defendant, makes sense, what is becoming less clear is how to navigate the ramifications of this complicated issue. As a result of the strong preference that plaintiffs and defendants have for one forum over the other in BIPA cases, what is currently happening is a role reversal between the two parties when they arrive in the federal forum after removal. This role reversal is a type of gamesmanship that the policy goals of CAFA aimed to prevent. The vehicle that is causing this role reversal is the holding of *Spokeo*.

1. *Thornley v. Clearview AI*

Thornley v. Clearview AI illustrates the current dilemma well. In *Thornley*, the defendant utilized a software which functioned to "scrape" pictures from various social media sites "such as Facebook, Twitter, Instagram, LinkedIn, and Venmo."[98] Through this scraping process, the defendant's software harvested from each photograph the biometric facial scan and associated metadata, storing the information in its database.[99] At the time of litigation, this database included "literally billions of entries."[100] The defendant offered access to this database for users who wished to find out more about someone in a photograph, and many of the defendant's clients were law enforcement agencies.[101] The plaintiff filed suit in Circuit Court of Cook County on behalf of herself and her class, asserting violations of three subsections of BIPA: 740 ILCS 14/15(a), (b), and (c).[102] When the defendant removed the case to the federal forum under the provisions

94. *Id.*
95. Frankel, *supra* note 8.
96. *See id.*
97. *See* 28 U.S.C. § 1332(d)(2).
98. Thornley v. Clearview AI, Inc., 984 F.3d 1241, 1242–43 (7th Cir. 2021).
99. *Id*. at 1243.
100. *Id*.
101. *Id.*
102. *Id.*

of CAFA, plaintiff voluntarily dismissed the action and the dismissal was without prejudice.[103]

After dismissal, the plaintiff returned to the Circuit Court of Cook County on May 27, 2020, with a new, more tailored action against the defendant.[104] The lawsuit filed was significantly narrowed mainly in the fact that it alleged only a technical violation of BIPA § 15(c), 740 ILCS 14/15(c).[105] Once again, the defendant removed the case to the federal forum; however, this time the plaintiff moved to remand on the fact that she was asserting only a "bare procedural violation, divorced from any concrete harm," and thus lacked Article III standing.[106] The court noted that while the plaintiff is ordinarily the party who bears the burden of demonstrating an injury-in-fact for purposes of Article III standing, it need not always be the plaintiff; indeed, in this particular case, the defendant bears the burden of demonstrating an injury-in-fact as party who wants to be in the federal forum.[107] The court ultimately held that the defendant failed to "champion" the plaintiff's right to sue in federal court by not identifying a concrete and particularized harm to the plaintiffs.[108] The case was then remanded to state court.[109]

Thornley is an illustrative example of the role reversal happening in the federal forum with BIPA cases. The defendant, in its strong preference for a federal forum and through its removal, must take on the traditional role of the plaintiff to assert that the plaintiff's case can and should be heard in the federal forum and that the class action plaintiff's injury meets the standard set by *Spokeo*.[110] The defendant becomes the "champion" of plaintiff's right to be heard in the federal forum,[111] and is met with the harsh burden to show that the plaintiff experienced something *more* than a mere violation of BIPA, something that affects the plaintiff in a personal way and something that *actually exists* to satisfy the injury-in-fact requirement.[112] Hence, the defendant must argue plaintiff's injuries are both greater and different than what the plaintiff has claimed in order to be heard in federal court. The defendant must agree that a class of plaintiffs is injured and make the case that the class is particularly and concretely injured by the defendant's own actions.

What is even more bizarre about this scenario is that defendants, as in *Thornley*, appear *more* willing to do this, to concede that the defendant not only

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1244.
108. *Id.* at 1247.
109. *Id.* at 1249.
110. *Id.* at 1244.
111. *Id.*
112. Spokeo, Inc. v. Robins, 578 U.S. 330, 338–40 (2016).

violated BIPA but concretely injured the plaintiff, than to simply let the case be remanded back to the state forum. On the other hand, the class action plaintiffs are taking on the more traditional role of the defendant in the federal forum, insisting on a lack of Article III standing, minimizing injuries to "bare procedural violations," and asking to return to state court, with *Spokeo* as the mechanism of such return.

2. *Bryant v. Compass Group*

As in *Thornley*, in the *Bryant* case, the plaintiff brought a putative class action against the defendant in the Circuit Court of Cook County alleging violations of BIPA and the case was removed to the federal forum by the defendant under the provisions of CAFA.[113] The plaintiff then moved to remand the action back to the state court, arguing that because the plaintiff is lacking a concrete injury-in-fact required for Article III standing, the district court does not have the requisite subject-matter jurisdiction.[114] As in *Thornley*, the defendant argued that the plaintiff had a concrete injury, urging that "BIPA has elevated to protectible status" and that "a person's inherent right to control her own body, including the associated biometric identifiers and information" is enough to constitute a concrete injury.[115] Here, however, the court sides with the defendant and finds that the violation is enough to constitute a concrete injury and keeps the case in federal court.[116] "This was no bare procedural violation; it was an invasion of her private domain, much like an act of trespass would be."[117]

3. *King v. PeopleNet*

In *King v. PeopleNet Corp.*, the plaintiff filed a class action lawsuit in the Circuit Court of Cook County alleging violations of § 15(a), (b), and (c) of BIPA; in response, the defendants removed the case to the federal forum under CAFA.[118] As in *Thornley* and *Bryant*, plaintiffs, using *Spokeo*, moved to remand based on the allegations in King's complaint which articulated that injuries sustained by the class were "bare procedural violations."[119] The *King* court noted that the injuries suffered by the class action plaintiffs were "mere violation[s] of that duty" and, as such, they did not rise to the degree of a concrete injury which is demanded by *Spokeo*.[120] Based on the way that the plaintiffs' complaint was constructed in addition to the defendant failing to show a concrete injury

113. Bryant v. Compass Grp. USA, Inc., 958 F.3d 617, 620 (7th Cir. 2020).
114. *Id.*
115. *Id.* at 621.
116. *Id.* at 627.
117. *Id.* at 624.
118. 2021 WL 5006692 at *1, *9 (N.D. Ill. 2021).
119. *Id.* at *2.
120. *Id.* at *4.

suffered by the plaintiffs, the court found for the plaintiffs and remanded the case back to Cook County Circuit Court.[121]

III. THE NEED TO REVISIT *SPOKEO*

A potential solution to the conflict occurring in the federal forum would be for the Supreme Court to revisit *Spokeo* and determine how it would apply to a state specific statute like BIPA, which provides a private right of action based on intangible injuries. Judge Wood noted in the *Thornley* opinion, "allegations matter" and "a plaintiff is the master of her own complaint."[122] While this is true, the sort of gamesmanship which is occurring as a result of *Spokeo* and how it is being applied to BIPA cases are directly against the policy goals of CAFA, a law which was established for the very purpose of curbing abuses of the class action device by extending the reach of federal diversity jurisdiction over state law class actions.[123] While the plaintiff is the master of the complaint, if class action plaintiffs can carefully characterize their injuries as "bare procedural violations," they can then avoid the federal forum altogether, and this type of manipulation directly opposes the goals of CAFA.[124] The question becomes, then, to what extent can the plaintiff master her complaint without violating the policy goals of CAFA? If a class of plaintiffs has suffered a truly grave injury, an injury which is more than a "bare procedural violation," then it violates the purpose of BIPA to characterize the injury as a "bare procedural violation." After all, BIPA was created by the Illinois legislature specifically to safeguard the biometric information of individuals and allow individuals a means to hold violators accountable through the creation of a private right of action,[125] and such minimization of injury seems counterintuitive to the statute's purpose.

Thus, there is an inherent conflict between the goal of BIPA and the utilization of *Spokeo* as a tool to get into plaintiffs' preferred forums by minimizing injuries related to BIPA to "bare procedural violations." The question of how far a class of plaintiffs can go in regard to mastering their complaint without violating the purposes of both CAFA and BIPA through a clever manipulation of *Spokeo* is a question that should be directly addressed by the Supreme Court. While not all BIPA cases can be heard in federal court, to take away removal as an option is to take away the purposes of CAFA and diversity jurisdiction.[126] "If *Spokeo* and *TransUnion* are carried to their logical

121. *Id.* at *8, *9.

122. Thornley v. Clearview AI Inc., 984 F.3d 1241, 1246 (7th Cir. 2021).

123. EVERYCRSREPORT, *supra* note 13.

124. Deal, *supra* note 1, at 19.

125. *See* John L. Ropiequet et al., *The Next Big Thing: Current Issues Under the Illinois Biometric Information Privacy Act*, 74 CONSUMER FIN. L. Q. REP. 43, 44 (2020).

126. EVERYCRSREPORT, *supra* note 13.

conclusion, common and longstanding private rights of action for countless laws, including copyright law, might no longer be viable in federal court."[127]

In *Thornley*, Judge Hamilton wrote a concurrence to the majority opinion which stated that the lower federal courts have "already spilled a great deal of ink interpreting the Supreme Court's statement in *Spokeo* that the plaintiff could not satisfy Article III standing 'by alleging a bare procedural violation.'"[128] "Given the number of cases in this and other lower courts finding only 'bare procedural violations,' it is worth emphasizing that the only example the Court actually provided was utterly trivial: an incorrect zip code in the information about a debtor under the Fair Credit Reporting Act."[129] The judge wrote that the Seventh Circuit has taken *Spokeo* too far in recent opinions without giving proper credence to *Spokeo's* support of Article III standing in instances where Congress, or here, a state legislature, has intended to create a private right of action for those consumer plaintiffs suffering intangible injuries.[130] Finally, Judge Hamilton noted his hope that, sooner or later, "the Supreme Court will revisit the problem of standing in private actions based on intangible injuries under a host of federal consumer-protection statutes."[131]

Judge Hamilton's concurrence harkens back to some of the warnings provided in Justice Ginsburg's dissent in *Spokeo*. Justice Ginsburg argued that Congress, though the FCRA's procedural requirements, aimed to prevent the harm sustained by the plaintiff and Congress can use its power to "confer rights and delineate claims for relief where none existed before."[132] Taking the opinions of Judge Hamilton and Justice Ginsburg in tandem, the Supreme Court, in revisiting *Spokeo*, should consider Congress's intent with more gravity. Justice Ginsburg is, of course, speaking about FCRA in relation to Congress's intent: to safe-guard the interests of consumers by ensuring credit reporting agencies maintain sufficient levels of accuracy within credit reports.[133] With reference to a state-specific statute like BIPA, the Court would consider the Illinois legislature's purpose: to safeguard the biometric information of individuals and allow individuals a means to hold violators accountable through the creation of a private right of action.[134] Just as Congress intended to create a

127. Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 65 (2021), https://www.bu.edu/bulawreview/2021/07/21/standing-and-privacy-harms-a-critique-of-transunion-v-ramirez/ [https://perma.cc/CJQ2-8NAM].

128. Thornley v. Clearview AI, Inc., 984 F.3d 1241, 1250 (7th Cir. 2021) (Hamilton, J., concurring).

129. *Id.*

130. *Id*. at 1251.

131. *Id.*

132. Spokeo, Inc. v. Robins*,* 578 U.S. 330, 350–51, 354 (2016) (Ginsburg, J., dissenting).

133. *See* Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 115 COLUM. L. REV. 2311, 2311 (2015).

134. *See* Ropiequet et al., *supra* note 125, at 51, 57.

way for consumers to address harms created by violations of the FCRA,[135] the Illinois State legislature clearly intended for there to be redressability for individuals who fall victim to a violation of BIPA.[136]

Congress's intent could go even further, however. Through enacting CAFA, Congress intended to "assure fair and prompt recoveries for class members with legitimate claims," and "benefit society by encouraging innovation and lowering consumer prices."[137] Congress intended, specifically, to curb abuses of the class action device.[138] In reconsidering *Spokeo*, the Supreme Court should consider not only Congress's intent in relation to enacting the specific statute at issue, but Congress's intent related to CAFA and how parties could potentially violate CAFA through the manipulation of a doctrine created by the Supreme Court, as is occurring with *Spokeo*.

Spokeo has been widely criticized as "doing little more than creating an additional hurdle for plaintiffs to clear by requiring them to demonstrate both a statutory violation and, where not apparent from or intrinsic to that violation, injury-in-fact that is both concrete and particularized."[139] Of course, in the BIPA context, that extra hurdle is being used to the class action plaintiff's benefit in returning to the state forum. More dangerous than the creation of an extra hurdle, however, is the concern that *Spokeo* provides a mechanism for courts to use their powers to supersede what the state legislatures have decided constitutes a harm to their state's citizens.[140]

The Supreme Court could curtail the gamesmanship in the Seventh Circuit through the selective application of the logic in *Spokeo*. The Court should reconsider the argument presented by Justice Ginsburg as well as the majority opinion's discussion on the importance of the history and judgment of Congress in the determination of a concrete injury-in-fact. The Supreme Court should also consider the significance of CAFA in their interpretation of Congress's intent and judgment. The Supreme Court should revisit *Spokeo* and how it should apply to a state-specific law like BIPA to prevent the current dilemma occurring in Seventh Circuit from happening in other states and circuits as more BIPA-type laws come into effect across the nation. In revisiting this case, the Court should reflect on the goals of BIPA, to protect Illinois residents against the unlawful collection, use, and transfer of biometric information, the purpose of CAFA and diversity jurisdiction generally, how *Spokeo* is currently being used by class action plaintiffs, and how to move forward towards a just resolution.

135. Olin, *supra* note 7, at 74.

136. Ropuequet et al., *supra* note 125, at 56.

137. Inkeles, *supra* note 37, at 752; *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified as amended at 28 U.S.C. § 1711).

138. EVERYCRSREPORT, *supra* note 13.

139. Seiver & Thompson, *supra* note 77.

140. Solove, *supra* note 78.

CONCLUSION

While BIPA only applies to residents of Illinois, with the advancement of technology, the evident need to protect people's biometric privacy, and the influx of BIPA-modeled laws that have been passed recently, this problem could become less isolated within the state of Illinois and the Seventh Circuit. Indeed, this could become a more national problem across states and across circuits, as others look to the precedent set by the Seventh Circuit and the state of Illinois for guidance. Rather than seeing the current situation as an unavoidable consequence of the new legal landscape presented by BIPA litigation, instead, the matter should be considered with some concern for the road ahead. Thus, the Supreme Court should revisit *Spokeo* to give instruction on how the holding should apply to a state-specific law which provides a private right of action based on intangible injuries, keeping in mind the policy goals both of the statute itself and of CAFA.

MARY FLETCHER*

* Student at Saint Louis University School of Law, Class of 2023.