COMMENTARY

Dismissal of Virtual Try-On Class Action Illustrates Power of Health Care Exemption as BIPA Defense

A powerful defense has emerged for the targets of VTO suits, and online eyewear retailers in particular—BIPA's health care exemption.

September 15, 2022 at 11:00 AM

Privacy

By David J. Oberly, Squire Patton Boggs | September 15, 2022 at 11:00 AM

For almost two years now, online retailers that utilize virtual try-on ("VTO") tools have faced a barrage of class action litigation alleging that their technology violates the Illinois Biometric Information Privacy Act ("BIPA"). During this period, a powerful defense has emerged for the targets of VTO suits, and online eyewear retailers in particular—BIPA's health care exemption.

Relying on this exemption, Frames for America, Inc. ("FFA") defeated a class action lawsuit alleging it improperly collected shoppers' face geometry data through its VTO tool in violation of Illinois's biometric privacy statute. The opinion—*Svoboda v. Frames For America, Inc.*, No. 21 C 5509, 2022 U.S. Dist. LEXIS 162077 (N.D. Ill. Sept. 8, 2022)—illustrates the strength of this defense to procure outright dismissals in BIPA class actions involving eyewear brands.

Background

Frames for America, Inc. is an online eyewear retailer that sells prescription and non-prescription glasses through its website. FFA offers shoppers a VTO tool on its site, which allows users to virtually "try on" a set of eyewear frames to see how they might look on them prior to making a purchase by virtually placing the frames on the user's face.

Tanya Svoboda ("Svoboda") filed suit against FFA, alleging that the retailer's VTO tool ran afoul of BIPA's privacy policy, data retention, notice/consent, and disclosure requirements. Svoboda did not consult with a medical professional while using the VTO tool, did not request any treatment from FFA, and did not purchase any glasses from FFA.

In response, FFA moved to dismiss the complaint under Federal Civil Rule 12(b)(6), arguing that Svoboda could not establish a cognizable BIPA claim against it because the law's health care exemption served as a complete defense to liability against FFA. The exemption provides that "[b]iometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996."

BIPA's Health Care Exemption Proves Fatal to Plaintiff's VTO Suit Against Eyewear Retailer

The court agreed, finding Svoboda's claim to be nearly identical to the claim that was dismissed in *Vo v. VSP Retail Dev. Holding, Inc.*, No. 19 CV 7187, 2020 U.S. Dist. LEXIS 53916 (N.D. Ill. Mar. 25, 2020). In *Vo,* the plaintiff used another company's VTO software, then sued for violations of BIPA. An Illinois federal court dismissed the complaint, finding that the alleged biometric identifiers at issue in that case—scans of face geometry—fell under BIPA's health care exemption. Applied to Svoboda's complaint, the court held that her BIPA claims arising out of the use of FFA's VTO tool were also barred by the same health care exemption.

In so doing, the court rejected several arguments asserted by Svoboda in her attempt to avoid dismissal of her class action suit. First, the court found Svoboda's arguments that BIPA's health care exemption did not apply because she was not a recipient of any health care service and, in turn, not a patient, and also because she did not receive any health care service because she was not treated by any "trained and licensed professionals," to be without merit.

Here, the court noted that prescription lenses, non-prescription sunglasses, and frames used to hold prescription lenses are all Class I medical devices under U.S. Food and Drug Administration ("FDA") regulations. In this regard, both prescription lenses and non-prescription sunglasses "maintain or restore physical . . . well-being" by correcting or protecting vision. As a result, even if Svoboda did not personally consult with any trained or licensed professional, she would have received a "health care service" had she purchased glasses from FFA.

In addition, Svoboda also argued that she was not a "patient" as the term is used in the health care exemption, as she only used the VTO tool to see if she liked the style of the glasses she had selected—not in anticipation of any medical care or treatment. Critically, however, Svoboda alleged in her complaint that the VTO software "accurately simulated what [she] would look like wearing different pairs of glasses."

The court found this allegation fatal to Svoboda's argument, as similar fitting and evaluation services are offered in optometrists' offices when a patient is considering which pair of frames to purchase. As such, even if Svoboda did not ultimately purchase any frames or glasses, the fitting and evaluation services she received constituted a health care service. Thus, Svoboda was a "patient," as she was the recipient of a "various personal service." And as stated in *Vo,* the court noted, "[a]n individual cannot escape BIPA's health care exemption simply by choosing to forego the health care service for which they were evaluated."

Taken together, the court held that in using the VTO software, Svoboda was a patient receiving a health care service in a health care setting. Consequently, BIPA's health care exemption was applicable to the claims asserted against FFA, precluding FFA from being held liable under Illinois's biometric privacy statute for its alleged collection and use of Svoboda's biometric identifiers or information. As such, the court dismissed the BIPA class action suit with prejudice.

Analysis & Takeaways

As indicated above, *Svoboda* is not the first VTO biometric privacy class action to fail as a matter of law based on the law's health care exemption. In *Vo v. VSP Retail Dev. Holding, Inc.*, VSP Retail Development Holding, Inc. ("VSP") successfully utilized the health care exemption to obtain the dismissal of a BIPA suit involving the company's VTO software that was offered on its website.

VSP sold prescription and non-prescription glasses on its e-commerce site. The court found that because prescription and non-prescription eyewear are medical devices under FDA regulations, VSP provided health care by selling eyewear and offering a service or procedure that affects the function of the body, namely vision. VSP's VTO software facilitated this health care service by replicating the diagnostic services typically performed by an eye care professional, such as measuring an individual's face to ensure the appropriate fit.

Thus, in allegedly obtaining the plaintiff's face geometry to accomplish these objectives, VSP's VTO tool collected biometric information from a patient in a health care setting. In turn, the purported biometric identifiers at issue fell within BIPA's health care exemption and VSP could not be held liable for the collection or use of the plaintiff's biometric data. Further—and in similar fashion to *Svoboda*—in granting VSP's motion to dismiss, the court rejected the plaintiff's argument that the health care exemption was inapplicable because the she never a patient of VSP and never sought or received any health care or treatment from VSP.

Taken together, *Vo* and *Svoboda* demonstrate the power of BIPA's health care exemption, which can serve as a valuable tool for eyewear brands in the defense of BIPA claims to definitively defeat bet-the-company class action lawsuits alleging purported violations of Illinois's stringent biometric privacy statute.

At the same time, *Svoboda* also demonstrates the broad scope of the health care exemption and the ability to procure outright dismissals in a wide range of BIPA suits—even those outside the VTO context—through the assertion of this defense, where the facts underlying the litigation involve prescription or *non-prescription* eyewear.

David J. Oberly *is an attorney in the Cincinnati office of Squire Patton Boggs LLP and a member of the firm's global Data Privacy, Cybersecurity & Digital Assets practice. David's practice focuses on counseling and advising clients on a wide range of biometric privacy, artificial intelligence, and data privacy/security compliance and risk management matters, as well as defending high-stakes, high-exposure biometric privacy and privacy class action litigation.*