OUT OF FOCUS

PLAINTIFFS LAWYERS TAKE AIM AT WEB ACCESS AND PRIVACY.

WHATEVER YOUR FEELINGS ABOUT THE PLAIN-tiffs bar, you have to admire its resourcefulness. In recent months, plaintiffs lawyers have devised new types of class action lawsuits that are catching companies off guard.

These aren't your father's class actions. They involve cutting-edge technology. And they reflect the ever-growing importance of e-commerce, which increased by 20 percent in 2015 and is expected to double by 2019.

Here's one example: Dozens of companies, from The Home Depot Inc. to the National Basketball Association Inc., have been accused of not making their websites accessible to blind or deaf users. The U.S. Department of Justice could stem the tide of lawsuits by clarifying what companies need to do, but the agency recently announced that it wouldn't offer guidance until 2018.

Biometric data such as facial scans and fingerprints have also become fodder for class actions. The second half of 2015 brought a rash of lawsuits alleging mishandling of this powerful data, including several cases relating to Facebook Inc.'s use of facial recognition software. These suits will likely increase as more states enact legislation to regulate the rapidly growing biometrics industry, which was worth an estimated $7 billion in 2014 and could be worth $44 billion by 2020, according to the research firm Radiant Insights.

Plaintiffs lawyers are scrutinizing electronic payments as well. In recent months, there has been a wave of class actions alleging unauthorized deductions from bank accounts. Because of the way the statute at issue is written, a single defendant can face multiple class actions, each purporting to represent plaintiffs in a different geographic region. "It's like death by a thousand cuts," says Donald Maurice, name partner at Maurice Wutscher, a financial services law firm.


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BY JAN WOLFE

WEBSITE ACCESSIBILITY: A NEW LITIGATION COTTAGE INDUSTRY

IS YOUR COMPANY'S WEBSITE OR APP ACCESSIBLE TO users who have vision, hearing or physical disabilities? If not, brace for potential litigation. And don't expect clarity anytime soon from the U.S. government on what's actually required.

The Americans with Disabilities Act prohibits discrimination in places of public accommodation such as shops and hotels. There's long been debate over what's required of websites under the ADA. In 2010, the DOJ suggested in a public notice that websites don't need to be fully accessible as long as there is an alternative way to access the goods and services provided on the website.

The DOJ later seemed to shift position, however. In 2014, it intervened in private litigation against H&R Block Inc. and signaled that companies should code their websites in compliance with the Web Content Accessibility Guidelines, a set of nonbinding standards. H&R agreed to overhaul its website and apps as part of a March 2014 consent decree.

The H&R Block consent decree has proved to be a road map for plaintiffs lawyers. In 2015, the floodgates opened for website accessibility lawsuits. More than 40 cases were filed against companies such as Red Roof Inns Inc. and Reebok International Ltd. The defendants are frequently accused of violating the ADA by not making their websites compatible with screen reader technology, which converts text and images to audio or braille, and other assistive technologies.

Defense lawyers wish that the DOJ would clarify its position once and for all. But in November, the DOJ announced that it wouldn't issue any proposed rules until 2018.

The DOJ's inaction has put companies in a difficult spot. Companies don't want to pay for upgrades, figuring that they should wait for the DOJ guidance. But waiting puts them at risk of being the next target for litigation. "The thing that's so frustrating about this legal situation is that the DOJ hasn't put companies on notice," says Minh Vu, a defense lawyer at Seyfarth Shaw. "The DOJ lulled companies into a sense of security," she says, "and then pulled a 180."

Some defendants have tried to get these cases stayed (i.e., halted), arguing that it doesn't make sense to litigate until the DOJ weighs in. But that argument isn't succeeding. Most recently, a judge refused to issue stays in cases against Harvard University and the Massachusetts Institute of Technology, which are accused of violating the ADA by not providing closed captioning for online lectures. The judge held that the court "already has access to the views of the DOJ to an appreciable extent."

Vu calls that ruling "very bad news for other defendants." Expect more of these cases to follow.

JAY EDELSON HAS FILED MULTIPLE PRIVACY LAWSUITS.

RYAN LOWRY; ISTOCK (ICON)

BIOMETRICS HAVE ARRIVED—AND SO HAVE THE CLASS ACTIONS

AS 2015 CAME TO A CLOSE, THERE WAS A RASH OF putative class actions alleging unlawful use of biometric data. The courts are just beginning to wade into these suits. But one defendant, Shutterfly Inc., recently struck out on a motion to dismiss—an encouraging sign for plaintiffs.

Once the stuff of science fiction novels, biometric data now has many uses. In the workplace, fingerprints can be used to grant facility access or log an employee's hours. Banks are increasingly using voiceprints to verify users. And photo-sharing platforms such as Facebook Inc. and Shutterfly are using facial recognition technology to identify people in uploaded photos.

Illinois was home to early pilot programs testing biometric technology. Recognizing the potential for privacy violations, Illinois legislators enacted a law in 2008, the Biometric Information Privacy Act (BIPA), that requires private entities to notify individuals that their data is being collected and obtain their consent in writing.

BIPA is a plaintiffs lawyer's dream statute. A plaintiff who shows a violation can recover statutory damages of $1,000 to $5,000 per offense, plus costs and attorney fees. By some estimates, Facebook could be liable for billions of dollars in damages.

Yet it took seven years for a plaintiffs lawyer to bring a big BIPA case. That someone was Chicago-based Jay Edelson, called "tech's least friended man" by The New York Times because of his many privacy lawsuits against tech companies. In an April 2015 lawsuit filed on behalf an Illinois resident, Edelson's law firm accused Facebook of basically ignoring BIPA when it unveiled its new facial recognition technology, known as DeepFace, which has a 97.5 percent rate of accuracy.

In July, a judge granted a request to transfer Edelson's case to Northern California. The judge also consolidated the case with two copycat cases.

Facebook isn't alone. BIPA lawsuits have more recently been filed against the online scrapbook company Shutterfly, the video game company Take-Two Interactive Software Inc. and the tanning salon chain L.A. Tan Inc. (Believe it or not, tanning salons have been using fingerprint scanners instead of membership cards for years to monitor tanning addicts and limit their access.)

"As companies incorporate this technology, they are going to be faced with these lawsuits, because, frankly, from the plaintiff's perspective they are pretty easy to bring," says David Almeida, a Chicago-based defense lawyer at Sheppard, Mullin, Richter & Hampton. "You have standardized conduct tailor-made for a class action. And you have statutory damages. It's the best of all worlds for plaintiffs."

The Shutterfly case was the first to produce a substantive ruling—and it's a discouraging one for Facebook. BIPA expressly states that photographs aren't the sort "biometric identifiers" the law is concerned with, so Shutterfly's lawyers argued that, if photographs fall outside the scope of the statute, so does information gleaned from photographs. But a U.S. district judge in Chicago refused to dismiss the case on the basis of that argument, which Facebook has also made in the California cases.

The Shutterfly ruling could "open the door" to more litigation, says Jason Koransky of the Chicago firm Pattishall, McAuliffe, Newbury, Hilliard & Geraldson. "Now that this statute is gaining publicity and there is greater awareness of it, lawyers will find good plaintiffs and good targets," he says.

Many of these cases will have merit, predicts Koransky. "The compliance provisions of [BIPA] are not simple," he says. "It's not going to be very difficult to find companies that haven't complied with this statute."

Facebook should prevail in the California cases, argues Sheppard Mullin's Almeida. "The plaintiffs are taking a well-intentioned statute and extending it to places it wasn't designed to go," he says. "Facebook and Shutterfly have compelling defenses."

But Almeida agrees with Koransky that smaller defendants that use biometrics, like L.A. Tan, should be worried. Facebook can credibly argue that the statute doesn't cover facial scanning technology, "but the L.A. Tans of the world can't make that argument. [Fingerprints] truly are biometric information."

There could be even more suits if other states enact biometrics legislation like BIPA. So far, Texas is the only other state with a law protecting biomet-

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rics. But similar laws are pending in Alaska and Washington. Compliance will also become trickier because "you'll have a patchwork of laws to deal with," says Koransky.

Defendants in BIPA cases could get some help from the U.S. Supreme Court. The high court will soon decide a case, *Spokeo Inc. v. Robins*, that poses a huge question in many types of class actions, including BIPA cases: Does a plaintiff have standing to sue if there's been a technical violation of a right created by statute but no actual, tangible injury? In other words, do plaintiffs suing over a statute such as BIPA need to show that they were actually harmed?

Justice Antonin Scalia's death in February may have tipped the scales in favor of the plaintiffs bar. Before his death, the court seemed likely to side with the defense bar by a 5-4 vote. But now the money is on a 4-4 split, in which case the ruling under appeal—a pro-plaintiff decision from the U.S. Court of Appeals for the Ninth Circuit—would stand.

FEELING THE PAIN FROM PAYMENTS

A FEW YEARS AGO, BANKS GOT HIT WITH A TORRENT of class actions over ATM fees and overdraft fees. The statute at the center of those case, the Electronic Fund Transfer Act, is now grist for class actions over the common practice of deducting periodic payments from a customer's bank account. Under EFTA, which is a strict liability statute, companies must obtain authorization before processing such electronic debits and provide the consumer with a copy of the authorization.

There has been a batch of lawsuits alleging that companies failed to comply with the authorization rules before processing electronic payments. These cases "are now being filed in volume," attorneys at the law firm Ballard Spahr wrote in a September 2015 client alert. "Other plaintiffs firms likely will follow suit."

Payments is an area ripe for litigation because it's not what companies focus on. They tend to be more concerned with the legal issues unique to their products and services. "Payments may not always get the attention it needs from a regulatory compliance perspective. It's not on the radar, but it should be," says Venable partner Jonathan Pompan, who represents financial services companies in regulatory matters.

The EFTA has been around a long time, so "the banks really have it down," says Maurice Wutscher's Donald Maurice. But other types of companies, such as health clubs and marketplace lenders, are getting tripped up. In February, the satellite television giant DirecTV settled a putative class action alleging it deducted payments from bank accounts without providing written authorization. "It's the nonfinancial institutions that have been having trouble," Maurice says.

EFTA places a cap on statutory damages—namely, "the lesser of $500,000 or one percent of the net worth of the defendant." Crucially, however, the statute mandates recovery of reasonable attorney fees. So plaintiffs lawyers often bring several small class actions against the same company, Maurice says. With this approach, they stay under the statutory damages cap while maximizing attorneys fees at the same time.

"The classes will be smaller. You'll see multiple classes in a single state," Maurice says.

Like the biometrics class actions, EFTA cases could change if the Supreme Court uses *Spokeo* to impose stricter standing requirements. But even if the defense bar gets a win in *Spokeo*—which, again, got more unlikely with Scalia's death—these cases will likely continue, predicts Maurice. He points out that *Spokeo* only deals with whether "no-injury" plaintiffs have standing to sue in federal court. No matter what happens, plaintiffs can still bring EFTA cases in state court. The statute explicitly states that federal courts and state courts have concurrent jurisdiction.

Being in state court isn't much of a problem for plaintiffs in these cases. "In my experience, it's more expensive to defend these cases in state court," says Maurice. Judges are less familiar with the law, he says, so outcomes are more unpredictable and defendants need to put in more effort to persuade judges. The takeaway for defendants, according to Maurice: "Be careful what you wish for."

Stephanie Forshee contributed to the reporting of this article.