

Lessons From a Failed Intervention

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Since the January 2020 New York Times exposé on Clearview AI's ("Clearview") data gathering and use practices, there have been nine class action cases filed against the company and several related parties. These cases have been raised in several different jurisdictions, and allege violations of a variety of laws. The alleged violations are not consistent between the claims. In *Calderon v. Clearview AI, Inc.*, 2020 U.S. Dist. LEXIS 94926 (S.D.N.Y. 2020) (*hereinafter* "Mutnick Intervention"), the Southern District of New York ("SDNY") recently reviewed a motion to intervene by a claimant that is independently filed against Clearview in the Northern District of Illinois ("NDI"). The elements considered in this motion present the complexity of the pending claims, but also shed light on key considerations for interventions in multi-jurisdictional filings of consumer privacy class actions.

Background

Per the combined allegations, Clearview uses facial recognition software to perform scans of images that have been scrapped from the internet. It then creates a biometric database of these images. This database can be used to match an image of one person to a pre-existing image that has been scanned, and in doing so generally allows for the identification of that person. Neither would that person have been required to have a role in Clearview obtaining their image, nor would they have necessarily been provided a notice of Clearview's practices or provided consent for this processing to occur.

To put it mildly, the details of these alleged practices were not well received when published by the New York Times.

Within three days of the publication, a federal class action was filed on January 22, 2020, by plaintiff David Mutnick (*Mutnick v. Clearview AI, Inc.*, No. 20-cv-00512 (N.D. Ill Jan. 22, 2020)). Mutnick's Complaint opened with a quote from Justice Brandeis that the "greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Mutnick then went on to note that while zealous, Clearview was not well-meaning. *Id.* at 1.

And we're off to the races.

A series of additional class actions were filed in and transferred to the SDNY. Soon thereafter, Mutnick filed a motion there to intervene under the "first-filed" rule and have those cases dismissed. *Mutnick Intervention* at *5. In the alternative, he requested to stay or transfer the

cases to the NDI where his case was pending. *Id.* The considerations and holdings in Mutnick’s intervention motion present important insights into the potential path for similarly situated consumer privacy class actions.

Competing Claims and Imbalanced Interests

At the time that Mutnick filed his motion to intervene, all but one of the class actions filed against Clearview were pending in SDNY as depicted in the below chart:

Case Name	Current Federal Jurisdiction	Original Federal Jurisdiction
Mutnick v. Clearview AI, Inc. et al	Northern District of Illinois	Northern District of Illinois
Broccolino v. Clearview AI, Inc.	Southern District of New York	Southern District of New York
Burke et al v. Clearview AI, Inc. et al	Southern District of New York	Southern District of California
Calderon et al v. Clearview AI, Inc. et al	Southern District of New York	Southern District of New York
John et al v. Clearview AI, Inc.	Southern District of New York	Southern District of New York
McPherson v. Clearview AI, Inc. et al	Southern District of New York	Southern District of New York
Roberson v. Clearview AI, Inc.	Southern District of New York	Eastern District of Virginia

General Intervention

In assessing whether to grant Mutnick’s motion to intervene, the Court noted the following three criteria for general intervention arising from Federal Rule of Civil Procedure 24(a):

1. An interest in the filed actions in which intervention is sought that is direct, substantial, and legally protectable;
2. An interest in the actions that would be impaired without intervention; and
3. Whether the personal interest claims of the intervener would be adequately represented by the plaintiffs in the other actions.

Mutnick Intervention at *12-13.

The Court found that Mutnick’s assertions did not meet any of these three requirements.

Looking at the first requirement for general intervention, Mutnick asserted that the filed cases are competing class actions and the claims between them were overlapping. *Id.* He further asserted that he had an interest in ensuring that the Illinois Biometric Information Privacy Act (“BIPA”) was properly applied and in protecting the class from procedural infighting. *Id.* at *13-14. The Court first noted that the motion to intervene was premature because a class had not yet been certified. *Id.* at *15. (Definitely something to keep in mind if you’re seeking to intervene in future privacy class actions!) It then observed that even if a class had been certified and there was an appropriate right to intervene, the claims from the various actions, including Mutnick’s, lack the necessary commonality. Despite being premised on the same underlying facts, the claims are widely varied between jurisdictions and alleged violations, do not fully align in their class definitions, and may require different discovery proceedings. *Id.* at *17-20. This is important for future privacy class actions because a variety of available claims between jurisdictions may equally result in diverse alleged violations and procedural considerations.

For the second general intervention criteria, Mutnick's concerns were that the SDNY assessing a BIPA claim may result in the improper application of the law, that the same assessment may be going on in tandem in the NDI, and that this tandem review could result in different findings. The Court shrugged off these concerns as failing to show what interest would be impeded without intervention. Moreover, the Court stated that multiple assessments of the same law are a normal occurrence, and in fact disagreements between Circuits in such situations is often what gives rise to matters reaching the Supreme Court. *Id.* at *19.

Assessing the final criteria for general intervention, the Court was unmoved by the argument that Mutnick's interest would not be adequately represented. The identity of interests between the claims created a presumption that Mutnick's interests would be adequately represented in the SDNY actions. *Id.* at *21. Mutnick attempted to overcome this presumption by stating that the other claimants may be colluding due to two of them transferring their actions to the SDNY. The Court concluded that transferring the actions to a jurisdiction where there was no question of personal jurisdiction was not evidence of collusion, and in fact was indicative of organized case management looking to get straight to the merits of the claims. *Id.* at *21-22.

Permissive Intervention

Aside from general intervention, courts may assess claims of permissive intervention arising from Federal Rule of Civil Procedure 24(b). In this matter, the Court recognized its broad discretion in examining requests for permissive intervention and looked to "whether intervention will unduly delay or prejudice the adjudication of the rights of the parties whose lawsuits are being invaded." *Mutnick Intervention* at *23. Here the Court concluded that those who have filed in or transferred to the SDNY would be prejudiced by Mutnick's claim of intervention. *Id.* at *24. Most notably the Court looked to the fact that if Clearview is not determined to be a state actor, then pendent jurisdiction in Illinois over NY defendants could be in jeopardy. *Id.* at *25.

Perhaps most interestingly, the Court noted that while it would not consider the merits of the motion to dismiss, transfer, or stay the SDNY cases due to a lack of intervention, it "almost certainly would not have granted such a motion." *Id.* at *26. In making this assertion the Court's considerations included (1) the number of pending cases in the SDNY, including a transfer that was permitted after careful judicial consideration as to whether the SDNY was an appropriate forum, (2) the multitude of laws under which claims are being asserted, and (3) the fact that New York is the one place no potential jurisdictional issues exist. *Id.*

The sole consideration in favor of transfer was that an Illinois judge will be more familiar with Illinois statutory law. But this consideration was promptly dismissed, recognizing that it is a longtime practice to have centrally managed claims arising from multiple states. *Id.* at *27.

Key Takeaways

As highlighted above, absent class certification, attempts to intervene may be deemed premature. This is a pivotal consideration when looking to whether or not intervention is an option.

Similarly, the overlapping of some claims is not enough to convince courts that intervention is appropriate. Defendants will do well to study this ruling when posturing themselves in similarly situated actions.

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