

WEBINAR

The Rapid Expansion of Biometric Class Action Litigation: Illinois and Beyond

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Illinois BIPA

Biometric Information Privacy Act (“BIPA”)

- Passed by the Illinois General Assembly in 2008
- Restricts how private entities collect, retain, disclose and destroy biometric identifiers and biometric information
- **A unique private right of action**



Illinois BIPA

- Companies **collecting biometric information in Illinois** must:
 1. Develop a written, “publicly available” policy;
 2. Create and disseminate a retention schedule and destruction guidelines;
 3. Receive a **written release** from the individuals whose data they are collecting; and
 4. Permanently destroy data within at least 3 years

The Stakes are High

- **Statutory Damages**

- \$1,000 for each “negligent violation”
- \$5,000 for each “intentional” or “reckless” violation

- **Large Settlements**

- Many cases have been settling for over **\$1,000 per class member**

Extraterritoriality

BIPA touches any company with operations in or with a connection to Illinois

- Whether BIPA applies to defendant's conduct is usually a fact issue that courts will not decide until summary judgment or trial
 - *Vance v. IBM*
 - *Patel v. Facebook*
- Several cases explain the parameters of when BIPA applies to companies or instances *outside* of Illinois
 - *Patel v. Facebook*
 - *Monroy v. Shutterfly*
 - *Neals v. PAR Technology Corp.*

“Strict Liability”

- No case law on what makes a violation negligent or reckless/intentional sufficient to trigger statutory damages of \$1,000 or \$5,000, respectively
- Difficult argument for defendants who violated the statute to say they were not at least negligent in doing so:
 - “BIPA was enacted in 2008 and numerous articles and court filings about the Act's requirements were published before Defendant employed [Plaintiffs]. And Defendant apparently became aware of BIPA at some point prior to Plaintiffs filing this lawsuit, as it attempted to obtain retroactive consent from Lenoir for the collection of her fingerprint data. These facts plausibly suggest that, at a minimum, Defendant was negligent for its earlier failures to comply with BIPA.”

Lenoir v. Little Caesar Enterprises, 2020 WL 4569695 (N.D. Ill. Aug. 7, 2020)

Statutory and Article III Standing

- Mere technical violations can result in BIPA liability, and thus statutory damages, even in the absence of any actual harm to the plaintiff
 - *Rosenbach v. Six Flags* circumvents challenges to constitutional standing in state court
- The Seventh Circuit has held that allegations that a defendant violated BIPA by collecting biometric information without consent constituted “injury in fact” adequate for Article III federal standing
 - *Bryant v. Compass Group USA* disagreed with district court decisions holding that purely technical violations of BIPA did cause concrete harm under *Spokeo*
- Claim Splitting – A 10/27 decision in the N.D. Ill. allowed a plaintiff to sever and remand a claim under §15(a) while the remaining litigation proceeded.

Workers Compensation Act Preemption

- A common BIPA defense argument was that the BIPA claims against employers were preempted by the Illinois Workers Compensation Act
- In September 2020, the Illinois Appellate Court (1st District) disagreed, in another unfortunate (but not unexpected) blow to the BIPA defense bar
- The Third District is currently considering the same issue

Statute of Limitations

BIPA is silent as to what statute of limitations applies

1 Year?

- Actions for slander, libel, or other right to privacy matters have a one-year statute of limitations. 735 ILCS 5/13-201.

2 Years?

- Actions for personal injury or “penal actions” have a two-year statute of limitations. 735 ILCS 5/13-202.

5 Years?

- Catch-all. 735 ILCS 5/13-205.

// Essentially every decision to date has held that the 5 year statute of limitations applies //

Successful BIPA Defenses

- Collective Bargaining Agreements can preclude class claims for union employees
 - *Miller v. Southwest Airlines Co.*
 - *Williams v. Jackson Park SLF*
- Mandatory arbitration provisions can block any effort to proceed on a class basis
 - *Miracle-Pond v. Shutterfly*

Biometric Laws in Other States, Cities, and the Federal Government

Other States Have Passed Biometric Laws

- Texas and Washington have also passed biometric-specific laws
- California's CCPA also specifically regulates biometric information
 - No private right of action
- Other states have included biometric data within the definition of "personal information" in state data security and breach notification laws
 - e.g., NY SHIELD and Colorado's data retention and destruction policy
- Biometric privacy laws similar to BIPA have been considered in over a dozen states in the previous 12 months
 - Legislation remains pending in a handful of states
 - Several of these pending bills are a combination of BIPA and the CCPA

Proposed Federal Legislation

- Proposed by Sens. Merkley and Sanders.
- Would make it illegal for businesses to collect, purchase, or trade biometric information obtained from customers without permission.
- Includes: face prints, voice prints for AI assistant personalization, eye scans, and other forms of unique information about a person's body used to identify people.
- **Would have a private right of action**, but would not preempt more restrictive local or state laws.

So Have American Cities...

- Portland (2020)
 - Cambridge (2020)
 - San Francisco (2019)
 - Oakland (2019)
- **Of these, Portland goes the farthest in that it:**
 - **applies to private entities; and**
 - **contains a private right of action**

THANK YOU!



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