

Illinois Biometric Privacy Cases To Watch In 2nd Half Of 2021

By Celeste Bott

Law360 (July 8, 2021, 7:05 PM EDT) -- The evolving landscape of biometric privacy litigation in Illinois could be significantly altered by pending state and federal cases considering the timing of claims under the state's landmark statute and whether employee privacy claims are preempted by the Illinois workers' compensation law.

The Illinois Supreme Court has agreed to consider whether the state's workers' compensation law preempts claims for statutory damages under the Illinois Biometric Information Privacy Act, a state law requiring informed consent and certain disclosures before the collection, use and storage of biometric information, such as fingerprints.

The Seventh Circuit has been asked to decide whether BIPA claims accrue with each alleged violation or only at the first instance. And two Illinois appellate panels have been asked to address the amount of time a plaintiff has to file a BIPA claim before a court considers it untimely.

Each is a hotly contested question in the growing number of BIPA battles, as companies and employers continue to explore ways to escape the lawsuits, and they could offer much-needed clarity for litigators, experts say.

They're key cases to watch because they're causing numerous other cases to get stayed pending their resolution, Melissa Siebert, director of Shook Hardy & Bacon LLP's biometric privacy task force, told Law360.

III. Justices to Consider Workers' Comp Effect on BIPA

The Illinois Supreme Court in January granted a petition for leave to appeal a September ruling by an appellate panel that a former employee's BIPA claim against nursing home operator Symphony Bronzeville Park LLC does not represent the type of injury that falls under the state's workers' comp law, "a remedial statute designed to provide financial protection for workers that have sustained an actual injury."

The company argued in its October petition to the high court that the ruling ignores the plain language of the exclusivity provisions in the state Workers' Compensation Act, which clearly bar an employee's claim against the employer for statutory damages under BIPA because those damages arise from a workplace injury that occurred in the line of duty.

So far, courts have uniformly held that BIPA claims aren't preempted by the state's workers' compensation law, but if the high court goes the opposite way, it will show a desire to constrain BIPA liability, Seth Horvath, a Nixon Peabody LLP partner who also serves on the board of directors for the Illinois Appellate Lawyers Association.

"That would be a big win for the defense bar on BIPA, and it would really show a break from the trend that's evolved in the trial courts leading up to this point," he said. "I can't even overstate the interest in this case."

It would also significantly curtail the number of cases that could even go forward, given that most BIPA cases are filed against employers by current or former employees, said Pat Eckler, a partner at Pretzel & Stouffer.

"If workers' comp applies, then three-quarters or more of these cases are going to go away," Eckler told Law360.

The case is *In re: Marquita McDonald v. Symphony Bronzeville Park LLC*, case number 126511, in the Supreme Court of Illinois.

Seventh Circuit Will Weigh When BIPA Violations Take Place

White Castle told the Seventh Circuit in March that a lower court incorrectly held BIPA claims accrue with each violation instead of only the first violation. White Castle says a correct interpretation of the law would make untimely a former employee's allegation that it unlawfully collected workers' fingerprints.

White Castle System Inc. is urging the appellate court to reverse a lower court order forcing it to litigate biometric privacy claims filed by former employee Latrina Cothron in 2018, arguing the district court went against well-defined accrual principles and ignored case precedent to find that each unlawful biometric collection or disclosure gives rise to a new BIPA claim.

The Seventh Circuit's eventual ruling is important because it will determine if these are per-scan damages cases, said Shook Hardy's Siebert, one of the attorneys representing White Castle in the case.

The issue has spooked employers, who could face "ruinous damages" and may ultimately be unable to survive given the long-term, widespread use of finger-scan timekeeping technology, per White Castle's brief to the appellate court.

Legal groups representing the restaurant and retail industries have thrown their support behind White Castle in their own briefs to the court, noting that employees who perform finger scans while working typically use the technology multiple times per day and that per-scan liability could cripple businesses operating in the state.

The case is *Latrina Cothron v. White Castle System Inc.*, case number 20-3202, in the U.S. Circuit Court of Appeals for the Seventh Circuit.

Two Appellate Courts Will Address BIPA's Statute of Limitations

Illinois Appellate Courts in the First and Third districts are both considering a "novel question" of BIPA law, Siebert said — whether BIPA claims are subject to a one-, two-, or five-year statute of limitations.

BIPA plaintiffs have largely argued, and trial courts have largely held, that a claim under Illinois' unique law is subject to the state's "catchall" five-year statute of limitations for laws that don't explicitly list their own time limits.

But Illinois trucking company Black Horse Carriers Inc. is urging an appellate court to find instead that a BIPA claim is subject to the state's one-year limit on claims rooted in the invasion of someone's privacy. And Illinois plastic container manufacturer Ring Container Technologies contends that the two-year statute of limitations for personal injury torts applies.

If that statute of limitations is narrowed, it can significantly reduce the number of BIPA cases overall, as many are brought by employees who haven't worked at the company in question for a number of years, Siebert said.

It could also meaningfully reduce class sizes in BIPA cases, she said.

The cases are *Tims v. Black Horse Carriers Inc.*, case number 1-20-0563, in the Illinois Appellate Court, First District; and *Marion v. Ring Container Techs. LLC*, case number 3-20-0184, in the Illinois Appellate Court, Third District.

--Additional reporting by Lauraann Wood. Editing by Orlando Lorenzo.