BIPA (and GIPA!) Litigation and Compliance Updates

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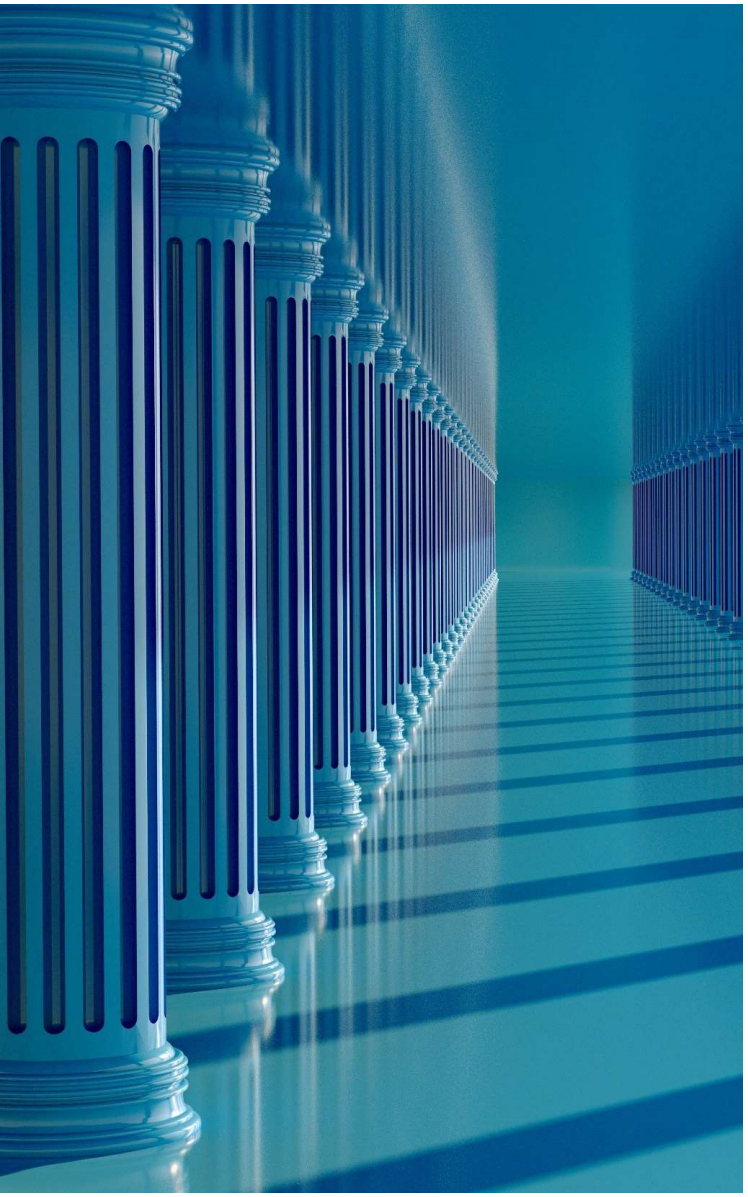
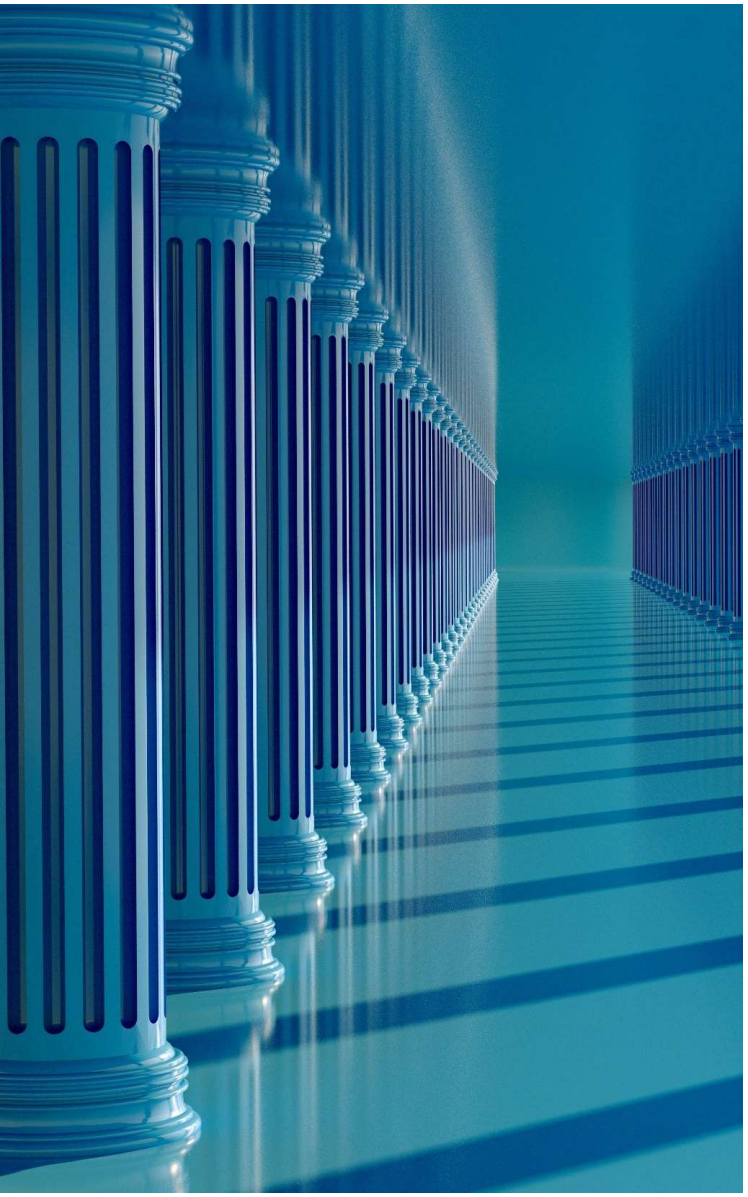


Cothron v. White Castle: Illinois Supreme Court Denies White Castle's Petition for Rehearing – Ruling Defining Violation Stands

- In its original decision February 2023, the Illinois Supreme Court made special note of White Castle's argument that Cothron's statutory interpretation would entangle businesses in "'astronomical' damages awards that would constitute 'annihilative' liability, not contemplated by the legislation and possibly be unconstitutional."

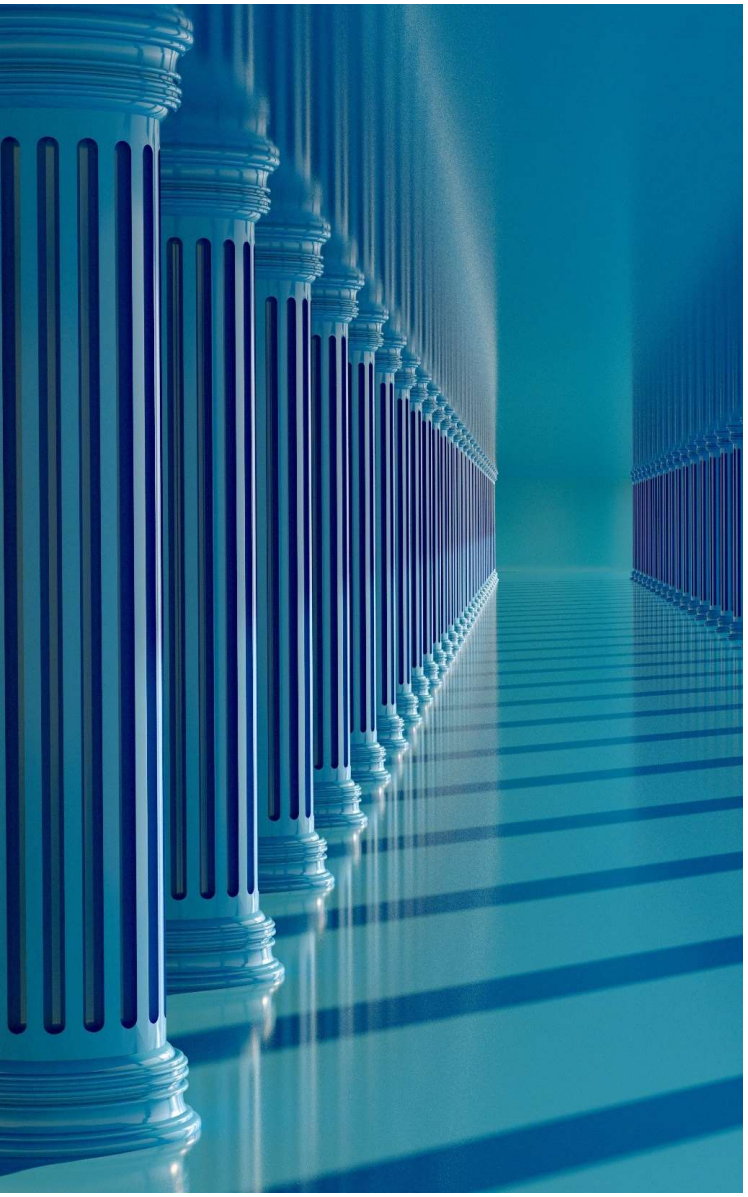
- But the Court nonetheless held "where statutory language is clear, it must be given effect, 'even though the consequences may be harsh, unjust, absurd, or unwise.'"

- Yet, trial courts "certainly possess the discretion to fashion a damage award . . . to deter future violations, without destroying defendant's business."



Cothron v. White Castle, continued …

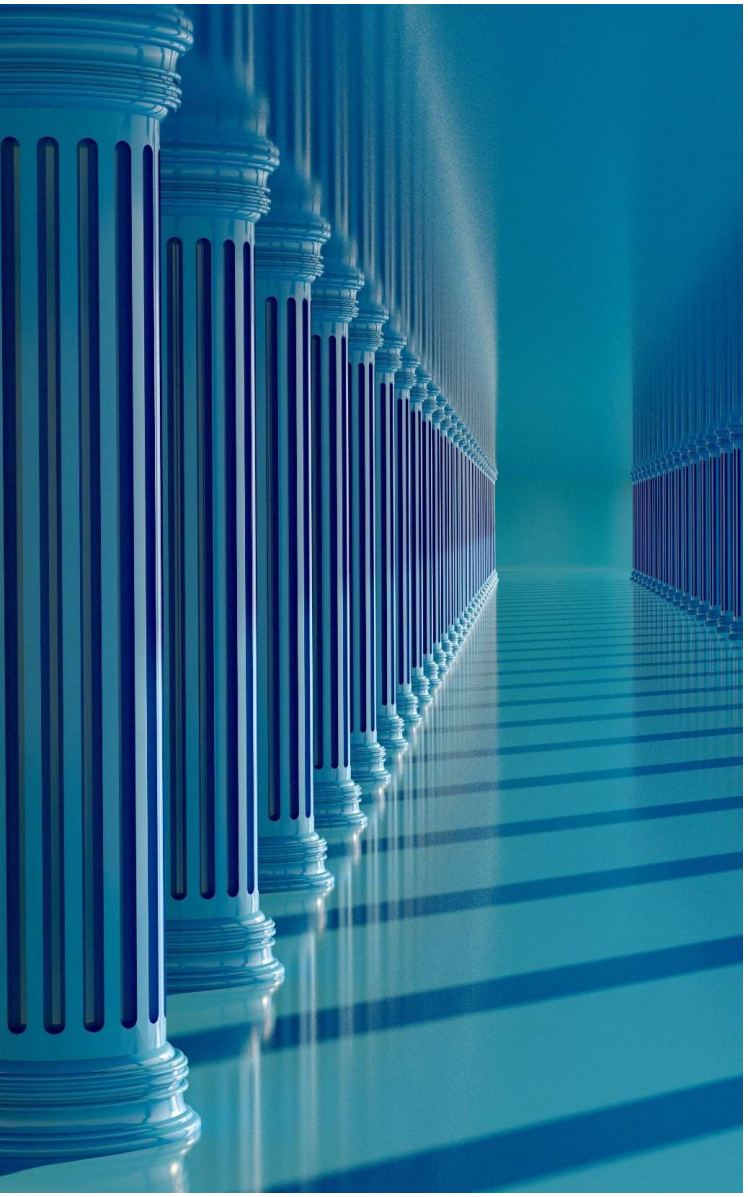
- White Castle petitioned for re-hearing with the Illinois Supreme Court on March 10, 2023. On **July 18, 2023**, the Illinois Supreme Court denied the petition.
- In its petition for rehearing, White Castle primarily argued that the Illinois Supreme Court erred in its interpretation
  - Highlighted the phrase "unless it first" within Section 15(b), contending that this language suggests that the acts of collecting or capturing biometric data can only happen at one singular point in time
  - Section 15(d) refers to "the disclosure of biometrics by one party to a new, third party—said differently, a party that has not previously possessed the relevant biometric identifier or biometric information"
  - The Illinois Supreme Court firmly rejected White Castle's statutory arguments, just as it did in February, without offering any new analysis.



Cothron v. White Castle, continued . . .

Judge Overstreet's Dissent

- While the majority did not write a new opinion, Judge Overstreet – joined by Judges Theis and Holder White – issued a fresh dissent.
- Judge Overstreet focused more on practical and constitutional concerns rather than analysis of the statutory language.
  - The majority's holding "subverted the intent of the Illinois General Assembly, threatens the survival of businesses in Illinois, and consequently raises significant constitutional due process concerns."
  - The Illinois General Assembly intended for BIPA "to be a remedial statute that implemented prophylactic measures . . . ." However, "under the majority's view, the legislature intended for Illinois businesses to be subject to cataclysmic, job-killing damages, potentially up to billions of dollars, for violations of the Act."
  - The dissent found no statutory support for the majority's interpretation and emphasized that, under the majority's holding, Plaintiff Cothron alone could be entitled to "damages exceeding $7 million . . . despite the fact that plaintiff has not alleged a data breach or any costs or other damages associated with identity theft or compromised data."

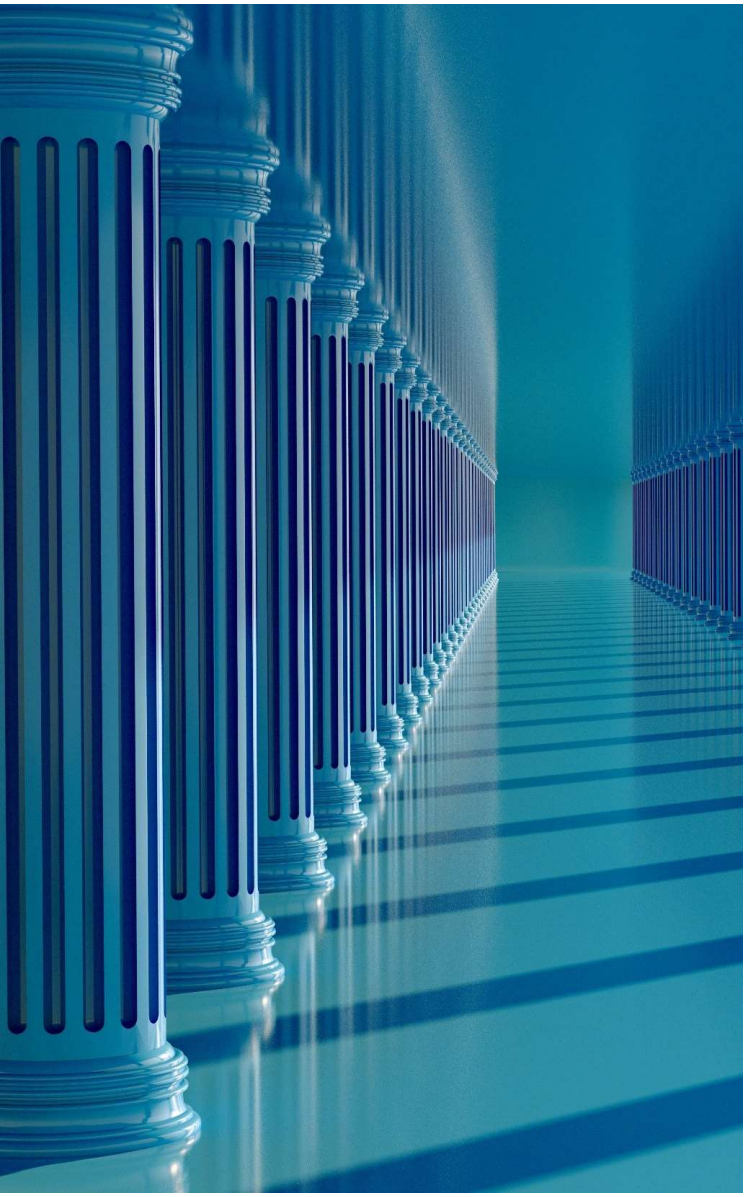


Cothron v. White Castle, continued . . .

Judge Overstreet's Dissent

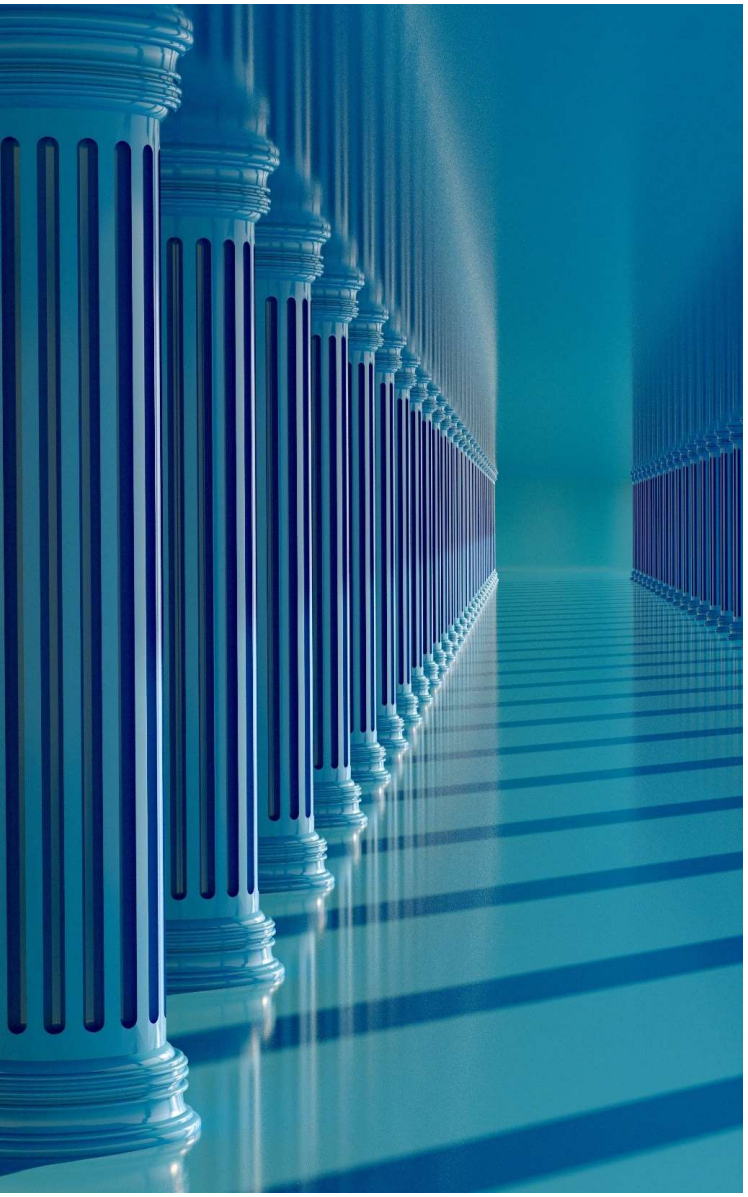
– The dissent concluded by "implor[ing]" the Court to reconsider White Castle's petition for rehearing and assess whether the resulting interpretation of BIPA passes constitutional scrutiny.

Implications . . .



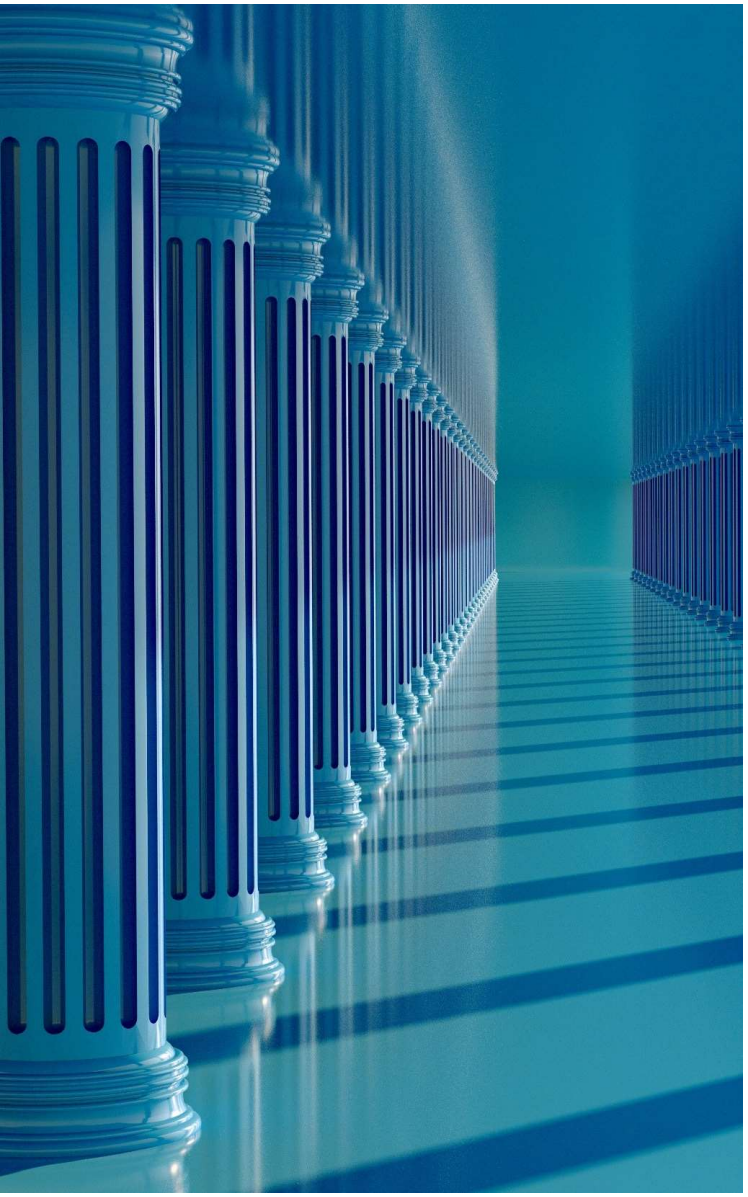
The Latest on *Rogers v. BNSF Railway* (N.D. Illinois)

- First ever BIPA jury trial. On October 12, 2022, class of plaintiffs awarded $228 million in damages ($5,000 per employee).
- Even though the Court found the third-party vendor collected and processed fingerprints on behalf of BNSF, the railway was still responsible for compliance.
- Both parties filed post-trial briefs that argued *White Castle* supports a revisiting of the damage award (plaintiffs say too little, defendants say too large).
- On June 30, 2023, Judge Kennelly granted BNSF's motion for a new trial on damages only.
- Trial scheduled to begin October 2, 2023.



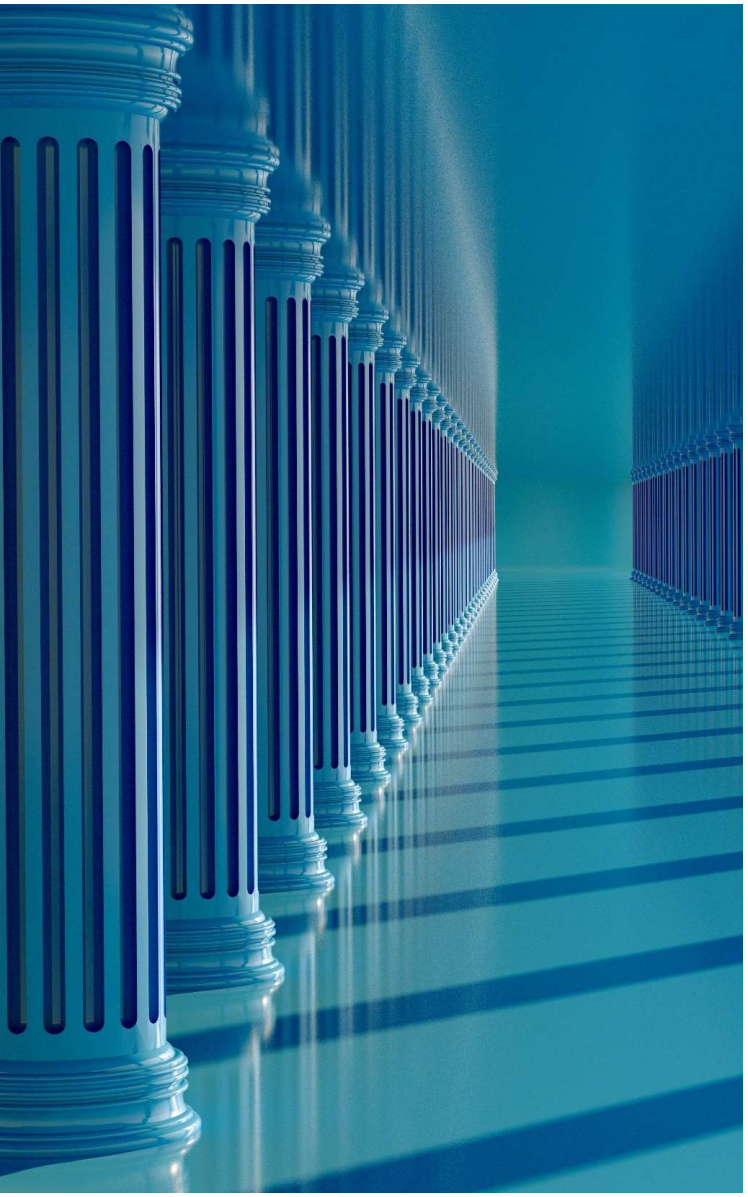
Mosby v. Ingalls Memorial Hosp. (Illinois Supreme Court)

- On February 25, 2022, the First District Illinois Appellate Court held that finger-scan information collected by a healthcare provider from its employees ***does not*** fall within BIPA's exclusion for "information collected, used, or stored for health care treatment, payment or operations under HIPAA."
- On March 18, 2022, defendants petitioned the appellate court for rehearing, which the court granted.
- On September 30, 2022, the First District Appellate Court modified its original opinion but again held that finger-scan information collected by a healthcare provider from its employees does not fall within BIPA's health care exclusion.
- Defendants' petition for leave to appeal to the Illinois Supreme Court was granted.
- Oral argument will be held September 21, 2023 at 9 a.m.



Powell v. DePaul University (N.D. Ill. 2022)

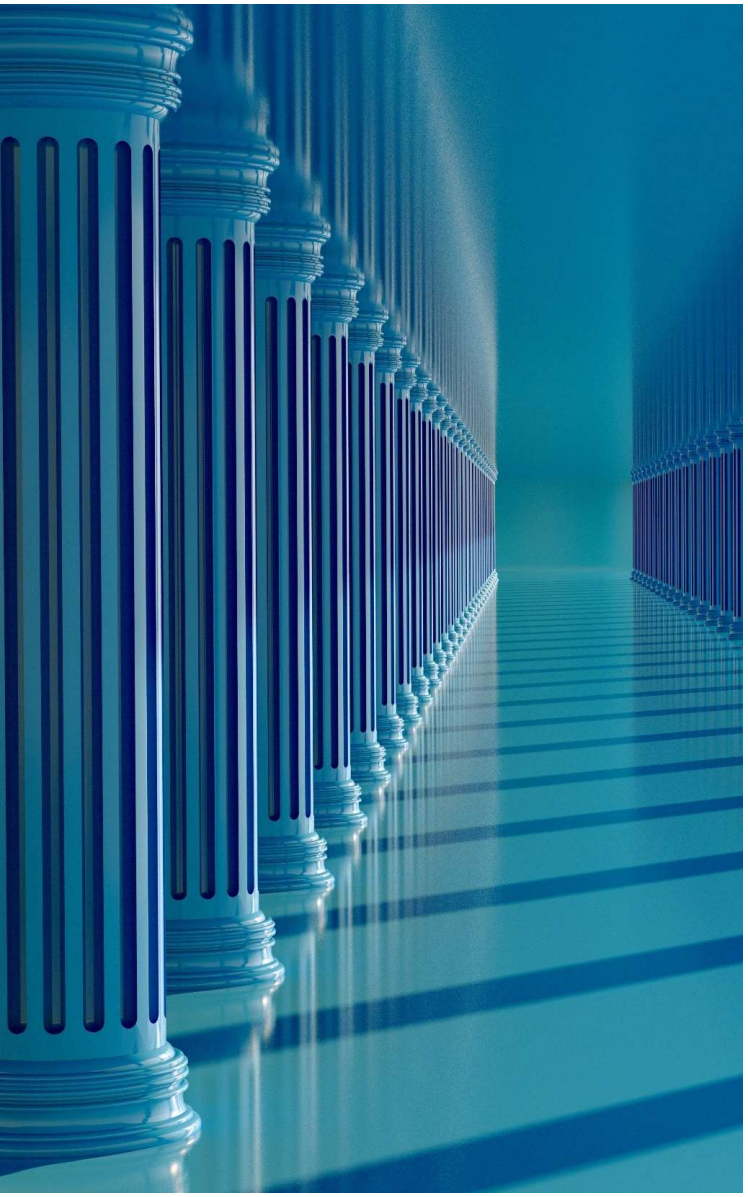
- Applies BIPA's exemption: "Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the Gramm-Leach-Bliley Act of 1999 and the rule promulgated thereunder." 740 ILCS 14/25(c).
- The Northern District of Illinois dismissed a student's proposed class action alleging that Defendant's remote test-proctoring software violated BIPA.
- Held that BIPA does not apply to financial institutions that are subject to Title V of the Gramm-Leach-Bliley Act ("GLBA"). The court looked to the FTC's definition of a "financial institution" and concluded from documents submitted by defendants, of which it took judicial notice, that the exemption applied to the defendants.
- However, *see Patterson v. Respondus Inc.* (N.D. Ill. 2022), denying motion to dismiss because the university relied on general statements by the FTC that universities are financial institutions rather than providing evidence that the university was "significantly engaged in lending funds to consumers."
- The application of the provision "or an affiliate of a financial institution" is relatively untested.



The Next Big Thing – Lawsuits Under the Genetic Information Privacy Act (GIPA)

A Slew of GIPA Lawsuits Filed In Last Few Months --

- GIPA is very similar to BIPA--mimics language, structure, and damages provisions. Enacted in 1998 so arguably a predecessor to BIPA.
- Focus of the statute is on the use of genetic testing to determine suitability for insurance coverage or employment.
- Like BIPA, it too, contains no statute of limitations, and no definition of what constitutes a violation of the statute.
- **Notably, consent is NOT a defense**. Under the strict wording of the statute, arguably the collection of the genetic information constitutes the statutory violation.
- GIPA provides minimum statutory damages of $2,500 per negligent violation and maximum statutory damages of $15,000 per intentional violation or actual damages, **whichever is greater.**



GIPA, Continued . . .

- Relevant here, defines “genetic information” as having “the meaning ascribed to it under HIPAA, as specified in 45 CFR 160.103.”
- In turn, the regulation provides:

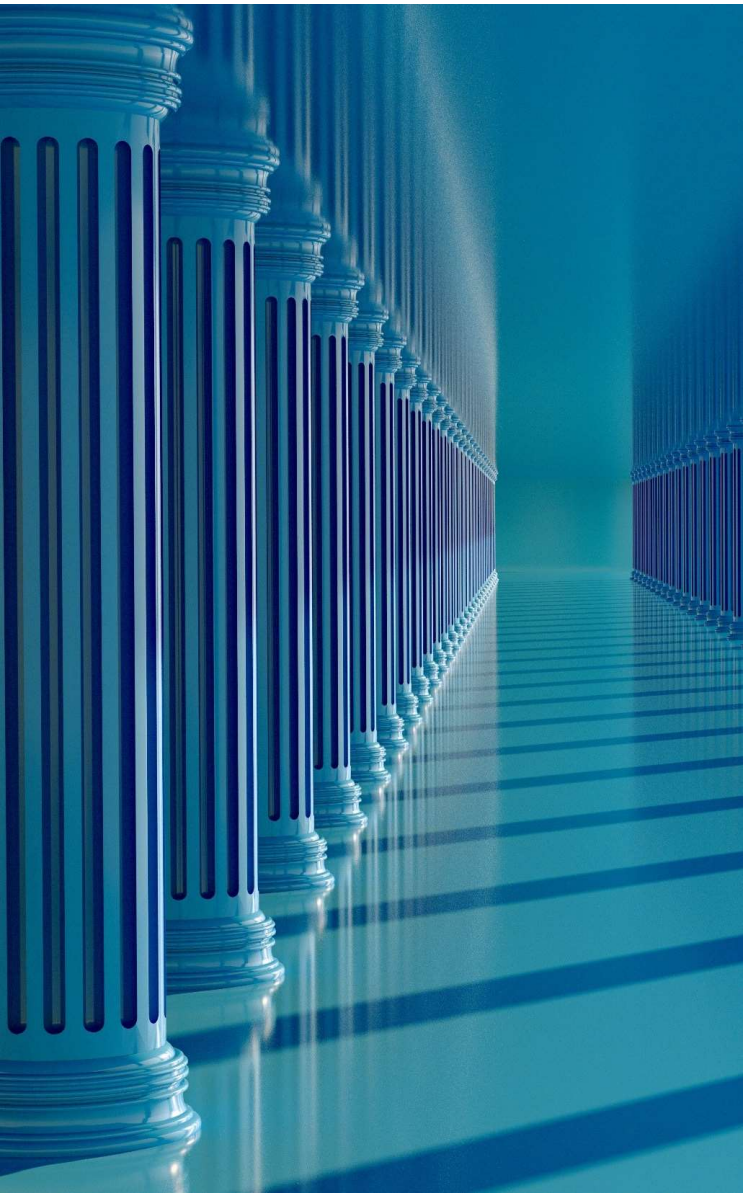
  Genetic information means: . . . with respect to an individual, information about:

(i) The individual's genetic tests;

(ii) The genetic tests of family members of the individual;

(iii) The manifestation of a disease or disorder in family members of such individual; or

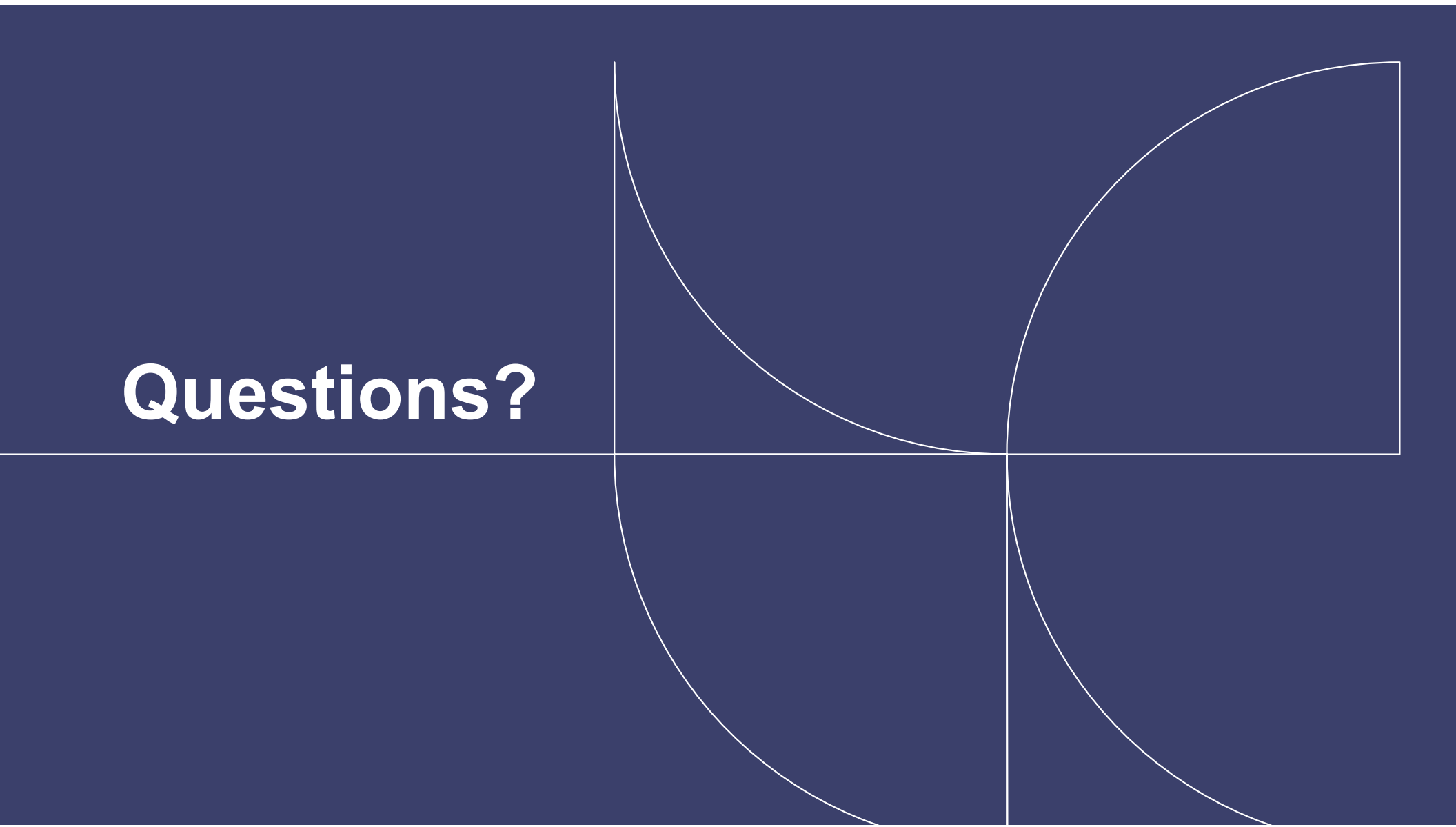
(iv) Any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by the individual or any family member of the individual.



GIPA, Continued . . .

- The plaintiffs' bar is targeting Illinois employers that conduct pre-employment medical examinations.
- The plaintiffs allege in the complaints that during the pre-employment medical examination, they were asked (by a health care provider) to provide information regarding their family medical history.
- The plaintiffs argue that this family medical history constitutes "genetic information" which GIPA precludes employers from collecting as a condition of employment.
- Often accompanied by requests for medical records that include HIPAA releases.
- Examine the release carefully to ensure do not exceed the limits of the release.

Questions?



thank you

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