Seyfarth Breaking BIPA Developments: Damages Keep Piling Up

Ada W. Dolph, Seyfarth Shaw LLP Danielle M. Kays, Seyfarth Shaw LLP

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Speakers



Danielle M. Kays Seyfarth Shaw LLP



Ada W. Dolph Seyfarth Shaw LLP

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Tims v. Black Horse Carriers: Illinois Supreme Court Holds Five Year Statute of Limitations For BIPA

- For sections 15(a) (retention schedule), (b) (written consent and release), and (e) (reasonable standard of care),"there are no words that could be defined as involving publication"
- For sections 15(c) (prohibit sale, lease, trade or profit without consent) and (d) (prohibit disclosure without consent) "the words sell, lease, trade, disclose, redisclose and disseminate could be defined as involving publication"
- "Therefore, we acknowledge that the one-year statute of limitations could be applied to subsections (c) and (d)"
 - <u>But</u> the Court found "it would be best to apply the five-year catchall limitations period codified in section 13-205 of the Code."
 - The Court "considered not just the plain language of [BIPA,] but also the intent of the legislature, the purposes to be achieved by the statute, and the fact that there is no limitations period in the Act."



Cothron v. White Castle: Illinois Supreme Court Held BIPA Claim Accrues Upon Every Scan or Transmission

- Court noted White Castle's argument that its statutory interpretation would entangle businesses in "astronomical' damages awards that would constitute 'annihilative' liability, not contemplated by the legislation and possibly be unconstitutional."
- But it 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: Illinois Supreme Court Held BIPA Claim Accrues Upon Every Scan or Transmission

 The Illinois Supreme Court made an explicit call to the Illinois legislature to "review these policy and concerns and make clear its intent regarding the assessment of damages under the Act."

– Dissent:

- The "majority's interpretation cannot be reconciled with the plain language of the statute, the purposes behind the [BIPA], or this court's case law, and it will lead to consequences that the legislature could not have intended."
- "The subsequent scan did not collect any new information from plaintiff, and she suffered no additional loss of control over her biometric information."
- White Castle petitioned for re-hearing on March 10, 2023.
- What does this mean?



Other BIPA Cases to Watch

• Rogers v. BNSF Railway

- First ever BIPA jury trial. 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.
- BNSF moved for a new trial and to amend the judgment based on argument that damages are unconstitutional and there is not enough evidence to support third party liability.
- Both parties have filed post-trial briefs that argue White Castle supports a revisiting of the damage award (plaintiffs say too little, defendants say too large).
- Court has not held oral argument on post-trial briefs, but eventual appeal expected.

• Mosby v. Ingalls Memorial Hosp.

- 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."
- Illinois Supreme Court accepted the appeal on January 25, 2023.



BIPA Successes Spur GIPA Litigation

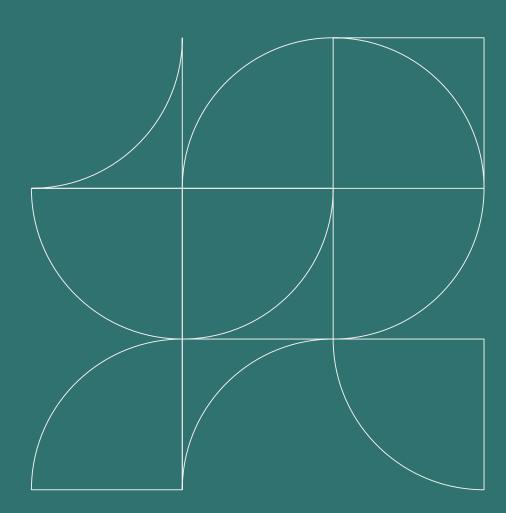
- Job Applicants Sue Employers Under Rarely-Cited Illinois Genetic Information Privacy Act
 - Plaintiffs allege that companies require job applicants to submit to a pre-employment physical as a condition of employment.
 - During this physical, the plaintiffs claim that employers' medical providers asked them to disclose their families' medical history, which they allege is a form of genetic information.
 - GIPA provides minimum statutory damages of \$2,500 per negligent violation and maximum statutory damages of \$15,000 per intentional violation.
 - Plaintiffs claim that-similar to the BIPA-individuals filing suit under the GIPA need not prove that they suffered actual damages in order to recovery.



Looking Ahead

- Plaintiffs are expanding the technology they are targeting.
- Growing trend by plaintiffs to use BIPA litigation to expand privacy causes of action outside of Illinois under various state laws.

Pending BIPA Bills





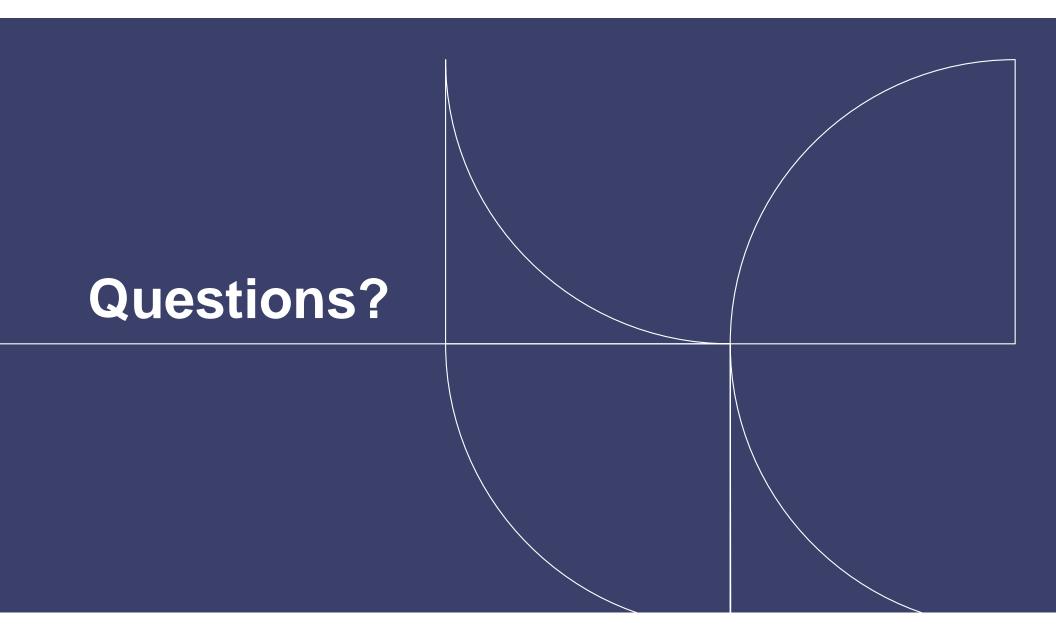
Update on Pending IL House Bills

- **HB 1230** proposes amending the statute to exclude health care providers.
- **HB 2252** proposes extensive amendments, including right to cure, some adjustments to how policy is available.
- **SB 1506** proposes amending to make clear only first enrollment is the violation, that employers should be provided information regarding BIPA, and that BIPA is not preempted.

New Activity

HB 3204 seeks to amend BIPA to add a statute of limitations of one year.

- Currently is written to start from the "date of the violation" or "the date on which the aggrieved person discovers the violation." Coupled with *White Castle*, may not provide much relief.
- **HB 3199** proposes a right to cure within 15 days of notification of a violation.
- All of the bills have been referred Assignment or Rules Committee.



thank you

For more information please contact: Ada Dolph

adolph@seyfarth.com 312-460-5977

Danielle Kays

dkays@seyfarth.com 312-460-5674

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