

## III. Biometric Privacy Law Is Unconstitutional, Grocer Says

By **Lauraann Wood**

Law360 (August 21, 2019, 9:29 PM EDT) -- Albertsons told an Illinois state judge Tuesday that the state's hot-button biometric privacy law unconstitutionally hits some companies harder than others, as the grocer fights a former pharmacist's proposed class action over its finger-scanning technology.

New Albertsons Inc.'s motion argued the Illinois Biometric Information Privacy Act suit brought by a subsidiary's former employee should be dismissed because the law should be considered special legislation prohibited by the state's constitution, since it applies to some companies while improperly leaving others out. The grocer also argued it should not have to face the former employee's biometric privacy claims because certain provisions in the law are ambiguous and can leave companies unsure over whether the law applies to them.

Albertsons said BIPA excludes a variety of companies from liability "without rational basis," such as financial institutions and local governments and their contractors and agents. That violates Illinois' constitution, which prohibits the legislature from passing a law that gives one group special benefits while excluding similarly situated groups, it said.

"There is no rational reason to exclude such entities," the company argued. "A janitorial company would be exempt from the statute where providing services pursuant to a government contract ... but a similar company would be covered where providing services in the private building next door."

Lawsuits claiming damages under BIPA have been hitting companies big and small in waves over the last couple of years, but that door has remained open since the Illinois Supreme Court ruled individuals **do not need** to allege actual damages to have BIPA standing. Several suits filed since the state high court's January ruling have attacked the fingerprint-collecting employment practices from numerous other companies, **including** Walmart Inc., as well as other biometric information collection methods, such as the voice-identifying technology used by **Google Assistant**, which is installed in millions of electronic devices nationwide.

BIPA is impermissibly vague because it leaves certain companies unsure whether the statute applies to them, but on the hook to "bear the brunt of alarming statutory damages if it does," Albertsons said. That much was made clear when the court previously called ambiguous a BIPA exclusion for biometric information gathered from patients in a health care setting, or information collected for "treatment, payment or operations" under the federal Health Insurance Portability and Accountability Act, Albertsons argued.

Albertsons owns several different grocery chains, including Jewel-Osco. Plaintiff Gregg Bruhn, who worked for nearly 30 years as a full-time pharmacist at an Illinois Jewel-Osco store, sued on behalf of all Illinois Jewel-Osco workers in 2018, claiming he and other pharmacy employees were required to scan their fingerprints into a biometric device for access to its computer system without the company obtaining informed consent.

Bruhn fought an earlier dismissal motion by arguing the so-called HIPAA exception applied only to patient information, while Albertsons contended the language also included information that pharmacists gather to carry out functions under HIPAA, according to the filing.

The court said both interpretations were plausible and called the exception ambiguous, but said Bruhn's version was the legislature's intent "without any legislative history to aid the interpretation," Albertsons said.

BIPA requires most companies that collect, store and use individuals' biometric information to first obtain informed consent. The law imposes a \$1,000 penalty for each negligent violation and a \$5,000 penalty for each willful violation. But forcing Albertsons to risk liability for such astronomical damages despite its reasonable interpretation of BIPA is "manifestly unfair," the company argued.

If the court agreed that its interpretation of the HIPPA exclusion was plausible, and agreed that the provision was ambiguous on its face, "it necessarily follows that persons of ordinary intelligence did not have a reasonable opportunity to know that their conduct fell within the reach of the BIPA," Albertsons said.

Representatives for both sides did not immediately respond to a request for comment Wednesday.

Bruhn is represented by James Zouras and Andrew Ficzkko of Stephan Zouras LLP.

Albertsons is represented by David Almeida, Suzanne Alton de Eraso and Mark Eisen of Benesch Friedlander Coplan & Aronoff.

The case is Gregg Bruhn v. New Albertson's Inc., case number 2018-CH-01737, in the Circuit Court of Cook County, Illinois.

--Editing by Alanna Weissman.