

Albertson's Urges Dismissal Of Employee's Biometric Suit

By **Lauraann Wood**

Law360, Chicago (November 12, 2019, 6:25 PM EST) -- Albertson's argued Tuesday that it shouldn't have to face a lawsuit for collecting employees' fingerprints because there is no functional difference between it and the types of businesses excluded from liability under Illinois' biometric privacy law.

If the goal of Illinois' Biometric Information Privacy Act is to protect individuals' biometric information, then the statute's exceptions for financial institutions and government contractors "do nothing" to achieve that goal, Mark Eisen, counsel for New Alberston's Inc., told Cook County Circuit Judge Anna Loftus. The company, which owns the Jewel-Osco chain of grocery stores, **says BIPA is unconstitutional** and wants the court to dismiss a lawsuit by former pharmacist Gregg Bruhn alleging that it unlawfully collected fingerprint data from pharmacy employees.

BIPA contains exclusions for businesses including financial institutions and government contractors. But the law's definition of financial institution could cover a typical bank as well as "retailers that happen to issue credit cards," Eisen said. Albertson's would merely need to issue its own credit card to escape BIPA liability, which proves the exception has "no rational relation to this law," he argued.

For example, a janitorial service that contracted to work with the state court building in downtown Chicago would also not be subject to BIPA's provisions, but it could be forced to face biometric privacy claims if it was doing work in a building next door, Eisen told Judge Loftus. "And that doesn't make any sense" because there is "no functional difference" between Albertson's and any BIPA-exempted businesses as they relate to Bruhn's suit, he argued.

James Zouras of Stephan Zouras LLP, who represents Bruhn, urged the judge to reject Albertson's third attempt at ditching his client's claims. He argued that the company had fallen "woefully short" of overcoming its burden to prove the Illinois legislature acted arbitrarily in carving out the exceptions. The statute governs biometrics "specifically in the private sector," just as it was intended to do, Zouras argued.

"It's not enough for [Albertson's] to come in and say, 'Hey, we think we could have written this better,'" Zouras said.

BIPA's financial institution exclusion takes in institutions that fall under the Gramm-Leach-Bliley Act, a federal law that requires those institutions to explain their information-gathering practices and protect sensitive data. But the exclusion is irrational because the GLBA covers only consumer data and not employee data, such as that at issue in the majority of BIPA suits that have been filed, Eisen said.

And since employee data isn't covered in the GLBA, which trumps any inconsistent state law, excluding any entity that meets the broad definition of financial institution would leave those employees with no rights under BIPA, Eisen argued.

Zouras responded that the question of whether the GLBA applies to employee data is "undecided at best." But the court need not decide any potential preemption issues between BIPA and the GLBA because the operative question is whether Illinois' legislature had "a good reason for acting the way they did," he argued.

Eisen asked Judge Loftus to certify questions for appeal if she sides with Bruhn on its dismissal motion, arguing that the Illinois Appellate Court could help it solve the legal question over BIPA's constitutionality, and potentially end the case if it finds in Albertson's favor. Judge Loftus is set to rule in January.

Bruhn, a full-time pharmacist for nearly 30 years 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 the pharmacy's computer system without the company obtaining informed consent as required under BIPA.

Albertson's launched its most recent dismissal bid in August, claiming Illinois' biometric privacy law unconstitutionally hits some companies harder than others. But Bruhn fought back against that claim **in October**, saying the law is "a poster child of constitutionally sound legislation."

Bruhn is represented by James Zouras, Ryan F. Stephan and Andrew Ficzko of Stephan Zouras LLP.

Albertson's is represented by Mark Eisen, David Almeida, Suzanne Alton de Eraso of Benesch Friedlander Coplan & Aronoff.

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

--Editing by Peter Rozovsky.