

Albertson's Wants Ill. Justices To Decide If BIPA Is Unlawful

By Celeste Bott

Law360 (February 26, 2020, 9:20 PM EST) -- Albertson's is seeking permission to ask Illinois' high court whether the Illinois Biometric Information Privacy Act is unconstitutional, after failing to convince a lower court in pharmacy employees' suit alleging violations of the state's expansive biometric privacy law.

Cook County Circuit Judge Anna Loftus last month denied the company's **motion to dismiss** the pharmacy workers' case. Albertson's had argued that the Illinois Biometric Information Privacy Act should be considered special legislation prohibited by the state's constitution, because it applies to some companies while improperly leaving others out.

Now New Albertson's Inc., which owns the Jewel-Osco chain of grocery stores where the named plaintiff in the case worked, wants the BIPA suit paused while it takes the issue to the Illinois Supreme Court, it said in a motion for interlocutory appeal filed on Monday.

BIPA's financial institution exclusion exempts 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. Apart from government contractors, no other entity is wholesale excluded from the law, Albertson's said.

If the "far-reaching" exemption is ultimately considered impermissible special legislation, that calls BIPA into question entirely, Albertson's said.

"There is no severability provision in the BIPA and it is unclear whether the legislature would have passed the BIPA without the exclusion. If the exclusion is determined unseverable, the BIPA would fail," the company said.

The district court wrongfully concluded that the exemption was rational because the state legislature could have been concerned about preemption, the company said, because it didn't base that analysis on BIPA's objectives.

"Where preemption was a legitimate concern of the legislature, it crafted a narrow conflict preemption clause. If preemption were a concern, there are myriad groups that would be entitled to the same exclusion," Albertson's said. "The medical field, airline industry, railroad industry, insurance industry, labor unions, etc. are all heavily regulated by federal law often the subject of preemption, but received no broad BIPA exclusion. The HIPAA and the [Gramm-Leach-Bliley Act] are analogous laws, and yet the financial and health care industries are inexplicably treated differently under the BIPA."

Albertson's also wants Illinois' top court to address whether BIPA's exemption for information collected, used and stored for health care treatment or payment under the Health Insurance Portability and Accountability Act of 1996 applies to the biometric information of employees such as the named plaintiff in the case, Gregg Bruhn, who worked for nearly 30 years as a full-time pharmacist at an Illinois Jewel-Osco store.

Interpretation in Albertson's favor could not only terminate the present case, but could provide clarity

in approximately 30 BIPA putative class actions filed against the health care industry, as "it should not be the case that whether a health care provider meets the HIPAA exemption varies by court," the company said.

"Both questions also are not only critical to this case, but are recurring questions of law appearing in myriad BIPA cases throughout the state," Albertson's said. "The HIPAA exemption has, in fact, already been interpreted in three different ways by three different courts."

Bruhn 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.

Representatives of the parties could not be immediately reached for comment.

Bruhn is represented by James Zouras, Ryan F. Stephan and Andrew Ficzkowski 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.

--Additional reporting by Lauraann Wood. Editing by Nicole Bleier.