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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Illinois Cases To Watch In 2023

By **Lauraann Wood**

Law360 (January 2, 2023, 12:03 PM EST) -- The Illinois Supreme Court is set to significantly help businesses in 2023 assess the risk of litigating biometric privacy claims, with anticipated decisions regarding how long plaintiffs can wait to sue over violations and how often their claims accrue.

While arguably the most anticipated, those long-pending questions are not the only issues Illinois' top justices are expected to resolve under the state's unique Biometric Information Privacy Act this year. Businesses are also waiting to see if the justices agree with the Seventh Circuit that federal labor law preempts union-represented workers from suing their employers for alleged BIPA violations.

Illinois drug manufacturers should also watch for whether the state high court will allow a woman suing Abbott Laboratories over allegedly insufficient Depakote label warnings to take those claims to trial, as that ruling could weaken their ability to lean on doctors' prescribing decisions for protection in patient failure-to-warn cases.

And in federal court, public corruption will be the theme of bribery trials involving two of the most high-profile political figures in Illinois and Chicago.

Here, Law360 highlights some of Illinois' biggest cases to watch in 2023.

Clarity For Biometric Privacy Litigation

Companies and their legal counsel are looking forward to hearing from the Illinois Supreme Court regarding the appropriate limitation period and accrual rate for BIPA claims, as certainty will help them more reliably determine a case's potential liability.

Claim timing and accrual have been significant gray areas in the nearly five years since BIPA suits began flooding Illinois' courts. While businesses found some guidance from an intermediate appellate panel that assigned **different time limits** to different types of claims, they've been waiting for **at least a year** to learn whether BIPA claims accrue with every unlawful data collection and dissemination, or just the first.

The justices are **also considering** whether the Labor Management Relations Act preempts union-represented workers from taking their employers to court over alleged BIPA violations. The Seventh Circuit ruled such claims **were preempted** in 2021, when it found that reviving a BIPA suit against food producer Kerry Inc. would improperly require it to interpret the complaining workers' collective bargaining contract.

The ongoing uncertainty over claims accrual and statute of limitations specifically has led some businesses to either shut down or suspend certain operations out of fear for the amount of damages they could face for unlawfully capturing, storing or using biometric information, Meredith Slawe, a partner at Skadden Arps Slate Meagher & Flom LLP, told Law360.

"It's one of those scenarios where the issue being an open question and that uncertainty really just creates such an incredibly difficult risk calculus for companies because you don't know the scope of the damages exposure that you actually face," she said.

The high court's rulings will be important because they'll help determine who can bring a BIPA case and how large a class might be. That will be particularly helpful not just for courts that have stayed

biometric privacy suits in light of these pending decisions, but also for defendants trying to determine how to litigate or settle a case, Greenberg Traurig LLP shareholder Brett Doran told Law360.

"You want to know if you've got a five-year class or a one-year class, because that's a very big difference in determining the value of a case and the risk of a case," he said.

Some experts believe companies could still face massive damages even if the high court finds aggrieved individuals have just one year to sue and can only do so over a business' first BIPA violation. Slawe told Law360 that the justices' rulings might only downgrade "catastrophic" exposure to "crushing" levels, and it will take legislative action to fully rein in the statute.

Doran, though, said the impact of that combination of rulings will likely depend on a company's employee turnover. And the same could be true in cases challenging the "try-on" technology some retailers use on their websites for products such as eyewear and makeup, where a customer might have used the technology recently but first tried it more than a year ago, he said.

"Does it take the sting out? A little, but it's a big stinger," he said.

The cases are Tims v. Black Horse Carriers, case number 127801, and Cothron v. White Castle Systems, case number 128004, both before the Illinois Supreme Court.

Liability Over Drugmakers' Warning Labels

Drug manufacturers in Illinois may have less of a liability buffer in failure-to-warn cases if the state Supreme Court decides Abbott Laboratories should go to trial in a woman's suit over allegedly insufficient Depakote warnings.

The justices in November accepted a request from Abbott to review an intermediate panel's decision that the company can't rely on the state's so-called "learned intermediary" doctrine to escape a woman's accusations that she gave birth to a child with spina bifida because the drugmaker failed to adequately inform the medical community of the risks of birth defects associated with taking Depakote.

The learned intermediary doctrine provides that drug manufacturers cannot be held liable for failing to properly warn patients about their drugs' risks if they provide that information to the physicians who in turn prescribe the medication based on their assessment of the patient's current circumstances. Courts in many states have backed that theory, including the Washington Supreme Court **just months ago.**

But an intermediate Illinois panel essentially turned that subjective analysis into an objective one when it reversed Abbott's summary judgment win against patient Angie Muhammad, according to Gretchen Harris Sperry, who leads Hinshaw & Culbertson LLP's appellate practice.

While that immunity was previously based on specific circumstances, like a patient's current symptoms, the panel's ruling requires that decision to be based on whether other doctors would have acted similarly in the same situation, she said.

"From a procedural perspective, it basically turned the analysis on its head" and conflates the standard for analyzing medical malpractice claims, Sperry said. "It puts pharmaceutical manufacturers in an extraordinarily difficult position to write drug labels and not be able to rely on the doctors to interpret them."

Illinois has followed the learned intermediary doctrine for at least 40 years, so the intermediate appellate court's holding was "a real departure" from the analysis typically applied to patients' failure-to-warn claims against drugmakers. The state high court would send a shockwave through the state if it backs the panel, she said.

Muhammad had initially sued Abbott in 2017 but refiled her case in 2019 after a jury awarded her $18.5 million against Northwestern Memorial Hospital and one of the physicians involved in prescribing her Depakote in 2005 to treat major psychotic episodes she'd been experiencing. She claimed Abbott's birth defect warnings for Depakote were insufficient, which led her physician to

prescribe the treatment in the first place.

Abbott argued on appeal that its summary judgment win should have stayed intact under the learned intermediary doctrine because Muhammad's physicians testified they'd have still recommended she take Depakote even if they had additional risk information to consider or communicate with her. But the intermediate appellate panel **disagreed and said** a jury should decide whether Muhammad's child would have suffered injuries if they'd told her the drug carried significantly higher birth defect risks than what was disclosed in the drug's package insert.

The case is Charles Muhammad et al. v. Abbott Laboratories Inc. et al., case number 128841, in the Illinois Supreme Court.

High-Profile Political Corruption Trials

Federal juries are expected to hear two notable bribery trials this year: the first against a group of Commonwealth Edison employees accused of using bribes to gain former House Speaker Michael Madigan's legislative favor, and the other against a powerful Chicago alderman accused of trading his considerable political clout for private legal work.

Former ComEd CEO Anne Pramaggiore, former lobbyists Michael McClain and John Hooker, and former consultant Jay Doherty are set for an eight-week trial beginning in March on charges that **they helped** arrange jobs and other benefits for allies of Madigan, once the Prairie State's most powerful politician, in exchange for his support on legislation the Exelon subsidiary favored.

Then in November, Chicago Alderman Edward Burke, who has long been considered the city's most powerful alderman, will face a jury to defend charges that **he used** his considerably influential position on the City Council to help advance initiatives from businesses and constituents who agreed to hire his firm for their tax work.

The trials will be important to follow not just because of the names involved but also to see what conduct juries excuse and what they consider improper influence, with their verdicts considered reflections of societal values, according to Mark J. Silberman, a partner at Benesch Friedlander Coplan & Aronoff LLP who chairs the firm's white collar, government investigations and regulatory compliance group.

"While lawyers and judges have interpretations of what it means to improperly influence, the jury gets to chime in on that too," he said.

That's a particularly significant factor since social morality changes over time, Silberman said. When mores change around someone who's walked a particular career path for a long time, "changing your muscle memory isn't always easy," he said.

Being an elected official is a part-time job in Illinois, so everyone in office has some other type of work they do, Silberman said. It's possible that companies could reach out to an elected official's business hoping to curry favor, but that doesn't mean the official has acted illegally, he said.

And most people like to work with people they know and trust at some point, Silberman added.

"At what point, though, do relationships become proper horse-trading become improper horse-trading become corruption? I don't know," he said. "These will be interesting questions that will likely play out, and I would expect that that is where some of the battlefield will be," Silberman said.

The cases are U.S. v. McClain et al., case number 1:20-cr-00812, and U.S. v. Burke et al., case number 1:19-cr-00322, both in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Celeste Bott. Editing by Janice Carter Brown.