

III. Justices' BIPA Ruling Invites 'Callous' Critique

By **Celeste Bott**

Law360 (February 17, 2023, 8:31 PM EST) -- The Illinois Supreme Court's long-awaited decision on how often biometric privacy claims accrue dealt a blow to defendants facing massive potential damage awards and ultimately left it to trial courts and state lawmakers to strike a balance between compensating privacy plaintiffs and protecting companies from financial ruin.

In a close 4-3 decision, the high court's majority **on Friday found** plaintiffs could bring Biometric Information Privacy Act claims for every time their data was unlawfully collected or disclosed, rather than just the first time. The court acknowledged that siding with plaintiff Latrina Cothron could expose BIPA defendants to catastrophic liability, with defendant White Castle estimating that it could face damages exceeding \$17 billion if the court found it was liable each and every time an employee scanned their fingerprint for timekeeping purposes.

But the court said its hands were tied because "the statutory language clearly supports plaintiff's position." Instead, it invited the state legislature to revisit the landmark privacy law, saying policy-based concerns about potentially excessive damage awards under BIPA are best addressed by Illinois lawmakers.

"The way the majority dealt with that was essentially to say, 'Sure, it might be absurd, but call your state representative,'" Mark Eisen, a Benesch Friedlander Coplan & Aronoff partner who defends clients in BIPA cases, told Law360.

Defense attorneys described the high court's ruling to Law360 as "callous," "misguided" and simply "bad law." But Jim Zouras of Stephan Zouras LLP, who represented Cothron, said his client's victory should "encourage employers and other biometric data collectors to finally start taking the law seriously and ensure such biometric data is properly safeguarded."

The justices' Friday decision, coupled with their finding **on Feb. 2** that BIPA claims are subject to a five-year statute of limitations period, clears the way for dozens of lawsuits that have been stayed awaiting the high court's clarity on the still-developing BIPA landscape to resume and reach more merits-based arguments.

Plaintiffs now have a stronger hand to play in negotiations, but that could just put them on level footing with corporate defendants. David Saunders, a cybersecurity and privacy partner at McDermott Will & Emery LLP, said Friday's ruling will make settlements and resolutions in such ongoing BIPA cases more challenging. And attorneys on the plaintiffs' side tended to agree, with Douglas Werman of Werman Salas PC saying the ruling simply "clarifies the risks that defendants face moving forward in BIPA litigation."

A 'Potential Life Saver': BIPA Damages Discretionary, Not Mandatory

Other lawyers told Law360 that the court's move to clarify that damages under the statute are not mandatory, but discretionary, provides some much-needed comfort to companies that have taken steps to comply with BIPA and should quell any plans by plaintiffs attorneys to point to a defendant's potentially massive exposure in settlement negotiations.

"That's something that members of the defense bar have been arguing for some time, and it's gratifying to see the Illinois Supreme Court recognize that," said John Ruskusky, a partner in Nixon Peabody LLP's litigation department.

The majority did its best to limit the impact of its opinion by throwing that "potential life saver" to the state's business community when it made clear that lower courts have discretion to fashion a damage award that is both fair and would not "destroy" the defendant business, said Goldberg Kohn's David Morrison.

"It will be critical to see courts exercise judicial discretion to give the business community a baseline of their realistic potential liability for violating BIPA, if for no other reason than to underwrite the value of potential claims," Morrison said.

And it softens the ruinous financial result that plaintiffs lawyers have relied on as leverage over companies doing business in Illinois, according to Jason Rosenthal of Much Shelist PC.

"It's a helpful sign and signaling that courts can and perhaps should exercise restraint and caution in awarding damages for violations of the act," he said.

Benesch's Eisen, however, was not particularly reassured, saying the court's ruling, even with its instruction that courts can use their discretion, will not be easy to apply.

"Is it really the case that the court is saying, in the context of this case, that the court has the discretion to award between \$0 and \$17 billion?," he asked. "Using what set of metrics?"

But Jody Kahn Mason, co-leader of the Jackson Lewis PC's biometric privacy litigation group, noted that she wasn't aware of a single case in which a plaintiff alleged their biometric data had been actually compromised or misused by some bad actor in any way, and the claims were solely statutory violations.

The Illinois Supreme Court has ruled that plaintiffs can pursue damages for simply violating the statute, but if there's no real world harm, "I'm sure that's something taken into account in a discretionary damages award," Mason said.

Court 'Shrugged Its Shoulders' At Biz Impact

Not all BIPA defendants are major restaurant chains like White Castle, Saunders of McDermott noted, saying that smaller companies facing these claims "will now face the very real possibility that they could, or should, declare bankruptcy to discharge the claims against them."

"It's difficult to imagine that was the intent of the Illinois legislature, to cause businesses in Illinois to shutter," Saunders said.

In the course of several appeals on biometric privacy issues, the court has deferred heavily to its perceived intent of the legislature, and yet has failed to reference what likely launched BIPA in the first place: the bankruptcy of biometrics company Pay By Touch, which caused legislators to fear the ramifications of millions of fingerprint records that could be exposed in bankruptcy proceedings, Eisen said.

"If one thing can be ascertained from the legislative history, it's that the legislature did not want bankrupt companies that potentially possessed biometric information," Eisen said. "Surely you would not want to create the very situation that led to the statute."

Instead, however, the majority just "sort of shrugged its shoulders," he said.

"To discuss the possible damages and essentially not care, that is almost inconceivable," Eisen said.

Cothron's attorneys have maintained that she and other BIPA plaintiffs aren't seeking damages based on every allegedly unlawful biometric scan or data disclosure, with Zouras **arguing to the high court** that it's BIPA defendants like White Castle that have estimated potential damages ranges based on a per-scan or per-disclosure theory in order to cross the \$5 million threshold of the Class Action Fairness Act when they are trying to move cases from state court to federal court. He also noted there are constitutional due process protections against disproportionate damages awards, Zouras said.

That's exactly what BNSF Railway **argued in November**, renewing a bid for judgment as a matter of law or alternatively asking for either a new trial or a reduced damages payout after it was hit with a \$228 million verdict last year in the first BIPA case to **go to trial**.

It contends the award — which only reflects one violation for each of 45,600 class members, not for each time they scanned their fingerprints to gain access to BNSF facilities — is unconstitutional and clearly unreasonable given the class members suffered no actual harm. And it cited the then-forthcoming White Castle case as possible grounds to revisit the judgment.

Jon Loevy of Loevy & Loevy, who represented plaintiff Richard Rogers in that case, said Friday that the White Castle decision was a big win for the class.

"BNSF just lost its last hope of avoiding the obligation to compensate the drivers whose rights it violated," he told Law360.

Next For BIPA: Fewer Class Actions, Legislative Review?

One question Eisen is mulling in the wake of White Castle is how the high court's interpretation of the statute will impact class certification.

If a plaintiff wants to pursue a million-dollar claim, reflecting damages for all the times they scanned their fingerprint, for example, they can go litigate their own claim as an individual, and the class action mechanism serves very little purpose, Eisen said.

"Maybe what ends up happening as a result, is we see a lot more individual biometric claims. [Plaintiffs attorneys] may try to avoid bringing cases in which the argument is made to the court that the defendant is going to go bankrupt," Eisen said. "Rather than do that, they could try to bring six to seven individual claims instead and not even get into the annihilating damages issue."

From here, it'll be worth watching if courts are simply going to defer to the Illinois Supreme Court's analysis or if they're going to dig into how the technology actually operates, he said.

Mason of Jackson Lewis agreed that there are other outstanding questions and issues to litigate in the still-developing area of biometric privacy law in Illinois, saying she'll be waiting to see what happens when cases that have been stayed for so long can move forward.

"We haven't gotten to the substance of a lot of these cases," she said.

And as Illinois' justices have signaled in other BIPA disputes, the high court majority said it continued to believe that concerns about excessive damages is a debate left to state lawmakers and not the courts.

"We respectfully suggest that the legislature review these policy concerns and make clear its intent regarding the assessment of damages under the act," the court said Friday.

There have been bills introduced in recent years that would revise BIPA, but there has not been appetite in the legislature to move them forward. Some attorneys predict the White Castle decision may finally be impactful enough on the state's business community to move the needle, even if curbing the ability for people to sue for privacy violations isn't the most popular platform for a politician to adopt.

"If Illinois wants to retain business and entice new businesses to come to Illinois, then a legislative fix would appear essential," said Morrison of Goldberg Kohn.

--Additional reporting by Lauraann Wood. Editing by Dave Trumbore.