

Dataprivacy & Cybersecurity

Illinois Supreme Court weighs in on the Biometric Information Privacy Act | March 2023

By: Dan Cotter

The Act

In 2008, the Illinois state legislature passed legislation that was signed by then-Governor Rod J. Blagojevich, the Biometric Information Privacy Act (“BIPA” or “the Act”). The Act was dormant for many years, until 2016, when the number of class actions substantially grew. Most have been against employers that use biometric information collected from workers for timekeeping.

What BIPA Covers

A “biometric identifier” is defined to include “a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry.” The act provides for the awarding of statutory damages in amounts greater of \$1,000 or actual damages for each negligent violation and \$5,000 or actual damages for intentional violations, plus reasonable attorney fees, litigation expenses and costs.

Two Decisions from Illinois Supreme Court in February 2023

The Illinois Supreme Court recently issued two decisions that substantially increase the exposure of employers and others collecting biometric information. The first case that the Illinois Supreme Court decided was *Tims v. Black Horse Carriers*, heard on September 22, 2022. On February 2, 2023, the Illinois Supreme Court held that the five-year provision was the appropriate statute of limitations. The court held, “For the following reasons, we find that the five-year limitations period contained in section 13-205 of the Code governs claims under the Act.” This was counter to the appellate courts, which had held that there was a one-year statute of limitations for some sections and five years for others.

In a second decision, *Cothron v. White Castle*, No. 128004, the Illinois Supreme Court answered the following certified question from the 7th U.S. Circuit Court of Appeals: “Do section 15(b) and 15(d) claims accrue each time a private entity scans a person’s biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?”

The oral argument was heard on May 17, 2022. Of note is that the Illinois Supreme Court has changed composition since then, with the court having a large number of new justices as a result of a retirement, redistricting, and the November elections.

On February 17, 2023, the Supreme Court issued its decision. In a 4-3 decision, the court held: “We hold that a separate claim accrues under the Act each time a private entity scans or transmits an individual’s biometric identifier or information in violation of section 15(b) or 15(d).”

While the court in Cothron suggested that courts have the ability to assess damages in such a manner as to not be ruinous to companies, the two decisions in these recent cases broadly expand the potential exposure that users of biometric data and information will face, unless the legislature takes steps to amend BIPA to soften these likely unintended consequences. In the meantime, if you as a business are using biometric information, you must immediately review your policies and procedures and manner of collecting to ensure you are in compliance with the requirements of BIPA.

For more information about the status of the Illinois BIPA Act, please contact Dan Cotter of Howard & Howard Attorneys PLLC.



Dan Cotter

Partner

Chicago, IL

312.502.7480

dcotter@howardandhoward.com