

# Chicago Daily Law Bulletin®

VOLUME 170

LAW BULLETIN MEDIA.

## BIPA battles continue to play out as courts weigh class-action suits

The Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 et seq., protects Illinois residents from threats posed by the collection of their biometric information. It establishes some of the strongest legal protections for biometric data in the nation and has spawned numerous class-action lawsuits targeting small and large businesses.

This article reviews the statute, examines current Illinois Supreme Court BIPA rulings and Illinois' single trial verdict on BIPA, and argues why mediating BIPA cases is a more prudent route to resolution than trial.

### Statute highlights

BIPA defines biometric Information as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILCS 14/10. The use of biometric identifiers like a retina or iris scan, fingerprint, voiceprint, and scans of hand or face geometry has become a widespread tool in consumer transactions, employment operations and health care systems.

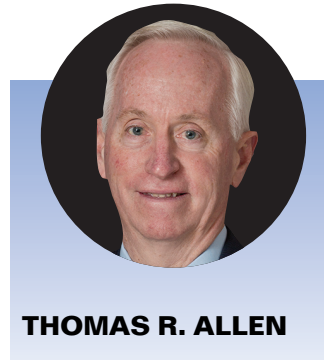
Private entities using biometric technology must develop a written policy and retention schedule, obtain

informed consent and a written release from the subject. They also must not sell, lease, trade, disclose or redisclose biometric information. 740 ILCS 14/15. BIPA affords an aggrieved person a right of action against an offending party and states that the prevailing party may recover liquidated damages of \$1,000 for a negligent violation and \$5,000 for an intentional or reckless violation. 740 ILCS 14/20.

### Illinois Supreme Court and BIPA

Once the plaintiff class-action bar discovered this consumer-friendly statute, a flood of lawsuits ensued. Business owners and defense counsel have scrambled to fashion defenses and appeals to reviewing courts to narrow BIPA's impact and avoid potentially catastrophic damage awards. The Illinois Supreme Court eventually stepped in, issuing rulings that have quickly shaped the BIPA playing field.

The Supreme Court first held that an individual need not allege some actual injury or adverse effect beyond violation of their rights to qualify as an "aggrieved" person and be entitled to damages under BIPA. *Rosenbach v. Six Flags*, 2019 IL 123186. The



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court next ruled that the Illinois Workers' Compensation Act does not preempt claims brought under BIPA. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511. The court next defined the statute of limitations on BIPA claims as five years. *Tims v. Black Horse Carriers*, 2023 IL 127801. In a close ruling, the Supreme Court held that each scan of a biometric identifier constitutes a separate BIPA violation. *Cotbron v. White Castle System, Inc.*, 2023 IL 128004.

And most recently, the court held that Section 10's plain language excludes from its protections health care workers' biometric

information, which would be used at medication-dispensing stations for patient care, because it is considered "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" and is, thus, specifically excluded from the definition of biometric identifiers under BIPA. *Mosby v. Ingalls Memorial Hospital*, 2023 IL 129081, ¶ 57.

These decisions may seem to leave the defense bar with few new theories; however, closer scrutiny of them reveals the Supreme Court's uneasiness with the potentially catastrophic damages to businesses if BIPA is interpreted too strictly.

Notably, the *Cotbron* court threw a lifeline to defendants in several respects. First, it found that the General Assembly chose to make damages discretionary, not mandatory, under BIPA.

Second, it punted the catastrophic damages argument to the trial courts, encouraging them to exercise their broad equitable powers in these disputes.

Lastly, it suggested that the General Assembly "make clear its intent regarding the assessment of damages" under BIPA.

The battle over BIPA is far from over. But counsel representing businesses need

to think creatively. Potential new theories of defense are surfacing, including violation of due process, third-party suits, and contribution from biometric timeclock vendors and tech experts who are opining that businesses do not really “possess” the biometric information because it is encrypted.

### **Only one verdict**

The only BIPA case tried to verdict resulted in a \$240 million jury award. *Rogers v. BNSF Ry. Co.*, 1:19-cv-03083 (N.D. Ill. Oct. 7, 2022). A single jury award cannot be relied upon as precedent, so counsel on both sides must

assess the risk of being the second BIPA case to be tried in Illinois.

Although the *BNSF* award emboldens plaintiffs, *Cotbron* cautions that damages are discretionary, not mandatory, and that chancery judges have equitable powers to fashion an award that would not result in a business’ financial destruction. But as of this writing, no chancery judge has rendered a decision on damages, and what constitutes a fair damage award may vary by jurist. Therefore, a prudent BIPA litigant cannot predict where awards for damages may end up once more cases are tried.

### **Mediation as a path forward**

Counsel can take the long, expensive, uncertain road to trial and risk a runaway damage award or choose mediation and minimize risks.

Counsel have myriad reasons to mediate BIPA class actions. Parties can exercise greater control over the mediation proceeding, for example. They choose their mediator and the mediation’s date, time, duration and format. Mediation offers an informal environment with no fixed time constraints, and parties can schedule one quickly. It also

provides many opportunities for a deeper dive into the facts and circumstances of each case while giving those involved the feeling of “having their day in court.”

In the end, settling BIPA cases will be a great relief for business clients. Likewise, getting a reasonable, timely settlement for class members before many disappear and never realize a dime is also a good result. With trial, risks loom on both sides, but mediation returns control to the parties, allowing counsel to serve their clients’ best interests efficiently, at a lower cost and with no surprises.