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In wake of BIPA amendments, mediation remains good path

The signing of SB2979 into law in August officially revised the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 et seq. The amendments respond to last year's Illinois Supreme Court decision that statutory damage claims under sections 15(b) and 15(d) of BIPA accrue on a per-scan basis. *Cotbron v. White Castle System, Inc.*, 2023 IL 128004.

But what difference do these amendments make for BIPA litigants? This column reviews the amendments, explains how they will affect the legal landscape for existing BIPA actions and looks at the benefits of resolving BIPA actions via mediation.

The amendments

Under the amendments, damages will now be limited to one scan per method of collecting biometric information. When a private entity in more than one instance collects biometric information using the same method, it "has committed a single violation of subsection (b) of Section 15 for which the aggrieved person is entitled to, at most, one recovery."

Likewise, when a private entity in more than one instance discloses the same biometric information using the same method, it "has committed a single violation

for which the aggrieved person is entitled to, at most, one recovery."

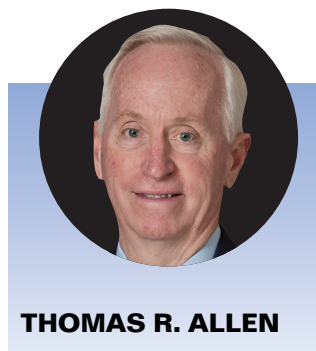
Moreover, the amendments add language to BIPA's definition section about electronic signatures. An electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." This now validates the use of electronic signatures on consent forms authorizing private entities to collect personal biometric information.

Effect on existing BIPA actions

Although these amendments likely relieve many businesses that are currently defending cases, one has to wonder how much does this really change things on the whole?

Even with the *Cotbron* ruling that each scan constitutes a separate violation in place, it has been my experience as a mediator of these matters that lawyers did not actually evaluate these cases by measuring damages on a perfectly exact per-scan basis.

It is not likely that parties engaged in serious settlement discussions have armed or would arm themselves with demands based



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upon those damage claims because they are so astronomical. In practice, although parties have known that per-scan damages is law under *Cotbron*, it was not followed to the letter for practical reasons.

That being said, it is a fact that thousands of BIPA cases remain on Illinois court dockets. Stays have all been lifted by now, and trials are looming. (Only one case, *Rogers v. BNSF Ry. Co.*, 1:19-cv-03083 (N.D. Ill. Oct. 7, 2022), has been tried to a jury, resulting in a verdict of \$240 million.)

Moreover, no language in the amendments states that they apply retroactively to pending BIPA cases, and leg-

islative history may help argue that this was the Illinois General Assembly's intent if that question is litigated. In addition, the language in the amendments that clarify the per-scan issue only applies to sections 15(b) and 15(d). This may well invite class counsel to develop new theories of recovery for violations of sections 15(a), 15(c) and 15(e).

For those waiting for pending BIPA cases to find direction, the new amendments may be less than they desired, changing much for the future and little for the present.

Merits of mediating BIPA actions

Because of the long appeal process on the many unsettled legal issues, BIPA cases have been mired in stay after stay as the Illinois Supreme Court wrestled with the statute's legislative intent for some time now. Meanwhile, business owners twisted in the wind, frightened by the threat of crushing damages. On the other side, class counsel was left guessing what discovery may reveal once the stays were lifted.

Additionally, after so many rulings in so few years, the Supreme Court may be slow in taking on any new BIPA cases. The legislature did

not give the business community and defense bar the full relief they were seeking, and it is unlikely to revisit this subject any time soon.

Mediation is a reliable recourse. Once they agree to mediation, parties to nearly any BIPA dispute fully control their mediation's

logistics and scheduling. They decide its date, time, duration and who will mediate it, under what parameters and how they will resolve the dispute in an enforceable settlement agreement.

By its very nature, the mediation process obviates

risks for both sides in a legal landscape rife with delays, uncertainty, untested theories of defense and lingering concerns about the outcome of another jury trial.

With many cases pending for four or five years and with certain legal boundaries more firmly estab-

lished (per-scan and electronic signature issues being settled), parties can opt for mediation for a better sense of the settlement value of their case. The process offers immediacy and finality, two solid benefits that should not be undervalued.