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Ill. BIPA Rulings Highlight Safety Valve For Defendants

By **Jason Stiehl and Erika Dirk** (March 17, 2023, 1:59 PM EDT)

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Recently, the Illinois Supreme Court issued two long-awaited decisions that redefine the Biometric Information Privacy Act landscape.

On Feb. 2, the court issued its decision in Tims v. Black Horse Carriers Inc., holding that the catch-all, five-year statute of limitations applied to the statute.[1]

On Feb. 17, the court dropped another BIPA bomb in Cothron v. White Castle System Inc., holding that a violation occurs with each capture of biometric data.[2]

While on the surface, these decisions appear to exponentially expand the risk associated with violations of BIPA, the court buried the lede in its recent decision and noted later in the opinion that the statute, while potentially allowing for billions of dollars in exposure, has a safety valve.

Specifically, the court observed that a lower court would have the discretion to fashion the size of the award, and that the court's power is discretionary, not mandatory.

While dicta, this passing comment in Cothron may ultimately become the most important element of the decision.

Exorbitant Aggregated Statutory Damages Is Nothing New

BIPA's statutory damages provision is certainly not the first to raise the hackles of companies.

In recent years, the ability to aggregate statutory damages has sounded alarm bells in courts across myriad areas of the law, ranging from copyright law to statutes such as the Telephone Consumer Protection Act, the Fair and Accurate Credit Transaction Act and the Electronic Funds Transfer Act.

Each one of these examples provides for the possibility of millions, if not billions, in damages when a suit is brought as a class action. Indeed, in just the past year, the U.S. District Court for the Northern District of Illinois approved a damages award of $228 million dollars after a jury trial in Richard Rogers v. BNSF Railway Co.[3]

Amazingly, this is not the largest jury decision in the consumer statutory damages context, with a U.S.

District Court for the District of Oregon jury awarding $925 million in damages under a TCPA claim in Wakefield v. ViSalus Inc.[4]

These incredible damage awards ultimately forced many companies to avoid the risk and settle for equally unbelievable sums, including Meta Platforms Inc., then Facebook Inc., settling a BIPA class action lawsuit for $650 million in 2021, followed by several other social media companies resolving similar claims for tens of millions of dollars.

Again, equally large settlements can be found in other statutory contexts, such as Capital One Financial Corp.'s TCPA settlement for $75 million in the Northern District of Illinois in 2014 and the $31 million Subway Restaurant's FACTA settlement in the U.S. District Court for the Southern District of Florida in 2017.

In some instances, unlike BIPA, there is no discretion as to the award of the statutory damages amount, which left courts initially feeling as if their hands were tied by the legislature.

Many of these courts, much like the Illinois Supreme Court discussed in Cothron, discovered several tools to avoid a destructive outcome.

Be Careful What You Wish For

The prospect of a potential billion-dollar award would be enough to make any litigant, and their counsel, wildly uneasy. But extraordinarily expensive outcomes have often resulted in courts taking extraordinary steps to avoid such results.

One of the first tools courts utilized to limit the extent of statutory damages was the due process clause.

In Texas v. American Blastfax Inc. in 2001, the U.S. District Court for the Western District of Texas reduced a TCPA statutory award of $500 per violation to $0.07, holding it was inequitable and unreasonable to award damages that would accumulate to over $2.34 billion. Other courts have followed suit.[5]

The ability to deny class certification has served as another tool in courts' toolboxes for limiting extensive damages awards.

For example, in Ratner v. Chemical Bank New York Trust Co. in 1972, the U.S. District Court for the Southern District of New York rejected class certification of claims brought under the Truth in Lending Act, where the proposed recovery would "be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class."

Additionally, in Leysoto v. Mama Mia I. Inc. in 2009, the Southern District of Florida denied class certification under FACTA where little if any harm occurred, but the plaintiffs sought $46 million in damages.

The Illinois Supreme Court Clears a Path

Recently, in the Cothron case, the Illinois Supreme Court decided that a claim accrues with each separate violation of BIPA.

To provide a sense of just how quickly these violations can stack up, consider a typical BIPA case brought by employees against a company that uses biometric technology, where the employees use the technology to scan in and out of work and track their time.

Each and every time an employee scans a finger, a separate claim accrues — $1,000 in cases in which the company's collection and retention of the biometric information is negligent, and $5,000 in cases where it is reckless or intentional.

In that scenario, a single employee who scans a finger to start a shift, to take a lunch break, to return from a lunch break, and to clock out for the day could run up a tab of statutory damages amounting to $20,000 per day.

In holding that a new claim accrues with each violation, the court followed the plain language of the statute, essentially noting that it had no discretion but to hold that a claim accrues with each separate violation.

But it then made the conscious decision to not simply end the inquiry there. The court provided guidance, albeit in dicta, as to how a lower court can implement the tools at its disposal to avoid the absurd result feared by White Castle in its defense.

Specifically, the court pointed to the opinion of the Illinois Appellate Court, First Division, in Central Mutual Insurance Co. v. Tracy's Treasures Inc. in 2014, where the court observed that

> [a] trial court presiding over a class action—a creature of equity—would certainly possess the discretion to fashion a damage award that (1) fairly compensated claiming class members and (2) included an amount designed to deter future violations without destroying a defendant's business.[6]

It buttressed this ability by noting that the Illinois legislature "chose to make damages discretionary rather than mandatory" and that "there is no language in the Act suggesting legislative intent to authorize a damages award that would result in the financial destruction of a business."[7]

A Silver Lining?

BIPA has become only the latest example of a statute with a well-intended damages provision stretched beyond its reasonable limits.

If faced with a class action, companies should take note of the Illinois Supreme Court's observed options, both express and implied, in its recent decision in Cothron.

For now, it will be up to the lower courts to determine how to craft damages awards in cases where companies are found liable for violating BIPA.

However, the recent Illinois Supreme Court decision, along with decisions on analogous statutory damages claims, provides a host of potential tools to undermine these potentially inequitable and unreasonable outcomes.

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[1] Tims v. Black Horse Carriers, Inc., 2023 IL 127801, (Ill. Feb. 2, 2023).

[2] Cothron v. White Castle System Inc., 2023 IL 128004 (Ill. Feb. 17, 2023).

[3] See Richard Rogers v. BNSF Railway Company (Case No. 19-C-3083, N.D. Ill.) (entered judgment).

[4] Wakefield v. ViSalus, Inc., D. Org., No. 3:15-cv-1857 (April 12, 2019).

[5] See Golan v. FreeEat.com, Inc., 2019 U.S. App. LEXIS 21015 (8th Cir. July 16, 2019) (affirming reduction of TCPA damages from $500 per call to $10 per call, where holding otherwise would result in an oppressive award that violated the Due Process Clause).

[6] See Cothron, 2023 IL 128004, ¶ 42.

[7] Id.