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Illinois Cases To Watch In 2023: A Midyear Report

By **Lauraann Wood**

Law360 (July 20, 2023, 5:57 PM EDT) -- A jury will decide appropriate damages for biometric privacy violations, federal antitrust regulators will put a relatively novel pharmaceutical theory to the test and nursing homes in the state will learn whether they'll need to tweak their contracts, as part of cases in Illinois worth watching for the rest of 2023.

Companies with business in the Prairie State will be paying close attention to see how a jury may assess Biometric Information Privacy Act damages against BNSF compared to the Chicago federal judge who vacated his $228 million award for a class of truck drivers who say the railroad collected their fingerprint data without informed consent.

With rulings regarding BIPA claim accrual and time limits in the rearview mirror, the Illinois Supreme Court is moving on to interpret other parts of the state's landmark biometric privacy law. Next up for the court is whether health care workers can sue their employers for mishandling their biometric information, or whether that data is exempt from BIPA's strict informed-consent requirements.

Pharmaceutical companies thinking of major mergers or acquisitions will also be waiting to see if the Federal Trade Commission can convince a Chicago federal judge that the mere possibility of anti-competitive product bundling is enough to block Amgen's nearly $28 billion merger with Horizon Therapeutics.

And nursing homes in the state may want to reassess the resident agreements they enter depending on how the state's justices interpret the arbitrability of Survival Act claims under a contract that otherwise terminated upon a resident's death.

Here are four cases Illinois attorneys will be watching in the second half of 2023.

Jury to Decide BIPA Damages

The first BIPA case that ever went to trial will also be the first to give defendants an idea of what damages could look like under the statute if they're assessed by discretion rather than an automatic calculation.

BNSF has already been found liable for collecting and using 44,000 truck drivers' fingerprint data in violation of BIPA. But the railroad and class representative Richard Rogers will go back before a jury to argue over the appropriate amount of damages for those violations after U.S. District Judge Matthew

Kennelly found his $228 million award didn't follow case law and statutory language indicating there's room for discretion on the issue.

Defendants had been dealt blow after blow with recent state Supreme Court rulings interpreting BIPA in plaintiffs' favor, but Judge Kennelly's decision to vacate his basic-math damages award gave them "some reason for cautious optimism as they attempt to navigate the BIPA landscape," Andrew May, a partner at Neal Gerber & Eisenberg LLP, told Law360. Illinois' justices have taken a literal approach to interpreting BIPA, but putting the issue into a jury's hands "serves as a counterbalance to that literal interpretation," he said.

"It will be interesting to watch because this is really the first time that we're going to get the opportunity to see how a jury left to its own devices exercises its discretion" in this area, said May, who helps clients navigate BIPA-related insurance matters.

The jury's award could come out substantially lower than Judge Kennelly's award, but that may not be enough to lessen companies' concerns about taking a BIPA case to trial in the future, May said. A jury going easy on BNSF doesn't mean a different jury would do the same with a different defendant, he said.

Judge Kennelly had initially entered his $228 million damages award himself after a jury found that the railroad company unlawfully scanned the truck drivers' fingerprints for identity verification without providing notice or getting consent. The railroad's penalty came as a result of the court's finding that the company must pay $5,000 for each of the 45,600 times that a defense expert estimated that drivers' fingerprints were registered.

But Judge Kennelly found in June that the jurors should be told damages are optional in BIPA cases and should have the chance to determine penalties themselves. The judge said he was issuing the ruling in light of the Illinois Supreme Court's February decision in Cothron v. White Castle, in which the high court said lawmakers had intended to make damages "discretionary" under the statute. But some have since called that section of the justices' ruling dicta.

"Until we have definitive guidance from the Illinois Supreme Court on this issue of whether BIPA damages are mandatory or discretionary, it would still behoove defendants to exercise caution in taking a case like that to trial," Judge Kennelly said.

The case is Richard Rogers v. BNSF Railway Co., case number 1:19-cv-03083, in the U.S. District Court for the Northern District of Illinois.

Interpreting BIPA's Health Care Exemption

The Illinois Supreme Court's pending interpretation of BIPA's health care exemption could either wipe out or bolster lawsuits against hospitals and other medical facilities accused of collecting and using employees' biometric data without informed consent.

The state's justices will soon set oral argument in a consolidated appeal from two hospitals seeking clarification on whether they can require employees to scan their biometric data to clock in, access drug dispensing cabinets or perform other aspects of their jobs without having to make sure those practices comply with BIPA.

Specifically at issue in the interlocutory appeal is whether BIPA's exemption for "information collected,

used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to those workers' data. A split intermediate appellate panel said it doesn't apply.

The question at hand is fairly industry-specific for BIPA litigation, so a ruling on this issue won't have a widespread effect. But BIPA defendants in the health care space are keen to learn what justices make of the intermediate appellate court's dissent, which took issue with the majority's narrow interpretation of the exception, Crowell & Moring LLP partner Jason Stiehl told Law360.

If the state's justices agree the exception doesn't apply to health care workers' fingerprints, such a finding could result in "a retargeting of certain health care companies" over alleged BIPA violations, Stiehl said. Receiving a definitive ruling that health care companies could be liable for improperly collecting worker's biometric data could "open up a space that I think a lot of people were not focused on," he said.

The intermediate appellate court addressed the issue in a consolidated appeal stemming from BIPA cases against two suburban-Chicago hospitals. In September, a two-justice majority found that the exclusion was plainly inapplicable because the nurses who sued were neither patients nor protected under HIPAA.

A dissenting justice, however, said she believed lawmakers intended to exempt health care workers' biometric information from BIPA. The nurses and appellate panel majority appeared to ignore important aspects of statutory construction and overcomplicated a straightforward reading of the exclusion to reach the opposite conclusion, she said.

The case is Mosby v. Ingalls Memorial Hospital, case number 129081, before the Illinois Supreme Court.

FTC Pursues Unique Theory in Pharma Merger Challenge

Amgen, Horizon Therapeutics and the FTC are headed for a September evidentiary hearing that will help a federal judge decide whether he'll side with the regulator's argument that he should block the companies' anticipated $28 billion merger because it could lead to anti-competitive product bundling.

The FTC's suit is the first pharmaceutical merger challenge in at least 25 years, and it's the first time the agency has pursued this theory against companies that don't have overlapping products, Axinn Veltrop & Harkrider LLP partner Jeny Maier told Law360.

Seeing the theory in a court pleading, however, wasn't particularly surprising because it had previously been floated in working groups with regulators, academics and other professionals, Maier said. Still, the commission's decision to bring the suit demonstrates its willingness to push the envelope when it comes to challenging deals it believes would stifle competition in a market, she said.

"This current FTC leadership has not been shy about bringing cases based on ... either novel theories or theories that have perhaps fallen out of favor in more recent decades," Maier said.

Amgen and Horizon revealed in January that the FTC was reviewing the proposed merger, just one month after the two announced the deal. Horizon makes the only U.S. Food and Drug Administration-approved treatment for thyroid eye disease, Tepezza, and the only FDA-approved treatment for chronic refractory gout, Krystexxa.

Enforcers moved to block Amgen's planned purchase of Horizon in May over concerns that Amgen could leverage its portfolio of blockbuster drugs to protect the monopoly positions of Horizon's Tepezza and Krystexxa by bundling rebates provided to insurance companies and pharmacy benefits managers.

The FTC filed an administrative complaint regarding the planned $27.8 billion merger on June 22, and the administrative proceeding is expected to begin Oct. 25. The two companies already agreed to defer completion of the deal until either Oct. 31 or two days after the court makes a ruling on the administrative complaint, whichever is sooner.

The case is Federal Trade Commission v. Amgen Inc. et al., case number 1:23-cv-03053, in the U.S. District Court for the Northern District of Illinois.

Nursing Home Arbitration at Stake

The state Supreme Court's incoming decision on whether a nursing home can redirect a daughter's Survival Act claims to arbitration may lead other nursing homes to ensure they tighten up their own contracts.

Illinois' justices heard argument in May over whether Oakbrook Healthcare Centre Ltd. should be allowed to arbitrate Nancy Clanton's claims against it under her deceased mother's contract despite a provision stating the agreement at issue terminates upon death.

The court is being asked to navigate "big concepts," Gretchen Harris Sperry, partner and co-chair of the appellate practice group at Gordon Rees Scully Mansukhani LLP, told Law360. That includes the competing interests between arbitration, which can be seen as more economically efficient, and a plaintiff's right to have their issues resolved by a jury, she said.

The nursing home argued it should be allowed to invoke the arbitration agreement in deceased resident Laurel Johnson's contract since Clanton is pursuing claims that arose while her mother was still alive. It's urging the justices to follow a Fourth District Appellate Court decision in Mason v. St. Vincent's Home Inc., which cited Illinois' public policy favoring arbitration to enforce an arbitration agreement under similar circumstances.

Clanton's attorney spent just four minutes urging the justices to reject the nursing home's position, arguing the question is not when the claim accrued but rather what form of relief exists between the parties. Since Jansen's contract terminated upon her death, the nursing home only has rights under the law, and the law doesn't give parties a right to arbitrate simply because they elect to, her counsel argued.

The case highlights the "critical distinction" between claims brought under Illinois' Wrongful Death Act, which belong to a decedent's family, and claims brought under Illinois' Survival Act, which belong to a deceased individual and accrue while an individual is still alive, Sperry said.

Depending on its scope, the court's impending ruling could also lead other nursing homes to change their contracts to ensure more certainty regarding the proper forum if they ever face similar claims, Sperry said.

But the justices may also find that Clanton never had the legal authority to bind her mother to the

nursing home's arbitration provision as her health care power of attorney, although they put little focus on that issue during oral argument.

"If it did come down to the power to contract, it could prompt some nursing homes to make some changes to their admission requirements," Sperry said.

The case is Clanton v. Oakbrook Healthcare Centre Ltd., case number 129067, before the Illinois Supreme Court.

--Additional reporting by Jade Martinez-Pogue. Editing by Marygrace Anderson.
