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Biggest Illinois Decisions Of 2023: A Midyear Report

By **Celeste Bott**

Law360 (July 19, 2023, 4:08 PM EDT) -- State and federal courts have handed down rulings in Illinois cases so far this year that have altered the legal landscape for biometric privacy claims in the state, opened up an area of uncertainty for False Claims Act litigants and upheld a state statute tacking 6% prejudgment interest onto personal injury and wrongful death verdicts.

Early in 2023, the Illinois Supreme Court sided with the plaintiffs in its highly anticipated White Castle decision, ruling that Biometric Information Privacy Act claims accrue each time data is unlawfully collected and disclosed rather than simply the first time.

But the justices' statement that damages under BIPA are discretionary and not mandatory offered a silver lining for the defense bar, and ultimately led an Illinois federal judge to vacate a $228 million fine against BNSF Railway in the first BIPA case to go before a jury.

In June, an Illinois appeals court declared the state's prejudgment interest law constitutional. The judges affirmed a $6.5 million jury award to a woman who said her health care providers failed to diagnose her breast cancer, becoming the first appellate court to rule on the issue.

And weeks later, the U.S. Supreme Court ruled that liability in False Claims Act suits depends on whether defendants believed their claims were false and not on whether they had made an "objectively reasonable" interpretation of law or regulation, throwing out a pair of Seventh Circuit decisions in an Illinois case that held supermarket chains SuperValu Inc. and Safeway Inc. did not bilk Medicare and Medicaid when they claimed costs that were higher than their discounted prices.

Here's a look at the biggest Illinois decisions in the first half of 2023.

Claim Accrual Ruling Turns BIPA Landscape 'Upside Down'

The state Supreme Court determined in February that claims accrue under BIPA each time data like fingerprints is collected, and not just in the first instance, a ruling affecting hundreds of pending lawsuits that say companies subjected their employees and customers to unlawful biometric data collection practices.

But while the justices sided with plaintiff Latrina Cothron over defendant White Castle System Inc., the defense bar found a glimmer of hope in their acknowledgment that there was no legislative intent to authorize a damages award that would cause "financial destruction of a business" and their finding that

trial courts presiding over class actions should have discretion to fashion a damages award that adequately compensates class members without dismantling a company.

Danielle Kays, a labor and employment attorney at Seyfarth Shaw LLP, said the court's holding that BIPA damages are discretionary and not mandatory "affirms the argument we've been making for years."

The ruling emboldened the plaintiffs' bar initially, but it also bolsters defense attorneys' contention that some cases may not produce any damages at all, Kays said.

Gerald L. Maatman Jr., chair of Duane Morris LLP's workplace class action group, told Law360 that White Castle turned the BIPA world upside down, now giving juries the opening to determine what it means to suffer an injury to one's privacy.

Companies facing litigation under the biometric privacy law and the lawyers defending them have long argued that they could face enormous damages under a per-scan interpretation of the law, even if a plaintiff's data were never subject to real-world harm like a data breach.

Juries will now get to analyze damages in response to a technical violation of the law, Maatman said, offering a hypothetical where a plaintiff's employers scanned their fingerprints without their informed consent but their biometric data was never compromised.

"Mr. Smith never had to go to the doctor, never missed a day of work, never objected to what was going on" and "got a full paycheck," Maatman said. "So we're sorry we engaged in a technical violation of the law, but we did it so we could pay Mr. Smith accurately, and we didn't harm him, and he didn't suffer."

One effect of the decision could be a shift in the type of BIPA cases filed, according to Jason Stiehl of Crowell & Moring LLP, who said he's seen 30 to 40 single-plaintiff BIPA cases filed in Illinois state court in recent months.

On a per-scan basis, "damages for one plaintiff could easily be over $1 million standing by themselves," he said, which could dispense of the need to take a class action approach.

BIPA Damages Is Now a Question for Jurors

In the wake of the White Castle ruling, an Illinois federal judge threw out a $228 million judgment he ordered from the bench against BNSF, ordering a new trial where jurors will decide damages.

U.S. District Judge Matthew Kennelly had entered the damages award himself after a Chicago jury in October 2022 found that BNSF unlawfully scanned more than 44,000 truck drivers' fingerprints for identity verification without providing notice or getting consent. The court found that the company must pay $5,000 for each of the 45,600 times that a defense expert estimated that drivers' fingerprints were registered.

The jury found that the company had been reckless or intentional in breaching the Illinois law, a distinction that allows for penalties of $5,000 per violation.

The new trial will be limited solely to whether BNSF should have to pay damages and, if so, how steep they should be, the court ruled last month. Judge Kennelly left in place the jury's finding that the company should be held liable for its fingerprint collection system breaching BIPA.

White Castle cleared the way for this ruling, as "now there are some lines on the playing field that weren't there before 2023," Maatman of Duane Morris said. The justices on Tuesday denied a request to reconsider the White Castle case, with the dissenting justices from the original opinion criticizing the majority for not offering guidance for trial courts on setting discretionary damages.

Jurors will now get to consider different factors as they craft a damages award, including a defendant's ability to pay, efforts to comply, knowledge of the law and the extent of the harm, Maatman said.

Ken Suh, a privacy and technology attorney at Locke Lord LLP, also noted that no matter what the jury ultimately decides for BNSF, it's likely to be appealed, meaning there could soon be more appellate case law on the issue.

That's particularly notable given that other states are adopting or considering similar biometric privacy laws, with private rights of action, Suh said, meaning the outcomes of these cases have influence beyond Illinois.

Maatman echoed that observation. "This is like Chapter One or this is mile marker 1 of the 26-mile marathon," he said. "We have a long way to go in BIPA jurisprudence before we get a sense of where juries are."

Prejudgment Interest Ruling Could Drive More Settlements

The state Appellate Court, First District, concluded in June that an Illinois law allowing plaintiffs to recover 6% prejudgment interest on all damages except punitive damages, sanctions, statutory attorney fees and costs neither "encroaches upon a jury's calculation of damages nor penalizes a defendant who elects a jury trial."

The interest begins to accrue once a lawsuit is filed, and won't apply to any amount of a settlement offer a defendant makes in writing within a year that the plaintiff doesn't accept within 90 days. Defense attorneys contend the law imposes an arbitrary and unreasonable interest rate that applies before liability is determined, while those on the plaintiffs' side argue it levels the playing field for suits against large corporations, especially when the nature of some injuries eligible for prejudgment interest can make it difficult for those plaintiffs to support themselves.

But 6% is not a small amount and can add significantly to the potential judgment defendants face, putting pressure on them to resolve the matter quickly even if they feel they aren't liable, said Kim Jansen, a Hinshaw & Culbertson LLP appellate partner.

"My read of the statute and the decision is that the only way to reduce your exposure is to get a not-guilty verdict or make an offer of settlement," she said.

Although she said she anticipated the Illinois Supreme Court would likely have the final say on the issue, the Appellate Court's decision to uphold the law could result in more settlements and fewer trials, and defendants could be more inclined to bump up their settlement offers accordingly.

The court said that incentive for parties to settle their disputes earlier in the legal process is "a legitimate governmental interest that the legislature may pursue through its police powers."

Defendants in False Claim Act Suits Face Uncertainty

Experts say the U.S. Supreme Court's decision in a pharmacist's False Claims Act suit accusing Safeway of misreporting to the government how much it charged Medicaid and Medicare customers for generic drugs raised a new issue about what counts as a "substantial and unjustifiable risk" that a claim for payment is false.

The high court held that proving FCA defendants acted with scienter, or knowledge of their wrongdoing, requires assessing their subjective beliefs, rejecting the Seventh Circuit's finding that an "objectively reasonable" view of a policy is enough to disprove scienter.

Scienter includes not only actual knowledge of falsity but also "deliberate ignorance" or "reckless disregard" of the truth, and the high court said that acting with reckless disregard includes defendants "who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway." It did not, however, define a substantial and unjustifiable risk.

The decision was at least partially a win for the plaintiffs bar and the U.S. Department of Justice; they successfully asserted that FCA cases must consider what the defendants thought about the legality or illegality of their actions, and the defendants can't get off the hook by arguing that some objective reasonable person might have found the actions legal.

Illinois' attorney general, Kwame Raoul, who joined a coalition of top state prosecutors filing briefs to the high court, praised the decision, saying the state's False Claims Act closely follows the federal one, and the ruling allows Illinois to continue bringing such cases against wrongdoers and ensuring compliance with the state's Medicaid program.

"I appreciate the Supreme Court's decision to preserve the False Claims Act, which is an important tool for my office to hold those who defraud Illinois' Medicaid program accountable," Raoul said in a statement. "This decision will preserve the integrity of a critical health care program, which serves some of our state's most vulnerable residents."

Defense lawyers have seized on the decision's discussion of scienter, saying reckless disregard is often easier to prove than actual knowledge or deliberate ignorance.

In the aftermath of the decision, defendants in various cases have already begun contending that reckless disregard now has a three-part test requiring evidence that someone was aware of a compliance risk that was both substantial and unjustifiable, yet submitted noncompliant claims anyway.

--Additional reporting by Daniel Wilson, Jeff Overley and Ben Kochman. Editing by Brian Baresch.
