

### 3 Takeaways From The First BIPA Verdict

By **Celeste Bott**

*Law360 (October 13, 2022, 9:46 PM EDT)* -- A Chicago federal jury's finding that BNSF Railway violated Illinois' landmark Biometric Information Privacy Act in the first such case to go to trial underscores the urgency for employers and companies to comply with the statute, and will likely lead to appellate battles over a company's liability for third-party vendors.

On Wednesday, jurors handed a win to a class of more than 44,000 truck drivers and served up \$228 million in damages when they found in favor of lead plaintiff Richard Rogers. Rogers claimed BNSF unlawfully scanned his and other drivers' fingerprints for identity verification purposes without written informed permission or notice while he visited BNSF rail yards to pick up and drop off loads, in violation of BIPA.

Melanie Chico, co-lead of the BIPA practice team at Dykema Gossett PLLC, noted that despite all the evidence presented over a five-day trial, jurors came back with a decision in roughly an hour and found BNSF liable not just for negligent violations of the law but reckless or intentional ones, which provides for higher damages.

"They obviously came to an agreement quickly," she said.

But that conclusion, or how fast it came, was no shock to the plaintiffs bar, according to attorneys who represent clients bringing these kinds of suits.

"An important thing about this verdict is that it really confirms that people care about privacy. Privacy matters and protecting privacy matters," said David Neiman, a partner at Romanucci & Blandin LLC.

BNSF argued unsuccessfully that Remprex, the third-party vendor it hired to process drivers at the gates of the railroad's Illinois rail yards, was the only party to collect drivers' fingerprints and therefore broke the law. The railroad has sued Remprex in Texas state court over the issue, but that case is stayed.

Attorneys told Law360, however, that the verdict won't be the last time that such an argument will be raised as a BIPA defense. The railroad has already said it will appeal, which could mean the Seventh Circuit will get to weigh in on the issue of vicarious liability.

In the meantime, lawyers expect the verdict to give plaintiffs a firmer hand in settlement negotiations for BIPA cases and hope it will sound the alarm for any companies or businesses not yet compliant with the statute, particularly if they work with a third-party vendor that handles biometrics.

And while \$228 million is a huge figure, damages were awarded per class member, and not for each time drivers scanned their fingerprints. More could be on the table in other BIPA cases if the Illinois Supreme Court rules this year that an entity violates BIPA each time it unlawfully scans and discloses their information, as opposed to just the first instance.

Here are three takeaways from Wednesday's ruling.

### **BIPA Damages Could Get Even Bigger**

Jurors in the Rogers case were not asked to calculate damages. Instead, they were asked to mark on the verdict form how many times BNSF violated BIPA negligently or how many times the railroad violated the statute recklessly or intentionally. Jurors said BNSF recklessly or intentionally violated the law 45,600 times, equal to the defense expert's estimated number of drivers who had their fingerprints registered.

BIPA provides for as much as \$5,000 in liquidated damages for every willful or reckless violation and \$1,000 for every negligent violation. U.S. District Judge Matthew Kennelly, who presided over the case, entered a judgment for \$228 million in damages, on a basis of one violation per plaintiff.

In another case, the Illinois Supreme Court has heard arguments but has not yet issued a ruling in *Latrina Cothron v. White Castle System Inc.*, which grapples with whether companies could be liable under BIPA each time a plaintiff is scanned for their fingerprint or other biometric information, or just the first instance.

Dykema's Chico said if the Illinois Supreme Court rules that plaintiffs can pursue damages for every time a fingerprint is scanned — and not just once per class member — the already high damages in a case like this could increase exponentially.

If a per-person verdict amounts to \$228 million, "it's kind of hard to even wrap your head around the potential for a per-scan judgment," said Lauren Daming of Greensfelder Hemker & Gale PC. "That could wipe out so many companies."

Jim Zouras of Stephan Zouras LLP, who argued the pending White Castle case on behalf of the plaintiff, said one of the arguments raised by defendants in that case as well as the one against BNSF is that the damages on a per-scan basis in such cases could reach astronomical proportions, and a class could end up receiving trillions of dollars. He had argued to the high court that repeated violations of the statute give plaintiffs more chances to sue, but don't equate to unlimited damages claims.

"We've always said that's nonsense," Zouras said Thursday.

Other attorneys, like Mark Eisen of Benesch Friedlander Coplan & Aronoff, told Law360 that the verdict, while an "alarmingly high number," doesn't change much in the wake of massive BIPA settlements. Tech giants Google and Facebook have inked \$100 million and \$630 million deals, respectively, to settle BIPA allegations rather than continue litigating in court.

"The math [under BIPA] really is what it is," he said.

### **An Appellate Fight Over Vicarious Liability**

BNSF tried to put the question of whether it could be held vicariously liable for Remprex's actions before the Seventh Circuit after Judge Kennelly ruled that that was a matter for the jury at the summary judgment stage, but he also denied the railroad's bid for interlocutory appeal.

Attorneys told Law360 that that's now a question that will likely be probed by the Seventh Circuit on appeal, and it's one that's received relatively little attention in the case law.

Eisen said that this case, particularly under a law with so many unanswered questions and the potential for large-scale damages, begs the question of whether an appellate court should be allowed to step in sooner and "make sure we're right on this."

"Not many companies can afford to take a case this far, and are settling cases simply because the alternative is risking potential bankruptcy," Eisen said. "That's not to say interlocutory appeals should be granted left, right and center. ... It does seem unfair to ask a company to wait until after a verdict of this nature to appeal."

Zouras said BNSF was permitted to introduce evidence to support its vicarious liability theory, but the jury "just didn't buy it."

"The plain text of the statute is pretty clear. There were no serious doubts [BNSF] was a collector of biometric data, and nothing permits a collector to outsource its responsibility for following the law and its accountability to follow the law," Zouras said.

### **'A Wake-Up Call' for Companies and Employers**

Watching a large railroad company get hit with such a massive damages number will be "a wake-up call" for other businesses to dive into their privacy practices and make sure they're in compliance with BIPA, according Jason Stiehl of Crowell & Moring LLP.

"Overall, it really is just an exclamation point on the risk that a lot of industries aren't focused on, which exists for pretty much everyone who does business in Illinois," he said. "I think everyone's aware of BIPA now, but it's one of the statutes where companies think, 'It couldn't happen to me.'"

Greensfelder Hemker's Daming said one of the biggest takeaways from the Rogers verdict is that companies should be careful about using third parties like Remprex. She said companies should vet third parties carefully to ensure they're complying with the law, and make sure the contracts in place secure indemnity language, assurances and insurance coverage.

Stiehl agreed.

"What I tell clients is, assume that you are as liable as your agent is, because the law is so amorphous," he said. "You better make sure your contracts are properly buttoned up, your oversight is proper and that you know what every arm of your company is doing."

Zouras told Law360 he thought one reason the jury so easily found willful and reckless conduct here is because the statute is so easy to comply with, with straightforward requirements to protect delicate personal information.

"The verdict may be a wake-up call to defendants, but it's no surprise to us," Zouras said. "Juries are

smart. The jury got it right here. They understood what most regular people have always understood: that this is really sensitive data."

"It's high time corporations start taking this law seriously," he added.

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

--Editing by Alanna Weissman and Kelly Duncan.

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