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Seventh Circuit Kicks Questions Regarding Accrual of BIPA Violation to Illinois Supreme Court

On December 20, 2021, the Seventh Circuit sided with the plaintiff in the case of Cothron v. White Castle System. Inc., No. 20-3202 (7th Cir. 2021) by deferring to the Illinois Supreme Court to answer the question of when a violation of the Illinois Biometric Information Privacy Act ("BIPA") accrues. In 2008, the Illinois Legislature enacted BIPA, which generally prohibits the collection, use, and handling of an individual's biometric identifiers (i.e., fingerprints, iris scans, etc.) by private entities without prior consent. However, BIPA does not expressly state when an injury occurs; that is, whether an injury is only the first unconsented scan of biometric identifiers or every single collection, use, or dissemination of same. Rather than deciding, the Seventh Circuit panel certified the question for the Illinois Supreme Court, stating that it is proper for an Illinois Court to get the chance to interpret the Illinois statute, rather than a federal appellate court with little guidance on the topic.

In oral arguments, the parties focused on when the injury occurred. The defendant argued that an injury occurred only once, when the plaintiff's biometric information was first collected without consent, because that was the moment she lost control and secrecy of her biometric information, thereby breaching BIPA. The plaintiff argued that an injury occurred every single time she clocked into work via the fingerprint scanning system, and her biometric information was disseminated, because each occurrence was a separate injury after the initial lack of consent.

BIPA also provides recovery for "each" violation, which brings into question concerns about large damages that could result if each scan is deemed a separate violation. BIPA litigants have recently received some guidance on damages and statute of limitations in the case of Tims v. Black Horse Carriers, 2021 IL App (1st) 200563 (discussed here) and will soon receive additional guidance in the appeal of Marion v. Ring Container Technologies, LLC, No. 3- 20-0184 (Ill. App. Ct., 3rd Dist.). Tims held that a one-year statute of limitations applies to the BIPA violation of publishing biometric information to third parties, and a five-year statute of limitations applies to all other violations. Marion is set to decide whether a two-year statute of limitations for personal injury applies to BIPA. These statute of limitations decisions, in conjunction with Cothron, could result in massive damages under BIPA, if a plaintiff has five years to bring claims and every single collection and dissemination is a separate injury.

Although the Seventh Circuit's opinion centered mostly around the statutory interpretation, consideration needs to be given to the public policy implications at hand. The defendant in Cothron argues that the enormous recoveries possible under plaintiff's argument will have a crippling effect on Illinois businesses and private entities, contrary to BIPA's legislative intent of it being a remedial statute designed to prevent privacy violations. Moreover, there is a statutory amendment to BIPA to this effect in the works in the Illinois General Assembly. HB 559 (discussed here) was proposed in January 2021 to curb the influx of BIPA litigation and the increasing settlement amounts by including, among other amendments, a 30-day curing period for private entities before they are punished with lawsuits.

New York enacted a law nearly identical to BIPA in July 2021, but included the same 30-day curing period proposed under HB 559. The proposed reform in Illinois, similar to New York shows that, despite how the Illinois Supreme Court in Cothron will interpret the statute, there is movement towards practical and reasonable approaches when dealing with biometric privacy.

KD is Here to Help

Should you have any questions or concerns on this matter, please contact Stefan R. Dandelles, Managing Partner of KD's Chicago Office, at (312) 646-6742 or Sarah Suddarth, Chicago Attorney, at (312) 863-3697.

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