Legal Update Article

Trade Associations Urge Illinois High Court to Reconsider BIPA Decision in *Cothron*

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The Illinois Supreme Court's decision that a separate claim under Illinois' Biometric Information Privacy Act (BIPA) accrues each time an entity scans or transmits an individual's biometric identifier or biometric information will lead to absurd and unjust results not intended by the Illinois General Assembly, Jackson Lewis argued in a friend-of-the-court brief filed on behalf of a coalition of trade associations representing the interests of thousands of Illinois businesses employing approximately 2.9 million individuals in Illinois.

The coalition includes the Illinois Manufacturers' Association, the National Association of Manufacturers, the Illinois Health and Hospital Association, the Illinois Retail Merchants Association, the Chemical Industry Council of Illinois, the Illinois Trucking Association, the Mid-West Truckers Association, the American Trucking Associations, the Chicagoland Chamber of Commerce, and the American Property Casualty Insurance Association (collectively, the Associations). The Associations urged the Illinois Supreme Court to grant the petition for rehearing filed by White Castle and reconsider its decision in *Cothron v. White Castle System, Inc.*, 2023 IL 128004 (Feb. 17, 2023).

The Associations contended that the Supreme Court's ruling could expose their members to liability totaling millions — if not billions — of dollars, threaten their very existence and the employment of their employees, hinder technology development within the State of Illinois, and result in decreased health and safety for the citizens of Illinois. The Associations argued that the astronomical damages awards seemingly authorized by the per-scan theory of claim accrual adopted by the court majority in *Cothron* would be grossly disproportionate to the alleged harm the BIPA seeks to redress, particularly where there has not been a single case filed under BIPA where an individual's alleged biometric data has been compromised or misused in any way. Because such an outcome does not reflect the intent of the Illinois General Assembly when it enacted BIPA, the Associations urged the Illinois Supreme Court to reconsider White Castle's appeal.

In the brief, Jackson Lewis argued on behalf of the Associations that an interpretation of BIPA that allows for a per-scan theory of accrual or liability would lead to absurd and unjust results that could bankrupt Illinois businesses and cause thousands of Illinois employees to become unemployed. This broad interpretation would be contrary to the remedial purpose of BIPA, which was intended to promote adoption of commonsense data privacy practices so as to minimize the risk biometric data could be improperly accessed or used.

Since 2019, more than 1,700 class action lawsuits have been filed under BIPA. The Associations noted that, to the best of their knowledge, not a single case has involved allegations that an individual's alleged biometric data has been hacked, breached, or

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misused in any way by a malicious actor. Yet, if a new claim accrues each time an employee scans their finger (or hand, face, retina, or other biometric identifier or biometric information) on an alleged biometric time clock four times a day, for example, and the employee can recover a separate award of statutory liquidated damages for each scan, the potential damages for a single employee over the course of a year would total $1 million, which is more than 16 times the average annual earnings for Illinois employees. Jackson Lewis, on behalf of the Associations, argued that such an outcome would be absurd and unjust.

Please contact a Jackson Lewis attorney with any questions about this case or the BIPA.