

Illinois Supreme Court Rules Each Scan is a Violation of Biometric Information Privacy Act

On Friday, February 17, 2023, the Illinois Supreme Court decided 4-3 that “a separate claim accrues under [the Illinois Biometric Information Privacy Act, ‘BIPA’] each time a private entity scans or transmits an individual’s biometric identifier or information in violation of Section 15(b) or 15(d)” of the Act. See *Cothron v. White Castle Systems, Inc.*, 2023 IL 128004 ¶ 1. This could have potentially devastating consequences for BIPA defendants, as it means individual plaintiffs or putative class members may seek statutory damages of \$1,000 or \$5,000 for *each* unauthorized scan of their biometric data during the five-year statutory limitations period.

For BIPA defendants, potential silver linings are that the Court also found that: (1) damages are “discretionary rather than mandatory under the Act;” and (2) “there is no language in the Act suggesting legislative intent to authorize a damages award that would result in the financial destruction of a business.” *Id.* ¶ 42; see also *id.* ¶ 43 (suggesting “the legislature review these policy concerns and make clear its intent regarding the assessment of damages under the Act”). Defendants should use these parts of the decision to seek judicial rulings limiting the damages that are recoverable in BIPA class actions.

The decision could also potentially be used against class certification. If BIPA plaintiffs can now potentially recover damages in the tens or even hundreds of thousands of dollars (depending on the number of scans), then a class action would not seem to be a superior or appropriate method for fairly adjudicating claims. See Fed. R. Civ. P. 23(b)(3), 735 ILCS 5/2-801. Individual plaintiffs would have ample incentive to pursue recovery in their own right. Class damages also may be subject to due process challenges, insofar as they seek to impose ruinous liability on a defendant completely disproportionate to any harm suffered by the asserted class.

Defendants will want to aggressively press these and other arguments, since the stakes of BIPA cases just went up enormously.

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