

Illinois appellate court clarifies accrual date of BIPA claims



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The Illinois appellate court recently confirmed that a claim under the Illinois Biometric Information Privacy Act (BIPA) accrues each time an individual's biometric information is scanned or captured.

The case is *Watson v. Legacy Healthcare Financial Services, LLC, et al.*, 2021 IL App (1st) 210279. Watson claimed to have worked as a certified nursing assistant for Legacy Healthcare Financial Services (Legacy), Lincoln Park Skilled Nursing Facility (Lincoln Park), and South Loop Skilled Nursing Facility (South Loop). According to Watson, Legacy owns residential health care services facilities, including Lincoln Park and South Loop, and he worked at Lincoln Park from December 2012 through February 2019 and at South Loop from May 2017 through November 2017. Watson alleged that Defendants committed four separate BIPA violations by requiring him to scan his finger and/or hand at Lincoln Park and South Loop for timekeeping purposes from 2012 through the end of his employment.

Defendants moved to dismiss Watson's complaint, arguing that it was time-barred because his claims accrued on the first day Defendants collected his biometric information. In response, Watson argued that his BIPA claim accrued each time Defendants captured his biometric information. The trial court held that a plaintiff's cause of action under BIPA accrues the first time that an entity obtains his or her biometric information, and ultimately dismissed Legacy and Lincoln Park because those Defendants first scanned Watson's information in December 2012 – when his employment with Lincoln Park began.

On appeal, the First District Appellate Court reversed. After closely examining BIPA's text, the court

concluded that BIPA applies to each scan of a person’s finger or hand and each use of his or her biometric information. In reaching that conclusion, the court noted that the federal court for the Northern District of Illinois recently reached a similar conclusion in *Cothron v. White Castle System, Inc.*, 477 F.Supp.3d 723 (N.D. Ill. 2020).¹ The decision in *Watson* is significant not only because it confirms that the statute of limitations on a BIPA claim is tolled until the last possible collection and use of biometrics, but also because it could be read to support the proposition that each such collection or use is a separately compensable violation – which could lead to an exponential increase in liability given BIPA’s stiff statutory damages.

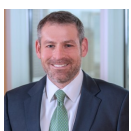
However, despite the significance of these issues, the *Watson* court declined to address whether and to what extent its decision affected the computation of damages under BIPA. In particular, the court refused to consider the Defendants’ argument that liability would be “ruinous” under *Watson*’s theory. In doing so, the court expressly left open the question of whether each scan represented a separate violation or a continuing violation. And in a footnote, the court noted that damages under BIPA are discretionary, not mandatory, emphasizing that the statute provides an aggrieved person “may” recover certain damages.

The *Watson* opinion has wide-ranging implications for the defense of BIPA cases. The *Watson* court’s ruling prevents BIPA defendants from arguing that the statute of limitations outright bars claims by individuals whose first scans occurred long ago. But the open question of whether additional scans of a plaintiff’s biometrics constitute a separate violation or a continuing violation provides BIPA defendants with a potential defense. And the court’s footnote provides defendants with an argument that they should not be subject to the exorbitant penalties routinely sought by plaintiffs in BIPA class action cases.

(1) The decision in *Cothron* is now on appeal to the Seventh Circuit. On December 20, 2021, the Seventh Circuit certified the question of when a claim accrues under BIPA to the Illinois Supreme Court.



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