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Lowered Bar For BIPA Lawsuits Will Raise Insurance Issues

By **Jonathan Viner** (February 13, 2019, 3:33 PM EST)

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For many individuals, the frequent and widespread collection, use and storage of their personally identifying information and other data about them has become a concern. Perhaps the most recent use of PII causing such concern is the use in our everyday lives of biometric identifiers — e.g., retinal scans, fingerprints and facial geometry. Indeed, as was humorously explored in a recent Super Bowl commercial by Olay, you might be unable to access your mobile phone until it recognizes your face.

Concerns about the use of this unique type of data were addressed in Illinois, beginning in 2008, by the state legislature's Biometric Information Privacy Act.[1] BIPA restricts when and under what circumstances private entities[2] are allowed to collect, capture, purchase or otherwise obtain biometric identifiers — for example, a scan of a person's retina, iris or hand/facial geometry, a fingerprint, a voiceprint[3] — or biometric information, i.e., information based on an individual's biometric identifier that is used to identify that individual. (This article refers to biometric identifiers and biometric information collectively as BMII.) BIPA prohibits a private entity from collecting, capturing, purchasing or receiving a person's BMII unless that private entity first informs the person that it will be collecting or storing that BMII, advises the individual as to the purpose and expected duration of storage, and obtains an appropriate written release.

BIPA also details the circumstances in which biometric identifiers or biometric information can be disclosed, disseminated, sold or otherwise provided to others for profit. Significantly, BIPA is enforceable through a private right of action by any person who is aggrieved by a statutory violation. For each violation, a prevailing party may recover actual damages or liquidated damages of $1000, whichever is greater; for intentional or reckless violation, liquidated damages jump to $5000 per violation. A prevailing party can also obtain injunctive relief and reasonable attorneys' fees and costs, as well as expert witness fees and other litigation expenses.

On Jan. 25, 2019, the Illinois Supreme Court issued an eagerly awaited decision explaining the nature and degree of injury or damages an individual must allegedly have suffered to state a legally cognizable claim under BIPA. In Rosenbach v. Six Flags Entertainment Corp.[4], the court held that, to qualify as an aggrieved person entitled to seek liquidated damages and injunctive relief under BIPA, a plaintiff must allege only that the defendant violated BIPA. The plaintiff does not need to allege that the statutory violation resulted in any actual injury or adverse impacts. Therefore, we can expect to see a continuation of the proliferation of BIPA litigation.

Rosenbach arose out of an alleged BIPA violation by the defendant, an amusement park owner, who allegedly fingerprinted a minor to claim a season pass his parent purchased online. The defendant allegedly failed to provide any of the required disclosures or seek execution of a release before fingerprinting the child. The lawsuit therefore sought liquidated damages, injunctive relief, attorneys' fees and court costs.

While alleging that the defendant violated BIPA, the lawsuit did not allege that any harm befell the plaintiff or her child. The defendant moved to dismiss, arguing that, absent such harm, the complaint failed to sufficiently articulate a private cause of action under BIPA. The court disagreed. After reviewing the statutory language — including the fact that it provides for liquidated damages in the absence of actual damages — the court concluded that the statute unambiguously permits claims for statutory violations that are unaccompanied by actual injury or any adverse impacts. The court sent the case back to the trial court with instructions that it proceed on the merits.

As has been reported in this publication, there are hundreds of pending BIPA lawsuits and, presumably, many anticipated future BIPA lawsuits that might be impacted by Rosenbach.[5] Some of these lawsuits could prove significant, and with good reason: misuse or wrongful disclosure of BMII can potentially result in identity theft, causing significant actual damages. What is especially significant about BIPA's liquidated damages provisions, though, is that many BIPA lawsuits serve as putative class actions and liquidated damages can be awarded for each violation.

Given the tendency to think of keeping one's PII secure as a "privacy" issue, defendants who find themselves the subject of pending and future BIPA lawsuits will undoubtedly wish to evaluate whether there is insurance coverage for those lawsuits under their commercial general liability policies. As such, coverage disputes will likely arise with increasing frequency. Indeed, several BIPA-related coverage actions already have been filed in Illinois and in other jurisdictions.[6]

A host of issues could arise with respect to whether a BIPA violation potentially implicates CGL coverage. As a threshold matter, CGL policies typically apply only to damages because of "bodily injury," "property damage" or "personal and advertising injury." One wouldn't necessary expect a BIPA violation to produce bodily injury, sickness or disease. However, allegations of emotional distress resulting from the discovery that someone has collected or disseminated one's BMII might require further analysis. Even if there is "bodily injury," of course, questions will necessarily arise as to whether such injury was caused by an "occurrence," typically defined to mean an accident.

Similarly, one would not necessarily think that improperly obtaining an individual's BMII could cause "property damage," which is customarily defined to require physical injury to and/or loss of use of tangible property. Aside from having to establish that one's BMII has been physically injured or that the claimant has lost the use of the BMII, an insured asserting that the allegations involve "property damage" would have to establish that BMII constitutes tangible property.

The difficulty in doing so might arise, at least in part, from policy provisions stating that electronic data that comprises one's stored biometric information is not tangible property within the meaning of "property damage." Additionally, CGL policies using more recent forms typically contain electronic data exclusions that preclude coverage for damages arising out of, among others, the loss of use of electronic data.[7] Nevertheless, to the extent a biometric identifier has been compromised, it would not be surprising to see an insured argue that an individual has lost some ability to utilize that feature in the future.

Presumably, though, the most significant disputes that will arise are those concerning whether BIPA claims necessarily involve "personal and advertising injury," which is defined as injury, typically including consequential "bodily injury," arising out of an enumerated offense. The offense most likely to be placed at issue is "oral or written publication of material that violates a person's right of privacy." Assuming for the sake of argument parties agree that BMII is "material" as that term is used in the offense, a threshold matter is whether there is oral or written publication of such material. Because violations of BIPA can arise out of mere collection and storage of BMII, publication is not a given.

However, it is not difficult to imagine an insured arguing that the publication requirement of the offense is potentially satisfied by conduct short of the insured's dissemination or disclosure of BMII to third parties. Insurers, on the other hand, might argue that, whether or not there is a publication, there is nothing "private" about one's BMII; rather, notwithstanding the fact that an individual maintains exclusive rights over the use and control of her or his BMII and the legal protections afforded those rights, biometric identifiers are, in fact, public and do not implicate "privacy" rights.

Several exclusions are likely to come into play. Many more recent policies exclude coverage for liability arising, whether directly or indirectly, out of the violation of statutes, whether federal, state or local, that prohibit or limit the sending, transmitting, communicating or distribution of material, including – but typically not limited to – the Telephone Communication Privacy Act (TCPA) and the CAN-SPAM Act of 2003. Insurers are likely to argue that such exclusions preclude any duty to defend or indemnify insureds for BIPA claims, while insureds can be expected to argue that the pleading of additional causes of action – such as invasion of privacy torts or negligence – precludes operation of such exclusions as a basis for an insurer to avoid the duty to defend.

Other exclusions that potentially come into play are exclusions precluding coverage for injury arising out of intrusion into or theft of information that is electronically stored (i.e., "hacking" or "cyber" liability exclusions). To date, moreover, numerous BIPA lawsuits have been brought by the employees of the defendants, who allege their employer has improperly obtained their BMII. Accordingly, it's possible a policy's employer's liability exclusion operates to preclude, or at least limit, coverage.

An additional issue expected to be addressed is whether and to what extent the relief available under BIPA constitutes damages of a kind potentially covered under a CGL policy. With respect to liquidated damages that are awarded in the absence of – or absent specific proof of – actual damages, parties might disagree as to whether those amounts are compensatory and/or whether they are, in fact, penal or punitive and, therefore, not the kind of monetary relief covered under a CGL Policy, whether based on the meaning of the term "damages" or as a matter of public policy.

Parties might also contest whether costs an insured incurs to comply with an injunction are damages for purposes of a CGL policy. Whether court costs and attorneys' and other fees awarded to a prevailing plaintiff are covered, moreover, depends upon the wording of the policy's Supplemental Payments provision and/or whether such fees and costs can be considered damages because of any otherwise-covered "bodily injury," "property damage" and/or "personal and advertising injury."

As the first wave of coverage actions wend their way through the court system, developments in this area will be closely watched, and it will be interesting to see if other jurisdictions begin to take Illinois' lead and develop similar legislation of their own, possibly resulting in coverage disputes across more jurisdictions.

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[1] 740 Ill. Compiled Stats. 14/1 et seq. (West, current through P.A. 100-1179 of the 2018 Reg. Sess.)

[2] Private entity is defined in relevant part as any individual, partnership, corporation, limited liability company, associates or other group however organized.

[3] BIPA excludes numerous items and types of information, such as writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, and physical descriptions such as height, weight, hair color, or eye color, as well as donated organs/tissues and information or images captured in a healthcare setting. 740 ILCS 14/10.

[4] 2019 IL 123186.

[5] Due to the virtual explosion in BIPA litigation, the Illinois legislature has contemplated various amendments that would narrow BIPA's scope, such as where a private entity collects BMII solely for purposes of, among others, employment and/or security, and to exclude from the definition of "biometric identifier" digital photographs and any diametric data generated from digital photographs. See SB 3053 (2018). Notably, lawsuits arising under BIPA are not limited to Illinois courts. In re Facebook Biometric Information Privacy Litigation, 326 F.R.D. 535 (N.D. Cal. 2018).

[6] See, e.g., Westfield Ins. Co. v. Caputo's New Farm Produce Inc., No. 2019-CH-00232 (Circuit Ct. Ill. (Cook Cty.)); Zurich Ins. Co. v. Omnicell, Inc., No. 3:18-cv-05345 (N.D. Cal.).

[7] Electronic data is typically defined, in relevant part, as information stored as or on computer software, including systems and applications software, or computer hardware.