

BY CHARLES N. INSLER



Are insurers obligated to defend their insureds in BIPA litigation?

Insurance Providers & BIPA Litigation

THE BIOMETRIC INFORMATION PRIVACY ACT ("BIPA" OR "ACT") is the litigation gift that keeps on giving. Hundreds, if not thousands, of BIPA lawsuits have been filed across the state and federal courts of Illinois. Some BIPA lawsuits have even made their way out of state,¹ with some settling for enormous sums.² With so many BIPA lawsuits being filed across all industries, an important question emerges: Is there insurance coverage for these BIPA lawsuits?

What is BIPA?

BIPA establishes safeguards and procedures relating to the retention, collection, disclosure, and destruction of biometric data.³ Passed in October 2008, BIPA is intended to protect a

1. See, e.g., *Vance v. Microsoft Corp.*, 534 F. Supp. 3d 1301 (W.D. Wash. 2021).
2. See *Zellmer v. Facebook, Inc.*, No. 3:18-CV-01880-JD, 2022 WL 976981, at *1 (N.D. Cal. Mar. 31, 2022) (noting the \$650 million settlement in favor of Illinois Facebook users).
3. 740 ILCS 14/15.



◀ **CHARLES N. INSLER** is a partner in the St. Louis office of HeplerBroom LLC, where he concentrates on complex commercial litigation matters.

✉ charles.insler@heplerbroom.com

ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *Pitfalls in Biometric Information Privacy Act Litigation* (recorded April 2021), law.isba.org/3AeZB3P.
- John M. Fitzgerald & Alexandra M. Franco, *Guide to the Illinois Biometric Information Privacy Act: 2021 Edition*, ISBA Store, law.isba.org/2R6P8oM.
- Ambrose V. McCall, *What Does the Illinois Biometric Information Privacy Act Require Employers to Do?*, *Privacy and Information Security Law* (Feb. 2019), law.isba.org/3POV3aa.

person's unique biological traits and the data encompassed in a person's fingerprint, voice print, retinal scan, or facial geometry. Given the sensitivity of this information—there is no replacing or reissuing your fingerprint—BIPA provides a private right of action for “[a]ny person aggrieved by a violation of this Act ...”⁴

BIPA litigation shows no signs of slowing down. It seems as if plaintiffs are filing new class-action complaints each week.⁵ In addition, the Illinois Appellate Court continues to face novel legal issues surrounding the statute, such as its statute of limitations,⁶ a claim's accrual date,⁷ and whether certain state or federal laws offer preemption.⁸

Another looming issue surrounding BIPA is the issue of insurance coverage. Are defendants covered by their policies for the costs of defending and (even settling) BIPA lawsuits? There is no clear answer to this question. The federal district courts have reached conflicting decisions on this important issue,⁹ even as to the *same named insured*.¹⁰ This article explores these decisions.

The exclusion game

BIPA establishes that “individuals possess a right to privacy in and control over their biometric identifiers and biometric information.”¹¹ A lawsuit asserting a violation of this right to privacy therefore falls within the “personal and advertising injury” provision of an insurance policy, triggering coverage.¹² Indeed, it is all but “uncontested” that the underlying BIPA lawsuits at issue “allege personal and advertising injury.”¹³ Instead, the issue is whether a policy exception unambiguously applies to preclude coverage.¹⁴

Insurers have pressed three specific policy

exclusions for denying coverage in BIPA lawsuits: 1) the employment-related practices (ERP) exclusion; 2) the statutory-violation exclusion; and 3) the access or disclosure exclusion.¹⁵ Remarkably, there is no uniformity

4. *Id.* § 14/20.

5. See, e.g., *Mahmood v. Berbix Inc.*, No. 22 LA 000012 (Lake County Cir. Ct. Apr. 4, 2022); *Clarke v. Lemonade, Inc.*, No. 2022 LA 000308 (DuPage County Cir. Ct. Mar. 31, 2022); *Banks v. Meridian Lodging Assocs., LLP*, No. 2022 LA 000268 (DuPage County Cir. Ct. Mar. 18, 2022).

6. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 1, *appeal allowed*, No. 127801, 2022 WL 808656 (Ill. Jan. 26, 2022).

7. *Cothron v. White Castle Systems, Inc.*, 20 F.4th 1156, 1159 (7th Cir. 2021) (certifying to the Illinois Supreme Court the question of whether a BIPA claim accrues only once or repeatedly); *Watson v. Legacy Healthcare Financial Services, LLC*, 2021 IL App (1st) 210279, ¶ 65.

8. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 1; *Walton v. Roosevelt University*, 2022 IL App (1st) 210011, ¶ 2.

9. *Citizens Insurance Co. of America v. Wynmdalco Enterprises, LLC*, No. 20-CV-3873 JZL, 2022 WL 952534, at *1 (N.D. Ill. Mar. 30, 2022) (granting insured's motion for judgment on the pleadings), *appeal filed* (7th Cir. Apr. 27, 2022); *American Family Mutual Insurance Co., S.I. v. Carnagio Enterprises, Inc.*, No. 20-CV-3665 JZL, 2022 WL 952533, at *1 (N.D. Ill. Mar. 30, 2022) (granting insurer's motion for summary judgment); *Citizens Insurance Co. of America v. Highland Baking Co.*, No. 20-CV-4997 MMP, 2022 WL 1210709, at *1 (N.D. Ill. Mar. 29, 2022) (granting insured's motion for judgment on the pleadings); *State Farm Automobile Mutual Insurance Co. v. Tony's Finer Foods Enterprises, Inc.*, No. 20-CV-6199 SCS, 2022 WL 683688, at *1 (N.D. Ill. Mar. 8, 2022) (denying insurer's motion for summary judgment); *Massachusetts Bay Insurance Co. v. Impact Fulfillment Services, LLC*, No. 1:20-CV-926 WLO, 2021 WL 4392061, at *1 (M.D.N.C. Sept. 24, 2021) (granting insurer's motion for judgment on the pleadings); *American Family Mutual Insurance Co. v. Caremel, Inc.*, No. 20-CV-637 HDL, 2022 WL 79868, at *1 (N.D. Ill. Jan. 7, 2022) (granting insurer's motion for summary judgment).

10. *Compare Citizens Insurance Co. of America v. Thermoflex Waukegan, LLC*, No. 20-CV-05980 JFK, 2022 WL 602534, at *1 (N.D. Ill. Mar. 1, 2022) (granting insured's motion for judgment on the pleadings), *with Thermoflex Waukegan, LLC v. Mitsui Sumitomo Insurance USA, Inc.*, No. 21-CV-788 JZL, 2022 WL 954603, at *1 (N.D. Ill. Mar. 30, 2022) (granting insurer's motion for summary judgment).

11. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 33.

12. *Thermoflex Waukegan*, 2022 WL 602534, at *4.

13. *Id.* at *3.

14. *Id.* at *4.

15. See *id.* at *4-7.

TAKEAWAYS >>

- Courts have not reached agreement on whether defendants are covered by their insurance policies for the costs of defending and even settling Biometric Information Privacy Act lawsuits.

- The main area of disagreement concerns whether insurance policy exceptions unambiguously apply to preclude coverage.

- Depending on which side attorneys represent, attorneys should prepare to argue for or against three types of insurance policy exclusions for denying coverage in BIPA lawsuits: 1) the employment-related practices exclusion; 2) the statutory-violation exclusion; and 3) the access or disclosure exclusion.

ARE DEFENDANTS COVERED BY THEIR POLICIES FOR THE COSTS OF DEFENDING AND (EVEN SETTLING) BIPA LAWSUITS? THERE IS NO CLEAR ANSWER TO THIS QUESTION. THE FEDERAL DISTRICT COURTS HAVE REACHED CONFLICTING DECISIONS ON THIS IMPORTANT ISSUE, EVEN AS TO THE SAME NAMED INSURED.

with respect to any of these exclusions; the federal courts have come to conflicting decisions on the application of each of these three exclusions.

The employment-related practices exclusion

With talk of voiceprints and retina scans, BIPA may conjure up scenes from futuristic films like “Blade Runner” or “Minority Report.” But most of the BIPA lawsuits concern a far more quotidian technology: an employer’s fingerprint-operated punch clock. The practice of fingerprinting employees has led insurers to invoke the ERP exclusion.

In a typical policy, the ERP exclusion means the insurance does not apply to any injury arising out of any: 1) refusal to employ that person; 2) termination of that person’s employment; or 3) employment-related practices, policies, or acts or omissions such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person.¹⁶

For those courts finding the ERP exclusion does not apply, the enumerated examples consisted of “actions that an employer or someone else in the workplace takes against a particular employee,” while a company-wide policy of requiring employees to provide their fingerprints “when clocking in or out is one that applies generally to all employees.”¹⁷ Scanning a

finger is not a disciplinary action, and it is not akin to the type of enumerated conduct that “would get the HR Department involved.”¹⁸ In short, scanning a finger “isn’t the type of practice or policy envisioned” by the text of an ERP provision. For those courts finding the ERP exclusion does apply, a BIPA violation was of the “same nature” as the listed “employment-related practices”; the fact that the conduct “harmed many employees at the same time” does not change the analysis.¹⁹

The statutory-violation exclusion

Certain statutes are known for spawning litigation. To that end, insurers have noted their unwillingness to insure against such claims. In a typical policy, the statutory-violation exclusion means the insurance does not apply to any injury arising out of a violation of:

- 1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- 2) The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM), including any amendment of or addition to such law;
- 3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- 4) Any other laws, statutes, ordinances, or regulations that address, prohibit, or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating, or distribution of material or information.²⁰

In *Krishna*, the Illinois Supreme Court reviewed a “very similar” exclusion and found BIPA was not “a statute of the same kind as the TCPA and the CAN-SPAM Act” because the Act does not regulate methods of communication.²¹

For courts finding the statutory-violation exclusion does not apply, BIPA is simply not the same kind of statute as the TCPA, the CAN-SPAM Act, and

the FCRA.²² These statutes regulate methods of communication (TCPA and CAN-SPAM) and the use of materials (FCRA).²³ BIPA, by contrast, “regulates the collection, use, storage, and retention of biometric identifiers and information.”²⁴ At best, it is unclear whether BIPA is sufficiently similar to the listed statutes and, at worst, it is different in kind.²⁵ For those courts finding the statutory-violation exclusion does apply, BIPA “is of the same kind, character and nature as the enumerated statutes” because all the statutes “protect and govern privacy interests in personal information.”²⁶

The access or disclosure exclusion

In a typical policy, the access or disclosure exclusion means the insurance does not apply to:

“Personal and advertising injury” arising out of any access to or disclosure of any person’s or organization’s confidential or personal information, including patents, trade secrets, processing methods, cus-

16. See *American Family Mutual Insurance Co., S.I. v. Carnagio Enterprises, Inc.*, No. 20-CV-3665 JZL, 2022 WL 952533, at *12 (N.D. Ill. Mar. 30, 2022).

17. *Id.*; see also *Thermoflex Waukegan*, 2022 WL 602534, at *4-5 (finding the ERP exclusion did not apply).

18. *State Automobile Mutual Insurance Co. v. Tony’s Finer Foods Enterprises, Inc.*, No. 20-CV-6199 SCS, 2022 WL 683688, at *7 (N.D. Ill. Mar. 8, 2022).

19. *American Family Mutual Insurance Co. v. Caremel, Inc.*, No. 20-CV-637 HDL, 2022 WL 79868, at *4 (N.D. Ill. Jan. 7, 2022).

20. See *Citizens Insurance Co. of America v. Wymndalco Enterprises, LLC*, No. 20-CV-3873 JZL, 2022 WL 952534, at *2 (N.D. Ill. Mar. 30, 2022).

21. *Thermoflex Waukegan*, 2022 WL 602534, at *5 (quoting *W. Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 58).

22. *Id.* at *6.

23. *Id.*

24. *Id.*

25. *Id.*; see also *American Family Mutual Insurance Co., S.I. v. Carnagio Enterprises, Inc.*, No. 20-CV-3665 JZL, 2022 WL 952533, at *7 (N.D. Ill. Mar. 30, 2022) (“[T]he Court concludes that BIPA is not like the TCPA and the CAN-SPAM Act, because BIPA protects a different kind of privacy and uses a different method to do so.”); *Wymndalco Enterprises*, 2022 WL 952534, at *6 (“The only discernible resemblance between the TCPA, the CAN-SPAM Act, FCRA, and FACTA is that they all protect ‘privacy.’ But once more, ‘privacy’ in the BIPA context means something much different than ‘privacy’ in the TCPA context, so the similarity is superficial at best.”); *American Family Mutual Insurance Co. v. Caremel, Inc.*, No. 20-CV-637 HDL, 2022 WL 79868, at *4 (N.D. Ill. Jan. 7, 2022) (“This exclusion is virtually identical to the provision analyzed in *Krishna*.”).

26. *Massachusetts Bay Insurance Co. v. Impact Fulfillment Services, LLC*, No. 1:20-CV-926 WLO, 2021 WL 4392061, at *7 (M.D.N.C. Sept. 24, 2021).

customer lists, financial information, credit card information, health information or any other type of nonpublic information.²⁷

For those courts finding the access or disclosure exclusion does not apply, handprints do not share the privacy or sensitivity attributes found in the listed examples.²⁸ “Patents, trade secrets, processing methods, and customer lists are all forms of intellectual property which cannot be interpreted to include fingerprints.”²⁹ “Financial information likewise cannot be interpreted to include fingerprints.”³⁰ And while “health information” could arguably be interpreted to include fingerprints, doing so “would stretch the definition of health information to include a physical characteristic that has nothing to do with” an individual’s state of health.³¹ For those courts finding the access or disclosure exclusion does apply, the

“biometric data that BIPA protects certainly falls within” the category of confidential or personal information.³²

Work to come

With so many conflicting decisions on *each* exclusion, these BIPA issues will continue to give litigators plenty of work. Practitioners representing clients in BIPA litigation should provide notice of any BIPA claim to their client’s insurer and, depending on which side they are on, be prepared to argue for or against the merits of the three possible exclusionary provisions. 

27. See *Thermoflex Waukegan*, 2022 WL 602534, at *6.

28. *Id.* at *7.

29. *Carmel*, 2022 WL 79868, at *3.

30. *Id.*

WITH TALK OF VOICEPRINTS AND RETINA SCANS, BIPA MAY CONJURE UP SCENES FROM FUTURISTIC FILMS LIKE “BLADE RUNNER” OR “MINORITY REPORT.” BUT MOST OF THE BIPA LAWSUITS CONCERN A FAR MORE QUOTIDIAN TECHNOLOGY: AN EMPLOYER’S FINGERPRINT-OPERATED PUNCH CLOCK.

31. *Id.*

32. *Thermoflex Waukegan*, 2022 WL 954603, at *5-6; *American Family Mutual Insurance Co., S.I. v. Carnagio Enterprises, Inc.*, No. 20-CV-3665 JZL, 2022 WL 952533, at *7-9 (N.D. Ill. Mar. 30, 2022).