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Cybersecurity & Privacy Alert

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The Seventh Circuit certifies question regarding accrual of BIPA claims to Illinois Supreme Court

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The Seventh Circuit's take on the latest BIPA question provides some insight into how the issue of accrual timing might eventually be resolved.



What's the Impact?

- / The Seventh Circuit's analysis provides some insight into how the issue might eventually be resolved by the Illinois Supreme Court
- / Regardless of how the Illinois Supreme Court decides the issue of accrual for BIPA claims under Section 15(b) and (d), the outcome will impact pending and future of BIPA litigation

Fresh on the heels of the Illinois Appellate Court's decision in [Watson v. Legacy Healthcare Financial Services, LLC](#),¹ the 7th Circuit on Monday issued its own opinion regarding the accrual of claims under the Illinois Biometric Information Privacy Act (BIPA), ultimately certifying the question for the Illinois Supreme Court. In *Cothron v. White Castle Systems, Inc.*, the plaintiff, an

¹ *Watson v. Legacy Healthcare Financial Services, LLC*, 2021 IL App (1st) 210279.

employee at one of White Castle's Illinois restaurants, first used an alleged biometric finger scanner more than a decade before filing her BIPA lawsuit in 2018. In her complaint, plaintiff alleged that White Castle implemented a system that collected and disclosed her biometric information without obtaining her written consent in violation of Sections 15(b) and (d) of BIPA.

White Castle moved for judgment on the pleadings under Rule 12(c), arguing that plaintiff's suit was untimely even under the longest applicable statute of limitations of five years because her first alleged finger scan occurred as early as 2008. Plaintiff countered that a new claim accrued each time she scanned her fingerprint into White Castle's system, and White Castle disclosed her biometric information to its third-party timekeeping vendor. The district court sided with the plaintiff, holding that each collection and disclosure of her biometric information within the five years preceding her lawsuit was a separately accruing claim and, therefore, timely. The district judge, however, certified his opinion for interlocutory appeal, which the Seventh Circuit accepted.

The Seventh Circuit weighs the arguments

The Seventh Circuit's analysis provides some insight into how the issue might eventually be resolved by the Illinois Supreme Court. First, regarding whether the plaintiff's Section 15(d) claim accrued upon each disclosure of her biometric information, the court examined the Illinois Supreme Court's prior decision in [*West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*](#),² which held that a disclosure of a fingerprint scan in violation of BIPA was a "publication" within the meaning of a commercial insurance policy. Interpreting *West Bend*, the court found potential support for White Castle's argument applying the "single publication rule," often arising in defamation lawsuits, to determine accrual under BIPA Section 15(d). Illinois courts have adopted the "single publication rule" for defamation and other privacy torts, which allows only one viable claim despite a party's repeated publication or disclosure of the same libelous or invasive material. Ultimately, the court noted that "although Section 15(d) does not clearly say that a claim accrues only once, that is a plausible reading of the statutory language."

The court also examined the parties' dispute over the Illinois Supreme Court's preeminent decision in [*Rosenbach v. Six Flags Entertainment Corp.*](#),³ which concerned only Section 15(b) of BIPA. Specifically, White Castle argued that the Illinois Supreme Court's pronouncement of the right to "privacy in and control over" biometric data is invaded upon an entity's first collection and disclosure of biometric data. The court reasoned that White Castle's "one and done" theory would only make sense if subsequent collections or disclosures of biometric data did not further harm an aggrieved plaintiff. But the court countered that an "aggravement" could occur at each violation, "with a claim accruing each time as well."

Finally, the court briefly addressed the practical implications resulting from a decision accepting or rejecting White Castle's claims accrual theory. White Castle argued that rejecting its theory would result in "staggering damages." In contrast, the plaintiff argued that accepting White

² *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 WL 2005464 (Ill. Sup. Ct. May 20, 2021).

³ *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186.

Castle's theory would leave "little incentive for [private entities] to course correct and comply if subsequent violations carry no legal consequences." The court reasoned that "the practical implications of either side's interpretation, to the extent that Illinois courts would weigh them, do not decisively tilt one way or the other."

BIPA litigation—the road ahead

Ultimately, the court found that the accrual issue met the criteria necessary to certify the question for the Illinois Supreme Court. As such, it certified the following question: "Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?" Regardless of how the Illinois Supreme Court decides the certified question, it will have drastic implications on pending and future BIPA litigation. Although a decision by the Illinois Supreme Court may take time to materialize, we will continue to monitor developments in *Cothron v. White Castle*, as well other BIPA cases currently pending in state and federal appellate courts.

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