Internet Law & Cybersecurity

Will the Proposed Amendments to the Biometric Information Privacy Act (BIPA) Be Retroactive?

6 Min Read   By: Charles N. Insler | April 30, 2021

BACKGROUND

Illinois' Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (BIPA) establishes safeguards and procedures relating to the retention, collection, disclosure, and destruction of biometric data. 740 ILCS 14/15. Passed in October 2008, BIPA is intended to protect a person's unique biological traits – the data encompassed in a person's fingerprint, voice print, retinal scan, or facial geometry. *Id.* But in the last few years, BIPA – with its statutory penalties of $1,000 for each negligent violation and $5,000 for each intentional or reckless violation – has quickly become the bane of corporate defendants. The situation became even worse after the Illinois Supreme Court's decision in *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186. In *Rosenbach,* the Court held that a "violation [of BIPA], *in itself,* is sufficient to support the individual's or customer's statutory cause of action." *Rosenbach* at ¶33 (emphasis added). In other words, a bare statutory violation confers standing on a BIPA plaintiff. *See id.*

WHAT WOULD THE AMENDMENTS DO?

The Illinois Legislature is currently considering three bills that would amend BIPA in several significant ways. Illinois House Bill 559 would protect companies that store an individual's biometric information in the form of indecipherable mathematical representations or encrypted algorithms. Under HB 559, biometric information would, by definition, not include "biometric information that cannot be used to recreate the original biometric identifier." HB 559 would also establish a one-year statute of limitations, beginning from the date that the "cause of action accrued," and also establish a 30-day period in which the company could cure any alleged violation. If the private entity "actually cures the noticed violation" and provides notice to the aggrieved person, then the individual would no longer be able to bring an "action for individual statutory damages or class-wide statutory damages…" Illinois House Bill 559. These "statutory damages" have also been redlined. Under HB 559, aggrieved individuals would no longer be entitled to the statutory damages of $1,000 and $5,000. Instead, negligent violations would permit a plaintiff to recover only their "actual damages," and willful

violations would permit a plaintiff to recover their "actual damages plus liquidated damages up to the amount of actual damages." Illinois House Bill 559. HB 559 has advanced out of the Judiciary Committee and has been placed on the calendar for debate before the House.

Illinois House Bill 560, meanwhile, would eliminate BIPA's private right of action and would vest the state of Illinois (through the Attorney General, the appropriate State's Attorney's Office, or the Department of Labor) with the power to enforce the BIPA's provisions. Illinois House Bill 560. HB 560 has not advanced out of the Rules Committee. Illinois Senate Bill 330 largely replicates the amendments found in HB 559, but provides definitions for what it means to cure the violation and for when a claim accrues. Senate Bill 330 remains in the Judiciary Committee.

WOULD ANY OF THESE AMENDMENTS BE RETROACTIVE?

There are hundreds (if not a few thousand) of BIPA suits currently pending in the Illinois state and federal courts. If any of these amendments become law, the critical question would be which of these amendments are retroactive and could have an impact on the pending lawsuits?

Illinois has adopted the first step of the United States Supreme Court's retroactivity analysis. *People v. Stefanski*, 2019 IL App (3d) 160140, ¶12 (citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)). Under *Landgraf,* the first question is whether the legislature has clearly indicated the statute's "temporal reach." *Id.* If it has, and assuming there is no constitutional prohibition, then the legislature's intent will be given effect. *Id.* If the legislature's intent is not clear, then Illinois courts bypass the *Landgraf* analysis and proceed to determine whether the statutory amendments are procedural or substantive. *Id.* at ¶13. Procedural changes to a statute will be applied retroactively, while substantive changes will be applied prospectively. *Id.* The court in *Perry v. Dep't of Fin. & Pro. Regul.* noted that distinguishing between procedural and substantive changes is not always easy, of course. *Perry v. Dep't of Fin. & Pro. Regul.*, 2018 IL 122349, ¶69. There is also a general presumption that an amended statute is "not to be applied retroactively." *Stefanski*, 2019 IL App (3d) 160140, ¶13.

None of the three bills contains any statement on retroactivity. The Illinois courts, would therefore need to determine whether the amendments are procedural or substantive in nature. House Bill 560's elimination of a private right of action would be a substantive amendment because it is an amendment that "creates, defines, and regulates the rights, duties, and powers of the parties." *Perry*, 2018 IL 122349, ¶70. House Bill 559's amendment to the definition of "biometric information" would likely also be viewed as a substantive change to the law, since it would eliminate an entire class of devices and conduct that were not previously immune from suit. *Perry,* 2018 IL 122349 at ¶71 ("Because [these amendments] alter the scope of information that is accessible, both amendments are substantive changes . . . [and] may not be retroactively applied...").

The other amendments are not so clear. The amendment establishing a one-year statute of limitations could have retroactive application. Amendments which change "statutes of limitations are considered procedural," which means they "may be given retroactive effect." *Wanless v. Burke*, 253 Ill. App. 3d 211, 215 (3rd Dist. 1993).

This can be especially true where the amendments affect a statutory right of action and not a common law right. *See Stanley v. Denning*, 130 Ill. App. 2d 628, 632 (2d Dist. 1970) ("In determining whether a statute is intended to operate retroactively, we believe that there is an important distinction between an amendment reducing an existing time limitation which affects rights, statutory in origin, as opposed to those originating in the common law."). Where the legislature has created the right, it has the power to withdraw it. *Orlicki v. McCarthy*, 4 Ill. 2d 342, 351 (1954). The amendment to add a BIPA statute of limitations, if passed, could impact the limitations period for *current* and future cases, particularly because the *current* applicable limitations period is unsettled.[1]

The elimination of liquidated damages could also have a retroactive application. Statutory amendments that impact available remedies are often seen as procedural and not substantive. *Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 299 (1999). Amendments to remedies may, therefore, be applied to a pending suit, "irrespective of when the cause of action accrued or the complaint was filed." *Id.* In *Dardeen,* the Illinois Supreme Court held the repeal of a treble damage provision related solely to a remedy and was therefore procedural in nature. *Id.* A plaintiff has no vested right to "exemplary, punitive, vindictive or aggravated damages." *Id.* Fifteen years later, though, the Illinois Supreme Court held that an amendment related to remedies was substantive because it created an "entirely new type of liability." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶36. In *Einoder,* the Illinois Supreme Court held that the amendment could not be applied retroactively because it created a "substantive change in the law" by imposing "new liability on defendants' past conduct." *Id.* Whether the repeal of liquidated damages is seen as relating solely to a remedy (*Dardeen*) or as imposing a new burden on plaintiffs (*Einoder*) presents an intriguing question.

CONCLUSION

The proposed amendments to BIPA are intended to provide clarity and relief to corporate defendants. But even if passed, the amendments generate further questions about their retroactivity and the full extent of the relief that they might provide defendants.

---

[1] BIPA does not include a statute of limitations. Defendants have argued the one-year statute of limitations for privacy claims should apply (735 ILCS 5/13-201), while plaintiffs have argued for the five-year catchall limitations period (735 ILCS 5/13-205). The Illinois Court of Appeals is poised to decide what limitations period applies to BIPA claims in *Tims v. Black Horse Carriers, Inc.*, Case No. 1-20-0563 (1st Dist.).

By: Charles N. Insler | April 30, 2021