Carriers May Reevaluate Driver-Facing Cameras After $228M Privacy Act Verdict

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An Illinois jury recently awarded $228 million to a class of truck drivers who were required to submit fingerprints to pass security gates at a customer's property. The verdict, the first under the Illinois Biometric Information Privacy Act ("BIPA"), may cause trucking companies to reconsider the use of certain types of driver-monitoring systems, including some driver-facing cameras.

Rogers v. BNSF Rail Company

The lead plaintiff, truck driver Richard Rogers, delivered loads to BNSF-operated facilities. BNSF used an automated gate system for security at the entrances to its properties. To access the BNSF properties, Rogers had to register his fingerprints with the third-party gate system operator, Remprex, and provide his fingerprint each time he entered. Although Rogers voluntarily gave his fingerprint when registering with Remprex and entering the properties, he testified at trial that he never consented to the collection of his fingerprints and that BNSF never notified him of how long it would keep the fingerprint data. Rogers was among the class of 45,000 truck drivers who registered with the Remprex system to access BNSF properties. In the lawsuit, they alleged that BNSF violated BIPA, which requires entities that collect biometric data to obtain written consent from the individuals providing the data and to notify those individuals of the entities' data retention policies.

At trial, BNSF argued that Remprex, with whom it contracted to provide gate security, was the proper defendant because BNSF itself never collected or stored the data. Because it did not collect or store the data, BNSF argued, it did not have to obtain consent from the truck drivers or notify them of the retention policy.

The jury returned its verdict in less than an hour. It found that BNSF violated BIPA 45,600 times, once for each driver registered through the Remprex system. BIPA's liquidated damages provision authorizes an award of $1,000 for each negligent violation of the Act and $5,000 for each reckless or intentional

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violation. Finding that BNSF's violations were reckless or intentional, the jury awarded a total of $228 million to the class of truck drivers.

The verdict sent shockwaves through the Illinois legal community, but it could have been even bigger. Before trial, the judge barred the plaintiffs from introducing evidence of the number of times each class member used their fingerprints to access a BNSF property. The plaintiffs had argued that each scan violated the BIPA and supported a separate award. Indeed, in a separate opinion in a different case just released by the Illinois Supreme Court, the Court held that a separate BIPA violation does occur each time biometric data is improperly collected. It is unclear whether or how this new opinion will impact the BNSF case.

Import to Trucking Companies

The *Rogers* case concerned the collection and storage of fingerprints, but BIPA also imposes consent and notification duties on entities that collect other types of biometric data, including retina scans and scans of facial geometry. Because both types of data are used in some types of driver-facing cameras, trucking companies may face liability under BIPA if they fail to comply with the statute's strict consent and notification requirements.

In recent years, many trucking companies installed driver monitoring systems that scan drivers' eyes and faces for signs of fatigue, attentiveness, or distraction. The systems typically include a driver-facing camera equipped with software that monitors the direction of the driver's gaze, which could suggest distraction, and the size of the eyelid opening, which could indicate fatigue. Although photographs and videos have generally fallen outside of BIPA, an Illinois federal court recently held that software that utilizes facial and retina scans falls squarely within BIPA's confines. If the trucking companies that utilize such cameras do not comply with BIPA's stringent consent and notice requirements, they could face liability and stiff penalties under BIPA.

Going forward, carriers must be mindful of BIPA and similar laws in other states, including Texas, Washington, and New York City, which restrict the use of biometric information. Compliance with the laws is often complicated and carriers unsure of whether the technology they are using might expose them to liability should seek legal counsel.

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Michael Reda, a partner in HeplerBroom's St. Louis office, has nearly 40 years of experience in tort litigation, including catastrophic trucking accident cases. He is also actively involved in alternative dispute resolution and serves as an arbitrator and mediator in many cases. Reda is a member of HeplerBroom's Rapid Response Team, which conducts on-site investigations of transportation accidents in Illinois and Missouri.

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