

In This Issue

THE ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

Richard Goldwasser

ILLINOIS SUPREME COURT TACKLES RICHARD DENT'S EFFORTS TO DISCOVER IDENTITIES OF WITNESSES

Adam Glazer

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We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

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SCHOENBERG FINKEL
BEEDERMAN BELL GLAZER LLC
300 S. WACKER DRIVE
15TH FLOOR
CHICAGO, ILLINOIS 60606
T 312.648.2300
F 312.648.1212
sfbbg.com

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The Illinois Biometric Information Privacy Act

Last May Facebook settled a \$650 million class-action settlement over alleged Biometric Information Privacy Act (BIPA) violations. TikTok settled a \$92 million BIPA class-action suit in November. And just last month, Google agreed to pay \$100 million to settle a BIPA class-action lawsuit. The plaintiffs in each of these cases brought their suits in Illinois to avail themselves of Illinois' privacy protections, perhaps the strictest in the U.S.

Despite these headline grabbing cases, BIPA class actions are not limited to large publicly-traded companies. Cases against smaller closely held companies are already common and expected to increase as the big targets get wise and bring themselves into compliance with BIPA.

The Illinois legislature enacted BIPA in 2008 to address privacy concerns, including identity theft, over what was then the rapidly growing use of biometrics for financial transactions and security screening. Use of biometrics has greatly increased over the last 14 years. One very common use is a finger-scan to help track an employee's hours. Businesses need to be aware of BIPA's requirements so they can avoid costly litigation and settlements.

The Act requires private entities, as well as individuals, that collect, capture, purchase, or receive a person's retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry to maintain a publicly available written policy regarding the retention and destruction of the information. Additionally, BIPA requires companies to inform a person in writing that their information is being collected, the purpose for which it is collected and the length of time the information is being collected, stored and used.

The Act provides for the recovery of minimum damages of \$1,000 for negligent violations and \$5,000 for intentional or reckless violations, plus reasonable attorney's fees and litigation expenses. Plaintiffs may recover their actual damages if they exceed the statutory minimums.

For businesses caught on the wrong side of a BIPA claim, defenses to a suit are few and far between, accounting for the large settlements. Given this landscape, it's perhaps unsurprising that much of

the litigation around BIPA has centered around insurance coverage.

Insurance companies seeking to avoid the enormous exposure brought on by a BIPA class-action case primarily seek to deny coverage by invoking two common policy exclusions excluding coverage for violations of statutes and employment related practices. So far, the results have been a mixed bag.

In May 2021, the Illinois Supreme Court in *West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc.* held that a provision excluding coverage for violations of the Telephone Consumer Protection Act, the CAN-SPAM Act, and other statutes "that prohibit or limit the sending, transmitting, communicating, or distribution of information" did not apply to BIPA cases.

This past January, the United States District Court for the Northern District of Illinois in *Am. Family Mut. Ins. Co. v. Caremel, Inc.*, found that an employment related practices provision excluding coverage for claims "arising out of any . . . employment related practice, policies, acts omissions, such as coercion, demotion, reassignment discipline, defamation, harassment, humiliation or discrimination directed at the person..." applied to BIPA cases.

As with all coverage issues, the ultimate coverage determination will depend on the precise language of the policy.

Just as the large tech targets become aware of the need to comply with BIPA, so too will insurance companies begin tailoring their policies to exclude coverage for BIPA claims, and businesses can expect to see specific BIPA exclusions become common place.

Businesses should therefore be diligent on both fronts. Comply with BIPA in the first instance and understand the scope of insurance coverage in the second.

Please contact Richard Goldwasser with any questions by e-mail at richard.goldwasser@sfbbg.com or call him at (312) 648-2300.



Illinois Supreme Court Tackles Richard Dent's Efforts to Discover Identities of Witnesses

Case Success Stories

On April 25, SFBBG's Norm Finkel and Matt Tyrrell obtained a victory on behalf of a firm client in a federal suit asserting that the client violated the federal wiretap act and engaged in other tortious conduct. The plaintiff, who was dating the firm client's ex-husband, alleged that the firm client had reviewed emails and other communications between the plaintiff and the ex-husband that were stored on an iPad used by the children of the client and her ex-husband. The plaintiff's complaint asserted that this alleged conduct violated the Electronic Communications Privacy Act (or Federal Wiretap Act) and gave rise to claims for invasion of privacy and intentional infliction of emotional distress. SFBBG moved to dismiss all of the plaintiff's claims soon after the lawsuit. The motion was granted by U.S. District Judge Sara L. Ellis, who dismissed all claims against the firm's client.

* * * * *

In March, Andrew Johnson prevailed in a bench trial involving a shareholder dispute between former co-owners of a jointly-held corporation. The litigation involved the buyer's material breach of the stock purchase agreement. Following closing arguments, judgment was promptly rendered in favor of the firm's client.

Welcome Aboard!

The Firm has welcomed a few new attorneys over the last several months! Those include:

- Monica Shamass, Real Estate
- Jason Newton, Real Estate Tax
- Steven Shaw, Estate Planning and Tax

Speaking Engagements

Adam Glazer and Adam Maxwell presented "Challenges, Vulnerabilities and Considerations for a Pandemic World: A Legal Perspective on FAQs" at the ERA Conference on February 28 and March 1 in Austin, Texas.

Mike Kim was a featured speaker for the CBA Condo Subcommittee Meeting on May 17, where a MCLE-credit webinar was given entitled "Management Company and Attorney Issues and Conflicts – How to Resolve from the Attorney's Perspective."

Pat Deady presented "Introduction to the Chicago Joint Conference Board & the Standard Agreement," a training session for Board Agents and Board Attorneys at the Region 13 of the National Labor Relations Board in Chicago on May 12. This presentation was also given to the Chicago Building Trades Business Agents on May 17.

Notable Publications

Mike Kim was quoted in articles "Owners Can Sue Managers Over Excessive Disclosure Doc Fees" (January 6), "Cornering Kickbacks: How to Help Your Managers Avoid Them" (January 8), and "Residential Use Restriction Prohibits STRs" (January 12), all of which can be found in *Community Association Management Insider*.

"How To Bequeath a Vacation Home to Your Kids Without Strife" (*Forbes*, February 14, 2022, Bruce Bell)

"How To Claim Bad Debt Losses on Your Taxes" (*Forbes*, March 11, 2022, Bruce Bell)

"As Battle with COVID Changes, So Does Status of Workplace Vaccine Mandates" (*Chicago Daily Law Bulletin*, March 17, 2022, Bill Klein)

"Minimizing Taxes When Purchasing and Selling Sales Organizations" (*The Representor*, Spring 2022, Bruce Bell)

"The Latest in the Ongoing Saga Between BI-QEM and Its Rep Company" (*The Representor*, Spring 2022, Adam Glazer)

Virtually all Chicago football fans of a certain age remember the '85 Bears and Richard Dent, MVP of Super Bowl XX, the team's last championship. With his days as an All-Pro defensive end well behind him, Dent now runs an energy services business, RLD Resources LLC. This business had contracts with Constellation NewEnergy, Inc., an Exelon subsidiary, until Dent was accused of groping a guest at a party Constellation sponsored at Chicago's Shedd Aquarium in 2018.

Constellation looked into the alleged misconduct, and the guest, identified in court papers as "Person A," reported that at an earlier Constellation event held in 2016, Dent told her she "had a butt like a sister." A "Person B" allegedly told its investigator, "Person C," that Dent was drunk and disorderly at a hotel in advance of the 2018 event.

Dent was also interviewed by attorneys for Constellation and offered his side of the story, denying all wrongdoing. When the report issued, Dent viewed the statements of Persons A and B, and its authorship by Person C, as false and defamatory, and the cause of Constellation terminating its contracts with RLD.

However, he did not know the true identities of Persons A, B or C, so Dent filed a petition in the Circuit Court of Cook County under an Illinois Supreme Court Rule seeking pre-suit discovery to obtain their names. The judge granted the motion to dismiss Dent's petition, but not on a basis argued by Constellation.

Instead, he noted that Dent already knew the identity of certain potential defendants to his potential defamation suit, namely Constellation and the attorneys who interviewed him and disclosed the statements he now claimed were false and defamatory. Under the judge's interpretation of the Supreme Court Rule, a party aware of any potential defendant was not permitted to petition the court to learn the identity of others.

Dent appealed, and the Illinois appellate court sided with the Hall of Famer. Because Constellation and its attorneys were not the parties who made the allegedly false statements about Dent, they posed no impediment to the petition to learn the identities of those who did.

The appellate court then considered whether the allegedly defamatory statements about Dent were legally privileged and therefore immune from attack. If the statements would not subject Persons A, B and C to liability, then identifying them served no purpose.

Under Illinois law, statements made in the reporting and investigation of sexual harassment in the workplace are protected by a qualified privilege and not subject to liability for defamation. But the

appellate court punted on this issue, deciding that questions of qualified privilege were inappropriate for resolution on Constellation's motion to dismiss and sent the case back to the trial court to grant Dent's petition.

Constellation then took the case up to the Illinois Supreme Court, where the subject of qualified privilege took center stage, together with considerations of Illinois public policy.

"Qualified privilege in Illinois defamation law," wrote Justice Michael Burke, "is based on a policy of protecting honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information." One "favored circumstance" clearly involves investigating allegations of sexual harassment.

The court ruled that "a qualified privilege exists in cases alleging defamation in the context of workplace sexual harassment allegations." Dent's own petition established that Constellation hired Person C to investigate sexual harassment allegations arising from when he was their invited guest, and the statements of Persons A and B were part of Person C's investigation. As such, Persons A, B and C were "protected by the qualified privilege for investigation of workplace sexual harassment claims."

The privilege is "qualified" and not absolute in the sense that the privilege can be lost if it is abused, such as through "any reckless act showing a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties."

Dent contended such abuse occurred because the statements of Persons A and B were "completely false," and they knew of their falsity, thereby defeating any qualified privilege. The Illinois Supreme Court would have none of this, pointing out that Dent's petition set forth no facts showing false statements and no abuse of the privilege. "Allowing a conclusory denial to overcome qualified privilege would," the Court ruled, "in essence, eviscerate the privilege."

In other words, one cannot defeat the qualified privilege that protects witnesses in a sexual harassment investigation merely by denying their allegations. Richard Dent may have ruled supreme for the Bears, but to convince the Illinois Supreme Court to expose the identities of his accusers so he can sue them in defamation, he must come forward with some evidence, not just assertions that he "didn't do it."

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