

TRANSPORTATION

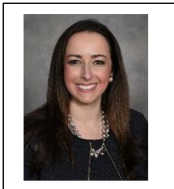
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This article will examine a recent federal district court verdict in a class action lawsuit involving the Illinois Biometric Privacy Act (“BIPA”).

The Biometric Data Fallout - What are Biometrics and Why Businesses Should Beware

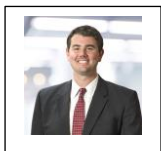
ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at www.iadclaw.org.



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In what is considered the seminal jury verdict on the issue in the state of Illinois, a Federal District Court jury returned a \$228 million verdict in favor of the plaintiff in a class action lawsuit arising out of the Illinois Biometric Privacy Act (“BIPA”).

Plaintiff Richard Rogers brought *Rogers v. BNSF Railway Co.* on behalf of a class of more than 45,000 truck drivers who entered and exited the BNSF railyards by using fingerprint scanning technology on an automated gate system.

Mr. Rogers alleged that BNSF violated section 15(b) of the Illinois Biometric Information Privacy Act, 740 ILCS 14/15(b), when it collected and stored his biometric information without obtaining his consent, informing him of the purpose of collecting fingerprints and of its data retention policies.

What is biometric data? BIPA defines a biometric identifier as a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face geometry. It does not include demographic data or physical descriptions such as height and weight, nor does it include tattoos or a photograph. Biometric data is used globally and across all industries to include security of buildings, locking of laptops and clocking into work.

Section 15(b) of BIPA states that “[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's

biometric identifier or biometric information" without providing notice to and obtaining written consent from that person. 740 ILCS 14/15(b). Enacted in 2008, Illinois was one of the first states to pass a law restricting the collection and storage of biometrics. Since then, similar biometric privacy laws have been enacted in other states, to include New York, Washington and Texas. Critically, BIPA is one of the few laws in the United States that provides a private right of action to the owners of biometric data.

Turning back to the *Rogers* litigation, during summary judgment, pre-trial, and at trial, BNSF argued that it was not the responsible party, contending that it contracted with a third-party company, Remprex LLC, to operate the equipment that collected Mr. Rogers’ biometric information. BNSF took the position that it could not be held responsive for Remprex’s actions. Judge Matthew Kennelly rejected this argument, citing Judge Manish Shah, who stated, “while BIPA is limited to 'private entities,' the text does not close the door on traditional theories of agency liability”. Notably, the judge previously found that the Federal Railway Safety Act (“FRSA”), the Interstate Commerce Commission Termination Act (“ICCTA”), and the Federal Aviation Administration Authorization Act (“FAAAA”) do not preempt a BIPA claim.

After a five-day trial, the jury found that BNSF recklessly or intentionally violated BIPA 45,600 times, which constitutes one

violation per class action member. BIPA provides for \$5,000 in statutory damages for each intentional or reckless violation and \$1,000 for each negligent violation.

The *Rogers* verdict follows a number of other cases in which Illinois Courts grappled with construing BIPA. For example, in *Rosenbach v. Six Flags Entertainment Corp.*, the Illinois Supreme Court held that actual harm is not a requirement in order to state a claim under BIPA.

Not only does this verdict set a precedent for assessing statutory damages in a BIPA suit, it confirms the risks businesses take when biometric identifiers are used for any purpose. While the BNSF defense asserted a number of novel defenses against application of BIPA, the case further confirms the court's intent to liberally construe BIPA.

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