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Northern District of Illinois finds BIPA amendment a "clarification" of existing law and enforces it in pending action

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Takeaway: We have written before about the Illinois Biometric Information Privacy Act (BIPA) and the risk of annihilating damages in class actions if every alleged biometric scan or transmittal of that scan for a single person constituted a separate violation. After the Illinois Supreme Court ruled that each such scan could constitute a violation in 2023 (Illinois Supreme Court Clarifies BIPA Violation Accruals Opening the Door for Annihilative Damages), the Illinois legislature responded by amending the statute in 2024 (Illinois legislature passes bill amending BIPA violation accrual standards). The Northern District of Illinois recently held that this amendment constitutes a "clarification" of existing law and thus applies to actions pending at the time of its enactment. *Gregg v. Central Transport LLC*, No. 24 C 1925, 2024 WL 4766297 (N.D. Ill. Nov. 13, 2024).

In *Gregg*, District Judge Elaine Bucklo summarized the interpretative dispute as to whether BIPA authorized statutory damages for each allegedly improper biometric scan or transmission, as opposed to treating multiple scans or transmissions of one person as a single violation. 2024 WL 4766297, at *1. In *Cothron v. White Castle System, Inc.*, 216 N.E.3d 918 (Ill. 2023), the Illinois Supreme Court ruled in response to a certified question from the Seventh Circuit that "a separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information'" in violation of BIPA. *Id.* (quoting *Cothron*, 218 N.E.3d at 929). But *Cothron* limited its holding to the "accrual of claims" under BIPA and expressly invited the Illinois legislature to "'make clear its intent regarding the assessment of damages'" under BIPA. *Id.* (quoting *Cothron*, 218 N.E.3d at 929).

The legislature "took up the invitation" and passed Public Act 103-0769, which Governor Pritzker signed into law on August 2, 2024. *Id.* The law, which "became effective immediately upon signature," expressly clarifies that any entities collecting or transmitting biometric information from the "'same person'" has committed a "'single violation'" for which the person "'is entitled to, at most, one recovery.'" *Id.* at *2 (quoting Public Act 103-0769). The question in *Gregg* was whether the statutory amendment applied in cases "where the alleged conduct occurred and the complaint was filed before its enactment." *Id.* If so, the *Gregg* court had to dismiss the plaintiff's action as falling below the amount-in-controversy minimum for diversity jurisdiction. *Id.*

While Illinois courts recognize a "presumption" that statutory amendments are "'intended to change existing law,'" that presumption does not apply where "'the circumstances surrounding the amendment' indicate that 'the legislature intended merely to interpret or clarify the original act.'" *Id.* (quoting *People v. Stewart*, 215 N.E.3d 752, 758 (Ill. 2022) (citing *K. Miller Constr. Co. v. McGinnis*, 938 N.E.2d 471, 481 (Ill. 2010))). And where an amendment is "a clarification of the prior statute,' it 'must be accepted as a

legislative declaration of the meaning of the original Act." *Id.* (quoting *K. Miller Constr.*, 938 N.E.2d at 482). This moots any dispute about retroactive effect, because "it is as if the amendment has been in place all along." *Id.*

The Illinois Supreme Court has identified circumstances that "'may indicate whether an amendment is merely a clarification rather than a substantive change in law,'" including (1) whether the legislature expressed an intent to clarify existing law; (2) "'whether a conflict or ambiguity existed prior to the amendment'"; and (3) whether the amendment is "'consistent with a reasonable interpretation of the prior enactment.'" *Id.* (quoting *K. Miller Constr.*, 938 N.E.2d at 481). The *Gregg* court found the latter two circumstances present because the *Cothron* court has specifically flagged the ambiguity in the existing BIPA statute regarding damages and noted the absence of language indicating an intent to authorize annihilating damages. *Id.* at *3.

The *Gregg* court further rejected the argument that *Cothron* had itself foreclosed a clarifying amendment, because the Supreme Court had invited legislative clarification and the legislature responded by clarifying "that plaintiffs are entitled to a single recovery for violations caused by the collection or dissemination of the same biometric identifiers or information via the same method." *Id.* Because *Cothron* invited the legislature to "clarify" the "unsettled" issue of damages, the Illinois Supreme Court "endorsed the view that the issue was unsettled and that the legislature could permissibly settle it," which Public Act 103-0769 unambiguously did. *Id.* "Accordingly, the clarified intent enacted in PA 103-0769 must be applied as if it were clear from the date of the BIPA's enactment." *Id.*

With the "substantive change v. clarification" issue resolved, the *Gregg* court easily disposed of the jurisdictional question, finding the plaintiff's individual statutory damages claim (with a maximum recovery of $15,000, assuming proof of recklessness or intentional misconduct) insufficient to satisfy the minimum amount in controversy for diversity jurisdiction. *Id.* at *4. Thus, the *Gregg* court dismissed the action without prejudice for lack of subject-matter jurisdiction. *Id.*

While *Gregg* involved an individual claimant, its finding that the recent BIPA amendment clarified existing law rather than effectuating a substantive change in existing law should have a significant impact on pending class actions predicated on multiple violations of BIPA as to the same person using the same method.