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FIRST BIPA VERDICT HANDED DOWN. WHAT'S COMING NEXT?

Last week, a federal jury in Chicago found that BNSF Railway Company committed 45,600 reckless or intentional violations of the Illinois Biometric Information Privacy Act, 740 ILSC 14/1, *et. seq.* ("BIPA"). *Rogers, et al. v. BNSF Railway Co.*, No. 1:19-cv-03083 (N.D. Ill. Oct. 12, 2022). BNSF collected fingerprints from its intermodal drivers without informed consent and without providing written information regarding the purpose and length of time the fingerprints would be retained. This is the first jury verdict rendered against a company under the 2008 statute, and the judge awarded $228 million in damages by applying a $5,000 statutory penalty per violation over the six-year class period.

The verdict is interesting in several respects. The jury instructions asked whether BNSF acted negligently, *i.e.*, if BNSF failed to do something a reasonably careful entity would do, or whether BNSF acted recklessly and/or intentionally, *i.e.*, if BNSF acted with conscious disregard of plaintiffs' rights or intended to violate BIPA. The jury found that BNSF acted recklessly and/or intentionally with respect to each class member (subjecting BNSF to a potential $5,000 penalty per violation, as opposed to $1,000 per negligent violation), but the jury instructions stated that "the law does not say how a reasonably careful person or entity would act under the circumstances. That is for you to decide." The jury was left with little guidance regarding how to render its verdict.

BNSF got the Court to exclude belated testimony as to how many times each class member scanned his or her fingerprints in the system, essentially the same factual issue raised in *Cothron v. White Castle System, Inc.*, No. 128004 (Ill.), argued to the Illinois Supreme Court on May 17, 2022. Allowing the testimony could have allowed each class member to recover for multiple violations, which could have resulted in a several-billion-dollar verdict.

The Court also certified a six-year class period. At least one Illinois state appellate court determined that a five-year statute of limitations applied to the types of violations complaint of in the *Rogers* case. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563 (Ill. App. Ct. Sept. 17, 2021). Like the *Cothron* case, *Tims* was argued before the Illinois Supreme Court on September 22, 2022. No. 127801 (Ill.). If the five-year statute of limitations is upheld, or even further limited, it would appear that some class members may not be entitled to recovery if the violations pre-date the five-year limitations period.

Finally, BIPA allows for recovery of "reasonable" attorneys' fees. The final judgment form notes that plaintiffs can recover costs from defendants, meaning that the final amount BNSF is obligated to pay will likely exceed the $228 million verdict. The court also noted in its final minute entry that it remained willing to re-initiate settlement discussions, which may avoid further appeals. The outcome of the *Cothron* and *Tims* Illinois Supreme Court appeals will inform any appeals taken in this case. Walker Wilcox will continue to follow further developments.