

Insurer Duty to Defend Biometric-Related Statutory Violations: Triggers, Standing, Pleading, Exclusions

TUESDAY, JULY 12, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Cort T. Malone, Shareholder, **Anderson Kill P.C.**, New York

Daniel J. Healy, Partner, **Anderson Kill P.C.**, Washington, D.C.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call Customer Service at 800-926-7926 ext.1 or visit Strafford's website at www.straffordpub.com.



STRAFFORD WEBINARS

Live Webinar
July 12, 2022
1:00 pm – 2:30 pm

**INSURER DUTY TO
DEFEND BIOMETRIC-
RELATED STATUTORY
VIOLATIONS: TRIGGERS,
STANDING, PLEADING,
EXCLUSIONS**



Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER



Cort T. Malone is a shareholder in the New York and Stamford offices of Anderson Kill and practices in the Insurance Recovery and the Corporate and Commercial Litigation Departments. He is an experienced litigator, focusing on insurance coverage litigation and dispute resolution, with an emphasis on commercial general liability insurance, directors and officers insurance, employment practices liability insurance, advertising injury insurance, and property insurance issues. Cort is also a member of the firm's Hospitality, Environmental Law, Cyber Insurance Recovery and COVID Task groups.

Cort also possesses extensive commercial litigation experience, including arbitration and alternative dispute resolution relating to a variety of tort, contract, and regulatory disputes. While attending the Fordham University School of Law, Cort was a member of the Fordham Moot Court Board and garnered several awards for both oral argument and brief writing skills at various inter- and intra-school competitions. He also spent three years teaching a first-year Legal Writing course as an adjunct professor of law at Fordham.

Cort T. Malone, Esq.
Shareholder
Anderson Kill P.C.
(212) 278-1382

cmalone@andersonkill.com

SPEAKER



Daniel J. Healy, Esq.
Partner

Anderson Kill L.L.P.
(202) 416-6547

dhealy@andersonkill.com

Daniel J. Healy is a partner in Anderson Kill's Washington, D.C. office. He started his career with Anderson Kill over 20 years ago, served for five years as a Trial Attorney with the U.S. Department of Justice, Tax Division and currently represents policyholders seeking insurance coverage.

Dan is co-chair of Anderson Kill's Cyber Insurance Recovery Practice Group and the firm's Government Enforcement, Internal Investigation and White Collar Defense Practice Group. He is also a member of the firm's Technology, Media and Distributed Systems and COVID Task Groups. Since 2018, Dan has been selected by his peers for inclusion in The Best Lawyers in America for Insurance Litigation and recognized by Super Lawyers for Insurance Coverage. In 2019, he was selected for inclusion in the American College of Coverage Counsel. While at the Department of Justice, he received numerous Outstanding Attorney awards and served as the E-Discovery Coordinator for the Tax Division.

OVERVIEW

- Definition of Biometric Data
- Why It Matters
- State Statutes Governing the Collection of Biometric Data
- State Statutes That Grant a Private Right of Action
- How Lawsuits Are Styled
- Insurance Coverage Options
- Key Exclusions

DEFINITION OF BIOMETRIC DATA

“Biometric information” means an individual’s physiological, biological, or behavioral characteristics, including an individual’s deoxyribonucleic acid (DNA), that can be used, singly or in combination with each other or with other identifying data, to establish individual identity. Biometric information includes, but is not limited to, imagery of the iris, retina, fingerprint, face, hand, palm, vein patterns, and voice recordings, from which an identifier template, such as a faceprint, a minutiae template, or a voiceprint, can be extracted, and keystroke patterns or rhythms, gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information.

Cal. Civil Code § 1798.140(b).



WHY IT MATTERS



The use of biometric data continues to increase as employers and others increasingly use this data to authenticate and verify their employees' or users' identity, including for security purposes and computer system access. Over the past several years, hundreds of lawsuits have been filed over the use or storage of biometric information, some of which have resulted in multi million-dollar settlements.

BIOMETRICS IN ACTION



Source: DiscoveryMagazine.com



Source: itprotoday.com



Source: bayometric.com



Source: hospitalitynet.org



Source: frost.com



Source: usatoday.com

STATE STATUTES GOVERNING THE COLLECTION OF BIOMETRIC DATA



Illinois – The Biometric Information Privacy Act (“BIPA”)

New York City – NYC Admin. Code § 22-1202

Texas – Texas Bus. & Com. Code § 503.001

Washington – Wash. Rev. Code § 19.375.010

California – California Consumer Privacy Act, Civil Code § § 1978.100 et seq.

STATE STATUTES THAT GRANT A PRIVATE RIGHT OF ACTION

- 740 ILCS 14/15 (b) (Illinois)
- NYC Admin Code § 22-1201-1205

ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

- Companies must advise individuals that they are collecting biometric information.
- Indicate length and purpose of collection.
- Obtain written consent to proceed with collection.
- Covered entities
 - Prohibited from selling or profiting from personal information.
 - Must use reasonable standards of care.
 - Cannot disclose except in enumerated circumstances.
 - Must develop a written retention policy and guidelines for destroying biometric identifiers/information when purpose has been satisfied or at most, within three years.

HOW LAWSUITS ARE STYLED

Civil lawsuits seeking recovery of damages and attorneys' fees, alleging that the defendant used, collected and stored its employees' biometric data without informed consent. Further allegation that the employer failed to inform its employees of the specific purpose, and length of time for which their biometric identifiers or information would be collected, stored and used. See, e.g., *Twin City Fire Ins. Co. v. Vonachen Services, Inc.*, 2021 WL 4876943 (C.D. Ill. October 19, 2021).



BIPA LITIGATION – ROSENBAACH V. SIX FLAGS – ILLINOIS SUPREME COURT – 2019

- Thumb scan needed for season pass.
- Question Presented: whether a party is “aggrieved” under BIPA when no “actual” injury occurred.
- Claim – Six Flags (1) did not inform in writing that data would be collected, (2) did not explain purpose of collection in writing, and (3) did not obtain written consent before collection.
- Court held that Six Flags was liable even in absence of injury.
- Takeaway: Individual need not allege any injury or adverse effect – just violation of BIPA.

COSTS FOR BIOMETRIC PRIVACY LAW VIOLATIONS

- Under BIPA, statutory damages of \$1,000 per negligent violation or \$5,000 per intentional or reckless violation.
- Over past several years, hundreds of BIPA class actions have been filed in Illinois.
- Under CUBI, in Texas, a civil penalty of \$25,000 per violation applies, although there is no private right of action in Texas.
- Texas AG has recently sued Meta, Facebook's parent company, claiming the lawsuit could result in *hundreds of billions of dollars in civil penalties*.

OTHER BIPA CASES

PATEL V. FACEBOOK – NINTH CIRCUIT

- Allegation – Facebook used facial recognition software without consent.
- Court – there was actual harm or material risk of harm to privacy interests.
- Facebook settled for \$650,000,000.

COOK COUNTY ILLINOIS

SIMILAR RESULT IN BIPA CASE

- Allegation – ADP violated BIPA by supplying equipment and support to employers requiring employees to scan their fingerprints when punching in at work.
- 40,000 people filed claims under the settlement.
- ADP settled for \$25,000,000.

NORTHERN DISTRICT OF ILLINOIS TIK-TOK

- Used AI to recognize facial features in user videos.
- BIPA – collection, use, and transmission of biometric data without consent.
- Consisted of 21 putative class actions.
- Settlement – \$92,000,000.

OTHER RECENT BIPA CLAIMS

- Holiday Inn was sued in Illinois by its own insurance company for making a coverage claim for a biometric class action. *AXIS Surplus Insurance Co. v. New Crown Holdings LLC*, case number 2021CH00900.
- A college student initiated a class action against DePaul University over its use of facial-recognition technology in online exam proctoring.
- An IT company was sued when it resold licenses to use a product that “scrapes” facial identifiers from social media sites.
- Many more (and more to come).

BIOMETRIC LEGISLATION IN OTHER STATES

- Biometric statutes being considered in several other states, including Florida, Massachusetts, New York, Arizona and Hawaii.
- New York
 - Proposed NY “BPA” bill mirrors BIPA and has a private right of action.
 - SHIELD ACT – added biometrics to data breach notification law, but no private right of action.
- Question: In absence of statute, is there a common law invasion of the right to privacy?

INSURANCE COVERAGE OPTIONS

CGL

D&O

EPL

CYBER



CGL POLICIES

There may be coverage under CGL Policy's "personal and advertising injury" coverage, as a typical offense is "the oral or written publication of material that violates a person's right of privacy." See, e.g., *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan Inc.*, 2021 IL 125978, 183 N.E. 3d 47(2021). In *Krishna*, the court found that the "publication" requirement was satisfied when the biometric information was shared with a single party (one of the defendant's outside vendors) and was not disseminated to a large audience.

CGL POLICIES (CONT'D)

“We hold the allegations in Sekura’s complaint fall within or potentially within West Bend’s policies’ coverage for personal injury or advertising injury because Sekura’s complaint contained allegations that alleged Krishna shared biometric identifiers and information with SunLync, which was potentially a publication that violated Sekura’s right to privacy.”

CASES AFTER WEST BEND MOSTLY FAVOR COVERAGE FOR BIPA CLAIMS

- *Citizens Insurance Company of America v. Thermoflex Waukegan, LLC*, 20-cv-05980 (N.D. Ill. March 1, 2022).
 - Rejected three insurance company arguments based on exclusions.
 - Found ambiguities requiring insurance company to defend BIPA claims.
- *State Automobile Mutual Insurance Co. v. Tony's Finer Foods Enterprises Inc.*, No. 1:20-cv-06199 (N.D. Ill. March 8, 2022); and *Citizens Ins. Co. of Am. v. Wynndalco Enters.*, No. 20-cv-3873 (N.D. Ill. March 30, 2022).
- Contrast Cases Finding Against Coverage
 - *American Family Mutual Insurance Company v. Caremel, Inc.*, Case No. 20-c-637 (N.D. Ill. Jan. 7, 2022) (applying employment related practices exclusion).
 - *Massachusetts Bay Ins. Co. et al. v. Impact Fulfillment Services, LLC*, Case No. 20-cv-926-WLO (M.D.N.C. Sept. 24, 2021) (applying recording and distribution exclusion under North Carolina law).

D&O POLICIES

- D & O policies typically contain an “invasion of privacy” exclusion see e.g., *Horn v. Liberty Ins. Underwriters, Inc.*, 391 F. Supp. 3d 1157 (S.D. Fla. 2019), *aff’d*, 998 F. 3d 1289 (11th Cir. 2021). Absent such an exclusion, however, private company D&O policies that provide entity coverage could provide coverage for such claims.
- In *Twin City*, the defendant company argued that the underlying complaints merely asserted “procedural violations of BIPA” that did not constitute invasion of privacy. It also asserted that the underlying actions did not allege any disclosure, release or misuse violations, but instead only alleged procedural violations where the plaintiff-employees “did not face an appreciable risk to harm to their privacy interests.”

D&O POLICIES (CONT'D)

The District Court disagreed, noting that the Illinois courts had concluded that BIPA codifies person's right to privacy in their biometric identifiers and information. *See West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, (Ill. 2021); *Rosenbach v Six Flags Ent. Corp.* 129 N.E. 3d 1197, 1206 (Ill. 2019) (holding that individuals possess a right to privacy in and control over their biometric identifiers and biometric information). In sum, the Court rejected the company's argument that BIPA is violated only if the biometric information is collected surreptitiously or disseminated to third parties. For this reason, the Court determined that there was no coverage for the underlying claims under the D&O portion of the policy.

EPL POLICIES

- The court in *Twin City* determined that there was coverage under the EPL part. In this regard, an “employment practices wrongful act” was defined to include the “breach of any oral, written or implied employment contract, including, without limitation, any obligation arising from a personnel manual, employee handbook or policy statement.” According to the court, this language assumes that a personnel manual, employee handbook or policy statement can give rise to a contractual obligation.
- Vonachen successfully argued that its employee handbook required employees to use the designated timekeeping system or face penalties for noncompliance, including termination. It also emphasized that the handbook stated that Vonachen “will comply with all applicable laws and regulations.” Based on these provisions, Vonachen’s argument concerning coverage was that, because the handbook required it to use the timekeeping system, and because Vonachen had obligated itself in the handbook to comply with all laws associated with that system, including BIPA, *Twin City’s* duty to defend was triggered based on the alleged BIPA violations alleged in the underlying complaint.

CYBER POLICES

Cyber policies can also be a source of coverage for biometric claims. This is because such information may be included among the types of data protected in the liability section of cyber policies. In this regard, a cyber policy might provide the broadest possible protection against biometric data privacy claims from regulatory actions, and civil lawsuits where the underlying statute grants a private right of action or employee privacy claims.

KEY EXCLUSIONS

- The access or disclosure exclusion, which bars coverage for access or disclosure and confidential information or data.
- The ERP exclusion, which pertains to employment related practices and bars coverage for claims arising from employment related practices.
- The violation of statute exclusion, which bars coverage arising from the distribution of material in violation of statute.

THE ACCESS OR DISCLOSURE EXCLUSION

This exclusion does not bar coverage for suits under BIPA *AM*. *Family Mut. Ins. Co. vs. Caramel, Inc.*, 2022 U.S. Dist. 3475 (N.D. Ill. 2022). Compare: *Mass. Bay Ins. Co. vs. Impact Fulfillment Servs., LLC*, 2021 U.S. Dist. LEXIS 182970 (M.D.N.C. 2021) (Recording and Distribution of Material or Information Exclusion barred coverage for suit brought under BIPA).

THE ERP EXCLUSION

- This exclusion does not bar coverage for BIPA action. *AM. Family Mut. Ins. Co. vs. Carnagio Ent.*, 2022 U.S. Dist. LEXIS 58358 (N.D. Ill. 2022); *State Auto Mut. Ins. Co. vs. Tony's Finer Foods Enters.*, 2022 U.S. Dist. LEXIS 40567 (N.D. Ill. 2022).
- But in the absence of an Illinois Supreme Court decision concerning the applicability of this exclusion, there is a split in authority. See *AM. Family Mut. Ins. Co. vs. Caremel, Inc.*, supra. (determining that ERP exclusion barred BIPA claim that arose out of plaintiff's employment activities).

THE VIOLATION OF STATUTE EXCLUSION

This exclusion does not bar coverage for BIPA suits. *AM Family Mut. Ins. Co. vs. Caremel, Inc.*, supra; *West Bend Mut. Ins. Co. vs. Krishna Schaumburg Tan, Inc.*, supra; *Citizens Ins. Co. and AM Family Mut. Ins. Co. vs. Wynndalco Ent., LLC*, 2022 U.S. Dist. LEXIS 57654 (N.D.Ill 2022)(because this exclusion is “intractably ambiguous”, it did not override the insurer’s duty to defend).

TAKEAWAYS

- Use of biometrics will likely increase with advancements in technology.
- Employers should be aware of the increased risk of liability.
- Coverage may exist under several types of policies.

THANK YOU!



Cort T. Malone, Esq.
Shareholder
Anderson Kill P.C.
(212) 278-1382
cmalone@andersonkill.com



Daniel J. Healy, Esq.
Partner
Anderson Kill L.L.P.
(202) 416-6547
dhealy@andersonkill.com