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Analyzing BIPA's Financial Institution Exemption

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Since the Illinois Supreme Court's 2019 decision in *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197 (Ill. 2019)—which held that no actual injury or harm is needed to pursue claims for purported violations of Illinois's draconian biometric privacy statute—litigation under the Illinois Biometric Information Privacy Act has ascended to the top spot as the nation's newest class action trend.

While the wave of BIPA filings has remained constant, the targets of these class action suits has ebbed and flowed over time. Originally focused primarily on employers that use fingerprint biometrics for timekeeping purposes, plaintiffs' attorneys have branched out by seeking out a wide variety of new targets for this bet-the-company litigation.

Financial institutions have for the first time found themselves in the crosshairs of BIPA class litigation. This has come as a surprise to many, as Illinois' biometric privacy law provides a complete exemption from compliance with the law for entities that fall under the scope of the Gramm-Leach-Bliley Act (GLBA), which covers the majority of financial institutions in operation today.

This new wrinkle in BIPA class litigation provides several important takeaways for financial institutions that collect and use biometric data in their operations today, as well as other types of entities that find themselves on the receiving end of a class action complaint alleging violations of Illinois' biometric privacy statute.

BIPA's Financial Institution Exemption

BIPA includes a complete exemption from compliance with Illinois' biometric privacy statute for certain financial institutions. This carve-out, known commonly as the "financial institution exemption," provides that "[n]othing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder." 740 ILCS 14/25(c).

In *Bryant v. Compass Group USA, Inc.,* 503 F. Supp. 3d 597, 601-02 (N.D. Ill. 2020), the U.S. District Court for the Northern District of Illinois noted that the General Assembly's decision to exclude financial institutions from regulation under BIPA was rationally related to BIPA's legitimate interest in protecting Illinois residents' privacy. Financial institutions covered by the exemption already have privacy guards in place, so imposing additional obligations on them would be minimally efficacious.

In *Heard v. Becton*, 2021 BL 83328, at *10 (N.D. Ill. Mar. 9, 2021), another federal court judge highlighted the expansive scope of the financial institution exemption by juxtaposing it with the law's health-care exemption. The *Heard* opinion rejected the argument that BIPA's health-care exemption—and the language "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" in particular—applied not only to patients, but to health-care workers as well.

The court noted that had Illinois lawmakers intended to exclude health-care workers from BIPA, it would have done so in a much more straightforward manner: by including an explicit carve-out for health-care workers like that provided to financial institutions, which the court characterized as a "provision *explicitly* stating that BIPA *shall not be construed to apply*" to financial institutions.

As illustrated by the *Heard* opinion, BIPA's text makes clear that the law does not apply in any capacity to financial institutions that are required to maintain compliance with the GLBA. Thus, financial institutions that fall under the scope of the GLBA possess a robust defense that precludes plaintiffs from establishing liability against them under any circumstances in BIPA class action suits.

Recent Complaints Filed Against Financial Institutions

Despite this straightforward, complete liability defense, financial institutions are still finding themselves targeted with BIPA class action complaints. The recent wave of BIPA filings naming banking entities as defendants provides several key takeaways not just for financial institutions, but also all types of businesses that may be subject to potential BIPA liability exposure.

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Proactive BIPA Compliance

These suits illustrate that despite being completely insulated across the board from BIPA liability exposure, financial institutions may nonetheless still be targeted with class action suits alleging violations of Illinois' biometric privacy law. The mere fact that the financial institutions are involved with the collection and use of biometric data is enough for a potential class action suit.

Thus, even where compliance is exempted, financial institutions and other types of entities should not operate under the assumption that no possibility exists of them being named as a defendant in a BIPA complaint. Suits filed against banking entities show there is no bulletproof way for a company to completely shield itself from being ensnared in BIPA class litigation.

There are, however, several action steps banks (and other entities) can take to signal to plaintiff's attorneys that filing suit against the financial institution will be a futile endeavor, minimizing the likelihood of being targeted as a defendant in a BIPA suit.

Namely, this entails satisfying the requirements of BIPA to the greatest extent possible where it is feasible and not burdensome for the institution to do so.

In addition, including a strong arbitration agreement and class action waiver in a financial institution's website terms and conditions is another strategy that can be used to further disincentivize enterprising plaintiff's attorneys from targeting the entity for purported BIPA violations.

Importantly, most plaintiff's attorneys will turn their attention to other, more vulnerable, targets when they learn they will likely be forced to arbitrate a BIPA suit. In the event the entity is targeted in a class action complaint, the prospect of arbitration drastically reduces the likelihood of a large payday for counsel—which can only come about through a class-wide settlement.

Indemnification Language in Biometric Service Provider Agreements

The second major takeaway of this wave of financial institution-focused BIPA class litigation does not relate directly to target financial institutions themselves. Also targeted are the service providers that financial institutions and other types of businesses often use to provide the biometric technology or other services that are needed to facilitate the collection and use of biometric data.

In at least a portion of the initial wave of BIPA complaints taking aim at financial institutions, the banking entity's third-party biometrics vendor was also named as a defendant along with the institution itself.

This tactic of naming vendors as defendants in BIPA complaints highlights the importance that financial institutions must place on their third-party service providers. Financial institutions must ensure that all agreements entered into with third-party service providers contain strong contractual language that guarantees full indemnification to the financial institution in the event it is named in a BIPA suit as a result of some type of compliance shortcoming on the part of the service provider.

Financial Institution Carve-Out & Dismissal Through Motion Practice

In the event a financial institution finds itself named as a defendant in a BIPA class action, the entity, and its biometric privacy counsel, should review the language of BIPA's financial institution carve-out to confirm that the exclusion applies to the institution.

If so, the immediate course of action that should be taken by the institution is for its biometric privacy legal team to reach out to opposing counsel to inform them about the applicability of the financial institution exemption.

At the same time, counsel for the banking entity should also impress on opposing counsel the necessity of immediately dismissing the suit in its entirety and with prejudice due to the categorical inability to establish liability against the banking defendant.

This is often an effective strategy that can achieve the desired result of obtaining a dismissal from the litigation in a much more efficient and cost-effective manner vis-à-vis simply charging full steam ahead with motion practice right out of the gate after suit is filed.

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If opposing counsel refuses to dismiss the suit against the financial institution, the next—and likely final—step should be to file a motion to dismiss for failure to state a claim asserting the applicable financial institution exemption available to the banking defendant under BIPA. This should allow the banking defendant to obtain an order from the court dismissing it from the litigation with prejudice.

Conclusion

Class action litigation pursued under BIPA has continued to proliferate since the Illinois Supreme Court ruled in *Rosenbach* that plaintiffs can pursue BIPA claims for mere technical violations of the law. As the wave of BIPA suits filed against financial institutions demonstrates, entities operating in the banking sector may be hit with a BIPA class action complaint even where it is clear that liability cannot be established against the financial institution defendant.

Proactive BIPA compliance can significantly reduce the likelihood that financial institutions and other types of businesses with strong defenses to liability will be hauled into court for claimed violations of Illinois' biometric privacy law.

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