

## Civil Law and Practice Section MCLE Program Webinar May 4, 2022

### Welcome/Announcements and Introduction

Dan Cetina - Civil Law and Practice Section Vice Chair

12:00 PM - 1:00 PM

### Program

#### 2022 Update: Illinois Biometric Information Privacy Act

Mary A. Smigielski and Michael J. Roman, Lewis Brisbois

### Presentation Summary

Lewis Brisbois formed the first Illinois Biometric Information Privacy Act (BIPA) practice in the nation and is on the forefront of the defense of BIPA class actions and risk management. Partner Mary Smigielski, Co-Chair of the BIPA Practice Group and Head of Labor & Employment in Chicago, and Senior Associate Michael Roman will provide an overview of BIPA, the current state of this evolving law, defense strategies, a settlement overview and how BIPA and laws like it are having an impact throughout the United States.

### Link to Evaluation

The evaluation must be completed to receive CLE credit.

<https://www.surveymonkey.com/r/CivilLaw05042022>

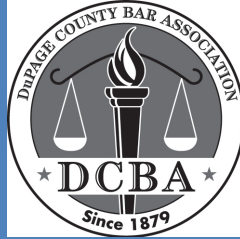
### Next CLE Program

June 14, 2022 - Trial Pad in the Courtroom, Sean Driscoll, Driscoll Law Group

### DCBA Events:

May 6<sup>th</sup> - [Presidents Ball](#) - Esplanade by Doubletree, Downers Grove

May 13<sup>th</sup> - [DCBA/KCBA Family Night at the Ballgame](#), Northwestern Medicine Field, Geneva

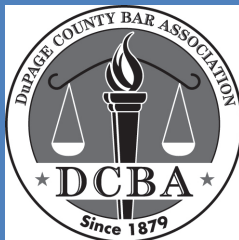


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**Mary Smigielski** is a partner at Lewis Brisbois, the sixth largest law firm in the country, and Co-chair of the firm's Illinois Biometric Information Privacy (BIPA) Practice. Ms. Smigielski is also head of Lewis Brisbois' Employment & Labor Practice in Chicago.

Ms. Smigielski defends class actions for alleged violations of Illinois' unique biometric privacy act, which presently provides the only private right of action in the nation for biometric violations, and helps companies manage their BIPA compliance obligations. In her employment practice, she routinely represents employers in class, collective and single-plaintiff employment litigation in State and Federal Courts, running the gamut from sexual harassment and discrimination to wage and hour litigation. She has appeared in courts across the United States and has a nationwide counseling practice to address employee relations and policy issues. She conducts sexual harassment and other types of training as well as sensitive workplace investigations, including at the C-Suite level.

Immediately prior to joining Lewis Brisbois, Ms. Smigielski spent nearly a decade in-house at a multi-national, Fortune 50 company where she was responsible for all aspects of employment law for over 100,000 employees in all 50 states and off shore. This unique experience makes her well suited to partner with all levels of leadership to achieve complex business objectives, define, assess and control legal risk, and implement workplace policies and best practices. Ms. Smigielski is a graduate of the University of San Diego School of Law and member of the Illinois and California bars.

**Michael J. Roman** is a Senior Associate in the Chicago office of Lewis Brisbois and a member of the Illinois Biometric Information Privacy (BIPA), Labor & Employment and General Liability practices. Michael focuses his practice on complex civil litigation including the vigorous defense of BIPA class actions throughout Illinois and has obtained favorable rulings and individual and class-wide settlements on behalf of Illinois companies. Michael's practice involves all aspects of general liability, premises liability, and auto and trucking accidents as well as representing employers in wage and hour class actions, labor relations and discrimination claims in state and federal courts and administrative agencies across the country.

Michael attended law school at DePaul University in Chicago and completed his undergraduate studies at Indiana University – Bloomington. Prior to joining Lewis Brisbois, he was an associate at a plaintiff's firm that focused on consumer class action litigation under the FCRA, TCPA and BIPA, where he assisted in litigating the seminal *Rosenbach v. Six Flags* BIPA case before the Illinois Supreme Court.



*President Hiley M. Whitty Cordially Invites  
You to the*

# DCBA PRESIDENTS BALL

*Oh, What a Night!*

FRIDAY, MAY 6, 2022  
5:30 PM

*Esplanade Lakes*

2111 BUTTERFIELD RD.  
DOWNS GROVE, IL

PLEASE RSVP BY APRIL 28, 2022

ONLINE: [WWW.DCBA.ORG/22GALA](http://WWW.DCBA.ORG/22GALA) OR PHONE: 630-653-7779



DuPage County Bar Association | May 4, 2022

**2022 Update –**

**Illinois Biometric Information Privacy Act**

Presented by Mary Smigielski and Michael Roman

With special thanks to George Manos

# Presenters

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**Mary Smigielski**  
Chicago



**Michael Roman**  
Chicago

# What Is BIPA & Why Do We Care?

- Hotbed of litigation: Over 900 pending class actions in Illinois and nationally with more being filed daily
  - Who is getting sued?
  - Millions of dollars at risk for non-compliance
- BIPA overview
  - 740 ILCS 14, et seq.
  - Protects the collection, use and storage of *certain* biometric data
  - Impetus for BIPA: Pay By Touch
  - Illinois Legislature in **2008**: “Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse...”



# Where Do We Find “Biometrics” And What Does BIPA Require?

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- “Biometrics” are used for timekeeping, building security, dispensing medication in hospitals, laptop security, POS systems, safes and lockboxes, commercial applications, and even school children paying for lunch
- Companies doing business in Illinois must comply with a number of requirements, including:
  - Notify employees and consumers if their biometric data, as defined by BIPA, is being collected, used or stored
  - Obtain **prior** written consent to do so
  - Have a publicly available written policy regarding the retention and destruction of biometric data
  - Securely store biometric identifiers

# BIPA Definitions

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- “**Biometric identifier**” means a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry
- “**Biometric information**” means any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual
- “**Written release**” means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment
  - Must include that a biometric identifier or biometric information is being collected or stored and inform of the specific purpose and length of term for which the information is collected, stored and used

# Millions Of \$\$\$ At Risk...No Harm Required

- BIPA provides for “per violation” statutory damages **or** actual damages plus attorneys’ fees and costs
  - \$1,000 for *each* negligent violation
  - \$5,000 for *each* intentional or reckless violation
- What is a “violation”?
- When can someone sue under BIPA? Data breach? Stolen information?
- *Rosenbach v. Six Flags Entertainment Corporation*, 2019 IL 123186 (January 25, 2019)
  - No harm is required; a mere statutory violation is sufficient to confer standing to sue
  - A unanimous Illinois Supreme Court decision with unnecessary dicta in decision
    - *“This is no mere ‘technicality.’ The injury is real and significant.”*
    - *“The precise harm the Illinois legislature sought to prevent is then realized.”*

# The Illinois Supreme Court Weighs in Again

- Illinois Workers Compensation Act (IWCA)
  - ***McDonald v. Symphony Bronzeville Park, LLC***, 2022 IL 126511 (February 3, 2022)
    - Certified Question: “Do the exclusivity provisions of the Illinois Workers Compensation Act (“IWCA”) bar a claim for statutory damages under Illinois’ Biometric Information Privacy Act (“BIPA”) where an employer is alleged to have violated an employee’s statutory privacy rights under BIPA?”
    - The Illinois Supreme Court affirmed that the IWCA does not pre-empt workplace BIPA claims when only statutory damages, but no actual injury, is alleged.
    - Justice Burke observed in his concurring opinion that had McDonald not dropped claims for mental anguish, the exclusivity provisions of the IWCA would have barred her claims, writing “[t]his opportunity for gamesmanship in pleading highlights the incongruity of applying the Compensation Act’s exclusivity provisions to Privacy Act claims that allege actual injuries but not to those that allege technical violations.”

# Under Review by the Illinois Supreme Court

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- What is the statute of limitations?
  - *Tims v. Black Horse Carriers, Inc.*, Case No. 127801
    - The Illinois Supreme Court will decide whether a 1-year or 5-year statute of limitations applies to Section 15(b) and/or Section 15(d) claims
- When does a claim under BIPA accrue?
  - *Cothron v. White Castle Systems, Inc.*, Case No. 127801
    - The Illinois Supreme Court will decide the following Certified Question: “Do section 15(b) and 15(d) claims accrue each time a private entity scans a person’s biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?”

# Article III Standing

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- *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020) – Article III standing exists for Section 15(b) claims.
- *Cothron v. White Castle Sys, Inc.*, 20 F.4<sup>th</sup> 1156 (7th Cir. 2021) – Relying on *Bryant*, the Seventh Circuit held that standing exists for Section 15(d) claims (unlawful disclosure without consent) because failure to comply with the consent provisions of 15(d) deprives person of the opportunity to consider “whether the terms of ... collection and usage are acceptable given the attendant risks,” which is concrete and particularized.
- *Hogan v. Amazon, Inc.*, 2022 U.S. Dist. LEXIS 58347 (N.D. Ill. March 30, 2022) – The Court held that there is no standing for Section 15(c) claims (unlawful sale of or profit from biometrics) because plaintiffs failed to allege how the sale harmed them individually.
- *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1154-1155 (7th Cir. 2020) – Article III standing for Section 15(a) claims exists if plaintiffs allege defendant retained biometric data beyond the time limits of the statute, but plaintiffs lack standing to pursue 15(a) claims for failure to publish retention schedule because that is a duty owed to the public generally, not the individual.

# Federal Preemption

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- *Miller v. Southwest Airlines*, 926 F.3d 898 (7th Cir. 2019)
  - Disputes about the interpretation or application of a collective bargaining agreement (CBA) related to the use of biometrics by air carriers must be determined by an adjustment board under the federal Railway Labor Act (RLA).
- *Fernandez v. Kerry, Inc.*, 14 F4 644 (7th Cir. 2021)
  - The Labor Management Relations Act (LMRA) broadly preempts BIPA when plaintiffs are subject to an applicable CBA.
- *Kislov v. Am. Airlines, Inc.*, 2021 U.S. Dist. LEXIS 194911 (N.D. Ill. Oct. 8, 2021)
  - BIPA claims brought by consumers are preempted by the Airline Deregulation Act.
- *Fleury v. Union v. Pac. R.R. Co.*, 528 F. Supp. 3d 885 (N.D. Ill. Mar. 24, 2021)
  - BIPA claims brought by truck driver against railroad were not preempted by the Federal Railroad Safety Act (FRSA).

# Other Recent Decisions

- *Watson v. Legacy Healthcare Fin. Srvs., LLC*, 2021 IL App (1st) 210279 – The First District Court of Appeals held that BIPA claims accrue *each time* biometrics are collected for purposes of the statute of limitations. The Court declined to address whether violations were “continuing” vs. “separate” and the impact on the recovery of damages.
- *Rodriguez v. Returns ‘R’ US, INC.*, No. 2021 IL App (2d) 210684-U – The Second District Court of Appeals reversed a Lake County trial court’s denial of an unopposed motion to stay proceedings pending *McDonald* appeal.
- *Barnett v. Apple, Inc.*, No. 2021-CH-03119 (Cir. Ct. Cook County Jan. 3, 2022) – The Circuit Court of Cook County dismissed §15(a) claims on a 2-615 motion to dismiss for failure to plead that the defendant ever was “in possession” of biometrics and only alleged the data was stored on plaintiff’s personal device.
- *Twin City Fire Insurance Co. v. Vonachen Services Inc., et al*, 20-cv-1150-JES-JEH (C.D. Ill. Oct. 19, 2021) – D&O insurance coverage was not implicated due to broad invasion of privacy exclusion, but EPLI coverage was potentially implicated, triggering a duty to defend, because the definition of employment practices wrongful acts included obligations arising from the employee manual; the company’s handbook required fingerprint time keeping as a condition of employment.

# What About Insurance?

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- Several potential sources of insurance coverage, including:
  - Employment Practices Liability
    - The majority of BIPA cases have been filed by employees
  - Cyber Liability
  - Commercial General Liability
  - Director and Officer Liability/Board Liability Policies

# Significant Insurance Decisions – Commercial General Liability (CGL) Coverage

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*West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2020 IL 125978 (May 20, 2021)

- 1) The Illinois Supreme Court held that communication of biometric information to a third-party vendor satisfied the publication requirement for personal or advertising injury coverage under the CGL policy.
- 2) The High Court also ruled BIPA does not fall within the Statutory Exclusion “catchall” language, because BIPA does not regulate methods of communication, which is the context of the exclusion.

# Significant Insurance Decisions – Employment Related Practices Exclusion to CGL

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- BIPA violations fall within the Employment Related Practices Exclusion because it relates to conduct that can cause harm to an employee. *Am. Family Mut. Ins. Co. v. Caremel, Inc.*, No. 20 C 637, 2022 U.S. Dist. LEXIS 3475, at \*10 (N.D. Ill. Jan. 7, 2022), but...
- BIPA violations are not like the other specifically enumerated employment-related practices contained within the exclusionary language. *State Auto. Mut. Ins. Co. v. Tony's Finer Foods Enters.*, No. 20-cv-6199, 2022 U.S. Dist. LEXIS 40567, at \*18 (N.D. Ill. Mar. 8, 2022).

# Significant Insurance Decisions – Access and Disclosure Exclusion to CGL Policies

- Courts are split on whether Access and Disclosure Exclusions exclude coverage for BIPA claims.
- Some have held that BIPA claims are not unambiguously excluded under the Access and Disclosure Exclusion.
  - *Am. Family Mut. Ins. Co. v. Caremel, Inc.*, No. 20-cv-637, 2022 U.S. Dist. LEXIS 3475 (N.D. Ill. Jan. 7, 2022);
  - *Citizens Ins. Co. of Am. v. Thermoflex Waukegan, LLC*, Case No. 20-cv-05980, 2022 WL 602537 at 6-7 (N.D. Ill. Mar. 1, 2022);
  - *Citizens Ins. Co. of America v. Highland Baking Co., Inc.*, Case No. 20-cv-04997 (N.D. Ill. March 29, 2022).
- Other recent decisions hold that the Access or Disclosure Exclusion unambiguously bars coverage for BIPA claims.
  - *American Family Mut. Ins. Co., S.I. v. Carnagio Enters.*, Case No 20-c-3665 (N.D. Ill. Mar. 30, 2022);
  - *Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, Case No. 21-c-788 (N.D. Ill. Mar. 30, 2022).

# Structuring BIPA Settlements

- Settlements in BIPA cases take different forms
  - Direct Pay vs. Claims Made
    - Different structures for different class member groups (e.g., inactive vs. active employees)
  - Non-Reversionary vs. Reversionary vs. *Cy Pres*
  - Individual settlement vs. Class-wide settlement
  - Type of Notice and Claim submission – U.S. Mail, email, online website, etc.
  - Issues affecting value of the settlement
    - Compliance with BIPA before or after being sued, class size, ascertainability of the class, arbitration agreements, releases, type of technology
- Vendor settlements
  - Often broad definition of class without regard to prior employer settlements or release covering customers. Courts have approved subpoenaing employers for class member contact information to ascertain a class.

# Significant BIPA Settlements

- *In re: Facebook Biometric Info., Privacy Litig.*, March 2021 (\$650M settlement, estimated 1.6M class member, claims made, each approved claim to receive ~\$345)
- *Rosenbach v. Six Flags*, June 2021 (\$36M settlement, estimated 1.1M class members, claims made basis, each member to receive ~\$200 in installments of \$60)
- *Figueroa v. Kronos, Inc.*, February 2022 (\$15.3M settlement, estimated 173,643 class members, claims made, each to receive \$290-\$580)
- *Jackson v. Ultimate Software Group, Inc.*, March 2022 (\$3.3M settlement, estimated 75,978 members, claims made, each to receive estimated \$200-\$400)
- *In re: Google Photos*, April 2022 (\$100M settlement, estimated \$200-400 per member, claims made with *cy pres*)

# Will the Illinois Legislature Fix It?

- All prior attempts to amend BIPA have failed
- In March of 2021, the Illinois House judiciary committee proposed House Bill 559:
  - Narrow the definition of biometric information by exempting “information derived from biometric information that cannot be used to recreate the original biometric identifier”;
  - Require a 30 day notice and cure period before a private action can be filed;
  - Create a one year statute of limitations to file a BIPA suit;
  - Eliminate statutory penalties of \$1,000 or \$5,000 “for each violation” and limit recovery to actual damages and attorneys’ fees (double damages for willful violations);
  - Exclude lawsuits by employees subject to a CBA; and
  - Permit electronic consent instead of requiring a “written release.”
- The Illinois House of Representatives failed to read HB 559 by the April 23, 2021 deadline and it was re-referred to the Rules Committee. HB 559’s future is unclear.

# It's Not Just in Illinois...

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- Texas and Washington have enacted biometric laws, but so far only the Illinois law provides individuals with a private right of action.
- Texas Capture or Use of Biometric Identifier Act (CUBI) – Enacted in 2009. Violations may result in civil penalties of up to \$25,000 per violation, with no maximum cap.
- Washington Code 19.375.020 – Passed in 2017. Non-compliance is subject to the same penalties as the Washington Consumer Protection Act, including a fine of up to \$500,000 plus attorneys' fee.

# Examples in Other States

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- California's Consumer Privacy Act (CCPA) covers the protection of biometric data, but the Act only allows for a private right of action where exposure resulted from the business' failure to implement and maintain reasonable security procedures and to take certain steps after receiving a request from a consumer.
- Louisiana's Data Breach Security Notification Law was amended to include biometrics in 2018. Private actions are limited to actual damages based on the failure to timely disclose a breach.
- Past legislative activity in Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Virginia, West Virginia, Washington, Wisconsin.

# Pending Legislation

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## **In 2022, 7 states introduced biometric laws generally based on BIPA:**

- California – 2/17/22, SB 1189, pending reading with proposed amendments.
- Kentucky – 2/28/22, HB 626, no subsequent action to date.
- Maine – 1/26/22, HB 1945, divided views during work sessions.
- Maryland – 1/13/22, HB 259, now before the state Senate.
- Massachusetts – 2/14/22, SB 2687, no subsequent action to date.
- Missouri – 2/16/22, HB 2716, pending.
- New York – 1/21 and 1/22, AB 27, stuck in committee (as are similar bills).

# My Client Got Sued, Now What?

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- Is there insurance coverage?
- Is the technology covered by BIPA?
- Was there a consent?
- Were the claims already released?
- Is there a Collective Bargaining Agreement?
- Are the claims preempted in another manner?
- Is there an arbitration agreement, either the company's own or is the company the third party beneficiary of an arbitration agreement?
- Is there indemnification from a third party?
- Can the case be removed? Is venue proper?
- Should the case be stayed?

# My Client Hasn't Been Sued But Uses “Biometric” Technology, Now What?

- BIPA is here to stay – All BIPA amendments have failed to date
  - Continued case filings
- Examine insurance policies and consider exclusions or purchasing additional coverage
- Be proactive!
  - Companies should review compliance with BIPA
  - Get rid of the “biometric” technology!
  - Put a carefully drafted BIPA policy in place – there are nuances
  - Obtain releases?
  - Check contracts for indemnification obligations with third parties
  - Consider an arbitration policy with a class action waiver
  - Work with the experts and do it right

# Questions?

# ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT (BIPA)

## Practice Area

In the wake of the Illinois Supreme Court decision in *Rosenbach v. Six Flags Entertainment Corporation*, which drastically reduced the threshold required for an individual to seek redress for alleged violations of the Biometric Information Privacy Act (“BIPA” or “the Act”), companies with operations in Illinois saw an uptick in litigation. Although we have been providing counsel and litigating under BIPA for years, Lewis Brisbois created a specialized BIPA Practice Group to assist organizations likely to face challenges under the Act, which requires all private entities that collect or use biometric information to take action with respect to its collection, disclosure and retention.

Our BIPA team is at the cutting-edge of defense in the recent wave of class action litigation being brought against Illinois employers and other groups under the Act, handling cases for companies and large insurers. We recognize the challenges that the decision in *Rosenbach* raises for organizations, both in terms of compliance with the Act and in avoiding costly violations. BIPA allows plaintiffs to recover \$1,000.00 per negligent violation and \$5,000.00 per intentional or reckless violation. Legal arguments have been crafted by the plaintiffs’ bar to assert potentially astronomical recovery, for instance, as much as \$20,000 per employee, per day, for use of a biometric timekeeping device without consent.

If you, your organization, or your clients collect and/or maintain any biometric information within the State of Illinois, you need certainty as to your obligations under BIPA. Our dedicated attorneys are available to outline the legal landscape and provide strategic direction to address all aspects of compliance, insurance coverage, litigation and the BIPA horizon.

Lewis Brisbois, with the largest number ABOTA-certified trial lawyers in the nation, is uniquely positioned to immediately spearhead the defense of BIPA litigation and provide compliance advice.



**Mary A. Smigielski** is a partner in the Chicago office of Lewis Brisbois, head of the Labor & Employment Practice in Chicago, and co-chair of the firm's Illinois Biometric Information Privacy Act (BIPA) practice group. Ms. Smigielski handles class/collective actions and single-plaintiff employment litigation, administrative charges, nationwide counseling, training, and sensitive workplace investigations, including at the C-Suite level. Having spent nearly a decade as in-house employment and business counsel for a multi-national, Fortune 50 company with responsibility for over 100,000 employees, Ms. Smigielski is in a unique position to recognize the challenges faced by our clients and is committed to achieving creative and cost-effective solutions.

Ms. Smigielski partners with all levels of leadership to achieve complex business objectives, define, assess and control legal risk, and implement workplace policies and best practices.

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**Michael J. Roman** is an associate in the Chicago office of Lewis Brisbois and a member of the General Liability and Labor & Employment Practices. Michael focuses his practice in complex civil litigation involving all aspects of general liability, premises liability, and auto and trucking accidents as well as representing employers in wage and hour class actions, labor relations and discrimination claims in state and federal courts and administrative agencies across the country. Michael has developed particular expertise in the defense of class actions brought under the Illinois Biometric Information Privacy Act (BIPA) and has obtained favorable individual and class-wide settlements on behalf of Illinois employers.

Michael received his Juris Doctor from DePaul University College of Law and completed his undergraduate degree at Indiana University—Bloomington.

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