

## Illinois Supreme Court Rules a Five-Year Statute of Limitations Applies to BIPA Claims

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On February 2, 2023, the Illinois Supreme Court issued a long awaited ruling on ***Jorome Tims et al. v. Black Horse Carriers, Inc., No. 127801***, a class action lawsuit alleging violation of the Illinois Biometric Information Privacy Act (“BIPA”). The Court reversed in part and remanded a judgment of the lower appellate court, ultimately holding that the appellate court erred when it applied different limitations periods to claims brought under the BIPA statute. The Court held that the five-year limitation period contained in Section 13-205 of the Illinois Code applies to claims brought under the BIPA statute.

### **Background on *Tims v. Black Horse Carriers***

The *Tims* case began in March 2019 when Jorome Tims and Isaac Watson sued their former employer, Black Horse, alleging that Black Horse violated (1) Section 15(a) of BIPA by failing to institute, maintain, and adhere to a publicly available biometric information retention and destruction policy; (2) Section 15(b) of BIPA by failing to provide notice and to obtain consent when collecting his biometric information; and (3) Section 15(d) of BIPA by disclosing or otherwise disseminating his biometric information to third parties without their consent. The BIPA statute itself does not contain a specific statute of limitations for any claims arising under it. Therefore, the company moved to dismiss the plaintiffs’ claims as untimely, arguing that, because the BIPA does not contain its own statute of limitations, the court should apply the one-year limitations period for privacy actions set forth in 735 ILCS 5/13-201. The plaintiffs countered that the five-year “catch-all”

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limitations period contained in 735 ILCS 5/13-205 was more appropriate for actions under the BIPA. This issue was subject to an interlocutory appeal to the Illinois Appellate Court.

### Illinois Appellate Decision

The First District Appellate Court held that the one-year limitations period set forth in 735 ILCS 5/13-201 (applicable to defamation torts) applies to BIPA Sections 15(c) and 15(d) because those sections involve “publication” of biometric data, which is a term explicitly used in § 201. Furthermore, The First District Appellate Court held that the five-year “catchall” limitations period in 735 ILCS 5/13-205 applied to claims brought under Sections 15(a), (b), and (e) of the BIPA statute that do not involve publication of an individual’s biometric data. The company subsequently appealed this decision to the Illinois Supreme Court.

### Illinois Supreme Court Review

On review, the Illinois Supreme Court observed that both the Plaintiffs and Defendant: (1) agreed that the Illinois Appellate Court erred in applying two different limitations periods to BIPA; and (2) requested the Court to apply either a one-year or a five-year limitations period to the entire BIPA statute. The Court agreed that one statute of limitations should apply. The Court reasoned that a five-year limitation period is appropriate for the statute because Illinois courts have routinely applied the catch-all limitations period under 735 ILCS 5/13-205 to other statutes that lack a specific statute of limitations, which BIPA similarly lacks “because the Act does not have its own limitations period; because the subsections are causes of action ‘not otherwise provided for’; and because we must ensure certainty, predictability, and uniformity as to when the limitations period expires in each subsection, the Act is subject to the default” statute of limitations found in Illinois’ Code of Civil Procedure. The ruling also discussed that the five-year limitations period would serve Illinois General Assembly’s policy concerns by applying a longer statute of limitations period.

### Next in BIPA Litigation

While *Tims* has decided the statute of limitation applicable to BIPA claims, companies and courts are still awaiting the Illinois Supreme Court’s ruling on a certified question in *Latrina Cothron v. White Castle System Inc.*, No. 128004, on whether BIPA violations accrue each time an illegal biometric scan is performed or upon the first or last biometric collection. Depending on how the Court rules in *Cothron*, the ruling will have a significant impact on potential damages under BIPA, as the decision could increase the damages companies may face for a violation significantly if it is held that a violation occurs each time an individual’s biometric information is scanned, and may even result in potential bankruptcies for some companies.

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Additionally, with the BIPA statute being largely untested, defendants continue to test defenses to BIPA claims, including various potential exceptions to BIPA like preemption by the Labor Management Relations Act. See 740 ILCS 14/10.

### **What Does This Mean for Employers and Other Companies**

Plaintiffs' attorneys have filed thousands of cases under BIPA over the last few years, and this decision will continue to make BIPA litigation lucrative and attractive to plaintiffs and their attorneys. To ensure compliance with BIPA, employers and other companies should continue to review their technology, policies, and procedures before implementing new technology for use by employees and customers.

If you or your company is seeking more information on BIPA, or assistance ensuring your policies and procedures are compliant with BIPA, please contact your servicing Laner Muchin Attorney.