

Experts Say Biometric Suits, Coverage Fights Far From Over

By **Shane Dilworth**

Law360 (July 12, 2022, 7:41 PM EDT) -- The growing use of biometric data combined with a rising number of state laws aimed at protecting the information will likely lead to more underlying class actions and insurance coverage disputes, experts said during a webinar on Wednesday.



Experts believe the growing use of biometric data combined with a rising number of state laws aimed at protecting the information will likely lead to more underlying class actions and insurance coverage disputes. (Photographer: Angel Garcia/Bloomberg via Getty Images)

During the webinar presented by Strafford Publications Inc., Anderson Kill PC's Cort T. Malone and Daniel J. Healy — who represent policyholders — predicted that the use of fingerprints, facial recognition and retinal scans as a means for accessing buildings and accounts, which has risen dramatically over the last five years, will likely surpass the use of passwords.

"The things that used to be science fiction are here and now," Malone said.

State statutes, such as the Illinois Biometric Information Privacy Act, or BIPA, have been enacted to protect the privacy of the information. And alleged violations of the Illinois act have spurred a number of class actions from consumers and employees of companies that use the data. The plaintiffs in these suits complain that companies defied the statute by failing to inform them about the collection of the data and obtain their written consent.

Companies being accused of violating BIPA have turned to their insurers, seeking a defense under commercial general liability, or CGL policies. The policyholders allege that they have a right to a defense from their insurers, arguing that the underlying suits involve a personal injury caused by the publication of material that violates the right to privacy.

Carriers have countered that they have no obligation to provide a defense under CGL policies, citing "employment-related practice," "statutory violation" and "access or disclosure of information" exclusions.

Coverage may also be available under directors and officers policies, employer practices liability policies and cyber policies, Healy and Malone said. Although coverage under cyber policies seems hardest to find, the presenters said policyholders should provide notice to all of their carriers if facing a suit over an alleged BIPA violation.

Policyholder-Friendly Rulings

The Anderson Kill attorneys said that so far, policyholders have fared well in insurance coverage disputes. The presenters noted the Illinois Supreme Court's 2021 **landmark ruling** in [West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan Inc.](#), was important due to its finding that sharing biometric information with a third-party vendor constituted a publication that was covered under a CGL policy.

"This holding was great for policyholders because it said, in fact, even just providing a copy to one single party is enough to meet that requirement," Healy said. "There is no need for there to be a large audience."

Shortly after the Illinois high court's ruling, though, federal judges in North Carolina and Illinois issued rulings that an employment-related practices exclusion and "recording and distribution" exclusion applied to relieve insurers of the duty to defend, Healy and Malone said.

The momentum did not last long for carriers as federal judges presiding over three coverage disputes in Illinois federal court handed down policyholder-friendly rulings this past March. In [Citizens Insurance Co. of America v. Thermoflex Waukegan LLC](#), the judge **found** that three exclusions cited by three insurers did not clearly relieve them of their duties to defend.

Malone explained that policyholders have the upper hand in coverage disputes since the duty to defend is broad. Additionally, insurers have a high burden to show that there is no duty to defend and that exclusions must be clearly unambiguous in order for them to apply.

Legislation On The Horizon

The presenters pointed out that the growth potential for underlying class actions over the unlawful collection and dissemination of biometric data is bolstered by the rising number of states and municipalities seeking to implement laws similar to BIPA.

Texas, Washington and New York City have already enacted similar laws protecting the privacy of biometric data. However, they don't provide individuals with a private cause of action against an alleged wrongdoer, the Anderson Kill attorneys explained.

Virginia, meanwhile, recently passed a law governing the security of biometric data that will go in effect in January 2023. And Arizona, Hawaii, Maryland and Massachusetts are working on statewide legislation comparable to BIPA, as are lawmakers in the Empire State.

"The way that this is trending, we're going to have many dozens of these passed in the next few years," Healy said.

Malone indicated that if New York's proposed law, which is very similar to BIPA, passes, "we're going to see an explosion" of underlying class actions over alleged violations of the statute.

--Editing by Nick Petruncio.