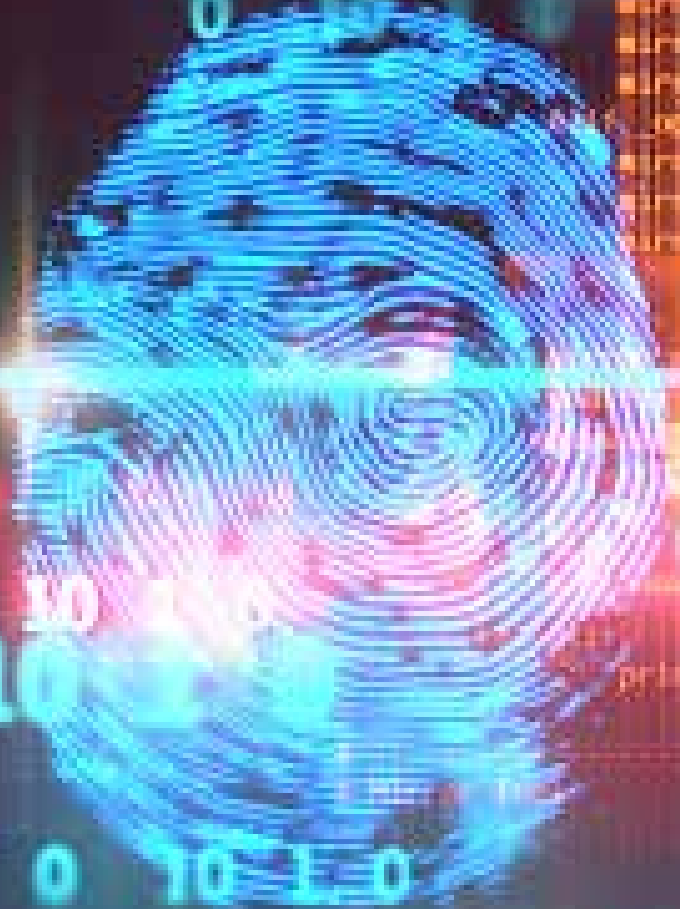


WEBINAR

# Coverage for Biometric Privacy Claims



Thursday, May 26, 2022

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Insurance Coverage Master Class 



## Coverage for Biometric Privacy Claims

Joe Stafford  
May 26, 2022

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Biometrics Insurance Coverage Master Class

- Biometric Information
  - Information based on an individual's biometric identifier used for identification purposes
- Biometric Identifier
  - Retina or iris scan
  - Fingerprint
  - Voiceprint
  - Hand scan
  - Face geometry
- Rising use of biometrics
- New technology → New problems


**The Growing Commercial Use of Biometrics**



Face and voice biometrics market forecast growth from 2020 to 2027: **\$22.7 billion** (up from **\$7.2 billion**)

**>75%** of U.S. consumers have used biometric technology

**>\$82 billion** Global biometrics market forecast growth by 2027

Sources: Argo Pro. & PropertyCasualty360  2

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Evolution of Biometric-Related Laws and Claims Insurance Coverage Master Class

2008 – Beginning of Biometric Legislation


2008 to 2014 – Minimal (if any) Biometric Claims or Lawsuits

Technological Advancements & Increased Availability

Surge in Use of Biometrics

2015 – Biometric Claims Emerge Focus on Larger Companies

2019 – Widespread Biometric Claims

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### The Biometric Privacy Claim/Lawsuit Insurance Coverage Master Class

- Background & Legislative Intent
- Biometric v. Traditional Privacy
- Types of Biometric Privacy Claims
  - Workplace
  - Online
  - Wearables
- Types of Technology
  - Fingerprint Scanners
  - No Contact Temperature Taking Devices
  - Facial Recognition



Sources: Labor & Employment Law Update WILSON ELSER  
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### State-Specific Biometric Privacy Laws Insurance Coverage Master Class

- Biometric Privacy Laws **Allowing** Private Right of Action
  - Illinois
  - California (limited)
  - New York (limited and subject to 30-day notice and cure period)
- Biometric Privacy Laws with **No** Private Right of Action
  - Attorney General empowered to pursue violations
  - Arkansas, Arizona, Colorado, Maine, Maryland, Montana, Texas, Utah, Vermont, Virginia, Washington
- Proposed Legislation
  - None Include Private Right of Action
  - Alabama, Florida, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Oklahoma, Oregon, South Carolina, West Virginia

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### Key Liability (and Penalty) Components Insurance Coverage Master Class

Using the Illinois Biometric Privacy Act (BIPA) as a guidepost:



- 5 Penalties**  
\$5,000 per Negligent violation  
\$5,000 per Intentional violation
- 4 Private Action**
- 3 Protection Guidelines**  
Publicly available retention schedule and destruction guidelines
- 2 No Profiting**  
Cannot sell, lease, trade or otherwise profit from biometric information
- 1 Informed Consent**  
Written release prior to collecting biometric identifier/information

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### Current Trends

Insurance Coverage Master Class

**Class Action Litigation Trends**

- 2008-2014: 0 Class Actions
- 2015-2017: 84 Class Actions
- 2018: 79 Class Actions
- 2019: ~300 Class Actions
- 2020: >900 Class Actions

**Industries Targeted**

- Business Services: 20%
- Healthcare: 20%
- Manufacturing: 19%
- Hospitality: 17%
- Retail: 16%
- Software & Tech: 10%

**Industries Targeted in BIPA Class Actions**

**Significant Rulings**

- Rosenbach
- West Bend
- Tims
- McDonald

Sources: Argo Pro., PropertyCasualty360, JD Supra, & Seyforth Shaw LLP

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### Settlement Trends & Considerations

Insurance Coverage Master Class

- Average Settlement Value = ~\$1,000 per class member
- Average Recovery Amount = ~\$500 per class member
- Class Sizes Vary Widely = 100 – 15,000,000 members
- Settlements With Injunctive Relief = ~50%
- Majority of Settlements Utilize a Claims Process
- No Reversion of Unclaimed Funds

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### Biometric Privacy Settlement Examples (chronological)

Insurance Coverage Master Class

Company	Year Settled	Amount Paid	Relevant Facts/Settlement Considerations
Superior Nut and Candy Co.	Mar 2020	\$725,000	• Jurisdiction: Cook County Illinois • Size of Class: 1,384 • Amount: \$565 per class member
Nandos	Oct 2020	\$1.7 million	• Jurisdiction: Northern District of Illinois • Size of Class: 1,787 • Amount: \$1,000 per class member
Facebook	Feb 2021	\$650 million	• Jurisdiction: Northern District of Illinois • Size of Class: 1,600,000 • Amount: \$350 per class member
ADP	Feb 2021	\$25 million	• Jurisdiction: Cook County Illinois • Size of Class: ~150,000 • Amount: \$250 per class member
Navitime	Feb 2021	\$4.1 million	• Jurisdiction: Northern District of Illinois • Size of Class: 62,000 • Amount: \$250 per class member
Superior Health Linens	Apr 2021	\$790,000	• Jurisdiction: Northern District of Illinois • Size of Class: 790 • Amount: \$1,000 per class member
Brandt Industries USA, Ltd.	Mar 2022	\$250,000	• Jurisdiction: Northern District of Illinois • Size of Class: 260 • Amount: \$618 per class member
Holiday Inn	Apr 2022	\$503,000	• Jurisdiction: Cook County Illinois • Size of Class: 402 • Amount: ~\$700 per class member

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### Role of Adjuster in Handling Biometric Claim/Lawsuit

Insurance Coverage Master Class

- Claims Handling & Bad Faith Risks for insurers are evolving.  
 - Initially, the focus was on the private entity.  
 - However, recent litigation shows a shift to availability of insurance amounts.

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### Policy-Specific Considerations

Insurance Coverage Master Class

- CGL – Commercial General Liability Policies
  - Main Issue: Application of common exclusions
  - Mostly Resolved Issue: Definition of "Personal and Advertising Injury"
- EPL – Employment Practices Liability Policies
  - Main Issue: Whether data collection is "employment practices wrongful act"
- Cyber Policies
  - Main Issue: Definition of "Privacy Event"
- D&O – Directors & Officers Policies
  - Main Issue: Application of CGL, EPL or Invasion of Privacy Exclusions
  - Private Company (potentially triggered)
  - Public Company (not likely triggered)

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### Common Biometric Privacy Insurance Coverage Issues

Insurance Coverage Master Class

•Least Common

•Fairly Common

•Most Common

•Common

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### Biometric CGL Coverage Scorecard Insurance Coverage Master Class

COVERAGE FOR BIIPA CLAIMS - CGL SCORECARD ON THE ISSUES		
Total: 9 cases		
	Insured Wins	Insurer Wins
Insuring Agreement	0	8/9
(Narrower) Violation of Statute Exclusion	0/3	3/3
(Broader) Recording & Distribution of Material or Information in Violation of Law Exclusion	1/4	3/4
Employment-Related Practices Exclusion	1/5	4/5
Access or Disclosure Exclusion	2/5	3/5
Statutory Right of Privacy Exclusion	Not addressed	

**MAIN TAKEAWAYS:**

- In Illinois – insured will likely win “personal injury” argument
- In Illinois – insured will likely win on Violation of Statute Exclusion
- In Illinois – insured will likely win on Recording & Distribution Exclusion
- The only Insurer win on Recording & Distribution Exclusion is from the Western District of North Carolina

Sources: Ashley Conaghan, Wilson Elser LLP

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### Underwriting & Claims Inquiry Checklist Insurance Coverage Master Class

- Does Insured use biometric technology?
- How is biometric data collected, stored, distributed, destroyed?
- How is data secured or protected?
- Biometric-specific endorsement/exclusion appropriate?
- Does the Insured have:
  - Publicly-available retention and destruction policy?
  - Written waiver required to be executed before biometric information collected?
  - Prohibition against profiting from biometric data (even with consent)?
  - Restrictions on disclosure and access?

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### Common Considerations & Strategies in Biometric Claims Insurance Coverage Master Class

- Motion to Dismiss/Judgment on the Pleadings Arguments

- Jurisdictional Issues/Article III Standing
- Common Arguments
- Court Rejection of Ubiquitous Arguments
- Court Acceptance of Unique, Fact-Specific Arguments

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