Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Biggest Illinois Decisions Of 2019

By **Celeste Bott**

Law360 (December 19, 2019, 3:40 PM EST) -- The Illinois Supreme Court this year determined that a mere violation of the state's biometric privacy law is enough to confer standing without proof of actual harm and offered a rare opinion on attorney-client privilege issues.

The Seventh Circuit split from other circuits when it held the Federal Trade Commission can only seek injunctive relief, and not damages, in its decision overturning the agency's $5.2 million judgment against a credit-monitoring company, a move that could have implications for other agencies.

Other notable decisions include a sexual abuse ruling from the state's high court that could create added layers of responsibility for employers as they hire and supervise their workers, and a revenge porn decision that bolstered Illinois' reputation as a protector of privacy.

Here, Law360 takes a look at some of the biggest Illinois decisions of 2019.

High Court Defines 'Aggrieved' Under Biometric Information Privacy Act

Kicking off the year in January, the Illinois Supreme Court found in Rosenbach v. Six Flags that a Six Flags season pass holder can claim that the theme park operator illegally collected her son's thumbprint without permission, even without alleging a separate, real-world harm.

The court's finding that her son could be considered an "aggrieved person" under the state's Biometric Information Privacy Act based merely on the idea that his print was taken without consent "opened the floodgates" for BIPA litigation this year, said Rich Tilghman, a partner at Nixon Peabody LLP.

"We're starting to see more decisions from the trial courts that are following or extending the decision probably even beyond the certified question that was answered in that case," Tilghman said.

Defendants have frequently argued in BIPA cases that plaintiffs have asserted statutory violations but haven't pled elements of negligence or recklessness that allow for monetary awards, he said. But courts are rejecting that argument at the pleading stage, as long as there is an alleged violation of the law.

"There's a deeper question of where it may be enough for a person to be aggrieved," Tilghman said. "But is it enough to assert a claim for damages?"

Revenge Porn Finding Continues Trend of Strict Privacy Protections

In October, Illinois' top court upheld the state's law criminalizing revenge pornography, finding 5-2 that it is in the state government's interest to protect the privacy rights of its citizens and that the law doesn't restrict First Amendment rights.

Disseminating private sexual images without the subject's consent isn't constitutionally protected free speech, the majority concluded, overruling a lower court. More than 40 states and the District of Columbia prohibit the practice, and Illinois' law has been appropriately tailored to deal with a "unique crime fueled by technology," the court said.

This ruling, along with the court's Rosenbach decision, show "a very aggressive protection of personal privacy rights by Illinois," said Kirkland & Ellis LLP partner Brent Rogers.

What will be worth watching is how those privacy protections from the state have to play out in the context of federal law, Rogers said.

The Seventh Circuit has already run into the issue in its June 2019 ruling that an adjustment board must settle disputes over whether Southwest Airlines Co. and United Airlines Inc. violated BIPA when they used fingerprint timekeeping systems requiring workers to clock in and out with their fingerprints, because their unions may have consented to the practice on the employees' collective behalf.

The question of whether Southwest or United's unions consented to that collection, or granted authority through a management rights clause, is a matter that must be resolved in arbitration and not before a judge, per the Railway Labor Act, the court said in those cases.

"I think the standing issue is going to arise frequently," Rogers said.

Sexual Abuse Ruling Could Have Deeper Implications for Hiring

An Illinois Supreme Court ruling in May over allegations of sexual abuse in a church youth group could impose greater diligence on employers hiring workers, said Gretchen Sperry, a Hinshaw & Culbertson LLP partner and president of the Illinois Appellate Lawyers Association.

The Doe v. Coe lawsuit alleged that the First Congregational Church of Dundee and its pastor were responsible for the negligent hiring and supervision of a youth minister who allegedly sexually assaulted a teenage church member, and the court reinstated claims of negligent hiring, negligent supervision and negligent retention.

While the court had acknowledged before that there is a separate and distinct cause of action for negligent supervision, it had not before determined the elements required for making such a claim, and it agreed with the appellate court's analysis: that prior notice of unfitness isn't required, only "general foreseeability" in an employment context.

"It does not require employer have any advance notice of any circumstances that put it on notice that this person may engage in the conduct causes the injury," Sperry said. "It's the first time they've had this discussion."

The plaintiffs based their negligence claims in part on the argument that a cursory Google search into

the online public presence of the youth minister, Chad Coe, would have revealed his activity, which included posting public photos of his genitalia.

But that creates some questions for employers over the limits of a Google search and what happens if a search doesn't turn up anything sinister, Sperry said, noting that in this case the youth minister was using pornography websites under a pseudonym.

"That's just a real stretch. If you're an employer and you want to avoid a lawsuit on the hiring grounds, it does put in place a new duty and obligation to make sure they check all these boxes," she said. "It would be a pretty tremendous expansion of an employer's obligation in the hiring context."

7th Circuit Splits Off, Diminishes Agency's Enforcement Powers

The Seventh Circuit's tossing of a $5.2 million restitution award the FTC won in a case against a deceptive credit monitoring service was a notable 2019 decision, with Mayer Brown LLP partner Mike Scodro saying it overturned longstanding precedent to find that the statute the agency sued under doesn't authorize such an award.

"It takes an arrow out of their enforcement quiver, and one they had come to understand they enjoyed historically," Scodro told Law360.

The opinion, which the full Seventh Circuit voted not to rehear before publishing, breaks from precedent the court set in its 1989 FTC v. Amy Travel Service decision, as well as eight other federal circuits that have adopted the ruling in their jurisdictions. In Amy Travel, the Seventh Circuit found restitution to be a proper form of ancillary relief that federal courts could order to help carry out their permanent injunction authorities under Section 13(b).

Rogers of Kirkland & Ellis said the matter will likely ultimately have to be decided by the U.S. Supreme Court, and it could have wide-ranging implications if the high court sides with the Seventh Circuit.

"If they agree with the Seventh Circuit that restitution is not authorized, then the FTC is going to lose one of its primary methods of getting money back from wrongdoers," he said. "This would be pretty significant. It would also be significant not just for the FTC but for other agencies."

High Court Speaks on Privilege in Tribune Buyout Dispute

In November, the state's top court determined that two foundations that were once the Tribune Co.'s second-largest shareholders don't have to fork over documents detailing their discussions with attorneys ahead of their participation in Tribune's 2008 leveraged buyout.

The foundations say insurance broker Arthur J. Gallagher Risk Management Services Inc. negligently caused them to lose coverage for lawsuits stemming from the buyout when they switched providers. Gallagher was arguing it was entitled to those documents under a common interest exception to attorney-client privilege laid out in Waste Management v. International Surplus Lines Insurance. In that decision, the Illinois Supreme Court held that the privilege could be waived under certain circumstances when an insurer and the insured have a common interest to defeat a claim.

The court said this case differed from Waste Management, where the insurer has a duty to indemnify its insured for the insured's negligence, not the insurance company's own negligence.

It's significant because the court doesn't usually weigh in on privilege issues even though they are often "hotly litigated" and of huge interest to the bar, said Seth Horvath, a partner at Nixon Peabody LLP.

And the opinion seemed to indicate a willingness to read exceptions to preserve protections over privilege, Horvath said.

--Editing by Brian Baresch and Alyssa Miller.