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Biggest Illinois Decisions Of 2022

By **Celeste Bott**

Law360 (December 14, 2022, 9:20 PM EST) -- Some of the most significant rulings in Illinois this year could lead to disparities in how clients recover damages from defense and plaintiffs attorneys in legal malpractice cases, while also offering guidance on how best to address improper statements made by opposing counsel at trial.

Companies that collect biometric information should take note of a ruling establishing exactly when they need to publish data retention and destruction policies required under the Prairie State's biometric privacy law, as well as a hefty verdict handed down in the first case under that law to go to trial, attorneys told Law360.

Other important holdings have prompted attorneys to question a state rule blocking companies from recovering lost profits if they lack a financial track record that can help predict future gains, as well as how courts admit expert witnesses at trial.

Here is a look at some of the biggest decisions in Illinois state and federal courts in 2022.

Defense, Plaintiffs Lawyers Get Different Malpractice Damages Rules

A former Sandberg Phoenix & von Gontard PC client can try to compel the law firm to pay a punitive damages award following the client's loss in an employment dispute where it was defended by the firm, the Illinois Supreme Court held in September.

The ruling allows the client to pursue the money as compensatory damages in a malpractice suit, but the decision has prickled some members of the defense bar who say plaintiffs attorneys aren't subject to the same kind of damages under previous high court precedent.

Illinois justices said Midwest Sanitary Service Inc. can include the $625,000 it paid in punitive damages as an element of the compensatory damages it is seeking against Sandberg Phoenix. Recovering that money in the company's malpractice suit wouldn't punish its former counsel "but instead replace the loss caused by the attorneys' alleged misfeasance or nonfeasance," the court ruled.

Midwest's lawsuit claims its defense team at Sandberg Phoenix, which has offices in Illinois and Missouri, committed a series of negligent acts that led a jury to find Midwest improperly fired an employee who had reported waste storage and dumping violations to state environmental regulators.

But Pat Eckler, a partner at Freeman Mathis & Gary LLP, pointed out that this ruling is quite a departure from the high court's 2006 holding in Tri-G Inc. v. Burke Bosselman & Weaver, in which the justices ruled that unrecovered punitive damages in an underlying case cannot be sought against an allegedly negligent attorney in the plaintiffs bar.

"It creates two classes of lawyers in Illinois," said Eckler, a board member of the Illinois Defense Counsel.

The case is Midwest Sanitary Service Inc. et al. v. Sandberg Phoenix & von Gontard PC et al., case number 127327, before the Supreme Court of the State of Illinois.

Appeals Court Offers Road Map for Handling Improper Statements

Eckler also highlighted the May decision by an Illinois appellate panel to overturn a $3.14 million jury verdict against Union Pacific Railroad based on the plaintiff's counsel's "inflammatory and improper" closing arguments.

The panel found the lawyer's comments asking jurors to send the railroad a message violated an order forbidding him from doing just that, effectively denying the railroad a fair trial in a suit brought by an ex-employee who alleged his supervisors physically battered him.

A petition to the Illinois Supreme Court appealing the overturned verdict has since been denied, Eckler said.

"This is a really important case for setting out what statements are improper and how a defendant should deal with it," Eckler told Law360.

Defense attorneys had successfully secured a motion in limine barring the ex-worker's counsel from presenting "any argument, comment or suggestion that the jurors act as safety advocates in this lawsuit," made objections when he did so anyway, and immediately moved for a mistrial after closings, Eckler noted, all leading to the panel's later conclusion that the violations warranted a do-over.

The case is McCarthy v. Union Pacific Railroad Co. et al., case number 5-20-0377, in the Appellate Court of Illinois, Fifth District.

BIPA Standards Still Getting Sketched Out

The torrent of litigation unleashed by Illinois' biometric privacy statute finally made its way in front of a jury this year, nearly 15 years after the law's passage. The case resulted in a Chicago federal jury's finding that BNSF Railway violated the Biometric Information Privacy Act and must pay $228 million in damages to a class of truck drivers.

BIPA is a state law requiring informed and written consent before the capture, use and storage of biometric information, including disclosures about an entity's data collection practices. The 2008 statute was the first in the nation to include a private right of action for biometric privacy violations.

Attorneys who kept an eye on the trial told Law360 the verdict underscores the urgency for employers and companies to comply with the statute and will likely lead to appellate battles over a company's liability for third-party vendors.

But there's another BIPA decision on an issue of first impression that has largely flown under the radar, according to Dan Cotter of Howard & Howard Attorneys PLLC.

A state appeals court found in December that BIPA requires companies to set up rules for storing and destroying data once they start collecting it, concluding that an Illinois metal finisher's obligation to do so was triggered by possessing the plaintiff's information.

Lead plaintiff Trinidad Mora sued former employer J&M Plating in February 2021, arguing in his proposed class action that the company's practice of requiring workers to scan their fingerprints to clock in and out violated the law.

The company had successfully argued that Mora's claim on the informed permission section of BIPA was time-barred, beating his claim under Section 15(a), which governs the biometric data schedule. J&M argued the section contained no timing language for the establishment of a retention-and-destruction schedule and that it didn't matter that its policy was not in place before the plaintiff's biometric data was first obtained.

But a three-judge appellate panel disagreed, finding the section of BIPA at issue specified that a private entity "in possession of" biometric data must develop a written policy laying out its retention and destruction protocols, and the trigger is the possession of that data. It's the first time an Illinois appellate court has ruled on 15(a)'s statutory period, Cotter said.

"Companies need to get these policies and procedures in place, and they need to have these already published and out there when they begin collecting [biometric] data," Cotter told Law360.

J&M Plating had argued that because Mora's biometric data was destroyed two weeks after his last day of work, he hadn't been harmed. But as the court pointed out in its ruling, that runs contrary to the Illinois Supreme Court's holding in Rosenbach v. Six Flags, which established that a plaintiff can sue based on an alleged statutory violation and not a real-world injury, like a data breach, Cotter said.

"You don't have to have actual harm. The violation can be the harm," he said.

The cases are Rogers v. BNSF Railway Co., case number 1:19-cv-03083, in the U.S. District Court for the Northern District of Illinois, and Mora et al. v. J&M Plating Inc., case number 2-21-0692, in the Appellate Court of Illinois, Second District.

No Loosening of "New Business Rule"

In late November, the state's top court affirmed an appellate panel's finding that a unit of credit reporting agency TransUnion correctly defeated another company's $23 million suit because the plaintiff couldn't sufficiently prove it suffered damages under the state's "new business rule."

Helix Strategies LLC and owner Roger Ivey claimed TransUnion unlawfully shelved a lease-customization platform project that TransUnion had planned to market for Helix.

The new business rule generally blocks companies from recovering lost profits if they lack a financial track record on which to predict future profits. Because Ivey's business model was based on what the high court determined was an innovation, it found the company was a new business within the meaning of the new business rule, according to Michael Scodro, a partner in Mayer Brown LLP's Chicago office

and a member of its appellate practice.

Helix argued it was not a new business because Ivey had been involved in creating lease products for years before he launched Helix, but the justices found that the Helix lease offered improvements and enhancements and that Ivey himself testified it was different from a standard lease drafted by a law firm. Ultimately, Helix failed to present evidence of revenues of a similar product or a similar business in a similar market to establish lost profits, the court said.

But Scodro flagged a dissenting opinion from Justice David Overstreet, which called for the application of a more lenient legal standard that would have permitted the plaintiff to present its damages theory and damages evidence to the trier of fact, instead of going out on summary judgment, Scodro said.

"I don't know if we'll continue to see cases that ask the courts to loosen the current new business rule, but this case shows that the stricter version of the rule is the standard in Illinois," Scodro said.

The case is Ivey v. Transunion Rental Screening Solutions Inc., case number 1-20-0894, in the Illinois Appellate Court, First District.

Illinois Sticks With Frye Test for Expert Witnesses

Another appellate decision, this one reviving claims by a former BNSF Railway Co. worker that exposure to toxins while on the job caused him to develop cancer, raises questions about the Prairie State's standards for admitting expert witnesses, Eckler of Freeman Mathis said.

Illinois applies the Frye test, which holds that expert witnesses testifying to an opinion based on a "new or novel" scientific methodology have to first establish that approach is generally accepted in their respective fields.

Plaintiff David Molitor sought to hold BNSF liable under the Federal Employers' Liability Act, alleging his diagnosis of B-cell lymphoma in 2015 was the result of his exposure to toxic fumes from idling locomotive engines.

To back his claim, he offered Hernando R. Perez, an industrial hygienist, as a liability expert and Dr. Ernest P. Chiodo, an internal medicine physician, as a causation expert. Perez had sought to testify that the engines Molitor worked near leaked the toxic fumes, while Chiodo had intended to testify those toxins could and did cause Molitor's lymphoma.

Reversing a lower court that excluded both experts, the appellate panel found in November that neither expert was subject to the Frye test, which isn't meant to examine the validity of the underlying data an expert uses, but whether the scientific methodology is generally accepted.

This opens the door for experts to draw unreliable conclusions as long as they use a generally accepted method to get there, leaving trial judges forced to greenlight their testimony as long as their approach isn't "new and novel," Eckler said.

The lower court blocked the experts because Perez based his opinions simply on talking to Molitor and because Chiodo pointed to two published articles that merely cited an "association" between the toxins at issue and cancer, rather than stating a causal relationship.

But association isn't causation, Eckler said. And while this isn't a case where the court is misapplying the Frye test, it does highlight that the test itself is troublesome, he said. It limits judges' powers as gatekeepers and leaves juries to interpret complex matters based on testimony that may not be sound, Eckler said, calling for a stricter evidentiary standard.

"It really sets out how really flawed Illinois' standard for experts is," Eckler said. "Once it's determined that [something isn't] new or novel, it's up to the jury to decide, and there's nothing for the trial judge to do there."

The case is Molitor v. BNSF Railway Co., case number 1-21-1486, in the Appellate Court of Illinois, First District.

--Additional reporting by Lauraann Wood and Mike Curley. Editing by Philip Shea and Jill Coffey.
