

# WHO BENEFITS FROM BIPA?

An Analysis of Cases Brought Under  
Illinois' State Biometrics Law



BY KAITLYN HARGER

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By Kaitlyn Harger, Senior Economist, Chamber of Progress<sup>1</sup>

## EXECUTIVE SUMMARY

- As of early 2023, more than a half dozen state legislatures were considering passing their own versions of Illinois' Biometric Information Privacy Act (BIPA). This paper is the first in-depth analysis of legal filings to show how the law has been used and whom it has benefited most.
- The study found that the **vast majority of BIPA lawsuits (88%) have been employer-employee disputes** resulting from biometric timekeeping. **40%** of all BIPA lawsuits have been filed against **Illinois-based companies**.
- The study found that in the eight BIPA case settlements involving alleged harm to consumers, **plaintiffs' lawyers received an average settlement of \$11.5 million per firm per case**, while **individuals received an average settlement of \$506 per case**.
- Four plaintiffs' law firms – Carrol, Rhow, and Fegan, Edelson, P.C., Labaton Sucharow, LLP., and Robins, Gellar, Rudman, and Dowd, LLP. – made more than **\$30 million each** from consumer-oriented settlements alone.
- The **largest category** of BIPA lawsuits alleging consumer harm involved **facial scans (78%)**, with most of those encompassing security and identity verification services or virtual try-on services.
- A key 2019 court ruling stating that plaintiffs did not need to demonstrate harm **led to a 1400% increase in BIPA lawsuit filings**, from 9 cases in 2018 to 134 in 2019. In 2020, this total continued to rise with 209 BIPA cases filed.

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# INTRODUCTION

As of January 2023, legislatures in Arizona, Hawaii, Massachusetts, Maryland, Mississippi, New York, and Tennessee were actively considering biometric privacy legislation modeled after Illinois' Biometric Information and Privacy Act (BIPA).<sup>2</sup>

Illinois' Legislature passed BIPA in 2008 with the goal of protecting Illinois residents from biometric data breaches that could put citizens at risk.<sup>3</sup> Illinois is unique in that it is the only U.S. state with a biometric privacy law that includes a private right of action.<sup>4</sup>

BIPA's private right of action allows individuals to sue companies for damages related to the collection of their biometric data. Illinois' BIPA statute allows individuals to sue for BIPA damages up to \$1,000 for negligent violations of BIPA and \$5,000 for reckless violations of BIPA.<sup>5</sup>

In the years since BIPA's initial passage in 2008, Illinois courts have issued opinions on a number of cases that established the legal landscape surrounding BIPA in Illinois today. In a major ruling in 2009, the Illinois Supreme Court issued an opinion in *Rosenbach v. Six Flags*, which stated that plaintiffs did not need to first prove harm in order to file a lawsuit related to BIPA. Specifically, the Court stated that, "The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action".<sup>6</sup>

After that ruling, filings of BIPA-related lawsuits increased as the Court effectively lowered the burden on plaintiffs bringing suit.<sup>7</sup>

In 2022, Illinois saw its first BIPA case go before a jury in trial. The case, *Rogers v. BNSF Railway Co.*, resulted in the jury awarding damages of \$228 million related to BIPA violations.<sup>8</sup> After the verdict, attorneys in Illinois expressed concern that the

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<sup>2</sup> Amy Miller, "Illinois BIPA-style privacy bills pending in at least seven US states", Mlex, January 26, 2023, <https://mlexmarketinsight.com/news/insight/illinois-bipa-style-privacy-bills-pending-in-at-least-seven-us-states>

<sup>3</sup> 740 ILCS 14/5

<sup>4</sup> U.S. Chamber Institute for Legal Reform, "A Bad Match: Illinois and the Biometric Information Privacy Act", October 2021, <https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf>

<sup>5</sup> See 740 ILCS 14/20

<sup>6</sup> *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 (Ill. Jan. 25, 2019). <https://www.illinoiscourts.gov/Resources/f71510f1-fb2a-43d8-ba14-292c8009dfd9/123186.pdf>

<sup>7</sup> See Figure 1.

<sup>8</sup> For settlement information and court documents, please see the settlement website: <https://bnsfbipaaction.com/>.

opinion in this case would lead to another increase in BIPA litigation, possibly matching or surpassing the increase the state saw after the *Rosenbach v. Six Flags* decision.<sup>9</sup>

## 2023 WHITE CASTLE CASE

The Illinois' Supreme Court issued another landmark opinion in 2023 in *Cothron v. White Castle*. The Court found that BIPA violations accrue each time a business collects biometric information in violation of BIPA.<sup>10</sup> This means that a business could unwittingly violate BIPA multiple times a day, for multiple employees, over multiple years and could accrue damages the entire time.

In court filings, White Castle estimated that the damages from this decision could amount to over \$17 billion. Additionally, the Court expressed concerns about the implications of this ruling. In the opinion, the Court further suggests that the Illinois legislature revisit BIPA, specifically concerns about excessive damages.<sup>11</sup>

In a dissenting opinion, Justice Overstreet wrote that the implications of the finding will lead to consequences that the legislature likely did not intend when originally passing the law. Justice Overstreet wrote,

*“I see nothing in the Act indicating that the legislature intended to impose cumbersome requirements or punitive, crippling liability on corporations for multiple authentication scans of the same biometric identifier. The legislature’s intent was to ensure the safe use of biometric information, not to discourage it altogether.”*

The implications of the *White Castle* ruling highlight the issues with BIPA as initially passed in 2008. States considering BIPA-style legislation in the future should consider the practical implications that resulted from litigation related to BIPA in Illinois.

<sup>9</sup> Skye Witley, Christopher Brown, and Paige Smith, “Biometric Privacy Perils Grow After BNSF Loses Landmark Verdict”, Bloomberg, October 14, 2022, <https://news.bloomberglaw.com/privacy-and-data-security/biometric-privacy-perils-grow-after-bnsf-loses-landmark-verdict>

<sup>10</sup> For coverage related to the Court’s ruling see: <https://www.reuters.com/legal/white-castle-could-face-multibillion-dollar-judgment-illinois-privacy-lawsuit-2023-02-17/>

<sup>11</sup> *Cothron v. White Castle System, Inc.*, 2023 IL 128004, <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e304b011-82d9-4832-9cae-d8205749a2ec/Cothron%20v.%20White%20Castle%20Sys->

## PREVIOUS BIPA ANALYSES

Previous quantitative analysis of the economic impact of BIPA on consumers and employers in Illinois is limited. In June of 2019, attorneys at Seyfarth Shaw LLP published work summarizing the quantity of case filings by court district, law firm, and industry.<sup>12</sup> Their research suggested that filings increased with *Rosenbach v. Six Flags* in early 2019. Their analysis also highlighted the impact of BIPA across industries, finding cases split across business services, healthcare, manufacturing, hospitality, retail, and software technology industries.

In 2021, the U.S. Chamber of Commerce's Institute for Legal Reform published a comprehensive report on issues related to BIPA in Illinois.<sup>13</sup> The research suggested that while well intentioned, BIPA unintentionally led to a deluge of lawsuits in Illinois without proof of substantive harm. The paper also highlighted BIPA's scope and its application to small businesses as well as large tech companies.

A 2022 article published in the *University of Illinois Law Review* discussed the cost of BIPA to companies and employers in Illinois. Author Emma Graham recommended that the Legislature amend BIPA to address the compounding damages that arise from multiple BIPA violations per plaintiff.<sup>14</sup> Additionally, she recommended limiting the private right of action to only disclosure violations by companies rather than any violation of BIPA statutes. Graham also notes the current legal landscape surrounding BIPA places significant costs on Illinois' courts, a pattern that is expected to continue without legislative intervention.

## APPROACH

In this research, I analyzed BIPA lawsuits alleging consumer harm from the use of biometric data in Illinois. This research is the first to examine the population of BIPA cases in Illinois and focus on consumer-oriented products and services.

First, I summarized legislative history and landmark court cases related to BIPA in Illinois. Next, I developed a dataset with information on case details and trends using Thomson Reuters' Westlaw Edge database. I then analyzed case data to understand underlying trends related to consumer-oriented technology and BIPA cases. After my analysis, I summarized main findings and derived policy recommendations from my conclusions.

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<sup>12</sup> <https://www.workplaceclassaction.com/2019/06/biometric-privacy-class-actions-by-the-numbers-analyzing-illinois-hottest-class-action-trend/>

<sup>13</sup> <https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf>

<sup>14</sup> <https://illinoislawreview.org/print/vol-2022-no-2/burdened-by-bipa/>

# BACKGROUND

## LEGISLATIVE HISTORY

The Illinois' General Assembly enacted BIPA legislation in 2008.<sup>15</sup> The statutory language provides information on legislative intent listing the increasing use of biometrics in many industry settings and the use of evolving biometric technology within Chicago at the time.<sup>16</sup> Additionally, the legislature highlighted the unique nature of biometric data stating that, “biometrics are unlike other unique identifiers...are biologically unique to the individual; therefore, once compromised, the individual has no recourse” ([740 ILCS 14/5](#)).

The bill text defines biometric information as, “any information based on an individual’s biometric identifier used to identify an individual” ([740 ILCS 14/10](#)). The passage of BIPA established retention, collection, disclosure, and destruction requirements for private entities in possession of biometric data.

The act also forbids private entities from collecting or purchasing the biometric data of an individual prior to: (1) informing the subject that their biometric data is being collected or stored, (2) informing the subject in writing how their biometric data will be used and how long it will be kept, (3) obtaining a written release from the subject in order to use their biometric data.

It also requires private entities in possession of biometric data to publish a written policy outlining the retention schedule of the biometric data as well as guidelines for when the data will be permanently destroyed. Further, the statute prohibits private entities from profiting from a person’s biometric data.<sup>17</sup>

BIPA also includes a private right of action that allows individuals to file suit stating, “Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or a supplemental claim in federal district court” ([740 ILCS 14/20](#)). The statute outlines damages as \$1,000 for negligent violation and \$5,000 for intentional or reckless violations of BIPA. The Legislature did not define the term ‘aggrieved individual’ in statute, leaving the courts to interpret the term in later years.

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<sup>15</sup> For more information, please see the bill page: <https://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=S-B&DocNum=2400&GAID=9&SessionID=51&LegID=36373>

<sup>16</sup> 740 ILCS 14/5

<sup>17</sup> 740 ILCS 14/10

## SIGNIFICANT COURT CASES

The term ‘aggrieved individual’ became the subject of the *Rosenbach v. Six Flags Entertainment Corp* suit in 2019.<sup>18</sup> In the complaint, the Plaintiff’s attorney described the collection of the Plaintiff’s son’s fingerprint by Six Flags in order to establish a season pass for the theme park. In January 2019, the Illinois’ Supreme Court found that actual injury was not required in order to qualify as an ‘aggrieved person’ under BIPA.<sup>19</sup> This effectively lowered the requirements needed to bring suit under BIPA in Illinois and likely led to an increase in case filings.

In 2022, *Rogers v. BNSF Railway Company* became the first BIPA case to go to trial. According to the complaint filed with the court, BNSF Railway required truck drivers visiting BNSF facilities to scan their fingerprints for use in identity verification and security purposes. BNSF collected this biometric data from truck drivers without obtaining written consent, publishing retention schedules, or detailing how the biometric information would be used. After deliberation, a jury awarded damages of \$228 million to the plaintiff class. The court ruled that BNSF committed 45,600 intentional or reckless violations of BIPA, with a fine of \$5,000 for each reckless violation.

In 2023, Bloomberg Law published an article highlighting the significant threat of litigation faced by companies operating in Illinois in the wake of *Rogers v. BNSF Railway*.<sup>20</sup> The article referenced comments from a class-action defense attorney who suspects that the jury’s award will lead to (1) plaintiff’s lawyers pursuing larger settlement amounts in the future and (2) a surge of consumer-oriented litigation related to BIPA.<sup>21</sup>

In February of 2023, the Illinois Supreme Court issued an opinion in *Cothron v. White Castle*. This case focused on the use of biometric timekeeping systems used to track employees as they clocked in and out of work.

The ruling in *Cothron v. White Castle* found that BIPA violations accrue upon each violation of BIPA, rather than only on the first violation.<sup>22</sup> White Castle estimated that they will face damages over \$17 billion due to the Court’s ruling. The Court’s opinion indicated that the topic of potentially excessive damages was for the Legislature to discuss and potentially resolve via legislation.

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<sup>18</sup> *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186

<sup>19</sup> *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186

<sup>20</sup> Witley, et al., “Biometric Privacy Perils Grow After BNSF Loses Landmark Verdict”, 2022.

<sup>21</sup> Witley, et al., “Biometric Privacy Perils Grow After BNSF Loses Landmark Verdict”, 2022.

<sup>22</sup> Skye Witley and Daphne Zhang, “White Castle Ruling Shakes Up Biometric Litigation, Insurance”, Bloomberg, February 22, 2023, <https://news.bloomberglaw.com/privacy-and-data-security/white-castle-ruling-shakes-up-biometric-litigation-insurance>

In light of the decision in *Cothron v. White Castle*, Plaintiffs' attorneys in *Rogers v. BNSF Railway Co.* filed post-trial motions to reconsider the calculation of the \$228 million judgment against BNSF Railway. When the Court calculated the damages in the BNSF Railway case, they based the calculation on one BIPA violation per class member. The decision in *Cothron v. White Castle* could force a recalculation of damages based on each instance of BIPA violation for each class member, potentially raising damages exponentially from the initial \$228 million judgment.

The Court's ruling that BIPA damages accumulate at each instance of violation has potentially major implications for businesses in Illinois as well as businesses in other states considering BIPA-style legislation. Without revising BIPA, businesses in Illinois that violate BIPA will likely face astronomical damages, much larger than amounts in settlements to date. As other states continue to consider copycat legislation modeled after Illinois' statute, policymakers should consider the amount of litigation that has resulted from BIPA in Illinois as well as the size of damages under the recent rulings.

# ANALYSIS

## DESCRIPTION OF DATA

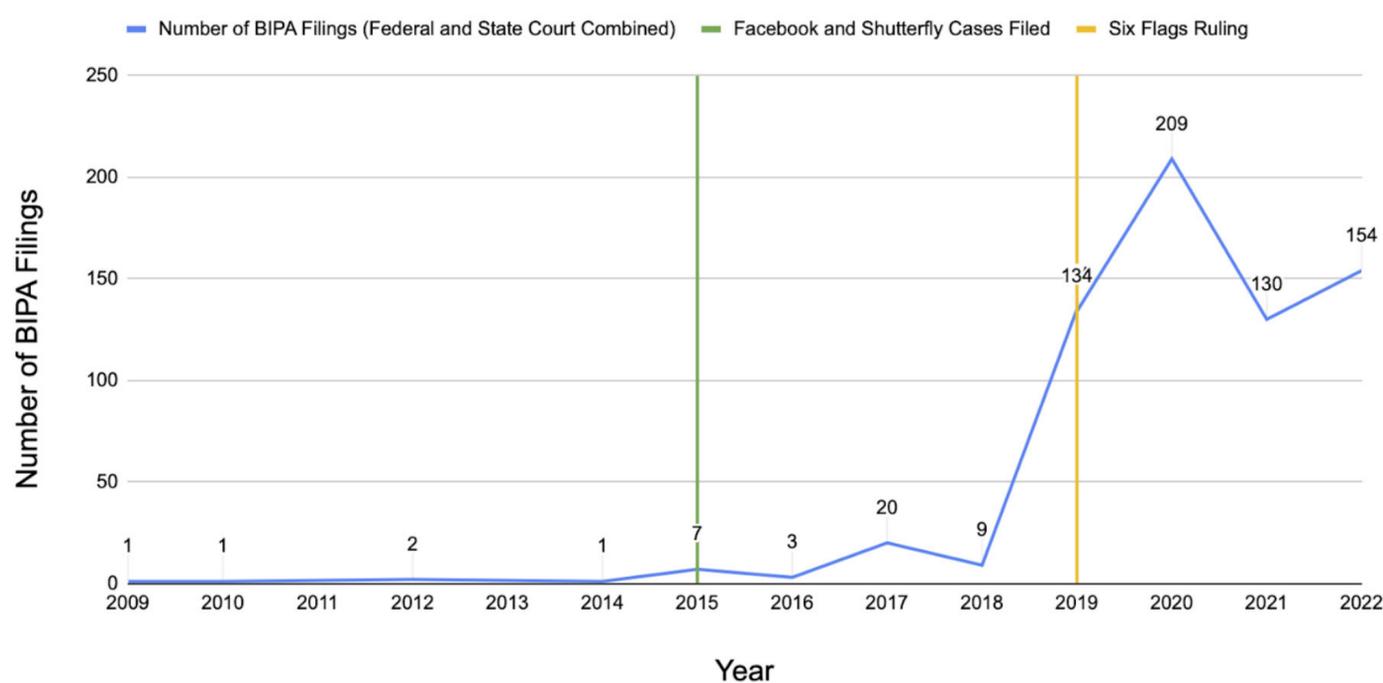
In order to analyze case filings and outcomes related to BIPA, I utilized Thomson Reuters' Westlaw Edge database. Westlaw compiles data from state and federal court websites, including information from dockets.

I searched the database for state and federal cases related to Illinois' BIPA statutes, in order to build a dataset of all filings related to BIPA. As of November 2022, this search resulted in 296 federal cases and 381 state cases.<sup>23</sup> From there, I manually reviewed each case in order to record case details relevant for this study.

After BIPA became law in 2008, BIPA-related litigation remained stagnant for several years. In 2015, Illinois saw four class action lawsuits filed against Facebook and one class action lawsuit filed against Shutterfly.<sup>24</sup> These highly publicized lawsuits likely increased public knowledge of BIPA statutes within the state.

The Court's 2019 decision in *Rosenbach v. Six Flags* lowered the bar for bringing suit, ruling that plaintiffs did not need to demonstrate actual harm in order to bring suit. After the ruling in 2019, BIPA related lawsuits increased dramatically, **rising 1400% in a single year**. Using Westlaw's database, I recorded the number of case filings by year, as shown in Figure 1 below.<sup>25</sup>

**Figure 1: Total BIPA Filings (Federal and State Court Combined), by Year**



<sup>23</sup> The data for the case analysis were found on the Westlaw database in November, 2022.

<sup>24</sup> Jackson Lewis, "Illinois Biometric Information Privacy Act FAQs", <https://www.jacksonlewis.com/sites/default/files/docs/IllinoisBIPAFAs.pdf>

<sup>25</sup> The data for this figure were pulled from Westlaw's database in March 2023. In subsequent sections of this analysis cases were cleaned for redundancy and focus.

The vertical lines in Figure 1 indicate years in which major cases and rulings mentioned above occurred. As shown above, the number of filings rose dramatically in 2019 when the Court issued its opinion in *Rosenbach v. Six Flags*.

Upon review of the cases, I found that **the majority of cases related to the use of biometric timekeeping technology. In these cases, employers required employees to scan their fingerprints in order to clock-in and clock-out of work.** Court filings in these cases acknowledged potential benefits to biometric timekeeping, stating that it relies on unique identifiers to verify working hours and thus leaves less room for error

### **KEY FINDING:**

The vast majority of BIPA lawsuits (88%) have been employer-employee disputes resulting from **biometric timekeeping.**

or dispute. However, in order to comply with BIPA requirements, employers using biometric timekeeping needed to comply with all BIPA requirements outlined in statute.

Recall that BIPA legislation required companies collecting biometric information to inform individuals of the collection of their biometric data, obtain a written release from individuals, provide written descriptions of use and

of use and retention of their biometric data, and publish a public retention schedule of the biometric data including information on permanent destruction of the data.

My analysis of cases found biometric timekeeping disputes as the focus of roughly 88% of case filings.<sup>26</sup> Most BIPA cases related to biometric timekeeping remained in state court since often the plaintiff class included only employees working for an Illinois business where the BIPA violations occurred.

### **BIPA Cases Involving Alleged Consumer Harm**

I created a subsample of consumer-oriented BIPA cases that are unrelated to employer-employee biometric timekeeping disputes in order to examine the consumer impacts of BIPA legislation.

Focusing on cases alleging consumer harm, I cleaned the remaining data in order to examine patterns across cases.

- I recorded information on how cases moved between state and federal courts and patterns of repeated claims against the use of certain types of technology that utilize biometric data.

<sup>26</sup> This calculation was based on the full list of cases prior to adjusting the sample for consumer-oriented cases and prior to addressing consolidated cases or state cases that moved to federal court.

- Next, I addressed the movement of cases from state court to federal court in the data. For these cases, I kept only the case where the most recent activity took place in order to avoid double counting cases.
- For ongoing cases this approach ensured my data reflected the most recent information on case status and location.
- In situations where cases have been resolved, this ensured I correctly measured the court where the final decision in the case took place.

After cleaning the data to address those issues, 121 unique consumer-oriented cases remained in the subsample.<sup>27</sup> I present information on these cases below including information on the type of court (state or federal), the court district, the type of biometric information collected, case type, status, and settlement details.

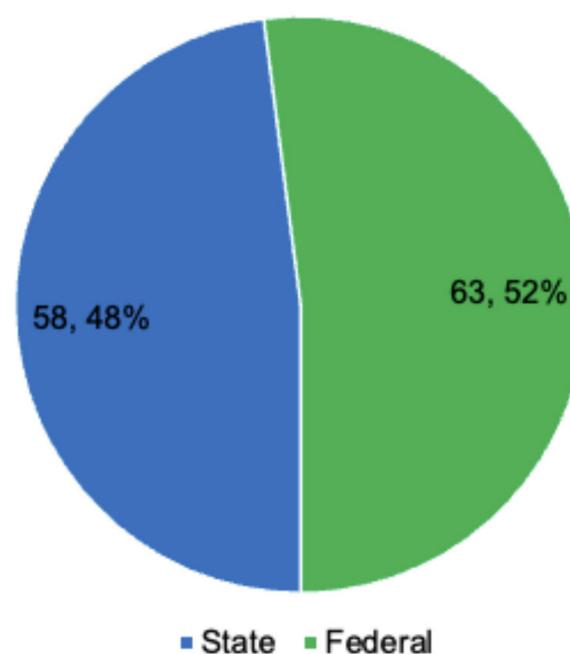
While reviewing data in the consumer-oriented sample, I found a more even distribution of cases across state and federal courts. Class action cases are often removed from state court to federal court if members of the class reside in a different state than any defendant, if the proposed class size is larger than 100 members, and/or if the amount of damages exceeds \$5 million.<sup>28</sup>

Cases removed from state court to federal court typically deal with large numbers of class members and correspondingly large damages. As shown in Figure 2 below, cases that alleged consumer harm were more likely to be in federal court than state court.

## CASES BY COURT TYPE AND DISTRICT

The figure below shows a distribution of cases by court type, based on whether a case is in state or federal court according to the most recent activity in each case.

**Figure 2:  
Consumer-Oriented  
BIPA Lawsuits, by  
Court Type**



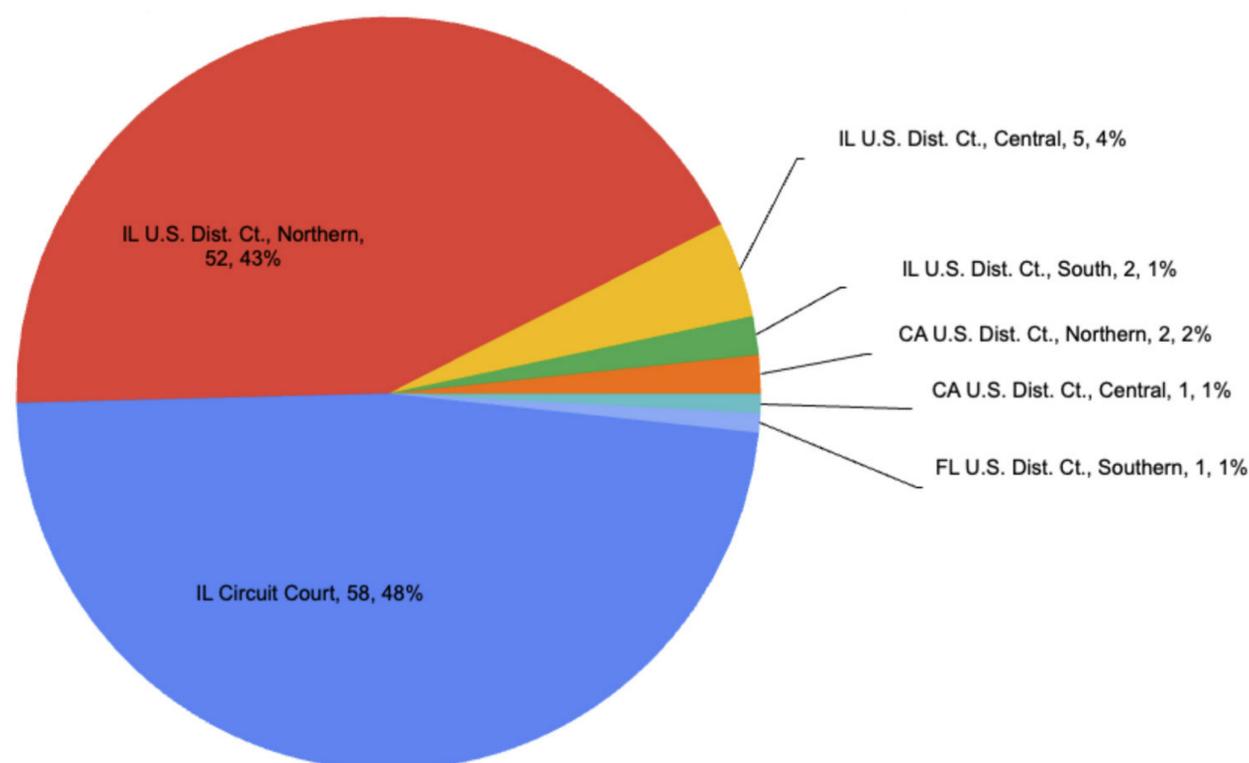
<sup>27</sup> Two cases were dropped from this total due to issues with court records.

<sup>28</sup> 28 U.S.C. § 1332

My review of cases alleging consumer harm found 52% of cases in the sample were located in federal court and 48% of the cases were located in state court. Consumer-oriented cases often included company defendants with headquarters located outside of Illinois and/or involved claims utilizing widely available technology, resulting in a large and diverse class of plaintiffs.

I further disaggregated cases by court in the consumer-oriented subset of cases as shown below in Figure 3.

**Figure 3: Consumer-Oriented BIPA Lawsuits, by Court**



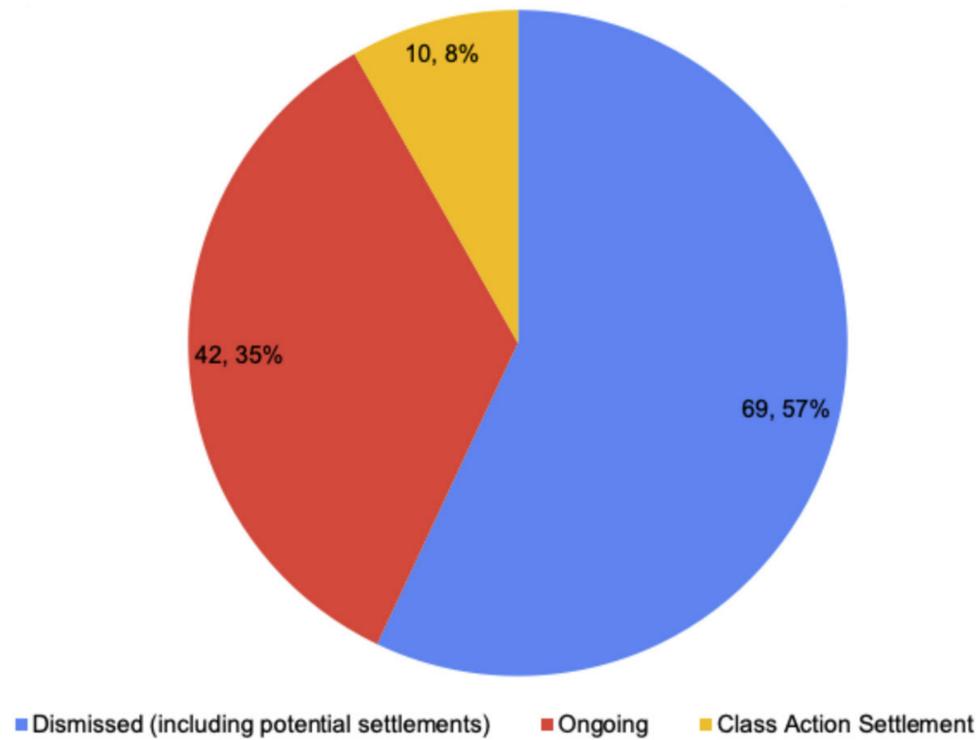
The Illinois Circuit Court system housed 48% of the case filings alleging consumer harm. The remaining cases were located in the federal court system at the time of my analysis. Figure 3 shows that the vast majority of these cases were under the jurisdiction of the U.S. District Court of Illinois, Northern District. Overall, Illinois' Northern District held 43% of consumer-oriented cases, Illinois' Central District held 4% of cases, and Illinois' U.S. District Court, Southern Division held 1% of cases.

The remaining cases were split among the U.S. District Courts in California and Florida. Overall, these cases comprise 4% of all cases related to BIPA. All of the cases in federal court jurisdictions outside of Illinois were removed due to the location of the defendant companies headquarters.<sup>29</sup>

Next I examined cases alleging consumer harm by status. As a result of the Court's decision in *Rosenbach v. Six Flags*, plaintiffs could bring suit in Illinois without demonstrating harm. That decision facilitated an increase in the number of lawsuits filed in Illinois. Figure 4 below shows the distribution of cases by status.

<sup>29</sup> Four cases fall into this category. Facebook is listed as the defendant in two of the cases and is headquartered in California. Snapchat is also domiciled in California and is the defendant in one case in this category. The remaining case is in Florida's Southern District and the defendant, Honorlock, is a company headquartered in Florida.

**Figure 4: Consumer-Oriented BIPA Cases by Status**



Roughly 57% of cases in the consumer-oriented sample were dismissed. Dismissals could be attributed to frivolous claims brought in court or could represent settlements made privately between parties.

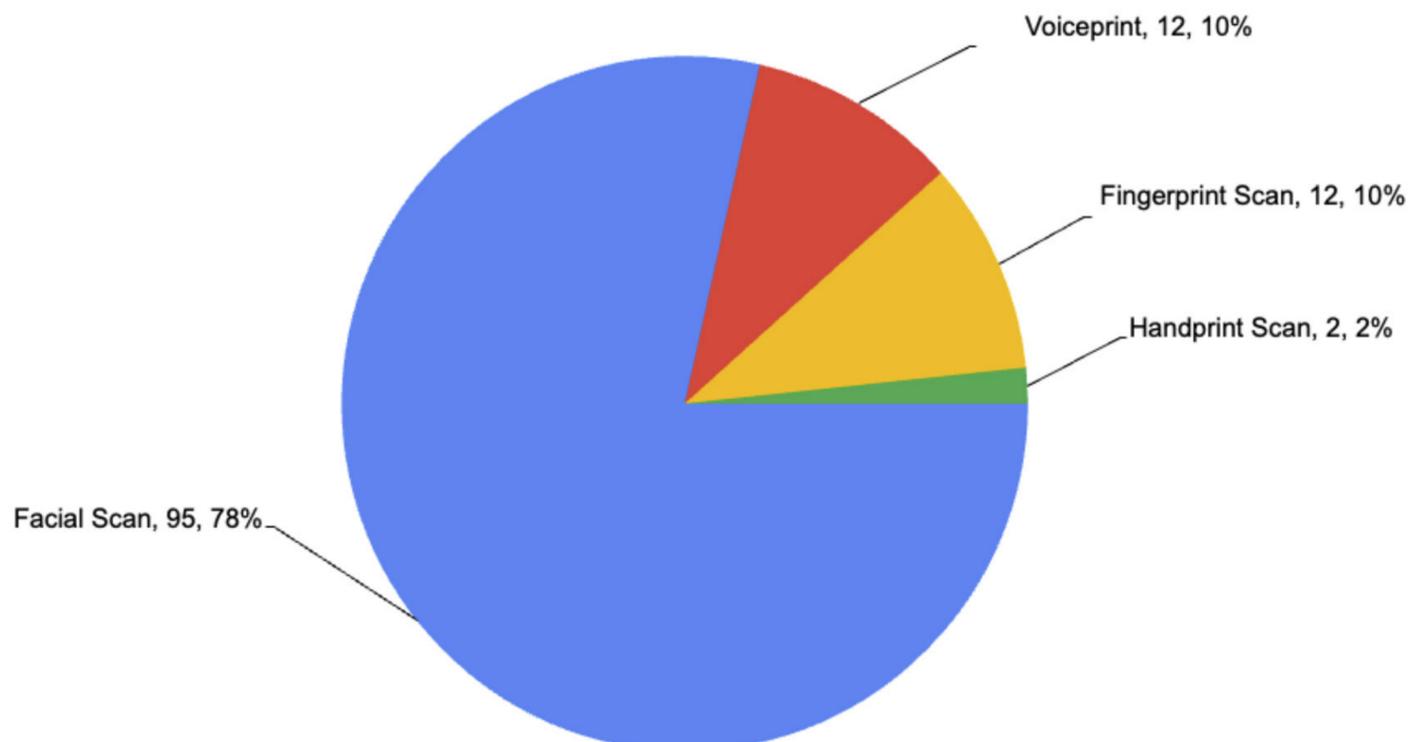
Court records do not typically include information on private settlement amounts, so I was unable to observe settlement amounts associated with dismissals. Lacking that information, the estimates shown later in this paper are likely underestimates of total settlement activity taking place in the state.

## CASES BY TYPE OF BIOMETRIC DATA COLLECTED

### Overall Distribution of Cases by Biometric Data Type

Figure 5 presents the distribution of consumer-oriented cases by type of biometric information collected.

**Figure 5: Consumer-Oriented BIPA Cases by Biometric Type**



As shown above, facial scans comprise roughly 78% of consumer-oriented cases. Often cases using facial scans and alleging consumer harm involve the use of face filters and photo tagging in popular photo and/or video applications, however the use of facial scans is not exclusively for facial recognition databases.

## Facial Scans

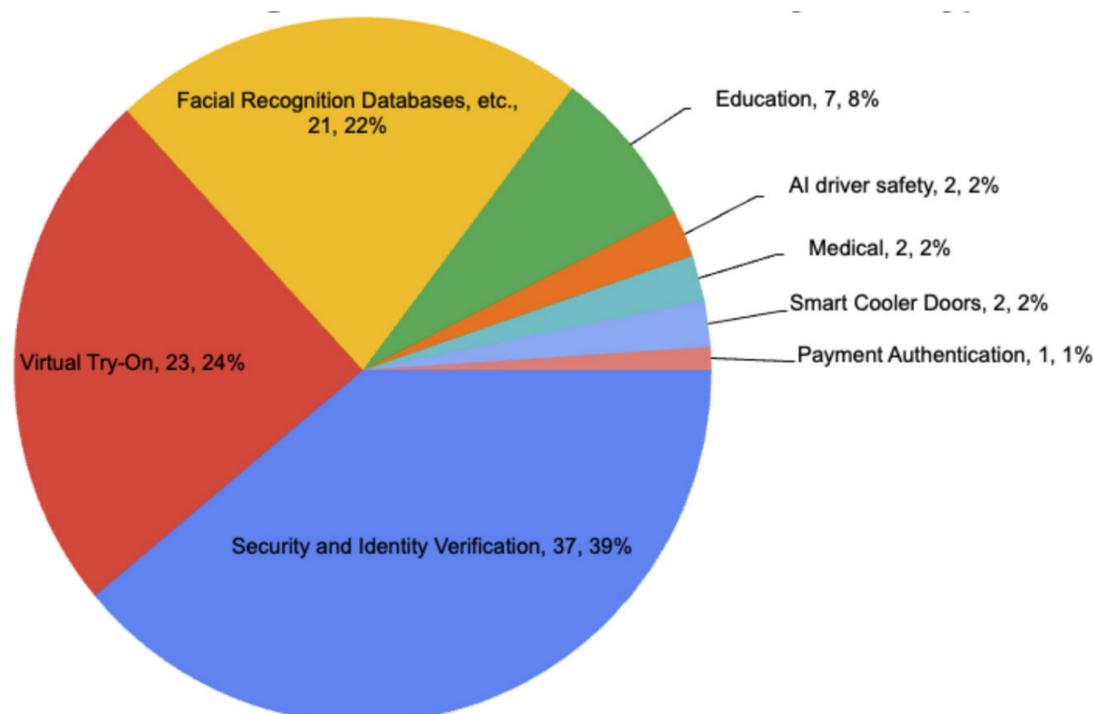
Figure six shows a categorization of cases where companies utilized facial scans by case type. Almost 40% of cases that utilized facial scan technology were used in security and identity verification services. Roughly 22% of cases that utilized facial scan technology were used for facial recognition databases, which are typically used with photo tagging suggestions or face filters.

### **KEY FINDING:**

**The largest category of BIPA lawsuits alleging consumer harm involved facial scans (78%), with most of those encompassing security and identity verification services or virtual try-on services.**

The variance in case type within BIPA cases that utilize facial scans highlights the complexity of uses within each type of biometric collected. In addition to security and identity verification services, facial scans were utilized in virtual try-on services for skincare and makeup products, medical applications related to COVID, educational proctoring in virtual settings, AI driver safety software, and smart devices like coolers and vending machines.

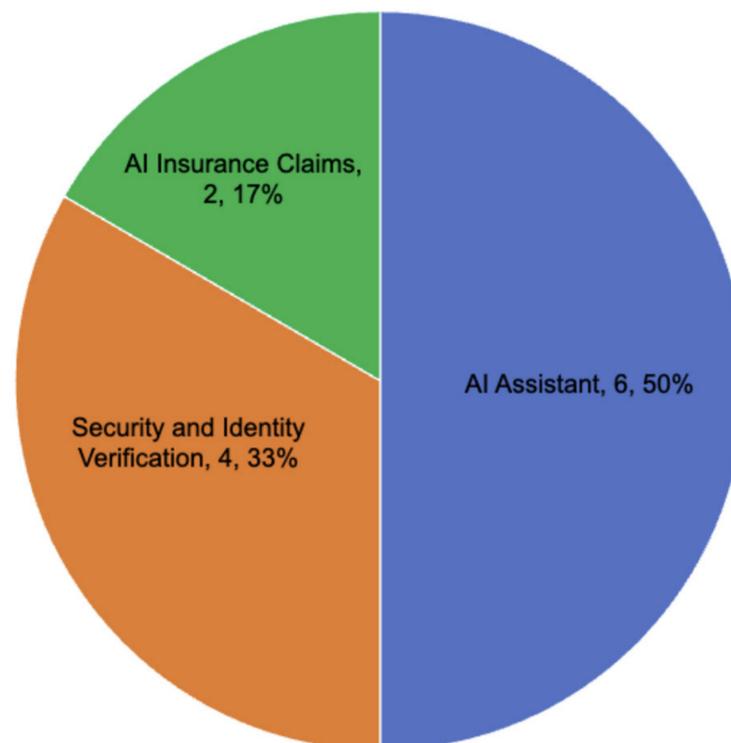
**Figure 6: Consumer-Oriented BIPA Cases, Facial Scans, by Case Type**



## Voiceprints

The distribution of BIPA cases alleging consumer harm that utilized voiceprints is shown in Figure 7 below.

**Figure 7: Consumer-Oriented BIPA Cases, Voiceprints, by Case Type**

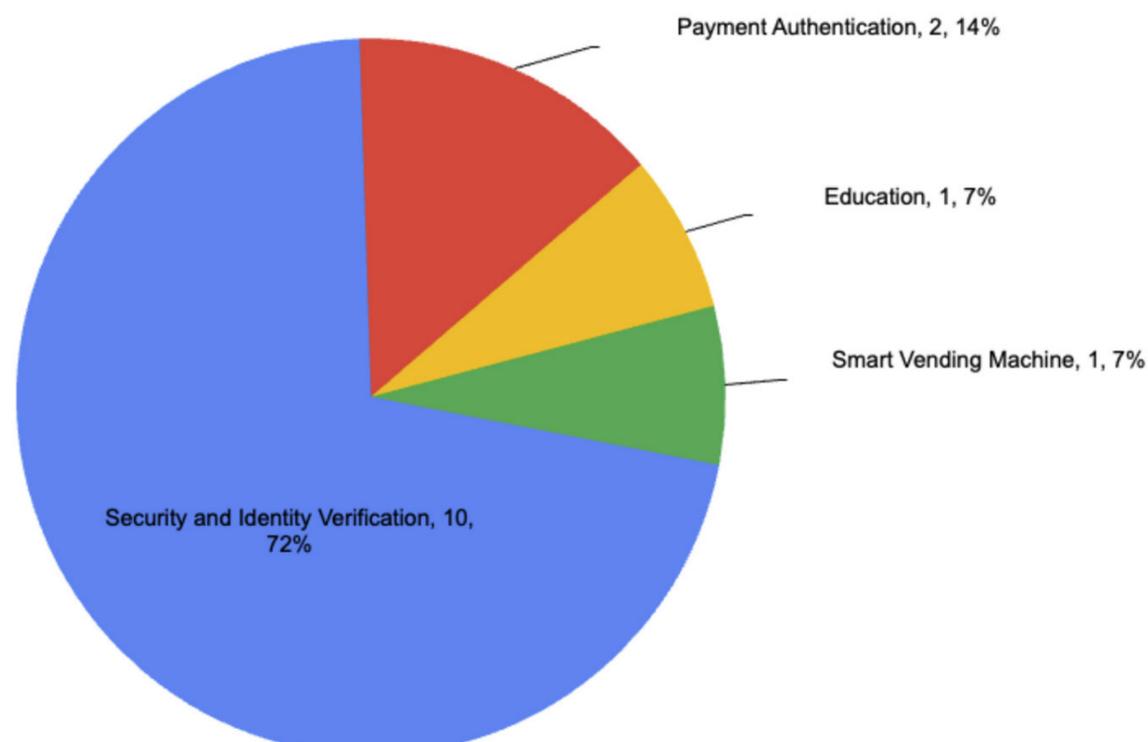


Companies involved in consumer-oriented BIPA lawsuits primarily utilized voiceprints for AI assistants, for example, Amazon's Alexa. Security and identity verification applications made up 33% of the cases where voiceprints were captured. AI processing of insurance claims made up the remainder of cases utilizing voiceprints.

## Fingerprint and Handprint Scans

Disaggregated case data for the subset of cases utilizing fingerprint or handprint scans shows the predominance of cases related to products used for security and identity verification.

**Figure 8: Consumer-Oriented BIPA Cases, Fingerprint and Handprints, by Case Type**

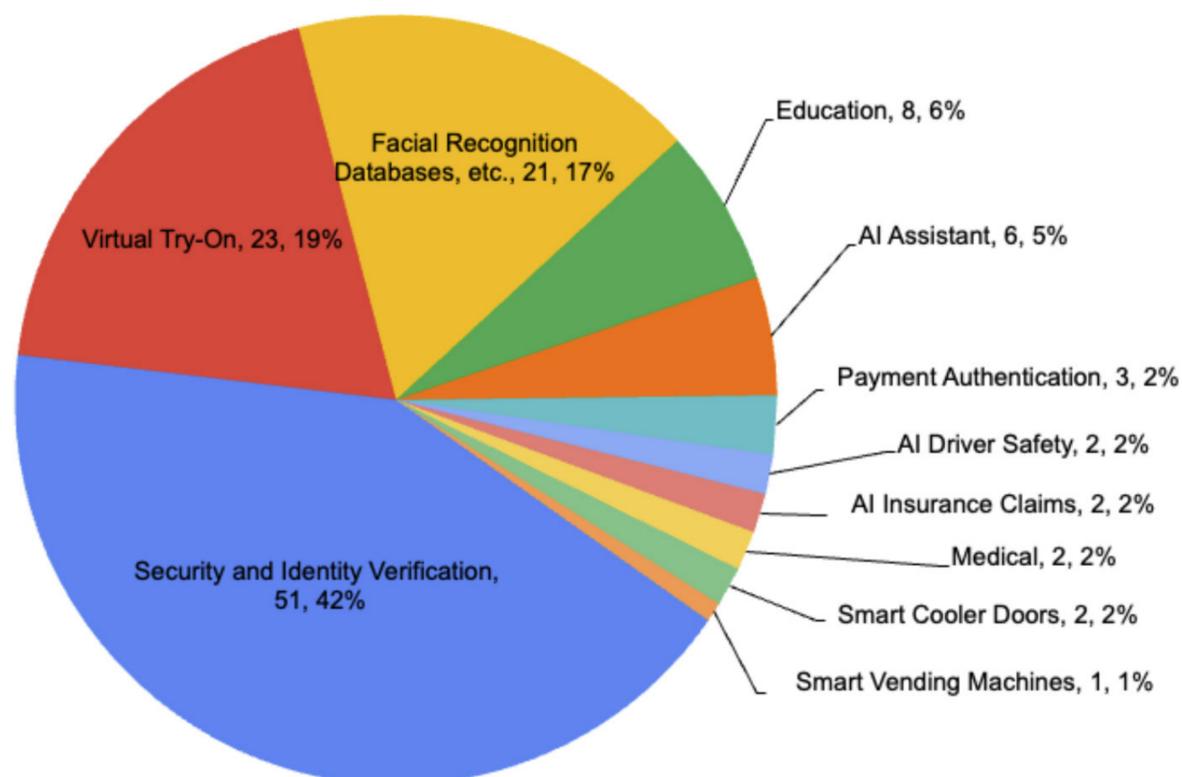


As shown above in Figure 8, 72% of the consumer-oriented cases utilizing fingerprint or handprint scans involved security and identity verification services. The remaining cases were split between payment authentication (14%), education (7%), and smart vending machine applications (7%).

### Cases by Case Category Type

Figure 9 presents all 121 BIPA cases alleging consumer harm by case type, showing the distribution of the full subset of consumer-oriented cases.

**Figure 9: Consumer-Oriented BIPA Lawsuits, by Case Type**



Security and identification services comprised 42% of the consumer-oriented case sample. Cases utilizing virtual try-on technologies made up 19% of the consumer-oriented sample. Facial recognition databases accounted for another 17% of the total number of cases alleging consumer harm. The remaining cases were split across technological application types in education, AI assistants, payment authentication, AI driver safety in consumer cars, AI processing of insurance claims, medical applications, smart cooler doors, and smart vending machines. Figure 9 highlights the breadth of consumer-oriented technologies impacted by BIPA litigation. Many of these applications offer additional security or safety to users but were the subject of BIPA litigation since Illinois' law does not offer exemptions for security applications. In order to avoid BIPA damage claims companies must meet all requirements outlined in statute, even if the consumer was not actually harmed.

## Settlement Data

Examining cases alleging consumer harm that reached class action settlements, I reviewed court documents to find details on the settlement funds for each case. Table 1 shows information on the settlement funds for the subset of consumer-oriented cases where a class action settlement was reached.<sup>30</sup>

**Table 1: Settlement Funds by Defendant**

Defendant	Settlement Fund Total
Compass Group	\$6,800,000
Facebook	\$650,000,000
Google	\$100,000,000
Ray Ban	\$8,000,000
Shutterfly	\$6,750,000
Six Flags	\$36,000,000
Tiktok	\$92,000,000
Zayo Group	\$990,000
<b>Total</b>	<b>\$900,540,000</b>

The settlement funds for consumer-oriented BIPA settlements **total just over \$900 million**. Recall that the consumer-oriented subset of BIPA cases accounts for just 12% of the entire population of case filings. Additionally, this total is likely an underestimate due to the inability to observe settlement amounts for cases settled outside of court.

The settlement agreements for the cases presented above typically include information on how the settlement fund is distributed between attorneys, administrative fees, and individual claimants. From those documents, I recorded information on attorney fees and expenses.<sup>31</sup>

In my review of cases, typically court records of final approval orders for class action settlements included language awarding fees to plaintiffs' attorneys. Additionally, settlement agreements included caps on the maximum percentage of settlement funds that can be awarded for attorney fees. Table 2, shown below, lists attorney fees and fee caps by case.

<sup>30</sup> Two cases (*Rafidia v. Keyme* and *Glynn v. Edriving*) that reached settlements are excluded from this portion of the analysis due to the inability to find court records describing relevant settlement details.

<sup>31</sup> Some cases list attorney fees and litigation expenses as separate amounts and other case records combine attorney fees and litigation expenses into one number. For ease of discussion, attorney fees and expenses are included as a single number in this table.

**Table 2: Attorney Fees, Expenses, and Maximum Settlement Shares**

<b>Defendant</b>	<b>Attorney Fees and Expenses</b>	<b>Attorney Fee Share Maximum</b>
Compass Group	\$2,236,702	33%
Facebook	\$98,400,000	20%
Google	\$35,000,000	40%
Ray Ban	\$3,040,000	38%
Shutterfly	\$2,413,941	35%
Six Flags	\$12,032,500	33%
Tiktok	\$30,200,000	33%
Zayo Group	\$407,256	40%
<b>Total</b>	<b>\$183,730,399</b>	<b>34%<sup>32</sup></b>

Based on the settlement agreements, the attorneys in the Facebook case – which established the largest BIPA settlement fund ever – received the minimum fee share compared to the other settlements, capped at 20% of the settlement fund.<sup>33</sup> The average cap on attorney fees in this subset of settlements was 30%.<sup>34</sup> Generally speaking, the attorney fee caps in this subsample are higher on average in Illinois state courts compared to cases transferred or filed in federal courts. The average fee caps by court type are shown below in Table 3.

**Table 3: Average Attorney Fee Maximums by Court Type**

<b>Court Type</b>	<b>Average Fee Cap</b>
Federal	24.44%
State	32.33%

Next, I calculated the net funds available to individual claimants after subtracting attorney fees and expenses and other settlement costs<sup>35</sup> from the settlement fund total. The table below lists net funds by case.

<sup>32</sup> This is the overall average of the portion of the settlement fund that goes to attorneys.

<sup>33</sup> Since attorney fees and litigation expenses are combined into one number in the table above, attorney fees and expenses may not exactly equal the attorney fee share multiplied by the settlement fund.

<sup>34</sup> The median of the attorney fee caps was 34%.

<sup>35</sup> Other settlement costs include administrative expenses and named plaintiff awards.

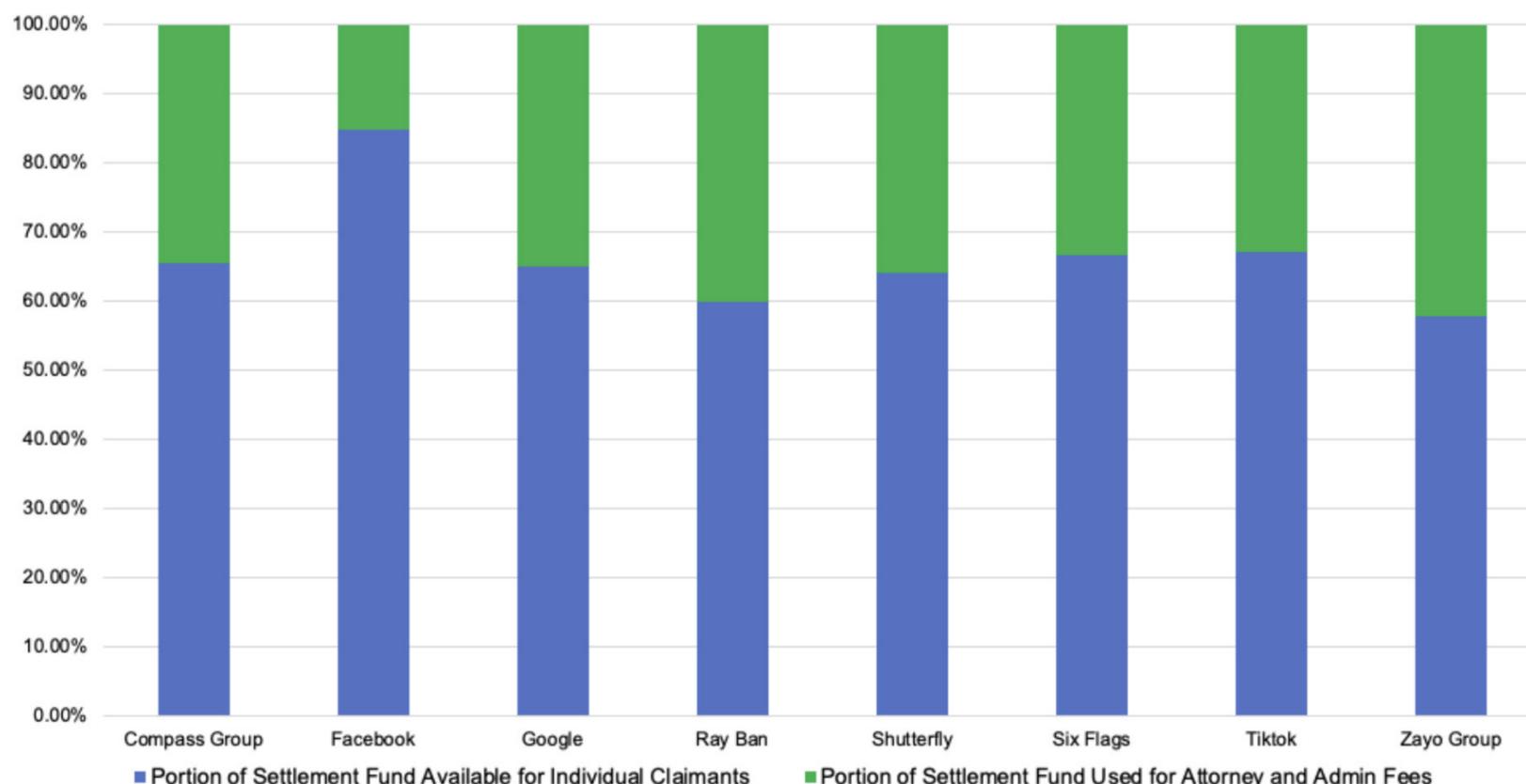
**Table 4: Settlement Amounts and Net Funds Available for Individual Claimants**

Defendant	Settlement Fund Total	Net Funds Available for Individual Claimants
Compass Group	\$6,800,000	\$4,447,812
Facebook	\$650,000,000	\$551,000,000
Google	\$100,000,000	\$65,000,000
Ray Ban	\$8,000,000	\$4,800,000
Shutterfly	\$6,750,000	\$4,331,059
Six Flags	\$36,000,000	\$23,957,500
Tiktok	\$92,000,000	\$61,800,000
Zayo Group	\$990,000	\$572,744
<b>Total</b>	<b>\$900,540,000</b>	<b>\$715,909,115</b>

Note that the funds available for individual claimants are not always equal to the monetary value of the attorney share cap. This is due to administrative costs associated with advertising to potential class members and managing the administration of the settlement fund.

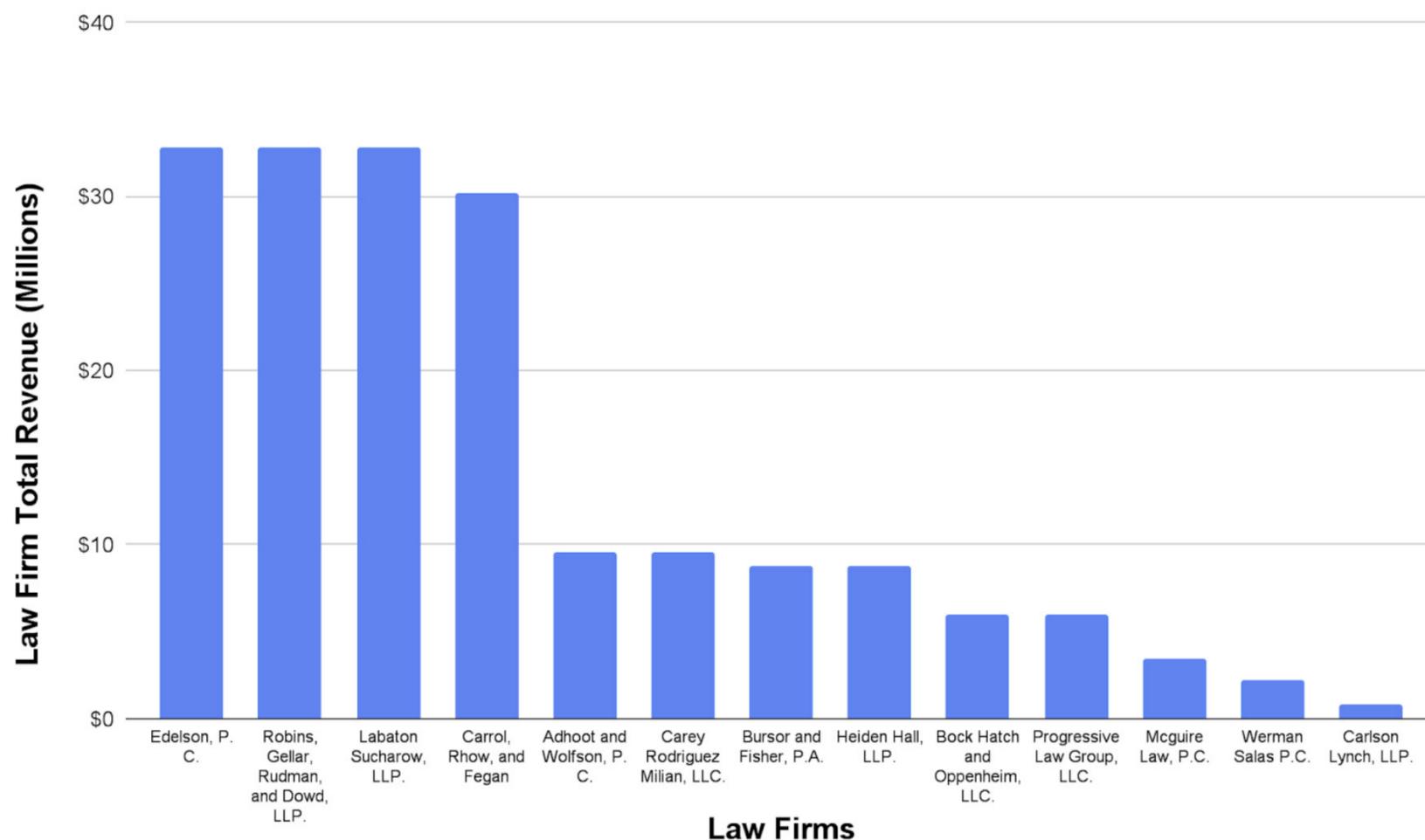
In Figure 10, shown below, I show the portion of each settlement fund that went to individual claimants compared to the portion of the fund paid for attorney fees and administrative costs. This proportion varies by case due to variations in administrative fees and attorney fee caps.

**Figure 10: Consumer-Oriented BIPA Cases Portion of Settlement Funds to Individuals vs. Attorney and Admin Fees**



Some law firms represented the plaintiff class in more than one case that reached settlement. Figure 11 presents revenue totals by law firm in order to reflect differences in scale due to some firms representing more than one plaintiff class.

**Figure 11: Attorney Revenue in Consumer-Oriented BIPA Settlements, by Law Firm**



On average, law firms collected \$11.5 million in revenue, per consumer-oriented BIPA case. **Four plaintiffs' law firms** – [Carrol, Rhow, and Fegan, Edelson, P.C., Labaton Sucharow, LLP., and Robins, Gellar, Rudman, and Dowd, LLP.] – **made more than \$30 million each from consumer-oriented settlements alone.**

Recall that the cases alleging consumer harm made up 12% of the total BIPA cases filed. Also, Figure 11 only includes information on cases that reached class-action settlements in court. Any cases alleging consumer harm related to BIPA that were dismissed via private agreement are unlikely to be captured in court records and thus are excluded from the sample above. In reality, attorneys are likely profiting from private settlements as well, so the numbers above represent an underestimate of the true value of all settlement dollars related to consumer-oriented BIPA lawsuits.

Gathering data on these cases, I estimated awards to individual claimants based on available information. The estimation of individual claimant award amounts depends

on the availability of related variables.<sup>36</sup> Sometimes court records related to settlement amounts provide information on the number of claimants, claims rate, or individual claim amounts. In other cases, settlement documents specified the maximum amount of awards to individual claimants. Table 5 shows individual award amounts by case.

**Table 5: Individual Award Amounts**

<b>Defendant</b>	<b>Individual Award</b>
Compass Group	\$413
Facebook	\$345
Google	\$142
Ray Ban	\$2,281
Shutterfly	\$106
Six Flags	\$200
Tiktok	\$163
Zayo Group	\$400
<b>Average</b>	<b>\$506</b>

In the Ray Ban case, I was unable to find information on claims rate or number of claims. In this instance, I assume a 9% claims rate in order to estimate individual award amounts. Court documents in other BIPA filings reference 9% as the median claims rate in BIPA cases.<sup>37</sup> All other individual claimant award amounts were taken directly from court documents.

On average, individual award amounts totaled \$506 based on available information. While individual claimants benefitted from these smaller individual settlement amounts, trial lawyers gained a much larger per-person sum as a result of these class action cases. In comparison, on average trial lawyers received \$11.5 million per-case, per law firm.

## **FINDINGS AND POLICY IMPLICATIONS**

### **Who is benefitting from BIPA?**

The settlement data showed that trial lawyers working on class action cases related to BIPA received large payouts from settlement funds. Given that BIPA was enacted in

<sup>36</sup> Class size represents the total population potential of class members based on the lawsuit. The number of claims shows the number of class size members who filed a claim as part of the class action settlement. The claims rate is the percentage of class members who filed claims. Court documents usually contain values for some but not all of these variables.

<sup>37</sup> Brian R. Vaughan v. Biomat USA, Inc. et al, 1:20CV04241, <https://www.troutman.com/images/content/3/3/334487/Plasma-Memo.pdf>

2008 as new legislation, BIPA cases and related funds represented new revenue for attorneys practicing in class action litigation.

Attorneys typically receive 20% to 40% of the settlement fund as compensation for their work. Individual claimants who were ‘aggrieved’ under BIPA received much smaller settlement amounts as the remaining funds were split across all class members. Individual consumers that filed claims in these class action suits received individual claim amounts ranging from \$106 to \$2,281.

According to statute the initial impetus for passing BIPA was that, “The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information”.<sup>38</sup>

However, because courts have interpreted the term ‘aggrieved’ in a way that rejects the need for claimants to show actual harm, BIPA may not serve its intended purpose of preserving public welfare and safety. The lack of a requirement to show harm seems to be incongruous with the original intent of the bill - security and protection.

### **Who is losing as a result of BIPA legislation?**

Companies in Illinois must consider the legal risks associated with operating in the ever-changing legal landscape of BIPA. In light of the decision in *Cothron v. White Castle*, companies now face damages each time BIPA is violated. This can lead to extremely large damages that are exponentially higher than previous settlement amounts under BIPA.

For example, White Castle stated in court documents that the damages from the Court’s interpretation could equate to annihilative liability to companies with repeated violations. As the legal risks of operating in the state increase, companies will likely face increased insurance and liability costs. Illinois residents may lose product offerings as a result of the ruling. A few companies have already opted to remove products from Illinois as a result of BIPA. For example, Google Nest removed its familiar faces feature for Illinois residents.<sup>39</sup>

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<sup>38</sup> 740 ILCS 14/5

<sup>39</sup> Google, “Google Nest Help”, <https://support.google.com/googlenest/answer/9268625?hl=en>

# CONCLUSION

BIPA in Illinois was originally enacted to protect consumers from potential data breaches resulting from the capture of biometric information. While the law is well intentioned, BIPA as it has been interpreted by the court system has had unintended consequences for Illinois consumers and businesses. In practice, BIPA currently prevents some product offerings in Illinois, requires no harm to be shown in order to bring suit, and creates tremendous liability risk for companies due to astronomical damage accruals.

The largest beneficiaries of BIPA cases alleging consumer harm appear to be plaintiffs' law firms. Trial lawyers received, on average, \$11.5 million per BIPA case that reached settlement in court, and four firms received in excess of \$30 million each. Alternatively, individuals received an average per-case award of \$506 and only individuals that affirmatively filed paperwork as part of the claims process received individual payouts.

States considering copycat legislation should be wary of designing legislation based on Illinois' BIPA statutes. Passing similar legislation in other states will likely lead to similar increases in litigation, increased business costs, additional product restrictions for customers, and limited benefits for consumers. While biometric privacy and related security concerns are extremely important protections for consumers, Illinois' BIPA is overly restrictive, leading to consequences for consumers and business owners within the state.

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