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Litigators of the Week: In Test Case Over Illinois Genetic Privacy Law, Kirkland Defends Ancestry.com Deal

By Ross Todd
May 5, 2023

In the privacy world, the Illinois Biometric Information Privacy Act, or BIPA, is about as big and bad as you can get when it comes to potential liability.

Just ask Facebook. Or White Castle.

But there's been an open question about whether the state's law concerning genetic information, the Genetic Information Privacy Act, or GIPA, would pack the same punch. After all, it has a statutory damages provision and private right of action similar to BIPA's.

Well, in the first test case brought under GIPA to get federal appellate review, **Kirkland & Ellis** partners **Martin Roth** and **Alyssa Kalisky** brought home a defense win. The Seventh Circuit this week upheld a ruling tossing claims brought under GIPA against their client Blackstone Inc. after it acquired Ancestry for $4.7 billion. "Put simply, we cannot infer from an acquisition alone—at least one structured as a stock transaction—that Blackstone compelled Ancestry to disclose genetic information," wrote Circuit Judge Michael Scudder for the unanimous three-judge panel.

Lit Daily: Who is your client and what is at stake?

Martin Roth: Our client, Blackstone, is one of the preeminent and most successful alternative asset managers in the world. This class action lawsuit sought to hold Blackstone liable under the Illinois Genetic Information Privacy Act (GIPA) simply for acquiring Ancestry.com. It essentially tried to impose significant statutory liability—thousands of dollars per class member—just for buying a company.

Courtesy photos

Martin L. Roth, left, and Alyssa C. Kalisky, right, of Kirkland & Ellis.

Alyssa Kalisky: Martin and I have litigated several Illinois Biometric Privacy Act (BIPA) matters, so we absolutely knew the stakes here. As has been well-reported, there has been a tidal wave of BIPA cases filed over the past few years, and several high-profile cases have settled for hundreds of millions of dollars. I remember seeing an article while we were in the middle of appellate briefing and the headline asked "Is GIPA the next BIPA?" Although we were confident in our legal and merits arguments, we couldn't help but feel a little pressure! As one of the only active GIPA cases being litigated since the statute's inception 25 years ago—in the midst of a massive privacy litigation surge that has resulted in some substantial settlements—we knew that the outcome of our case

could have a real impact on future privacy litigation and future class actions.

How did this matter come to the firm?

Roth: It's a great example of the collaboration and cross-practice partnership that I really love and embrace here at Kirkland. Blackstone has entrusted Kirkland for a decade with some of its most interesting work across virtually all our practice groups, including M&A, energy, investment funds, real estate, and litigation. When the original GIPA lawsuit was filed in Illinois state court almost two years ago, Alyssa and I worked with our partners to make sure Blackstone was aware of the case, and we shared our views on how to aggressively fight off the claim to not allow GIPA to become the next BIPA. We are very grateful that Blackstone trusted us to handle this important matter given our history with privacy class actions.

Who is on your team and how did you divide the work?

Kalisky: We had an incredible team. From day one, our partner **Amelia Bailey** has been instrumental in thinking strategically and creatively about how to craft our legal arguments. She played a huge role in leading the district court briefing and helped secure the early dismissal. For the appeal, associate **Max Samels** jumped in (while Amelia was welcoming her adorable newborn son, Connor!) and led the charge on the brief. He brought with him a fresh perspective, which was extremely helpful since Martin and I had been living with the case for over 18 months by then. Another key player on our team was first-year associate **Andrew Maxfield**, who had the unenviable task of trying to keep up with the near-daily BIPA opinions and staying abreast of the constantly changing landscape in the privacy space. And of course, Martin was a phenomenal leader both in developing the legal arguments and briefs, and also at the oral argument—he truly didn't miss a beat.

Roth: This was a dream team. Alyssa was sensational at brainstorming the best arguments and making sure our briefs really sang. Amelia and Max are excellent writers and wrote amazing drafts that we were able to polish into the winning briefs. We had an incredible in-house legal team at Blackstone, led by **Margie Truwit** and **Athena Cheng**, who were fabulous to work with and added helpful feedback and refinements along the way. It was really amazing to watch Alyssa and Amelia develop such incredible rapport with the clients and the entire team. And we'd be remiss if we didn't mention our partner **Aaron Marks**, who has represented Blackstone for years and helped on strategy issues, as well as our outstanding appellate-focused colleagues, led by **Aaron Nielson**, who helped me test out a number of different themes in moot arguments. I've had several appeals recently and I've learned that Kirkland's stable of brilliant appellate lawyers always find interesting angles and insightful questions that often anticipate the Panel's most pressing questions. This case was no different.

Tell me what corporate clients should know about GIPA. How much of a potential analog to the BIPA which has generated considerable litigation activity?

Roth: Both GIPA and BIPA have been amended several times during the same legislative session and therefore have a lot of similar language. Both statutes allow for fixed statutory damages for violations and a private right of action. Helpfully here, we were able to point out a key distinction between GIPA and BIPA: BIPA imposes liability specifically for obtaining or acquiring biometric information without consent, but the language of GIPA is narrower. Still, plaintiffs argued for an interpretation of GIPA that would bar compelling the disclosure of genetic information without consent, including by purchasing it from a third party. In that sense, the court's ruling that a compulsory disclosure cannot plausibly be inferred from a "run-of-the-mill corporate acquisition" is critical and has been described as "a welcome win for the defense bar." And that makes sense: one of the express purposes of GIPA was to help promote advancements, innovation, and increased use of genetic tests, particularly for public health and law enforcement reasons. The court's ruling should hopefully signal that investments can be made in genetic companies like Ancestry.com without fear of significant liability just for making that investment.

What other GIPA cases are there out there that you're following?

Kalisky: What really fascinated us was that GIPA was enacted over two decades ago (long before BIPA); yet, as best we can tell, our case was one of the first putative class actions brought in Illinois under the statute.

There was a data breach case in California a few years ago that included a claim under GIPA, and not much else. Recently, though, both Amazon and Ford were hit with GIPA suits, which sparked a lot of media coverage and concern among the defense bar that the floodgates would be opening for GIPA cases. We are closely following these cases and watching to see if others get filed, given the Illinois courts' BIPA precedent.

What were your key defenses regarding this particular transaction? And how did you drive them home with both the trial court below and the Seventh Circuit?

Roth: As noted above, our key defense turned on emphasizing that this was just a standard corporate transaction. Our argument was really based on the statutory language and legislative intent of GIPA, differentiating from BIPA, and explaining how adopting plaintiffs' view of liability would be untenable. We tried to focus the court on the actual language of GIPA along with the sound policies behind promoting genetic testing and the businesses that provide them. The Illinois legislature did not intend to punish companies that buy or invest in genetics but was really focused on discrimination against people who take genetic tests, most particularly by their employer or insurer. By focusing Judge Dugan and then the Seventh Circuit on these issues, we were able to overcome plaintiffs' focus on the sheer magnitude of the transaction, which the court held was not sufficient to find compulsion.

Kalisky: We knew that this case went far beyond the statute, but that can be tough to show when there is so little precedent interpreting it. To hammer this point home on appeal, we had to get creative and look at courts across the country that had interpreted other privacy statutes that have been passed in other states. We ended up finding a very helpful Connecticut Supreme Court case interpreting, of all things, nearly identical statutory language from a Connecticut HIV statute in a lawsuit regarding information shared over prison phone systems. Even though that's far from the Illinois law and corporate acquisition at issue in our case, it helped us back up our commonsense argument that the term "compel" imposes real limits on liability.

What's important here in this Seventh Circuit decision?

Kalisky: The biggest takeaway is that just buying a company with genetic information is not enough to create liability under GIPA. There needs to be more. That should hopefully place guardrails that will discourage litigation under the statute and not allow it to become BIPA 2.0.

Roth: Exactly. By making common sense textual and policy arguments we were able to get a critical win at the outset of litigation—before the law developed in a negative way. I think this is a critical strategic decision for how to litigate privacy class actions in general, and we're very grateful that Blackstone had the confidence in us to allow us to advance that argument early and often.

What will you remember most about handling this matter?

Kalisky: This case has been extremely unique in that there was essentially zero precedent interpreting the statute that the claim was brought under. This meant we had to think creatively and build our arguments from scratch, which was both really challenging and really fun.

Roth: Obviously the amazing team and novelty of the issue will always be memorable, but on a personal level the oral argument will always have a special place in my mind and in my heart. The Seventh Circuit argument was at Indiana University's Indianapolis campus before an audience of over 100 law students and members of the community. All three judges on our panel (Scudder, Hamilton, and Pryor) had ties to Indianapolis. At the start of my career I had the amazing privilege of clerking on the Seventh Circuit for an Indiana judge (the late Michael S. Kanne, who passed away last year). Judge Kanne's chambers were just up I-65 in Lafayette and it brought me great joy and pride to present a novel and winning argument to the court very near where I began my career working for one of my most important mentors.