Illinois Supreme Court Opens the Floodgates to Biometric Information Privacy Act Suits

On January 25th, the Illinois Supreme Court ruled in *Rosenbach v. Six Flags Entertainment Corp.* that a plaintiff may be "aggrieved" under the state's unique Biometric Information Privacy Act, 740 ILCS 14, even if she has suffered no injury. The Act, which became law in 2008, prohibits entities from storing biometric information—like fingerprints or facial structure—unless they explain the purpose for which the information is being collected and publish a retention and destruction policy for the data. In recent months, consumer protection firms have seized on the Act, filing new class action suits against employers and technology companies daily. The litigation will likely grow after the *Six Flags* decision, which cleared one of the central hurdles facing BIPA plaintiffs.

I. The Illinois Biometric Information Privacy Act

The Illinois Legislature passed the Biometric Information Privacy Act in response to the growing use of biometric identifiers as timekeeping devices by employers, as well as the increasing use of biometric identifiers as a security feature. The Act has several substantive provisions:

- **Written Policy Requirement**: All entities in possession of biometric information must "develop a written policy, made available to the public, establishing a retention schedule" for the data, as well as "guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first." 740 ILCS 14/15(a).

- **Authorization**: Private entities may not "collect, capture, purchase, receive trade, or otherwise obtain" a person's biometric information unless they inform the person (or their legally authorized representative) that their biometric data is being collected, identify in writing the specific purpose and length of time for which the information is being collected, stored, and used, and receive a written release from the individual. 740 ILCS 14/15(b).

- **Usage**: Private entities are prohibited from selling, leasing, trading, or otherwise profiting from a person's biometric information. 740 ILCS 14/15(c).

- **Disclosure**: Private entities are prohibited from disclosing or disseminating a person's biometric information without the person's consent, except in certain enumerated circumstances. 740 ILCS 14/15(d).

- **Security**: Private entities are required to store, transmit, and protect from disclosure biometric identifiers "using the reasonable standard of care within the private entity's industry," and they must store, transmit, and protect from disclosure biometric information in a manner that is "the same or more protective than" the manner in which they store, transmit, and protect other confidential and sensitive information. 740 ILCS 14/15(e).

Together, these requirements make Illinois among the states most protective of biometric identifiers.

II. Private Right of Action

While several other states have passed similar biometric information privacy laws, Illinois' Act is unique in affording a private right of action to individuals whose statutory rights have been violated. The Act provides that plaintiffs may receive $1,000 for negligent violations and $5,000 for intentional or reckless violations, as well as reasonable attorneys' fees and costs. 740 ILCS 14/20. The private right of action extends to "[a]ny person aggrieved by a violation" of the Act. *Id.* In *Six Flags*, the Illinois Supreme Court addressed whether a person could be aggrieved by a violation of the Act if he suffered no actual harm.

The *Six Flags* plaintiff was the mother of a minor who attended a Six Flags theme park in Gurnee, Illinois, and for whom she purchased a repeat-entry pass to the park. Upon entry to the park, Six Flags scans and stores pass-holders' fingerprints, enabling it to quickly verify customer identities upon subsequent visits to the park. According to the complaint, Six Flags did not inform the plaintiff or her son in writing of the purpose for which her son's fingerprints were to be used. Nor did Six Flags inform the plaintiff or her son of its retention and destruction policies or obtain a written release prior to collecting her son's fingerprints. The complaint alleged that Six Flags violated the Biometric Information Privacy Act's written policy and authorization provisions.

Six Flags moved to dismiss the complaint, arguing that the plaintiff—who did not allege that she or her son suffered any actual harm—was not "aggrieved by a violation" of the Act. The trial court denied the motion, and Six Flags sought interlocutory review. The intermediate appellate court ruled for Six Flags, holding that an individual is aggrieved only if they suffer an "injury or adverse effect," and that a "technical violation of the Act" on its own does not suffice.

The Illinois Supreme Court granted the plaintiff's petition for leave to appeal and reversed, concluding that an individual is "aggrieved"—and therefore has a right of action for damages under the Act—if they allege that the defendant violated their rights under the Act. The Court distinguished the Act from other consumer protection laws that expressly require an actual injury before a private right of action arises. By contrast, the Court noted, both the common usage of the word "aggrieved" and its historical use in Illinois statutes suggests than an individual may be aggrieved by a bare statutory violation.

The Court also explained that reading an actual injury requirement into the Act would frustrate its purpose, causing "the right of the individual to maintain his or her biometric privacy" to "vanish[] into thin air." In doing so, the Court cited the legislature's finding that "[b]iometrics . . . are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." According to the Court, requiring individuals to wait until they suffered actual harm before they may file suit "would be completely antithetical to the Act's preventative and deterrent purposes."

III. Article III Standing

Although *Six Flags* answered BIPA's lingering statutory standing question, another key BIPA litigation issue remains unresolved: does a bare violation of the Act constitute a "concrete" injury sufficient to confer federal standing? Because BIPA plaintiffs may choose to file in federal court and defendants alternatively may seek to remove BIPA cases under the Class Action Fairness Act, the question of Article III standing will be heavily litigated in the years to come.

Two 2018 cases typify the disagreement among courts as to standing. *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948 (N.D. Cal. 2018) concerned Facebook's use of facial recognition software to suggest that users "tag" themselves and others in specific photos. The *Patel* plaintiffs alleged that Facebook did not inform them in writing that it was storing their biometric identifiers, publish the purpose for which it was storing their data, provide written retention and destruction policies, or obtain a written waiver from the plaintiffs. The court concluded that the plaintiffs alleged a concrete injury sufficient to confer Article III standing. The court began by noting that state legislatures are "well-positioned to determine when an intangible harm is a concrete injury." *Id.* at 952. Like the *Six Flags* court, the *Patel* court heavily emphasized the Illinois legislature's findings about the unique nature of biometric identifiers and uncertainty surrounding technologies that capture and store them. The court also made an important distinction between Facebook's tag suggestions and other BIPA cases where the plaintiffs were aware that their biometric identifiers were being captured and stored—here, the court noted, the harm was more concrete because the plaintiffs were never informed that Facebook employed facial recognition software.

The court in *Rivera v. Google, Inc.*, No. 16 C 02714, 2018 WL 6830332 (N.D. Ill. Dec. 29, 2018) took a different tack. *Rivera* concerned Google's use of facial recognition software to create "face groups" of photographs with visually similar faces. The complaint alleged that Google did not receive plaintiffs' permission to capture, store, or use their biometric identifiers. The plaintiffs claimed an injury to their privacy interest, but did not purport to suffer any other physical, financial, or emotional injury. The court ruled that the plaintiffs had not suffered a concrete injury sufficient to sustain a federal action. The court's analysis began with the Supreme Court's pronouncement in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) that a "bare procedural violation" of a statute does not automatically satisfy Article III's concreteness requirement. The court further held that the only alleged harm flowing from Google's retention of plaintiffs' biometric data was that the plaintiffs felt aggrieved—and that, under *Spokeo* and subsequent Seventh Circuit precedent, merely feeling aggrieved does not constitute a concrete injury.

The *Rivera* court also held that Google's initial collection of the plaintiffs' face scans without their knowledge—as opposed to their subsequent retention of the face scans—did not inflict a concrete injury on the plaintiffs. The court rejected *Patel*'s reliance on the Illinois legislature's findings on the grounds that they were too general and overstated the risks posed by storage of biometric identifiers. The court also concluded that BIPA violations based on improper storage and lack of authorization had no analogy among actionable common law privacy torts. The plaintiffs, according to the court, therefore lacked Article III standing.

Overwhelmingly, federal courts—including the Second Circuit and most courts of the Northern District of Illinois—hue closer to *Rivera* than *Patel*, concluding that run of the mill BIPA plaintiffs do not have standing. This is not necessarily good news for BIPA defendants. If BIPA plaintiffs lack Article III standing, defendants may have challenges successfully removing BIPA cases to federal court. Indeed, state courts are likely be the primary battleground for BIPA disputes—including and especially Illinois state courts, which have shown little willingness to stem the tide of BIPA litigation.

IV. Impact of *Six Flags*

In *Six Flags'* wake, employers and technology companies that use biometric identifiers should be vigilant in ensuring compliance with the Act. The risk is especially palpable for companies that provide human resources services, as they may collect biometric identifiers for tens or hundreds of thousands of Illinois employees. That employees (or users of technology that stores biometric identifiers) need not demonstrate actual harm to be entitled to statutory damages vastly expands the universe of potential class members. And that expansion is likely to embolden plaintiffs' consumer protection attorneys, who will ensure that the flood of BIPA lawsuits continues unabated.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Jonathan Bunge
Co-Chair, National Trial Practice
Managing Partner, Chicago Office
191 N. Upper Wacker Drive
Suite 2700
Chicago, IL 60606
Phone: 312-705-7476
Email: jonathanbunge@quinnemanuel.com

Lazar Raynal
191 N. Upper Wacker Drive
Suite 2700
Chicago, IL 60606
Phone: 312-705-7411
Email: lazarraynal@quinnemanuel.com

Daniel Lombard
191 N. Upper Wacker Drive
Suite 2700
Chicago, IL 60606
Phone: 312-705-7402
Email: daniellombard@quinnemanuel.com

Andrew Schapiro
191 N. Upper Wacker Drive
Suite 2700
Chicago, IL 60606
Phone: 312-705-7403
Email: andrewschapiro@quinnemanuel.com

Robert Schwartz
865 S. Figueroa Street
Tenth Floor
Los Angeles, CA 90017
Phone: 213-443-3675
Email: robertschwartz@quinnemanuel.com

Brianne Straka
191 N. Upper Wacker Drive
Suite 2700
Chicago, IL 60606
Phone: 312-705-7415
Email: briannestraka@quinnemanuel.com

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