No. 123186

IN THE SUPREME COURT OF ILLINOIS

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach, individually and as the representative of a class of similarly situated persons,

Plaintiff-Appellant,

v.

SIX FLAGS ENTERTAINMENT CORP. and GREAT AMERICA LLC,

Defendants-Appellees.

On Appeal from the Appellate Court of Illinois, Second District, No. 2-17-317, there on Appeal from the Circuit Court of Lake County, Illinois, No. 2016-CH-13, the Hon. Luis A. Berrones, Judge Presiding

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BRIEF OF PLAINTIFF-APPELLANT STACY ROSENBACH

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff-Appellant, Stacy Rosenbach, as mother and next friend of her son Alexander Rosenbach ("Alexander"), sued defendants Six Flags Entertainment Corporation and Great America LLC ("Defendants") for violating the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.* by collecting 14-year-old Alexander's fingerprint without providing the written disclosures and obtaining the written release required by BIPA before biometrics collection.

Defendants moved to dismiss, arguing that Plaintiff failed to allege she was "aggrieved by" Defendants' violations of the BIPA. The Circuit Court denied Defendants' motion but later entered an order certifying questions to the Appellate Court pursuant to Illinois Supreme Court Rule 308(a). The Appellate Court granted Defendants' petition for leave to appeal and answered the certified questions in the negative, contrary to the Circuit Court's order denying Defendants' motion to dismiss.

Plaintiff petitioned for leave to appeal the Appellate Court's decision pursuant to Illinois Supreme Court Rule 315. The Court granted her Petition.

QUESTIONS CERTIFIED FOR REVIEW

Question 1: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek statutory liquidated damages authorized under § 20(1) of the Act when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who

collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act. (C. 002.)

Question 2: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek injunctive relief authorized under § 20(4) of the Act, when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act. (C. 002-03.)

STATEMENT OF JURISDICTION

On April 7, 2017, the Circuit Court entered an order Certifying Questions to the Appellate Court under Supreme Court Rule 308(a). (C. 001-03.) On May 5, 2017, Defendants filed a timely petition for leave to appeal with the Appellate Court. Ill. S. Ct. R. 308(b). The Appellate Court granted the petition, heard the appeal, and answered the certified questions in the negative on December 21, 2017. *Rosenbach v. Six Flags Entm't Corp.*, 2017 IL App (2d) 170317, ¶ 30.

On January 24, 2018, this Court granted Plaintiff's motion to extend the time to March 1, 2018, to file a petition for leave to appeal under Rule 315. Plaintiff filed her petition for leave to appeal to this Court on March 1, 2018. The Court granted Plaintiff's petition on May 30, 2018.

THE STATUTE INVOLVED

The text of the BIPA in its entirety is contained in the attached Appendix. (A. 15-22)

Section 15 of the BIPA protects the biometric information of persons in Illinois as follows:

> § 15. Retention; collection; disclosure; destruction.
>
> (a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and 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. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.
>
> (b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
>
> > (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
> >
> > (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
> >
> > (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

740 ILCS 14/15.

Section 20 of the BIPA provides a private cause of action as the exclusive method for enforcement of section 15 as follows:

> § 20. Right of action.
>
> Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:
>
> (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
>
> (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;
>
> (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
>
> (4) other relief, including an injunction, as the State or federal court may deem appropriate.

740 ILCS 14/20.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Defendants collected and stored fourteen-year-old Alexander Rosenbach's fingerprint when he entered Six Flags Great America for an eighth-grade class field trip.

Defendants own and operate the Six Flags Great America amusement park in Gurnee, Illinois. (C. 008, ¶ 16.) In 2014, Plaintiff's fourteen-year-old son, Alexander Rosenbach, learned that his eighth-grade class would be going to the amusement park on a field trip. (C. 615.) In anticipation of the trip, Plaintiff went online to Defendants' website and purchased Alexander a season pass. (C. 009, ¶ 21.) When he arrived with his classmates to enter the park,

officials directed Alexander to a security checkpoint, and then directed him to scan his thumbprint to gain access and to receive his season pass card. (C. 009, ¶¶ 21-23; C. 615.) Defendants scanned Alexander's thumbprint and stored his biometric information in Six Flag's biometric data capture system. (C. 009, ¶ 23.)[1]

Plaintiff did not know that her son would be fingerprinted at the amusement park. (C. 0066.) Defendants did not inform Alexander or Plaintiff in writing that his thumbprint would be collected and stored. (C. 009, ¶¶ 23, 25.) 740 ILCS 14/15(b)(1). Defendants did not advise Alexander or Plaintiff in writing of the specific purposes for which Defendants were collecting his thumbprint or how long they would keep his biometric information. (C. 009-10, ¶¶ 24, 25, 26.); 740 ILCS 14/15(b)(2). Defendants did not obtain a written release from Alexander or Plaintiff before scanning his thumbprint. (C. 010, ¶ 27.) 740 ILCS 14/15(b)(3).[2]

Defendants make no written policy available to the public that discloses their retention schedule or guidelines for retaining and then permanently destroying biometric identifiers and biometric information. (C. 010, ¶ 30.) 740

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[1] The Appellate Court noted that "Plaintiff did not allege in her complaint any harm or injury to a privacy right," but that statement is incorrect. 2017 IL App (2d) 170317, ¶ 20 n.1. Plaintiff sued under the Biometric Information *Privacy* Act for Defendants' violations of that privacy act in collecting Alexander's "personal information." (C. 006, 009.)

[2] "'Written release' means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." 740 ILCS 14/10.

ILCS 14/15(a). Defendants' use of biometric identifiers and information benefits Defendants by enabling seamless transactions at the gate of entry, eliminating improper sharing of season passes, and reducing labor or pass holder processing costs at the gate of entry, all enhancing Defendants' revenues. (C. 011, ¶ 32.)

Six Flags Entertainment Corporation ("SFEC") instituted a fingerprinting process for season pass holders at Great America (and its various other theme parks) that violates the BIPA. (C. 011, ¶ 36.) SFEC oversaw and directed the implementation of the entire biometric collection system. (C. 012, ¶ 37.) The biometric fingerprint scanning program used at Great America is operated by computers at SFEC's headquarters in Grand Prairie, Texas. (C. 012, ¶ 38.)

II. The Illinois Biometric Information Privacy Act.

BIPA became Illinois law in 2008. 740 ILCS 14/1. The Act restricts the collection and retention of "biometric identifiers" (such as fingerprint and retina scans) and "biometric information" (information based on a biometric identifier used to identify an individual) (collectively, "Biometrics"). Other Illinois laws protect personal consumer data privacy in discrete contexts—*e.g.*,

PIPA provides relief in the event of a data breach of biometric data[3]—but the BIPA creates broader rights and remedies exclusively regulating the collection of consumers' personal Biometrics. A sponsor of the BIPA summed it up by stating, "It sets collection and retention standards while prohibiting the sale of biometric information." Transcript of the State of Illinois 95th General Assembly House of Representatives, 249 (May 30, 2008) (remarks of Rep. Ryg).

The BIPA's "Legislative Findings and Intent" state, "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." 740 ILCS 14/5(g). Unlike most regulatory statutes, the BIPA does not empower a government agency to enforce the Act, nor does it allow for the promulgation of regulations thereunder. 740 ILCS 14/1 et seq. Instead, the Act relies exclusively on the private enforcement of violations. 740 ILCS 14/20.

The BIPA is a short, self-contained statute with only two operative sections. 740 ILCS 14/1 *et seq.* Section 15 regulates the collection and storage of Biometrics. Section 20 provides for enforcement of section 15, but only by creating a private right of action for "[a]ny person aggrieved by a violation of

[3] The Personal Information Protection Act, 815 ILCS 530/1 *et seq.* ("PIPA"), makes violations actionable under the Consumer Fraud and Deceptive Practices Act, Sec. 530/20, and by way of a 2016 amendment, P.A. 99-503, effective January 1, 2017, covers biometric data breaches, Sec. 530/5(1)(F). But PIPA only mandates notice when there is a data breach at a company that has collected personal data. 815 ILCS 530/10.

the Act." Thus, section 15's regulatory purpose cannot be enforced by the government. It can only be enforced by a private action brought in a "state circuit court or as a supplemental claim in federal district court against an offending party." 740 ILCS 14/20.

Section 15 mandates that entities collecting Biometrics must: (a) develop policies for the collection and storage of Biometrics, make their policies public, and abide by them; (b) give written notice and obtain a written release before collecting Biometrics; (c) refrain from selling or profiting from Biometrics they collect; (d) refrain from disclosing Biometrics they collect to others without prior written permission; and (e) exercise due care in storing Biometrics. 740 ILCS 14/15(a) (e).

Section 20 creates a private right of action as the exclusive method for enforcing the requirements of section 15. 740 ILCS 14/20. Section 20 states, "Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court ... against an offending party." A "prevailing party may recover for each violation ... against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater." 740 ILCS 14/20(1). The liquidated damages increase to $5,000 for "reckless" violations. 740 ILCS 14/20(2). Section 20 also allows for attorneys' fees and injunctive relief. 740 ILCS 14/20(3)-(4).

The BIPA highlights legislative concern that consumers must be able to make informed choices before permitting collection of their Biometrics, because

of the uncertain ramifications when they do, particularly in the context of "streamlined" "security screenings" using "finger-scan technologies," precisely the circumstances at bar. 740 ILCS 14/5.

Because personal biometric identifiers are immutable, Illinois recognizes that the danger of identity theft using Biometrics is much greater and more permanent than with other, mutable, personal information. 740 ILCS 14/5(c); *see also* Elizabeth M. Walker, *Biometric Boom: How the Private Sector Commodifies Human Characteristics*, 25 Fordham Intell. Prop. Media & Ent. L.J. 831, 841-844 (Spring 2015). The BIPA was based, in part, on the General Assembly's findings highlighting concerns with the immutable nature of personal biometric information and the unknown ramifications of its widespread collection:

> (c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, 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.
>
> ***
>
> (f) The full ramifications of biometric technology are not fully known.
>
> (g) 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.

740 ILCS 14/5.

The BIPA defines a "fingerprint" as a "[b]iometric identifier." 740 ILCS 14/10. If Alexander's thumbprint scan is stolen (something which may never come to light (see 740 ILCS 14/5(f))), he cannot change it and will forever be unable to use it to safely identity himself. 740 ILCS 14/5(c).

One specific event that led to the passage of the BIPA was the bankruptcy of Pay by Touch, a company that pioneered fingerprint scan technologies for use at grocery stores, gas stations, and school cafeterias to facilitate purchases. 740 ILCS 14/5(b); Transcript of the State of Illinois 95th General Assembly, *supra*, 249. Pay by Touch provided Illinois stores with fingerprint scanners to enable customers to pay for goods and services. Charlie White, *Pay by Touch System Tested by Gas Stations, Grocery Store*, Gizmodo (Nov. 1, 2007), https://gizmodo.com/3147641/pay-by-touch-system-tested-by-gas-stations-grocery-store.

The Pay by Touch system did not use actual fingerprints. "It used 40 data points that can be reverse engineered into a fingerprint. The data points are encrypted and converted into a mathematical equation that allows for secure identity match at the point of sale." Business Wire, *Cub Foods Launches Biometric Payment Technology; Customers Can Purchase Groceries with Touch of a Finger.*
https://www.businesswire.com/news/home/20050516005092/en/Cub-Foods-Launches-Biometric-Payment-Technology-Customers.

By 2008, Pay by Touch filed for bankruptcy and was no longer providing verification services. Transcript of the State of Illinois 95th General Assembly, *supra*, 249. The impending bankruptcy sale of Pay by Touch's database alarmed the General Assembly and prompted it to find that the people of Illinois needed the BIPA to protect their biometric information. *Id.*

A legislative precursor to BIPA was the enactment of "Student biometric information" amendments to the school code a year earlier, in 2007. 105 ILCS 5/10-20.40; 105 ILCS 5/34-18.34; Public Act 95-232. These amendments provide that, if a public school or school district collects a "fingerprint" or other "biometric information" from students, the collector must, at a minimum, obtain written permission from (1) the parent or guardian who legally enrolled the student or (2) the student, if he or she has reached the age of 18. The school biometric code provisions and its numerous references to regulating "collection" are quite clearly, if not principally, aimed at attaching requirements to the "collection" of biometric information. *See* 105 ILCS 5/10-20.40. That the BIPA borrows a host of key points from the school biometrics code tells plainly of a legislative intent in governing Biometrics collection, instituting a formal, informed consent process in order to collect fingerprints or other Biometrics, and protecting the biometric information of minors under the age of 18. *Compare,* 105 ILCS 5/10-20.40(a), (b); 105 ILCS 5/34-18.34(a), (b); BIPA, 740 ILCS Secs. 14/10, 14/15.

III. Procedural history.

Plaintiff filed her Complaint on behalf of Alexander, her minor son, on January 7, 2016. She filed her Amended Complaint on April 22, 2016. (C. 005-21.) Defendants moved to dismiss under 735 ILCS 5/2-615, arguing Plaintiff was not "aggrieved" by Defendants' violations of the BIPA.[4] The Circuit Court denied that motion by order dated June 17, 2016. (C. 004; C. 124-25.)[5] Specifically, the Circuit Court held:

> I read the statute as a whole, and especially with respect to the legislative findings and intent of the statute, and reconciling that with Section 20. I think an aggrieved party under this statute is defined as by the 10th edition of Black's or the common meaning in every American College Dictionary, and that is somebody who has suffered some injury to a right. I don't think it is dependent upon any actual damages, and especially, I think that's supported by the fact that Section 20 gives you the option of getting liquidated damages or actual damages, whichever is greater.
>
> I think that they, for purposes of a 2-615 motion, and I guess for purposes of the whole case …. I think an aggrieved party is somebody who has had a violation of the statute that is directed at them and violates their right. They have a right to have certain disclosures and they're an aggrieved party. [*Id.*]

The Circuit Court further explained that one is "actually damaged" "due to violation of the statute." (C.109.) "[I]f there is a statute made to protect me and

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[4] Defendants originally moved to dismiss under both sections 2-615 and 2-619. (C. 078.) The section 2-619 motion argued SFEC was not the proper defendant. *Id.* Plaintiff then filed her amended complaint adding Great America, LLC, and SFEC agreed to withdraw its section 2-619 motion to proceed with a determination of its section 2-615 motion only. *Id.*

[5] The Circuit Court granted Defendants' motion to dismiss under 735 ILCS 5/2-615 with respect to Count III for Unjust Enrichment, but that Count and its dismissal are irrelevant to the present appeal. (A. 14.)

somebody violates it, it may be a penny. I mean, you have to put a value. It's difficult to value, but there is actual damage[ ]." *Id.*

Following this ruling, Defendants moved to appeal pursuant to Supreme Court Rule 308. (C. 085.) The Circuit Court initially denied the motion, but later granted Defendants' motion to reconsider on April 7, 2017. (C. 359; C. 001.) The Circuit Court's order on reconsideration certified the following questions for appeal:

> Question 1: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek statutory liquidated damages authorized under § 20(1) of the Act when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act.
>
> Question 2: Whether an individual is an aggrieved person under § 20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek injunctive relief authorized under § 20(4) of the Act, when the only injury he alleges is a violation of § 15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by § 15(b) of the Act. [C. 002-03.]

On June 7, 2017, the Appellate Court granted Defendants' petition to appeal these certified questions.

On December 21, 2017, after briefing and oral argument, the Appellate Court issued an opinion answering the certified questions in the negative. 2017 IL App (2d) 170317. The court held:

> [I]f the Illinois legislature intended to allow for a private cause of action for every technical violation of the Act, it could have omitted the word "aggrieved" and stated that every violation was

> actionable. A determination that a technical violation of the statute is actionable would render the word "aggrieved" superfluous. Therefore, a plaintiff who alleges only a technical violation of the statute without alleging *some* injury or adverse effect is not an aggrieved person under section 20 of the Act.

Id. at ¶ 23 (emphasis in original). The Appellate Court noted, without explanation, that "the injury or adverse effect need not be pecuniary." *Id.* at ¶ 30. Plaintiff petitioned for leave to appeal under Supreme Court Rule 315, and the Court granted her petition. (A12).

STANDARD OF REVIEW

The standard of review on this appeal is *de novo*. "By definition, certified questions are questions of law subject to *de novo* review." *Rozsavolgyi v. City of Aurora,* 2017 IL 121048, ¶ 21 (citing *Moore v. City of Chicago Park Dist.*, 2012 IL 12788, ¶ 9). Review of denial of a motion to dismiss pursuant to 735 ILCS 5/2-615 is *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Questions of statutory construction are reviewed *de novo*. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86 (2002).

ARGUMENT

The BIPA is a well-crafted, efficient, and cost-effective solution to the problems posed by the collection of private biometric information. Rather than establishing a costly bureaucracy and burdensome regulatory scheme, the BIPA creates simple notice, consent, and handling requirements, and then leaves enforcement exclusively to private lawsuits by the persons whose

Biometrics are collected. If a BIPA violation cannot be enforced by a private lawsuit, it cannot be enforced at all.

Much of the BIPA is prophylactic. The Act requires entities to develop guidelines for handling Biometrics and to make these guidelines public. 740 ILCS 14/15(a). It requires entities to give prior notice before collecting Biometrics. 740 ILCS 14/20(b)(1). And it requires entities to obtain informed written consent—a release—before collecting Biometrics. 740 ILCS 14/15(b)(3). "'Written release' means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." 740 ILCS 14/10.

There is no regulator to enforce BIPA. Instead, the Act allows "any person aggrieved by a violation" to do so by seeking "liquidated damages of $1,000, or actual damages, whichever is greater." 740 ILCS 14/20. The Act does not limit actions to actual damages; nor does it limit actions to violations of specific subsections or to cases of actual data breach or disclosure as Defendants have argued. Instead, the BIPA makes all violations actionable and allows for statutory damages instead of actual damages. Like damages, injunctive relief is available only to a "person aggrieved by a violation." 740 ILCS 14/20(4). A violation must be at least "negligent" to support a claim for liquidated damages, so BIPA is not a strict liability statute. 740 ILCS 14/20(1).

The Appellate Court construed the word "aggrieved" in the phrase "person aggrieved by a violation" to mean that no one can sue for any violation

of the BIPA unless they can show an "actual injury, adverse effect, or harm" beyond a "technical violation." 2017 IL App (2d) 1703178, ¶¶ 20, 23. If the General Assembly had intended every violation to be actionable, the Appellate Court reasoned, it would have omitted the word "aggrieved" from the Act. 2017 IL App (2d) 170317, ¶ 23.

Under the Appellate Court's construction, however, an entity that refuses to develop guidelines and make them public, fails to give notice, and fails to request and obtain written permission before collecting Biometrics cannot be sued for these violations without more because such violations are "technical" and cause no adverse effect or damage. Such a construction defeats BIPA's express purpose of "*regulating* the collection, use, safe handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (emphasis added). If a private person must wait to sue until he suffers harm beyond the violation of his rights under BIPA, the BIPA becomes purely remedial and loses any regulatory or prophylactic effect. No one could enforce the Act to require any entity to create guidelines, make them public, provide written notice, or obtain informed written consent before collecting Biometrics. 740 ILCS 14/15(a)-(b). The Appellate Court's holding defeats BIPA's purpose.

The General Assembly used the phrase "[a]ny person aggrieved by a violation" because it meant something less exacting than "suffers actual damage." The phrase unambiguously specifies that a person becomes

"aggrieved by a violation"—aggrieved by violation of his rights under BIPA—and does not require the violation to cause additional harm, as the Appellate Court held.

The plain meaning of "aggrieved" is merely to be "deprived of legal rights or claims." *The Random House College Dictionary* 26 (Jess Stein *et al.* eds., 1st ed. 1984); *Aggrieved Definition*, Dictionary.com, http://dictionary.reference.com/ browse/aggrieved (last visited June 18, 2018); Black's Law Dictionary *similarly defines "aggrieved" as, "1. (Of a person or entity) having* legal rights that are adversely affected; having been harmed by an infringement of legal rights. 2. (Of a person) angry or sad on grounds of perceived unfair treatment. AGGRIEVED, *Black's Law Dictionary* (10th ed. 2014). It defines "aggrieved party" as, "A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." PARTY, *Black's Law Dictionary* (10th ed. 2014).

BIPA creates legal rights. A violation of those rights damages or harms a person and causes him to be "aggrieved." This Court held long ago that a person is "aggrieved" when his legal right is invaded or denied; nothing more is required to make one "aggrieved." *Glos v. People*, 259 Ill. 332, 340 (1913) ("A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of .... 'Aggrieved' means having a substantial grievance; a denial of some personal or property right."); *see also Am. Sur. Co.*

v. Jones, 384 Ill. 222, 229-30 (1943) (applying *Glos*). *See also In re Harmston's Estate*, 10 Ill. App. 3d 882, 885 (3d Dist. 1973) ("'Aggrieved' means having a substantial grievance; a denial of some personal or property right."); *Greeling v. Abendorth*, 351 Ill. App. 3d 658, 662 (4th Dist. 2004) ("Like any other plaintiff in a 'civil action,' the plaintiff must be "aggrieved" (citation omitted), that is, the plaintiff must 'suffer[] from an infringement or denial of legal rights'").

The Appellate Court erred by construing the BIPA in a way that renders its notice and consent provisions superfluous, and by construing "aggrieved," an often-used statutory term, in a way that is contrary to controlling law, customary use, and canons of construction. Furthermore, the Appellate Court's construction, which reduces the BIPA to a statute concerned only about unauthorized disclosure after collection, directly conflicts with the stated legislative intent that "[t]he public welfare, security, and safety will be served by regulating the collection … of biometric identifiers and information." 740 ILCS 14/5.

The Court should reverse the Appellate Court, answer the certified questions in the affirmative, and preserve the purpose of the BIPA to protect the personal biometric information of the citizens of Illinois through private regulatory enforcement of the BIPA's protections.

I. The BIPA was intended to enable any person whose Biometrics are collected in violation of the Act to sue the collecting entity, regardless of whether the violation results in additional harm or adverse effect.

The "primary objective in construing a statute is to ascertain and give effect to the legislative intent, and the surest and most reliable indicator of that intent is the plain and ordinary meaning of the statutory language itself." *People v. Chapman*, 2012 IL 111896, ¶ 23. "Where the language is clear and unambiguous," it should be applied "without further aids of statutory construction." *Id.* The statute should be considered "in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in passing it." *Id.* In *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.,* 2014 IL 115526, ¶ 24, the Court summarized the well-established rules of statutory construction as follows:

> The issue is thus one of statutory construction, and the principles guiding our review are familiar. The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. *Jackson v. Board of Election Commissioners,* 2012 IL 111928, ¶ 48. The best indication of legislative intent is the statutory language, which must be given its plain and ordinary meaning. *Metropolitan Life Ins. Co. v. Hamer,* 2013 IL 114234, ¶ 18. It is improper for a court to depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Id.* Words and phrases should not be viewed in isolation, but should be considered in light of other relevant provisions of the statute. *Midstate Siding & Window Co. v. Rogers,* 204 Ill. 2d 314, 320 (2003). Further, each word, clause and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous. *Prazen v. Shoop,* 2013 IL 115035, ¶ 21. Where statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction. *Kunkel v. Walton,* 179 Ill. 2d 519, 534 (1997). However, if the meaning of an enactment is unclear from the

> statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy, as well as other sources such as legislative history. *Gruszeczka v. Illinois Workers' Compensation Comm'n,* 2013 IL 114212, ¶ 12. A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses. *Id.* ¶ 16. In determining legislative intent, we may also consider the consequences that would result from construing the statute one way or the other, and, in doing so, we presume that the legislature did not intend absurd, inconvenient, or unjust consequences. *Solon v. Midwest Medical Records Ass'n,* 236 Ill. 2d 433, 441 (2010).

Here, the statutory language at issue is the phrase, "Any person aggrieved by a violation of this Act shall have a right in a State Circuit Court … against the offending party." 740 ILCS 14/20. The Appellate Court construed the word "aggrieved" to require "actual injury, adverse effect or harm." 2017 IL App (2d) 170317 at ¶ 20. The Appellate Court considered the BIPA's purpose, dictionary definitions, and case law from other jurisdictions, but, respectfully, its analysis was flawed at each step.

First, the Appellate Court ignored BIPA's purpose, structure, and lack of public enforcement, and narrowed its private remedies so as to defeat its central aim of "*regulating the collection*, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (emphasis added). Second, the court ignored the dictionary definitions it cited and simply concluded, "these definitions also *suggest* that there must be actual injury." *Id.* (emphasis added). Finally, while relying on the opinions of several federal district courts and a Wisconsin state court, the Appellate

Court ignored longstanding Illinois case law construing the word "aggrieved" broadly, as it should be here. *Id.* at ¶¶ 21-22.

A. The Appellate Court's holding that a BIPA claim requires an "injury or adverse effect" other than violation of rights created by BIPA nullifies the Act's notice, disclosure, and written permission requirements.

The BIPA was designed to regulate the collection and storage of the Biometrics of private citizens by empowering them to privately enforce its simple notice and consent requirements at no cost to the State and without burdening private entities with compliance with a complex regulatory scheme. The Appellate Court's decision eviscerates this purpose by prohibiting persons whose personal biometric information is collected in violation of the Act from enforcing its prophylactic provisions.

The BIPA requires entities who collect personal biometric information to: (a) make their policies publicly available; (b) provide written notice and obtain a written release before collecting the information; (c) refrain from selling, leasing or profiting from the information; (d) refrain from generally disclosing the information; and (e) properly store, transmit, and protect the information from disclosure. 740 ILCS 14/15(a)-(e). The BIPA creates a private cause of action for "[a]ny person aggrieved by a violation of this act." 740 ILCS 14/20. The BIPA does not provide for any other form of enforcement and no governmental or other entity may enforce the Act. *Id.*

As alleged at bar, Plaintiff did not receive the rights and benefits BIPA subsections 15 (a) and (b) expressly created. Defendants deprived Plaintiff of

the opportunity to receive the detailed notices subsections 15 (a) and (b) required; they deprived her of the opportunity to give, withhold, or otherwise consider informed consent for capture and collection of her son's Biometrics, as section 15(b) required; and, therefore, they illegally collected her son's Biometrics in violation of BIPA. These violations automatically caused harm; harm to Plaintiff's rights created by BIPA. Under Defendants' view, the Appellate Court's opinion establishes that these harms, without further adverse effect, do not suffice to bring a private right of action. Instead, Defendants read the statute as permitting companies to capture Biometrics in any way they see fit, and without fear of recourse, provided they do not allow the information to be wrongly used, disclosed, or breached in a way that is actually discovered later. Respectfully, such a statutory construction is upside down.

The Appellate Court defined the issue as "whether a 'person aggrieved by a violation of [the] Act must allege some actual harm." 2017 IL App (2d) 170317 at ¶ 1. The court concluded, "We find that a "person aggrieved" by such a violation must allege some actual harm." *Id.* The court noted "that the injury or adverse effect need not be pecuniary," but held that a person is not aggrieved merely by a violation of his rights under BIPA unless there is some other "injury or adverse effect." 2017 IL App (2d) 170317 at ¶ 28. "If a person alleges only a technical violation of the Act without alleging any injury or adverse

effect, then he or she is not aggrieved and may not recover under any of the provisions in section 20." *Id.*

The Appellate Court's construction renders subsections (a) and (b) of section 15 of the BIPA unenforceable nullities, as the injury or adverse effect contemplated by the Appellate Court only arises from situations concerning improper use or disclosure of Biometrics. Yet, the BIPA contains separate, subsequent provisions regarding improper use and disclosure. *See* 740 ILCS 14/15(c)-(e). Hence, if the General Assembly had intended the result reached by the Appellate Court, there would have been no reason for subsections (a) and (b) even to be included in the statute in the first place.

B. Examining the BIPA as a whole shows section 20 was intended to allow a private suit to enforce any violation of section 15.

The BIPA should be considered "in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in passing it." *Chapman*, 2012 IL 111896 at ¶ 23. Examining the structure and language of the BIPA as a whole shows that the General Assembly intended to allow private regulatory enforcement of all provisions of section 15 without an actual damage barrier to suit. *See, e.g.*, *Standard Mut. Ins. Co. v. Lay*, 2013 IL 114617, ¶ 32 (statutes provide for liquidated damages without proof of actual damage "at least in part, [as] an incentive for private parties to enforce the statute.")

In its entirety, the BIPA fills less than 8 printed pages.[6] The heart of the BIPA and its *only* requirements are contained in section 15, which: (a) mandates public disclosure of Biometrics retention and destruction policies; (b) requires written notice and a written release by the subject or the subject's legally authorized representative in order to collect; (c) prohibits selling the information; (d) requires express written permission to disclose the information; and (e) requires protection of the information. 740 ILCS 14/15(a)-(e). Section 20 gives those private persons whose information is collected—and only those persons—the right to enforce BIPA. 740 ILCS 14/20.

The Appellate Court viewed violations of section 15's notice and written release requirements—subsections (a) and (b)—as merely "technical." 2017 IL App (2d) 170317, ¶ 28. Nothing in the Act suggests such a distinction is appropriate. Section 20 renders "a violation of this Act" actionable. Section 20 does not distinguish between section 15's subsections. If the certified questions are answered in the negative, however, violations of subsections (a) and (b) might be viewed as never actionable, whether for liquidated damages or injunctive relief. Or, the Appellate Court's opinion might be perversely

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[6] BIPA consists of seven short sections, including its "Short Title," "Legislative Findings and Intent," and "Effective Date." 740 ILCS 14/1, 14/5, 14/99. The four other sections are: § 10 "Definitions"; § 15 "Retention, Collection, Disclosure, Destruction"; § 20 "Right of Action"; and § 25 "Construction." The Definition and Construction sections simply inform the only two operative sections – 15 and 20. Section 15 sets forth the requirements for entities that collect and store Biometrics, and section 20 gives those private persons whose information is collected a right to enforce. 740 ILCS 14/15, 20.

interpreted to permit recovery for a violation of subsections (a) or (b) only when an attendant violation (*e.g.*, disclosure, theft, or data breach) under subsection (c), (d), or (e) is alleged, contrary to rules of statutory construction. *E.g., Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.,* 2014 IL 115526, ¶ 24 ("[E]ach word, clause and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous.") If the General Assembly intended that only subsections (c), (d), and (e) would be enforceable, and that subsections (a) and (b) would not, then it would have said so expressly in the BIPA. It did not. The Appellate Court erred by reading such a distinction into the Act.

Section 20 allows for recovery of "liquidated damages of $1,000 *or* actual damages, whichever is greater." 740 ILCS 14/20(1) (emphasis added). Section 20 does not premise the liquidated damages on the existence of any actual damages, independent of the violation of BIPA. Section 20 also allows for recovery of "reasonable attorneys' fees, costs, including expert witness fees, and other litigation expenses." 740 ILCS 14/20(3). Given this relief, the liquidated damages provision would seem unnecessary and inappropriate if the General Assembly intended to bar actions that alleged no adverse effect other than the violation of one or more rights created by BIPA.

The link between the requirements of section 15 and enforcement under section 20 is the entity's possession of personal biometric information about a "person" who, when "aggrieved by a violation of" section 15, can enforce the

Act. On the one hand, no entity is subject to the BIPA if it does not collect and store personal biometric information. On the other hand, no one can enforce the BIPA unless their personal biometric information is collected and stored. Furthermore, the person is not "aggrieved" unless the entity collected or stored that information in violation of section 15. And, the person cannot sue for liquidated damages unless the violation was negligent or reckless. 740 ILCS 14/20(1)-(2). Thus, the Act contemplates only private enforcement of its prophylactic requirements and permits enforcement only by a particular subset of people: individuals whose BIPA rights were violated.

Subsection 15(a)'s requirement that entities develop a written policy for the retention and destruction of personal biometric information is illustrative. The written policy must provide a "schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting and obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity." 740 ILCS 14/15(a). Then, the private entity must follow the schedule and guidelines it created for itself. *Id.*

An expensive government bureaucracy might ordinarily enforce subsection 15(a), but BIPA does not create or authorize one. Instead, BIPA allows private entities to create their own guidelines within the specified limits, and provides only the threat of private enforcement. This offers industry much more leeway than a complex regulatory scheme and eliminates any cost

to the government to enforce the guidelines. This legislative scheme is meaningless, however, if there is no method for private enforcement.

Under the Appellate Court's construction of section 20, "any person aggrieved by a violation" does not include any person who cannot show a violation of section 15 caused him harm or adverse effect, beyond the violation of BIPA. Who could show they suffered actual harm because an entity violated its obligation to create its own policies and guidelines under subsection (a)? A person might be injured by an entity's failure to follow its own policies, but nobody could show a consequential injury flowing from a policy that did not exist. The Appellate Court's construction not only prevents enforcement of subsection (a)'s guideline requirement, but it also creates a perverse incentive not to comply.

Likewise, if a failure to comply with subsection (b)'s prior notice and written release requirements is not actionable, no entity would ever need bother complying with those requirements. If a person cannot sue a private entity for collecting and storing his personal biometric information in blatant violation of the BIPA, but rather must wait until the collector's illegal actions cause him additional harm, then the Appellate Court has rendered BIPA's notice and consent provisions unenforceable as written.

C. If damages are unavailable for a violation of the BIPA, so is injunctive relief.

Making matters worse, the Appellate Court concluded that injunctive relief is also unavailable, absent some other injury or adverse effect, so a victim

cannot sue even to compel the violator to destroy his Biometrics to prevent the potential for future harm. 2017 IL App (2d) 170317, ¶ 28; 740 ILCS 14/15(c)-(e). Section 20 allows for "other relief, including an injunction, as the State or federal court may deem appropriate." *Id.* at 20(4). As the Appellate Court correctly explained, the phrase "[a]ny person aggrieved" applies to the entirety of section 20, so it applies with equal force both to the liquidated damages subsection and the injunctive relief subsection. 2017 IL App (2d) 170317, ¶ 28. But, if the second certified question is answered in the negative, no one can bring any action for injunctive relief to compel any entity to comply with the BIPA unless they have already suffered damage or adverse effect.

This would seem particularly relevant to the enforcement of the policy and guideline requirement of subsection (a) of section 15. In the event a person's Biometrics were collected by an entity that had not "develop[ed] a written policy, made available to the public establishing a retention schedule and guidelines for permanently destroying biometric identifiers," the person could seek to compel the entity to do so. Once forced to do so, the entity would have to follow those policies.

Under the Appellate Court's construction, however, an injunctive action to compel an entity to develop guidelines would be impossible because it would be based on a mere "technical" violation. *Id.* Nor could the entity be compelled through injunctive relief to disclose the purposes for which the Biometrics were used, or if the Biometrics have been destroyed, absent a showing of some

resulting harm. Meanwhile, there would be no guidelines in force, and the person would have to wait to see if the scofflaw entity's possession of the person's Biometrics would ever cause the person actual harm. This result is especially flawed, because injunctive relief is intended to prevent future harm.

In BIPA's "Legislative Findings and Intent" section, the General Assembly stated, "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." 740 ILCS 14/5(g). This sentence and its emphasis on "*public* welfare" and "regulating" Biometrics is incompatible with the idea that only persons who have suffered personal harm over and above a violation of the Act can sue. By importing the requirement of personal actual damages on the single word "aggrieved" in section 20, the Appellate Court transformed the BIPA from a statute aimed at protecting the "public welfare" and "regulating" the collection of Biometrics into a strictly remedial benefit limited to those whose damage has advanced from privacy damage to pecuniary damage.

A sponsor of the BIPA stated, "It sets collection and retention standards while prohibiting the sale of biometric information." Transcript of the 95th General Assembly, *supra*, 249. If the BIPA is construed as the Appellate Court held, however, and subject only to remedial and not prophylactic enforcement, then these regulatory purposes are nullified. As noted above, "if the meaning of an enactment is unclear from the statutory language itself, the court may

look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy." *Home Star Bank & Fin. Servs.*, 2014 IL 115526 at ¶ 24, *citing Gruszeczka,* 2013 IL 114212 at ¶ 12. Such a construction is contrary to the BIPA's express purpose to protect the biometric data of the citizens of Illinois as a whole.

D. Answering the certified questions in the affirmative does not render the word "aggrieved" superfluous.

The BIPA passage at issue states, "Any person aggrieved by a violation of this Act shall have a right of action." 740 ILCS 14/20. Examining this passage and considering alternatives to the word "aggrieved" shows the Appellate Court's error.

The Appellate Court reasoned that "if the Illinois legislature intended to allow for a private cause of action for every technical violation of the Act, it could have omitted the word 'aggrieved' and stated that every violation was actionable." 2017 IL App (2d) 170317 at ¶ 23. This reasoning is flawed because, as explained above, it fails to consider any portion of the BIPA except the word "aggrieved." Moreover, if the General Assembly had intended to limit the BIPA's exclusively private cause of action enforcement mechanism to a person who suffered consequential damages, it could have said so instead of using the word "aggrieved." *Id.*; *see, e.g.,* 815 ILCS 505/10a(a); 215 ILCS 155/25; 740 ILCS 120/3; 815 ILCS 305/30; 765 ILCS 910/9. For example, the General Assembly might have said: "damaged" or "harmed," instead of "aggrieved," had it intended to limit actions as the Appellate Court's decision does. By choosing

"aggrieved," the General Assembly created a threshold for standing to sue that is less than "adversely affected" or "consequentially damaged."

But by the same logic, had the General Assembly intended to require proof of actual damage, it would have said so, as it is undoubtedly capable of doing. *See, e.g.*, 815 ILCS 505/10a(a) (Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person."); 215 ILCS 155/25 ("actual damages"); 740 ILCS 120/3 ("actual damages"); 815 ILCS 305/30 (requiring "actual damages" and permitting statutory damages only "in addition to" such actual damages); 765 ILCS 910/9 ("actual damages").

The Appellate Court concluded that "[a] determination that a technical violation of the statute is actionable would render the word 'aggrieved' superfluous." 2017 IL App (2d) 170317 at ¶ 23. That conclusion was wrong because the language limits the private cause of action created by the Act to the individual whose legal rights as created by the Act were deprived by the defendant's violation. "Aggrieved" performs an important function in BIPA, but it is not the one that the Appellate Court found. "Aggrieved" permits persons whose rights have been violated—and no others—to sue. This is consistent with the longstanding interpretation of "aggrieved" by this Court, as well as the legislature's usage in other statutes.

Without "aggrieved," the provision would allow "any person" to enforce a violation of the Act; aggrieved performs the critical function of limiting

statutory standing to those directly affected by a violation. Thus, the word "aggrieved" is not superfluous. It is part of the phrase "person aggrieved by a violation," which as a whole identifies the person who can enforce a violation. BIPA makes clear that the Act can be enforced by anyone whose personal "legal rights" as created by the Act were "deprived." *The Random House College Dictionary*, *supra*, 26; Dictionary.com, *supra*. *See also Estate of Hicks*, 174 Ill. 2d 433, 450 (1996) (use of the word "aggrieved" differentiates proper parties from improper parties).

To interpret the term to require some harm aside from a violation of the rights in BIPA renders the statute's provisions—aimed at *preventing* harm rather than remedying it—unenforceable by the people the General Assembly intended to enforce it. Accordingly, the word "aggrieved," like the phrase "aggrieved by a violation," does not imply a requirement of additional harm beyond invasion of the rights conveyed by BIPA, and the Appellate Court's conclusion to the contrary was wrong.

E. The Appellate Court relied on case law that is neither binding nor persuasive.

The Appellate Court placed heavy reliance on *Avudria v. McGlone Mortgage Co.*, 2011 WI App 95, 802 N.W.2d 524 (2011), but that reliance was misplaced. There, the Wisconsin statute at issue was enforced by a state regulatory agency, in sharp contrast to the BIPA. *Avudria* considered an action against a mortgage broker for failing to use forms created by the Wisconsin Department of Financial Institutions ("DFI"). A statute required all mortgage

brokers to comply with all DFI regulations. Wis. Stat. § 227.77(1)(k). Another statute allowed a private cause of action for "[a] person who is aggrieved by an act" in violation of the former statute. Wis. Stat. § 224.80(2).

The DFI issued detailed regulations mandating mortgage broker disclosures that included substantive requirements but also included a technical requirement that mortgage brokers use a "form prescribed by the department." Wis. Admin. Code §§ DFI-Bkg 44.01(3)-44.02(3). The defendant failed to use a DFI form but otherwise complied with the substance of the disclosure requirements. The plaintiff admitted he was "'pleased' with the services he received from" the defendant and was not misled. *Avudria*, 2011 WI App 95, ¶ 5, 802 N.W.2d at 526.

Under these circumstances, relying on Wisconsin precedents, and without reference to legislative purpose, the *Avudria* court held that the word "aggrieved" should be construed to require "*some* actual injury or damage." *Id.* at ¶ 25, 802 N.W.2d at 530 (emphasis in the original). The court was construing a statute that pre-supposed regulatory enforcement by an established governmental bureaucracy. The form at issue was a creation of that bureaucracy, not the statute. In contrast, the BIPA cannot be enforced by any agency and its requirements were set forth by the General Assembly, not a regulatory bureaucracy.

Although *Avudria* may have a superficial resemblance to the certified questions in this case, it presented a materially different situation where the

legislative intent and common sense did not support the plaintiff's action or its construction of the word "aggrieved." With BIPA, however, the stated legislative purposes and common sense compel the opposite conclusion.

Finally, the Appellate Court relied on two federal district court decisions. *McCullough v. Smarte Carte, Inc.*, No. 16-C-0377, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016); *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 519-520 (S.D.N.Y. 2017), *aff'd in part, vacated in part, remanded sub nom. Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017). Those decisions were primarily concerned with federal courts' limited subject matter jurisdiction in light of Article III standing limitations. In fact, in *Vigil* the Second Circuit vacated the portions of the lower court's opinion that went beyond the federal standing issue because the lower court did not have subject matter jurisdiction to opine on the merits of the plaintiff's claims. *Santana*, 717 F. App'x at *17-*18. Neither federal decision examined the BIPA's purpose or structure, which as explained above depend upon private regulatory enforcement to work.

The Court should find these Wisconsin and federal opinions unpersuasive and decline to follow them. Instead, the Court should follow the General Assembly's express intentions and construe the BIPA to advance its purpose of enabling regulation of the collection of Biometrics in Illinois by private lawsuit, rather than by expensive and burdensome governmental regulation.

II. The plain meaning of "aggrieved" means being deprived of a legal right, such as a legal right created by the BIPA.

The Appellate Court's conclusion that the word "aggrieved" requires second-level harm beyond a deprivation of a personal legal right is unsupported by the ordinary meaning of the word or prior Illinois decisions interpreting or applying it.

A. Dictionaries define "aggrieved" to mean a deprivation of any legal right.

Dictionaries are an established starting point for the construction of statutory language. *Chapman*, 2012 IL 111896, ¶ 24. As noted above, the plain meaning of "aggrieved" means nothing more than to be "deprived of legal rights or claims." *The Random House College Dictionary*, *supra*, 26; Dictionary.com, *supra*. *Black's Law Dictionary* similarly defines "aggrieved" as, "1. (Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights. 2. (Of a person) angry or sad on grounds of perceived unfair treatment. AGGRIEVED, *Black's Law Dictionary* (10th ed. 2014). It defines "aggrieved party" as, "A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." PARTY, *Black's Law Dictionary* (10th ed. 2014). The first definition covers anyone "having legal rights that are adversely affected," and the second covers anyone "entitled to a remedy."

The Appellate Court did not consult an ordinary dictionary, and it read the definitions in *Black's* to "suggest that there must be an actual injury," but

it did not explain why. 2017 IL App (2d) 170317 at ¶ 20. Upon closer examination, it would seem the Appellate Court simply ignored the first sentences of both of the *Black's* definitions and construed their second sentences after the semi-colon to be controlling. Significantly, neither definition suggests that an "aggrieved" person must have suffered actual damages as that is understood in the law.

The Appellate Court's application of *Black's* was not supported by the language it quoted or the source material, when considered in its entirety. Moreover, it was inconsistent with the ordinary dictionary definitions of the word "aggrieved." The Court should find that the word "aggrieved," standing alone, does not require proof of any damage or harm beyond deprivation of a legal right. With this understanding of the word, it is clear the certified questions should be answered in the affirmative and the Appellate Court should be reversed.

B. Illinois courts have broadly construed the word "aggrieved" to mean the infringement of a legal right.

The Appellate Court seemingly ignored the Illinois case law holding, quite clearly, that the word "aggrieved" does not require a showing of resulting damage. Consistent with dictionary definitions of the term, as discussed above, this Court long ago held that a person is "aggrieved" whenever his legal right is invaded or denied; nothing more is required to make one "aggrieved." *See Glos*, 259 Ill. at 340. An "aggrieved party" is anyone who is entitled to a remedy, not exclusively one who suffers loss. The definition includes an adverse effect

on one's "personal ... rights." AGGRIEVED, *Black's Law Dictionary*. It does not require an adverse effect *in addition to* the deprivation of one's legal rights.

Glos confronted the issue of whether a non-party to a foreclosure action could challenge the result. This Court held that only an "aggrieved person" could bring such an action, and proceeded to analyze and define the meaning of an "aggrieved person." 259 Ill. at 339-40. *Glos* stated, "A person is prejudiced or aggrieved, in the legal sense, *when a legal right is invaded by the act complained of* ...." *Id.* at 340 (emphasis added). In *Harmston's Estate*, the Appellate Court likewise wrote, "'Aggrieved' means having a substantial grievance; *a denial of some personal or property right*." 10 Ill. App. 3d at 885 (emphasis added). *Greeling* concluded, "[T]he plaintiff must be 'aggrieved' (citation omitted), that is, the plaintiff must 'suffer [ ] from *an infringement or denial of legal rights*.'" 351 Ill. App. 3d at 662 (emphasis added).

Glos, *Harmston's Estate*, and *Greeling* were Illinois law when the General Assembly drafted the BIPA. "The legislature is presumed to have been aware of" the definition. *Benhart v. Rockford Park Dist.*, 218 Ill. App. 3d 554, 558 (2d Dist. 1991), *citing Kozak v. Retirement Bd. Of Firemen's Annuity and Ben. Fund of Chicago*, 95 Ill. 2d 211, 218 (Ill. 1983) ("We must presume that in adopting that amendment the legislature was aware of judicial decisions concerning prior and existing law and legislation"). This rule is particularly important where, as here, the statute does not define the term differently than as construed. Applying *Glos* and its progeny here, Plaintiff was aggrieved when

Defendants invaded her (and Alexander's) right to receive written information and opportunity to decide whether to consent in writing to Alexander's fingerprinting. The Appellate Opinion does not follow or distinguish *Glos, Harmston*, or *Greeling,* or even mention them.

C. Other statutes and common law use the word "aggrieved" in the same manner as the BIPA, and demonstrate that one is aggrieved, and directly harmed, by a violation of BIPA subsection 15(b).

Like the case law, other Illinois statutes have used "aggrieved" to denote an invasion of a legal right and a concomitant right to a remedy without proof of actual or pecuniary loss. The Uniform Commercial Code defines an "aggrieved party" to mean "a party entitled to pursue a remedy." 810 ILCS 5/1-201(b). In the chapter on leases, the UCC provides: "Anticipatory repudiation. If either party repudiates a lease contract with respect to a performance not yet due ... the aggrieved party may suspend performance." 810 ILCS 5/2A-402(c). Similarly, the mortgage release statute states, "If any mortgagee or trustee, in a deed in the nature of a mortgage ... knowing the same to be paid, shall not, within one month after the payment of the debt secured ... comply with the requirements of Section 2 of this Act, he shall, for every such offense, be liable for and pay to the party aggrieved the sum of $200." 765 ILCS 905/4.

These are situations where the right to a legal remedy is completely independent of whether the "aggrieved party" has yet suffered any adverse effect other than the violation of rights. The Appellate Court's attempt to distinguish these statutes failed to do so. *Rosenbach*, 2017 IL App (2d) 170317

at ¶¶ 24-25. Like the BIPA, these statutes impose restrictions to protect against potential future harms. That the Appellate Court apparently dismisses the *per se* adverse effect on and injury to persons who surrender Biometrics without the protections conferred by the BIPA does not mean that the General Assembly dismissed them.

It is well established that deprivation of one's legal right to information required by statute itself causes injury. *See, e.g., FEC v. Akins*, 524 U.S. 11, 21 (1998) ("... a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); *Heartwood, Inc. v. United States For. Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) ("We find Heartwood's argument as to 'informational' injury compelling as well," and finding that the failure to provide an environmental assessment deprived stakeholders of information necessary to monitor agency activity).

Here, Defendants deprived Plaintiff of information the General Assembly deemed significant enough to codify and require. Plaintiff was injured and, therefore, aggrieved, when Defendants deprived her of required information concerning the risks of this particular Biometrics transaction, and the ability to make an informed decision about whether or not to sign a written release permitting the collection of her son's Biometrics. Such information is a tangible and important thing and Defendants deprived Plaintiff of it.

Furthermore, depriving a person of the right to refuse to execute a written release causes injury. *See, e.g.,* 405 ILCS 5/2-102(a-5) (physician must

"advise the recipient, in writing, of the side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment" and requires informed consent); *In re Beverly B.*, 2017 IL App (2d) 160327, ¶ 32 (discussing informed consent); *Fiala v. Bickford Sr. Living Group, LLC*, 2015 IL App (2d) 150067 (claim for medical battery requires "lack of consent to the procedure performed, that the treatment was contrary to the patient's will, or that the treatment was at substantial variance with the consent granted").

Illegally taking highly sensitive Biometrics constitutes injury, without further ensuing harm. The BIPA provisions at issue strictly prohibit collection, absent compliance with section 15(b). Illinois common law additionally endows individuals with rights to intangible personal property[7] and thus provides a foundation for a property interest in one's Biometrics, even independent of the protections conferred by the BIPA. The illegal taking of one's private, unique and immutable personal property is a harm that infringes upon property rights, as stated in *Glos* and its progeny.

The Appellate Court overlooked that a section 15(b) violation itself causes such harms by invading or infringing upon a person's rights under BIPA. The person is "aggrieved" as the General Assembly understood the term and can file a claim under section 20 without alleging any additional harm.

[7] *See First Nat'l Bank v. Department of Revenue,* 85 Ill. 2d 84 (Ill. 1981); *Liddle v. Salem Sch. Dist. No. 600,* 249 Ill. App. 3d 768 (5th Dist. 1993).

CONCLUSION

The Generally Assembly intentionally created the BIPA to regulate the collection of Biometrics in Illinois through private enforcement, so it would not require the creation of an expensive and burdensome governmental agency. To achieve this purpose, persons whose Biometrics are collected by entities in Illinois in violation of the BIPA must be able to sue to enforce the Act to protect the "public welfare." If the Court affirms the Appellate Court and answers the certified questions in the negative, it will render subsections (a) and (b) of section 15 of the BIPA both nullities and essentially defeat their application in Illinois. It will also greatly restrict the enforcement of the other subsections of section 15 of the BIPA, and defeat the Act's regulatory purpose, converting it into a strictly remedial statue. Instead, Plaintiff respectfully submits, the Court should answer the certified questions in the affirmative, reverse the Appellate Court, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief is 10,460 words, excluding the pages containing the Rule 341 (d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a).

Dated: July 5, 2018.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

The undersigned attorney further hereby certifies under oath, in accordance with 735 ILCS 5/1-109, that on July 5, 2018, he submitted the foregoing Brief of Plaintiff-Appellant *Stacy Rosenbach* using the Court's electronic filing service and he caused to be served a copy of the foregoing on the parties listed below by electronic mail and by depositing them in the U.S. Mail at 134 N. La Salle St., Chicago, IL with proper postage prepaid and addressed as follows:

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APPENDIX

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. SIX FLAGS ENTERTAINMENT CORPORATION and GREAT AMERICA LLC, Defendants-Appellants.	)	Appeal from the Circuit Court of Lake County. No. 16-CH-13 Honorable Luis A. Berrones, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court, with opinion.
Justices Jorgensen and Schostok concurred in the judgment and opinion.

OPINION

¶ 1 This interlocutory appeal arises from the claim of plaintiff, Stacy Rosenbach, as mother and next friend of Alexander Rosenbach and on behalf of all others similarly situated, that defendants, Six Flags Entertainment Corporation (Six Flags) and Great America LLC (Great America), violated the Biometric Information Privacy Act (Act) when Alexander purchased a season pass for a Great America theme park and defendants fingerprinted him without properly obtaining written consent or disclosing their plan for the collection, storage, use, or destruction of his biometric identifiers or information. 740 ILCS 14/1 *et seq.* (West 2016). Plaintiff alleged

not that she or Alexander suffered any actual injury but that, had she known of defendants' conduct, she would not have allowed Alexander to purchase the pass. Section 20 of the Act provides a cause of action to any "person aggrieved by a violation of this Act." 740 ILCS 14/20 (West 2016). Arguing that a person who suffers no actual harm has not been "aggrieved," defendants moved to dismiss the complaint. The trial court denied the motion to dismiss but later certified under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016) two questions relating to whether a "person aggrieved by a violation of [the] Act" must allege some actual harm. We find that a "person aggrieved" by such a violation must allege some actual harm.

¶ 2 I. BACKGROUND

¶ 3 A. The Act

¶ 4 The Illinois legislature passed the Act in 2008 to provide standards of conduct for private entities in connection with the collection and possession of biometric identifiers and biometric information. 740 ILCS 14/15 (West 2016). A "biometric identifier" is a retina or iris scan, fingerprint, voiceprint, or hand- or face-geometry scan. 740 ILCS 14/10 (West 2016). The Act requires private entities, like defendants, to develop written policies, made available to the public, establishing a retention schedule and guidelines for the destruction of biometric identifiers. See 740 ILCS 14/15(a) (West 2016). Private entities who collect or purchase biometric identifiers are required to first (1) inform subjects that the information is being collected or stored; (2) inform subjects of the purpose and length of term for which the information is being collected and stored; and (3) receive from subjects written consent to collect the information. 740 ILCS 14/15(b) (West 2016). Private entities are prohibited from selling the information and from disclosing the information without consent or other authorization. 740 ILCS 14/15(c), (d) (West 2016). The Act also requires "using the reasonable standard of

care within the private entity's industry" to store and protect the information. 740 ILCS 14/15(e) (West 2016).

¶ 5 Of relevance to this appeal is section 20, titled "Right of action," which provides that "[a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." 740 ILCS 14/20 (West 2016). The Act has a definition section, but there is no definition for the term "aggrieved" or "person aggrieved." See 740 ILCS 14/10 (West 2016).

¶ 6 B. Plaintiff's Complaint

¶ 7 Plaintiff's complaint alleged the following. Six Flags implements a biometric fingerprint-scanning and identification process for season-pass holders at Great America. Alexander and others were fingerprinted and had their biometric data collected, recorded, and stored as part of Six Flags' security process for entry into the Great America theme park in Gurnee, Illinois. When Alexander purchased his season pass, he went to the security checkpoint at the park and his thumb was scanned into the Six Flags "biometric data capture system." Then he went to the administrative building to obtain a season-pass card to use in conjunction with his thumbprint scan to gain access to the park.

¶ 8 Upon Alexander's return home, plaintiff asked him for a booklet or paperwork that accompanied the season pass, but she learned that there was none. Plaintiff alleged that neither she nor Alexander was informed in writing of the specific purpose and length of term for which Alexander's thumbprint would be collected, stored, and used and that neither she nor Alexander signed any written release regarding the thumbprint. Plaintiff alleged that she did not consent in writing to the collection, storage, use, sale, lease, dissemination, disclosure, redisclosure, or

trade of, or for Six Flags to otherwise profit from, Alexander's thumbprint "or associated biometric identifiers or information."

¶ 9 After Alexander obtained his season pass, he never returned to the park. Plaintiff alleged that "Six Flags retained [Alexander's] biometric identifiers and/or information, but did not obtain written consent to get it, has not publicly disclosed what was done with it or at relevant times any purposes for which the identifiers or information were collected, and has not disclosed for how long the identifiers or information were or will be kept."

¶ 10 In January 2016, plaintiff sued defendants for fingerprinting season-pass holders without properly obtaining written consent and without properly disclosing their plan for the collection, storage, use, or destruction of the biometric identifiers or information. Plaintiff alleged violations of the Act and unjust enrichment. Plaintiff alleged that she and the putative class were "entitled to the maximum applicable statutory or actual damages provided under [the Act]," which is $5000 per violation. 740 ILCS 14/20(2) (West 2016). Plaintiff alleged not that she or Alexander suffered any actual injury, but that, had she known of defendants' conduct, "she never would have purchased a season pass for her son."

¶ 11 C. Motion to Dismiss and Rule 308(a) Certification

¶ 12 Defendants filed a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)), arguing that under the Act any right of action is limited to a "person aggrieved," which excludes plaintiff because she failed to allege any actual injury. Defendants also argued that plaintiff failed to state a claim for unjust enrichment. Following a hearing, the court denied the motion as to the claims under the Act but granted it with prejudice as to the unjust-enrichment claim.

¶ 13 Defendants filed a motion for a Rule 308(a) certification on July 22, 2016. They argued that significant legal questions were raised by the order denying their motion to dismiss, mainly (1) whether an individual is "aggrieved" under the Act when he or she alleges that biometric information was collected without the disclosures and written consent required under the Act but does not allege that the collection caused an actual injury; (2) whether a purchase of a product constitutes an injury sufficient to make a person "aggrieved" under the Act if he or she otherwise received the benefit of the bargain; and (3) whether a plaintiff is entitled to liquidated damages under the Act if he or she cannot establish that he or she suffered an actual injury.

¶ 14 Defendants further argued that the appellate court had not yet interpreted the Act and its limitation of a right of action to a "person aggrieved," which presented issues of first impression and substantial grounds for differences of opinion. Also, an appeal would materially advance the termination of the litigation. The trial court denied defendants' motion for a Rule 308(a) certification on January 6, 2017.

¶ 15 Relying on rulings in several other cases under the Act, defendants filed a motion for reconsideration. On April 7, 2017, the trial court granted the motion and, reformulating the questions previously raised by defendants, certified the following two questions for our review: (1) whether an individual is an aggrieved person under section 20 of the Act and may seek statutory liquidated damages authorized under section 20(1) of the Act (740 ILCS 14/20(1) (West 2016)) when the only injury he or she alleges is a violation of section 15(b) of the Act by a private entity that collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining the written consent required by section 15(b) of the Act and (2) whether an individual is an aggrieved person under section 20 of the Act and may seek injunctive relief authorized under section 20(4) of the Act (740 ILCS 14/20(4) (West 2016))

when the only injury he or she alleges is a violation of section 15(b) of the Act by a private entity that collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining the written consent required by section 15(b) of the Act.

¶ 16 Defendants timely filed an application for leave to appeal in this court, and we granted the application pursuant to Rule 308.

¶ 17 II. ANALYSIS

¶ 18 The certified questions revolve around whether a party is "aggrieved," and thus may bring an action for liquidated damages or injunctive relief, when the only injury alleged is a violation of the notice and consent requirements of section 15(b) of the Act. Defendants contend that the interpretation of "aggrieved" most consistent with the Act's language and purpose, and with interpretations of that term in other statutes and in other jurisdictions, is that it requires actual harm or adverse consequences. Plaintiff opposes this and argues that a mere technical violation of the Act is sufficient to render a party "aggrieved."

¶ 19 Defendants' argument raises a question of statutory construction, which invokes well-settled principles. Our primary objective in construing a statute is to ascertain and give effect to the legislative intent, and the surest and most reliable indicator of that intent is the plain and ordinary meaning of the statutory language itself. *People v. Chapman*, 2012 IL 111896, ¶ 23. Where the language is clear and unambiguous, this court will apply the statute without further aids of statutory construction. *Id.* In determining the plain meaning of the statutory terms, we consider the statute in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in passing it. *People v. Davis*, 199 Ill. 2d 130, 135 (2002). Statutes must be construed so that each word, clause, and sentence is given meaning, and not rendered superfluous. *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007).

¶ 20 The Act does not define "aggrieved." When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the plain and ordinary meaning of the term. *Chapman*, 2012 IL 111896, ¶ 24. Black's Law Dictionary defines "aggrieved party" as "[a] party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." Black's Law Dictionary (10th ed. 2014). Similarly, "aggrieved" is defined as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." *Id.* Although plaintiff asserts that the dictionary definitions support her reading of the statute in that Alexander's right to privacy is a "personal right" or a "legal right" that has been "adversely affected," these definitions also suggest that there must be an actual injury, adverse effect, or harm in order for the person to be "aggrieved."[1]

¶ 21 In *McCollough v. Smarte Carte, Inc.*, No. 16-C-03777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016), the plaintiff sought damages stemming from violations of the Act. Citing the above definition of "aggrieved party," the district court held that, by alleging a technical violation of the Act, the plaintiff did not meet that definition, because she had not alleged any facts to show that her rights had been adversely affected by the violation. *McCollough*, 2016 WL 4077108, at *4; see also *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 519-20 (S.D.N.Y. 2017) (finding the court's analysis in *McCollough* instructive). While cases from lower federal courts are not binding, we may consider their analyses persuasive. See *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL (2d) 140589, ¶ 43. Alleging only technical violations of the notice and consent provisions of the statute, as plaintiff did here, does not equate to alleging an adverse effect or harm.

[1] Plaintiff did not allege in her complaint any harm or injury to a privacy right.

¶ 22 In *Avudria v. McGlone Mortgage Co.*, 2011 WI App 95, 802 N.W.2d 524 (2011), the Court of Appeals of Wisconsin was confronted with an issue similar to the one here. In that case, the plaintiff alleged that the defendant, a licensed mortgage broker, failed to provide him with a consumer disclosure as required by a Wisconsin statute. The trial court entered summary judgment in favor of the defendant, finding that the plaintiff was not an "aggrieved" person pursuant to the statute governing private causes of action against mortgage brokers (Wis. Stat. Ann. § 224.80(2) (West 2010)). *Avudria*, 2011 WI App 95, ¶ 8. The *Avudria* court noted that its supreme court had held that the terms "aggrieved" and "injured" are nearly synonymous and that "aggrieve" means "to inflict injury upon," which requires a showing of some actual injury or harm. *Avudria*, 2011 WI App 95, ¶¶ 24-25 (quoting *Liebovich v. Minnesota Insurance Co.*, 2008 WI 75, ¶ 37, 751 N.W.2d 764); see also *AlohaCare v. Ito*, 271 P.3d 621, 637 (Haw. 2012) ("person aggrieved" appears to be essentially synonymous with person who has suffered "injury in fact" (internal quotation marks omitted). The *Avudria* court stated:

> "To read the statute as Avudria suggests, as a strict liability statute permitting a private cause of action for a mere technical violation of Wis. Stat. ch. 224, requires that the word 'aggrieved' be read out of the statute. 'We avoid a construction of a statute that results in words being superfluous.' (Citation omitted.) The legislature qualified the private-cause-of-action provision with the phrase 'person who is aggrieved' for a reason. If the legislature had intended to permit all borrowers to file suit for violations of ch. 224, regardless of whether the borrower was injured by the violation, it could have drafted the statute in a manner that omitted the word 'aggrieved'; the legislature could simply have said that a mortgage broker is liable for the statutorily-prescribed damages if

it fails to use the forms. Because the legislature included the word 'aggrieved,' we must interpret it to have meaning." *Avudria*, 2011 WI App 95, ¶ 26.

¶ 23 Likewise, if the Illinois legislature intended to allow for a private cause of action for every technical violation of the Act, it could have omitted the word "aggrieved" and stated that every violation was actionable. A determination that a technical violation of the statute is actionable would render the word "aggrieved" superfluous. Therefore, a plaintiff who alleges only a technical violation of the statute without alleging *some* injury or adverse effect is not an aggrieved person under section 20 of the Act.

¶ 24 Plaintiff cites the Uniform Commercial Code (UCC) (810 ILCS 5/2A-402(c) (West 2016)) and the Mortgage Act (765 ILCS 905/4 (West 2016)), asserting that they allow an "aggrieved" party a right of action without an actual injury. The provision of the UCC cited by plaintiff allows an "aggrieved party" to suspend performance after a party "repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract." 810 ILCS 5/2A-402 (West 2016)). This statute unambiguously identifies a concrete harm, *i.e.*, the diminished value of the lease contract.

¶ 25 Likewise, the Mortgage Act allows a "party aggrieved" to recover $200 for a violation of section 2, which requires a party to release a mortgage and record its release under certain conditions. 765 ILCS 905/2 (West 2016). The failure to release and record creates a tangible harm, *i.e.*, a cloud on title. Also, section 4 of the Mortgage Act is a strict liability statute, which penalizes all parties who do not comply with section 2. 765 ILCS 905/4 (West 2016). See *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1150 (2004) (Mortgage Act "unambiguously gives a mortgagor a right to damages where the mortgagee does not comply").

On the other hand, the Act requires the plaintiff to prove that the defendant acted negligently or intentionally or recklessly. 740 ILCS 14/20(1), (2) (West 2016)).

¶ 26 In a footnote, plaintiff cites *Monroy v. Shutterfly, Inc.*, No. 16-C-10984, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017), in which the court denied a motion to dismiss, holding, *inter alia*, that the Act does not require a party to allege actual damages. However, the court did not interpret the term "person aggrieved."

¶ 27 Defendants make an argument regarding substantial compliance with the Act, and plaintiff raises one that she did suffer an actual injury. Neither argument is relevant to this court's answering the certified questions, which is what we are limited to in this appeal. See *Hudkins v. Egan*, 364 Ill. App. 3d 587, 590 (2006) (recognizing that the scope of review "is ordinarily limited to the question certified" and that "[g]enerally, our jurisdiction is limited to considering the question certified and we cannot address issues outside that area").

¶ 28 The trial court certified two questions, one for each of two remedies contained in the Act: the first question is based on liquidated damages authorized under section 20(1), and the second is based on injunctive relief authorized under section 20(4). The court probably did so in light of Rottner v. Palm Beach Tan, Inc., No. 15-CH-16695 (Cir. Ct. Cook Co.), a case relied on by defendants, in which the circuit court allowed the case to go forward *only* for injunctive relief. We do not find this appropriate. In order for *any* of the remedies to come into play, the plaintiff must be "[a]ny person aggrieved by a violation of this Act." 740 ILCS 14/20 (West 2016). If a person alleges only a technical violation of the Act without alleging any injury or adverse effect, then he or she is not aggrieved and may not recover under any of the provisions in section 20. We note, however, that the injury or adverse effect need not be pecuniary.

¶ 29 III. CONCLUSION

¶ 30 Accordingly, we answer the trial court's certified questions in the negative.

¶ 31 Certified questions answered; cause remanded.

SUPREME COURT OF ILLINOIS

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May 30, 2018

In re: Stacy Rosenbach, etc., Appellant, v. Six Flags Entertainment Corporation et al., Appellees. Appeal, Appellate Court, Second District.
123186

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

CLERK OF THE COURT
(847) 695-3750

55 SYMPHONY WAY
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June 7, 2017

Debra Rae Bernard
Perkins Coie LLP
131 Sourh Dearborn St., Suite 1700
Chicago, IL 60603

RE: Rosenbach, Stacy et al., v. Six Flags et al.
General No.: 2-17-0317
County: Lake County
Trial Court No: 16CH13

The court has this day, June 07, 2017, entered the following order in the above entitled case:

Application for Leave to Appeal pursuant to Supreme Court Rule 308 filed by appellant, Six Flags Entertainment Corporation and Great America LLC, is granted. The parties are directed to Supreme Court Rule 308(d) concerning an additional Record on Appeal. If an additional Record on Appeal is filed, it is due the same time as the appellant's opening brief.
Briefing schedule is as follows: The additional Record on Appeal, if any, and appellant's opening brief is due July 12, 2017. Appellee's response brief is due August 16, 2017. Appellant's reply brief is due August 30, 2017.

Robert J. Mangan
Clerk of the Appellate Court

cc: Bock, Hatch, Lewis & Oppenheim LLC
Progressive Law Group, LLC

FILED

JUN 17 2016

Keith Brin
CIRCUIT CLERK

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

Rosenbach

vs.

Six Flags Entertainment et al

Case No. 16 CH 13

ORDER

This cause coming to be heard on Defendants' motion to dismiss under 735 ILCS 5/2-615. The Court, having considered the parties' written submissions and arguments of counsel, ORDERS as follows:

(1) Defendants' motion is denied with respect to Counts I and II.

(2) Defendants' motion is granted with respect to Count III. Count III is dismissed with prejudice.

(3) Defendants shall answer within 28 days.

ENTER: Luis A. Berrones

JUDGE

Dated this 17th day of June, 2016.

Prepared by:
Attorney's Name: David Oppenheim
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171-94 (Rev. 10/11)

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/1

14/1. Short title

Effective: October 3, 2008
Currentness

§ 1. Short title. This Act may be cited as the Biometric Information Privacy Act.

Credits
P.A. 95-994, § 1, eff. Oct. 3, 2008.

Notes of Decisions (2)

740 I.L.C.S. 14/1, IL ST CH 740 § 14/1
Current through P.A. 100-579 of the 2018 Reg. Sess.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/5

14/5. Legislative findings; intent

Effective: October 3, 2008
Currentness

§ 5. Legislative findings; intent. The General Assembly finds all of the following:

(a) The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings.

(b) Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.

(c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, 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.

(d) An overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information.

(e) Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.

(f) The full ramifications of biometric technology are not fully known.

(g) 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.

Credits
P.A. 95-994, § 5, eff. Oct. 3, 2008.

740 I.L.C.S. 14/5, IL ST CH 740 § 14/5
Current through P.A. 100-579 of the 2018 Reg. Sess.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/10

14/10. Definitions

Effective: October 3, 2008
Currentness

§ 10. Definitions. In this Act:

"Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

"Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

"Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property. Examples of confidential and sensitive information include, but are not limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a PIN number, a pass code, a driver's license number, or a social security number.

"Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.

"Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

Credits
P.A. 95-994, § 10, eff. Oct. 3, 2008.

Notes of Decisions (4)

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/15

14/15. Retention; collection; disclosure; destruction

Effective: October 3, 2008
Currentness

§ 15. Retention; collection; disclosure; destruction.

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and 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. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:

(1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

Credits
P.A. 95-994, § 15, eff. Oct. 3, 2008.

Notes of Decisions (2)

740 I.L.C.S. 14/15, IL ST CH 740 § 14/15
Current through P.A. 100-579 of the 2018 Reg. Sess.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/20

14/20. Right of action

Effective: October 3, 2008
Currentness

§ 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;

(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

Credits
P.A. 95-994, § 20, eff. Oct. 3, 2008.

740 I.L.C.S. 14/20, IL ST CH 740 § 14/20
Current through P.A. 100-579 of the 2018 Reg. Sess.

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Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/25

14/25. Construction

Effective: October 3, 2008
Currentness

§ 25. Construction.

(a) Nothing in this Act shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

(b) Nothing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act.

(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder.

(d) Nothing in this Act shall be construed to conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government.

Credits
P.A. 95-994, § 25, eff. Oct. 3, 2008.

740 I.L.C.S. 14/25, IL ST CH 740 § 14/25
Current through P.A. 100-579 of the 2018 Reg. Sess.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/99

14/99. Effective date

Effective: October 3, 2008
Currentness

§ 99. Effective date. This Act takes effect upon becoming law.

Credits
P.A. 95-994, § 99, eff. Oct. 3, 2008.

740 I.L.C.S. 14/99, IL ST CH 740 § 14/99
Current through P.A. 100-579 of the 2018 Reg. Sess.

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