

PRAYER FOR LEAVE TO APPEAL

This case presents an issue of statutory interpretation regarding the word “aggrieved.” Without Plaintiff’s knowledge or consent, Defendants scanned and stored her 14-year-old son Alexander’s thumbprint when he entered the Great America theme park in Gurnee, IL. Section 15 (b) of the Biometric Privacy Information Act, 740 ILCS 14/1 *et seq.* (“BIPA”), forbids any private entity to collect biometric information, such as a thumbprint, unless it first makes certain, written disclosures (including “the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used”), and obtains a written release consenting to collection. 740 ILCS 14/15 (b). Because Defendants collected and stored Alexander’s thumbprint without writings and without consent, Plaintiff filed this lawsuit under BIPA’s private right of action, which permits “[a]ny person aggrieved by a violation of this Act” to bring an action in court for liquidated or actual damages and injunctive relief. 740 ILCS 14/20. There is no other means of enforcing BIPA.

Defendants moved to dismiss, arguing Plaintiff is not “aggrieved” without an allegation of economic injury or subsequent theft of Alexander’s biometrics from Defendants’ computer system. The trial court denied the motion but certified two questions for appeal pursuant to Supreme Court Rule 308. Both questions ask whether a person is “aggrieved” under BIPA “when the only injury he or she alleges is a violation of section 15(b) of the

Act.” *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, ¶ 15 (referencing 740 ILCS 14/15 (b)). In answering “no” to both questions, the Appellate Court ignored this Court’s prior definition of “aggrieved.”

In *Glos v. People*, 259 Ill. 332, 340 (1913), the Court defined the word “aggrieved” as follows: “A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment.” *See American Surety Co. v. Jones*, 384 Ill. 222, 229-30 (1943) (“In *Glos* ... this Court defined the word ‘aggrieved.’”). Applying *Glos* here, Plaintiff was aggrieved when Defendants invaded her (and Alexander’s) right to written information and opportunity to decide whether to consent to Alexander’s fingerprinting.

The Appellate Court did not follow or distinguish *Glos*. Instead, it held the violation of a legal right causes a person to be “aggrieved” only if it also causes “some actual harm.” *Rosenbach*, 2017 IL App (2d) 170317, ¶ 1. Collecting and storing a 14-year-old’s thumbprint, without his mother’s informed, written consent, is a “mere technical violation” of BIPA, insufficient without an allegation of “some actual harm.” *Id.* at ¶¶ 1, 18. Even a claim for injunctive relief will require an allegation of “some actual harm.” *Id.* The Appellate Court did not define “actual harm,” but noted it “need not be pecuniary.” *Id.* at ¶ 30.

BIPA is 10 years old, its legislative findings discuss the importance of these new rights for Illinois residents, and cases involving claims under BIPA

are pending in state and federal trial courts in Illinois and elsewhere. In the wake of the Appellate Opinion, it is unclear whether an Illinois resident can enforce or protect her rights under BIPA. Plaintiff respectfully requests that the Court grant this petition and review and interpret this important consumer protection statute.

Alternatively, because the Appellate Court did not follow or distinguish (or mention) this Court's binding decisions in *Glos v. People*, 259 Ill. 332 (1913) and *American Surety Co. v. Jones*, 384 Ill. 222 (1943), Plaintiff respectfully requests that the Court enter a supervisory order pursuant to Illinois Supreme Court Rule 383 instructing the Appellate Court to reverse and reconsider its opinion in light of those decisions.

DATES RELEVANT TO THE TIMELINESS OF THIS PETITION

The Appellate Court filed its opinion on December 21, 2017. On January 24, 2018, this Court granted Plaintiff's request for an extension of time, extending from January 25, 2018, to March 1, 2018, the due date for this petition. Ill. S. Ct. Rule 315(b); Order dated January 24, 2018.

STATEMENT OF THE POINTS RELIED UPON FOR REVERSAL

Glos v. People, 259 Ill. 332, 340 (1913), defines the term "aggrieved" as follows: "A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment. * * * 'Aggrieved' means having a substantial grievance; a denial of some personal or property right." *See also American Surety Co. v. Jones*, 384 Ill. 222, 229-30 (1943) (applying *Glos*); *In*

re Estate of Harmston, 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. Abendroth*, 351 Ill. App. 3d 658, 662 (4th Dist. 2004) (“the plaintiff must suffer from an infringement or denial of legal rights”).

BIPA prohibits the collection of biometrics without prior informed and written consent. 740 ILCS 14/15 (b) (“No private entity may collect ... unless it first ...”). Plaintiff is an “aggrieved” person under *Glos* and *American Surety* because Defendants deprived Plaintiff of her rights to receive information and decide whether to consent to Alexander’s fingerprinting.

BIPA comprehensively regulates the collection, storage, use, retention, and destruction of biometrics. In BIPA’s “legislative findings,” the General Assembly noted public fear in the “use of biometrics,” and that “many members of the public are deterred from partaking in biometric identifier-facilitated transactions,” explained that “the full ramifications of biometric technology are not fully known,” and therefore decided that “the public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.” 740 ILCS 14/5. Defendants disregarded BIPA and infringed Plaintiff’s right to maintain Alexander’s biometric privacy by collecting it without prior, informed consent. This is the precise harm the General Assembly sought to prevent.

The Appellate Opinion holds that a person cannot be “aggrieved” by “a mere technical violation of the Act” and “must allege some actual harm.” *Rosenbach*, 2017 IL App (2d) 170317, ¶ 1. Nothing in BIPA suggests any of Section 15’s requirements are “merely technical.” And, respectfully, the Appellate Court is not permitted to substitute its judgment for the legislature’s to decide some statutory requirements are significant and others are not. *See, e.g., Illinois Dept. of Healthcare and Family Servs. ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483, 489-90 (Ill. 2011) (“We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute.... When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it.”), *quoting First Federal Savings & Loan Ass’n of Chicago v. Walker*, 91 Ill. 2d 218, 227 (Ill. 1982) and *Stone v. Gardner*, 20 Ill. 304, 309 (Ill. 1858); *Belfield v. Coop*, 8 Ill. 2d 293, 307 (Ill. 1956) (“The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning.”).

Depriving a person of information required by statute 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”). 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”).

Statutes offering the greater of statutory damage or actual damage do not require proof of actual damage and can be understood “at least in part, [as] an incentive for private parties to enforce the statute.” *Standard Mut. Ins. Co. v. Lay*, 2013 IL 114617, ¶ 32.

STATEMENT OF FACTS

I. The Biometric Privacy Information Act (“BIPA”).

BIPA became law in 2008. 740 ILCS 14/1. It restricts the collection and retention of “biometric identifiers” (such as finger and retina scans) and “biometric information” (information based on a biometric identifier used to identify an individual) (collectively, “biometrics”). The Personal Information Protection Act, 815 ILCS 530/1 *et seq.* (“PIPA”), enacted two years earlier in

2006, already provided relief in the event of a biometric data breach,¹ and BIPA was intended to fill gaps in existing law. *E.g.*, 740 ILCS 14/5 (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.”)

The General Assembly enacted BIPA to protect consumer biometrics through disclosure, consent, retention, and destruction requirements and private enforcement. BIPA reflects stated legislative concern that consumers must be able to make informed choices before permitting their biometrics to be captured, and 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. BIPA defines a “fingerprint” as a “[b]iometric identifier.” 740 ILCS 14/10.

The General Assembly’s “legislative findings; intent” provide as follows:

- (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.

¹ Violations of PIPA are actionable under the Consumer Fraud and Deceptive Practices Act, 815 ILCS 530/20, and a 2016 amendment, P.A. 99-503, effective January 1, 2017, covers biometric data breaches. Sec. 530/5(1)(F).

- (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.

740 ILCS 14/5.

Because personal biometric information is immutable, BIPA recognizes that the danger of identity theft using biometrics is much greater than with other, mutable, personal information. 740 ILCS 14/5 (c) (“For example, social security numbers, when compromised, can be changed.”) If Alexander’s thumbprint biometrics are stolen—something which may never come to light (see 740 ILCS 14/5 (f))—he cannot change them and would forever be unable to use them safely to identity himself. *Id.*

BIPA establishes five distinct requirements for private entities collecting biometrics from Illinois residents 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.
- (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.

740 ILCS 14/15 (subsection (b) in bold).

Each of Section 15's requirements is enforceable only through the private right of action contained in Section 20:

§ 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.

II. Defendants collected and stored Alexander's thumbprint without prior notice or consent.

Defendants operate the Great America amusement park in Gurnee, IL. (C. 005-21, ¶ 16). In advance of her 14-year-old son Alexander's trip to Great America, Plaintiff purchased him a season pass on Defendants' website that he would retrieve during his next visit to the park. *Id.*, ¶¶ 19-21.

In 2014, Alexander traveled to Great America on a school trip. *Id.*, ¶ 19. There, Defendants scanned and stored Alexander's thumbprint biometrics without first: (1) informing Plaintiff or Alexander in writing that his fingerprint would be collected or stored; (2) informing Plaintiff or Alexander in writing of the specific purposes for which Defendants were collecting his fingerprint or how long they would keep it; and (3) obtaining a written release from Plaintiff or Alexander authorizing the collection. *Id.*, ¶¶ 21-28; 740 ILCS 14/15(b).

Defendants collected and retained Alexander's biometrics as part of a nationwide customer biometrics roll-out at Six Flags theme parks across the

United States, including at Great America beginning in 2014, instituted to enhance Defendants' revenue and reduce their costs. *Id.*, ¶¶ 2-3, 31-32.

Defendants collected and stored Alexander's biometrics without satisfying *any* of BIPA's requirements. C. 005-021, ¶¶ 17-30.

III. Proceedings below

Plaintiff filed her Complaint on January 7, 2016, seeking liquidated damages and injunctive relief. Plaintiff's Amended Complaint, dated April 22, 2016, is the operative pleading. C005-21.

Defendants moved to dismiss. The Circuit Court denied the motion on June 17, 2016. C004; C124-25. The 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 court further explained that one is "actually damaged" "due to violation of the statute." C109. "[I]f there is a statute made to protect me and 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.*

Thereafter, Defendants moved to appeal pursuant to Supreme Court Rule 308. (C 085). The Circuit Court denied the motion, but later granted Defendants' motion to reconsider. (C 359; C001). The court's April 7, 2017 order on reconsideration certified two questions of law 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. [C002-03]

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

After briefing and argument, the Appellate Court issued its opinion answering the certified questions in the negative. 2017 IL App (2d) 170317.

In pertinent part, the Appellate Opinion explains:

[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 opinion also states, “Plaintiff did not allege in her complaint any harm or injury to a privacy right.” *Id.* at ¶ 20, n.1. The Appellate Court did not explain the parameters of “only a technical violation,” but noted “the injury or adverse effect need not be pecuniary.” *Id.* at ¶ 30.

ARGUMENT

BIPA creates a cause of action that may be brought by “[a]ny person **aggrieved** by a violation of this Act.” 740 ILCS 14/20 (emphasis added). In *Glos v. People*, 259 Ill. 332, 340 (1913), this Court defined the term “aggrieved” as “A person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of...” Ignoring *Glos* and its progeny, the Appellate Court held the phrase “aggrieved by a violation of this Act” requires an allegation of “some actual harm,” not just the allegation of a “mere technical violation” of BIPA. *Rosenbach*, 2017 IL App (2d) 170317, ¶¶ 1, 17. Nothing in BIPA or Illinois law supports that conclusion.

- I. **The meaning of “aggrieved” was established in this Court’s prior precedent and compels the conclusion that the denial or impairment of any right created by BIPA—including the right to receive written information about the purpose and length of term for which biometrics are being collected and the right to decline to sign a written release tendered by the collector—causes a person to be “aggrieved.”**

Before Defendants could collect Alexander’s thumbprint biometrics, BIPA required them to provide particular written information about “the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used” (740 ILCS 14/15

(b) (2)) and give Plaintiff an opportunity to decline to execute “a written release” (740 ILCS 14/15 (b) (3)).

Long ago, this Court held that a person is “aggrieved” when his legal right is invaded or denied; nothing more is required to make one “aggrieved.” *Glos*, 259 Ill. at 340 (“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 American Surety*, 384 Ill. at 229-30 (applying *Glos*); *Harmston*, 10 Ill. App. 3d at 885 (“‘Aggrieved’ means having a substantial grievance; a denial of some personal or property right.”); *Greeling*, 351 Ill. App. 3d at 662 (“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”).

Like *Glos*, Black’s Law Dictionary defines an “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). An “aggrieved party” is one who is entitled to a remedy, not exclusively one who suffers loss. The definition includes an adverse effect on one’s “personal ... rights” as a basis to be an “aggrieved party.” It does not require an adverse effect *in addition to* injury to or 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. Later, in *American Surety*, this Court discussed *Glos* as having interpreted and defined the term “aggrieved” in Illinois. 384 Ill. 229-30. *American Surety* involved the interpretation of the Illinois Insurance Code; specifically, which insurers could challenge a ruling by the Director. *Id.*, generally. Like BIPA, the Insurance Code “gives the right of review to any company or person aggrieved by the order or decision of the Director.” The Court cited and applied *Glos*.

Glos and *American Surety* 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”).

Applying *Glos* here, Plaintiff was aggrieved when Defendants invaded her (and Alexander’s) right to written information and opportunity to decide whether to consent to Alexander’s fingerprinting. The Appellate Opinion does not follow or distinguish *Glos* or *American Surety*, or mention them.

Courts have consistently held that a person is injured when he is deprived of information required by statute. *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”); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (“common law and the literal understanding of privacy encompass the individual’s control of information concerning his or her person”). “[P]rivacy torts do not always require additional consequences to be actionable.” *Eichenberger v. ESPN, Inc.*, 876 F. 3d 979, 983 (9th Cir. 2017). *See Mount v. PulsePoint, Inc.*, 684 F. App’x 32, 34 (2d Cir. 2017), as amended May 3, 2017 (unauthorized access to and monitoring of web-browsing is concrete injury).

Likewise, 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”).

II. Technical or not, Defendants' violations of BIPA are actionable under BIPA.

The Appellate Court stated, "A determination that a technical violation of the statute is actionable would render the word 'aggrieved' superfluous." *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, ¶ 23. Nothing in BIPA supports the conclusion that some violations are material and others merely technical. The legislature intended that all of BIPA's requirements would be followed and enforced.

Courts are not permitted to substitute their judgment for the legislature's in interpreting a statute's requirements.² BIPA comprehensively regulates the collection, storage, use, retention, and destruction of personal biometric information. The General Assembly explained why it enacted BIPA in its "legislative findings" section, identifying public fear of the "use of biometrics," and that "many members of the public are deterred from partaking in biometric identifier-facilitated transactions," explaining that

² See, e.g., *Illinois Dept. of Healthcare and Family Servs. ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483, 489-90 (Ill. 2011) ("We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute; it has been always disclaimed, and the real or supposed hardship of no case can justify a court in so doing. When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it."), quoting *First Federal Savings & Loan Ass'n of Chicago v. Walker*, 91 Ill. 2d 218, 227 (Ill. 1982) and *Stone v. Gardner*, 20 Ill. 304, 309 (Ill. 1858); *Belfield v. Coop*, 8 Ill. 2d 293, 307 (Ill. 1956) ("The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning.").

“the full ramifications of biometric technology are not fully known,” and concluding “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.

Defendants disregarded BIPA and infringed Plaintiff’s right to maintain Alexander’s biometric privacy by collecting it without her prior, informed consent. Section 15 (b)’s information and consent requirements are essential, material requirements, not superfluous technicalities. This is the precise harm the General Assembly sought to prevent.

If the General Assembly intended BIPA to prohibit only the disclosure or dissemination of biometrics after collection, BIPA would not regulate their collection in the first place. Interpreting “aggrieved” to require an allegation of harm or injury in addition to the violation of rights BIPA created will undermine the Act’s enforcement. The General Assembly could not have intended such an absurd result. *See Home Star Bank & Fin. Servs. v. Emerg. Care & Health Org., Ltd.*, 2014 IL 115526, ¶ 24 (“we presume that the legislature did not intend absurd, inconvenient, or unjust consequences”).

BIPA is enforceable only through its private right of action. 740 ILCS 14/20. Statutory liquidated damages and injunctive relief are recoverable for the violation of any of BIPA’s provisions. *Id.* Section 15 of BIPA has 5 distinct subparts, each defining and protecting the rights of Illinois residents who might permit the collection of their biometrics, and establishing the duties

and responsibilities of, and restrictions on, the private entities that collect or possess such information. 740 ILCS 14/15. A private entity could violate all of the sections without causing additional, separately identifiable injury or damage.

III. “Aggrieved” identifies who may file suit—only a person whose rights were adversely affected by the violation—rather than limiting the right of action to only some persons whose rights are impaired or denied.

The word “aggrieved” identifies who can bring suit: “[a]ny person aggrieved by a violation of this Act.” 740 ILCS 14/20. Only the victim of a BIPA violation can bring suit. A whistleblower employee of a private entity collecting or possessing biometric information in violation of BIPA cannot; an interested stranger cannot; and the Attorney General of the State of Illinois cannot.

Other Illinois statutes use the word “aggrieved” to denote an invasion of a legal right and a concomitant right to a remedy without requiring 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) (emphasis added). Thus, a party can be aggrieved even before suffering damage.

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 (emphasis added). 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.

IV. The Appellate Court erred by adding an element—“and who alleges some actual harm”—to BIPA’s cause of action for “any person aggrieved by a violation of this Act.”

The denial of a right created by BIPA—such as the right to refuse to execute a written release permitting the collection of biometrics—is the only adverse effect necessary to render a “person aggrieved by a violation of this Act.” The Appellate Opinion erroneously requires that some other “adverse effect” or “actual harm” must be alleged. 2017 IL App (2d) 170317, ¶ 21.

The General Assembly considered “actual damages” and expressly permitted the recovery of liquidated damages in their alternative. 740 ILCS 14/20 (1) (“liquidated damages of \$1,000 or actual damages, whichever is greater”); *see also* C124. Like other statutes, BIPA creates a right to recover statutory liquidated damages “at least in part, [as] an incentive for private parties to enforce the statute.” *Standard Mut.*, 2013 IL 114617 at ¶ 32. Allowing persons whose biometrics are collected in violation of BIPA to sue

for liquidated damages or injunctive relief does not ignore the requirement that a plaintiff must be “aggrieved” before filing suit.

The General Assembly recognized the difficulty in quantifying the damage that necessarily results when BIPA rights are violated—What is the dollar value of taking 14-year-old Alexander’s thumbprint biometrics without his mother’s written permission?—and set the recoverable liquidated damages at \$1,000. If it intended to limit the cause of action to actual damages, it would have said so. *See, e.g., Lay*, 2013 IL 114617, ¶¶ 31-32. Statutes are construed as written. *E.g., Ehredt v. Forest Hospital, Inc.*, 142 Ill. App. 3d 1009, 1012 (1st Dist. 1986) (“statutory language must be given its plain and ordinary meaning and a court is prohibited from restricting or enlarging the plain meaning of an unambiguous statute”). If a stricter standard were intended, the General Assembly would have included one; absent a stricter standard written into the statute, the court must follow the plain, ordinary meaning of the statutory language. *Id.*

When the General Assembly wishes to confine a right of recovery to persons who suffer actual damage, it knows how to do so. *See, e.g.*, 815 ILCS 505/10a (“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 Opinion makes BIPA redundant of PIPA, 815 ILCS 530/1, which provides remedies for actual damages suffered through data theft.

V. The Appellate Opinion makes even injunctive relief dependent upon an allegation of “some actual harm.”

BIPA empowers an aggrieved person to seek injunctive relief. 740 ILCS 14/20 (4). According to the Appellate Opinion, however, if a person does not “allege some actual harm,” and “the only injury he or she alleges is a violation of section 15(b) of the Act,” she cannot even maintain a BIPA cause of action seeking only injunctive relief. *Rosenbach*, 2017 IL App (2d) 170317, ¶¶ 1, 17, 28. Injunctive relief is sought to prevent harm, not to remedy it. *Kanter & Eisenberg v. Madison Assocs.*, 116 Ill. 2d 506, 512-13 (Ill. 1987) (injunctive relief “available only to prevent irreparable harm”). Nothing indicates the legislature intended such an inverse, remedy-defeating result. The Appellate Opinion’s impact on injunctive relief demonstrates the need for this Court to address the erroneous application of the term “aggrieved” in this case.

VI. The Appellate Opinion has broad and profound implications.

The Appellate Court’s determination that violations of section 15 (b) of BIPA are technical and carry no consequence without more “actual harm,” negates BIPA’s statutory language and intent. The opinion shifts the burden

from the regulated entity to comply with the law and prove its compliance, to the statutory beneficiary who must now allege specific harm from illegal collection or unknown misuse of their biometric data. Of additional importance, the Appellate Opinion affects other statutes that include the phrase “any person aggrieved” or “aggrieved person” in their right to action provision, since the opinion departs from established jurisprudence and engrafts requirements not included or contemplated by the legislature.

CONCLUSION

Plaintiff respectfully submits that the Appellate Court’s decision is incompatible with BIPA’s plain language, it fails to apply definitions supplied by this Court’s binding precedent, and it improperly restricts an important, new Illinois consumer protection statute. Plaintiff alleges that Defendants violated Alexander’s rights by collecting his thumbprint biometrics without the written, informed consent BIPA requires. That allegation is sufficient to support a claim for monetary or injunctive relief under BIPA. Plaintiff respectfully requests that the Court grant this petition, reverse the Appellate Court’s decision, and answer the certified questions in the affirmative.

In the alternative, because the Appellate Court did not follow or distinguish this Court’s binding decisions in *Glos v. People*, 259 Ill. 332 (1913) and *American Surety Co. v. Jones*, 384 Ill. 222 (1943), Plaintiff respectfully requests that the Court enter a supervisory order pursuant to Illinois Supreme Court Rule 383 instructing the Appellate Court to vacate and reconsider its opinion in light of those decisions.

Respectfully submitted,

STACY ROSENBACH

By: /s/ David M. Oppenheim
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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, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (c) certificate of compliance, and those matters to be appended to the brief under Rule 342 (a), is 5,996 words.

Dated: March 1, 2018.

s/ David M. Oppenheim

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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 March 1, 2018, he submitted the foregoing *Petition for Leave to Appeal of Plaintiff 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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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,

Petitioner/Plaintiff,

v.

SIX FLAGS ENTERTAINMENT CORP. and GREAT AMERICA LLC,

Respondents/Defendants.

On Petition for Leave to 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

**APPENDIX TO THE PETITION FOR LEAVE TO APPEAL
OF PLAINTIFF STACY ROSENBACH**

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2017 IL App (2d) 170317
 No. 2-17-0317
 Opinion filed December 21, 2017

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT

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

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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

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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

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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.

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¶ 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))

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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).

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¶ 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 *McCullough 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. *McCullough*, 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 *McCullough* 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.

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¶ 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

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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”).

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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

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

¶ 31 Certified questions answered; cause remanded.

 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

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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 14/5

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.

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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 14/20

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

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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 14/25

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 ILCS 14/25, IL ST CH 740 § 14/25

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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

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