No. 20-3202

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LATRINA COTHRON,
individually and on behalf of all others similarly situated,
Plaintiff-Appellee

v.

WHITE CASTLE SYSTEM, INC.,
Defendant-Appellant

Appeal from the U.S. District Court
for the Northern District of Illinois, Case No. 19-cv-00382
Hon. John J. Tharp, Jr., Judge Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT WHITE CASTLE SYSTEM, INC.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

White Castle System, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Shook, Hardy & Bacon, L.L.P.

Lewis Brisbois Bisgaard & Smith LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

None

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: s/ Melissa A. Siebert Date: March 29, 2021

Attorney's Printed Name: Melissa A. Siebert

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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None

Attorney's Signature: s/ Erin Bolan Hines Date: March 29, 2021

Attorney's Printed Name: Erin Bolan Hines

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: s/ William F. Northrip Date: March 29, 2021

Attorney's Printed Name: William F. Northrip

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction Under the Class Action Fairness Act.

Plaintiff-Appellee Latrina Cothron filed a class action lawsuit in the Circuit Court of Cook County, Illinois on December 6, 2018, alleging violations of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq*. (R1, ¶ 1).[1] Ms. Cothron filed an Amended Class Action Complaint on January 8, 2019, and then-defendant Cross Match Technologies, Inc. removed the lawsuit to the United States District Court for the Northern District of Illinois. (*Id.*).[2]

The District Court had jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1453. (R1, ¶ 7). CAFA extends federal jurisdiction over class actions where: (1) any member of the proposed class is a citizen of a state different from any defendant; (2) the proposed class consists of more than 100 members; and (3) the amount in controversy exceeds $5 million, aggregating all claims and exclusive of interests and costs. *Id.* §§ 1332(d)(2), 1332(d)(5)(B). Each

[1] All references to "R__" are references to the docket entries below. For example, R1 refers to Docket Entry No. 1.
[2] Ms. Cothron voluntarily dismissed Defendant Cross Match Technologies, Inc. on April 11, 2019. (R43; R45).

requirement is met here. (R44, ¶ 14). Minimal diversity is satisfied because Ms. Cothron is a citizen of Illinois, and White Castle is a citizen of Ohio for the purposes of diversity jurisdiction. (*Id.* ¶¶ 12–13). White Castle is incorporated under the laws of Ohio and has its principal place of business in Columbus, Ohio. *See* § 1332(c)(1); (R1, ¶ 11; R44, ¶¶ 12–13; R118, ¶ 1). The lawsuit involves a putative class of more than 100 members, and the amount in controversy exceeds $5 million. (R44, ¶ 14).

II. Appellate Jurisdiction on Interlocutory Appeal.

The Court has appellate jurisdiction under 28 U.S.C. § 1292(b). On August 7, 2020, the District Court entered an order denying White Castle's motion for judgment on the pleadings. (A15; R125 at 15). On August 17, 2020, White Castle filed a motion to amend the District Court's order to certify a question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and on October 1, 2020, the District Court granted White Castle's motion. (R134; R141 at 3).

On October 13, 2020, under 28 U.S.C. § 1292(b), White Castle timely filed a petition for permission to appeal the District Court's order. *See* Case No. 20-8029, Dkt. 1-1 (7th Cir. Oct. 13, 2020). On

November 9, 2020, the Court granted White Castle's petition for permission to appeal, noting the appeal is not limited to the certified question. *See* Case No. 20-8029, Dkt. 9 (7th Cir. Nov. 9, 2020) (citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); *Edwardsville Nat. Bank & Tr. Co. v. Marion Labs., Inc.*, 808 F.2d 648, 650 (7th Cir. 1987)).

STATEMENT OF THE ISSUE

Whether, when conduct that allegedly violates BIPA is repeated, that conduct gives rise to a single claim under Sections 15(b) and 15(d) of BIPA, or multiple claims.

STATEMENT OF THE CASE

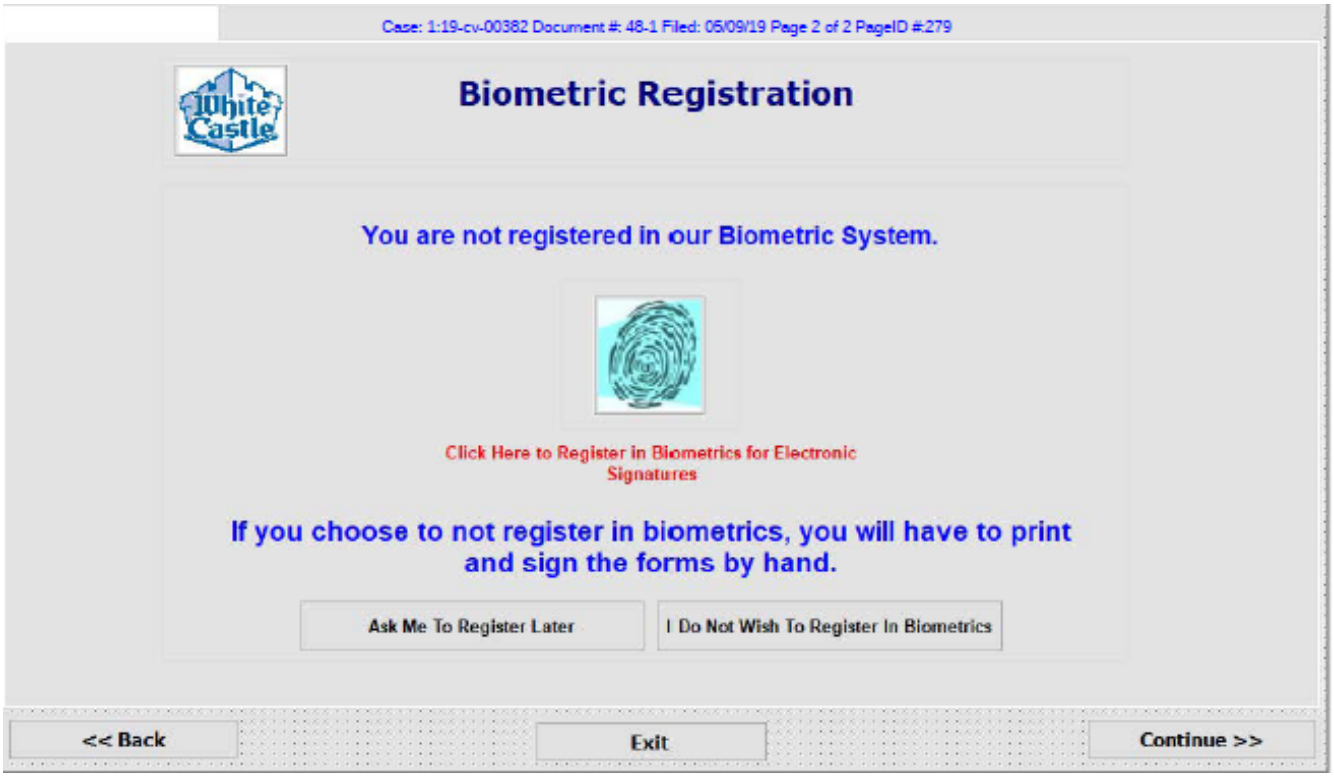
I. Factual Background.

White Castle was founded about one-hundred years ago, on March 10, 1921. It remains a family-owned business and is a significant employer in Illinois and throughout the Midwest. Ms. Cothron has worked at White Castle locations ("Castles") in Chicago since 2004. (R118 at 23–24). Throughout most of her employment, she has voluntarily consented to and used White Castle's finger-scan system.

Shortly after Ms. Cothron began her employment in 2004, White Castle began using an optional, consent-based finger-scan system for

employees to sign documents and access their paystubs and computers. (*Id.* at 24, ¶ 6). The system has always been optional and consent based.

In 2004, White Castle presented Ms. Cothron with the following registration screen:



(A16; R48-1, White Castle System Registration Screen). Through the registration process, Ms. Cothron had the option to select "I Do Not Wish To Register In Biometrics." (*Id.*). As the enrollment screen itself states, had Ms. Cothron declined to enroll in the finger-scan system, she would have had to "print and sign [certain] forms by hand." (*Id.*). Ms. Cothron voluntarily enrolled in the system. (*See* R44; R118). Similarly,

on October 15, 2018, following BIPA's enactment and before bringing this lawsuit, Ms. Cothron also signed White Castle's biometric information privacy policy and consented to White Castle's "collection, storage, and use of biometric data." (A17; R48-2, White Castle Biometric Information Privacy Team Member Consent Form (Oct. 15, 2018)).

II. Illinois Biometric Information Privacy Act.

The Illinois legislature enacted BIPA in 2008, following the bankruptcy of a company called Pay by Touch, where "fingerprint records" could have been sold as a bankruptcy asset. (R44, ¶¶ 17–18). The legislature recognized the promise of biometric technology and was concerned Illinois citizens would hesitate to participate in such transactions without certain safeguards. 740 ILCS 14/5(d)–(g). To this end, two of BIPA's key sections create a consent regime for the collection and disclosure of biometric information. Both of those sections are at issue in this appeal.

Section 15(b) governs collection. It allows the collection of biometrics upon notice and consent, providing:

> 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.

Id. at 15(b).

Section 15(d) governs disclosure. It allows the transfer of another's biometrics to third parties, with consent. Section 15(d) provides, in pertinent part:

> 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.

Id. at 15(d).[3]

BIPA then creates a private right of action to enforce its consent requirements. Specifically, Section 20 states that "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." *Id.* at 20. A court may award to an "aggrieved" party actual damages, or liquidated damages of either $1,000 or $5,000, contingent upon finding that a BIPA violation has occurred. *Id.*

III. Claims and Proceedings Before the District Court.

In December 2018, Ms. Cothron filed this putative class action. (R1, ¶ 1). Ms. Cothron alleges she "was required" to scan her finger each time she accessed her work computer and weekly paystubs. (R44, ¶¶ 2, 40, 43–44). She alleges White Castle violated BIPA Sections 15(b) and 15(d) by collecting, then "systematically and automatically" disclosing her biometric information without adhering to BIPA's requirements.

[3] Section 15(d) permits disclosure in other circumstances that are not relevant here, such as when "required by State or federal law or municipal ordinance" or in response to a "valid warrant or subpoena." 740 ILCS 14/15(d)(3)–(4).

(*Id.* ¶¶ 80–97).[4] She seeks statutory damages for "each" violation on behalf of herself and a putative class. (*Id.*, Prayer for Relief, ¶ C).

Ms. Cothron's First Amended Complaint alleged that she "never" received notice from or provided consent to White Castle for its collection and disclosure of her biometric information. (R1-1, ¶¶ 60, 95). White Castle then filed a motion to dismiss based on, in relevant part, the notice provided to and consent obtained from Ms. Cothron in 2004, and her subsequent consent in 2018. (R37–R38). Ms. Cothron responded by amending her complaint. (R44). White Castle then moved to dismiss Ms. Cothron's Second Amended Complaint, highlighting again the 2004 and 2018 consents. (R47–R48). The District Court denied the second motion, finding White Castle did not obtain a BIPA-compliant written release from Ms. Cothron before her first scan "because BIPA did not exist yet," and concluding the 2018 consent was not a valid waiver of claims for her prior scans. (R117 at 2, 10).

[4] Ms. Cothron also alleged that White Castle violated BIPA Section 15(a), which requires White Castle to maintain a publicly available biometric information retention and deletion policy. (R44, ¶¶ 71–78). The District Court dismissed her Section 15(a) claim on June 16, 2020, for lack of Article III standing. (R117 at 17).

White Castle then answered and moved for judgment on the pleadings on the grounds that Ms. Cothron's Section 15(b) and 15(d) claims are time barred because they accrued, if ever, in 2008, with her first scan after BIPA's enactment. (R120 at 7; *see also* R118 at 26; R119–R120). On August 7, 2020, the District Court denied White Castle's motion, holding that two independent, actionable BIPA violations occurred, and thus accrued, each time Ms. Cothron used the finger-scan system without the appropriate notice and consent. (A12–A14). The District Court held that each scan constituted both a collection under Section 15(b) and a disclosure under Section 15(d) because Ms. Cothron alleged "systematic and automatic" disclosure with each scan. (*Id.*).

On August 17, 2020, White Castle filed a timely motion to amend the District Court's order to certify it for interlocutory appeal. (R134–R135). On October 1, 2020, the District Court granted White Castle's Motion (R141 at 1), and White Castle then filed, and the Court granted, a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). *See* Case No. 20-8029, Dkt. 1-1; Dkt. 9. This appeal followed.

SUMMARY OF THE ARGUMENT

Ms. Cothron's BIPA claims against White Castle are time barred. She started working for White Castle in February 2004 and voluntarily consented to and began using White Castle's finger-scan system that same year. (R118 at 23–24). Ms. Cothron's claims accrued, if at all, when she first used White Castle's finger-scan technology following BIPA's effective date in October 2008. Even assuming the most generous statute of limitations applied, Ms. Cothron had, at most, five years to file her claims.[5] She waited more than a decade. (R1, ¶ 1).

In failing to dismiss Ms. Cothron's claims as time barred, the District Court adopted an outlier interpretation of accrual that is inconsistent with Illinois Supreme Court and Seventh Circuit precedent and that eviscerates any statute of limitations by permitting Ms. Cothron to refresh her claims each time she scanned her finger. Specifically, the District Court held that multiple independent, actionable BIPA claims accrue *each time* an employee uses finger-scan

[5] BIPA does not contain a statute of limitations, and BIPA litigants have argued for the application of a one-year, two-year, or five-year limitations period. This issue is currently on appeal in multiple state appellate courts. *See, e.g.*, *Tims v. Black Horse Carriers, Inc.*, No. 1-20-0563 (Ill. App. 1st Dist.); *Marion v. Ring Container Techs., LLC*, No. 3-20-0184 (Ill. App. 3d Dist.). This question is beyond the scope of this appeal.

technology in the workplace. (A12–A14). And while acknowledging that Ms. Cothron's initial claims from 2008 were time barred, the Court held at least some of her claims were timely when she filed suit in 2018 because she had repeatedly scanned her finger to access her work computer and paystubs since BIPA's effective date. (A14–A15). The Court concluded Ms. Cothron had an actionable claim for each one of these scans within the limitations period under potentially both Section 15(b) and Section 15(d). (*Id.*).

The District Court reached this result by ignoring well-defined Illinois accrual principles and the nature of a BIPA injury. As both the Illinois Supreme Court and this Court have explained, at its core, BIPA requires that private entities give individuals the power to say "no" to the collection or disclosure of their biometric information. *Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d 1197, 1206 (Ill. 2019); *see also Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1155 (7th Cir. 2020); *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 623–24 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (June 30, 2020).

In a word, BIPA is about *control*. As such, this precedent has defined a BIPA injury as the loss of control over biometric information.

Rosenbach, 129 N.E.3d at 1206. When an individual loses that control, the individual has been "aggrieved" under BIPA, and an actionable claim exists. *Id.* at 1206–07. An individual cannot lose control or be aggrieved a second time. Once control is lost, it is lost. *Fox*, 980 F.3d at 1155. Accordingly, the individual is aggrieved the first time an entity collects or discloses biometric information without adhering to BIPA's requirements, and in that moment, the BIPA claim accrues; and it only accrues one time.

More than 780 BIPA lawsuits have been filed in state and federal courts since 2016, most of which are putative class actions against employers who, like White Castle, use routine workplace finger-scan technology. If the District Court's order stands, these employers could face potentially crippling damages as *each employee* would be entitled to one or more awards of liquidated damages for *each time* the employee used the technology. Whether to electronically sign onboarding documents, access confidential records, or clock in and out of work, each scan would be an independent, actionable claim under Section 15(b), subject to separate liquidated damages awards of $1,000 or $5,000 for each scan. Likewise, if the District Court's order stands, each scan also

could be considered a "disclosure" in violation of Section 15(d) subject to separate liquidated damages. (A11 n.7).

The District Court's reading conflicts with the statute's plain language and the Illinois General Assembly's intent. Indeed, as one Illinois state court bluntly said, it is contrary to "common sense." *Smith v. Top Die Casting Co.*, No. 2019-L-248, at 3 (Ill. Cir. Ct. Mar. 12, 2020) (A20). The Court should reverse.

STANDARD OF REVIEW

Questions of law presented on interlocutory appeal are reviewed *de novo*. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 942 (7th Cir. 2015).

ARGUMENT

The Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, has led to an explosion of litigation in Illinois state and federal courts, with dozens of cases filed monthly and hundreds over the last four years. Both the Illinois Supreme Court and this Court have clearly defined a BIPA injury and what actions give rise to a BIPA claim. *See Fox*, 980 F.3d at 1155; *Bryant*, 958 F.3d at 623–24; *Rosenbach*, 129 N.E.3d at 1206; *see also Thornley v. Clearview AI, Inc.*, 984 F.3d 1241 (7th Cir. 2021); *Miller v. Southwest Airlines Co.*, 926 F.3d

898 (7th Cir. 2019). Building upon this precedent, the Court must now decide when BIPA claims accrue. Based on existing case law, the answer is simple: BIPA claims accrue once, upon the first alleged collection under BIPA Section 15(b) or disclosure under BIPA Section 15(d). The District Court erred in concluding otherwise.

I. Ms. Cothron's BIPA Claims Accrued Once, if at All, in 2008.[6]

An accrual analysis necessarily begins by determining when Ms. Cothron's purported BIPA injury occurred. The District Court held Ms. Cothron's injuries were immediately actionable when White Castle "first scanned" and "first disclosed" her biometric information in violation of Sections 15(b) and 15(d). (A9). The District Court erred, however, in failing to appreciate that Ms. Cothron's subsequent finger scans and their subsequent alleged disclosures did not give rise to new claims because they caused no additional injury. BIPA claims cannot

[6] White Castle disputes that Ms. Cothron ever suffered an injury under BIPA or that her claim accrued in the first instance. Ms. Cothron received notice and consented before using White Castle's finger-scan system for the first time in 2004. (A16). In denying White Castle's motion to dismiss, the District Court noted White Castle did not obtain the necessary consents from Ms. Cothron when she first began using the finger-scan system because BIPA "did not exist yet." (R117 at 2). The Court recognizes, however, that employers were capable of complying with BIPA before its enactment. *See Miller*, 926 F.3d at 904. The District Court's order denying White Castle's motion to dismiss is not before the Court in this appeal, but the issue of when, if ever, Ms. Cothron's claims accrued is.

accrue without injury. In the language of the statute, BIPA claims may be maintained only by a "person aggrieved."

Put simply, under the Illinois Supreme Court's controlling decision in *Rosenbach*, Ms. Cothron was "aggrieved" when she first lost control of her biometric information due to White Castle's alleged violations of the statute. Ms. Cothron was not newly "injured" or "aggrieved" with each subsequent finger scan or purported disclosure. As such, no new claims accrued, or could accrue.

A. Under Illinois Law, Claims Accrue When a Party's Interest Is Invaded and Injury Is Inflicted.

Determining when a claim accrues is critical in evaluating a lawsuit's timeliness, because accrual commences the statute of limitations. *See Brucker v. Mercola*, 886 N.E.2d 306, 331 (Ill. 2007) ("[A] statute of limitations governs the time within which lawsuits may be commenced after accrual."). Indeed the very definition of "accrue" is "to come into existence as an enforceable claim or right." Black's Law Dictionary (11th ed. 2019). This definition is consistent with Illinois law. Per the Illinois Supreme Court, a claim accrues, and the limitations period begins to run, when "facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*,

798 N.E.2d 75, 85 (Ill. 2003). Specifically, where there is a "single overt act" from which subsequent damages may flow, a claim accrues "on the date the defendant invaded the plaintiff's interest and inflicted injury."[7] *Id.*

With BIPA claims, the invasion of a plaintiff's interest and the resulting injury are one and the same, as demonstrated by both the statutory text and the Illinois Supreme Court's analysis of that text in *Rosenbach*. In this manner, BIPA differs from other types of claims where the initial invasion of a plaintiff's interest is different from the infliction of an injury. For instance, toxic-tort suits may seek redress for an injury that happens years after the first exposure. BIPA simply is not structured that way; there are no latent injuries. The invasion and injury happen in the same moment.

Section 20 of BIPA provides that a "person aggrieved" may sue for violations set forth by any subsection of BIPA Section 15. In *Rosenbach*, the Illinois Supreme Court addressed what Section 20's use of the term "aggrieved" means as applied to any of Section 15's provisions, and

[7] Illinois law recognizes a few exceptions to its general accrual rule, none of which applies here. *See, e.g.*, *Feltmeier*, 798 N.E.2d at 85; *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177, 192 (Ill. 2002).

when a "person aggrieved" by a Section 15 violation may sue. In doing so, the Illinois Supreme Court recognized that BIPA provides "crucial" protections for biometric identifiers "that cannot be changed if compromised or misused." *Rosenbach*, 129 N.E.3d at 1206 (citation omitted).

To provide these protections, the General Assembly "codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Id.* Accordingly, a violation of BIPA is not "merely 'technical' in nature." *Id.* Rather, because BIPA "vests in individuals and consumers the right to control their biometric information," a "real and significant" injury arises when an entity first fails to adhere to BIPA's requirements set forth in Section 15. *Id.* The first moment that an individual loses control over her biometrics, she is sufficiently "aggrieved," and may bring a claim under BIPA. No further injury, such as misuse of those biometrics, is required. *Id.* at 1206–07. This is true no matter which of "section 15's requirements" are alleged to be violated; whether a question of collection under Section 15(b) or disclosure under Section 15(d) that first "violation constitutes an

invasion, impairment or denial of" the statutory right to privacy and control. *Id.*

By emphasizing the individual's control over biometrics, BIPA is consistent with traditional invasion of privacy torts. Indeed, the Court has recognized a violation of the privacy interests BIPA protects is "akin to a tortious invasion of privacy." *Fox*, 980 F.3d at 1154; *see also Bryant*, 958 F.3d at 624. For tort claims, "the cause of action usually accrues when the plaintiff suffers injury." *Am. Fam. Mut. Ins. Co. v. Krop*, 120 N.E.3d 982, 987 (Ill. 2018) (quoting *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135 (Ill. 1995)).

Accordingly, and as discussed further below, invasion of privacy claims accrue at the time the injured party's interest in privacy is purportedly invaded. *See Blair v. Nev. Landing P'ship*, 859 N.E.2d 1188, 1193 (Ill. App. Ct. 2006) (privacy claim accrued when employer first displayed employee's image). This is true even if there are subsequent consequences of the initial invasion—or even republication of material that offends a privacy interest. *See id.* at 1194 (claim accrued with first display, despite nine years of republication to same target audience and with singular purpose on various brochures, signs,

billboards, calendars, postcards, and a website); *see also Bank of Ravenswood v. City of Chicago*, 717 N.E.2d 478, 484 (Ill. App. Ct. 1999) (plaintiff's claim accrued at the time of first trespass, despite ongoing presence of offending subway tunnel); *Winrod v. Time, Inc.*, 78 N.E.2d 708, 714 (Ill. App. Ct. 1948) (libel claim accrued upon first publication of magazine and subsequent distributions did "not constitute a new publication or create a new cause of action"). Accrual upon initial invasion is a fundamental principle that applies equally to Section 15(b) as to 15(d), as explained below.

B. BIPA Claims Under Section 15(b) Accrue Once, Upon First Use of Finger-Scan Technology.

1. The plain language of BIPA shows a Section 15(b) claim accrues upon the initial loss of control.

When interpreting BIPA, the Illinois Supreme Court has made clear that courts "may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may [courts] add provisions not found in the law." *Rosenbach*, 129 N.E.3d at 1204. Section 15(b)'s plain language makes clear that the injury occurs upon the initial failure to obtain consent before collection: "[n]o 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*" complies with three requirements. 740 ILCS 14/15(b) (emphasis added).

Under Section 15(b), a private entity must "first" do the following before collecting a biometric: inform the subject in writing (1) that biometric information is being collected or stored and (2) of the specific purpose and length of term for which biometric information is being collected, stored, and used. *Id.* at 15(b)(1)–(2). Lastly, the private entity (3) must receive a "written release" executed by the subject. *Id.* at 15(b)(3); s*ee also Miller*, 926 F.3d at 900 ("*[b]efore* obtaining any fingerprint, a 'private entity' must inform the subject . . . in writing about several things" (emphasis added)). When an entity fails to do these three things *before* collecting biometric information, a Section 15(b) injury occurs and a plaintiff's claim accrues.

Rosenbach makes exactly this point. As the Illinois Supreme Court explained, when biometrics are collected without consent, control "vanishes into thin air," and the "real and significant" injury the legislature wanted to prevent "is then realized." *Rosenbach*, 129 N.E.3d at 1206. The moment control is lost, the BIPA plaintiff is sufficiently

"aggrieved" to have a claim, and she may pursue the private right of action granted by BIPA Section 20. "No additional consequences need to be pleaded or proved." *Id.*

Ms. Cothron's allegations in her Second Amended Complaint track the statute and recognize that the BIPA violation is the failure to obtain consent. (*See* R44, ¶¶ 47–49 (alleging White Castle failed to obtain consent "prior" to the collection)). Ms. Cothron's own allegations of her purported Section 15(b) injury are thus consistent with the statute's plain language: her interests were invaded and she suffered injury when White Castle allegedly collected her biometric information without first adhering to BIPA's notice and consent requirements.

Pursuant to *Rosenbach*, control is lost at the first, and only the first, collection without adequate notice and adequate consent. The Court has explained why this makes sense: "biometric identifiers . . . once compromised, are compromised forever." *Fox*, 980 F.3d at 1155. Thus, subsequent collections change nothing; there is no new injury or aggrievement with later collections of the same biometric information because the individual has already lost control over that information. If that were not the case, the term "unless it first" in Section 15(b) would

have no meaning—an interpretation the Court cannot adopt. *See People v. Perez*, 18 N.E.3d 41, 44 (Ill. 2014) ("Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." (citation omitted)).

2. The District Court's analysis was flawed.

Applying BIPA's plain language, three Illinois courts have concluded that a Section 15(b) claim accrues once, on the date an entity first denies individuals the power to control their biometric information by failing to obtain consent prior to the first collection. *See Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425, at 3 (Ill. Cir. Ct. June 10, 2020) ("[A]ll [of the employee's] damages flowed from that *initial act* of collecting and storing Plaintiff's handprint . . . *without first complying* with the statute." (emphasis added)) (A24); *Robertson v. Hostmark Hospitality Group, Inc.*, No. 2018-CH-05194, at 4 (Ill. Cir. Ct. May 29, 2020) (explaining a defendant's "alleged failure to first obtain" a person's "written consent *before* collecting his biometric data . . . is the essence of and gave rise to the cause of action" (emphasis added)) (A32); *Smith*, No. 2019-L-248, at 2 ("The offense, and thus the cause of action for the offense, occurs *the first time* the biometric information is

collected . . . .” (emphasis added)) (A19). Each of these cases involves essentially identical allegations and arguments as presented to the District Court. The District Court’s reading to the contrary is a true outlier.

Rather than adhering to the statute’s plain language and applying it to Ms. Cothron’s claims as outlined above and as other courts have done, the District Court’s analysis overlooked fundamental accrual principles and Section 20’s requirement of aggrievement as it applies to Section 15(b). Indeed, the fact that repeated use of technology does not give rise to additional injury, or “aggrievement,” was central to the analyses in *Watson*, *Robertson*, and *Smith*. In *Watson*, the court conducted a comparison of BIPA claims and wage claims where each inadequate paycheck does give rise to a separate cause of action. *Watson*, No. 2019-CH-03425, at 3 (A24). The court distinguished BIPA claims from wage claims: in wage claims “[a]dditional damages accrue each time a paycheck is short,” while in BIPA claims all damages flow from the single initial “collection and storage of [] biometric data.” *Id.* Thus, although the BIPA plaintiff’s complaint alleged multiple scans,

"all his damages flowed from that initial act of collecting and storing . . . without first complying with the statute." *Id.*

The District Court erred in failing to apply proper statutory construction, which requires examination of the statute as a whole and consideration of all relevant parts. *See Beeler v. Saul*, 977 F.3d 577, 585 (7th Cir. 2020) ("The 'whole text' canon of statutory interpretation also 'calls on the judicial interpreter to consider the entire text, in view of its structure and the physical and logical relation of its many parts.'" (citation omitted)); *In re Christopher K.*, 841 N.E.2d 945, 955 (Ill. 2005) ("[T]his court will examine a statute as a whole, considering all relevant parts.").[8] It failed to consider Section 20's aggrievement requirement applies to Section 15(b) (and consequently how "aggrieved" has been defined by the courts), which is critical to understanding BIPA's statutory scheme and the accrual question. The District Court erred as a result.

Moreover, the District Court effectively added words into Section 15(b). That it cannot do. It reasoned:

[8] *See also, e.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (describing statutory construction as a "holistic endeavor"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (directing courts to consider "the language and design of the statute as a whole").

> A statutory requirement indicating ***when*** certain information must be provided, moreover, is different than a requirement indicating for ***which*** collections that provision of information is required. The text of Section 15(b) does indicate when consent must be acquired, but it does not differentiate between the first collection and subsequent collections: for any and all collections, consent must be obtained "first." 740 ILCS 14/15(b).

(A12 (emphasis original)).

The District Court's statement that "consent *must* be obtained 'first'" for "any and all collections" strongly suggests that an employer using biometric technology in the workplace "must" obtain informed consent each time the finger-scan technology is used. The District Court's holding necessarily reads into the statute terms that are not there and that are inconsistent with BIPA's purpose. It transforms Section 15(b) to read "unless *each time* it first . . . ." But, when construing a statute, a court cannot "add provisions not found in the law." *Rosenbach*, 129 N.E.3d at 1204; *see also In re Consol. Objections to Tax Levies of Sch. Dist. No. 205*, 739 N.E.2d 508, 512 (Ill. 2000) (courts may not depart from a statute's plain language by reading into it "exceptions, limitations or conditions" conflicting with legislative intent). The District Court's doing so here was error.

The District Court claims that its reading of the term each time could be cured with a forward-looking consent, suggesting a singular consent could cover all future collections by requiring an employee to "consent to all future scans." (A12). But all parties, including employers, are entitled to rely upon the law as it is written. In fact, the 2018 consent the District Court found to be sufficient here does not contain "each time" in it or reference consent to "all future scans." (*See* A17). By reading words into the statute that are not there, the District Court has created liability for employers who, like White Castle, have obtained consent according to the way the statute is actually written; the court wants parties to jump through hoops that the law does not require.

Under either scenario—whether an employer must obtain consent each time or craft a release that explicitly covers each time—any employer who uses workplace finger-scan technology is exposed to millions of dollars in potential damages, as discussed *infra*, under the District Court's reading. That alone is enough to chill the use of biometrics in the workplace. BIPA was not designed to discourage use of biometrics or to make using biometric technology so risky that companies avoid it all together. Quite the opposite. The legislature

wanted to *encourage* the use of biometric technology and, through BIPA, calm any fears of a hesitant public. *See* 740 ILCS 14/5(a)–(g) (finding that, before BIPA, lack of state law regulating biometrics deterred public from partaking in biometric transactions).

In sum, BIPA's plain language, as written, should control—an individual's interests are invaded and an injury occurs under Section 15(b) only once, upon the first collection without informed consent. *See Fox*, 980 F.3d at 1155; *Rosenbach*, 129 N.E.3d at 1206. In that moment, a claim accrues; and it can only accrue once.

C. BIPA Claims Under Section 15(d) Accrue Once, Upon the First Alleged Disclosure.

1. A BIPA plaintiff is "aggrieved" by a Section 15(d) violation once, with the initial disclosure.

Individuals' interests under BIPA are invaded when a private entity first violates the rights granted them under any provision of Section 15, which includes Section 15(d). *See Rosenbach*, 129 N.E.3d at 1206–07 (BIPA seeks to prevent harm that results from biometric information that is "not properly safeguarded"). Under Section 15(d), that is the moment of the first alleged disclosure. The injury under 15(d) also occurs at the same moment of the first disclosure, because

biometrics "once compromised, are compromised forever." *Fox*, 980 F.3d at 1155; *see id.* at 1153 (individuals are "actually harm[ed]" when entities fail to comply with Section 15's requirements); *Rosenbach*, 129 N.E.3d at 1206 (when a private entity fails to comply with Section 15, a violation occurs and a person is "clearly" aggrieved under the statute).

That an individual's interests are only invaded under Section 15(d) upon the first disclosure makes sense given the risks BIPA guards against. The Court has explained that Section 15(d) limits "transfers" of biometric information to a third party. *Miller*, 926 F.3d at 901. This is so because the longer biometrics are retained and the more people who have access, "the greater the risk of disclosure" beyond that initial transaction. *Id.* at 902. Said differently, Section 15(d) is about protecting control of biometrics by limiting the risk of compromised biometrics through unauthorized transfer or dissemination. Any such risk is created with the first "transfer," *i.e.*, disclosure, that places biometric information in the hands of a third party—the risk does not arise anew with the next "transfer" for the same purpose. *See Robertson*, No. 2018-CH-05194, at 6–7 (where complaint alleged disclosure occurred "systematically and automatically" for the same

purpose, Section 15(d) claim accrued upon first use of technology) (A34–A35).

An individual may only recover for a disclosure if it produces injury—as the statute itself provides, and as discussed in detail *supra*, Section 20 explicitly limits recovery to only a "person aggrieved." 740 ILCS 14/20. To be clear, this applies to any and all provisions in BIPA. Because the Illinois Supreme Court has defined aggrievement under BIPA as the loss of control over biometric information, to have an actionable, recoverable Section 15(d) claim, the plaintiff must have been "aggrieved" by the offending conduct, *i.e.*, the plaintiff must have lost control of her biometrics by the disclosure at issue. *Rosenbach*, 129 N.E.3d at 1206. The Section 15(d) claim thus accrues only upon the first alleged disclosure, because disclosing the same information over and over for the same purpose cannot cause a second loss of control. Loss of control, by definition, is a singular injury that occurs once in the context of Section 15(d)—the moment of the initial loss of control with the first unauthorized disclosure.

Whether a claimant was also separately aggrieved under Section 15(b) is irrelevant to this analysis. If there is collection but no

disclosure, the plaintiff could be aggrieved under Section 15(b) but not Section 15(d). The converse is also true—there could be an actionable 15(d) claim, but not a 15(b) claim. Under either circumstance, pursuant to Section 20, the defendant's action in question must have produced injury as defined in *Rosenbach*. Any reading to the contrary would be inconsistent with and render superfluous Section 20's requirement of aggrievement and its explicit mention of permitting recovery for "each violation" of Section 15. *See* 740 ILCS 14/20 (providing that "[a] prevailing party may recover for each violation"); *see also Perez*, 18 N.E.3d at 44 (courts cannot adopt a statutory interpretation that renders a "word, clause, [or] sentence . . . superfluous" (citation omitted)).

Moreover, the use of "redisclosure" in Section 15(d) does not change how Section 20's aggrievement requirement applies to the 15(d) claims. This is so because, distinct from Section 15(b)'s regulation of the actions of only one entity, Section 15(d) necessarily assumes a relationship involving more than one entity. A person or entity discloses, rediscloses, or disseminates the purported biometric information *to someone else*. Because Section 15(d) assumes the

presence of a third party, it would make sense for this subsection to speak to that potential third party's conduct—*redisclosure*. The District Court appeared to conclude that redisclosure refers to the collecting entity's continued disclosure of the same biometric information to the same third party. (*See* A13). But the use of the term "redisclosure" reflects the relationship nature of this subsection, which is distinct from Section 15(b) discussed above. In Section 15(d), the language assumes the presence of and potential harm inflicted by a third party who receives disclosed information and *rediscloses* it without consent. This highlights the Court's concern in *Miller*—that absent proper safeguards, captured and disclosed information may be vulnerable to redisclosure by a third party. *See Miller*, 926 F.3d at 902–03 (discussing identity theft as one way information could be redisclosed at "the hands of malefactors").

Accordingly, BIPA Section 15(d) claims accrue once, upon the first alleged disclosure to a third party. That is the moment of both the invasion and the injury, and the injury occurs only once where repeated disclosures are made for the same purpose.

2. This reading is consistent with well-established principles of accrual for publication-based privacy statutes.

Because BIPA is a privacy statute and Section 15(d)'s plain language contains a clear prohibition against disclosing biometric information to a third party, a comparison of accrual under BIPA to accrual under other publication-based privacy claims is appropriate. *See Fox*, 980 F.3d at 1149 (BIPA claims are based on the "invasion of a legally protected privacy right"); *Bryant*, 958 F.3d at 623 (plaintiff's BIPA claims are "closely analogous to historical claims for invasion of privacy"). Under Illinois law, privacy claims involving disclosure or publication accrue upon the first alleged act because subsequent invasions of the same privacy interest (*i.e.*, disclosure or publication of the same information for the same purpose) do not give rise to new claims. *See, e.g.*, *Blair*, 859 N.E.2d at 1193 (in right-of-publicity case, republication of same image in numerous advertisements did not give rise to new claims).

Indeed, it has long been the law in Illinois that in privacy torts involving publication, the claim accrues a single time, upon first disclosure or publication. *See Winrod*, 78 N.E.2d at 714 (libel claim

accrued upon first publication of magazine and subsequent distributions did "not constitute a new publication or create a new cause of action"). Where a protected interest is invaded through disclosure or publication, such as under Section 15(d), subsequent disclosure or publication of the same information does not create a new injury and does not give rise to new claims. *See, e.g.*, *Blair*, 859 N.E.2d at 1193; *see also Winrod*, 78 N.E.2d at 714. Federal courts consistently have applied Illinois accrual law in the same manner regarding repeated publication of the same material. *See Troya Int'l, Ltd. v. Bird-X, Inc.*, No. 15 c 9785, 2017 WL 6059804, at *14 (N.D. Ill. Dec. 7, 2017) (claims accrued upon first publication of a video, despite that defendant uploaded the video to multiple websites and YouTube channels); *Martin v. Living Essentials, LLC*, 160 F. Supp. 3d 1042, 1046 n.4 (N.D. Ill. 2016), *aff'd*, 653 F. App'x 482 (7th Cir. 2016) (noting repeated airing of a television commercial constituted a single overt act and plaintiff's claim accrued at the first invasion).

This rule is so fundamental that the Illinois legislature has codified it as the Uniform Single Publication Act, 740 ILCS 165/1 *et seq*. The Act provides that "[n]o person shall have more than one cause of

action for . . . invasion of privacy . . . founded upon any single publication." 740 ILCS 165/1. Arguably, separate violations could accrue if different information were published for different purposes. *See, e.g.*, *Yeager v. Innovus Pharms., Inc.*, No. 18-cv-397, 2019 WL 447743, at *6 (N.D. Ill. Feb. 5, 2019) (plaintiff plausibly alleged timely claims where offending advertisement was placed in different channels in different geographic locations to reach new audiences). But that is not the case where, as here, the same information is alleged to be repeatedly disclosed "systematically and automatically" for the same purpose. (*See* R44, ¶¶ 31, 86).

Just recently, on March 18, 2021, the Illinois Supreme Court emphasized this point and explained why this accrual principle is so fundamental. In *Ciolino v. Simon*, 2021 IL 126024, ¶ 43, -- N.E.3d -- (Ill. 2021), the Court observed that "the single-publication rule would not serve its purpose if it were applied to encompass the subsequent screenings [of the same defamatory film to the same target audiences] in Cleveland and Chicago." The Court explained that showing the same material repeatedly to the same target audience could not give rise to separate claims for liability, because it would create a situation the

single-publication rule is explicitly designed to prevent—namely, "ungovernable piecemeal liability and [a] potentially endless tolling of the statute of limitations." *Id.* (citations omitted and alteration in original). But that is precisely the circumstance that the District Court has created here. Where the disclosure of biometric information is alleged to be "systematic and automatic," *i.e.*, the same data is repeatedly disclosed for the same purpose, per-disclosure accrual under Section 15(d) is completely inconsistent with well-established, and recently emphasized, Illinois accrual principles.

Thus, like the interest invasion in publication-based privacy claims, an actionable interest invasion of an individuals' privacy interest under Section 15(d) occurs one time, when biometric information is first disclosed. The injury that results, the loss of control, also occurs once. Once a biometric is collected, it is collected; once disclosed, it is disclosed; and "once compromised, [it is] compromised forever." *Fox*, 980 F.3d at 1155. Because BIPA plaintiffs do not suffer additional injury with each collection or disclosure of the same biometric information for the same purpose, they do not—and cannot—have additional claims accrue each time they use a finger-scan system

to clock in and out of work, to check a paystub, or to log into a computer. The District Court's conclusion to the contrary should be reversed.

D. Ms. Cothron's Claims Are Time Barred.

Under a simple application of Illinois accrual law and a plain reading of Sections 15(b) and 15(d), Ms. Cothron's claims accrued, if ever (*see supra* n.6), in 2008 and are time barred. BIPA became effective on Friday, October 3, 2008. 740 ILCS 14/99. Ms. Cothron's rights were invaded, and she suffered injury under BIPA—*i.e.*, her right to control her biometric information "vanished into thin air," *Rosenbach*, 129 N.E.3d at 1206—immediately when she used the finger-scan technology following BIPA's effective date.

Ms. Cothron's own allegations confirm this. She alleges she was "required" to scan her finger to access a work computer and her paystubs beginning no later than 2007. (R44, ¶¶ 3, 39–40, 44). She also alleges White Castle "systematically and automatically" disclosed her information at all relevant times. (*Id.* ¶¶ 41, 90–97). Therefore, as of her first scan upon BIPA's enactment in 2008, Ms. Cothron "effectively yielded" control of her biometric information to White Castle. *See Bryant*, 958 F.3d at 623. Put differently, by her own allegations, Ms.

Cothron suffered injury and was aggrieved under BIPA in October 2008, and her claims accrued in October 2008, immediately upon the first collection and disclosure of her biometric information.

Subsequent scans change nothing, because Ms. Cothron had already been injured when she lost control of her biometrics due to White Castle's alleged failure to comply with BIPA. Her control cannot "vanish" a second time. *Rosenbach*, 129 N.E.3d at 1206; *see Fox*, 980 F.3d at 1155 ("once compromised . . . compromised forever"). There is no second injury, and, without injury, there is no second, third, or one-thousandth accrual. *See Feltmeier*, 798 N.E.2d at 85. Specifically, where there is a "single overt act" from which subsequent damages may flow, a claim accrues "on the date the defendant invaded the plaintiff's interest and inflicted injury." *Id.* Thus, Ms. Cothron's claims accrued, if at all, in 2008, and they are time barred. The District Court erred in failing to reach this conclusion.

II. Policy and Equity Considerations Support White Castle's Reading of BIPA.

The District Court's accrual analysis is contrary to public policy and basic equity, in addition to BIPA's plain language. If adopted, the District Court's analysis will lead to a situation where, as the District

Court acknowledged, "the statutory damages for each violation—if defined as every unauthorized scan or disclosure of Ms. Cothron's fingerprint—would be crippling." (A13). By disregarding the "crippling" effect of its analysis, the District Court reached a conclusion that is inconsistent with the Illinois General Assembly's intent.

To determine legislative intent, a court may consider "not only the language of the statute but also the reason and necessity for the law, the problems sought to be remedied, the purpose to be achieved, and the consequences of construing the statute one way or another." *Lakewood Nursing & Rehab. Ctr., LLC v. Dep't of Pub. Health*, 158 N.E.3d 229, 234 (Ill. 2019). A review of BIPA's nature and purpose, as well as relevant public policy considerations, conclusively shows that the legislature did not intend and could not have intended to make per-scan accrual and damages part of BIPA's statutory scheme.

A. BIPA Is a Remedial Statute Designed to Prevent Problems Before They Occur.

Illinois law draws a clear distinction between remedial statutes and penal statutes. Remedial statutes "are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." *Standard Mut. Ins. Co. v. Lay*, 989 N.E.2d

591, 599 (Ill. 2013) (citation omitted); *see also Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir. 1981) (liquidated damages strengthen enforcement of a remedial statute). In contrast, penal statutes operate as "punishment for the nonperformance of an act or for the performance of an unlawful act" and "require[] the transgressor to pay a penalty without regard to proof of any actual monetary injury sustained." *Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman*, 18 N.E.3d 884, 893 (Ill. 2014) (citations omitted).

BIPA is a remedial statute. *See Rosenbach*, 129 N.E.3d at 1207 (discussing General Assembly's goal, through BIPA, of "prevent[ing] problems before the occur"); *Burlinski v. Top Golf USA Inc.*, No 19-cv-06700, 2020 WL 5253150, at *7 (N.D. Ill. Sept. 3, 2020) (BIPA has a remedial purpose to protect biometric privacy); *Meegan v. NFI Indus., Inc.*, No. 20 C 465, 2020 WL 3000281, at *4 (N.D. Ill. June 4, 2020) ("BIPA's provision for actual damages and the regulatory intent of its enactment show that it is a remedial statute[.]").[9] When enacting BIPA,

[9] *See also Owens v. Wendy's Int'l, LLC*, No. 2018-CH-11423, at 15 (Ill. Cir. Ct. June 8, 2020) ("BIPA is remedial, not penal.") (A53); *Young v. Tri City Foods, Inc.*, No. 2018-CH-13114, at 22 (Ill. Cir. Ct. June 8, 2020) (BIPA's purpose and its liquidated damages "clearly serve[] more than purely punitive or deterrent goals . . . BIPA is remedial." (citations and internal quotation marks omitted)) (A86).

the General Assembly found that "[t]he 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).

Like any remedial statute, recovery under BIPA must be tied to actual injury. As Judge Chang of the Northern District of Illinois recently emphasized, BIPA is not a statute where "it is irrelevant whether plaintiffs have suffered actual damages." *Burlinski*, 2020 WL 5253150, at *7 (citing *Landis v. Marc Realty, L.L.C.*, 919 N.E.2d 300, 308 (Ill. 2009)); *see also Chavez v. Temperature Equip. Corp.*, No. 2019-CH-02538, at 8 (Ill. Cir. Ct. Sept. 11, 2019) ("BIPA is a remedial statute, not a penal statute. [BIPA] does not impose damages without regard to the actual damages suffered by a plaintiff . . . .") (A98).

Per-scan damages would transform BIPA from a remedial statute into one that is harshly punitive. The District Court "fully acknowledge[d] the large damage awards that may result from [its] reading of the statute" but was unconcerned. (A13). It explained that the legislature may have "sought to impose harsh sanctions" and that a federal court should not "avoid a construction that may penalize

violations severely." (A14). But when interpreting a statute, a court should not ignore its nature and purpose, or the injury it seeks to prevent. *Lakewood Nursing*, 158 N.E.3d at 234. Nor should it ignore "the practical consequences, which naturally guide [any] interpretation of legislative enactments." *Martin v. Luther*, 689 F.2d 109, 114 (7th Cir. 1982).

BIPA's liquidated damages provision does not change the nature of the statute. Remedial statutes may include liquidated damages as "one part of the regulatory scheme, intended as a supplemental aid to enforcement rather than as a punitive measure." *Scott v. Ass'n for Childbirth at Home, Int'l*, 430 N.E.2d 1012, 1017 (Ill. 1981). BIPA's liquidated damages provision is no different. Because BIPA seeks to prevent the "substantial and irreversible harm" that results from inadequate safeguards for biometric information, BIPA provides liquidated damages to give entities "the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." *Rosenbach*, 129 N.E.3d at 1207.

The District Court's decision to overlay per-scan accrual and damages onto BIPA's liquidated damages provision fundamentally

alters and distorts the nature of the statute and ignores how the Illinois Supreme Court has defined a BIPA injury. As Judge Chang explained, liquidated damages are "an alternative mode of relief to actual damages." *Burlinski,* 2020 WL 5253150, at *7. Accordingly, "it is only when the actual damages are relatively small or unquantifiable that the [liquidated] damages come into play." *Id.*; *see also Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 729 n.5 (7th Cir. 2016) (noting statutory damages are reserved for violations when damages are "small or difficult to ascertain" (citation omitted)); *Standard Mut. Ins. Co.*, 989 N.E.2d at 600.

The District Court's reading converts the liquidated damages provision from a supplemental aid to enforcement into a harshly punitive measure. It no longer functions as an alternative mode of relief where damages are small or unquantifiable. Rather, it generates windfall damages that are wholly untethered to the plaintiff's injury and Section 20's plain requirement of aggrievement.[10] Construing a

[10] The very definition of a BIPA injury distinguishes BIPA's liquidated damages provision from other remedial statutes that do allow for multiple injuries and thus multiple damage awards on a per-act basis. For instance, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, permits, in some cases, per-call recovery. *See, e.g.*, *Perez v. Rash Curtis & Assocs.*, No. 4:16-cv-03396-YGR, 2020 WL

liquidated damages provision in a remedial statute to skyrocket in a manner unrelated to actual damages is inconsistent with the plain language of the statute, the definition of a BIPA injury, and the clearly established case law regarding BIPA's remedial nature.

B. Per-Scan Accrual and Damages Lead to Absurd and Unjust Results.

BIPA must be read logically, consistent with what the Illinois Supreme Court and this Court have said about the nature of BIPA injuries and protected interests. In other words, it must be "supported by common sense and an assessment of the practical consequences." *Martin*, 689 F.2d at 114. A court "must presume that the legislature did not intend to enact a statute that leads to absurdity, inconvenience, or injustice." *Lakewood Nursing*, 158 N.E.3d at 234; *see also Slepicka v. Ill.*

1904533, at *1 (N.D. Cal. Apr. 17, 2020) ($500 awarded "per call made in violation of the TCPA"). Like lost wages discussed *supra*, a new injury occurs under the TCPA with each unwanted call. Damages on a per-call or per-paycheck basis, therefore, remain tied to actual injury. Each action causes a new, recoverable injury. Thus, despite having a remedial nature, the TCPA, like lost wages, prevents an injury fundamentally different from that of BIPA. As defined by the Illinois Supreme Court, a BIPA injury occurs one time, and accordingly, BIPA's liquidated damages provision must be treated differently than these other statutes. Subsequent collections of the same information or disclosures of the same information for the same purpose do not compound the singular BIPA injury. Without a new injury, there can be no new liquidated damages award.

Dep't of Pub. Health, 21 N.E.3d 368, 373 (Ill. 2014); *Land v. Bd. of Educ. of the City of Chi.,* 781 N.E.2d 249, 255 (Ill. 2002).

The District Court's interpretation is inconsistent with that presumption. Ms. Cothron alleges she had to scan her finger each time she accessed a work computer and each time she accessed her weekly paystub. (R44, ¶¶ 2, 40, 43–44). Assuming Ms. Cothron worked 5 days per week for 50 weeks per year and accessed the computer each day and her paystub weekly, her total scans would exceed 1,500 over a five-year limitations period and total violations (collections under 15(b) and disclosures under 15(d)) would exceed 3,000 based on her allegations of systematic and automatic disclosure. (*Id.* ¶ 96). This leads to low-end liquidated damages exceeding $3 million just for Ms. Cothron. She also seeks to bring a class action on behalf of all White Castle employees who used the system at White Castle's sixty-three Illinois locations during the five years prior to Ms. Cothron filing her claim. Even if each of those employees could not lay claim to a potential liquidated damages award the size of Ms. Cothron's, class-wide liquidated damages under the District Court's per-scan approach could easily exceed $1 billion dollars. This would be catastrophic for any company.

This result defies logic because BIPA was designed to encourage and incentivize the responsible use of biometric technology, not put companies out of business for technical violations. *See* 740 ILCS 14/5(a)–(g). The outcome is also absurd and unjust given that Ms. Cothron consented to the use of White Castle's finger-scan system and does not allege an injury beyond the loss of control of her biometric information. Like most employees asserting BIPA claims, Ms. Cothron has not alleged a breach or any costs associated with identity theft or compromised data.[11] As defined by *Rosenbach*, then, Ms. Cothron suffered a single injury, *i.e.*, loss of control, which, by definition, can only occur once. Critically, the General Assembly valued that singular injury between $1,000 and $5,000. Allowing a BIPA plaintiff to assert thousands of individual claims based on daily scans, that cause no additional injury, to create a multi-million-dollar award is absurd and outlandish. A $3 million recovery for Ms. Cothron, whose injury, by definition, only happened once (if ever) and that the General Assembly valued as worth *at most* $5,000, would amount to a shocking windfall.

[11] In fact, of the hundreds of BIPA class actions pending in Illinois, White Castle is not aware of a single one that alleges an actual data breach.

Should the District Court's order stand, the implications across the state are grave. As demonstrated by the hundreds of cases filed against Illinois employers for use of finger-scan timekeeping technology, the technology is widely used and has been for years. Employers throughout Illinois would face ruinous damages, particularly where dozens or hundreds of employees used finger-scan technology twice a day, or more, for years. Many businesses would not survive. *See, e.g.*, *Smith*, No. 2019-L-248, at 3 (explaining that per-scan damages would "force out of business—in droves—violators who without any nefarious intent installed new technology") (A20). The Court should not assume that the General Assembly intended to cripple Illinois' economy in this fashion.

This is particularly so because the legislature enacted BIPA in response to the Pay by Touch bankruptcy. Ms. Cothron's Complaint provides the Pay by Touch bankruptcy "was alarming" to the Illinois legislature because "there was a serious risk that millions of fingerprint records . . . could now be sold, distributed, or otherwise shared" through the bankruptcy proceedings. (R44, ¶ 17). Illinois legislators recognized the bankruptcy left thousands of customers "wondering what will

become of their biometric and financial data." *See* Ill. House Tr., 2008 Reg. Sess. No. 276 (Statement of Rep. Kathleen A. Ryg). Accordingly, Illinois citizens were in "very serious need" of protections. *Id*. The legislature did not intend to address these bankruptcy concerns by unleashing a tsunami of BIPA bankruptcies in response.

Tellingly, before the Court, Ms. Cothron has attempted to avoid the clear implications—and even the plain language—of the District Court's holding. Specifically, in opposing White Castle's petition for permission to appeal, she has asserted that she "has never advanced such a theory of damages" that would entitle her to per-scan recovery. *See* Case No. 20-8029, Dkt. 8 at 22. She goes as far as describing such recovery as "baseless and absurd," even "bizarre." (*Id.*). But the District Court's order leads directly to such a result. (A13). The order has been entered, and the implications are dire. The Court should reverse.

C. Per-Scan Accrual Operates to Eliminate Any Meaningful Statute of Limitations for Workplace BIPA Claims.

The District Court's interpretation of BIPA is also contrary to Illinois public policy because it effectively eliminates the statute of limitations for BIPA claims arising in the employment context. Statutes

of limitations "discourage the presentation of stale claims and [] encourage diligence in the bringing of actions" and "represent society's recognition that predictability and finality are desirable, indeed indispensable, elements of the orderly administration of justice." *Sundance Homes, Inc. v. Cty. of DuPage*, 746 N.E.2d 254, 265–66 (Ill. 2001); *see Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003) (statutes of limitation promote justice by preventing the "revival of claims that have been allowed to slumber" (citation omitted)). As discussed *supra*, the Illinois Supreme Court also recently cautioned against interpreting accrual in the publication context in a manner that would lead to the "potentially endless tolling of the statute of limitations." *Ciolino*, 2021 IL 126024, ¶ 43.

Under the District Court's analysis, when an alleged violation occurs each time an employee uses biometric technology at work, the limitations period does not run until either the employee signs a consent that would be sufficient to cover all future uses, assuming such a consent could exist, or the employee leaves the company. Instead, it is refreshed on a daily or weekly basis each time the employee uses the purported biometric technology. This interpretation permits employees

to "slumber" on their rights and disincentives them from putting their employers on timely notice. The District Court's interpretation of BIPA actually incentivizes employees to delay bringing their claims, because each additional punch-in, punch-out, or scan creates an additional $1,000 or $5,000 in liability. Such an outcome puts the "jackpot" in "jackpot justice."

Moreover, a perpetual limitations period undermines BIPA's goal of preventing harm before it happens. The Illinois legislature designed BIPA to incentivize compliance and "to try to head off [] problems before they occur." *Rosenbach*, 129 N.E.3d at 1206. BIPA's purpose and goals are best served when individuals are incentivized to bring their claims diligently. The sooner individuals file suit, the sooner businesses are aware of alleged violations, and the sooner those businesses can take corrective action, if necessary. The District Court's order results in the opposite of what BIPA intends and permits delays that will lead to privacy invasions of *more* individuals, not fewer.

Per-scan accrual and damages plainly conflict with Illinois public policy. The District Court's failure to appreciate this was error, and the Court should reverse.

CONCLUSION

The District Court's order is contrary to BIPA's plain language, to BIPA's nature and purpose, and to Illinois public policy. The only reasonable interpretation of the statute is that the repeated use of finger-scan technology in the workplace gives rise to a single violation that accrues the first time the technology is used by an employee. Here, if ever, that occurred in October 2008, when Ms. Cothron allegedly first utilized White Castle's finger-scan system without informed consent after BIPA's enactment. Under any possible applicable statute of limitations—whether one, two, or five years—her claims are time barred. The Court should vacate the District Court's order and remand with instructions to grant White Castle's motion for judgment on the pleadings.

Dated: March 29, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Defendant-Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,024 words, excluding the parts of the brief exempted by Rule 32(f).

The undersigned further certifies that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14 point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 29, 2021

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Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

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APPENDIX

A1–A38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LATRINA COTHRON, Individually and on behalf of similarly situated individuals, Plaintiff, v. WHITE CASTLE SYSTEM, INC. D/B/A WHITE CASTLE, Defendant.	)	No. 19 CV 00382 Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

Despite numerous recent suits concerning Illinois' Biometric Information Privacy Act (BIPA), important questions of statutory interpretation remain unresolved. This case presents two such questions: what acts violate BIPA Section 15(b) and Section 15(d) and when do claims premised on such violations accrue? Plaintiff Latrina Cothron alleges that, in 2007, her employer, White Castle System, Inc. ("White Castle"), implemented a system that involved capturing her fingerprint data and disclosing it to third parties. After BIPA's enactment in mid-2008, White Castle continued to operate its system but did not obtain the newly required consent of its employees, thereby violating BIPA Section 15(b) and Section 15(d).[1] White Castle has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Ms. Cothron's claims accrued in 2008 and are therefore barred by the statute of limitations. Because

[1] Ms. Cothron's second amended complaint included alleged violations of Section 15(a), but the Court dismissed her claims under that provision for lack of Article III standing. *See* Mem. Op. Order 5-6, ECF No. 117.

the Court finds that Ms. Cothron's claims under both Section 15(b) and Section 15(d) are timely, White Castle's motion is denied.

BACKGROUND[2]

The facts set forth below are largely the same as those described in the Court's prior opinion in this case. *See* Mem. Op. Order 2-3, ECF No. 117. Latrina Cothron began working for White Castle in 2004 and is still employed by the restaurant-chain as a manager. Sec. Am. Compl. ¶ 39, ECF No. 44. Roughly three years after Ms. Cothron was hired, White Castle introduced a fingerprint-based computer system that required Ms. Cothron, as a condition of continued employment, to scan and register her fingerprint in order "to access the computer as a manager and access her paystubs as an hourly employee." *Id.* ¶ 40. According to Ms. Cothron, White Castle's system involved transferring the fingerprints to two third-party vendors—Cross Match and Digital Persona—as well as storing the fingerprints at other separately owned and operated data-storage facilities. *Id.* ¶¶ 28-31. Perhaps unsurprisingly—given that the Illinois Biometric Information Privacy Act ("BIPA") did not exist yet—White Castle did not receive a written release from Ms. Cothron to collect her fingerprints or to transfer them to third parties before implementing the system. *Id.* ¶ 41.

When the Illinois legislature enacted BIPA in mid-2008, the legal landscape changed but White Castle's practices did not—at least not for roughly ten years. *Id.* ¶¶ 27-28. White Castle continued to use its fingerprint system in the years following BIPA's passage and continued to disseminate that data to the same third parties. *Id.* ¶¶ 28-31. It was not until October 2018 that

[2] On a motion for judgment on the pleadings, the Court must accept all well-pleaded facts in the second amended complaint as true and draw all permissible inferences in favor of the plaintiffs. *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007).

White Castle provided Ms. Cothron with the required disclosures or a consent form. *Id.* ¶¶ 45, 48-49. On December 6, 2018, Ms. Cothron filed her class action complaint in the Circuit Court of Cook County, Illinois and the case was subsequently removed to this Court by Cross Match Technologies, Inc. (since dismissed from the case). Mot. J. Pleadings 2, ECF No. 120. After the Court denied White Castle's motion to dismiss Ms. Cothron's second amended complaint, White Castle filed an answer. *Id.* In the answer, White Castle raised a statute of limitations defense and subsequently moved for judgment on the pleadings on that basis. *Id.*

DISCUSSION

A motion for judgment on the pleadings under Rule 12(c) is evaluated using the same standard as a motion to dismiss under Rule 12(b)(6): to survive the motion, "a complaint must state a claim to relief that is plausible on its face." *Bishop v. Air Line Pilots Ass'n, Int'l*, 900 F.3d 388, 397 (7th Cir. 2018) (citations omitted). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wagner v. Teva Pharm. USA, Inc.*, 840 F.3d 355, 358 (7th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In assessing a motion for judgment on the pleadings, the Court draws "all reasonable inferences and facts in favor of the nonmovant, but need not accept as true any legal assertions." *Id.* Ms. Cothron provides two arguments for rejecting White Castle's statute of limitations defense: first, that White Castle waived its statute of limitations defense by not asserting it in its previously filed motion to dismiss; second, that her claims are timely.

I. Waiver

In making her waiver argument, Ms. Cothron ignores the basic framework provided by the Federal Rules of Civil Procedure as well as the language of Rule 12(g)(2), on which she relies.

The Rules provide that a defendant may respond to a complaint by filing a responsive pleading or, alternatively, by filing a motion to dismiss under Rule 12(b). Fed. R. Civ. P. 12(a). A Rule 12(b) motion, which must be made before a responsive pleading, is the proper vehicle for challenging the sufficiency of the complaint. Fed. R. Civ. P. 12(b). And White Castle, in its previously filed motion to dismiss, properly raised arguments under Rule 12(b)(6) that targeted the sufficiency of the complaint. Affirmative defenses (such as the defense of statute of limitations), on the other hand, are "external" to the complaint. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n.1 (7th Cir. 2012). Per Rule 8(c), the proper time to identify affirmative defenses is in a defendant's responsive pleading. Fed. R. Civ. P. 8(c). Then, "[a]fter pleadings are closed," a party may subsequently file a motion for judgment on the pleadings and seek judgment based on the previously raised affirmative defense. Fed. R. Civ. P. 12(c). In keeping with these rules, the Seventh Circuit has "repeatedly cautioned that the proper heading for such motions is Rule 12(c)." *Brownmark Films LLC*, 682 F.3d at 690 n.1; *see also Burton v. Ghosh*, 2020 WL 3045954, at *3 (7th Cir. 2020) ("The proper way to seek a dismissal based on an affirmative defense under most circumstances is not to move to dismiss under Rule 12(b)(6) for failure to state a claim. Rather, the defendant should answer and then move under Rule 12(c) for judgment on the pleadings." (citation omitted)). Contrary to Ms. Cothron's argument, White Castle did not waive its right to assert a statute of limitations defense in a motion for judgment on the pleadings; Rule 12(g)(2) expressly states that its limitation on further motions is applicable "***except as provided in Rule 12(h)(2)***." And Rule 12(h)(2)(B), in turn, expressly provides that failure to state a claim may be raised "by a motion under Rule 12(c)"—a motion which, again, may only be made "after the

pleadings are closed."[3] Far from having waived its statute of limitations defense, White Castle has raised the affirmative defense at precisely the procedural posture envisioned by the Rules. Ms. Cothron's argument to the contrary is entirely off-base.

II. Timeliness

Ms. Cothron's second argument for denying the motion—that, considered on the merits, White Castle's statute of limitations defense fails—is substantially stronger; indeed, the Court concludes that it is correct. A statute of limitations defense is an argument about the timeliness of a claim, and timeliness is a function of both the accrual date of a cause of action and the applicable statute of limitations. Nonetheless, in asserting its defense, White Castle limits itself to the issue of accrual and the Court does the same. *See* Reply Br. 5 n.2, ECF No. 124 ("White Castle has argued that Plaintiff's claims are untimely no matter what statute of limitations applies. Should the Court wish to determine the applicable limitations period, White Castle requests additional briefing on the issue.").[4]

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[3] *See* 5C FED. PRAC. & PROC. CIV. § 1392 (3d ed.):

> The operation of Rule 12(h)(2) is relatively simple. The three defenses protected by the rule may be asserted by motion before serving a responsive pleading. Unlike the Rule 12(h)(1) defenses, however, if a party makes a preliminary motion under Rule 12 and fails to include one of the Rule 12(h)(2) objections, she has not waived it, even though, under Rule 12(g), the party may not assert the defense by a second pre-answer motion. As the rule explicitly provides, a defending litigant also may interpose any of the Rule 12(h)(2) defenses in the responsive pleading or in any pleading permitted or ordered by the court under Rule 7(a). Moreover, even if these defenses are not interposed in any pleading, they may be the subject of a motion under Rule 12(c) for judgment on the pleadings or of a motion to dismiss at trial.

[4] As noted, the Court accepts, for present purposes, White Castle's position that the statute of limitations for BIPA claims has not been definitively resolved and that such claims are

As a general matter, under Illinois law, a cause of action accrues and the "limitations period begins to run when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278, 798 N.E.2d 75, 85 (Ill. 2003). On the same facts, however, the parties put forth accrual dates that differ by roughly 10 years: White Castle argues that the claims accrued in mid-2008, while Ms. Cothron contends that at least a portion of her claims accrued in 2018. How so far apart? The ten-year delay stems from accepting either of Ms. Cothron's two theories of accrual. First, Ms. Cothron contends that the alleged BIPA violations can be understood as falling under an exception to the general rule governing accrual, the continuing violation exception. "[U]nder the 'continuing tort' or 'continuing violation' rule, 'where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease.'" *Id.* (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 345, 770 N.E.2d 177 (Ill. 2002)).

Applying this doctrine, Ms. Cothron argues that the statute of limitations did not begin to run on any portion of her claim until the final violation (the last time White Castle collected and disseminated her fingerprint before she received BIPA notice and provided her consent). In the alternative, Ms. Cothron contends that each post-BIPA scan of her fingerprint constituted a separate violation of Section 15(b) and each disclosure to a third-party over that same period a separate violation of Section 15(d), with each violation accruing at the time of occurrence. Under this theory, at least a portion of Ms. Cothron's claims did not accrue until 2018 and would therefore

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potentially subject to a "one-, two-, or five-year statute of limitations." Mot. J. Pleadings 1, ECF No. 120. Nonetheless, the Court also acknowledges Ms. Cothron's argument that "[e]very trial court that has decided the issue has unanimously held the five-year 'catch-all' limitations period applies." Pl.'s Resp. 8, ECF No. 123.

be timely under any statute of limitations. White Castle rejects both theories, arguing instead that the complaint describes a single violation of Section 15(b) and a single violation of Section 15(d), both of which occurred and accrued "in 2008, during the first post-BIPA finger-scan that she alleges violated BIPA." Mot. J. Pleadings 10, ECF No. 120. The Court considers each argument in turn.

A. Continuing Violation Exception

At the outset, it is worth noting that Ms. Cothron's invocation of the continuing violation exception is ambiguous: it is unclear whether, in her view, White Castle's alleged course of conduct amounts to a single ongoing violation of each of the two BIPA provisions at issue or whether her argument is that White Castle violated the statute's terms repeatedly but the violations should be viewed as a continuous whole for prescriptive purposes only. Under either interpretation, however, the argument fails.

The continuing violation doctrine is a well-established, but limited exception to the general rule of accrual. In *Feltmeier*, the Illinois Supreme Court limned the doctrine's scope: "A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." 207 Ill. 2d at 278, 798 N.E.2d at 85. And those unlawful acts must produce a certain sort of injury for the doctrine to apply: the purpose of the doctrine is "to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought." *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 801 (7th Cir. 2008). Thus, the continuing violation doctrine is "misnamed"—"it is [ ] a doctrine not about a continuing, but about a cumulative, violation." *Id. See also Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 442 (7th Cir. 2005) ("Where a cause of action arises not from individually identifiable wrongs but rather from a series of acts considered collectively, the Illinois Supreme

Court has deemed application of the continuing violation rule appropriate."). By contrast, "the continuing violation rule does not apply to a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing." *Id.* at 443. *Compare Cunningham v. Huffman*, 154 Ill. 2d 398, 406, 609 N.E.2d 321, 324-325 (Ill. 1993) ("When the cumulative results of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent treatment."), *with Belleville Toyota*, 199 Ill. 2d at 349, 770 N.E.2d at 192 ("Rather, each allocation constituted a separate violation of section 4 of the Act, each violation supporting a separate cause of action. Based on the foregoing, we agree with defendants that the appellate court erred in affirming the trial court's application of the so-called continuing violation rule.").

BIPA claims do not fall within the limited purview of this exception. The Illinois Supreme Court has held that a person is "'aggrieved within the meaning of Section 20 of the [BIPA] and entitled to seek recovery under that provision" whenever "a private entity fails to comply with one of section 15's requirements." *Rosenbach v. Six Flags Entm't Corp.*, 432 Ill. Dec. 654, 663, 129 N.E.3d 1197, 1206 (Ill. 2019). And, as relevant here, Sections 15(b) and 15(d) impose obligations that are violated through discrete individual acts, not accumulated courses of conduct. Section 15(b) provides that no private entity "may collect, capture, purchase, receive through trade, or otherwise obtain" a person's biometric information unless it first receives that person's informed consent. 740 ILCS 14/15(b). This requirement is violated—fully and immediately—when a party collects biometric information without the necessary disclosure and consent. Similarly, Section 15(d) states that entities in possession of biometric data may only disclose or "otherwise disseminate" a person's data upon obtaining the person's consent or in limited other circumstances inapplicable here. 740 ILCS 14/15(d). Like Section 15(b), an entity violates this obligation the

moment that, absent consent, it discloses or otherwise disseminates a person's biometric information to a third party. The injuries resulting from these violations do not need time to blossom or accumulate. Time may exacerbate them, but an injury occurs immediately upon violation.[5] *Cf. Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 627 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020) (by failing to obtain informed consent, defendant "inflicted the concrete injury BIPA intended to protect against, *i.e.* a consumer's loss of the power and ability to make informed decisions about the collection, storage, and use of her biometric information.").

On the facts set forth in the pleadings, White Castle violated Section 15(b) when it first scanned Ms. Cothron's fingerprint and violated Section 15(d) when it first disclosed her biometric information to a third party. At that point, Ms. Cothron's injuries stemming from those actions were immediately and independently actionable. Even if White Castle repeatedly violated BIPA's terms—a possibility discussed below—that would not transform the violations into a continuing violation. *See Belleville Toyota*, 199 Ill. 2d at 348-49, 770 N.E.2d at 192 ("Although we recognize that the allocations were repeated, we cannot conclude that defendants' conduct somehow constituted one, continuing, unbroken, decade-long violation of the Act."). This case presents a substantially similar question to the one confronted in *Belleville Toyota* and the Court views it as a good "indicator of how the [Illinois Supreme] Court would decide this case." *Rodrigue*, 406 F.3d at 444.

[5] The Court notes that BIPA provides for either liquidated or actual damages, whichever is greater. 740 ILCS 14/20. While actual damages might not be immediately obvious and could emerge at any point after an unlawful scan or disclosure, there is nothing cumulative about the damages that would require treating a series of violations as a continuous whole.

In sum, the Court finds that the continuing violation doctrine does not apply to BIPA violations—at least not to those at issue here—and, as a result, Ms. Cothron's right to sue for those violations accrued when the violations occurred. The next question is: when did the alleged violations occur?

II. BIPA Violations Alleged in the Second Amended Complaint

As an alternative argument, Ms. Cothron contends that each post-BIPA scan of her fingerprint constituted an independent violation of Section 15(b) and each disclosure to a third party over that same period violated Section 15(d). Because Ms. Cothron has alleged scans and disclosures occurring within a year of filing suit, this alternative theory would also render at least some of her claims timely.[6]

The question of what constitutes a violation of BIPA's terms is a pure question of statutory interpretation, and the Illinois Supreme Court has counseled that the "most reliable indicator" of legislative intent is "the language of the statute." *Michigan Ave. Nat. Bank v. Cty. of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 535 (Ill. 2000). "The statutory language must be given its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Id.* Therefore, the analysis must begin with the text of Sections 15(b) and 15(d).

In full, Section 15(b) provides:

> 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:

[6] As noted *supra* note 4, the shortest potentially applicable statute of limitations is one year.

> (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(b). In the Court's view, this text is unambiguous and therefore dispositive. A party violates Section 15(b) when it collects, captures, or otherwise obtains a person's biometric information without prior informed consent. This is true the first time an entity scans a fingerprint or otherwise collects biometric information, but it is no less true with each subsequent scan or collection. Consider a fingerprint-based system like the one described in Ms. Cothron's complaint. Each time an employee scans her fingerprint to access the system, the system must capture her biometric information and compare that newly captured information to the original scan (stored in an off-site database by one of the third-parties with which White Castle contracted).[7] In other words, the biometric information acts like an account password—upon each use, the information must be provided to the system so that the system can verify the user's identity.

[7] One fact question that may be of particular significance to liability under Section 15(d) is where the comparison takes place. Must White Castle send the newly collected fingerprint scan to one of the third parties in order for the comparison to be made at an off-site location or does White Castle retrieve the information from the off-site location such that the comparison takes place at the White Castle location? It is entirely unclear, however, why the statute is designed such that this distinction should matter to the question of liability; the privacy concerns are implicated equally whether the new data is sent off-site for comparison or the old data is retrieved from an off-site location so that the comparison can take place on-site.

In its only text-based argument to the contrary, White Castle points to the statute's language requiring that informed consent be acquired before collection. That means, White Castle urges, that it is the failure to provide notice that is the violation, not the collection of the data. But that reading simply ignores the required element of collection. There is no violation of Section 15(b) without collection; unlike Section 15(a), a failure to disclose information is not itself a violation. Section 15(b) is violated only where there is both a failure to provide specific information about collection of biometric data and collection of that data. A statutory requirement indicating ***when*** certain information must be provided, moreover, is different than a requirement indicating for ***which*** collections that provision of information is required. The text of Section 15(b) does indicate when consent must be acquired, but it does not differentiate between the first collection and subsequent collections: for any and all collections, consent must be obtained "first." 740 ILCS 14/15(b).

This understanding of the consent requirement is entirely consistent with the possibility of consent covering multiple future scans (*e.g.*, all scans in the context of employment). Section 15(b) provides for consent through "written release," which is defined elsewhere in the statute as "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." 740 ILCS 14/10. To comply with Section 15(b), White Castle could have provided Ms. Cothron with a release informing her of "the specific purpose and length of term" for which her information was being used and requiring her consent to all future scans consistent with those uses as a condition of employment. 740 ILCS 14/15(b). On the facts alleged, however, it did not do so until 2018 at the earliest; as for the intervening years, the only possible conclusion is that White Castle violated Section 15(b) repeatedly when it collected her biometric data without first having obtained her informed consent.

The language of Section 15(d) requires the same result. In relevant part, Section 15(d) provides:

> 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

740 ILCS 14/15(d). Again, each time an entity discloses or otherwise disseminates biometric information without consent, it violates the statute. This conclusion is especially unavoidable where, as here, the statute includes "redisclose" in the list of actions that cannot be taken without consent. As a result, even where an entity transmits the biometric information to a third party to which it has previously transmitted that same information, the redisclosure requires consent. Here, White Castle does not provide a single text-based argument to the contrary. And again, the Court notes that, as with Section 15(b), it is consistent with the statutory language to obtain consent for multiple future disclosures through a single written release. But it is also once again true that White Castle failed to do so until 2018 at the earliest. Therefore, each time that White Castle disclosed Ms. Cothron's biometric information to a third party without consent, it violated Section 15(d).

Instead of providing a plausible alternative reading of the statutory text, White Castle maintains that reading Section 15(b) and Section 15(d) this way would lead to absurd results because the statutory damages for each violation—if defined as every unauthorized scan or disclosure of Ms. Cothron's fingerprint—would be crippling. And the Court fully acknowledges the large damage awards that may result from this reading of the statute. But, as an initial matter, such results are not necessarily "absurd," as White Castle insists; as the Illinois Supreme Court explained in *Rosenbach*, "subjecting private entities who fail to follow the statute's requirements

to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law" is one of the principal means that the Illinois legislature adopted to achieve BIPA's objectives of protecting biometric information. *Rosenbach*, 432 Ill. Dec. at 663, 129 N.E.3d at 1207. And absurd or not, the Illinois Supreme Court has repeatedly held that, where statutory language is clear, it must be given effect:

> Where the words employed in a legislative enactment are free from ambiguity or doubt, they must be given effect by the courts ***even though the consequences may be harsh, unjust, absurd or unwise***. Such consequences can be avoided only by a change of the law, not by judicial construction.

Petersen v. Wallach, 198 Ill. 2d 439, 447, 764 N.E.2d 19, 24 (Ill. 2002) (cleaned up) (emphasis added). As a result, the Court is bound by the clear text of the statute. If the Illinois legislature agrees that this reading of BIPA is absurd, it is of course free to modify the statute to make its intention pellucid. But it is not the role of a court—particularly a federal court—to rewrite a state statute to avoid a construction that may penalize violations severely. In any event, this Court's ruling is unlikely to be the last word on this subject. On appeal—and possibly upon certification to the Illinois Supreme Court[8]—White Castle will have ample opportunity to explain why it is absurd to suppose that the legislature sought to impose harsh sanctions on Illinois businesses that ignored the requirements of BIPA for more than a decade.

In sum, the Court concludes that Ms. Cothron has alleged multiple timely violations of both Section 15(b) and Section 15(d). According to BIPA Section 20, she can recover "for each violation." 740 ILCS 14/20. The number of those timely violations will be resolved at a future point when, in accordance with White Castle's request, further briefing is devoted to the issue of

[8] The Illinois Supreme Court accepts certified questions from federal courts of appeals but not from federal district courts. *See* Ill. S. Ct. Rule 20.

the applicable statute of limitations. For the present, however, it is clear that at least some of her claims survive under this reading of the statute and, therefore, White Castle's motion for judgment on the pleadings is denied.

Date: August 7, 2020

John J. Tharp, Jr.
United States District Judge

Biometric Registration

You are not registered in our Biometric System.

Click Here to Register in Biometrics for Electronic Signatures

If you choose to not register in biometrics, you will have to print and sign the forms by hand.

Ask Me To Register Later | I Do Not Wish To Register In Biometrics

A16

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WHITE CASTLE BIOMETRIC INFORMATION PRIVACY TEAM MEMBER CONSENT FORM

The team member named below has been advised and understands that White Castle System, Inc. and its affiliates ("White Castle") collects, retains, and uses biometric data and/or information for the purpose of identifying a team member's signature when utilizing White Castle's proprietary software. Biometric scanners are computer-based systems that scan a team member's finger for purposes of identification. The computer system extracts unique data points and creates a unique mathematical representation used to verify the team member's identity when the team member, for example, signs a document such as a Form I-9 or IRS Form W 4 or has a need to access secure information systems. White Castle deletes such biometric data and/or information when a team member's employment with White Castle ends.

The team member understands that he or she is free to decline to provide biometric identifiers and biometric information to White Castle through its biometrics software. Electing not to provide such consent will not result in any adverse effects on his or her employment with White Castle. Further, the team member may revoke this consent at any time by notifying White Castle in writing.

The undersigned team member voluntarily consents to White Castle's collection, storage, and use of biometric data and/or information through White Castle's proprietary software, including to the extent that it utilizes the team member's biometric identifiers or biometric information as defined in the Illinois Biometric Information Privacy Act (BIPA).

LATRINA L COTHRON	10/15/2018
Print Name	Date
LATRINA L COTHRON	10/15/2018
Signature	Date

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

Winnebago County Courthouse
400 West State Street
Rockford, Illinois 61101
PHONE (815) 319-4804* FAX (815) 319-4809

March 12, 2020

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Marcia Smith vs. Top Die Casting Co.
2019-L-248

MEMORANDUM OF DECISION AND ORDER

Plaintiff has filed suit alleging defendant violated sections 15 (a) and (b) of the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.* Defendant has filed a 2-619 Motion to Dismiss the complaint on the basis that defendant believes suit has been brought outside the statute of limitations. The matter has been fully briefed and argued. The court finds and orders as follows:

I. Violation of section 15(a)

740 ILCS 14/15 deals with "Retention; collection; disclosure; destruction" Section (a) states,

"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." (Emphasis added.)

The parties agree that the plaintiff began working for the defendant in August of 2017. It also appears without dispute that the plaintiff's last day on the job was February 28, 2019. Her assignment "officially" ended March 5, 2019. It also appears uncontroverted that when the

plaintiff began working for the defendant and defendant acquired her biometric information, there was no written policy in place for the retention and destruction of that data. Under the wording of the statute, and the use of the "or" connector, either there are written guidelines for permanently destroying the biometric information once the purpose for having it/using it have been satisfied or in the absence of written guidelines, destruction must take place within 3 years of the individual's last interaction with the entity. The latter applies here.

The United States Supreme Court has said, "a cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v Febar Corp. of California, Inc.*, 522 U.S. 192 at 193. In *Blair v Nevada Landing Partnership*, 369 Ill.App.3d 318, 323 our Second District Appellate Court stated, "Generally, in tort, a cause of action accrues and the limitations period begins to run when facts exist that authorize one party to maintain an action against another [citing *Feltmeier*, infra." At this point, only approximately 1 year after the plaintiff's last interaction with the defendant, the plaintiff's claim has not ripened as there is still a considerable time (at minimum until February 28, 2022), for the defendant to comply with the statute, regardless of what the statute of limitations is.

Defendant's motion to dismiss is granted as it pertains to paragraph 47 as well as any other paragraphs alleging a violation of section 15(a).

II. Violation of section 15(b)

740 ILCS 14/15(b) states, "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."

The plain language of the statute indicates when a claim accrues for violating this section. The offense, and thus the cause of action for the offense, occurs the first time the biometric information is collected without meeting the requirements of paragraphs (1) – (3).

The Illinois Supreme Court has said, "At this juncture, we believe it important to note what does *not* constitute a continuing tort. A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. See *Pavlik*, 326 Ill.App.3d at 745, 260 Ill.Dec. 331, 761 N.E.2d 175; *Bank of Ravenswood*, 307 Ill.App.3d at 167, 240 Ill.Dec. 385, 717 N.E.2d 478; *279 *Hyon*, 214 Ill.App.3d at 763, 158 Ill.Dec. 335, 574 N.E.2d 129. Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. See *Bank of Ravenswood*, 307 Ill.App.3d at 167–68, 240 Ill.Dec. 385, 717 N.E.2d 478; *Hyon*, 214 Ill.App.3d at 763, 158

Ill.Dec. 335, 574 N.E.2d 129; *Austin v. House of Vision, Inc.*, 101 Ill.App.2d 251, 255, 243 N.E.2d 297 (1968). For example, in *Bank of Ravenswood*, the appellate court rejected the plaintiffs' contention that the defendant city's construction of a subway tunnel under the plaintiff's property constituted a continuing trespass violation. The plaintiffs' cause of action arose at the time its interest was invaded, *i.e.*, during the period of the subway's construction, and the fact that the subway was present below ground would be a continual effect from the initial violation, but not a continual violation. *Feltmeier v Feltmeier*, 207 Ill.2d 263 at 278-279." (Emphasis in original) See also *Blair*, supra at 324 -325.

In this matter, it is undisputed that the plaintiff first began using the timeclock in question in August of 2017. Plaintiff's argument that each time the plaintiff clocked in constituted an independent and separate violation is not well taken. The biometric information is collected the one time, at the beginning of the plaintiff's employment, and thereafter the original print, or coordinates from the print, are used to verify the identity of the individual clocking in. Thus, the offending act is the initial collection of the print and at that time the cause of action accrues. To hold otherwise is contrary to the plain wording of the statute and common sense as to the manner the initially collected biometric information is utilized. Additionally, as a matter of public policy, the interpretation plaintiff desires would likely force out of business – in droves - violators who without any nefarious intent installed new technology and began using it without complying with section (b) and had its employees clocking in at the start of the shift, out for lunch, in for the afternoon and out for the end of the shift. Over a period of 50 weeks (assuming a two week vacation) at $1000 for each violation it adds up to $1,000,000 *per employee* in a year's time. This would appear to be contrary to 14/5 (b) and (g) – Legislative findings; intent. It also appears to be contrary to how these time clocks purportedly work.

Given the violation occurs at the first instance of collection of biometric data that does not conform to the requirements set forth, the question becomes what the statute of limitations is given the Act's silence. Defendant argues that because BIPA clearly concerns matters of privacy as well as concerns itself with the dissemination of uniquely personal information and preventing that from occurring, the one year statute of limitations set forth in 13-201 applies, supporting its motion to dismiss.

The parties agree that the Illinois Supreme Court (in *Rosenbach v Six Flags Entm't Corp.* 2019 IL 123186) as well as other cases addressing BIPA have made it clear that BIPA involves an invasion of privacy but they disagree as to what that means. BIPA's structure is designed to prevent compromise of an individual's biometric data. Indeed, the common law right to privacy as it relates to modern technology is at the core of BIPA. The United States Supreme Court has noted that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v Reporters Comm.for Freedom of the Press*, 489 U.S. 749, 763. Defendant relies heavily on *Blair* and its application of 13-201's one year limitation period and the fact the Right of Publicity Act (765 ILCS 1075) involved in *Blair*, like BIPA, sets forth no statute of limitations period.

However, the Court noted in *Blair* that at common law there was a tort of appropriation of likeness, for which a plaintiff needed to set forth elements of appropriation of a person's name or likeness, without consent, done for another's commercial benefit. The statute of limitations for doing so was the one year statute set forth in 13-201. The Right to Publicity Act went into effect January 1, 1999 and completely replaced the common law tort. The legislature specifically

said it was meant to supplant the common-law. As such, the *Blair* court held the one year statute of limitations would remain applicable for the Act. BIPA is not an act which completely supplants a specific common law cause of action, so is distinguishable from the Right to Publicity Act in this regard. Additionally, *Blair* clearly involved publication as an essential element. That further distinguishes it from BIPA to the extent that publication is not a necessary element of every BIPA claim. Notably, the case at hand contains no allegation of publication.

The Second District's decision and language in *Benitez v KFC Nat. Management Co.*, 305 Ill.App.3d 1027 is informative. There, while the matter involved intrusion upon seclusion and the voyeuristic nature of the affront to privacy which is not present here, the court stated, at page 1034, "The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication. (see 735 ILCS 5/13-201 (West 1994); *McDonald's Corp. v. Levine*, 108 Ill.App.3d, 737, 64 Ill.Dec. 224, 439 N.E.2d 475(1982) (even if eavesdropping claim was actually a claim for intrusion upon seclusion, the one-year statute of limitations of what is now section 13-201 would not apply…)). Accordingly, since the statute does not refer to a cause of action for intrusion upon seclusion, we decline to read the statute as such." The court went on to note two cases which disagreed with its decision and held that 13-201 applied to intrusion upon seclusion and sexual harassment cases. The court commented, at pages 1007-8, "Nonetheless, we are not persuaded by those cases, since neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion. Instead, we find the plain language of the statute controlling."

It is also noteworthy that inclusion upon seclusion is a relatively new, statutorily created violation of the right to privacy and it is an extension of the common law's four distinct types of privacy breaches. While BIPA claims are not claims which can be characterized as intrusion upon seclusion cases, BIPA also is a statutorily created violation of the right to privacy which extends common law privacy protections, as opposed to supplanting a common law right. For those reasons also, as well as the Second District's logic and analysis of 13-201 in *Benitez* (which this court must follow) 13-201 does not apply.

Therefore, for all the foregoing reasons, the court finds that section 5/13-205's Five year limitations period applies to BIPA violations. Given the lack of an express limitations period in the Act, and the finding 13-201 does not apply, BIPA falls into the category of "civil actions not otherwise provided for" and plaintiff has clearly brought her claim prior to August, 2022.

The defendant's motion to dismiss section (b) allegations of BIPA violations is denied.

So ordered:

Date: 3/12/2020 Enter: _____

Hon. Judge Donna Honzel

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

BRANDON WATSON, individually and on behalf of all others similarly situated, Plaintiff, v. LEGACY HEALTHCARE FINANCIAL SERVICES, LLC d/b/a Legacy Healthcare; LINCOLN PARK SKILLED NURSING FACILITY, LLC d/b/a Warren Barr Lincoln Park a/k/a The Grove at Lincoln Park; and SOUTH LOOP SKILLED NURSING FACILITY, LLC d/b/a Warren Barr South Loop, Defendants.	CASE NO. 19 CH 3425 CALENDAR 11

ORDER

This matter came before the Court on Defendants' 2-619 motion to dismiss the putative Class Action Complaint of Plaintiff Brandon Watson. For the reasons explained below, the motion is granted.

BACKGROUND

Plaintiff was required to scan his hand to clock in and out of work at Defendants' nursing home facilities in Chicago.[1] Plaintiff worked as a Certified Nursing Assistant for Defendant Legacy Healthcare Financial Services, LLC ("Legacy"), which controls 26 nursing home facilities in Illinois. He worked at Defendant Lincoln Park Skilled Nursing Facility, LLC from December of 2012 through February of 2019, and at Defendant South Loop Skilled Nursing Facility, LLC from May through November of 2017.

Plaintiff filed his one-count Class Action Complaint on March 15, 2019, alleging that Defendants failed to properly disclose and obtain releases related to the collection, storage, and use of his biometric information, in violation of the Illinois Biometric Information Privacy Act ("BIPA"). He asks for statutory damages and an injunction under BIPA, individually and on behalf of a class of similarly-situated employees.

[1] The facts recited here are based upon the allegations of Plaintiff's Complaint, which are taken as true for purposes of this motion.

Defendants move to dismiss the Complaint under Section 2-619 of the Illinois Code of Civil Procedure, arguing that (1) Plaintiff's claims are time-barred; (2) Plaintiff's claims are preempted by the Illinois Workers Compensation Act; and (3) Plaintiff's claims are preempted by Section 301 of the Labor Management Relations Act.

APPLICABLE LAW

The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(5) provides for dismissal of a claim that "was not commenced within the time limited by law." Dismissal of a complaint pursuant to section 2-619(a)(9) is permitted where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* The affirmative matter must negate the cause of action completely. *Id.* The trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party, and grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

ANALYSIS

(1) Statute of Limitations

Defendants argue that Plaintiff's claim is barred by the statute of limitations. BIPA does not contain its own statute of limitations, so Defendants contend that the claim should be governed by the one-year statute applicable to what it calls the "most analogous common law claim"—invasion-of-privacy claims. That statute provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILCS 5/13-201.

This is not the applicable statute of limitations. BIPA's Section 15(d) could be construed to address "publication of matter violating the right of privacy" in prohibiting private entities from "disclos[ing], redisclos[ing], or otherwise disseminat[ing] a person's or a customer's biometric identifier or biometric information . . . ." 740 ILCS 14/15(d). However, in this case Plaintiff did not include a claim under Section 15(d). Rather, he claimed violations only of Sections 15(a) and (b), which require private entities to publicly provide retention schedules and guidelines for permanently destroying biometric information, and to make disclosures and obtain releases before collecting, storing, and using that information. Sections (a) and (b) are violated even if there is no publication. Therefore, the one-year statute does not apply.

Nor does the two-year statute of limitations for a "statutory penalty" (735 ILCS 5/13-202) apply to this case. BIPA's liquidated damages provision is remedial, not penal. In *Rosenbach v. Six Flags Entertainment Corp.*, the Illinois Supreme Court explained that the General Assembly enacted BIPA "to try to head off such problems before they occur," by enacting safeguards and "by subjecting private entities who fail to follow the statute's

requirements to substantial potential liability, including liquidated damages . . . ." 2019 IL 123186, ¶ 36. Like the Telephone Consumer Protection Act at issue in *Standard Mutual Ins. Co. v. Lay*, BIPA was "designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." 2013 IL 114617, ¶ 31.

The applicable statute of limitations is the five-year "catch-all" provision of 735 ILCS 5/13-205. It begins to run on the date the cause of action accrued. Defendants argue that, even if the five-year statute applies, Plaintiff's claim is time-barred because his cause of action accrued when Defendant scanned Plaintiff's hand on his *first* day of work—December 27, 2012. This suit was filed on March 15, 2019, more than six years later.

Plaintiff argues that each daily scan of his hand violated BIPA, so his *last* day of work—February 21, 2019—is the key date for limitations purposes. He argues that all scans in the five years before he filed the Complaint are actionable.

Generally, a cause of action accrues "when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). Plaintiff argues that his claims are most analogous to wage claims, where each inadequate paycheck gives rise to a separate cause of action. The same cannot be said for each of Plaintiff's hand scans. As the Court in *Feltmeier* stated:

> [W]here there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.

Id. at 79. (emphasis added).

In wage claims, damages flow from each inadequate paycheck. Additional damages accrue every time a paycheck is short. By contrast, Plaintiff's damages flow from the "single overt act" of the initial collection and storage of his biometric data. According to the Complaint, "From the start of Plaintiff's employment with Defendants in 2012," Defendants required him to have his "fingerprint and/or handprint collected and/or captured so that Defendants could store it and use it moving forward as an authentication method." (Cplt ¶18). The Complaint alleges that, *before* collecting Plaintiff's biometric information, Defendants did not provide Plaintiff with the required written notices and did not get his required consent. (Cplt ¶¶ 22, 23). While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute. Plaintiff's handprint was scanned and stored in Defendants' system on Day 1, allowing for authentication every time he signed in.

Plaintiff's cause of action accrued when his handprint allegedly was collected in violation of BIPA on his first day of work on December 27, 2012. Therefore, because Plaintiff filed his case on March 15, 2019, Plaintiff's claim is time-barred under the five-year statute of limitations.

This holding disposes of the case, but the Court will address Defendants' other arguments for the record.

(2) Preemption by Workers Compensation Act

Defendant argues that Plaintiff's claims are preempted by the exclusive remedy provisions of the Illinois Workers Compensation Act (the "Act"), 820 ILCS 305/5(a) and 11.

The Act "generally provides the exclusive means by which an employee can recover against an employer for a work related injury." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶ 14. However, the employee can escape the Act's exclusivity provisions by establishing that the injury "(1) was not accidental; (2) did not arise from his [or her] employment; (3) was not received during the course of employment; or (4) was not compensable under the Act." *Id.*

Defendant argues that none of these exceptions apply in this case. In response, Plaintiff argues that exceptions (1) and (4) both apply—that the BIPA violations were not accidental and were not compensable under the Act.

To show that an injury was not accidental, "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, ¶ 29. Plaintiff has made no such allegation in his Complaint, so he has not established that the injury was not accidental. To put it another way, the Complaint leaves open the possibility that the injury *was* accidental. Plaintiff implicitly acknowledges this when he alleges that he and the members of the class are entitled to recover "anywhere from $1,000 to $5,000 in statutory damages." (Cplt ¶ 57). Statutory damages of $1,000 may be recovered for *negligent* violations of BIPA (740 ILCS 14/20(1)), and caselaw has equated "negligent" with "accidental" under the Act. *See Senesac v. Employer's Vocational Res.*, 324 Ill. App. 3d 380, 392 (1st Dist. 2001).

Plaintiff also argues that exception (4) applies—the injury was not compensable under the Act. In *Folta*, the Illinois Supreme Court addressed how courts should analyze this exception.[2] Rejecting the argument that the plaintiff's mesothelioma was not compensable under the Act because recovery in his situation was barred by a statute of repose, the court focused on the *type of injury* alleged and whether the legislature intended such injuries to be within the scope of the Act. The court stated, "[W]hether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." *Id.* at ¶ 23. Because the Act specifically addressed diseases caused by asbestos exposure (such as mesothelioma), the court found that the legislature contemplated that this type of disease would be within the scope of the Act, and it was therefore compensable under the Act. *Id.* at ¶¶ 25, 36.

The same cannot be said for injuries sustained from violations of BIPA. As the court stated in *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30, BIPA "is a privacy rights law that applies inside and outside the workplace." By including in BIPA a provision for a private right of action in state or federal court (740 ILCS 14/20), the legislature showed it did not contemplate that BIPA claims would categorically fit within the purview of the Workers Compensation Act. Moreover, BIPA's definition of "written release" refers specifically to

[2] *Folta* was decided under both the Workers Compensation Act and the Workers' Occupational Diseases Act, 820 ILCS 310/5(a) and 11, which contain analogous exclusivity provisions.

releases executed by an employee as a condition of employment, further evidence that the legislature did not intend the Workers Compensation Act to preempt BIPA actions in the employment context. 740 ILCS 14/10.

The court holds that BIPA claims are not compensable under the Act. Therefore, BIPA claims fall within the fourth exception to the Act's exclusivity provisions. Plaintiff's BIPA claims are not preempted by the Act.

(3) Preemption by § 301 of Labor Management Relations Act

Finally, Defendant argues that this case should be dismissed because Section 301 of the Labor Management Relations Act (29 U.S.C. §185(a)) preempts Plaintiff's BIPA claim. That section provides:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In analyzing this provision, the U.S. Supreme Court stated:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 405-06 (1988).

In Illinois, the First District Appellate Court explained the analysis as follows:

> Where a matter is purely a question of state law and is entirely independent of any understanding of the terms of a collective bargaining agreement, it may proceed as a state-law claim. By contrast, where the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim will be preempted. Where claims are predicated on rights addressed by a collective bargaining agreement, and depend on the meaning of, or require interpretation of its terms, an action brought pursuant to state law will be preempted by federal labor laws. Defenses, as well as claims, must be considered in determining whether resolution of a state-law claim requires construing of the relevant collective bargaining agreement.

Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005) (internal citations omitted).

With their motion, Defendants submitted sworn declarations attaching copies of the collective bargaining agreements ("CBAs") in effect at the Lincoln Park and South Loop nursing facilities where Plaintiff worked. The Lincoln Park CBA with SEIU provided, in relevant part:[3]

> Management of the Home, the control of the premises and the direction of the working force are vested exclusively in the Employer subject to the provisions of this Agreement. The right to manage includes . . . to determine and change starting times, quitting times and shifts, and the number of hours to be worked . . . to determine or change the methods and means by which its operations ought to be carried on; to set reasonable work standards . . . .

(Dfts' Mot., Choi Dec., Exh. A, p. 7).

The South Loop CBA with Local 743 in effect when Plaintiff worked at the South Loop facility in 2017 provided, in relevant part:

> [South Loop] has, retains, and shall continue to possess and exercise all management rights, functions, powers, privileges and authority inherent in the right to manage includ[ing] . . . the right to determine and change schedules, starting times, quitting times, and shifts, and the number of hours to be worked . . . to determine, modify, and enforce reasonable work standards, rules of conduct and regulation (including reasonable rules regarding . . . attendance, and employee honesty and integrity) . . . .

(Dfts' Mot., James Dec., Exh. A, p. 5).

Under *Lingle* and *Gelb*, the question is whether resolution of the BIPA claim in this case depends on an interpretation of the CBAs quoted above. Defendants argue that Plaintiff's claim "cannot possibly be resolved" without interpreting the governing CBAs. The Court disagrees. Resolution of this case is purely a question of state law—whether or not Defendants complied with BIPA by making the required written disclosures and getting the required written release before collecting, storing, and using Plaintiff's biometric information. Even if the CBAs allowed Defendants to set a rule requiring Plaintiff to clock in with his handprint—as part of "determining reasonable work standards"—the Court does not need to interpret the CBAs to decide if Defendants complied with BIPA's requirements. This is so even though the unions may be Plaintiff's "legally authorized representatives" under Section 15(b)(3) for purposes of signing the required release. The Court does not need to interpret the CBA to determine if the release was signed or not.

The CBAs are only tangentially related to this dispute, if at all. As the U.S. Supreme Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), "[N]ot every dispute

[3] Defendants attached the CBA in effect between May 1, 2017 and April 30, 2020. The relevant CBA would be the one in effect when Plaintiff began work at Lincoln Park on December 27, 2012. Even if Defendants had attached the correct CBA, though, Defendants' preemption argument fails for the other reasons described herein.

concerning employment, or *tangentially involving* a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." (emphasis added). Preemption promotes uniformity of federal labor law, but preemption is required only if resolution of the dispute is "substantially dependent" on analysis of the terms of the CBA. *Id.* at 220.

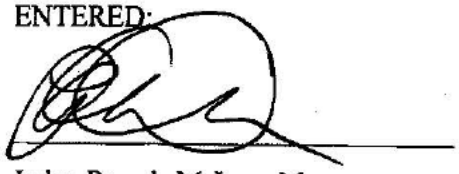
As the court in *Gelb* directed, this Court has considered the defenses as well as the claims in this case. The Court notes that Defendants have raised no defenses that require an interpretation of the CBAs. Defendants do not assert that the unions received the required BIPA disclosures or signed BIPA releases on behalf of employees. Instead, they only point out that the broad management rights provisions of the CBAs allow them to set work standards. Deciding this case does not require the Court to interpret the CBAs.

In making our holding, the Court respectfully declines to follow the nonbinding Seventh Circuit case of *Miller v. Southwest Airlines*, 926 F. 3d 898 (7th Cir. 2019) and the Northern District of Illinois cases that followed it, *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536 (N.D. Ill. Mar. 26, 2019) and *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577 (N.D. Ill. Feb. 26, 2020). Our case involves a motion to dismiss under Section 2-619 of the Illinois Rules of Civil Procedure, which should be granted "only if the plaintiff can prove no set of facts that would support a cause of action." *In re Chicago Flood Litigation,* 176 Ill. 2d 179, 189 (1997). Here, Plaintiff *could* prove a set of facts under which his claim was not preempted. Defendants did not meet their burden of proof on their 2-619 motion to dismiss argument based on Section 301 preemption.

CONCLUSION

Defendants' Motion to Dismiss is granted under 2-619(a)(5) and Plaintiff's Complaint is dismissed with prejudice for failure to bring suit within five years after the cause of action accrued. This is a final order disposing of all matters.

ENTERED:



Judge Pamela McLean Meyerson

Judge Pamela McLean Meyerson

JUN 10 2020

Circuit Court – 2097

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THOMAS ROBERTSON, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 18-CH-5194**
HOSTMARK HOSPITALITY GROUP, INC., et al,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Plaintiff Thomas Robertson has filed a motion to reconsider this court's January 27, 2020 Memorandum and Order pursuant to 735 ILCS 5/2-1203(a).

I. Background

On April 20, 2018, Plaintiff Thomas Robertson ("Robertson") filed his original complaint alleging Defendants Hostmark Hospitality Group, Inc. ("Hostmark") and Raintree Enterprises Mart Plaza, Inc. ("Raintree") (collectively "Defendants") violated the Biometric Information Privacy Act ("BIPA").

On April 1, 2019, this court granted Robertson's motion for leave to file an amended class action complaint (the "Amended Complaint"). The Amended Complaint now alleges three counts, each alleging a violation of a different subsection of section 15 of BIPA. 740 ILCS 14/15.

Count I alleges a violation of subsection 15(a) based upon Defendants failure to institute, maintain, and adhere to a publicly available retention and deletion schedule for biometric data. 740 ILCS 14/15(a). Count II alleges a violation of subsection 15(b) based upon Defendants failure to obtain written consent prior to collecting and releasing biometric data. 740 ILCS 14/15(b). Count III alleges a violation of subsection 15(d) based upon Defendants failure to obtain consent before disclosing biometric data. 740 ILCS 14/15(d).

On July 31, 2019, this court issued its Memorandum and Order denying Defendants' motion to dismiss Robertson's Amended Complaint. In summary, this court held that: (1) Robertson's claim was not preempted by the Illinois Worker's Compensation Act; (2) the applicable statute of limitations was five years, as provided for in 735 ILCS 5/13-205; and (3) Robertson had adequately pled his claim.

As part of the court's July 31, 2019 ruling, this court addressed the parties' arguments regarding the date Defendants stopped collecting Robertson's biometric information but did not address their arguments regarding when Robertson's claims accrued.

On August 30, 2019, Defendants filed their motion to reconsider and certify questions to the appellate court. In their motion to reconsider, Defendants argued, *inter alia*, that this court erred in applying a five-year statute of limitations to Robertson's claim. On September 4, 2019, this court denied Defendants' motion, in part, but allowed further briefing on the issue of the application of the five-year statute of limitation.

On January 27, 2020, this court issued its Memorandum and Order granting in part and denying in part Defendants' motion to reconsider. The court held that Robertson's claims relating to Defendants' alleged violations of section 15(b) and 15(d) accrued in 2010. The court found that the continuing violation rule did not apply to Robertson's claims because the violations of sections 15(b) and 15(d) represented a single discrete act from which any damages flowed. Thus, it was held that Counts II and III were barred by the five statute of limitations.

Regarding Count I, the court viewed section 15(a) as imposing two distinct requirements: (1) requiring private entities to develop a publicly available retention schedule and deletion guidelines; and (2) requiring the permanent deletion of an individual's biometric data, either in accordance with the deletion guidelines or within 3 years of the individual's last interaction with the private entity, whichever is earlier.

The court held that since it was Defendants' stated position that they ceased collection of biometric data in 2013, the math dictated by section 15(a) results in the conclusion that Robertson's claim could not have started to accrue until, at the earliest, 2016. Accordingly, Robertson's claim was not barred by the five-year statute of limitations.

II. Motion to Reconsider

A. *Application of the Continuing Violation Rule*

"The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." Chelkova v. Southland Corp., 331 Ill. App. 3d 716, 729-30 (1st Dist. 2002). A party may not raise a new legal or factual argument in a motion to reconsider. North River Ins. Co. v. Grinnell Mut. Reinsurance Co., 369 Ill. App. 3d 563, 572 (1st Dist. 2006).

Robertson's current Motion to Reconsider of this court's January 27, 2020 Memorandum and Order reiterates his previously stated position that his claim is well within the statute of limitations because he was a victim of a continuing violation of his rights under BIPA. Alternatively, he seeks to certify the question to the First District pursuant to Illinois Supreme Court Rule 304(a). [1]

---

[1] Not surprisingly, Defendants argue this court properly applied the law surrounding continuing violations to Robertson's BIPA claims. Alternatively, Defendants suggest that if the question is to be certified it should be pursuant to Illinois Supreme Court Rule 308.

Robertson's most recent request suggests that the proper application of the continuing violation rule is illustrated by Cunningham v. Huffman, 154 Ill. 2d 398, 406 (1993).

Cunningham involved a matter of first impression, namely, "whether the Illinois four-year statute of repose is tolled until the date of last treatment when there is an ongoing patient/physician relationship." Cunningham v. Huffman, 154 Ill. 2d 398, 400 (1993). The trial court found that the plaintiff's claims were time-barred and the continuous course of treatment doctrine was not the law in Illinois. Id. at 401. The Appellate Court affirmed the dismissal stating that "in medical malpractice actions, the statute of repose is triggered only on the last day of treatment, and if the treatment is for the same condition, there is no requirement that the negligence be continuous throughout the treatment. Id. at 403.

The Illinois Supreme Court declined to adopt the continuous course of treatment doctrine. Id. at 403-04. Nonetheless, the court held that statutory scheme did not necessarily preclude the cause of action asserted by the plaintiff. Id. at 404. Specifically, the court held that the medical treatment statue of repose would not bar the plaintiff's action if he could demonstrate: (1) that there was a continuous and unbroken course of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." Id. at 406 (emphasis in original). The Illinois Supreme Court emphasized "that there must be a continuous course of *negligent* treatment as opposed to a mere continuous course of treatment." Id. at 407 (emphasis in original).

Robertson's assertion is that Cunningham stands for the proposition that "the continuing violation doctrine applies where a plaintiff demonstrates a continuous and unbroken course of conduct, so related as to constitute one continuous wrong." (Motion at 5).

But the Illinois Supreme Court has explicitly rejected Robertson's argument, stating **"[t]he Cunningham opinion did not adopt a continuing violation rule of general applicability in all tort cases or, as here, cases involving a statutory cause of action.** Rather, the result in Cunningham was based on interpretation of the language contained in the medical malpractice statute of repose." Belleville Toyota v. Toyota Motor Sales, U.S.A., 199 Ill. 2d 325, 347 (2002)(Fitzgerald, J)(emphasis ours).

Robertson ignores Belleville and replies that "[t]here is no binding authority to which the Court may turn for guidance on the exact issue regarding whether the continuing violation doctrine applies." (Reply at 4).

While Justice Fitzgerald's written opinion in Belleville is pretty solid authority to the contrary, as this court previously pointed out, the First District has considered "[w]hether a series of conversions of negotiable instruments over time can constitute a continuing violation under Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325 (2002), for the purpose of determining when the statute of limitations runs." Kidney Cancer Assoc. V. North Shore Com. Bank, 373 Ill.App.3d 396, 397-98 (1st Dist. 2007). The court reasoned that where a complaint alleges a serial conversion of negotiable instruments by a defendant, it cannot be denied that a single unauthorized deposit of a check in an account opened by the defendant gives the plaintiff a right to file a conversion action. Id. at 405. The court rejected the plaintiff's claim

that the defendant's repeated deposits (identical conversions) following the initial deposit served to toll the statute of limitations under the continuing violation rule. Id. Instead, according to the court, each discrete act (deposit) provided a basis for a cause of action and the court need not look to the defendant's conduct as a continuous whole for prescriptive purposes. Id.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 33, the Illinois Supreme Court held when a private entity fails to comply with one of section 15's requirements, that violation is itself sufficient to support the individual's or customer's **statutory cause of action**. Id. (emphasis ours).

Robertson's Amended Complaint alleges that his statutory rights were invaded in 2010, when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements. (Amended Complaint at ¶42).

In our January 27, 2020 Memorandum and Order, this court explained that under the general rule a cause of action for a statutory violation accrues at the time a plaintiff's interest is invaded. Blair v. Nevada Landing Partnership, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006) (citing Feltmeier v. Feltmeier, 207 Ill. 2d 263, 278-279 (2003)("where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id, 207 Ill. 2d at 279); see also, Limestone Development Corp. v. Village of Lemont, 520 F.3d 797, 801 (7th Cir. 2008) ("The office of the misnamed doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. [citations]. It is thus a doctrine not about a continuing, but about a cumulative, violation.").

Here, this court respectfully disagrees with Robertson concerning the application of continuing violation rule. It was Defendants' alleged failure to first obtain Robertson's written consent before collecting his biometric data which is the essence of and gave rise to the cause of action, not their continuing failure to do so. Robertson's statutory rights were violated in 2010 when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements.

Per Feltmeier, "where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id., 207 Ill. 2d at 279. That Defendants lacked the written release to collect and consent to disseminate Robertson's biometric data from 2010 until they ceased collection, does not change the fact Robertson's statutory rights were violated in 2010 nor does it serve to delay or toll the statute of limitations. Id; see also, Bank of Ravenswood v. City of Chicago, 307 Ill. App. 3d 161, 168 (1st Dist. 1999) (holding that the action for trespass began accruing when the defendant invaded plaintiff's interest and the fact that subway was present below the ground was a continual ill effect from the initial violation but not a continual violation.).

The court did not err in holding that the continuing violation rule did not apply to Robertson's claims.

B. *Single vs. Multiple Violations*

Robertson argues that this court erred in holding that his claims for violation of sections 15 (b) and (d) amount to single violations which occurred in 2010. Instead, according to Robertson, each time Defendants collected or disseminated his biometric data without a written release constitutes a single actionable violation.

Robertson's argument is contrary to the unambiguous language of the statute and taken to its logical conclusion would inexorably lead to an absurd result.

* * *

Section 10 of BIPA defines "written release" as: "[. . .] informed written consent or, *in the context of employment, a release executed by an employee as a condition of employment*." 740 ILCS 14/10 (emphasis added).

And, Section 15 (b)(3) of BIPA provides:

> (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: *** (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 (b)(3).

Reading section 10 and 15 of BIPA together makes clear that the "written release" contemplated by section 15 (b)(3) in the context of employment is to be executed as a condition of employment. 740 ILCS 14/10 and 15(b)(3).

As explained by the court in its January 27, 2020 Memorandum and Order, "[t]he most reasonable and practical reading of section 15 (b) requires an employer to obtain a single written release as a condition of employment from an employee or his or her legally authorized representative to allow the collection of his or her biometric data for timekeeping purposes for the duration of his or her employment. Such a release need not be executed before every instance an employee clocks-in and out, rather a single release should suffice to allow the collection of an employee's biometric data." January 27, 2020 Memorandum and Order at 4.

Robertson admits that this is a reasonable reading, (Motion at 7), but argues that Defendants, having failed to obtain a written release or his consent, had to obtain his written release before collecting his biometric data. Since Defendants failed to do, Robertson argues, each time Defendants' collected Robertson's biometric is independently actionable.

But, taken to its logical conclusion Robertson's construction would lead employers to potentially face ruinous liability.

Section 20 of BIPA provides any individual aggrieved by a violation of BIPA with a right of action and further provides that said individual may recover liquidated statutory damages for

each violation in the amount of either $1,000 for negligent violations or $5,000 for intentional or reckless violations. 740 ILCS 14/20.

Robertson alleges that he was required to scan his fingerprints each time he clocked in and out. (Amended Complaint at ¶44). Therefore, at minimum, there exists at least two potentially recoverable violations for *each day* Robertson worked. Extending this to its logical conclusion, a plaintiff like Robertson could potentially seek a total of $500,000 for negligent violations or $2,500,000 for intentional or reckless violations *for each year*[2] Defendants allegedly violated BIPA.

It is a well-settled legal principle that statutes should not be construed to reach absurd or impracticable results, Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 21, which is where Robertson's argument would take us. This court finds nothing in the statute as it is written or as it was enacted to indicate it was the considered intent of legislature in passing BIPA to impose fines so extreme as to threaten the existence of any business, regardless of its size.

C. *Section 15 (d)(1) – Consent for Dissemination*

Section 15 (d)(1) of BIPA provides:

> (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;
>
> * * * * *

740 ILCS 14/15 (d)(1).

Robertson's main contention here is that: (1) he never alleged when Defendants actually disseminated his biometric data; and (2) a defendant can potentially violate section 15(d) multiple times by disseminating an individual's biometric to additional third-parties.

But this court did not rule that section 15(d)(1) can only be violated a single time by a defendant. Rather, it ruled that based on the allegations as pled, Robertson's claim accrued in 2010.

The court recognizes that "a plaintiff is not required to plead facts with precision when the information needed to plead those facts is within the knowledge and control of defendant rather than plaintiff." Lozman v. Putnam, 328 Ill. App. 3d 761, 769-70 (1st Dist. 2002). However, even under this standard a plaintiff may not simply plead the elements of a claim, Holton v. Resurrection Hospital, 88 Ill. App. 3d 655, 658 (1st Dist. 1980), nor does this rule excuse a plaintiff from alleging sufficient facts. Holton, 88 Ill. App. 3d at 658-59.

[2] Two violations a day multiplied five days multiplied fifty weeks a year multiplied either 1,000 or 5,000.

If Robertson was actually trying to allege that Defendants violated section 15(d)(1) multiple times by disseminating his biometric data to multiple third parties on many occasions between 2010 and whenever Defendants ceased collection, this allegation is not well-pled and Robertson has not stated a claim for this factual scenario. To be sure, Robertson's Amended Complaint plainly alleges that any dissemination occurred systematically and automatically, but Robertson does not allege any underlying facts which support this assertion.

Robertson also argues that it is possible for a private entity to violate section 15(d) multiple times and that therefore the court erred in holding that Defendants violated Robertson's section 15(d)(1) statutory rights only in 2010. ("Defendants, at any point in time, could have disseminated [his] biometric data to any number of other entities, any number of times, over any period of time," (Motion at 13)).

Robertson alleges Defendants "disclose or disclosed [his] fingerprint data to at least one out-of-state third-party vendor, and likely others," (Id. at ¶33), but the allegation relating to "likely others" is not well pled. The Amended Complaint contains no allegations alleging Defendants disseminated Robertson's biometric data to additional third parties at some undetermined point between 2010 and the date Defendants ceased collection.

The Amended Complaint plainly alleges that any disseminations were, on information and belief, done "systematically or automatically." (Id. at ¶¶ 33, 97). "[A]an allegation made on information and belief is not equivalent to an allegation of relevant fact [citation]." Golly v. Eastman (In re Estate of DiMatteo), 2013 IL App (1st) 122948, ¶ 83 (citation omitted).

Without alleging the supporting underlying facts which lead Robertson to believe that his biometric data was being systemically and automatically disseminated, his allegation regarding additional dissemination to additional third parties remains an unsupported conclusion. The same is true for the allegations Robertson pleads on information and belief. Defendants are not required to admit unsupported conclusions on a motion dismiss.

The court did not err.

III. Motions to Certify Questions and/or Motions Leave to Appeal

Robertson seeks leave to immediately appeal this court's orders pursuant to Illinois Supreme Court Rule 304(a). Defendants assert that Illinois Supreme Court Rule 308 is the better procedural vehicle and seeks certification of three questions:

1. Whether exclusivity provisions of the Illinois Worker's Compensation Act bar BIPA claims?

2. Whether BIPA claims are subject to the one-year statute of limitations pursuant to 735 ILCS 5/13-201 or the two-year statute of limitations pursuant to 735 ILCS 5/13-202?

3. Whether a claim for a violation of section 15(a) accrues when a private entity first comes into possession of biometric data?

The questions Defendants seek to certify have been either directly addressed or are closely related to questions other judges have certified.

Judge Raymond W. Mittchell in McDonald v. Symphony Bronzeville Park, LLC, Case No. 17 CH 11311 has already certified a similar question to Defendants' first question in an appeal is pending under Marquita McDonald v. Symphony Bronzeville Park, LLC, No. 1-19-2398.

Similarly, in Juan Cortez v. Headly Manufacturing Co., Case No. 19 CH 4935, Judge Anna H. Demacopoulos has certified the second question concerning of what statute of limitations appropriately applies BIPA claims. This court is informed that the First District has accepted the matter and it is currently being briefed.

The third proposed question – as to whether a violation of section 15(a) begins accruing when a private entity first comes into possession of biometric data – is not yet pending on appeal.

A. Rule 308?

Rule 308(a) provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved.

ILL. SUP. CT., R. 308(a).

Rule 308(a) "should be strictly construed and sparingly exercised." Kincaid v. Smith, 252 Ill. App. 3d 618, 622 (1st Dist. 1993). "Appeals under this rule should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation." Id.

Because Rule 308 should be strictly construed and sparingly exercised, the court will not certify a question already accepted by the Appellate Court. Accordingly, in the interests of efficiency and of not burdening the First District with issue in cases which echo one another, the court declines to certify questions regarding the applicability of the Illinois Worker's Compensation Act, or questions concerning the appropriate statute of limitations under BIPA. Answers to those questions should be forthcoming through the certifications by Judges Mitchell and Demacopoulos.

Regarding the third question concerning the accrual of section 15(a) claims, the court is willing to certify a question regarding section 15(a) but is not willing to certify the question as currently phrased by Defendants.

As explained by the court in its January 27, 2020 Memorandum and Order, section 15(a) contains two distinct requirements: (1) private entities in possession of biometric data must develop a publicly available retention schedule and deletion guidelines; and (2) those guidelines

must provide for the permanent destruction of biometric data when the initial purpose for collecting the biometric data has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

Contrary to Defendants' phrasing of their question regarding section 15(a), the court did not rule that a section 15(a) violation could only accrue once. Rather the court interpreted section 15(a) as imposing two distinct requirements on private entities each with separate accrual dates. The pure legal question is not simply when does the action for a violation of section 15(a) accrue but rather whether the court's interpretation of the statutory language of section 15(a) is correct.

Defendants motion is therefore denied, as written. If they wish, Defendants may resubmit the request to reflect this court's ruling and it will be reconsidered.

B. Rule 304(a)?

Rule 304(a) provides as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.

ILL. SUP. CT., R. 304(a).

Rule 304(a) creates "an exception to [the] general rule of appellate procedural law by permitting appeals from trial court orders that only dispose of a portion of the controversy between parties." Mostardi-Platt Associates, Inc. v. American Toxic Disposal, Inc., 182 Ill. App. 3d 17, 19 (1st Dist. 1989). Rule 304(a)'s exception "arises when a trial judge [. . .] makes an express finding that there is no just reason to delay the enforcement or appeal of the otherwise nonfinal order." Id.

Here, the court did issue a final judgment as to fewer than all of the claims on January 27, 2020 when it granted Defendants' motion to reconsider and dismissed Counts II and III of Robertson's Amended Complaint with prejudice because they were barred by the applicable statute of limitations.

However, as explained many issues Robertson would seek review of under Rule 304(a) will be disposed of by the Appellate Court's answers to Judge Demacopoulos' certified question. Therefore, the court declines to make the necessary finding to allow Robertson to appeal pursuant to Rule 304(a).

III. Conclusion

Robertson's motion for reconsideration is DENIED.

Robertson's request for a Rule 304(a) finding is DENIED.

Defendants' request for to certify questions pursuant to Rule 308(a) is GRANTED IN PART and DENIED IN PART. The court denies Defendants' questions relating to the application of the Illinois Worker's Compensation Act and the two-year statute of limitations.

The court grants Defendants' request in so far as it seeks to certify a question relating to section 15(a) but denies Defendants' question as currently written.

The court orders the parties to confer and to attempt to reach an agreement regarding the phrasing of a question relating to the section 15(a).

The court set the next status date for this matter as June 16, 2020 at 9:30 a.m.

Entered: 5-29-20

Judge Neil H. Cohen