No. 123186

IN THE SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellant,

v.

SIX FLAGS ENTERTAINMENT CORP. and GREAT AMERICA LLC,

Defendants-Appellees.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

Phillip A. Bock
David M. Oppenheim
Bock, Hatch, Lewis & Oppenheim, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602-1086
(312) 658-5500
david@classlawyers.com

Ilan Chorowsky
Mark Bulgarelli
Progressive Law Group, LLC
1570 Oak Avenue, Suite 103
Evanston, Illinois 60201
(312) 787-2717

Attorneys for Plaintiff-Appellant Stacy Rosenbach

E-FILED
9/24/2018 9:34 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

INTRODUCTION

The Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, was created to "regulat[e] the *collection*, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information" ("Biometrics"). 740 ILCS 14/5(g) (emphasis added). No company needs to collect Biometrics, but those that choose to do so must comply with BIPA's collection requirements. When a company collects a person's Biometrics without providing the written disclosures and obtaining the written release BIPA requires, the company violates the legal rights BIPA creates.

By legislative choice, BIPA can be enforced only through a private action. 740 ILCS 14/20. BIPA neither burdens the taxpayers of Illinois with an enforcement bureaucracy nor burdens businesses with answering to one. And, BIPA does not require anything nearly as onerous as the disclosures and permissions required by innumerable other laws and regulations. *See, e.g.,* 765 ILCS 77/35 (Residential Real Property Disclosure Act); 815 ILCS 605/6 (Credit Services Organizations Act).

Section 15 is BIPA's only operative section. 740 ILCS 14/15. This appeal concerns subsection 15(b), which regulates the "collection" of Biometrics. Subsection 15(b) prohibits a private entity from collecting, capturing, or otherwise obtaining Biometrics unless it (1) discloses in writing that it is collecting Biometrics, (2) discloses in writing why and for how long the Biometrics are being collected, stored, and used, and (3) obtains "a

written release executed by the subject … or the subject's legally authorized representative." 740 ILCS 14/15(b).

Defendants and the amici supporting them complain bitterly about their potential liability under BIPA, but fail to explain why they did not comply with the law. Compliance would have been simple. Defendants violated subsection (b) when they collected the fingerprint of Plaintiff's minor son, Alexander Rosenbach, without giving this written information and without obtaining her written release. (C. 009-010, ¶¶ 23-30).

Defendants ask the Court to prevent enforcement of subsection 15(b) through their tortured construction of the phrase "any person aggrieved by a violation" to require actual damages. 740 ILCS 14/20. Defendants postulate about unspecified actual damages that could flow from a collection violation, but these are unrealistic (physical, emotional, or mental injury) or they are connected to third party-related liability under other subsections. Resp., p. 6. Although "it may be difficult to show harm flowing from a violation of BIPA's notice and consent provisions," Defendants argue, "aggrievement is not an insurmountable bar." Resp., p. 33. Defendants' assertion is disingenuous. A person is aggrieved whenever her Biometrics are collected in violation of the legal rights BIPA creates requiring her advance written notice and advance written consent. If not, then there can be no enforcement of BIPA's collection requirements and BIPA's stated purpose is undermined and ignored.

Defendants essentially ask the Court to repeal BIPA's provisions "regulating the collection" of Biometrics. Defendants request not only that they be excused from past violations of subsection 15(b), but also that they be given permission to violate them with impunity. Plaintiff respectfully requests that the Court decline this invitation, recognize that "regulating the collection" of Biometrics is a meaningful requirement with meaningful consequences, reverse the Appellate Court, and remand this case for further proceedings.

ARGUMENT

I. The plain meaning of "aggrieved" includes "having legal rights that are adversely affected," and requires nothing more.

Defendants argue the word "aggrieved" requires proof of damage other than the violation of Plaintiff's rights under subsection 15(b). In support, Defendants cite and attach six dictionary definitions. These dictionaries define "aggrieved" to include the following meanings:

- "(Of a person or entity) having legal rights adversely affected." Black's Law Dictionary (10th ed. 2014) (Resp., A003);
- "A party entitled to a remedy; esp., a party whose … personal ... rights have been adversely affected by another person's actions." Black's Law Dictionary (10th ed. 2014) (Resp., A004);
- "[S]uffering from an infringement or denial of legal rights." Webster's New Int'l Dictionary (3d ed. 1981) (Resp., A007)

- "[W]ronged in one's rights, relations, or position." The Compact Edition of the Oxford English Dictionary (1984) (Resp., A010)
- "Deprived of legal rights or claims." The Random House College Dictionary (Jess Stein et al. eds. 1st ed. 1984) (Resp., A013)
- "Deprived of legal rights or claims." Dictonary.com (Resp., A014)

To be sure, a person who suffers actual damage is "aggrieved," but, as Defendants' dictionary references show, the word is broader than that and covers anyone who has been "deprived of legal rights." Plaintiff agrees the word "'aggrieved' connotes an injury" (Resp., p. 13), but disagrees with Defendants where Black's and every other definition disagrees with them: the invasion of a legal right is an injury. The violation of a legal right created by BIPA aggrieves the person holding that right.

BIPA was expressly intended to "regulat[e] the collection … of biometric identifiers." 740 ILCS 14/5(g). It creates a legal right to notice and requires "a written release" *before* any Biometrics may be collected. 740 ILCS 14/15(b). Plaintiff has alleged that Defendants "deprived" her of these "legal rights or claims" when they collected her minor son's fingerprint without written notice or a written release. That allegation falls comfortably within the commonly understood meaning of "aggrieved" as found in *all* of the dictionary definitions.

Longstanding Illinois law is equally clear. *E.g., Glos v. People*, 259 Ill. 332, 340 (1913) ("A person is prejudiced or aggrieved, in the legal sense, when

a legal right is invaded by the act complained of ***or*** his pecuniary interest is directly affected by the decree or judgment.") (emphasis added); *Am. Sur. Co. v. Jones*, 384 Ill. 222, 230 (1943) (quoting the *Glos* definition in full).[1]

Defendants also argue that statutes *expressly defining* "aggrieved" should define it here. The converse is true. Where the General Assembly does not define a term, courts look to its ordinary or historically-understood meaning. *See Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 25 ("Words should be given their plain and obvious meaning unless the legislative act changes that meaning.")[2]

---

[1] Nor do all of the cases ultimately turn on pecuniary harm, as Defendants contend. For instance, in *Jones*, the plaintiff insurance companies challenged the renewal of a certificate of authority permitting foreign insurers—Lloyd's of London—to transact business in the state. *Jones*, 384 Ill. at 224. Even though the plaintiffs likely suffered a pecuniary harm in the loss of business through competition from Lloyd's, the Court held that they were not aggrieved because that harm was attenuated *and* because none of their legal rights had been violated. *Id.* at 125 ("It seems logical that the Director's order and decision renewing Lloyd's certificate did not directly affect the interest of the appellants since *none of their certificates were involved in the decision nor was any order directed against any of them*.") (emph. added). The *Glos* plaintiff alleged harm, because she alleged a one-third property ownership was wrongly adjudicated by foreclosure without her. The Court found she had no right to object to the prior foreclosure proceedings, and there could be no cloud of title, because she was not a party. *Glos*, 259 Ill. at 336, 341-345 ("Not being a party to the decree of foreclosure and sale, the supplemental proceedings could have no force or effect whatever upon [her] rights, which would remain the same as if the foreclosure proceedings and sale had never been had. … [S]aid decree could not bind or affect in any way the interests of Emma J. Glos, as the record shows that she was not a party to the proceedings….")

[2] Defendants cite *Hartney* to argue the Court can look to "similar and related enactments" when construing the meaning of "person aggrieved" as

Defendants illegally collected Plaintiff's minor son's Biometrics without the informed, written consent BIPA required.[3] Under the plain meaning of "aggrieved," as defined by the dictionaries Defendants cite, Plaintiff was aggrieved because she was "deprived of legal rights" created by BIPA.

II. Defendants seek an interpretation of "aggrieved" that removes subsection 15(b) from BIPA.

Defendants argue subsection 15(b) confers no legal rights. They argue it merely "imposes legal obligations on 'private entities' that collect biometric data"; a statutory honor system with no consequence for violations. *Id.* Resp., p. 13. Defendants cite *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) to support a circular argument that their "legal obligations" are not owed to

---

used in BIPA. The statutes Defendants cite are not "similar and related" to BIPA. First, Defendants cite the Illinois Human Rights Act, which, unlike BIPA, is enforceable by the Attorney General, 775 ILCS 5/10-104 and expressly defines "Aggrieved party" as it applies to that statute ("a person who is alleged or proved to have been injured by a civil rights violation"), (775 ILCS 5/1-103(B). Resp., p. 14. *Hartney*, 2013 IL 115130 ¶ 25.

Second, Defendants cite the Soil and Water Conservation District Act. 70 ILCS 405/3.20 (defining the term "aggrieved party" to mean "any person whose property resources, interest or responsibility is being injured or impeded in value or utility or any other manner by the adverse effects of sediment caused by soil erosion"). An act designed to reduce soil "erosion" is not similar and related to BIPA, a statute designed to protect individuals. That act defines "aggrieved party," but does not use the term anywhere else. Defining the term in the act signifies the legislature's distinct treatment of the term, but with no context for its use and no apparent reason why it was defined, it is impossible to know what to make of the definition.

[3] Plaintiff received no notice of Defendants' Biometrics collection practice. C009.

Plaintiff, Resp., p. 13, but *Sandoval* concerned a federal statute that created no private right of action and was enforceable by the federal government. Here, the circumstances are reversed, because BIPA expressly creates only a private right of action and there is *no* mechanism for government enforcement. Moreover, BIPA's right of action provision (section 20) plainly and equally applies to each of section 15's requirements.

Defendants admit that subsection 15(b) "imposes legal obligations" on them, but offer no explanation about how those obligations can be enforced? Given Defendants' own conduct, and the apparent conduct of the members of the organizations filing amicus briefs on their behalf, some businesses have blatantly ignored these "legal obligations." And they effectively argue they should be excused from compliance.

The plain meaning of BIPA's enforcement provision—section 20, which by its placement and expansive wording applies to every provision of section 15—makes all of section 15's subsections enforceable and actionable. Each of section 15's subsections is enforceable, and enforceable only by private individuals, under section 20. 740 ILCS 14/20. If Plaintiff cannot enforce her legal rights, no one can. *Id.*

If an entity mishandles Biometrics in a way that causes the pecuniary harm that Defendants argue is required to support a cause of action, other provisions of the statute have been violated. *See* 740 ILCS 14/15(c) (sale and profit provisions); 15(d) (disclosure provisions); 15(e) (security provisions).

Defendants have little response to the fact that their interpretation of "aggrieved" writes subsection 15(b) out of the statute, or at least any enforcement of it. Defendants suggest that the "provisions remain enforceable in other situations" (Resp., p. 37), but do not identify any such situation.

Furthermore, the legislature provided liquidated damages precisely to avoid the actual damages requirement that Defendants advance. Defendants argue that liquidated damages do not obviate an actual damages requirement, but instead are a penalty for the greater culpability involved in a negligent or willful violation of BIPA. Resp., p. 19-20. This argues past the point: regardless of a defendant's culpability, the existence of liquidated damages makes proof or quantification of actual damages unnecessary.[4]

Finally, the perverse results of Defendants' statutory construction are evident in the context of injunctive relief, which is available for "any person aggrieved by a violation." 740 ILCS 14/20(4). By grafting an unstated harm requirement to the word "aggrieved," Defendants' definition precludes injunctive relief related to subsection 15(b). Without injunctive relief, people whose Biometrics are being collected in violation of BIPA are powerless to

---

[4] Had the General Assembly intended to allow claims only when actual damage was alleged, it would have said so. For example, BIPA section 20 could have provided "actual damages sustained by the individual as a result of the [violation], but in no case shall a person entitled to recovery receive less than the sum of $1,000." *Doe v. Chao*, 540 U.S. 614, 619 (2004) (holding the quoted language required proof of some actual damages notwithstanding the liquidated damages minimum).

find out what is happening to their Biometrics, whether their Biometrics were shared or sold, and if collected illegally, powerless to request their destruction, unless and until some unstated adverse effect is shown. For example, under Defendants' construction of "aggrieved," Plaintiff would be powerless to force Defendants to destroy her son's stored Biometrics absent a data breach or sale to a third-party. The availability of such relief is good policy and the only method of preventing the harm the statute is expressly concerned with avoiding. *See* 740 ILCS 14/5(c), (d), (e), (f), (g) .

III. Defendants ignore the fact that every violation of subsection 15(b) causes an injury.

Defendants argue the Appellate Court was correct to find no actual damages without an allegation of adverse effect beyond the deprivation of rights conferred by the statute. Even assuming, *arguendo*, that the Appellate Court's reasoning was correct and properly accounted for the commonly understood meaning of "aggrieved" and the structure of the statute, no second-order or adverse effect is needed. Biometrics are highly sensitive, intangible personal property and they are not Defendants to take. BIPA forbids their taking without advance notice and written consent.

Defendants' failure to follow BIPA's collection pre-conditions made their taking of Alexander's Biometrics illegal. The Appellate Court did not address this *built-in* adverse effect of Defendants' non-compliance—the illegal *taking* of Biometrics—though it is alleged in Plaintiff's Amended Complaint. The Appellate Court similarly did not address the argument that

depriving Plaintiff of information required by statute constitutes actual injury without further adverse effect.[5]

Defendants took possession of Plaintiff's son's Biometrics, and did so only by violating BIPA. Under the plain meaning of "aggrieved," as defined by the dictionaries cited by Defendants, Plaintiff was aggrieved by Defendants' violation of BIPA because she was "deprived of legal rights" the Act created. The same result is true even under Defendants' definition.

IV. Construing "aggrieved by" to mean "deprived of legal rights" does not render it superfluous.

Defendants argue that construing the phrase "aggrieved by" to require nothing more than a deprivation of a personal legal right created by BIPA renders the phrase superfluous. Resp., p. 18. This is not true as a matter of grammar and syntax or the plain meaning of the language used in BIPA. It is *Defendants'* construction that renders BIPA's express purpose—to "regulat[e] the collection" of Biometrics—and subsection 15(b), superfluous and a nullity. 740 ILCS 14/5(g).

---

[5] Defendants argue that BIPA does not create a separate interest in the right to control one's Biometrics, but instead is intended only to protect Biometrics after they are collected. Resp., p. 39. That argument ignores BIPA's stated intent to regulate collection and to condition collection upon informational disclosures rather than just post-collection data protection. *Id.* Indeed, BIPA intends to encourage the public to permit Biometrics collection. 740 ILCS 14/5(e) ("Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.").

Section 20 states: "Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party." 740 ILCS 14/20. Substituting the definitions of "aggrieved" in the dictionaries cited by Defendants for the word "aggrieved" in section 20 results in the following sentence, "Any person ['deprived of legal rights'] by a violation of this Act shall have a right of action." This shows that "aggrieved by" simply defines the person whose legal rights are deprived by a violation as the person who has the right of action.

In other words, it is the person whose Biometrics are collected in violation of BIPA (or their legal representative) who has the right of action. Had the General Assembly meant to limit actions to a person suffering actual damage it could have said so expressly as it has said in many other statutes. *See, e.g.*, 815 ILCS 505/10a(a) ("Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person."); 215 ILCS 155/25 ("actual damages"); 740 ILCS 120/3 ("actual damages"); 815 ILCS 305/30 (requiring "actual damages" and permitting statutory damages only "in addition to" such actual damages); 765 ILCS 910/9 ("actual damages").

Defendants counter that other statutes create private rights of action for "consumers" or "customers" without using the word "aggrieved" or any reference to actual damages. Resp., pp. 15-18 (citing 220 ILCS 5/22-501(r)(4);

12 U.S.C. § 3417; 15 U.S.C. § 1640; *id.* § 1681n(a); *id.* § 1692k; *id.* §1693m). For example, the Cable and Video Customer Protection Law states, "Any customer, the Attorney General, or a local unit of government may pursue alleged violations of this Act by the cable or video provider in a court of competent jurisdiction." 220 ILCS 5/22-501(r)(4).

Defendants' argument overlooks that BIPA applies not only to "customers" or "consumers," but to all persons whose Biometrics might be collected.[6] 740 ILCS 14/15 ("a person's *or* a customer's biometric identifier") (emphasis added); 740 ILCS 14/15(b) (requiring informed consent by the "legally authorized representative"); 740 ILCS 14/10 (requiring a written release to be executed by employees "as a condition of employment"). Had the General Assembly "expanded" the reach of BIPA beyond "any person aggrieved" to "customers" or "consumers," as Defendants suggest, then it actually would have reduced BIPA's reach, leaving aggrieved employees with no remedy no matter how injurious the violation of BIPA by their employer. Attempting to craft an enforcement provision that defined every category of person entitled to relief would make the right of action provision unwieldy;

---

[6] Defendants' citations to federal statutes are similarly limited to particular regulated financial industries and the specific categories of persons with whom they conduct regulated business activities, namely banking, lending, and credit reporting. 12 U.S.C. § 3417 (disclosure of customer information by a financial institution); 15 U.S.C. § 1640 (compliance with truth in lending disclosures); *id.* § 1681n(a) (consumer credit reporting); *id.* § 1692k (consumer credit reporting for employment purposes); *id.* §1693m (adverse action based on consumer credit report use).

instead, the legislature simply empowered those persons who are aggrieved to bring suit.

"Any person aggrieved by a violation" applies to *anyone* whose Biometrics are collected in violation of BIPA, regardless of whether they are aware of the collection and regardless of whether they have any relationship with the collecting entity. Under Defendants' construction, a person whose Biometrics are surreptitiously collected is not necessarily a customer, a consumer, or even an employee, would have no recourse under BIPA, and could not bring an action to compel the thief to destroy his collected Biometrics.

Finally, Defendants argue "aggrieved" is qualified by the phrase "by a violation," so it is "superfluous" if it covers "any violation." Resp., p. 18. Defendants are incorrect. The sentence is written in the passive voice. "Any person" is the subject who is acted upon, "aggrieved by" is the verb, and "a violation" is the object that has acted upon "any person." Defendants suggest "the legislature could have simply stated that a data collector would be liable *for a violation*" if it had not intended "aggrieved" to narrow the meaning, but the sentence is written in the passive voice and does not mention "data collectors" at all. Resp., p. 18. Defendants' argument requires re-writing the sentence from scratch.

Moreover, if BIPA simply "stated that a data collector would be liable *for a violation*," Resp., p. 18, the question would remain – liable to whom?

"Aggrieved by" answers the question, and limits suit to those persons whose rights are violated.

Without "aggrieved by," a court would have to rely—as Defendants point out—on background principles of prudential standing. *Id.* The legislature's choice to codify a common-law principle is unremarkable. *See Wagner v. City of Chicago*, 166 Ill. 2d 144, 152 (1995). Indeed, standing requirements may not be the same in every jurisdiction where a BIPA lawsuit might be brought, and including this limitation ensures that only persons whose rights are violated may sue. *See, e.g., Jones v. Prince George's County*, 378 Md. 98, 119 (2003) (finding that law of Maryland standing applies, regardless of choice of law analysis). Furthermore, standing is an affirmative defense and waivable. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010).[7] By adopting aggrieved as a statutory requirement, the legislature ensured that the proper plaintiff must identify himself as the

---

[7] Though not at issue here, Defendants mistakenly suggest that standing is a constitutional requirement that limits the Illinois courts' subject matter jurisdiction. It is not. *Lebron*, 237 Ill. 2d at 252-53. *Amici* Retail Merchants Association, Speedway, and others attempt to put it at issue, arguing that Plaintiff must meet a constitutional standing requirement of "injury in fact," which *amici* assert is not met. Defendants do not argue that Plaintiff lacks standing to bring this suit, and tacitly acknowledge that invasion of a legal right satisfies standing requirements. Resp., pp. 16-17. This is in keeping with Illinois courts' well-established interpretations of the prudential standing doctrine in suits under a statute that provides a private right of action and damages. For example, where the legislature creates a legal right and remedy, the invasion of that right "give[s] rise to the type of injury necessary to establish standing...." *Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations*, 322 Ill. App. 3d 17, 31 (1st Dist. 2001).

correct party, rather than that being the defendant's burden to plead and prove. *See id.*

The choice of "aggrieved," rather than some word that would implicate pecuniary harm, further clarifies the limitation that the legislature actually sought to impose. For example, the General Assembly could have written "injured by," "harmed by," or "damaged by," had it intended to require the actual damages Defendants now urge. Given the many alternative ways of describing actual damage, "aggrieved by" is a meaningful choice that shows no intent to act as a synonym for "damaged by."

Some verb must be used in the sentence, and Defendants do not offer a simple substitution for "aggrieved by" that would support their argument because there is none. "Aggrieved by" is not superfluous. It is the grammatically necessary verb linking the subject "any person" with the object "a violation," so as to include any person whose Biometrics are collected in violation of subsection 15(b). Using the dictionary definition for "aggrieved by"—"deprived of legal rights"—is the most natural and reasonable construction of the sentence.

V. Better reasoned case law supports Plaintiff's arguments.

Defendants rely heavily on two federal district court decisions that held that plaintiffs lacked federal Article III standing under the federal "case or controversy" requirement to bring claims under BIPA for violations of subsections 15(a) or (b). Resp., pp. 20-22 (citing *McCullough v. Smarte Carte,*

Inc., No. 16-C-0377, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016); *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 519, 520 (S.D.N.Y. 2017), *aff'd in part, vacated in part, remanded sub nom. Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017).[8] The *McCullough* court did not consider BIPA's structure or purpose, or the fact that it can be enforced only by a private action. The court did not recognize that its interpretation renders the subsection 15(b) requirements unenforceable by anyone, and defeats the express purpose of BIPA to "regulat[e] the collection of ... biometric identifiers and information." 740 ILCS 14/5(g). Relying upon *McCullough*, *Vigil* made these same errors.

More importantly, both cases were concerned with federal Article III standing. Defendants argue they also addressed standing under Illinois law, but that is not accurate. For example, *McCullough* expressly distinguished the Circuit Court of Lake County's decision in this case denying Defendants' motion to dismiss, stating, "As this Court notes above, even if a state court would find McCollough to be an aggrieved person under BIPA a state statute cannot confer federal constitutional standing." 2016 WL 4077108, at *5. Similarly, the federal appellate court reversed the *Vigil* court's dismissal with

[8] Defendants also cite *Dixon v. Wash. & Jane Smith Comm.*, No. 17 C 8-033, 2018 WL 2445292 (N.D. Ill. May 31, 2018), which denied a motion to dismiss in a BIPA case, distinguishing the Appellate Court's *Rosenbach* opinion. *Id.* at *12. Defendants mischaracterize *Dixon* as "adopting" the lower court's reasoning, but it did not. Moreover, that case concerned an allegation that the defendant disclosed the plaintiff's Biometrics to a third-party.

prejudice because a lack of federal Article III standing rendered the district court without jurisdiction to rule on the state law issues. 717 F. App'x at 17.

As Defendants concede, there are federal decisions to the contrary. Resp., pp. 22-23 (citing *In re Facebook Biometric Info. Priv. Litig.*, No. 3:15-cv-03747-JD, 2018 WL 1794295 (N.D. Cal. Apr. 16, 2081); *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017).[9]

---

[9] Defendants cite three state court decisions, but those involved the construction of statutes where principal enforcement was left to the government, and private causes of action were more narrowly defined and supplemental to primary government oversight. Resp., p. 26 (citing *Walls v. Am. Tobacco Co.*, 11 P.3d 626 (Okla. 2000); *Avudria v. McGlone Mortgage C.*, 802 N.W.2d 524 (Wis. Ct. App. 2011); *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993)). BIPA is not similarly structured, so these cases are not on point. *See, e.g.*, *Walls*, 11 P.3d at 630, ¶ 16; *Finstad*, 845 P.2d at 691 ("A loss or injury resulting from a violation of the Act is not required in an action filed by the attorney general under K.S.A. 50-632 and K.S.A. 50-636; it is, however, required for one filed by a consumer under K.S.A. 50-634(b)."); *Friends of Bethany Place, Inc. v. City of Topeka*, 307 P.3d 1255, 1263 (Kan. 2013) (rejecting the premise, also cited in *Finstad*, that "aggrieved" requires a pecuniary interest; the Act in question showed the legislature intended to confer broader standing); *Avudria,* 802 N.W.2d at 529-30 ("*Based upon the plain language of WIS. STAT. § 224.80(2)*, we determine that a "person who is aggrieved" is one who suffered at least some actual injury or damage.") (emph. added). *Avudria*, upon which the Appellate Court relied here, does not broach the topic of invasion of rights. It addresses only the first of two categories of injury defined by the term "aggrieved," set forth by the Wisconsin Supreme Court in *Liebovich v. Minn. Ins. Co.*, 751 N.W.2d 764, 775 (Wisc. 2008), one category being "to inflict injury upon," with examples given in tort, and the other category being "violation of rights" as independent grounds for injury: "In addition, a violation of rights, as alleged by the Halls' complaint, may constitute an injury." 751 N.W.2d at 775 (citing *Webster's* and *Black's*). *Leibovich* found the underlying plaintiff alleged both. *Id.* at 776 ("In this case, the Halls' complaint clearly alleges a violation of their interests and rights, a breach of a covenant resulting in harm, and an actionable invasion of a legally protected interest. As such, the complaint alleges "injury" within the dictionary meaning of that word."). *Compare, Id.*;

These better-reasoned decisions, properly analyzing the statute's structure and purpose, find that BIPA does not contain a covert pecuniary-harm requirement.

VI. BIPA's intent to encourage the use of Biometrics in Illinois by assuring the public that Biometrics will be safely collected and stored only with people's consent will be defeated if BIPA cannot be enforced until after irreparable harm has occurred and been discovered.

Defendants argue BIPA was intended to facilitate the use of Biometrics in Illinois by reassuring people that BIPA would "impose 'collection and retention standards while prohibiting the sale of biometric information.'" Resp., p. 28 (quoting Transcript of the State of Illinois 95th General Assembly House of Representatives, 249 (May 30, 2008) (remarks of Rep. Ryg) (Resp. A017)). Plaintiff does not disagree with that proposition.

Defendants go on to assert, however, that facilitating the use of Biometrics must be balanced against the purpose of "protecting individual privacy." Resp., p. 28. This is incorrect. BIPA makes clear that it sought to protect individual privacy for the very purpose of facilitating the use of Biometrics. These are not competing interests to be balanced, but complementary interests. If consumers believe Biometrics will be safely

---

Avudria, 802 N.W.2d at 530-31. Similarly in *Spade,* cited by Defendants, the meaning of "aggrieved consumers" was based on the statute's selective definition of "consumer" and its own "plain language" – a question of "statutory interpretation." *Spade v. Select Comfort Corp.*, 181 A.3d 969, 979 (N.J. 2018) (furniture customer asserted that receipt of a sales contract prohibiting returns violated a regulation requiring the opportunity for a refund in the event of late delivery, and no late delivery was alleged).

collected, handled, stored, and destroyed, and only with their express consent, they will not be "weary of the use of biometrics when such information is tied to finances and other personal information." 740 ILCS 14/5(d) and (g).

Defendants' argument that no one should be able to enforce the portions of BIPA governing the collection of Biometrics defeats this purpose. *Id.* Citizens will still be wary of the use of Biometrics and reluctant to allow collection if they know that businesses such as Defendants are subject to no regulation unless and until they actually cause harm, potentially irreparable harm. 740 ILCS 14/5(c) ("Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions"). They will receive no written disclosures and will not be asked to provide a written release.

Plaintiff does not seek to "eliminate the use of biometric data." Plaintiff merely seeks to enforce the minimal requirements BIPA created as a precondition of collecting them. If businesses comply with these minimal requirements, rather than resisting their enforcement, that compliance will reassure a wary public and promote the use of Biometrics. 740 ILCS 14/5(d)-(g).

VII. BIPA was expressly intended to create new private rights and "regulat[e] the collection" of Biometrics, so other privacy statutes and the common law of privacy are inapposite to its construction.

Defendants argue, "there are numerous examples of other privacy statutes that do not permit any private right of action *at all*," so BIPA's private right of action should be limited to actual damages. Resp., pp. 30-31 (emphasis in the original). Defendants cite the student biometric information amendments to the school code. *Id.* (citing 105 ILCS 5/10-20.40; 105 ILCS 5/34-18.34). And they cite the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. *Id.* (citing 68 Ill. Adm. Code 1240.535(c)(8)). Both are part of comprehensive regulatory schemes enforced exclusively by the government; the State Board of Education and the Department of Financial and Professional Regulations, respectively. 105 ILCS5/2-3.3; 225 ILCS 447/5-3. By contrast, BIPA allows only private enforcement.

That the common law tort of invasion of privacy permits recovery of actual damages, as Defendants note, is equally inapposite. BIPA was enacted to create new rights that "regulat[e] the collection" of Biometrics because the General Assembly deemed existing law inadequate. 740 ILCS 14/5.

VIII. BIPA should be enforced as written because companies like Defendants are not complying with it.

Defendants do not dispute that BIPA's written notice and consent requirements will be toothless and unenforceable, absent private enforcement. Resp., pp. 32-35. Defendants argue this is what the General

Assembly must have intended, because otherwise an "army of private attorneys general" will be incentivized "to seek harmless deficiencies in BIPA paperwork." Resp., p 32. Defendants cite BIPA's flexibility in not mandating any "standardized notice and consent" requirements. Defendants' argument amounts to arguing "the Illinois legislature knows that compliance with state laws is too hard, so it does not require it." That argument cannot withstand scrutiny.

BIPA subsections 15(a) and (b) hardly require onerous or complex "paperwork." Subsection 15(a) requires only "a written policy, made available to the public, establishing a schedule and guidelines for permanently destroying biometric identifiers." 740 ILCS 14/15(a). The only constraint is that destruction must be set for no later than three years after last contact with the person or when the purpose for retaining the information has ceased. *Id.* Subsection 15(b) requires only that a company provide written notice that biometric information is being collected and identify the purpose and length of term for which it is being collected and stored, and then obtain written consent. Defendants cite specifying a "retention period in a BIPA notice" as a technical burden that will stifle innovation, but they do not explain how or why that is so. Resp., p. 32. Given that each person's Biometrics are an immutable part of her individual identity, it hardly seems onerous to compel companies to disclose how long they plan to retain it.

Defendants' primary complaint is that their violation of Plaintiff's rights makes them liable for BIPA's statutory damages, describing that outcome as "absurd" and BIPA's damages as "outsized." Resp., pp. 33-34. The circularity of this reasoning is transparent. Also absurd, in Defendants' view, is that enforcement might take the form of a class action. *Id.* These policy arguments have no place in statutory interpretation. Whatever the merits of Defendants' views on BIPA and class actions, the statute Defendants desire is not the one that the General Assembly passed. Consistent with longstanding practice, the Court should interpret the statute on its language and purpose alone.

Nor are Defendants' policy arguments well-grounded. First, a case can only be a class action if a company systematically collects Biometrics in violation of BIPA. Second, while it is possible the company would destroy all of the data before any was misused or lost, it is more likely that it would, as has happened recently, fail to properly secure the data and lose in it some sort of data breach. *See, e.g.,* Kate Taylor, *Panera Reportedly Ignored a Breach That Exposed Thousands of Customers' Information for 8 Months*, BUSINESS INSIDER, Apr. 3, 2018, https://www.businessinsider.com/panera-data-breach-reportedly-remained-unsolved-for-months-2018-4; Dennis Green, *Forever 21 Says That Customers' Credit Card Info May Have Been Stolen*, BUSINESS INSIDER, Nov. 14, 2017, https://www.businessinsider.com/forever-

21-potential-credit-card-breach-2017-11. Third, the policy argument is misplaced here, for Plaintiff has not sought recovery for repeat violations.

What Defendants cannot explain is why they should face no liability for systematically collecting Biometrics in violation of BIPA when compliance is so simple. There is a foolproof way for Defendants and other companies to avoid statutory damages: don't break the law. Rather than nullifying BIPA as Defendants ask, the Court should allow enforcement of the statute as written so businesses comply with it.

CONCLUSION

Defendants' response has two glaring flaws. First, they do not explain why they did not comply with BIPA's notice and consent requirements. Second, they do not explain why their failure to comply should cause the Court to declare that no one need comply with those requirements. Defendants violated BIPA by collecting Plaintiff's son's Biometrics without her informed, written release. Because Defendants violated her rights, Plaintiff is an aggrieved person.

Plaintiff respectfully requests that the Court reverse the Appellate Court, answer the certified questions in the affirmative, and remand for further proceedings.

Respectfully submitted,

STACY ROSENBACH

By: /s/ Phillip A. Bock
One of her attorneys

Phillip A. Bock
David M. Oppenheim
Bock, Hatch, Lewis & Oppenheim, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602-1086
(312) 658-5500

Ilan Chorowsky
Mark Bulgarelli
Progressive Law Group, LLC
1570 Oak Avenue, Suite 103
Evanston, Illinois 60201
(312) 787-2717

Attorneys for Plaintiff-Petitioner Stacy Rosenbach

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,992 words

Dated: September 24, 2018.

s/ Phillip A. Bock
Phillip A. Bock

Attorney for Plaintiff-Petitioner
BOCK, HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602
Telephone: (312) 658-5500

CERTIFICATE OF SERVICE

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

The undersigned attorney further hereby certifies under oath, in accordance with 735 ILCS 5/1-109 that on September 24, 2018, he submitted the foregoing *Reply Brief of Plaintiff-Appellant Stacy Rosenbach* using the Court's electronic filing service and he caused to be served a copy of the foregoing on the parties listed below by electronic mail:

Debra Bernard
PERKINS COIE LLP
131 S. Dearborn St., Ste. 1700
Chicago, IL 60603
dbernard@perkinscoie.com

Kathleen M. O'Sullivan
PERKINS COIE LLP
1201 Third Ave., Ste. 4900
Seattle, WA 98101
KOSullivan@perkinscoie.com

Attorneys for Defendants- Appellees

Alexander Tievsky
Ryan Andrews
Jay Edelson
EDELSON PC LLP
350 N. La Salle St., 14th Fl.
Chicago, Illinois 60654
atievsky@edelson.com
randrews@edelson.com
jedelson@edelson.com

Attorneys for Klaudia Sekura

Rebecca Glenberg
Roger Baldwin Foundation of ACLU, Inc.
150 N. Michigan Ave. Ste. 600
Chicago, IL 60601
rglenberg@aclu-il.org

Attorney for the ACLU of Illinois

Garry Miller
SHOOK, HARDY & BACON L.L.P.
111 S. Wacker Dr., Suite 5100
Chicago, IL 60606
gmiller@shb.com

Attorney for Amici Curiae Illinois Retail Merchants Association, National Federation of Independent Business Small Business Legal Center, International Health, Racquet & Sportsclub Association and Speedway LLC

And further certifies that he caused a copy of the foregoing to be served on the parties listed below by depositing them in the U.S. Mail at 134 N. La Salle St., Chicago, IL with proper postage prepaid and addressed as follows:

Marc Rotenberg
Alan Butler
Natasha Babazadeh
ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave. NW, Ste. 200
Washington, D.C. 20009

Adam J. Levitt
Amy E. Keller
DICELLO LEVITT & CASEY LLC
Ten North Dearborn Street,
Eleventh Floor
Chicago, IL 60602

Attorneys for Amicus Curiae Electronic Privacy Information Center

Melissa A. Siebert
Bonnie Keane DelGobbo
BAKER HOSTETLER LLP
191 N. Wacker Dr. Ste. 3100
Chicago, IL 60606

Angelo I. Amador
Restaurant Law Center
2055 L Street, NW, Ste. 700
Washington, D.C. 20036

Attorneys for Amici Curiae Restaurant Law Center and Illinois Restaurant Association

Michele Odorizzi
Michael A. Scodro
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, IL 60606

Lauren R. Goldman
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020

Attorneys for Amicus Curiae Internet Association

Noah A. Finkel
Thomas E. Ahlering
SEYFARTH SHAW LLP
233 S. Wacker Dr., Ste. 8000
Chicago, IL 60606

Attorney for Amici Curiae Illinois Chamber of Commerce

Dated: September 24, 2018.

s/ Phillip A. Bock
Phillip A. Bock

Attorney for Plaintiff-Appellant
BOCK, HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602
Telephone: (312) 658-5500