

Illinois Supreme Court Opens Floodgates for Claims under Illinois Biometric Information Protection Act

by Andrew L. Goldstein

A FREEBORN & PETERS LLP CLIENT ALERT

ABOUT THIS CLIENT ALERT:

Recently, the Illinois Supreme Court opened the floodgates for claims and class actions under the BIPA and renewed and underscored the importance of compliance with its requirements.

On January 25, 2019, the Illinois Supreme Court ruled that you do not need to have suffered damages in order to recover for violations of the Illinois Biometric Information Protection Act (BIPA). This decision opens the floodgates for claims and class actions under the BIPA and renews and underscores the importance of compliance with its requirements.



The BIPA applies to the collection of biometric identifiers such as fingerprints, face or hand scans, and retina scans. The BIPA imposes requirements on the use, safeguarding, handling, storage, retention and destruction of biometric identifiers and biometric information by private entities. The BIPA provides that “aggrieved” individuals can recover \$1,000 for each violation of the Act per person and \$5000 if the violation was intentional or reckless. The Act also allows for a private right of action, which means that claims can be brought by individuals and not just by the Illinois Attorney General. For further details on the BIPA, see my prior Client Alert [here](#).



If you are a business or other entity that is collecting, or will collect, biometric information such as fingerprints, face or retina scans and the like, such as collecting fingerprints of employees for a timeclock system or of customers for a membership database, you must ensure that you comply with the requirements of the BIPA.

Several courts have dismissed cases under the BIPA because there was only a “technical” violation of the Act, (i.e., the defendant did not comply with the requirements of the Act, and the plaintiff did not suffer any actual damages, such as damages resulting from a data breach). One such case is *Rosenbach v. Six Flags Entertainment Corp.*, which involved a school field trip to the Great America amusement park. Mrs. Rosenbach bought her 14-year-old son a season pass to the park for the field trip and, in order to purchase the pass, Great America required her son to scan his thumb print into their system. Great America did not provide Mrs. Rosenbach or her son with any notice of or obtain a written release for the thumb scan as is required by the BIPA. Mrs. Rosenbach sued Six Flags for violations of the BIPA, claiming monetary and injunctive relief, even though neither she nor her son alleged that they suffered any damages.

Six Flags moved to dismiss the case on the grounds that the plaintiff did not suffer any damages and the lower court agreed. The case was appealed and the Illinois Appellate Court ruled that while the “injury or adverse effect need not be pecuniary ... it must be more than a technical violation of the Act” and it upheld the dismissal. Mrs. Rosenbach then appealed the case to the Illinois Supreme Court.

The Supreme Court stated that the “central issue in this case ... is whether one qualifies as an ‘aggrieved’ person and may seek ... damages and injunctive relief pursuant to the Act if he or she has not alleged some actual injury or adverse effect, beyond violation of his or her rights under the statute.” To answer the question, the Supreme Court reviewed prior Illinois cases and other Illinois statutes, such as the AIDS Confidentiality Act, and concluded that when a private entity fails to comply with the requirements of the BIPA, “that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach ... and such a person or customer would clearly be ‘aggrieved’” under the BIPA. The Court went on to say that violations of the BIPA are “particularly concerning ... because the full ramifications of biometric technology are not fully known.”

The Supreme Court also addressed the burdens and costs of complying with the requirements of the BIPA. It stated, “Compliance should not be difficult; whatever expenses a business might incur to meet the law’s requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded; and the public welfare, security, and safety will be advanced.”

There have been over 200 cases filed under the BIPA and, in light of the *Rosenbach* case, plaintiffs’ class action lawyers will be looking to file even more claims under the Act. If you are a business or other entity that is collecting, or will collect, biometric information including fingerprints, face or retina scans and the like, such as collecting fingerprints of employees for a timeclock system or of customers for a membership database, you must ensure that you comply with the requirements of the BIPA.



If you are in possession of biometric identifiers or biometric information, you must store, transmit, and protect them from disclosure using a reasonable standard of care based on your industry using the same or more protective manner as you use to protect your own confidential and sensitive information.

The BIPA requires that no entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's biometric identifier or biometric information unless it first:



01 Informs the subject in writing that the information is being stored;

01



02 Informs the subject about "the specific purpose and length" of the use;

02



03 Receives express written authorization to use the information. For employers, the release can be conditioned on continued employment.

03

In addition, the BIPA requires entities storing biometric identifiers or biometric information to have in place a written policy establishing a retention schedule and guidelines for permanently destroying the identifiers and information when the initial purpose for collecting or obtaining them has been satisfied or within three years of the individual's last interaction with the entity, whichever occurs first. Further, if you are in possession of biometric identifiers or biometric information, you must store, transmit, and protect them from disclosure using a reasonable standard of care based on your industry using the same or more protective manner as you use to protect your own confidential and sensitive information.

If you require assistance in creating an appropriate consent form and/or a policy compliant with the BIPA, contact Andrew L. Goldstein at agoldstein@freeborn.com.

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