

Litigation under the Biometric Information Privacy Act after *Rosenbach*.

Still a Wild Ride

BY CHARLES N. INSLER

THE ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT (BIPA OR ACT) ESTABLISHES SAFEGUARDS and procedures relating to the retention, collection, disclosure, and destruction of biometric data.¹ Passed in October 2008, BIPA is intended to protect biological data encompassed in a person's fingerprint, voice print, retinal scan, or facial geometry. This information is the most sensitive data belonging to an individual. Unlike a PIN code or a Social Security number, once biometric data is compromised, "the individual has no recourse, is at [a] heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions."² For this reason, BIPA provides a private right of action for "[a]ny person aggrieved by a violation of this Act"³

A bare statutory violation confers standing

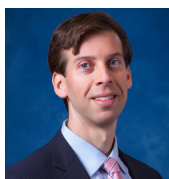
The question facing Illinois courts interpreting BIPA had been how best to interpret the meaning of "aggrieved." Was an individual aggrieved if the defendant violated the statute or did the individual need to have sustained "some actual injury or harm, apart from the statutory violation itself, in order to sue under the Act"?⁴ Illinois appellate courts had reached conflicting decisions on this

1. 740 ILCS 14/15.

2. *Id.* § 14/5(c).

3. *Id.* § 14/20.

4. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 23.



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question, with the First District holding that a bare statutory violation was sufficient to confer standing under BIPA⁵ and the Second District holding that BIPA required a person aggrieved by a violation of the Act to allege an actual harm and not simply a technical violation.⁶

On Jan. 25, 2019, the Illinois Supreme Court resolved this split and held, in *Rosenbach*, that a person is aggrieved in the legal sense “when a legal right is invaded by the act complained of”⁷ In other words, the “violation [of the statute], *in itself*, is sufficient to support the individual’s or customer’s statutory cause of action.”⁸ The underlying goals of BIPA support this result.⁹ If the purpose of BIPA is to safeguard biometric identifiers and information *before* data is compromised, then individuals must be permitted to enforce those protective rights as soon as they became aware of a defendant’s failure to properly protect their biometric data.¹⁰ To hold otherwise and require “individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights . . . would be completely antithetical to the Act’s preventative and deterrent purposes.”¹¹

The Supreme Court’s ruling has, predictably, spurred additional litigation asserting bare violations of the statute. By last count, more than 100 lawsuits have been filed in the few months following the *Rosenbach* decision, with almost all of the lawsuits brought as class actions. This veritable onslaught of litigation raises the question of where BIPA litigation is heading and what legal issues remain unresolved.

What constitutes a “violation” under BIPA?

Under *Rosenbach*, even a “technical”

violation of the statute produces a “real and significant” injury, giving rise to a private cause of action.¹² Previous defenses based on standing and lack of injury are no longer viable based on *Rosenbach*’s definition of “aggrieved.” “Violation” may be the next critical word under the Act.

BIPA provides for damages of \$1,000 for each negligent violation and \$5,000 for each intentional or reckless violation of the statute.¹³ But the statute does not define “violation.” Plaintiffs have always argued that each facial or fingerprint scan is an independent and compensable violation.¹⁴ Assuming four violations per employee per day (clocking in for the day, out for lunch, back in after lunch, and out for the day), an employer who has run afoul of BIPA could count 20 violations per employee, per week.¹⁵ An employer with 50 employees would stand to be liable for 1,000 violations a

5. *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 77.

6. *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, ¶ 28.

7. *Rosenbach*, 2019 IL 123186, ¶ 30.

8. *Id.* ¶ 33 (emphasis added).

9. *Id.* ¶¶ 24-37.

10. See *id.* ¶ 37.

11. *Id.*

12. *Id.* ¶ 34.

13. 740 ILCS 14/20.

14. With talk of voiceprints and retina scans, BIPA may conjure up scenes from futuristic films like *Blade Runner* or *Minority Report*. But most of the lawsuits concern a far more quotidian technology: an employer’s fingerprint-operated punch clock. See, e.g., *Grabowska v. Millard Maintenance Co.*, No. 2017-CH-13730, 2017 WL 4767159 (Ill. Cir. Ct. Oct. 12, 2017) (Complaint at ¶ 2) (“Millard employees in Illinois have been required to clock ‘in’ and ‘out’ of their work shifts by scanning their fingerprints, and Millard’s biometric computer systems then verify the employee . . .”).

15. *Espinosa v. RevMD Partners, LLC*, No. 2019-L-000523, 2019 WL 2103430 (Ill. Cir. Ct. May 10, 2019) (“Defendant required Plaintiff and other employees to scan their fingerprints in Defendant’s biometric time clock each time they started and finished working a shift, and when they clocked in and out for lunch breaks.”).

TAKEAWAYS >>

- Under *Rosenbach*, even a “technical” violation of the Biometric Information Privacy Act produces a “real and significant” injury.
- BIPA has several potential weak spots, including being susceptible to challenges under substantive due process and the Dormant Commerce Clause, and questions over undefined terms such as “limitations period” and “violations.”
- BIPA defendants are unlikely to receive legislative relief from the Illinois General Assembly or Congress.

UNDER *ROSENBACH*, EVEN A “TECHNICAL” VIOLATION OF THE STATUTE PRODUCES A “REAL AND SIGNIFICANT” INJURY, GIVING RISE TO A PRIVATE CAUSE OF ACTION. PREVIOUS DEFENSES BASED ON STANDING AND LACK OF INJURY ARE NO LONGER VIABLE BASED ON *ROSENBACH*’S DEFINITION OF “AGGRIEVED.” “VIOLATION” MAY BE THE NEXT CRITICAL WORD UNDER THE ACT.

week, or \$1 million a week for negligent violations of the statute.¹⁶

A different reading of the statute would be that an employer commits only one violation for each employee whose biometric data is collected. After all, once a fingerprint has been scanned, the harm has been done—there is no additional harm or risk from each successive fingerprint scan. This interpretation would be in contrast to other statutory-damage schemes, such as the Telephone Consumer Protection Act, where each additional phone call creates a new annoyance and disruption.¹⁷ Under this interpretation, 50 aggrieved employees would amount to a \$50,000 statutory violation, not a violation of \$1 million a week. The definition

of “violation” remains a critical and undecided issue for assessing BIPA liability.

Could BIPA violate the substantive Due Process Clause as applied?

If each new scan amounts to a separate violation of the statute, defendants could face crippling liability. This, in turn, could make the statute susceptible to a substantive due-process challenge. Damages under a state statute violate due process if they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”¹⁸ A six-month period of violations (a relatively short 26-week period) could mean \$26 million in damages for the small business with 50 employees. This damage figure appears so severe and oppressive that it could violate substantive due process.

A similar argument was unsuccessfully made in *In re Marriage of Miller*, surrounding the Income Withholding for Support Act.¹⁹ In *Miller*, the plaintiff sued her ex-husband’s employer for failing to withhold his wages after he failed to pay child support. The statutory penalty was up to \$100 per day for an employer’s violation, and in *Miller*, the employer racked up more than \$1.1 million in statutory penalties. The Second District found that the Act did violate the Due Process Clause based on the severe penalty, but the Illinois Supreme Court reversed, holding that the Act did not violate substantive due process as applied to the defendant employer.²⁰

Could BIPA violate the Dormant Commerce Clause?

A challenge under the Dormant Commerce Clause argues that the application of one state’s law would have the practical effect of controlling conduct beyond the boundaries of that state. In other words, enforcing BIPA in Illinois would effectively enforce BIPA in California (and other states), even though California has rejected similar legislation and even though some of the larger technology companies effected by BIPA are based in California.²¹ This argument has been unsuccessful, at least at the dismissal stage.²²

What other important issues remain unsettled?

BIPA does not provide for a limitations period. The limitations period could be the one-year period associated with publication of matter violating the right to privacy,²³ or it could be something larger.²⁴ As noted above, BIPA separates willful violations (\$5,000 per violation) from negligent violations (\$1,000 per violation), but the statute never describes the level of conduct that separates the former from the latter.

16. See 740 ILCS 14/20.

17. See *Stillmock v. Weis Markets, Inc.*, 385 F. App’x 267, 277 (4th Cir. 2010) (Wilkinson, C.J., concurring) (noting that statutory damages were available on a per-consumer rather than a per-receipt basis in FACTA action).

18. *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 67 (1919).

19. *In re Marriage of Miller*, 879 N.E.2d 292 (Ill. 2007).

20. *Id.* at 305; but see *Stillmock*, 385 F. App’x at 278 (Wilkinson, C.J., concurring) (“Other courts have noted that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues.”).

21. This impact is not just theoretical. BIPA is believed to be behind Nest’s decision not to offer facial recognition on doorbells operating in Illinois and Google’s decision not to allow Illinois users to match their selfies with faces depicted in works of art. Ally Marotti, *Illinois Supreme Court Rules Against Six Flags in Lawsuit Over Fingerprint Scans. Here’s Why Facebook and Google Care*, Chicago Tribune (Jan. 25, 2019).

22. See *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846, at *8 (N.D. Ill. Sept. 15, 2017).

23. 735 ILCS 5/13-201.

24. On Oct. 25, 2019, Cook County Circuit Judge Pamela McLean Meyerson held that BIPA was governed by a five-year statute of limitations. See Jonathan Bilyk, *Cook County Judge: Walmart, Other Employers Can’t Look To IL Constitution For Protection From Biometrics Class Actions*, Cook County Record (Oct. 31, 2019).

ISBA RESOURCES >>

- Coming in 2020: Guide to the Illinois Biometric Information Privacy Act, a new ISBA book authored by John M. Fitzgerald.
- Jonathan Nessler, *Law Firms Must Be Cautious About the Handling and Storage of Biometric Data*, The Bottom Line (Sept. 2019), law.isba.org/2Dhdp3.
- Rhys Saunders, *Rule of Thumb*, 107 Ill. B.J. 16 (Mar. 2019), law.isba.org/34ksJ8x.
- ISBA Free On-Demand CLE, *GDPR and BIPA: What General Counsel and Privacy Attorneys Need to Know* (recorded Oct. 3, 2018), law.isba.org/2VnFoXi.

Fingerprint vendors have largely remained on the litigation sideline, even though these vendors have known that their biometric timekeeping devices have the potential to expose their clients to severe damages under BIPA.²⁵ It remains unsettled whether defendant employers may maintain claims for contribution or negligence (for failing to warn of potential liability) against the suppliers of their biometric devices.

What role will the Illinois General Assembly or Congress play in resolving these issues?


Defendants hoping for a legislative panacea are likely to be disappointed. In response to the *Rosenbach* decision, the Illinois Senate introduced Senate Bill 2134, which proposes to eliminate BIPA's private right of action and, instead, give enforcement power to the Illinois attorney general (as is the case in Washington and Texas).²⁶ But the bill seems unlikely to get a floor vote, let alone become law. On March 28, 2019, the bill was rereferred to the Assignments Committee and never left.²⁷ On the other hand, efforts to *expand* BIPA's reach also seem unlikely to pass.²⁸

Past efforts to amend BIPA have also come up short. In 2018, the Senate introduced Senate Bill 3053, which would have made BIPA's dictates inapplicable if "the biometric information is used exclusively for employment, human resources, fraud prevention, or security purposes."²⁹ The bill's passage would have been a boon for employers. But like Senate Bill 2134, Senate Bill 3053 failed to make it out of committee.³⁰ In May 2016, an amendment to House Bill 6074 was introduced that would have expressly excluded

"physical or digital photographs" from the definition of "biometric identifier" and limited the definition of "scan" to "an in-person process."³¹ The legislature did not act on the proposed amendment.³²

The federal government also seems unlikely to offer employers a lifeline any time soon. On March 14, 2019, the U.S. Senate introduced the Commercial Facial Recognition Privacy Act, which, if passed, would obligate companies to first obtain explicit user consent before collecting any facial recognition data. If the bill were to pass, defendants could potentially raise a federal preemption argument, though that argument would not likely reach fingerprint scans, just facial scans. As of now, any argument based on federal preemption seems a very long way away. Regardless, the legislation has remained in the U.S. Senate's Committee on Commerce, Science, and Transportation since it was introduced.³³

Be prepared to buckle up

Illinois defendants are unlikely to get legislative relief from BIPA, either at the state or federal level. At the same time, defendants have a number of avenues by which to challenge BIPA's potency, from the definition of "violation" to the statute's very constitutionality. Given their importance, these legal issues could wind their way back to the Illinois Supreme Court. Even after *Rosenbach*, BIPA litigants should be prepared for a wild ride. 

25. See, e.g., *Dixon v. The Washington & Jane Smith Community*, No. 2017-CH-13051, 2017 WL 4481303 (Ill. Cir. Ct. Sept. 28, 2017) (naming Kronos, Inc. as a codefendant).

26. 2017 Wash. Legis. Serv. Ch. 299 (S.H.B. 1493); Tex. Bus. & Com. Code Ann. §503.001; see also Paul

[SINCE *ROSENBACH*], THE RULING HAS, PREDICTABLY, SPURRED ADDITIONAL LITIGATION ASSERTING BARE VIOLATIONS OF THE STATUTE. BY LAST COUNT, MORE THAN 100 LAWSUITS HAVE BEEN FILED IN THE FEW MONTHS FOLLOWING THE *ROSENBACH* DECISION, WITH ALMOST ALL OF THE LAWSUITS BROUGHT AS CLASS ACTIONS. THIS VERITABLE ONSLAUGHT OF LITIGATION RAISES THE QUESTION OF WHERE BIPA LITIGATION IS HEADING AND WHAT LEGAL ISSUES REMAIN UNRESOLVED.

Shukovksy, *Washington Biometric Privacy Law Lacks Teeth of Illinois Cousin*, Bloomberg BNA (July 18, 2017).

27. Illinois General Assembly, Bill Status of SB2134, available at <http://www.ilga.gov/legislation/BillStatus.aspx?DocNum=2134&GAID=15&DocTypeID=SB&SessionID=108&GA=101>.

28. HB3024, which would have *expanded* BIPA's definition of "biometric identifier" to include an "electrocardiography result from a wearable device," also seems unlikely to pass. Illinois General Assembly, Bill Status of HB3024, available at <http://www.ilga.gov/legislation/BillStatus.aspx?DocTypeID=HB&DocNum=3024&GAID=15&SessionID=108&LegID=119367>.

29. Illinois General Assembly, Bill Status of SB3053, available at <http://www.ilga.gov/legislation/BillStatus.aspx?DocNum=3053&GAID=14&DocTypeID=SB&SessionID=91&GA=100>.

30. *Id.*

31. Illinois General Assembly, Full Text of HB6074, available at <http://www.ilga.gov/legislation/fulltext.aspx?DocName=09900HB6074sam001&GA=99&SessionID=88&DocTypeID=HB&LegID=95604&DocNum=6074&GAID=13&Session>.

32. *Id.*

33. United States Senate, Bill Status of S.847, available at <https://www.congress.gov/bills/116th-congress/senate-bill/847> (last checked Nov. 25, 2019).