

Illinois Biometric Information Privacy Act Case Has Significant Impact On Consumer Class Actions

1 min read

Dec 10, 2018

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On November 20, 2018, the Illinois Supreme Court heard oral arguments regarding the Illinois Biometric Information Privacy Act (BIPA) in *Rosenbach v. Six Flags Entertainment Corporation, et al.* BIPA governs how entities may collect, use, and retain biometric data, such as fingerprints and retinal scans. Specifically, the Illinois Supreme Court will rule on whether a plaintiff is an “aggrieved party” to state a claim under BIPA without suffering any actual injury. If the Supreme Court rules the way that they indicated at oral argument, then BIPA will become a large consumer issue.

Rosenbach claimed Six Flags violated BIPA when it scanned her son’s thumbprint for his season pass without written consent. The Illinois Appellate Court held that a plaintiff must demonstrate more than a technical violation of BIPA in order to state a claim. There have been conflicting decisions about whether actual harm is required since “person aggrieved” is not defined in the statute.

During oral arguments before the Illinois Supreme Court, both parties heavily relied on legislative intent and statutory interpretations to support their definitions of the term “aggrieved party.” Rosenbach contended the plain meaning of “aggrieved party” should be broadly construed to mean the infringement of a legal right, such as a legal right created by BIPA. In response, Six Flags argued Rosenbach was not an “aggrieved party” because neither she nor her son suffered an injury from this technical violation.

BIPA provides for liquidated damages of \$1,000 for each negligent violation, and \$5,000 for each willful violation. BIPA also allows a prevailing plaintiff to recover litigation costs and expenses, including attorneys’ fees.

Illinois has seen a surge of BIPA cases filed as class actions. Most of the filed lawsuits have arisen in the employer/employee context. However, the law acts more like a consumer protection statute rather than a labor law. There are obvious differences in defending a consumer class action as compared to an employment class action. With that said, the Illinois Supreme Court will soon tell us what a plaintiff must allege to qualify as an “aggrieved party” in order to state a claim under BIPA.

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