

## **Illinois Supreme Court Rules That Actual Damages Are Not Necessary Under The Illinois Biometric Information Privacy Act**

### The Illinois Supreme Court's Ruling

On January 25, 2019, the Illinois Supreme Court issued its long awaited opinion in *Rosenbach v. Six Flags Entertainment Corp*, ruling that the Illinois Biometric Privacy Act, 740 ILCS 14/1 et seq. ("BIPA") does not require an actual injury for a plaintiff to be considered "aggrieved" under the Act. The ruling, which was widely anticipated based on the court's comments during oral argument, is widely expected to open the flood gates on class actions brought under BIPA, given the statutory damages available to plaintiffs. Indeed, in the first week since the ruling, at least 10 new BIPA class actions have been filed.

Under BIPA, parties that possess biometric identifiers (i.e. fingerprints, retina scans and voice recognition) are prohibited from (i) selling, leasing, trading or otherwise profiting from such identifiers; and (ii) otherwise disclosing or disseminating such information unless the individual consents to such disclosure. BIPA imposes penalties of \$1,000 per negligent violation of the Act and \$5,000 (or actual damages, whichever is greater) for intentional or reckless violations. Second, BIPA allows for the recovery of reasonable attorneys' fees and costs, including expert witness fees.

### What Next?

The court's ruling stands at odds with the Northern District of Illinois' recent decision in *Rivera v. Google*, in which that court ruled that, unless a party suffers an actual injury, it does not satisfy the "injury in fact" requirement of Article III standing to pursue a BIPA claim in Federal Court. Consequently, expect all future BIPA cases going forward to be filed in Illinois state courts.

While the Illinois Supreme Court's ruling opens the door for an onslaught of BIPA litigation, certain defenses to such actions remain untested and will surely be litigated. For one, expect the issue of whether a plaintiff has consented to the use of his or her biometric information to be hotly contested. For plaintiffs who are employees, that likely means arguing over a company's policies contained in a handbook or employment agreement. Indeed, employers would be well served to review their policies and agreements to specifically address its potential collection of employees' biometric information.

Another line of defense may rest in a defendant's ability to remove a case to federal court and then have it dismissed. If successful, a defendant could avoid liability to a plaintiff who does not suffer an actual injury if it can successfully use the parties' diversity jurisdiction to remove the case and then argue that the plaintiff lacks Article III standing.

One thing is for sure - expect Illinois state courts to become a hotbed of BIPA litigation.