



CLIENT BULLETIN

Illinois Supreme Court says Actual Harm is Unnecessary for Biometric Case

Section 20 of the Biometric Information Privacy Act creates a private right of action for any person aggrieved by a violation of this Act. 740 Ill. Comp. Stat. 14/20 (2008). The statute, however, provides no definition as to what “aggrieved” means in this context. The lack of clarity has raised the question as to whether an actual harm must be suffered for a person to successfully bring a cause of action under the Act. The Illinois Supreme Court today addressed this issue. On January 25, 2019, Chief Justice Karmeier delivered the opinion in *Rosenbach v. Six Flags Entertainment Corporation, et al*, reversing the decision of the appellate court and holding that actual harm is not needed to qualify as aggrieved under the Act. No. 123186 (Ill. filed Jan. 25, 2019).

Rosenbach involves a teenage boy whose mother purchased him a season pass for Six Flags in Gurnee, Illinois. *Id.* As part of the process of obtaining the season pass, the boy had to be fingerprinted once he arrived at the park and his fingerprints were retained to ensure that only he could use the pass. *Id.* His mother, who brought this cause of action on his behalf, as part of a class action lawsuit, argued that they were never given written notice about the collection of fingerprints, a biometric identifier, or the retention of the biometric information and, therefore, never gave their consent. *Id.* Additionally, no information was made available to the public regarding the use of biometric identifiers at the Park or the collection of the biometric information. *Id.*

The Defendants in this case argued that Plaintiff’s action should be dismissed because the Plaintiff had suffered no actual or threatened injury and, therefore, lacked standing to sue. *Id.* The appellate court agreed with the Defendants and held that “Plaintiff isn’t aggrieved within the meaning of the Act and may not pursue either damages or injunctive relief under the Act based solely on a defendant’s violation of the statute.” *Id.* at 15. The court also held that “injury or adverse effect must be alleged” and while it need not be pecuniary, it had to be “more than a technical violation of the Act.” *Id.*

In order to determine whether the Plaintiff needed to suffer an actual harm, the Court looked to the plain meaning of the word “aggrieved”, as well as a recent decision in a California case involving Facebook’s use and collection of biometric data, where the court held that suffering an actual harm was not necessary to recover under the Illinois Biometric Information Privacy Act.¹ *In re Facebook Biometric Information Privacy Litigation*, 326 F.R.D. 535, 545-47 (N.D. Cal. 2018). In determining the plain meaning, the Court reviewed precedent cases, such as *Glos v. People*, where it held aggrieved to mean “having a substantial grievance; a denial of some personal or property right.” 359 Ill. 332, 340 (1913). The Court in *Glos* held that sustaining actual damages is not necessary to qualify as aggrieved. *Id.* The Court believes that when drafting the Biometric Information Privacy Act, the legislature was aware of the precedent case law definition of aggrieved and acted according to

¹ The court came to this decision while determining whether the class could be certified. The case is still ongoing.



this understanding. Furthermore, the Court looked to the dictionary to determine the term's definition. Black's Law Dictionary defines aggrieved as "having legal rights that are adversely affected" and Merriam-Webster's defines it as "suffering from an infringement or denial of legal rights." Both definitions, the Court held, are consistent with how it has previously defined the term.

In considering all of these definitions, the Court opined that "when a private entity fails to comply with one of section 15's requirements, 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." *Rosenbach v. Six Flags Entertainment Corporation, et al.*, Act. No. 123186 (Ill. filed Jan. 25, 2019). Given such a violation, the Court concluded that "a person or customer would clearly be aggrieved within the meaning of section 20 of the Act and entitled to seek recovery under that provision." *Id.* The Court reasoned that because "technology now permits the wholesale collection and storage of an individual's unique biometric identifiers – identifiers that cannot be changed if compromised or misused" the Legislature designed the Act to give individuals control over their own biometric information and allow them to withhold consent of private entities' use of it. *Id.* The Court held that if it allowed private entities to ignore adherence to the provisions of the Act, then the individuals' right to maintain their biometric privacy would disappear and that is the precise harm that the legislature sought to protect against. *Id.* Therefore, the Court held that the Defendants' violation of the provisions of the Act is enough to render the Plaintiff aggrieved.

The decision in *Rosenbach* is likely to open the doors to a wide range of class action claims where technical violations of the statute can be shown and makes it more important than ever for our clients that use biometric information in their

businesses to ensure compliance with applicable biometric privacy laws. For more information on biometric privacy issues, please contact:

William A. Chittenden III | wchittenden@cmn-law.com

Donald A. Murday | dmurday@cmn-law.com

Kaitlyn L. Luther | kluther@cmn-law.com

Tabitha E. Hill | thill@cmn-law.com

If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.

Chittenden, Murday & Novotny LLC
303 W. Madison St. Suite 1400
Chicago, Illinois 60606
312.281.3600