

CLASS ACTION BLOG

Illinois Biometric Information Privacy Act Class Action to Proceed

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The Supreme Court of Illinois ruled that the Rosenbach class action suit could proceed after finding that the plaintiff was an “aggrieved person” entitled to “seek liquidated damages and injunctive relief” for violations of the Biometric Information Privacy Act (“Act”) (740 ILCS 14/1 *et seq.*) without also alleging “some actual injury or adverse effect, beyond violation of his or her rights under the statute.” The court was not particularly concerned whether it was following the Supreme Court’s holding in *Spokeo* since the Illinois high court was addressing an Illinois statute.

The Act required private entities using “biometric identifiers” and “biometric information” to comply with certain technical requirements. If they did not, an “aggrieved” person was entitled to “recover for each violation” the greater of “liquidated damages or actual damages, reasonable attorney fees and costs and any other relief including an injunction,” that a court found appropriate.

The Rosenbach minor son visited defendant’s amusement park on a school field trip which took his fingerprints, but the amusement park operators failed to provide the disclosures the statute required. Rosenbach’s mother sued as her son’s next friend “and on behalf of all other similarly situated persons” for violating the Act. The first count of the three-count complaint sought monetary damages, Count II sought injunctive relief, and Count III asserted a common-law action for unjust enrichment.

The defendant sought interlocutory review of the circuit court’s rulings on its motion to dismiss. The appellate court held that a plaintiff was not “aggrieved” “based solely on a defendant’s violation of the statute.” For that reason, the plaintiff could not “pursue either damages or injunctive relief under the Act.” That court ruled a plaintiff’s “injury or adverse effect need not be pecuniary, ... but it must be more than a ‘technical violation of the Act.’” A unanimous Supreme Court of Illinois reversed that holding after ruling that a violation of the Act was a sufficient injury.

In reversing and remanding, the Supreme Court of Illinois found a “different district of the appellate court subsequently rejected the identical argument.” That case was *Sekura v. Krishna Schamburg Tan, Inc.* 2018 IL App (1st) 180175. Similarly, a California federal court predicted that the Supreme Court of Illinois would reject the argument *In re Facebook Biometrics Information Privacy litigation*, 326 F.R.D. 535, 545-47 (N.D. Cal. 2018).

The Supreme Court of Illinois compared the Act with the Illinois AIDS Confidentiality Act which allowed similar recoveries by aggrieved persons for statutory violations and where the appellate court upheld that proof of actual damages was not required. The court also turned to other cases as well as to the Merriam-Webster’s Collegiate Dictionary and Black’s Law Dictionary in concluding that the word “aggrieved” was sufficiently “embedded in our jurisprudence when the Act was adopted,” that the Illinois General Assembly knew what it was providing for, and that persons were indeed “aggrieved” “by violations of the Act”. Illinois Supreme Court Chief Justice Karmeier said that “the violation, in itself, is sufficient to support the individual’s or customer’s statutory cause of action.” He continued by stating that whenever a private entity “fails to adhere to the statutory procedures, ... ‘the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.’ *Id.* This is no mere ‘technicality.’ The injury is real and significant.”

Accordingly, the court rejected the defendant’s argument that recovery “under the act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond infringement of the rights afforded them under the law.” “That would require that we disregard the commonly understood and accepted meaning of the term ‘aggrieved,’ depart from the plain and, we believe, unambiguous language of the law, read into the statute conditions or limitations the legislature did not express, and interpret the law in a way that is inconsistent with the objectives and purposes the legislature sought to achieve.” To recover under the Act, “an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the act, in order to qualify as an ‘aggrieved’ person and be entitled to seek liquidated damages and injunctive relief.”

In light of this ruling by the Supreme Court of Illinois, it is likely that additional Illinois statutory violation class action cases will be asserted and prosecuted seeking damages for statutory violations. Prospective class counsel are likely to heavily rely upon the *Rosenbach* opinion in prosecuting such cases.