

# Rosenbach v. Six Flags Entertainment Corp.

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129 N.E.3D 1197 (ILL. 2019)

In *Rosenbach v. Six Flags Entertainment Corp.*, the Supreme Court of Illinois reversed the appellate court's holding and found that a technical violation of Illinois's Biometric Information Privacy Act ("BIPA"), without a showing of actual damages, can give rise to a cause of action.<sup>1</sup> The court relied on the Illinois statute's plain meaning to determine that a plaintiff's standing under this statute is not determined by actual harm, but rather by an invasion and infringement upon a statutory right, which gives rise to a cause of action.<sup>2</sup>

## I. BACKGROUND

BIPA states that a private entity cannot obtain a person's biometric information unless it provides the person whose information is obtained or their representative with written notice of what biometric information is stored, informs said subject of the purpose and duration of information storage, and obtains a written release from the subject or representative.<sup>3</sup> The Act also gives aggrieved persons a right of action to recover liquidated or actual damages.<sup>4</sup>

Plaintiff Alexander Rosenbach, whose interests were represented by his mother Stacy Rosenbach, formed a class of similarly situated plaintiffs.<sup>5</sup> Alexander visited the amusement park Six Flags Great America on a field trip.<sup>6</sup> Prior to his visit, Alexander's mother, Stacy, purchased a season pass for Alexander online.<sup>7</sup> Alexander needed to complete two steps at the park in order to obtain his pass: go to a security checkpoint to scan his thumbprint into the park's database and proceed to another building to collect his season pass.<sup>8</sup> Six Flags stated they utilize this biometric data to "quickly verify customer identities" and to "make entry into the park faster and more seamless," which in turn aids in maximizing revenue.<sup>9</sup> Six Flags claimed the

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1. *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197, 1200 (Ill. 2019).
  2. *Id.* at 1206.
  3. *Id.* at 1203.
  4. *Id.* at 1199.
  5. *Id.* at 1201.
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*

point of the biometric scan was to reduce season pass fraud and tie a unique identifier like a thumbprint to a season pass.<sup>10</sup>

After returning home, Alexander's mother asked him for a booklet of paperwork associated with the season pass, to which he responded "that no paperwork was provided."<sup>11</sup> Additionally, the complaint alleged that Six Flags retained Alexander's biometric information and that there was neither any publicly available information on "what was done with the information or how long it will be kept, nor . . . any 'written policy made available to the public that discloses [defendants'] retention schedule or guidelines for retaining and then permanently destroying biometric identifiers and biometric information."<sup>12</sup>

The plaintiff's complaint alleged violation of the Act, requested injunctive relief in the form of disclosures to those from whom the defendant collected biometric data, and asserted an action under the doctrine of unjust enrichment.<sup>13</sup> The first two counts survived defendant's motion to dismiss.<sup>14</sup> The defense then motioned for an interlocutory appeal under Illinois Supreme Court Rule 308, since the circuit court's ruling "involved a question of law as to which there is substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of litigation."<sup>15</sup>

The trial court proposed two questions of law: (i) whether an individual is an aggrieved person under the Act, and thus able to seek damages under the Act, when the only injury alleged is a violation of the portion of the Act that requires disclosures and written consent, and (ii) whether an individual is an aggrieved person under the Act, and thus able to seek injunctive relief under the Act, based on the same injury.<sup>16</sup> The appellate court answered both questions in the negative, finding that a violation of the Illinois statute was not enough to create a cause of action.<sup>17</sup> Additional injury had to be alleged.<sup>18</sup>

## II. ANALYSIS

Since it was undisputed that Alexander's thumbprint constituted a biometric identifier under the meaning of the statute,<sup>19</sup> and violation of the statute was not contested,<sup>20</sup> the issue left for the court to decide was whether or not a plaintiff had standing under the Act and constituted an "aggrieved person" if they could not prove harm beyond the collection of their biometric information in a way that is inconsistent with the statute.<sup>21</sup> The court first

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10. *Id.*  
11. *Id.*  
12. *Id.* at 1201.  
13. *Id.*  
14. *Id.* at 1202.  
15. *Id.*  
16. *Id.*  
17. *Id.*  
18. *Id.*  
19. *Id.* at 1203.  
20. *Id.* at 1204.  
21. *Id.* at 1207.

looked to the language of the statute and then discussed its enforcement mechanisms in order to deduce whether a “violation, in itself, is sufficient to support . . . [the] statutory cause of action.”<sup>22</sup>

The court began by disproving the defense’s argument that actual harm is required by pointing to other Illinois General Assembly legislation where the legislature explicitly required actual harm.<sup>23</sup> Next, the court analyzed the plain meaning of the word “aggrieved,” concluding that the statute does not require a person sustain “damages beyond a violation of his or her rights under the Act in order to bring an action under it.”<sup>24</sup> The court began its plain meaning analysis by assuming the legislature intended the used, undefined word to have its “popularly understood meaning,” being mindful of whether or not the term had an independent, legal meaning in mind.<sup>25</sup>

The court noted precedent defining aggrieved as “. . . denial of some personal or property right.”<sup>26</sup> Further, the court stated this meaning accords with definitions in Meriam-Webster’s and Black’s Law dictionaries.<sup>27</sup> Based on this, a cause of action arises once a private entity fails to comply with the statute at issue.<sup>28</sup> This is especially important, as the court noted that once the right to biometric privacy is invaded, it cannot be restored.<sup>29</sup> Since private rights of action remain the only enforcement mechanism, the court believed the legislature meant for the statutory penalties to be serious.<sup>30</sup>

### III. CONCLUSION

The Illinois Supreme Court held that, in order for a person to be aggrieved under Illinois’ Biometric Information Privacy Act, their statutory rights simply need to be violated.<sup>31</sup> They do not have to prove harm beyond the violation of that right.<sup>32</sup> The court reversed the appellate court’s contrary holding and remanded to the trial court for further proceedings.<sup>33</sup>

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22. *Id.* at 1206.

23. *Id.* at 1204.

24. *Id.* at 1205.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1206.

29. *Id.*

30. *Id.* at 1207.

31. *Id.*

32. *Id.* at 1206.

33. *Id.* at 1207.