

# Biometric Information Privacy Act

Vigilance and full compliance best defense against alleged violation **By David J. Tecson, Esq., and O. Koplán Nwabuoku, Esq.**

**ILLINOIS HEALTHCARE** providers and other sophisticated entities have increasingly used biometric information for multiple purposes. In particular, employers have utilized biometric information, such as handprints and fingerprints, to track the time worked by employees. The utilization of such information has raised privacy concerns associated with the use and storage of the data.

In 2008, the Illinois legislature enacted the *Biometric Information Privacy Act* (BIPA). Since that time, the plaintiff's class action bar discovered the statute and attempted to prosecute class actions on multiple occasions in state and federal courts. On Dec. 21, 2017, the Second District Appellate Court of Illinois (Second District) issued a decision finding that a BIPA plaintiff must allege actual harm or injury in order to survive a motion to dismiss.

## Before You Collect Biometric Identifiers

BIPA requires private entities that collect biometric information to protect the data and also comply with other statutory criteria. Pursuant to the statute, a "biometric identifier is a retina or iris scan, fingerprint, voiceprint or a geometric scan of the hand or face." Private entities must also establish a schedule for retention and the ultimate destruction of biometric identifiers. In addition, a private entity that collects biometric identifiers must also:

- Inform subjects that the information will be collected or stored.
- Inform persons of the purpose of the collection and the time period the information will be stored.
- Secure written consent from all individuals for the collection of their biometric information. The collecting entity is also prohibited from utilizing the information or disclosing the biometric identifier without the consent of the individual.

## Adhere to the Disclosure Guidelines to Prevent a Lawsuit

In *Six Flags*, the named class plaintiff alleged that her son was fingerprinted as part of the security process for entering a Six Flags Great America park located in Illinois. The plaintiff alleged multiple violations of BIPA, including the lack of consent for the collection and storage of the biometric identifier.

The trial court denied the defendant's motion to dismiss, which asserted that the plaintiff was not a

"person aggrieved" pursuant to the statute because she did not allege any actual injury. The Second District reversed after the trial court certified two issues for interlocutory appeal. In making its decision the Second District noted that "the certified questions revolve around whether a person is 'aggrieved,' and thus may bring an action for liquidated damages or injunctive relief when the only injury is a violation of the notice and consent requirements of Section 15(b) of the Act." BIPA does not contain a statutory definition of "person aggrieved."

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In finding for the defendant, the Second District relied in part on the Black's Law Dictionary definition of "aggrieved party" as a "party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment."

The Second District also relied on federal decisions wherein the trial court decided that allegations of statutory violations of BIPA are not sufficient without allegations of actual harm to the plaintiff.

The Second District's interpretation of BIPA required the plaintiff to properly allege that there is actual harm, thus narrowing the scope of potential plaintiffs. Nevertheless, businesses must remain vigilant because if a plaintiff properly alleges some actual harm, a party in violation of BIPA would not only be subject to liability for the plaintiff's actual harm, but also subject to the many statutory penalties prescribed by BIPA.

BIPA allows a prevailing party to recover their reasonable attorneys' fees from a private entity in violation of the Act, and for each violation, \$1,000 (liquidated or actual damages depending on which is greater) for negligent violations and \$5,000 for intentional or reckless violations.

Consequently, the best defense to any BIPA claim is full compliance with the statute.

*David J. Tecson, Esq., is a litigator with extensive experience advocating for hospital systems, medical providers, business ventures and international corporations. He can be reached at dtecson@chuhak.com. O. Koplán Nwabuoku, Esq., focuses on complex commercial litigation. He can be reached at knwabuoku@chuhak.com. *