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Ill. Biometric Privacy Suits Must Claim Actual Harm, Court Says

By **Allison Grande**

Law360, New York (December 22, 2017, 4:54 PM EST) -- An Illinois state appeals court in a dispute involving the allegedly unlawful collection of fingerprints from a Six Flags season pass holder ruled Thursday that plaintiffs must claim some actual harm in order to be considered an “aggrieved person” covered by the state’s unique Biometric Information Privacy Act.

Stacy Rosenbach, whose son’s thumbprint was taken by Six Flags after he purchased a season pass for one of its Great America theme parks, sued Six Flags Entertainment Corp. and Great America LLC in 2016 for allegedly violating Illinois’ biometric privacy statute by failing to properly obtain written consent or disclosing their plan for the collection, storage, use or destruction of his biometric identifiers or information. She claimed that had she known of Six Flags’ conduct, she would not have allowed her son to purchase the pass.

The theme park operators argued in pressing the Circuit Court of Lake County to ax the dispute that because the biometric privacy law allows only “aggrieved” individuals to sue for alleged violations, Rosenbach and similar plaintiffs who have suffered no actual harm cannot bring claims because they haven’t met this threshold. The lower court denied the theme park companies’ motion to dismiss, but later certified to the appellate court two questions relating to whether individuals “aggrieved by a violation of the act” can rely solely on alleged violations of the notice and consent requirements of the statute whether they must allege some actual harm.

In answering these questions Thursday, the three-judge appellate panel held that in order to meet the definition of an aggrieved person under the statute, plaintiffs must claim some actual harm.

“If the Illinois legislature intended to allow for a private cause of action for every technical violation of the act, it could have omitted the word ‘aggrieved’ and stated that every violation was actionable,” the panel ruled. “A determination that a technical violation of the statute is actionable would render the word ‘aggrieved’ superfluous. Therefore, a plaintiff who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person under ... the act.”

Because the privacy statute, which was enacted in 2008, does not explicitly define “aggrieved,” the panel looked to the dictionary to ascertain the plain and ordinary meaning of the term, settling on a definition that encompassed individuals whose personal, pecuniary or property rights have been adversely affected by another’s actions. While Rosenbach had argued that this definition bolstered her position because her right to privacy is a “personal” or “legal” right that has been “adversely affected,”

the panel concluded that the meaning also suggested “that there must be an actual injury, adverse affect, or harm in order for the person to be ‘aggrieved.’”

“Alleging only technical violations of the notice and consent provisions of the statute, as plaintiff did here, does not equate to alleging an adverse effect or harm,” the appellate court said, although it did note at the end of its opinion that the injury or adverse effect needed for a plaintiff to be considered an aggrieved person under the statute doesn’t necessarily have to be “pecuniary.”

Shook Hardy & Bacon LLP data security and privacy group chair Al Saikali, who is not involved in the case, called the appellate court’s opinion “a huge decision in the world of biometric privacy litigation.”

“It has the potential to deal a fatal blow to the scores of BIPA class action lawsuits that have been filed over the last few months,” he told Law360 Friday.

The ruling will have a particularly significant impact on the wave of biometric privacy cases that have recently been brought against employers that have been accused of not complying with the technical notice and consent requirements of the statute, but lack claims that the plaintiff suffered other harm such as unauthorized access to his or her biometric information, according to Saikali.

“This decision is a more natural fit with the factual reality,” he said, adding that many lawsuits to date under the biometric privacy statute have been based on an “unfounded fear and misunderstanding of how” the underlying technology works.

“Had the court decided that mere technical noncompliance without real harm was enough, scores of major companies would have faced hundreds of thousands, if not millions, of dollars in potential liability,” Saikali added. “The courts would have seen an even bigger wave of these lawsuits flooding their dockets.”

Representatives for the parties could not be reached for comment Friday.

Judges Michael J. Burke, Ann B. Jorgensen and Mary S. Schostok sat on the panel for the Second District.

Counsel information for either party was not immediately available.

The case is Rosenbach v. Six Flags Entertainment Corp., case number 2-17-0317, in the Appellate Court of Illinois, Second District.

--Editing by Adam LoBelia.

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