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Ill. Biometric Ruling A Boon To Plaintiffs, Yet Questions Linger

By **Allison Grande**

Law360 (January 25, 2019, 10:14 PM EST) -- The recent influx of litigation under Illinois' unique Biometric Information Privacy Act is set to intensify after the state's high court ruled that plaintiffs don't need to allege actual harm to mount such suits, but questions over how the law applies to companies' data-gathering practices could threaten the long-term viability of such challenges.

The Illinois Supreme Court's highly anticipated decision in Rosenbach v. Six Flags on Friday addressed the threshold issue of who can be considered an "aggrieved" person allowed to sue under BIPA. Reversing a state appellate court ruling that adopted a narrow view of this term, the high court unanimously found plaintiffs could bring claims for alleged violations of the statute's notice and consent requirements without alleging a separate, real-world harm.

The ruling is expected to embolden plaintiffs' attorneys to continue to pad a BIPA docket that already exceeds 200 cases, while prompting companies that collect biometric data for commercial and employment purposes to fortify their disclosures or scale back their offerings in Illinois, attorneys say. However, given the wealth of outstanding legal issues that remain to be litigated under the statute, the question of which side will have the upper hand in these disputes in the future is far from settled.

"I see this as being Chapter 1 of the book on BIPA litigation," said Al Saikali, chair of the data security and privacy group at Shook Hardy & Bacon LLP. "Obviously the question of what it means to be aggrieved under BIPA has been settled, but there are still several big defenses that need to be addressed and litigated."

Friday's ruling wasn't entirely unexpected, given the tenor of the questions asked by the justices during oral arguments in November and the outcome of other recent similar disputes. These include a California federal judge's March ruling that plaintiffs suing Facebook over its tagging feature did not need to show actual harm to sue under the law, a finding that was cited in the new Illinois high court ruling.

"There were no surprises in the Supreme Court's unanimous opinion," said Edelson PC partner Ryan D. Andrews, whose firm regularly represents plaintiffs in BIPA disputes including the Facebook case and Sekura v. Krishna Schaumburg Tan Inc., in which a different district of the Illinois appellate system went against the Six Flags ruling in finding plaintiffs have causes of action under BIPA even without allegations of actual harm.

"As we've repeatedly said — and as both the In re: Facebook and Sekura courts previously agreed — the plain language of the BIPA doesn't require any consequential damage beyond the rights conferred by the legislature," Andrews added.

The Supreme Court's answer to the certified question of what the statute means by "aggrieved" is poised to not only restart the scores of litigation that has been put on hold in anticipation of the Rosenbach decision, but also clear the way for more plaintiffs seeking to recoup uncapped statutory damages of between $1,000 and $5,000 per violation to at least make it through the courthouse doors.

"With their ruling today, the Illinois Supreme Court has decided that BIPA is a 'gotcha' statute, and if businesses don't use the magic words when using biometric technology, then they're going to be looking at hundreds of thousands to millions of dollars in exposure," said Justin Kay, a partner in the Chicago office of Drinker Biddle & Reath LLP.

Plaintiffs firm Stephan Zouras LLP said Friday that it was planning to immediately resume litigation in the more than 45 pending putative class actions it has filed against companies including Speedway, Crate and Barrel, Mariano's and Four Seasons Hotels, most of which had been stayed pending the Illinois high court's decision.

"Today's ruling is a profound victory for workers and consumers across Illinois who can now seek monetary damages against corporations that skirt the law and jeopardize the security of individuals' biometric data," the firm's two founding partners, Ryan Stephan and Jim Zouras, said in a Friday statement provided to Law360. "We look forward to securing justice on behalf of our aggrieved clients."

However, with the path now cleared for these disputes to move beyond the aggrieved party question, both sides will again find themselves in uncharted territory as they begin to spar over other unsettled aspects of the law, which could end up making the plaintiffs' victory on Friday short-lived.

"While this is a setback for BIPA defendants, who will face more lawsuits in state court, plaintiffs still face obstacles to prevailing in these matters," said Ice Miller LLP partner Reena Bajowala.

Some of the biggest looming fights are likely to be waged over whether defendants' business practices actually violate BIPA, which requires companies that capture individuals' biometric information — such as a fingerprint, voice sample or retina scan — to obtain written consent and disclose how they use, store and destroy that data.

Saikali noted that many federal courts have already been relying on the issues of implied notice and consent to dismiss BIPA cases, particularly in situations where employers have successfully argued that plaintiffs knew their biometrics were being collected and voluntarily submitted their finger scans for timekeeping purposes.

Other hotly disputed questions are likely to include what constitutes a "biometric identifier," whether the timekeeping devices at the heart of many of these disputes are actually collecting biometric information, whether the defendants acted negligently and whether plaintiffs have met the requirements for class certification, according to attorneys.

"At the end of the day, plaintiffs need to clear every hurdle," said Saikali, whose firm regularly defends BIPA class actions and represented some of the amici in Rosenbach. "Defendants only have to win on one."

Standing questions are also likely to continue to loom large in these disputes, according to attorneys.

At the federal level, BIPA cases have been swept up into the broader dispute over how to interpret the U.S. Supreme Court's 2016 decision in Spokeo v. Robins, which held that plaintiffs cannot rely on mere statutory violations but must allege some concrete harm to establish Article III standing to move forward with their claims.

As a result, many federal suits alleging violations of BIPA's notice and consent requirements without any additional harm have been tossed or remanded to state court. One of the most recent of these decisions was handed down last month, when an Illinois federal judge tossed a putative BIPA class action against Google after finding the plaintiffs had failed to show how Google Photos' creation and retention of face templates to aid in photo-sorting caused them concrete harm.

While these standing fights will continue at the federal level, attorneys were divided over the impact that Friday's decision would have on state-level litigation.

Michael Best & Friedrich LLP privacy and cybersecurity practice group chair Adrienne S. Ehrhardt said the Rosenbach ruling appeared to be consistent with Spokeo, which held that the violation of a procedural right granted by a statute "can be sufficient in some circumstances to constitute injury-in-fact" and that in those cases, "a plaintiff need not allege any additional harm beyond the one identified by" lawmakers.

“The Illinois Supreme Court found that the alleged biometric privacy violations weren’t merely technical because they created some harm for Illinois residents, and took issue with the Illinois appellate court’s ruling to the contrary,” Ehrhardt said.

But Dorsey & Whitney LLP partner Robert Cattanach reached a different conclusion, saying that BIPA is "squarely at odds" with Spokeo because it fails to specify that individuals have to suffer any cognizable harm in order to collect damages.

"If allowed to stand — an appeal to the United States Supreme Court would appear to be likely — the Illinois court's ruling would signal a significant sea change in how courts allow claims without actual damages to proceed and open the floodgates to class actions claiming privacy violations even without any showing of actual harm," Cattanach said.

While most of these cases are already filed in state court, Friday's ruling will only serve to encourage plaintiffs to continue with this strategy and to refile their disputes at the state level if they are kicked out of federal court on standing grounds, as the plaintiffs suing Google did on Thursday with the recently dismissed biometric privacy claims.

"As the avenue for bringing federal litigation under the BIPA is narrowing due to federal standing challenges, the state court pathway just widened substantially," Bajowala said.

But having the litigation in state court doesn't necessarily negate standing questions, given that the Illinois constitution is similar to Article III in that it requires actual injury for standing to sue, even if actual injury is not needed for statutory standing under BIPA.

“Federal courts have held that plaintiffs in these BIPA cases don’t have sufficient standing to meet

Article III," Saikali said. "It's highly unlikely — and not constitutionally permissible — for the state courts to lower that bar further."

However, while the defendants may end up winning on many of these issues in the long run, Friday's ruling still has wide-ranging consequences.

For one, the decision sets up a conflict with the Seventh Circuit and other state Supreme Courts over the meaning of the term "aggrieved," according to Benesch Friedlander Coplan & Aronoff LLP attorney Mark Eisen.

"The Seventh Circuit has held on multiple occasions that the term 'aggrieved' denotes some kind of injury," Eisen said. "It is bizarre, to say the least, that the Illinois Supreme Court could unanimously find the word 'aggrieved' means effectively the polar opposite of what numerous other appellate courts have unanimously held."

The Illinois Supreme Court's reading of the statute also raised flags for defense attorneys, some of whom viewed the conclusion that the legislature did not intend to make consumers wait for their data to be stolen or misused in order to sue to be overly broad.

"Even 100 percent compliance with the BIPA would not prevent problems before they happen," Eisen said. "This decision misses the point and creates absurd consequences as businesses throughout the state of Illinois risk insolvency without a single instance of biometric identity theft — not one."

Attorneys said they expect the decision to have a policy implications as well.

Michael Best partner Ryan Sulkin predicted that the ruling's confirmation of the Illinois statute's robust consumer privacy protections should "quiet down" some of the calls to clarify and strengthen the law.

But the businesses community is also pushing to reduce BIPA's liability risks by amending the statute, and attorneys say that the Illinois Supreme Court's ruling is likely to fuel these so far unsuccessful efforts to update the law —the nation's only biometric privacy law with a private right of action — and shape any similar rules that many pop up at the state or federal level in the coming years.

"Pretty much every state biometric privacy law I've seen proposed either mirrors the Illinois law or involves a discussion of that law," Kay said. "So it's likely that this Supreme Court decision is going to impact what other states do with their laws and prompt significant and justified pressure from the business community with respect to lobbying on those laws and to amend the Illinois law, since Friday's ruling has really opened a can of worms and declared open season on a lot of legitimate businesses that are trying to be innovative."

Rosenbach is represented by Phillip Bock and David Oppenheim of Bock Hatch Lewis & Oppenheim LLC and Ilan Chorowsky and Mark Bulgarelli of Progressive Law Group LLC.

Six Flags is represented by Debra Bernard and Kathleen O'Sullivan of Perkins Coie LLP.

The case is Stacy Rosenbach v. Six Flags Entertainment Corp. et al., case number 123186, in the Supreme Court of Illinois.