

Illinois and Federal Law Surrounding the Illinois Biometric Information Privacy Act Continues to Evolve with Recent 9th Circuit Decision

By: Stefan R. Dandelles and Jean Y. Liu

Although the Illinois Biometric Information Privacy Act ("BIPA") was enacted in 2008, Illinois state and federal court decisions in the last year have proven that BIPA continues to rapidly evolve. In January of this year, the Illinois Supreme Court unanimously ruled in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, that a plaintiff need not plead actual harm or injury resulting from an alleged BIPA violation to seek injunctive relief and liquidated statutory damages of up to \$5,000 per violation. In so ruling, the Illinois Supreme Court found that a mere technical violation of BIPA was sufficient to confer standing to sue. On July 31, 2019, a Cook County Circuit Court further defined the broad scope of BIPA lawsuits, ruling in *Robertson v. Hostmark Hospitality Group*, 2019 Ill. Cir. LEXIS 119, that despite that BIPA does not contain an express statute of limitations, a five year statute of limitations applies to claims brought under this statute.

Last week, a three-judge panel sitting on the Ninth Circuit in *Patel v. Facebook, Inc.*, No. 18-15982, 2019 U.S. App. LEXIS 23673 (9th Cir. Aug. 8, 2019) unanimously refused to decertify a class of Facebook users who have accused Facebook of violating BIPA through its facial recognition technology, purportedly employed without users' consent. Citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and ruling that the Facebook users had Article III (concrete injury-in-fact) standing, the Ninth Circuit found that "Facebook's alleged collection, use, and storage of plaintiffs' face templates here is the very substantive harm targeted by BIPA [and because] . . . BIPA protects the plaintiffs' concrete privacy interests and violations of the procedures in BIPA actually harm or pose a material risk of harm to those privacy interests, the plaintiffs have alleged a concrete and particularized harm, sufficient to confer Article III standing." Facebook has filed a motion seeking to extend the deadline to petition for panel rehearing or rehearing en banc to September 5, 2019.

The attorneys in KD's Chicago office are continuing to monitor this rapidly evolving area of law and are prepared to assist with your BIPA compliance and defense litigation needs.