No. _____

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LATRINA COTHRON,
individually and on behalf of similarly situated individuals,
Plaintiff-Respondent

v.

WHITE CASTLE SYSTEM, INC.,
Defendant-Petitioner

On Petition for Permission to Appeal from the U.S. District Court
for the Northern District of Illinois, Case No. 19-cv-00382
Hon. John J. Tharp, Jr., Judge Presiding

WHITE CASTLE SYSTEM, INC.'S PETITION FOR PERMISSION TO APPEAL ORDER PURSUANT TO 28 U.S.C. § 1292(b)

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: _____

Short Caption: Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

White Castle System, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Shook, Hardy & Bacon, LLP

Lewis Brisbois Bisgaard & Smith LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

None

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: /s/ Melissa A. Siebert Date: 10/12/2020

Attorney's Printed Name: Melissa A. Siebert

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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None

Attorney's Signature: /s/ Erin Bolan Hines Date: 10/12/2020

Attorney's Printed Name: Erin Bolan Hines

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ William F. Northrip Date: 10/12/2020

Attorney's Printed Name: William F. Northrip

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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PETITION FOR PERMISSION TO APPEAL

Pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, White Castle System, Inc. ("White Castle") petitions this Court for permission to appeal an Order of the District Court entered August 7, 2020 (A1–A15; R125),[1] which held that independent violations of Sections 15(b) and 15(d) of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14, occur each and every time the same entity collects or discloses the same individual's biometric information without the required notice and consent.

I. Introduction

Of the 700-plus BIPA class actions pending in Illinois state and federal courts, the vast majority are, like this case, brought by employees against their employers. The plaintiffs in these cases allege that their employers violated BIPA by implementing common work-related technology where employees use a finger or hand-sensor, to clock in and out of work, access computers, or perform other

[1] All references to "R__" are references to the docket entries below. For example, R125 refers to Docket Entry No. 125.

employment-related tasks. The plaintiff-employees in these cases, like Plaintiff-Respondent here, used the technology on a daily or weekly basis. As such, for many employees, the technology is used multiple times a day, or hundreds of times over the course of a year, and thousands of times during the course of employment.

On August 7, 2020, the District Court held that each and every time such technology is used without an appropriate consent constitutes a separate, independent, and actionable BIPA violation. This holding departed from three Illinois state court decisions holding BIPA violations occur only once, the first time such technology is used by an individual employee. *See Robertson v. Hostmark Hospitality Grp., Inc.*, No. 2018-CH-05194 (Cir. Ct. Cook Cty. May 29, 2020) (A20–A29); *Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425 (Cir. Ct. Cook Cty. June 10, 2020) (A30–A36); *Smith v. Top Die Casting Co.*, 2019-L-248 (Cir. Ct. Winnebago Cty. Mar. 12, 2020) (A37–A40).

The implications of this holding are far reaching. If broadly followed, employers who implemented state-of-the-art technology in the interests of privacy and data security would be subjected to millions of dollars in damages under an Act intended to protect privacy and ensure

data security. As one Illinois state court has explained, reading BIPA in this manner would force Illinois employers "out of business – in droves" because they "without any nefarious intent installed new technology . . . ." *Smith*, 2019-L-248 at 3 (A39). The District Court "fully acknowledge[d] the large damage awards that may result from this reading of the statute" but believed that the text of the statute supported its reasoning. (A13–A14). Other courts have concluded the opposite.

In an Order dated October 1, 2020, the District Court certified this issue for interlocutory appeal pursuant to § 1292(b). (A16–A19; R141). White Castle now petitions this Court for permission to appeal.

II. Facts Necessary to Understand the Question Presented

Plaintiff-Respondent Latrina Cothron works for Defendant-Petitioner White Castle. Cothron started at White Castle in 2004 and has continued working there to the present. (R44, ¶ 39). In 2004, White Castle implemented privacy and security technology requiring Cothron to scan her finger in order to access her company computer and her weekly paystubs. (R118 at 24, ¶ 6).

In 2008, the Illinois legislature enacted BIPA due to the growing use of biometrics in the business and security screening sectors. 740 ILCS 14/5(a). The General Assembly found that biometrics "are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." 740 ILCS 14/5(c). Accordingly, the General Assembly determined that the public welfare would be served by regulating the collection, handling, and destruction of biometric information and biometric identifiers ("biometric data"). 740 ILCS 14/5(g). Two sections of BIPA, 15(b) and 15(d), are pertinent to this Petition. BIPA Section 15(b) provides:

> No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject[.] 740 ILCS 14/15(b).

BIPA Section 15(d) provides:

> No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's

> biometric identifier or biometric information unless . . . the subject of the biometric identifier . . . consents to the disclosure or redisclosure[.] 740 ILCS 14/15(d).

Under BIPA, a court may award damages to an aggrieved prevailing party as follows:

> (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
> (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater[.] 740 ILCS 14/20.

White Castle provided Cothron with a BIPA-compliant disclosure and obtained electronic signed consent from her first in 2004, and again in October 2018. (R44, ¶ 45; R118 at 24, ¶ 6; R118-1 at 2, 4). On December 6, 2018, more than fourteen years after she began using the technology and provided electronic consent, and more than ten years after BIPA's enactment, Cothron filed this putative class action in the Circuit Court of Cook County, Illinois. (R1, ¶ 1). Cothron alleges that White Castle violated BIPA Sections 15(b) and 15(d) by collecting and "systematically and automatically" distributing her biometric information without the necessary BIPA notice and consent. (R44, ¶¶

80–97).[2] On behalf of herself and the class, she seeks "statutory damages of $5,000 for *each* reckless and/or intentional violation of BIPA pursuant to 740 ILCS 14/20(2)" or "statutory damages of $1,000 for *each* negligent violation of BIPA pursuant to 740 ILCS 14/20(1)." (R44, Prayer for Relief, ¶ C) (emphasis in original).

White Castle removed the case to federal court and filed a motion to dismiss arguing that Plaintiff had signed two BIPA-compliant consents: one in 2004, and a reaffirmation in 2018. (R1; R37–R38). Plaintiff responded by filing an amended complaint alleging that White Castle had collected and disseminated her biometric information without first obtaining a consent. (R44). White Castle then filed a second motion to dismiss, raising the same two consents. (R47–R48). After the District Court granted in part and denied in part White Castle's second motion to dismiss (R117), White Castle filed an answer asserting the statute of limitations as an affirmative defense and a motion for judgment on the pleadings arguing that Cothron's claims

[2] Plaintiff also alleged that White Castle violated BIPA Section 15(a), which requires White Castle to maintain a publicly available biometric data retention and deletion policy. (R44, ¶¶ 71–78). The District Court dismissed Plaintiff's Section 15(a) claim on June 16, 2020 for lack of Article III standing. (R117 at 17).

were time-barred. (R118–R120).[3] Specifically, White Castle argued that Cothron's BIPA claims accrued, if at all, in 2008, upon the first time White Castle allegedly collected and disclosed her biometric information following BIPA's enactment, and were time-barred under any applicable statute of limitations. White Castle's motion highlighted two Illinois state court decisions holding that Sections 15(b) and 15(d) of BIPA are violated, and BIPA claims accrue, only on the first alleged instance that an employer collects or discloses an employee's biometric information and is alleged to have done so without the proper BIPA notice or consents. (R120 at 5–7) (citing *Robertson*, No. 2018-CH-05194; *Watson*, No. 2019-CH-03425).

On August 7, 2020, the District Court issued an Order denying White Castle's motion, implicitly rejecting the reasoning of *Robertson* and *Watson*, and holding that a new and independent BIPA violation occurs, and thus a new and independent BIPA claim accrues, each and every time an employer allegedly collects or discloses an employee's

[3] BIPA does not contain a statute of limitations, and parties have argued for the application of a one-year, two-year, and five-year limitations period to BIPA claims. This issue is currently on appeal in multiple state appellate courts. *See, e.g.*, *Tims v. Black Horse Carriers, Inc.*, No. 1-20-0563 (Ill. App. 1st Dist.).

biometric information. (A11–A13). Therefore, the District Court held that at least some of Plaintiff's claims were timely. (A15). The District Court suggested its opinion was "unlikely to be the last word on the subject," and explained that White Castle could press its arguments "on appeal." (A14).

On August 17, 2020, White Castle filed a timely motion to amend the District Court's August 7 Order to certify the question of when BIPA violations occur and BIPA claims accrue if biometric technology is repeatedly used by the same plaintiff for interlocutory appeal pursuant to 28 U.S.C § 1292(b). In an Order dated October 1, 2020, the District Court, recognizing that "reasonable minds can and have differed" on this question, granted White Castle's motion, and certified this issue for interlocutory appeal. (A18).

III. Question Presented

The District Court certified the following question (A18):

> Whether a private entity violates Sections 15(b) or 15(d) of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq*., only when it is alleged to have first collected (§ 15(b)) or to have first disclosed (§ 15(d)) biometric information or biometric identifiers ("biometric data") of an individual without complying with the requirements of those Sections, or whether a violation occurs each time that a private entity allegedly

> collects (§ 15(b)) or discloses (§ 15(d)) the individual's biometric data without complying with the requirements of the applicable subsection.

IV. Relief Requested

White Castle requests that this Court grant permission to appeal the Order below denying White Castle's motion for judgment on the pleadings. White Castle further requests that, on appeal, the Court reverse the District Court's holding and hold that BIPA Sections 15(b) and 15(d) are violated only the first time an entity allegedly collects or discloses an individual's biometric information.

V. Reasons for Allowing the Appeal

This Court should settle when BIPA violations occur. The question of whether an individual plaintiff who uses common workplace technology involving finger or hand scans on a daily or weekly basis can assert a single BIPA claim for the alleged collection and a single BIPA claim for the alleged dissemination of their biometric information or whether that plaintiff can assert hundreds or thousands of separate independent claims for each time they utilized this technology, will have an enormous impact on BIPA litigation throughout Illinois. Allowing an immediate appeal will promote uniform application of BIPA and serve judicial economy. Resolution of White Castle's certified

question will impact every single BIPA case where any plaintiff, or class member, used the technology at issue more than once. Hundreds of pending cases will benefit from this Court's guidance.

This Court has jurisdiction to permit an appeal pursuant to 28 U.S.C. § 1292(b) from an order that "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation" if application is made within ten days after the entry of the order. 28 U.S.C. § 1292(b). This Court has broken the standard into a four-factor test: "there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation." *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). The District Court concluded that each of the statutory factors were met. (A18). This Court should reach the same conclusion and grant permission to appeal.

A. The issue is a pure question of law.

This Court has explained that "'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine[.]"

Ahrenholz, 219 F.3d at 676. In its Order denying White Castle's motion for judgment on the pleadings, the District Court noted: "[t]he question of what constitutes a violation of BIPA's terms is a pure question of statutory interpretation[.]" (A10). Similarly, in its Order granting White Castle's motion to certify, the District Court explained that "[t]he issue of when a cause of action accrues under Sections 15(b) and (d) is a 'question of the meaning of a statutory or constitutional provision.'" (A17) (*quoting Ahrenholz*, 219 F.3d at 676). Accordingly, the District Court concluded that this factor was "easily satisfied." (A17).

Before the District Court, Cothron attempted to confuse this issue by reframing White Castle's certified question to be about whether White Castle's alleged conduct violated BIPA and arguing that this would be a fact-intensive inquiry. (R138 at 3–4). The District Court easily rejected this and explained while adjudicating Cothron's "particular claims may require fact-intensive determinations," the "question of whether a separate cause of action arises each time an entity" collects or discloses biometric information can be decided "quickly and cleanly without having to study the record." (A17).

As the District Court recognized, the certified question relates only to the meaning of the BIPA statute. It only asks the Court to resolve how BIPA violations are counted when conduct that may violate BIPA is repeated on a daily or weekly basis in the context of an employer-employee relationship. There are no disputed facts to resolve and no questions of fact to explore. The complaint and answer provide a sufficient record for this Court to decide this issue of statutory construction, just as the pleadings provided a sufficient record for the District Court to decide the same. The first § 1292(b) factor is satisfied.

B. The issue is a controlling question of law.

The question of whether BIPA violations occur each time an employer collects or discloses biometric data without consent is a controlling question because its answer could dispose of this litigation entirely. *See, e.g.*, *Ahrenholz*, 219 F.3d at 677 (question is controlling when its resolution could prevent protracted litigation). If a single BIPA violation occurred and accrued when White Castle first collected or first disclosed Cothron's biometric data following BIPA's enactment in 2008, then her claims are time-barred. However, if a BIPA violation occurred each time she scanned her finger and each time White Castle allegedly

"systematically and automatically" disclosed her finger-scan, at least some of her claims are timely. (A10, A14–A15). In its Order granting White Castle's motion to certify, the District Court recognized the controlling nature of this question:

> Under the Court's interpretation of BIPA's statutory language, Cothron has at least some timely claims under Sections 15(b) and (d); should the Seventh Circuit's reading of the statute differ, Cothron may well have *no* timely BIPA claims. The question for certification is therefore "quite likely to affect the further course of the litigation . . . ."

(A17) (emphasis in original). Again, the District Court commented that this factor was "easily satisfied." (A17). This question is controlling and satisfies § 1292(b)'s second factor.

C. There are substantial grounds for difference of opinion.

The third factor, whether there are substantial grounds for difference of opinion, addresses whether an issue is "contestable." *Ahrenholz*, 219 F.3d at 675. District courts in this circuit have elaborated on this requirement and explained that a substantial ground for difference of opinion exists when "there is conflicting authority on the issue" or where "the issue is particularly difficult and of first impression." *Thrasher-Lyon v. CCS Commercial LLC*, No. 11 C 04473,

2012 WL 5389722, at *3 (N.D. Ill. Nov. 2, 2012). Here, many facts illustrate the contestable nature of the certified question and demonstrate that substantial grounds for difference of opinion exist.

First, the District Court indicated as much, describing this issue as an "important question[] of statutory interpretation [that] remains[s] unresolved." (A1). The District Court predicted the question would ultimately have to be resolved on appeal. (A14). Moreover, in its October 1 Order, the District Court emphasized that "reasonable minds can and have differed as to the clarity of BIPA's statutory text and the extent to which suppositions about legislative intent should shape courts' application of it." (A18).

Second, the contestable nature of this issue is highlighted by the multiple Illinois state court decisions holding that violations of Sections 15(b) and 15(d) only occur, and claims only accrue, the first time purported biometric data is collected or disclosed. *See Robertson*, No. 2018-CH-05194 at 5 (A24); *Watson*, No. 2019-CH-03425 at 3 (A32); *Smith*, 2019-L-248 at 3 (A39). These cases hold that, allegations like Cothron's allege single violation of these sections, not multiple repeated violations.

In *Robertson*, the court held Section 15(b) violations occur only on the first instance that biometric data is collected without consent and that arguments that the statute is violated on a per-scan basis are "contrary to the unambiguous language of the statute" and would "lead to an absurd result." (A24). Holding that each scan constituted a separate, independent, and actionable violation of BIPA "would lead employers to potentially face ruinous liability" and result in hundreds of thousands of dollars (if not millions) in liability per employee. (A24–A25). The court emphasized that the Illinois legislature would not have intended BIPA to impose a fine so extreme as to threaten the existence of any Illinois business. (A24–A25). Accordingly, the court held plaintiff's claims were time-barred because his claims accrued when he first used the finger-sensor technology to clock in and out of work and when his biometric data was first "automatically and systematically disclosed." (A25).

The *Watson* court similarly held that a plaintiff's BIPA claims occurred, and thus accrued, in 2012 after the first time his employer allegedly collected his handprint in violation of BIPA. (A32). Accordingly, his claim was time-barred. (A32).

Finally, in *Smith*, an Illinois court explained that both statutory interpretation and public policy compelled it to reject the argument that each time the plaintiff clocked-in at work constituted a separate violation of BIPA. (A39). With respect to statutory interpretation, the *Smith* court highlighted the "unless it first" language in BIPA Section 15(b), which provides "[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's [biometric data] *unless it first*" complies with BIPA's notice and release requirements. (A38); 740 ILCS 14/15(b) (emphasis added). Accordingly, the *Smith* court reasoned that Section 15(b) claims accrue at "the first instance of collection" and to hold otherwise would be contrary to the plain wording of BIPA. (A39). With respect to public policy, the Smith court emphasized that interpreting BIPA so that violations accrue on a per-scan basis, as the District Court did here, "would likely force out of business – in droves – violators who without any nefarious intent installed new technology . . . ." (A39).

Here, the District Court stressed that courts should not "avoid a construction that may penalize violations severely" and that the legislature may have intended to "impose harsh sanctions." (A14).

However, this merely highlights a fundamental difference between its analysis and that employed by numerous other courts that have emphasized that BIPA is a remedial, not a penal, statute. *Meegan v. NFI Indus.*, No. 20 C 465, 2020 WL 3000281, at *4 (N.D. Ill. June 4, 2020) ("BIPA's provision for actual damages and the regulatory intent of its enactment show that it is a remedial statute[.]"); *Owens v. Wendy's Int'l, LLC*, No. 18-CH-11423 at 15 (Cir. Ct. Cook Cty. June 8, 2020) ("BIPA is remedial, not penal.") (A55); *Young v. Tri City Foods, Inc.*, No. 18-CH-13114 at 22 (Cir. Ct. Cook Cty. June 8, 2020) (BIPA's purpose and its liquidated damages "clearly serve[] more than purely punitive or deterrent goals . . . BIPA is remedial.") (internal citations and quotations omitted) (A88); *Chavez v. Temp. Equip. Corp.*, No. 19-CH-02538 at 8 (Cir. Ct. Cook Cty. Sept. 11, 2019) ("BIPA is a remedial statute, not a penal statute. [BIPA] does not impose damages without regard to the actual damages suffered by a plaintiff . . . .") (A100).

The *Robertson*, *Watson*, and *Smith* courts' understanding of BIPA's remedial nature drove their analyses. *Robertson* focused on the absurdity that would result if it interpreted a remedial statute in a way that would impose "ruinous liability" on Illinois employers. (A24). The

Smith court explained that the Illinois legislature clearly did not intend to craft a remedial statute that would force Illinois employers "out of business – in droves." (A39). The *Watson* court specifically stressed that "BIPA's liquidated damages provision is remedial, not penal." (A32).

Indeed, the District Court's interpretation of BIPA creates a drastically different litigation picture for White Castle, and any other Illinois employer faced with a BIPA class action. Under *Robertson, Watson*, or *Smith*, Plaintiff's claims are untimely. Even if her claims were timely, a violation of BIPA Section 15(b) or 15(d) would be singular. However, applying the District Court's holding "that Ms. Cothron has alleged multiple timely violations of both Section 15(b) and Section 15(d)" and that "she can recover 'for each violation'" (A14) leads to the exact kind of ruinous penalties that *Robertson*, *Watson*, and *Smith* rejected. For example, Plaintiff alleges that she had to scan her finger each time she accessed a work computer and each time she accessed her paystub, which White Castle distributed on a weekly basis. (R44, ¶¶ 2, 39–40, 43–44). Assuming Plaintiff worked 5 days per week for 50 weeks per year and accessed the computer each day and her paystub weekly, her total scans would exceed 1,500 over a five-year

limitations period and total violations (scans and disclosures) would exceed 3,000 based on her allegations of systematic and automatic disclosure. (R44, ¶ 96). This leads to low-end liquidated damages exceeding $3 million just for Plaintiff.

Indeed, in construing statutes, Illinois law instructs that courts "must presume that the legislature did not intend an absurd [] result." *Carmichael v. Laborers' & Ret. Bd. Employees' Annuity & Benefit Fund of Chi.*, 2018 IL 122793, ¶ 45; *see also Robertson*, No. 2018-CH-05194 at 5 (A24). Rather, the result must be a logical one, consistent with what this Court, the Illinois Supreme Court, and other courts have said about the nature of the injury and the interests BIPA protects. As the Illinois Supreme Court had stated, BIPA protects an individual's control over their biometric information. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 34. Once such control is lost, it is lost. *Id.* (explaining that when BIPA is not followed, the right to control "vanishes into thin air"). Accordingly, a loss of control occurs once, the first time biometric information is collected. BIPA cannot reasonably be read to conclude that a BIPA violation occurs each and every time an employee voluntarily and repeatedly uses biometric technology at work.

Moreover, construing a liquidated damages provision in a remedial statute to skyrocket in a manner unrelated to actual damages and to allow Cothron to pursue more than $3 million for an injury this Court recently described as akin to a trespass, is plainly absurd. *See Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020) (describing the injury arising from a BIPA violation as "an invasion of [plaintiff's] private domain, much like an act of trespass would be")

Similarly, the Illinois Supreme Court has stressed that statutes should be interpreted to avoid constitutional problems. *Braun v. Retirement Bd. of Fireman's Annuity & Ben. Fund of Chi.*, 108 Ill. 2d 119, 127 (1985); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). A statutory interpretation "under which the statute would be considered constitutional is preferable to one that would leave its constitutionality in doubt." *Oswald v. Hamer*, 2018 IL 122203, ¶ 38 (to avoid constitutional infirmity, construing "shall" in property tax code to be permissive and not mandatory); *Braun*, 108 Ill. 2d at 127 (courts must assume legislature intended to enact a constitutional statute). The

imposition of such ruinous damages on a per-scan basis could implicate substantial questions under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

Neither this Court nor the Illinois Supreme Court, nor any Illinois Appellate Court has addressed when BIPA violations occur in this context. Other cases have commented that this is an "undecided" and "uncertain" question. *See Peatry v. Bimbo Bakeries USA, Inc.*, 393 F. Supp. 3d 766, 770 (N.D. Ill. 2019) (allowing removal because the court concluded that the complaint could be read plausibly as asserting BIPA violations on a per-scan basis). This further illustrates the presence of a substantial ground for difference of opinion and illustrates the need for this Court to provide guidance.

As the District Court correctly observed, "reasonable minds can and have differed" on the certified question. (A18). Given the lack of controlling authority and three separate contrary opinions, there is a substantial ground for difference of opinion regarding what constitutes a BIPA violation, and the third § 1292(b) factor is satisfied.

D. An immediate appeal will materially advance the termination of the litigation.

The final § 1292(b) factor, whether an answer to the certified question may materially advance the termination of the litigation, is also clearly satisfied. White Castle cannot overstate the impact an answer to its certified question will have on this case—one outcome leads to judgment in White Castle's favor based on the statute of limitations, the other raises the specter of tens of millions in potential class action damages. The potential for a judgment ending the litigation more than satisfies the § 1292(b) standard. *See Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012); *Searcy v. eFunds Corp.*, No. 08 C 985, 2010 WL 5245856, at *1 (N.D. Ill. Dec. 14, 2020) (immediate appeal would materially advance litigation where resolution in defendant's favor "would terminate [class claims] and forestall further protected, costly litigation"); *see also City of Joliet v. Mid-City Nat'l Bank*, No. 05 C 6746, 2008 WL 4889038, at *2 (N.D. Ill. June 13, 2008) (issue of law had potential to materially advance litigation where court "may well be required to dismiss this case" if defendant prevailed).

The appeal may also materially advance this litigation as it will greatly influence the prospects for settlement. Other BIPA class actions have been settling on a single violation basis, and many have settled well below the discretionary threshold of $1,000 for a negligent violation. *See, e.g.*, *Jones v. CBC Rest. Corp.*, No. 1:19-cv-06736 (N.D. Ill.) ($800 per-plaintiff settlement). The prospects of ultimately reaching a settlement in this case are drastically different if Plaintiff, and the class members, are entitled to seek liquidated damages of $1,000 for two BIPA violations or whether they are each entitled to seek $1,000 for hundreds or thousands of BIPA violations. Where legal issues threaten to delay class action settlements, courts find the "may materially advance" requirement of § 1292(b) is satisfied. *Sterk*, 672 F.3d at 536 (uncertainty about the viability of claim that could delay class action settlement was enough to satisfy § 1292(b)'s "may materially advance" clause).

In opposing certification of White Castle's question, Plaintiff argued that the District Court's holding did not advance per-scan or per-disclosure damages but merely specified the "window in time for which monetary damages may be recovered" but did not "dictate the

amount Plaintiff may recover." (R138 at 10–11). Plaintiff also emphatically insisted she had never advanced a theory of recovery for "each" scan or "each" disclosure, instead arguing she seeks damages only for three violations, presumably for violations of Sections 15(a), 15(b), and 15(d). (R138 at 11). Cothron's after-the-fact disavowal of the intent to seek per-scan damages in her response brief to the District Court contradicts her complaint (R44, Prayer for Relief, ¶ C), seeks damages for her dismissed Section 15(a) claim, and changes nothing. Resolution of whether a claim accrues "each time" an entity collects or discloses biometric information without consent necessarily dictates whether or not Cothron can maintain her action, regardless of the recovery she now claims to seek. In any event, whatever theory Cothron advances, the District Court made very clear in its October 1 Order that BIPA is violated "each time" an entity collects or discloses biometric information without consent. (A16). Resolution of the certified question may materially advance the termination of this case, and the Court should grant White Castle's Petition for permission to appeal.

VI. Conclusion

The question of when a BIPA violation occurs, and thus whether a plaintiff is entitled to seek damages for either one, two, or three BIPA violations or for several hundred (or thousand), will significantly impact BIPA litigation going forward. It will impact every part of BIPA cases: initial pleading strategy, the scope of discovery, expert witnesses, length of trial and—critically in a class action—settlement negotiations. It is not hyperbole to observe that the District Court's interpretation of BIPA threatens the existence of hundreds of Illinois businesses and would in effect eviscerate any arguable statute of limitations. This Court should provide clarity on this critical issue.

Because White Castle's certified question meets each of the factors this Court utilizes when evaluating whether to permit a § 1292(b) appeal, White Castle respectfully requests that the Court grant it permission to appeal.

Dated: October 12, 2020

WHITE CASTLE SYSTEM, INC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g), the undersigned counsel certifies that the foregoing Petition complies with the type-volume limitation of Rule 5(c)(1) because it contains 4,921 words, excluding the parts of the paper exempted by Rule 32(f).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14 point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, the foregoing Petition for Permission to Appeal was filed with the Clerk of the Court for the United States Court of Appeals via the CM/ECF system. A copy of the filing will be sent by email to all counsel of record in the District Court proceeding at the following addresses:

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) and Federal Rule of Appellate Procedure 5(b)(E) are included in the appendix.

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LATRINA COTHRON, Individually and on behalf of similarly situated individuals, Plaintiff, v. WHITE CASTLE SYSTEM, INC. D/B/A WHITE CASTLE, Defendant.	)	No. 19 CV 00382 Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

Despite numerous recent suits concerning Illinois' Biometric Information Privacy Act (BIPA), important questions of statutory interpretation remain unresolved. This case presents two such questions: what acts violate BIPA Section 15(b) and Section 15(d) and when do claims premised on such violations accrue? Plaintiff Latrina Cothron alleges that, in 2007, her employer, White Castle System, Inc. ("White Castle"), implemented a system that involved capturing her fingerprint data and disclosing it to third parties. After BIPA's enactment in mid-2008, White Castle continued to operate its system but did not obtain the newly required consent of its employees, thereby violating BIPA Section 15(b) and Section 15(d).[1] White Castle has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Ms. Cothron's claims accrued in 2008 and are therefore barred by the statute of limitations. Because

[1] Ms. Cothron's second amended complaint included alleged violations of Section 15(a), but the Court dismissed her claims under that provision for lack of Article III standing. *See* Mem. Op. Order 5-6, ECF No. 117.

the Court finds that Ms. Cothron's claims under both Section 15(b) and Section 15(d) are timely, White Castle's motion is denied.

BACKGROUND[2]

The facts set forth below are largely the same as those described in the Court's prior opinion in this case. *See* Mem. Op. Order 2-3, ECF No. 117. Latrina Cothron began working for White Castle in 2004 and is still employed by the restaurant-chain as a manager. Sec. Am. Compl. ¶ 39, ECF No. 44. Roughly three years after Ms. Cothron was hired, White Castle introduced a fingerprint-based computer system that required Ms. Cothron, as a condition of continued employment, to scan and register her fingerprint in order "to access the computer as a manager and access her paystubs as an hourly employee." *Id.* ¶ 40. According to Ms. Cothron, White Castle's system involved transferring the fingerprints to two third-party vendors—Cross Match and Digital Persona—as well as storing the fingerprints at other separately owned and operated data-storage facilities. *Id.* ¶¶ 28-31. Perhaps unsurprisingly—given that the Illinois Biometric Information Privacy Act ("BIPA") did not exist yet—White Castle did not receive a written release from Ms. Cothron to collect her fingerprints or to transfer them to third parties before implementing the system. *Id.* ¶ 41.

When the Illinois legislature enacted BIPA in mid-2008, the legal landscape changed but White Castle's practices did not—at least not for roughly ten years. *Id.* ¶¶ 27-28. White Castle continued to use its fingerprint system in the years following BIPA's passage and continued to disseminate that data to the same third parties. *Id.* ¶¶ 28-31. It was not until October 2018 that

[2] On a motion for judgment on the pleadings, the Court must accept all well-pleaded facts in the second amended complaint as true and draw all permissible inferences in favor of the plaintiffs. *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007).

White Castle provided Ms. Cothron with the required disclosures or a consent form. *Id.* ¶¶ 45, 48-49. On December 6, 2018, Ms. Cothron filed her class action complaint in the Circuit Court of Cook County, Illinois and the case was subsequently removed to this Court by Cross Match Technologies, Inc. (since dismissed from the case). Mot. J. Pleadings 2, ECF No. 120. After the Court denied White Castle's motion to dismiss Ms. Cothron's second amended complaint, White Castle filed an answer. *Id.* In the answer, White Castle raised a statute of limitations defense and subsequently moved for judgment on the pleadings on that basis. *Id.*

DISCUSSION

A motion for judgment on the pleadings under Rule 12(c) is evaluated using the same standard as a motion to dismiss under Rule 12(b)(6): to survive the motion, "a complaint must state a claim to relief that is plausible on its face." *Bishop v. Air Line Pilots Ass'n, Int'l*, 900 F.3d 388, 397 (7th Cir. 2018) (citations omitted). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wagner v. Teva Pharm. USA, Inc.*, 840 F.3d 355, 358 (7th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In assessing a motion for judgment on the pleadings, the Court draws "all reasonable inferences and facts in favor of the nonmovant, but need not accept as true any legal assertions." *Id.* Ms. Cothron provides two arguments for rejecting White Castle's statute of limitations defense: first, that White Castle waived its statute of limitations defense by not asserting it in its previously filed motion to dismiss; second, that her claims are timely.

I. Waiver

In making her waiver argument, Ms. Cothron ignores the basic framework provided by the Federal Rules of Civil Procedure as well as the language of Rule 12(g)(2), on which she relies.

The Rules provide that a defendant may respond to a complaint by filing a responsive pleading or, alternatively, by filing a motion to dismiss under Rule 12(b). Fed. R. Civ. P. 12(a). A Rule 12(b) motion, which must be made before a responsive pleading, is the proper vehicle for challenging the sufficiency of the complaint. Fed. R. Civ. P. 12(b). And White Castle, in its previously filed motion to dismiss, properly raised arguments under Rule 12(b)(6) that targeted the sufficiency of the complaint. Affirmative defenses (such as the defense of statute of limitations), on the other hand, are "external" to the complaint. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n.1 (7th Cir. 2012). Per Rule 8(c), the proper time to identify affirmative defenses is in a defendant's responsive pleading. Fed. R. Civ. P. 8(c). Then, "[a]fter pleadings are closed," a party may subsequently file a motion for judgment on the pleadings and seek judgment based on the previously raised affirmative defense. Fed. R. Civ. P. 12(c). In keeping with these rules, the Seventh Circuit has "repeatedly cautioned that the proper heading for such motions is Rule 12(c)." *Brownmark Films LLC*, 682 F.3d at 690 n.1; *see also Burton v. Ghosh*, 2020 WL 3045954, at *3 (7th Cir. 2020) ("The proper way to seek a dismissal based on an affirmative defense under most circumstances is not to move to dismiss under Rule 12(b)(6) for failure to state a claim. Rather, the defendant should answer and then move under Rule 12(c) for judgment on the pleadings." (citation omitted)). Contrary to Ms. Cothron's argument, White Castle did not waive its right to assert a statute of limitations defense in a motion for judgment on the pleadings; Rule 12(g)(2) expressly states that its limitation on further motions is applicable "***except as provided in Rule 12(h)(2)***." And Rule 12(h)(2)(B), in turn, expressly provides that failure to state a claim may be raised "by a motion under Rule 12(c)"—a motion which, again, may only be made "after the

pleadings are closed."[3] Far from having waived its statute of limitations defense, White Castle has raised the affirmative defense at precisely the procedural posture envisioned by the Rules. Ms. Cothron's argument to the contrary is entirely off-base.

II. Timeliness

Ms. Cothron's second argument for denying the motion—that, considered on the merits, White Castle's statute of limitations defense fails—is substantially stronger; indeed, the Court concludes that it is correct. A statute of limitations defense is an argument about the timeliness of a claim, and timeliness is a function of both the accrual date of a cause of action and the applicable statute of limitations. Nonetheless, in asserting its defense, White Castle limits itself to the issue of accrual and the Court does the same. *See* Reply Br. 5 n.2, ECF No. 124 ("White Castle has argued that Plaintiff's claims are untimely no matter what statute of limitations applies. Should the Court wish to determine the applicable limitations period, White Castle requests additional briefing on the issue.").[4]

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[3] *See* 5C FED. PRAC. & PROC. CIV. § 1392 (3d ed.):

> The operation of Rule 12(h)(2) is relatively simple. The three defenses protected by the rule may be asserted by motion before serving a responsive pleading. Unlike the Rule 12(h)(1) defenses, however, if a party makes a preliminary motion under Rule 12 and fails to include one of the Rule 12(h)(2) objections, she has not waived it, even though, under Rule 12(g), the party may not assert the defense by a second pre-answer motion. As the rule explicitly provides, a defending litigant also may interpose any of the Rule 12(h)(2) defenses in the responsive pleading or in any pleading permitted or ordered by the court under Rule 7(a). Moreover, even if these defenses are not interposed in any pleading, they may be the subject of a motion under Rule 12(c) for judgment on the pleadings or of a motion to dismiss at trial.

[4] As noted, the Court accepts, for present purposes, White Castle's position that the statute of limitations for BIPA claims has not been definitively resolved and that such claims are

As a general matter, under Illinois law, a cause of action accrues and the "limitations period begins to run when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278, 798 N.E.2d 75, 85 (Ill. 2003). On the same facts, however, the parties put forth accrual dates that differ by roughly 10 years: White Castle argues that the claims accrued in mid-2008, while Ms. Cothron contends that at least a portion of her claims accrued in 2018. How so far apart? The ten-year delay stems from accepting either of Ms. Cothron's two theories of accrual. First, Ms. Cothron contends that the alleged BIPA violations can be understood as falling under an exception to the general rule governing accrual, the continuing violation exception. "[U]nder the 'continuing tort' or 'continuing violation' rule, 'where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease.'" *Id.* (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 345, 770 N.E.2d 177 (Ill. 2002)).

Applying this doctrine, Ms. Cothron argues that the statute of limitations did not begin to run on any portion of her claim until the final violation (the last time White Castle collected and disseminated her fingerprint before she received BIPA notice and provided her consent). In the alternative, Ms. Cothron contends that each post-BIPA scan of her fingerprint constituted a separate violation of Section 15(b) and each disclosure to a third-party over that same period a separate violation of Section 15(d), with each violation accruing at the time of occurrence. Under this theory, at least a portion of Ms. Cothron's claims did not accrue until 2018 and would therefore

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potentially subject to a "one-, two-, or five-year statute of limitations." Mot. J. Pleadings 1, ECF No. 120. Nonetheless, the Court also acknowledges Ms. Cothron's argument that "[e]very trial court that has decided the issue has unanimously held the five-year 'catch-all' limitations period applies." Pl.'s Resp. 8, ECF No. 123.

be timely under any statute of limitations. White Castle rejects both theories, arguing instead that the complaint describes a single violation of Section 15(b) and a single violation of Section 15(d), both of which occurred and accrued "in 2008, during the first post-BIPA finger-scan that she alleges violated BIPA." Mot. J. Pleadings 10, ECF No. 120. The Court considers each argument in turn.

A. Continuing Violation Exception

At the outset, it is worth noting that Ms. Cothron's invocation of the continuing violation exception is ambiguous: it is unclear whether, in her view, White Castle's alleged course of conduct amounts to a single ongoing violation of each of the two BIPA provisions at issue or whether her argument is that White Castle violated the statute's terms repeatedly but the violations should be viewed as a continuous whole for prescriptive purposes only. Under either interpretation, however, the argument fails.

The continuing violation doctrine is a well-established, but limited exception to the general rule of accrual. In *Feltmeier*, the Illinois Supreme Court limned the doctrine's scope: "A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." 207 Ill. 2d at 278, 798 N.E.2d at 85. And those unlawful acts must produce a certain sort of injury for the doctrine to apply: the purpose of the doctrine is "to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought." *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 801 (7th Cir. 2008). Thus, the continuing violation doctrine is "misnamed"—"it is [ ] a doctrine not about a continuing, but about a cumulative, violation." *Id. See also Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 442 (7th Cir. 2005) ("Where a cause of action arises not from individually identifiable wrongs but rather from a series of acts considered collectively, the Illinois Supreme

Court has deemed application of the continuing violation rule appropriate."). By contrast, "the continuing violation rule does not apply to a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing." *Id.* at 443. *Compare Cunningham v. Huffman*, 154 Ill. 2d 398, 406, 609 N.E.2d 321, 324-325 (Ill. 1993) ("When the cumulative results of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent treatment."), *with Belleville Toyota*, 199 Ill. 2d at 349, 770 N.E.2d at 192 ("Rather, each allocation constituted a separate violation of section 4 of the Act, each violation supporting a separate cause of action. Based on the foregoing, we agree with defendants that the appellate court erred in affirming the trial court's application of the so-called continuing violation rule.").

BIPA claims do not fall within the limited purview of this exception. The Illinois Supreme Court has held that a person is "'aggrieved within the meaning of Section 20 of the [BIPA] and entitled to seek recovery under that provision" whenever "a private entity fails to comply with one of section 15's requirements." *Rosenbach v. Six Flags Entm't Corp.*, 432 Ill. Dec. 654, 663, 129 N.E.3d 1197, 1206 (Ill. 2019). And, as relevant here, Sections 15(b) and 15(d) impose obligations that are violated through discrete individual acts, not accumulated courses of conduct. Section 15(b) provides that no private entity "may collect, capture, purchase, receive through trade, or otherwise obtain" a person's biometric information unless it first receives that person's informed consent. 740 ILCS 14/15(b). This requirement is violated—fully and immediately—when a party collects biometric information without the necessary disclosure and consent. Similarly, Section 15(d) states that entities in possession of biometric data may only disclose or "otherwise disseminate" a person's data upon obtaining the person's consent or in limited other circumstances inapplicable here. 740 ILCS 14/15(d). Like Section 15(b), an entity violates this obligation the

moment that, absent consent, it discloses or otherwise disseminates a person's biometric information to a third party. The injuries resulting from these violations do not need time to blossom or accumulate. Time may exacerbate them, but an injury occurs immediately upon violation.[5] *Cf. Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 627 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020) (by failing to obtain informed consent, defendant "inflicted the concrete injury BIPA intended to protect against, *i.e.* a consumer's loss of the power and ability to make informed decisions about the collection, storage, and use of her biometric information.").

On the facts set forth in the pleadings, White Castle violated Section 15(b) when it first scanned Ms. Cothron's fingerprint and violated Section 15(d) when it first disclosed her biometric information to a third party. At that point, Ms. Cothron's injuries stemming from those actions were immediately and independently actionable. Even if White Castle repeatedly violated BIPA's terms—a possibility discussed below—that would not transform the violations into a continuing violation. *See Belleville Toyota*, 199 Ill. 2d at 348-49, 770 N.E.2d at 192 ("Although we recognize that the allocations were repeated, we cannot conclude that defendants' conduct somehow constituted one, continuing, unbroken, decade-long violation of the Act."). This case presents a substantially similar question to the one confronted in *Belleville Toyota* and the Court views it as a good "indicator of how the [Illinois Supreme] Court would decide this case." *Rodrigue*, 406 F.3d at 444.

[5] The Court notes that BIPA provides for either liquidated or actual damages, whichever is greater. 740 ILCS 14/20. While actual damages might not be immediately obvious and could emerge at any point after an unlawful scan or disclosure, there is nothing cumulative about the damages that would require treating a series of violations as a continuous whole.

In sum, the Court finds that the continuing violation doctrine does not apply to BIPA violations—at least not to those at issue here—and, as a result, Ms. Cothron's right to sue for those violations accrued when the violations occurred. The next question is: when did the alleged violations occur?

II. BIPA Violations Alleged in the Second Amended Complaint

As an alternative argument, Ms. Cothron contends that each post-BIPA scan of her fingerprint constituted an independent violation of Section 15(b) and each disclosure to a third party over that same period violated Section 15(d). Because Ms. Cothron has alleged scans and disclosures occurring within a year of filing suit, this alternative theory would also render at least some of her claims timely.[6]

The question of what constitutes a violation of BIPA's terms is a pure question of statutory interpretation, and the Illinois Supreme Court has counseled that the "most reliable indicator" of legislative intent is "the language of the statute." *Michigan Ave. Nat. Bank v. Cty. of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 535 (Ill. 2000). "The statutory language must be given its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Id.* Therefore, the analysis must begin with the text of Sections 15(b) and 15(d).

In full, Section 15(b) provides:

> No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

[6] As noted *supra* note 4, the shortest potentially applicable statute of limitations is one year.

> (1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

740 ILCS 14/15(b). In the Court's view, this text is unambiguous and therefore dispositive. A party violates Section 15(b) when it collects, captures, or otherwise obtains a person's biometric information without prior informed consent. This is true the first time an entity scans a fingerprint or otherwise collects biometric information, but it is no less true with each subsequent scan or collection. Consider a fingerprint-based system like the one described in Ms. Cothron's complaint. Each time an employee scans her fingerprint to access the system, the system must capture her biometric information and compare that newly captured information to the original scan (stored in an off-site database by one of the third-parties with which White Castle contracted).[7] In other words, the biometric information acts like an account password—upon each use, the information must be provided to the system so that the system can verify the user's identity.

[7] One fact question that may be of particular significance to liability under Section 15(d) is where the comparison takes place. Must White Castle send the newly collected fingerprint scan to one of the third parties in order for the comparison to be made at an off-site location or does White Castle retrieve the information from the off-site location such that the comparison takes place at the White Castle location? It is entirely unclear, however, why the statute is designed such that this distinction should matter to the question of liability; the privacy concerns are implicated equally whether the new data is sent off-site for comparison or the old data is retrieved from an off-site location so that the comparison can take place on-site.

In its only text-based argument to the contrary, White Castle points to the statute's language requiring that informed consent be acquired before collection. That means, White Castle urges, that it is the failure to provide notice that is the violation, not the collection of the data. But that reading simply ignores the required element of collection. There is no violation of Section 15(b) without collection; unlike Section 15(a), a failure to disclose information is not itself a violation. Section 15(b) is violated only where there is both a failure to provide specific information about collection of biometric data and collection of that data. A statutory requirement indicating ***when*** certain information must be provided, moreover, is different than a requirement indicating for ***which*** collections that provision of information is required. The text of Section 15(b) does indicate when consent must be acquired, but it does not differentiate between the first collection and subsequent collections: for any and all collections, consent must be obtained "first." 740 ILCS 14/15(b).

This understanding of the consent requirement is entirely consistent with the possibility of consent covering multiple future scans (*e.g.*, all scans in the context of employment). Section 15(b) provides for consent through "written release," which is defined elsewhere in the statute as "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." 740 ILCS 14/10. To comply with Section 15(b), White Castle could have provided Ms. Cothron with a release informing her of "the specific purpose and length of term" for which her information was being used and requiring her consent to all future scans consistent with those uses as a condition of employment. 740 ILCS 14/15(b). On the facts alleged, however, it did not do so until 2018 at the earliest; as for the intervening years, the only possible conclusion is that White Castle violated Section 15(b) repeatedly when it collected her biometric data without first having obtained her informed consent.

The language of Section 15(d) requires the same result. In relevant part, Section 15(d) provides:

> No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> > (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure

740 ILCS 14/15(d). Again, each time an entity discloses or otherwise disseminates biometric information without consent, it violates the statute. This conclusion is especially unavoidable where, as here, the statute includes "redisclose" in the list of actions that cannot be taken without consent. As a result, even where an entity transmits the biometric information to a third party to which it has previously transmitted that same information, the redisclosure requires consent. Here, White Castle does not provide a single text-based argument to the contrary. And again, the Court notes that, as with Section 15(b), it is consistent with the statutory language to obtain consent for multiple future disclosures through a single written release. But it is also once again true that White Castle failed to do so until 2018 at the earliest. Therefore, each time that White Castle disclosed Ms. Cothron's biometric information to a third party without consent, it violated Section 15(d).

Instead of providing a plausible alternative reading of the statutory text, White Castle maintains that reading Section 15(b) and Section 15(d) this way would lead to absurd results because the statutory damages for each violation—if defined as every unauthorized scan or disclosure of Ms. Cothron's fingerprint—would be crippling. And the Court fully acknowledges the large damage awards that may result from this reading of the statute. But, as an initial matter, such results are not necessarily "absurd," as White Castle insists; as the Illinois Supreme Court explained in *Rosenbach*, "subjecting private entities who fail to follow the statute's requirements

to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law" is one of the principal means that the Illinois legislature adopted to achieve BIPA's objectives of protecting biometric information. *Rosenbach*, 432 Ill. Dec. at 663, 129 N.E.3d at 1207. And absurd or not, the Illinois Supreme Court has repeatedly held that, where statutory language is clear, it must be given effect:

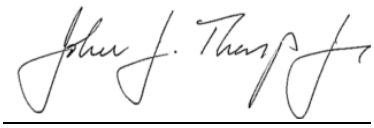
> Where the words employed in a legislative enactment are free from ambiguity or doubt, they must be given effect by the courts ***even though the consequences may be harsh, unjust, absurd or unwise***. Such consequences can be avoided only by a change of the law, not by judicial construction.

Petersen v. Wallach, 198 Ill. 2d 439, 447, 764 N.E.2d 19, 24 (Ill. 2002) (cleaned up) (emphasis added). As a result, the Court is bound by the clear text of the statute. If the Illinois legislature agrees that this reading of BIPA is absurd, it is of course free to modify the statute to make its intention pellucid. But it is not the role of a court—particularly a federal court—to rewrite a state statute to avoid a construction that may penalize violations severely. In any event, this Court's ruling is unlikely to be the last word on this subject. On appeal—and possibly upon certification to the Illinois Supreme Court[8]—White Castle will have ample opportunity to explain why it is absurd to suppose that the legislature sought to impose harsh sanctions on Illinois businesses that ignored the requirements of BIPA for more than a decade.

In sum, the Court concludes that Ms. Cothron has alleged multiple timely violations of both Section 15(b) and Section 15(d). According to BIPA Section 20, she can recover "for each violation." 740 ILCS 14/20. The number of those timely violations will be resolved at a future point when, in accordance with White Castle's request, further briefing is devoted to the issue of

[8] The Illinois Supreme Court accepts certified questions from federal courts of appeals but not from federal district courts. *See* Ill. S. Ct. Rule 20.

the applicable statute of limitations. For the present, however, it is clear that at least some of her claims survive under this reading of the statute and, therefore, White Castle's motion for judgment on the pleadings is denied.



Date: August 7, 2020

John J. Tharp, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LATRINA COTHRON, individually and on behalf of similarly situated individuals, Plaintiff, v. WHITE CASTLE SYSTEM, INC. d/b/a WHITE CASTLE, Defendants.	)	No. 19-cv-00382 Judge John J. Tharp, Jr.

ORDER

For the reasons set forth in the Statement below, Defendant White Castle System, Inc. ("White Castle")'s motion to amend to certify a question for interlocutory appeal [134] is granted. White Castle has ten days from the entry of this order to request the Seventh Circuit's interlocutory review of the certified question; if review is granted, the Court will stay this case pending the Seventh Circuit's resolution.

STATEMENT

On August 7, 2020, the Court denied Defendant White Castle's motion for judgment on the pleadings [125]. In doing so, the Court held that "[a] party violates [Illinois Biometric Privacy Act] Section 15(b) when it collects, captures, or otherwise obtains a person's biometric information without prior consent" and, under Section 15(d), "each time an entity discloses or otherwise disseminates biometric information without consent." Mem. & Op. 11, 13, Aug, 7, 2020, ECF No. 125.

White Castle now asks the Court to amend its order to certify a question for interlocutory appeal to the Seventh Circuit. Mot. Amend, Aug. 17, 2020, ECF No. 134. The proposed question for certification reads:

> Whether a private entity violates Sections 15(b) or 15(d) of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.*, only when it is alleged to have first collected or to have first disclosed alleged biometric information or biometric identifiers ("biometric data") of an individual without complying with those

> Sections, or whether a violation occurs under Sections 15(b) or 15(d) each time that a private entity allegedly collects or discloses the individual's biometric data.[1]

A district court may certify a question for interlocutory appeal only if the court's order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and an "immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Seventh Circuit has also recognized an additional, nonstatutory requirement that the petition must be filed in the district court "within a reasonable time after the order sought to be appealed." *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 675 (7th Cir. 2000). Though interlocutory appeals are generally frowned upon, given the significant delays in district court litigation they can cause, the Seventh Circuit has "emphasize[d] the duty of the district court . . . to allow an immediate appeal to be taken when the statutory criteria are met." *Id.* at 677.

Two of the three statutory requirements are easily satisfied here. The issue of when a cause of action accrues under Sections 15(b) and (d) is a "question of the meaning of a statutory or constitutional provision." *Ahrenholz*, 219 F.3d at 676. As a result, Cothron's protestations that the proposed question is not a "pure question of law" miss the mark. Resp. Opp'n 4, Sept. 1, 2020, ECF No. 138. Adjudicating her particular claims may require fact-intensive determinations about "when and to whom Defendant disseminated Plaintiff's biometric data." *Id.* But the question of whether a separate cause of action arises each time an entity "collect[s], captures," "disclose[s] . . . or otherwise disseminate[s]" biometric information without proper notice and authorization, 740 ILCS 14/15(b) and (d), is a question that a court of appeals can decide "quickly and cleanly without having to study the record." *Ahrenholz*, 219 F.3d at 677.

Moreover, White Castle's identified question of law is controlling, and a definitive resolution of the issue by the Seventh Circuit (whether through its own analysis or by certification of the question to the Illinois Supreme Court, pursuant to Ill. S. Ct. Rule 20) would materially advance the ultimate termination of the litigation. Under the Court's interpretation of BIPA's statutory language, Cothron has at least some timely claims under Sections 15(b) and (d); should the Seventh Circuit's reading of the statute differ, Cothron may well have *no* timely BIPA claims. The question for certification is therefore "quite likely to affect the further course of the litigation," *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996), and its resolution will expedite the litigation, either by defining more clearly the parameters of, and parties' reasonable expectations for, settlement negotiations or by extinguishing Cothron's claims altogether.

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[1] Technically, the Court's ruling addressed the question of when Cothron's claims accrued rather than when the violations on which those claims were based occurred. While the date of a statutory violation can, in some contexts, differ from the date when a cause of action for such violations accrued, the Court's ruling assumed that the date of violation is the date of accrual. The real question the Court addressed was, as reflected in the proposed certified question, whether every act of collection and disclosure that fails to comply with the notice requirements of Sections 15(b) and 15(d), respectively, constitutes a separate offense. Accordingly, the Court accepts the formulation of the certified question that White Castle has proposed, with modifications (*infra*) that are intended to clarify rather than to substantively modify the proposed question.

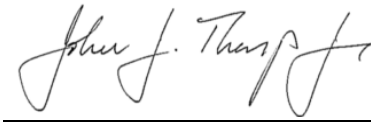
The closest issue is whether there is "substantial ground for difference of opinion" as to the proper interpretation of BIPA's statutory language—or, as the Seventh Circuit has characterized it, whether the question for certification is "contestable." *Ahrenholz*, 219 F.3d at 676. Admittedly, "substantial" is not well-defined by either the statute or the case law, but a few helpful guidelines have emerged. Novelty of a legal issue, alone, is insufficient to establish contestability, and courts have admonished that interlocutory appeal "should not be used merely to provide review of difficult rulings in hard cases." *In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995). Where there is controlling authority from the relevant court of appeals that guides a district court's analysis "there is no reason for immediate appeal," no matter how close the call may have been. *Id.* But, where there is no established body of law to draw on, and where, as here, "the issue is particularly difficult and of first impression," *Thrasher-Lyon v. CCS Commer. LLC*, No. 11 C 04473, 2012 WL 5389722, at *3 (N.D. Ill. Nov. 2, 2012), contestability—evidenced by conflicting opinions among courts that have grappled with the issue— weighs in favor of immediate appellate review.

To that end, Defendant White Castle identifies three recent cases where Illinois state courts have held that allegations like Cothron's should be treated as claims for a single violation of Section 15(b) or (d), rather than multiple actionable violations. *See Robertson v. Hostmark Hospitality Grp.*, No. 18-CH-5194 (Cir. Ct. Cook Cty. May 29, 2020), *Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425 (Cir. Ct. Cook Cty. June 10, 2020), *Smith v. Top Die Casting Co.*, 2019-L-248 (Cir. Ct. Winnebago Cty. Mar. 12, 2020). Because both *Robertson* and *Watson* were brought to the Court's attention in the parties' briefing on this issue, Cothron suggests that the Court's opinion casts doubt on the plausibility of those opinions' reasoning. Resp. Opp'n 5-8. That is not the case. The Court stands by its holding, but reasonable minds can and have differed as to the clarity of BIPA's statutory text and the extent to which suppositions about legislative intent should shape courts' application of it. Given how few courts have had reason to address the issue, the cases identified represent a "sufficient number of conflicting and contradictory opinions" to conclude there is substantial ground for difference of opinion. *Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 88 (E.D. Pa. 1983) (internal quotations omitted).

Because the question of when claims accrue under Sections 15(b) and (d) satisfies 28 U.S.C. § 1292(b)'s statutory threshold for interlocutory appeal, and because White Castle raised the issue of certification in a timely manner, Defendant's motion to amend [134] is granted and the Court certifies White Castle's proposed question, as modified below for purposes of clarity:

> Whether a private entity violates Sections 15(b) or 15(d) of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.*, only when it is alleged to have first collected (§ 15(b)) or to have first disclosed (§ 15(d)) biometric information or biometric identifiers ("biometric data") of an individual without complying with the requirements of those Sections, or whether a violation occurs each time that a private entity allegedly collects (§ 15(b)) or discloses (§ 15(d)) the individual's biometric data without complying with the requirements of the applicable subsection.

White Castle has 10 days from the entry of these findings to request the Seventh Circuit's interlocutory review of the certified question. If granted, the Court will stay the case pending interlocutory review.



Dated: October 1, 2020

John J. Tharp, Jr.
United States District Judge

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THOMAS ROBERTSON, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 18-CH-5194**
HOSTMARK HOSPITALITY GROUP, INC., et al,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Plaintiff Thomas Robertson has filed a motion to reconsider this court's January 27, 2020 Memorandum and Order pursuant to 735 ILCS 5/2-1203(a).

I. Background

On April 20, 2018, Plaintiff Thomas Robertson ("Robertson") filed his original complaint alleging Defendants Hostmark Hospitality Group, Inc. ("Hostmark") and Raintree Enterprises Mart Plaza, Inc. ("Raintree") (collectively "Defendants") violated the Biometric Information Privacy Act ("BIPA").

On April 1, 2019, this court granted Robertson's motion for leave to file an amended class action complaint (the "Amended Complaint"). The Amended Complaint now alleges three counts, each alleging a violation of a different subsection of section 15 of BIPA. 740 ILCS 14/15.

Count I alleges a violation of subsection 15(a) based upon Defendants failure to institute, maintain, and adhere to a publicly available retention and deletion schedule for biometric data. 740 ILCS 14/15(a). Count II alleges a violation of subsection 15(b) based upon Defendants failure to obtain written consent prior to collecting and releasing biometric data. 740 ILCS 14/15(b). Count III alleges a violation of subsection 15(d) based upon Defendants failure to obtain consent before disclosing biometric data. 740 ILCS 14/15(d).

On July 31, 2019, this court issued its Memorandum and Order denying Defendants' motion to dismiss Robertson's Amended Complaint. In summary, this court held that: (1) Robertson's claim was not preempted by the Illinois Worker's Compensation Act; (2) the applicable statute of limitations was five years, as provided for in 735 ILCS 5/13-205; and (3) Robertson had adequately pled his claim.

As part of the court's July 31, 2019 ruling, this court addressed the parties' arguments regarding the date Defendants stopped collecting Robertson's biometric information but did not address their arguments regarding when Robertson's claims accrued.

On August 30, 2019, Defendants filed their motion to reconsider and certify questions to the appellate court. In their motion to reconsider, Defendants argued, *inter alia*, that this court erred in applying a five-year statute of limitations to Robertson's claim. On September 4, 2019, this court denied Defendants' motion, in part, but allowed further briefing on the issue of the application of the five-year statute of limitation.

On January 27, 2020, this court issued its Memorandum and Order granting in part and denying in part Defendants' motion to reconsider. The court held that Robertson's claims relating to Defendants' alleged violations of section 15(b) and 15(d) accrued in 2010. The court found that the continuing violation rule did not apply to Robertson's claims because the violations of sections 15(b) and 15(d) represented a single discrete act from which any damages flowed. Thus, it was held that Counts II and III were barred by the five statute of limitations.

Regarding Count I, the court viewed section 15(a) as imposing two distinct requirements: (1) requiring private entities to develop a publicly available retention schedule and deletion guidelines; and (2) requiring the permanent deletion of an individual's biometric data, either in accordance with the deletion guidelines or within 3 years of the individual's last interaction with the private entity, whichever is earlier.

The court held that since it was Defendants' stated position that they ceased collection of biometric data in 2013, the math dictated by section 15(a) results in the conclusion that Robertson's claim could not have started to accrue until, at the earliest, 2016. Accordingly, Robertson's claim was not barred by the five-year statute of limitations.

II. Motion to Reconsider

A. *Application of the Continuing Violation Rule*

"The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." Chelkova v. Southland Corp., 331 Ill. App. 3d 716, 729-30 (1st Dist. 2002). A party may not raise a new legal or factual argument in a motion to reconsider. North River Ins. Co. v. Grinnell Mut. Reinsurance Co., 369 Ill. App. 3d 563, 572 (1st Dist. 2006).

Robertson's current Motion to Reconsider of this court's January 27, 2020 Memorandum and Order reiterates his previously stated position that his claim is well within the statute of limitations because he was a victim of a continuing violation of his rights under BIPA. Alternatively, he seeks to certify the question to the First District pursuant to Illinois Supreme Court Rule 304(a). [1]

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[1] Not surprisingly, Defendants argue this court properly applied the law surrounding continuing violations to Robertson's BIPA claims. Alternatively, Defendants suggest that if the question is to be certified it should be pursuant to Illinois Supreme Court Rule 308.

Robertson's most recent request suggests that the proper application of the continuing violation rule is illustrated by Cunningham v. Huffman, 154 Ill. 2d 398, 406 (1993).

Cunningham involved a matter of first impression, namely, "whether the Illinois four-year statute of repose is tolled until the date of last treatment when there is an ongoing patient/physician relationship." Cunningham v. Huffman, 154 Ill. 2d 398, 400 (1993). The trial court found that the plaintiff's claims were time-barred and the continuous course of treatment doctrine was not the law in Illinois. Id. at 401. The Appellate Court affirmed the dismissal stating that "in medical malpractice actions, the statute of repose is triggered only on the last day of treatment, and if the treatment is for the same condition, there is no requirement that the negligence be continuous throughout the treatment. Id. at 403.

The Illinois Supreme Court declined to adopt the continuous course of treatment doctrine. Id. at 403-04. Nonetheless, the court held that statutory scheme did not necessarily preclude the cause of action asserted by the plaintiff. Id. at 404. Specifically, the court held that the medical treatment statue of repose would not bar the plaintiff's action if he could demonstrate: (1) that there was a continuous and unbroken course of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." Id. at 406 (emphasis in original). The Illinois Supreme Court emphasized "that there must be a continuous course of *negligent* treatment as opposed to a mere continuous course of treatment." Id. at 407 (emphasis in original).

Robertson's assertion is that Cunningham stands for the proposition that "the continuing violation doctrine applies where a plaintiff demonstrates a continuous and unbroken course of conduct, so related as to constitute one continuous wrong." (Motion at 5).

But the Illinois Supreme Court has explicitly rejected Robertson's argument, stating **"[t]he Cunningham opinion did not adopt a continuing violation rule of general applicability in all tort cases or, as here, cases involving a statutory cause of action.** Rather, the result in Cunningham was based on interpretation of the language contained in the medical malpractice statute of repose." Belleville Toyota v. Toyota Motor Sales, U.S.A., 199 Ill. 2d 325, 347 (2002)(Fitzgerald, J)(emphasis ours).

Robertson ignores Belleville and replies that "[t]here is no binding authority to which the Court may turn for guidance on the exact issue regarding whether the continuing violation doctrine applies." (Reply at 4).

While Justice Fitzgerald's written opinion in Belleville is pretty solid authority to the contrary, as this court previously pointed out, the First District has considered "[w]hether a series of conversions of negotiable instruments over time can constitute a continuing violation under Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325 (2002), for the purpose of determining when the statute of limitations runs." Kidney Cancer Assoc. V. North Shore Com. Bank, 373 Ill.App.3d 396, 397-98 (1st Dist. 2007). The court reasoned that where a complaint alleges a serial conversion of negotiable instruments by a defendant, it cannot be denied that a single unauthorized deposit of a check in an account opened by the defendant gives the plaintiff a right to file a conversion action. Id. at 405. The court rejected the plaintiff's claim

that the defendant's repeated deposits (identical conversions) following the initial deposit served to toll the statute of limitations under the continuing violation rule. Id. Instead, according to the court, each discrete act (deposit) provided a basis for a cause of action and the court need not look to the defendant's conduct as a continuous whole for prescriptive purposes. Id.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 33, the Illinois Supreme Court held when a private entity fails to comply with one of section 15's requirements, that violation is itself sufficient to support the individual's or customer's **statutory cause of action**. Id. (emphasis ours).

Robertson's Amended Complaint alleges that his statutory rights were invaded in 2010, when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements. (Amended Complaint at ¶42).

In our January 27, 2020 Memorandum and Order, this court explained that under the general rule a cause of action for a statutory violation accrues at the time a plaintiff's interest is invaded. Blair v. Nevada Landing Partnership, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006) (citing Feltmeier v. Feltmeier, 207 Ill. 2d 263, 278-279 (2003)("where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id, 207 Ill. 2d at 279); see also, Limestone Development Corp. v. Village of Lemont, 520 F.3d 797, 801 (7th Cir. 2008) ("The office of the misnamed doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. [citations]. It is thus a doctrine not about a continuing, but about a cumulative, violation.").

Here, this court respectfully disagrees with Robertson concerning the application of continuing violation rule. It was Defendants' alleged failure to first obtain Robertson's written consent before collecting his biometric data which is the essence of and gave rise to the cause of action, not their continuing failure to do so. Robertson's statutory rights were violated in 2010 when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements.

Per Feltmeier, "where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id., 207 Ill. 2d at 279. That Defendants lacked the written release to collect and consent to disseminate Robertson's biometric data from 2010 until they ceased collection, does not change the fact Robertson's statutory rights were violated in 2010 nor does it serve to delay or toll the statute of limitations. Id; see also, Bank of Ravenswood v. City of Chicago, 307 Ill. App. 3d 161, 168 (1st Dist. 1999) (holding that the action for trespass began accruing when the defendant invaded plaintiff's interest and the fact that subway was present below the ground was a continual ill effect from the initial violation but not a continual violation.).

The court did not err in holding that the continuing violation rule did not apply to Robertson's claims.

B. *Single vs. Multiple Violations*

Robertson argues that this court erred in holding that his claims for violation of sections 15 (b) and (d) amount to single violations which occurred in 2010. Instead, according to Robertson, each time Defendants collected or disseminated his biometric data without a written release constitutes a single actionable violation.

Robertson's argument is contrary to the unambiguous language of the statute and taken to its logical conclusion would inexorably lead to an absurd result.

* * *

Section 10 of BIPA defines "written release" as: "[. . .] informed written consent or, *in the context of employment, a release executed by an employee as a condition of employment*." 740 ILCS 14/10 (emphasis added).

And, Section 15 (b)(3) of BIPA provides:

> (b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first: *** (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

740 ILCS 14/15 (b)(3).

Reading section 10 and 15 of BIPA together makes clear that the "written release" contemplated by section 15 (b)(3) in the context of employment is to be executed as a condition of employment. 740 ILCS 14/10 and 15(b)(3).

As explained by the court in its January 27, 2020 Memorandum and Order, "[t]he most reasonable and practical reading of section 15 (b) requires an employer to obtain a single written release as a condition of employment from an employee or his or her legally authorized representative to allow the collection of his or her biometric data for timekeeping purposes for the duration of his or her employment. Such a release need not be executed before every instance an employee clocks-in and out, rather a single release should suffice to allow the collection of an employee's biometric data." January 27, 2020 Memorandum and Order at 4.

Robertson admits that this is a reasonable reading, (Motion at 7), but argues that Defendants, having failed to obtain a written release or his consent, had to obtain his written release before collecting his biometric data. Since Defendants failed to do, Robertson argues, each time Defendants' collected Robertson's biometric is independently actionable.

But, taken to its logical conclusion Robertson's construction would lead employers to potentially face ruinous liability.

Section 20 of BIPA provides any individual aggrieved by a violation of BIPA with a right of action and further provides that said individual may recover liquidated statutory damages for

each violation in the amount of either $1,000 for negligent violations or $5,000 for intentional or reckless violations. 740 ILCS 14/20.

Robertson alleges that he was required to scan his fingerprints each time he clocked in and out. (Amended Complaint at ¶44). Therefore, at minimum, there exists at least two potentially recoverable violations for *each day* Robertson worked. Extending this to its logical conclusion, a plaintiff like Robertson could potentially seek a total of $500,000 for negligent violations or $2,500,000 for intentional or reckless violations *for each year*[2] Defendants allegedly violated BIPA.

It is a well-settled legal principle that statutes should not be construed to reach absurd or impracticable results, Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 21, which is where Robertson's argument would take us. This court finds nothing in the statute as it is written or as it was enacted to indicate it was the considered intent of legislature in passing BIPA to impose fines so extreme as to threaten the existence of any business, regardless of its size.

C. *Section 15 (d)(1) – Consent for Dissemination*

Section 15 (d)(1) of BIPA provides:

> (d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;
>
> * * * * *

740 ILCS 14/15 (d)(1).

Robertson's main contention here is that: (1) he never alleged when Defendants actually disseminated his biometric data; and (2) a defendant can potentially violate section 15(d) multiple times by disseminating an individual's biometric to additional third-parties.

But this court did not rule that section 15(d)(1) can only be violated a single time by a defendant. Rather, it ruled that based on the allegations as pled, Robertson's claim accrued in 2010.

The court recognizes that "a plaintiff is not required to plead facts with precision when the information needed to plead those facts is within the knowledge and control of defendant rather than plaintiff." Lozman v. Putnam, 328 Ill. App. 3d 761, 769-70 (1st Dist. 2002). However, even under this standard a plaintiff may not simply plead the elements of a claim, Holton v. Resurrection Hospital, 88 Ill. App. 3d 655, 658 (1st Dist. 1980), nor does this rule excuse a plaintiff from alleging sufficient facts. Holton, 88 Ill. App. 3d at 658-59.

[2] Two violations a day multiplied five days multiplied fifty weeks a year multiplied either 1,000 or 5,000.

If Robertson was actually trying to allege that Defendants violated section 15(d)(1) multiple times by disseminating his biometric data to multiple third parties on many occasions between 2010 and whenever Defendants ceased collection, this allegation is not well-pled and Robertson has not stated a claim for this factual scenario. To be sure, Robertson's Amended Complaint plainly alleges that any dissemination occurred systematically and automatically, but Robertson does not allege any underlying facts which support this assertion.

Robertson also argues that it is possible for a private entity to violate section 15(d) multiple times and that therefore the court erred in holding that Defendants violated Robertson's section 15(d)(1) statutory rights only in 2010. ("Defendants, at any point in time, could have disseminated [his] biometric data to any number of other entities, any number of times, over any period of time," (Motion at 13)).

Robertson alleges Defendants "disclose or disclosed [his] fingerprint data to at least one out-of-state third-party vendor, and likely others," (Id. at ¶33), but the allegation relating to "likely others" is not well pled. The Amended Complaint contains no allegations alleging Defendants disseminated Robertson's biometric data to additional third parties at some undetermined point between 2010 and the date Defendants ceased collection.

The Amended Complaint plainly alleges that any disseminations were, on information and belief, done "systematically or automatically." (Id. at ¶¶ 33, 97). "[A]an allegation made on information and belief is not equivalent to an allegation of relevant fact [citation]." Golly v. Eastman (In re Estate of DiMatteo), 2013 IL App (1st) 122948, ¶ 83 (citation omitted).

Without alleging the supporting underlying facts which lead Robertson to believe that his biometric data was being systemically and automatically disseminated, his allegation regarding additional dissemination to additional third parties remains an unsupported conclusion. The same is true for the allegations Robertson pleads on information and belief. Defendants are not required to admit unsupported conclusions on a motion dismiss.

The court did not err.

III. Motions to Certify Questions and/or Motions Leave to Appeal

Robertson seeks leave to immediately appeal this court's orders pursuant to Illinois Supreme Court Rule 304(a). Defendants assert that Illinois Supreme Court Rule 308 is the better procedural vehicle and seeks certification of three questions:

1. Whether exclusivity provisions of the Illinois Worker's Compensation Act bar BIPA claims?

2. Whether BIPA claims are subject to the one-year statute of limitations pursuant to 735 ILCS 5/13-201 or the two-year statute of limitations pursuant to 735 ILCS 5/13-202?

3. Whether a claim for a violation of section 15(a) accrues when a private entity first comes into possession of biometric data?

The questions Defendants seek to certify have been either directly addressed or are closely related to questions other judges have certified.

Judge Raymond W. Mittchell in McDonald v. Symphony Bronzeville Park, LLC, Case No. 17 CH 11311 has already certified a similar question to Defendants' first question in an appeal is pending under Marquita McDonald v. Symphony Bronzeville Park, LLC, No. 1-19-2398.

Similarly, in Juan Cortez v. Headly Manufacturing Co., Case No. 19 CH 4935, Judge Anna H. Demacopoulos has certified the second question concerning of what statute of limitations appropriately applies BIPA claims. This court is informed that the First District has accepted the matter and it is currently being briefed.

The third proposed question – as to whether a violation of section 15(a) begins accruing when a private entity first comes into possession of biometric data – is not yet pending on appeal.

A. Rule 308?

Rule 308(a) provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved.

ILL. SUP. CT., R. 308(a).

Rule 308(a) "should be strictly construed and sparingly exercised." Kincaid v. Smith, 252 Ill. App. 3d 618, 622 (1st Dist. 1993). "Appeals under this rule should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation." Id.

Because Rule 308 should be strictly construed and sparingly exercised, the court will not certify a question already accepted by the Appellate Court. Accordingly, in the interests of efficiency and of not burdening the First District with issue in cases which echo one another, the court declines to certify questions regarding the applicability of the Illinois Worker's Compensation Act, or questions concerning the appropriate statute of limitations under BIPA. Answers to those questions should be forthcoming through the certifications by Judges Mitchell and Demacopoulos.

Regarding the third question concerning the accrual of section 15(a) claims, the court is willing to certify a question regarding section 15(a) but is not willing to certify the question as currently phrased by Defendants.

As explained by the court in its January 27, 2020 Memorandum and Order, section 15(a) contains two distinct requirements: (1) private entities in possession of biometric data must develop a publicly available retention schedule and deletion guidelines; and (2) those guidelines

must provide for the permanent destruction of biometric data when the initial purpose for collecting the biometric data has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

Contrary to Defendants' phrasing of their question regarding section 15(a), the court did not rule that a section 15(a) violation could only accrue once. Rather the court interpreted section 15(a) as imposing two distinct requirements on private entities each with separate accrual dates. The pure legal question is not simply when does the action for a violation of section 15(a) accrue but rather whether the court's interpretation of the statutory language of section 15(a) is correct.

Defendants motion is therefore denied, as written. If they wish, Defendants may resubmit the request to reflect this court's ruling and it will be reconsidered.

B. Rule 304(a)?

Rule 304(a) provides as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.

ILL. SUP. CT., R. 304(a).

Rule 304(a) creates "an exception to [the] general rule of appellate procedural law by permitting appeals from trial court orders that only dispose of a portion of the controversy between parties." Mostardi-Platt Associates, Inc. v. American Toxic Disposal, Inc., 182 Ill. App. 3d 17, 19 (1st Dist. 1989). Rule 304(a)'s exception "arises when a trial judge [. . .] makes an express finding that there is no just reason to delay the enforcement or appeal of the otherwise nonfinal order." Id.

Here, the court did issue a final judgment as to fewer than all of the claims on January 27, 2020 when it granted Defendants' motion to reconsider and dismissed Counts II and III of Robertson's Amended Complaint with prejudice because they were barred by the applicable statute of limitations.

However, as explained many issues Robertson would seek review of under Rule 304(a) will be disposed of by the Appellate Court's answers to Judge Demacopoulos' certified question. Therefore, the court declines to make the necessary finding to allow Robertson to appeal pursuant to Rule 304(a).

III. Conclusion

Robertson's motion for reconsideration is DENIED.

Robertson's request for a Rule 304(a) finding is DENIED.

Defendants' request for to certify questions pursuant to Rule 308(a) is GRANTED IN PART and DENIED IN PART. The court denies Defendants' questions relating to the application of the Illinois Worker's Compensation Act and the two-year statute of limitations.

The court grants Defendants' request in so far as it seeks to certify a question relating to section 15(a) but denies Defendants' question as currently written.

The court orders the parties to confer and to attempt to reach an agreement regarding the phrasing of a question relating to the section 15(a).

The court set the next status date for this matter as June 16, 2020 at 9:30 a.m.

Entered: 5-29-20

Judge Neil H. Cohen

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

BRANDON WATSON, individually and on behalf of all others similarly situated, Plaintiff, v. LEGACY HEALTHCARE FINANCIAL SERVICES, LLC d/b/a Legacy Healthcare; LINCOLN PARK SKILLED NURSING FACILITY, LLC d/b/a Warren Barr Lincoln Park a/k/a The Grove at Lincoln Park; and SOUTH LOOP SKILLED NURSING FACILITY, LLC d/b/a Warren Barr South Loop, Defendants.	CASE NO. 19 CH 3425 CALENDAR 11

ORDER

This matter came before the Court on Defendants' 2-619 motion to dismiss the putative Class Action Complaint of Plaintiff Brandon Watson. For the reasons explained below, the motion is granted.

BACKGROUND

Plaintiff was required to scan his hand to clock in and out of work at Defendants' nursing home facilities in Chicago.[1] Plaintiff worked as a Certified Nursing Assistant for Defendant Legacy Healthcare Financial Services, LLC ("Legacy"), which controls 26 nursing home facilities in Illinois. He worked at Defendant Lincoln Park Skilled Nursing Facility, LLC from December of 2012 through February of 2019, and at Defendant South Loop Skilled Nursing Facility, LLC from May through November of 2017.

Plaintiff filed his one-count Class Action Complaint on March 15, 2019, alleging that Defendants failed to properly disclose and obtain releases related to the collection, storage, and use of his biometric information, in violation of the Illinois Biometric Information Privacy Act ("BIPA"). He asks for statutory damages and an injunction under BIPA, individually and on behalf of a class of similarly-situated employees.

[1] The facts recited here are based upon the allegations of Plaintiff's Complaint, which are taken as true for purposes of this motion.

Defendants move to dismiss the Complaint under Section 2-619 of the Illinois Code of Civil Procedure, arguing that (1) Plaintiff's claims are time-barred; (2) Plaintiff's claims are preempted by the Illinois Workers Compensation Act; and (3) Plaintiff's claims are preempted by Section 301 of the Labor Management Relations Act.

APPLICABLE LAW

The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(5) provides for dismissal of a claim that "was not commenced within the time limited by law." Dismissal of a complaint pursuant to section 2-619(a)(9) is permitted where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* The affirmative matter must negate the cause of action completely. *Id.* The trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party, and grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

ANALYSIS

(1) Statute of Limitations

Defendants argue that Plaintiff's claim is barred by the statute of limitations. BIPA does not contain its own statute of limitations, so Defendants contend that the claim should be governed by the one-year statute applicable to what it calls the "most analogous common law claim"—invasion-of-privacy claims. That statute provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILCS 5/13-201.

This is not the applicable statute of limitations. BIPA's Section 15(d) could be construed to address "publication of matter violating the right of privacy" in prohibiting private entities from "disclos[ing], redisclos[ing], or otherwise disseminat[ing] a person's or a customer's biometric identifier or biometric information . . . ." 740 ILCS 14/15(d). However, in this case Plaintiff did not include a claim under Section 15(d). Rather, he claimed violations only of Sections 15(a) and (b), which require private entities to publicly provide retention schedules and guidelines for permanently destroying biometric information, and to make disclosures and obtain releases before collecting, storing, and using that information. Sections (a) and (b) are violated even if there is no publication. Therefore, the one-year statute does not apply.

Nor does the two-year statute of limitations for a "statutory penalty" (735 ILCS 5/13-202) apply to this case. BIPA's liquidated damages provision is remedial, not penal. In *Rosenbach v. Six Flags Entertainment Corp.*, the Illinois Supreme Court explained that the General Assembly enacted BIPA "to try to head off such problems before they occur," by enacting safeguards and "by subjecting private entities who fail to follow the statute's

requirements to substantial potential liability, including liquidated damages . . . ." 2019 IL 123186, ¶ 36. Like the Telephone Consumer Protection Act at issue in *Standard Mutual Ins. Co. v. Lay*, BIPA was "designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." 2013 IL 114617, ¶ 31.

The applicable statute of limitations is the five-year "catch-all" provision of 735 ILCS 5/13-205. It begins to run on the date the cause of action accrued. Defendants argue that, even if the five-year statute applies, Plaintiff's claim is time-barred because his cause of action accrued when Defendant scanned Plaintiff's hand on his *first* day of work—December 27, 2012. This suit was filed on March 15, 2019, more than six years later.

Plaintiff argues that each daily scan of his hand violated BIPA, so his *last* day of work—February 21, 2019—is the key date for limitations purposes. He argues that all scans in the five years before he filed the Complaint are actionable.

Generally, a cause of action accrues "when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). Plaintiff argues that his claims are most analogous to wage claims, where each inadequate paycheck gives rise to a separate cause of action. The same cannot be said for each of Plaintiff's hand scans. As the Court in *Feltmeier* stated:

> [W]here there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.

Id. at 79. (emphasis added).

In wage claims, damages flow from each inadequate paycheck. Additional damages accrue every time a paycheck is short. By contrast, Plaintiff's damages flow from the "single overt act" of the initial collection and storage of his biometric data. According to the Complaint, "From the start of Plaintiff's employment with Defendants in 2012," Defendants required him to have his "fingerprint and/or handprint collected and/or captured so that Defendants could store it and use it moving forward as an authentication method." (Cplt ¶18). The Complaint alleges that, *before* collecting Plaintiff's biometric information, Defendants did not provide Plaintiff with the required written notices and did not get his required consent. (Cplt ¶¶ 22, 23). While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute. Plaintiff's handprint was scanned and stored in Defendants' system on Day 1, allowing for authentication every time he signed in.

Plaintiff's cause of action accrued when his handprint allegedly was collected in violation of BIPA on his first day of work on December 27, 2012. Therefore, because Plaintiff filed his case on March 15, 2019, Plaintiff's claim is time-barred under the five-year statute of limitations.

This holding disposes of the case, but the Court will address Defendants' other arguments for the record.

(2) Preemption by Workers Compensation Act

Defendant argues that Plaintiff's claims are preempted by the exclusive remedy provisions of the Illinois Workers Compensation Act (the "Act"), 820 ILCS 305/5(a) and 11.

The Act "generally provides the exclusive means by which an employee can recover against an employer for a work related injury." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶ 14. However, the employee can escape the Act's exclusivity provisions by establishing that the injury "(1) was not accidental; (2) did not arise from his [or her] employment; (3) was not received during the course of employment; or (4) was not compensable under the Act." *Id.*

Defendant argues that none of these exceptions apply in this case. In response, Plaintiff argues that exceptions (1) and (4) both apply—that the BIPA violations were not accidental and were not compensable under the Act.

To show that an injury was not accidental, "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, ¶ 29. Plaintiff has made no such allegation in his Complaint, so he has not established that the injury was not accidental. To put it another way, the Complaint leaves open the possibility that the injury *was* accidental. Plaintiff implicitly acknowledges this when he alleges that he and the members of the class are entitled to recover "anywhere from $1,000 to $5,000 in statutory damages." (Cplt ¶ 57). Statutory damages of $1,000 may be recovered for *negligent* violations of BIPA (740 ILCS 14/20(1)), and caselaw has equated "negligent" with "accidental" under the Act. *See Senesac v. Employer's Vocational Res.*, 324 Ill. App. 3d 380, 392 (1st Dist. 2001).

Plaintiff also argues that exception (4) applies—the injury was not compensable under the Act. In *Folta,* the Illinois Supreme Court addressed how courts should analyze this exception.[2] Rejecting the argument that the plaintiff's mesothelioma was not compensable under the Act because recovery in his situation was barred by a statute of repose, the court focused on the *type of injury* alleged and whether the legislature intended such injuries to be within the scope of the Act. The court stated, "[W]hether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." *Id.* at ¶ 23. Because the Act specifically addressed diseases caused by asbestos exposure (such as mesothelioma), the court found that the legislature contemplated that this type of disease would be within the scope of the Act, and it was therefore compensable under the Act. *Id.* at ¶¶ 25, 36.

The same cannot be said for injuries sustained from violations of BIPA. As the court stated in *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30, BIPA "is a privacy rights law that applies inside and outside the workplace." By including in BIPA a provision for a private right of action in state or federal court (740 ILCS 14/20), the legislature showed it did not contemplate that BIPA claims would categorically fit within the purview of the Workers Compensation Act. Moreover, BIPA's definition of "written release" refers specifically to

[2] *Folta* was decided under both the Workers Compensation Act and the Workers' Occupational Diseases Act, 820 ILCS 310/5(a) and 11, which contain analogous exclusivity provisions.

releases executed by an employee as a condition of employment, further evidence that the legislature did not intend the Workers Compensation Act to preempt BIPA actions in the employment context. 740 ILCS 14/10.

The court holds that BIPA claims are not compensable under the Act. Therefore, BIPA claims fall within the fourth exception to the Act's exclusivity provisions. Plaintiff's BIPA claims are not preempted by the Act.

(3) Preemption by § 301 of Labor Management Relations Act

Finally, Defendant argues that this case should be dismissed because Section 301 of the Labor Management Relations Act (29 U.S.C. §185(a)) preempts Plaintiff's BIPA claim. That section provides:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In analyzing this provision, the U.S. Supreme Court stated:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 405-06 (1988).

In Illinois, the First District Appellate Court explained the analysis as follows:

> Where a matter is purely a question of state law and is entirely independent of any understanding of the terms of a collective bargaining agreement, it may proceed as a state-law claim. By contrast, where the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim will be preempted. Where claims are predicated on rights addressed by a collective bargaining agreement, and depend on the meaning of, or require interpretation of its terms, an action brought pursuant to state law will be preempted by federal labor laws. Defenses, as well as claims, must be considered in determining whether resolution of a state-law claim requires construing of the relevant collective bargaining agreement.

Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005) (internal citations omitted).

With their motion, Defendants submitted sworn declarations attaching copies of the collective bargaining agreements ("CBAs") in effect at the Lincoln Park and South Loop nursing facilities where Plaintiff worked. The Lincoln Park CBA with SEIU provided, in relevant part:[3]

> Management of the Home, the control of the premises and the direction of the working force are vested exclusively in the Employer subject to the provisions of this Agreement. The right to manage includes . . . to determine and change starting times, quitting times and shifts, and the number of hours to be worked . . . to determine or change the methods and means by which its operations ought to be carried on; to set reasonable work standards . . . .

(Dfts' Mot., Choi Dec., Exh. A, p. 7).

The South Loop CBA with Local 743 in effect when Plaintiff worked at the South Loop facility in 2017 provided, in relevant part:

> [South Loop] has, retains, and shall continue to possess and exercise all management rights, functions, powers, privileges and authority inherent in the right to manage includ[ing] . . . the right to determine and change schedules, starting times, quitting times, and shifts, and the number of hours to be worked . . . to determine, modify, and enforce reasonable work standards, rules of conduct and regulation (including reasonable rules regarding . . . attendance, and employee honesty and integrity) . . . .

(Dfts' Mot., James Dec., Exh. A, p. 5).

Under *Lingle* and *Gelb*, the question is whether resolution of the BIPA claim in this case depends on an interpretation of the CBAs quoted above. Defendants argue that Plaintiff's claim "cannot possibly be resolved" without interpreting the governing CBAs. The Court disagrees. Resolution of this case is purely a question of state law—whether or not Defendants complied with BIPA by making the required written disclosures and getting the required written release before collecting, storing, and using Plaintiff's biometric information. Even if the CBAs allowed Defendants to set a rule requiring Plaintiff to clock in with his handprint—as part of "determining reasonable work standards"—the Court does not need to interpret the CBAs to decide if Defendants complied with BIPA's requirements. This is so even though the unions may be Plaintiff's "legally authorized representatives" under Section 15(b)(3) for purposes of signing the required release. The Court does not need to interpret the CBA to determine if the release was signed or not.

The CBAs are only tangentially related to this dispute, if at all. As the U.S. Supreme Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), "[N]ot every dispute

[3] Defendants attached the CBA in effect between May 1, 2017 and April 30, 2020. The relevant CBA would be the one in effect when Plaintiff began work at Lincoln Park on December 27, 2012. Even if Defendants had attached the correct CBA, though, Defendants' preemption argument fails for the other reasons described herein.

concerning employment, or *tangentially involving* a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." (emphasis added). Preemption promotes uniformity of federal labor law, but preemption is required only if resolution of the dispute is "substantially dependent" on analysis of the terms of the CBA. *Id.* at 220.

As the court in *Gelb* directed, this Court has considered the defenses as well as the claims in this case. The Court notes that Defendants have raised no defenses that require an interpretation of the CBAs. Defendants do not assert that the unions received the required BIPA disclosures or signed BIPA releases on behalf of employees. Instead, they only point out that the broad management rights provisions of the CBAs allow them to set work standards. Deciding this case does not require the Court to interpret the CBAs.

In making our holding, the Court respectfully declines to follow the nonbinding Seventh Circuit case of *Miller v. Southwest Airlines*, 926 F. 3d 898 (7th Cir. 2019) and the Northern District of Illinois cases that followed it, *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536 (N.D. Ill. Mar. 26, 2019) and *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577 (N.D. Ill. Feb. 26, 2020). Our case involves a motion to dismiss under Section 2-619 of the Illinois Rules of Civil Procedure, which should be granted "only if the plaintiff can prove no set of facts that would support a cause of action." *In re Chicago Flood Litigation,* 176 Ill. 2d 179, 189 (1997). Here, Plaintiff *could* prove a set of facts under which his claim was not preempted. Defendants did not meet their burden of proof on their 2-619 motion to dismiss argument based on Section 301 preemption.

CONCLUSION

Defendants' Motion to Dismiss is granted under 2-619(a)(5) and Plaintiff's Complaint is dismissed with prejudice for failure to bring suit within five years after the cause of action accrued. This is a final order disposing of all matters.

ENTERED:

Judge Pamela McLean Meyerson

Judge Pamela McLean Meyerson

JUN 10 2020

Circuit Court – 2097

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

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March 12, 2020

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Marcia Smith vs. Top Die Casting Co.
2019-L-248

MEMORANDUM OF DECISION AND ORDER

Plaintiff has filed suit alleging defendant violated sections 15 (a) and (b) of the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.* Defendant has filed a 2-619 Motion to Dismiss the complaint on the basis that defendant believes suit has been brought outside the statute of limitations. The matter has been fully briefed and argued. The court finds and orders as follows:

I. Violation of section 15(a)

740 ILCS 14/15 deals with "Retention; collection; disclosure; destruction" Section (a) states,

"A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing *a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied* **or within 3 years of the** individual's **last interaction with the private entity**, **whichever occurs first**. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines." (Emphasis added.)

The parties agree that the plaintiff began working for the defendant in August of 2017. It also appears without dispute that the plaintiff's last day on the job was February 28, 2019. Her assignment "officially" ended March 5, 2019. It also appears uncontroverted that when the

plaintiff began working for the defendant and defendant acquired her biometric information, there was no written policy in place for the retention and destruction of that data. Under the wording of the statute, and the use of the "or" connector, either there are written guidelines for permanently destroying the biometric information once the purpose for having it/using it have been satisfied or in the absence of written guidelines, destruction must take place within 3 years of the individual's last interaction with the entity. The latter applies here.

The United States Supreme Court has said, "a cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v Febar Corp. of California, Inc.*, 522 U.S. 192 at 193. In *Blair v Nevada Landing Partnership*, 369 Ill.App.3d 318, 323 our Second District Appellate Court stated, "Generally, in tort, a cause of action accrues and the limitations period begins to run when facts exist that authorize one party to maintain an action against another [citing *Feltmeier*, infra." At this point, only approximately 1 year after the plaintiff's last interaction with the defendant, the plaintiff's claim has not ripened as there is still a considerable time (at minimum until February 28, 2022), for the defendant to comply with the statute, regardless of what the statute of limitations is.

Defendant's motion to dismiss is granted as it pertains to paragraph 47 as well as any other paragraphs alleging a violation of section 15(a).

II. Violation of section 15(b)

740 ILCS 14/15(b) states, "No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, **unless it first**:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative."

The plain language of the statute indicates when a claim accrues for violating this section. The offense, and thus the cause of action for the offense, occurs the first time the biometric information is collected without meeting the requirements of paragraphs (1) – (3).

The Illinois Supreme Court has said, "At this juncture, we believe it important to note what does *not* constitute a continuing tort. A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. See *Pavlik*, 326 Ill.App.3d at 745, 260 Ill.Dec. 331, 761 N.E.2d 175; *Bank of Ravenswood*, 307 Ill.App.3d at 167, 240 Ill.Dec. 385, 717 N.E.2d 478; *279 *Hyon*, 214 Ill.App.3d at 763, 158 Ill.Dec. 335, 574 N.E.2d 129. Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. See *Bank of Ravenswood*, 307 Ill.App.3d at 167–68, 240 Ill.Dec. 385, 717 N.E.2d 478; *Hyon*, 214 Ill.App.3d at 763, 158

Ill.Dec. 335, 574 N.E.2d 129; *Austin v. House of Vision, Inc.*, 101 Ill.App.2d 251, 255, 243 N.E.2d 297 (1968). For example, in *Bank of Ravenswood*, the appellate court rejected the plaintiffs' contention that the defendant city's construction of a subway tunnel under the plaintiff's property constituted a continuing trespass violation. The plaintiffs' cause of action arose at the time its interest was invaded, *i.e.*, during the period of the subway's construction, and the fact that the subway was present below ground would be a continual effect from the initial violation, but not a continual violation. *Feltmeier v Feltmeier*, 207 Ill.2d 263 at 278-279." (Emphasis in original) See also *Blair*, supra at 324 -325.

In this matter, it is undisputed that the plaintiff first began using the timeclock in question in August of 2017. Plaintiff's argument that each time the plaintiff clocked in constituted an independent and separate violation is not well taken. The biometric information is collected the one time, at the beginning of the plaintiff's employment, and thereafter the original print, or coordinates from the print, are used to verify the identity of the individual clocking in. Thus, the offending act is the initial collection of the print and at that time the cause of action accrues. To hold otherwise is contrary to the plain wording of the statute and common sense as to the manner the initially collected biometric information is utilized. Additionally, as a matter of public policy, the interpretation plaintiff desires would likely force out of business – in droves - violators who without any nefarious intent installed new technology and began using it without complying with section (b) and had its employees clocking in at the start of the shift, out for lunch, in for the afternoon and out for the end of the shift. Over a period of 50 weeks (assuming a two week vacation) at $1000 for each violation it adds up to $1,000,000 *per employee* in a year's time. This would appear to be contrary to 14/5 (b) and (g) – Legislative findings; intent. It also appears to be contrary to how these time clocks purportedly work.

Given the violation occurs at the first instance of collection of biometric data that does not conform to the requirements set forth, the question becomes what the statute of limitations is given the Act's silence. Defendant argues that because BIPA clearly concerns matters of privacy as well as concerns itself with the dissemination of uniquely personal information and preventing that from occurring, the one year statute of limitations set forth in 13-201 applies, supporting its motion to dismiss.

The parties agree that the Illinois Supreme Court (in *Rosenbach v Six Flags Entm't Corp.* 2019 IL 123186) as well as other cases addressing BIPA have made it clear that BIPA involves an invasion of privacy but they disagree as to what that means. BIPA's structure is designed to prevent compromise of an individual's biometric data. Indeed, the common law right to privacy as it relates to modern technology is at the core of BIPA. The United States Supreme Court has noted that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v Reporters Comm.for Freedom of the Press*, 489 U.S. 749, 763. Defendant relies heavily on *Blair* and its application of 13-201's one year limitation period and the fact the Right of Publicity Act (765 ILCS 1075) involved in *Blair*, like BIPA, sets forth no statute of limitations period.

However, the Court noted in *Blair* that at common law there was a tort of appropriation of likeness, for which a plaintiff needed to set forth elements of appropriation of a person's name or likeness, without consent, done for another's commercial benefit. The statute of limitations for doing so was the one year statute set forth in 13-201. The Right to Publicity Act went into effect January 1, 1999 and completely replaced the common law tort. The legislature specifically

said it was meant to supplant the common-law. As such, the *Blair* court held the one year statute of limitations would remain applicable for the Act. BIPA is not an act which completely supplants a specific common law cause of action, so is distinguishable from the Right to Publicity Act in this regard. Additionally, *Blair* clearly involved publication as an essential element. That further distinguishes it from BIPA to the extent that publication is not a necessary element of every BIPA claim. Notably, the case at hand contains no allegation of publication.

The Second District's decision and language in *Benitez v KFC Nat. Management Co.*, 305 Ill.App.3d 1027 is informative. There, while the matter involved intrusion upon seclusion and the voyeuristic nature of the affront to privacy which is not present here, the court stated, at page 1034, "The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication. (see 735 ILCS 5/13-201 (West 1994); *McDonald's Corp. v. Levine,* 108 Ill.App.3d, 737, 64 Ill.Dec. 224, 439 N.E.2d 475(1982) (even if eavesdropping claim was actually a claim for intrusion upon seclusion, the one-year statute of limitations of what is now section 13-201 would not apply…)). Accordingly, since the statute does not refer to a cause of action for intrusion upon seclusion, we decline to read the statute as such." The court went on to note two cases which disagreed with its decision and held that 13-201 applied to intrusion upon seclusion and sexual harassment cases. The court commented, at pages 1007-8, "Nonetheless, we are not persuaded by those cases, since neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion. Instead, we find the plain language of the statute controlling."

It is also noteworthy that inclusion upon seclusion is a relatively new, statutorily created violation of the right to privacy and it is an extension of the common law's four distinct types of privacy breaches. While BIPA claims are not claims which can be characterized as intrusion upon seclusion cases, BIPA also is a statutorily created violation of the right to privacy which extends common law privacy protections, as opposed to supplanting a common law right. For those reasons also, as well as the Second District's logic and analysis of 13-201 in *Benitez* (which this court must follow) 13-201 does not apply.

Therefore, for all the foregoing reasons, the court finds that section 5/13-205's Five year limitations period applies to BIPA violations. Given the lack of an express limitations period in the Act, and the finding 13-201 does not apply, BIPA falls into the category of "civil actions not otherwise provided for" and plaintiff has clearly brought her claim prior to August, 2022.

The defendant's motion to dismiss section (b) allegations of BIPA violations is denied.

So ordered:

Date: 3/12/2020 Enter: _____
Hon. Judge Donna Honzel

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Martinique Owens and Amelia Garcia, *individually and on behalf of all others similarly situated,* Plaintiffs, v. Wendy's International, LLC, Defendant.	No. 18 CH 11423 Calendar 15 Hon. Anna M. Loftus Judge Presiding

MEMORANDUM OPINION & ORDER

This case, a proposed class action under the Biometric Information Privacy Act, presents a number of fundamental questions about the BIPA statute itself, its interaction with other legislative schemes, and the nature of a BIPA injury. These questions are raised by way of Motions to Dismiss, which the Court denies.

BIPA is not preempted by the Workers' Compensation Act. A BIPA injury is not the type of injury that is compensable under the Act. Because it is not compensable, the Act's exclusivity provision does not apply.

BIPA is subject to a five-year statute of limitations. The one-year statute of limitations only applies to privacy torts involving publications. Plaintiffs have made no such claim, and even if they did, BIPA does not require publication. The two-year statute of limitations applies to penal statutes. BIPA provides for statutory liquidated damages, but only as part of a broader remedial scheme that permits for actual damages. It is not penal, and the two-year statute does not apply either.

Because neither specialized statute of limitations applies, BIPA is subject to the five-year "catchall" statute of limitations. In light of this holding, the Court need not address when or how the various Plaintiffs' claims accrued, because under a five-year statute of limitations, all claims are timely.

The Motion to Dismiss is denied in its entirety.

I. Background

This opinion discusses two cases: *Owens v. Wendy's*, 18 CH 11423, and *Young v. Tri City Foods*, 18 CH 13114. Each case is a BIPA class action brought by employees; though the parties are different, Plaintiff's counsel, Defendants' counsel, and even the third-party respondent in discovery are the same. Indeed, in almost every aspect relevant here, the cases are essentially the same.[1]

The cases have not been consolidated or transferred, and are not formally connected. Rather, they were both randomly assigned to the same calendar, and have been lockstepped since case management. The parties capitalized on this serendipity and have briefed and argued the (separate, but almost identical) Motions to Dismiss in parallel. The Court's ruling is the same in both cases, and so substantially similar orders will be entered in both.

With that having been said: each Complaint is pled as a putative class action, on behalf of all employees who used a biometric time clock during a particular timeframe. Because the Complaints are framed as such, each individual Plaintiffs' factual circumstance is less relevant—in a proper class, the named plaintiff(s) would largely be fungible, because the underlying legal issues would predominate.

Nevertheless, because no class has been certified, the Court takes a moment to describe the factual allegations each set of Plaintiffs make concerning their respective biometric events. The Court takes the allegations as true for the purposes of the present Motions to Dismiss. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184 (Ill. 1997).

A. *Owens v. Wendy's*, 18 CH 11423

Wendy's is a well-known fast food restaurant chain. When employees first begin working for Wendy's, they are required to have their fingerprints scanned for an employee database. Employees then use fingerprints at their timeclocks to clock in and clock out of work. They also use fingerprints to unlock point-of-sale systems, including cash registers.

The Complaint alleges that Wendy's did not make any biometric disclosures to its employees, including why the information is collected, or to whom it might be disclosed. It also alleges that Wendy's did not provide written policies for retention or destruction of data, or offer guidelines for what happens to that data following an employee's separation.

The two named Plaintiffs, Owens and Garcia, each worked at a Wendy's in Illinois. Owens worked through July 2017; Garcia through July 2016.[2] Upon hiring, their fingerprints were collected; during their employment, they used fingerprint

[1] The sole exception is with respect to the effect of a two-year statute of limitations on claim accrual, discussed briefly in Part IV.E below. *See* Hrg. Tr. 32:19–33:15 (June 10, 2019).

[2] This Complaint does not provide specific dates when either Plaintiff began their employment. This particular information is not relevant to the disposition of the present Motion. *See* Part IV.E *infra* (accrual of claims moot).

scans to clock in and out and access POS systems. Neither was given biometric disclosures or written policies, and neither executed a release.

Plaintiffs filed suit on September 11, 2018. The Complaint alleges that Wendy's negligently failed to promulgate a retention policy under Section 15(a), or make necessary biometric disclosures under Section 15(b). 740 ILL. COMP. STAT. 14/15(a), (b). These claims cumulate in a single count for negligent violation of BIPA. *Id.* § 14/20(1). The Complaint's proposed class encompasses all Illinois residents whose fingerprints came into Wendy's' possession.

B. *Young v. Tri City Foods*, 18 CH 13114

Tri City Foods is a franchisee for Burger King, another well-known fast food restaurant chain. The substantive allegations are familiar: when employees first begin working for Tri City Foods, their fingerprints are scanned for a database. Employees use fingerprints at their timeclocks to clock in and out of work. This Complaint alleges that Tri City Foods did not make any biometric disclosures, or provide a retention or destruction policy.

The named Plaintiff, Young, worked for Tri City Foods from July 2017 to January 2018. His fingerprints were collected at the beginning of his employment, and he used fingerprints to clock in and out of work. He was not given biometric disclosures or written policies, and did not execute a release.

Plaintiff filed suit on October 22, 2018. The Complaint alleges that Tri City Foods negligently failed to promulgate a retention policy under Section 15(a), and make disclosures under Section 15(b). 740 ILL. COMP. STAT. 14/15(a), (b). As before, it presents a single count for negligent violation of BIPA. *Id.* § 14/20(1). The Complaint's proposed class encompasses all Illinois residents whose biometric data[3] came into Tri City Foods' possession.[4]

C. Procedural Developments

As noted above, though these twin cases were filed separately, they were both randomly assigned to the same calendar, and have proceeded in parallel since initial case management. Both were stayed for a time pending the Illinois Supreme Court's decision in *Rosenbach*, 2019 IL 123186. Once that ruling issued, parallel motions to dismiss were filed, briefed, and argued, with the Court taking the matters under advisement on June 10, 2019.

Since then, Plaintiffs have sought leave to supplement the records with additional authority in the form of recent trial court decisions on these issues in similar cases. After the third such motion, the Court advised the parties to refrain

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[3] BIPA defines "biometric identifier" and "biometric information" separately. 740 ILL. COMP. STAT. 14/10. For ease of reference, and because the difference between the two is not relevant here, the Court refers to both of these terms collectively as "biometric data."

[4] Whereas the *Owens* class specifically refers to fingerprints, the *Young* complaint refers instead to "biometric identifiers or biometric information." It is unclear why the class is more broadly defined, given that *Young* only alleges collection of fingerprints. For ease of reference, the Court refers to the allegations across both cases as fingerprinting generally.

from bringing further ones. The Court is aware of its colleagues' decisions, and no citation is needed to consider such public records.[5]

These decisions are not, of course, binding in any way, nor were they offered as such. Nevertheless, in such a rapidly evolving area of the law as this, where binding authority on these questions does not yet exist, it is appropriate to consider nonbinding persuasive authority. *E.g., Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245, ¶25. Binding or not, "Nothing, however, bars a court from adopting sound reasoning." *People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, ¶27. The Court happens to agree with the majority of its colleagues, but as this opinion demonstrates, its reasons are its own.

Finally, in the *Young* case only, Defendant moved to amend the Motion to Dismiss—which by that point had been fully briefed, argued, taken under advisement, and thrice supplemented—by adding a constitutional challenge. The Court denied that request, without prejudice; these matters are complex enough as they stand.

II. Legal Standards

Both Motions to Dismiss raise identical arguments by way of Section 2-619. Such motions require that the Court accept as true all well-pleaded facts and their attendant inferences. Specifically, Defendants raise arguments under Sections 2-619(a)(9) and (a)(5). 735 ILL. COMP. STAT. 5/2-619.

The Section 2-619(a)(9) arguments raised by Defendant seek a dismissal upon a showing of other affirmative matters, outside the four corners of the complaint, which defeat the claim in whole or in part. *Alford v. Shelton (In re Estate of Shelton)*, 2017 IL 121199, ¶21. Here, the affirmative matter is the exclusivity

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[5] The Court is familiar with twenty-one written decisions from trial courts addressing the Workers' Compensation Act, BIPA's statute of limitations, or both, to wit:
McDonald v. Symphony, 17 CH 11311 (Cir. Ct. Cook Co., June 17, 2019) (Judge Mitchell) (*McDonald I*);
Fluker v. Glanbia, 17 CH 12993 (Cir. Ct. Cook Co., July 11, 2019) (Judge Mitchell);
Robertson v. Hostmark, 18 CH 5194 (Cir. Ct. Cook Co., July 31, 2019) (Judge Cohen) (*Robertson I*);
Mims v. Freedman, 18 CH 9806 (Cir. Ct. Cook Co., Aug. 22, 2019) (Judge Demacopoulos);
Chavez v. Temperature Equipment, 19 CH 2358 (Cir. Ct. Cook Co., Sept. 11, 2019) (Judge Jacobius);
Tims v. Black Horse, 19 CH 3522 (Cir. Ct. Cook Co., Sept. 23, 2019) (Judge Atkins) (*Tims I*);
Roach v. Walmart, 19 CH 1107 (Cir. Ct. Cook Co., Oct. 25, 2019) (Judge Meyerson);
McDonald v. Symphony, 17 CH 11311 (Cir. Ct. Cook Co., Oct. 29, 2019) (Judge Mitchell) (*McDonald II*);
Carrasco v. Freudenberg, 19 L 279 (Cir. Ct. Kane Co., Nov. 15, 2019) (Judge Pheanis);
Cortez v. Headly, 19 CH 4935 (Cir. Ct. Cook Co., Nov. 20, 2019) (Judge Demacopoulos);
Woodard v. Dylan's Candybar, 19 CH 5158 (Cir. Ct. Cook Co., Nov. 20, 2019) (Judge Demacopoulos);
Figueroa v. Tony's Finer Foods, 18 CH 15728 (Cir. Ct. Cook Co., Dec. 10, 2019) (Judge Moreland);
Heard v. THC – North Shore, 17 CH 16917 (Cir. Ct. Cook Co., Dec. 12, 2019) (Judge Valderrama);
Treadwell v. Power, 2019 U.S. Dist. LEXIS 215467 (N.D. Ill. Dec. 16, 2019);
Marion v. Ring Container, 19 L 89 (Cir. Ct. Kankakee Co., Jan. 24, 2020) (Judge Albrecht) (*Marion I*);
Robertson v. Hostmark Hospitality, 18 CH 5194 (Cir. Ct. Cook Co., Jan. 27, 2020) (Judge Cohen) (*Robertson II*);
Tims v. Black Horse, 19 CH 3522 (Cir. Ct. Cook Co., Feb. 26, 2020) (Judge Atkins) (*Tims II*);
Smith v. Top Die, 19 L 248 (Cir. Ct. Winnebago Co., Mar. 12, 2020) (Judge Honzel);
Cortez v. Headly, 19 CH 4935 (Cir. Ct. Cook Co., Mar. 13, 2020) (Judge Demacopoulos);*Marion v. Ring Container*, 19 L 89 (Cir. Ct. Kankakee Co., April 17, 2020) (Judge Albrecht) (*Marion II*); and
Robertson v. Hostmark, 18 CH 5194 (Cir. Ct. Cook Co., May 29, 2020) (Judge Cohen) (*Robertson III*).

provision of the Workers' Compensation Act. 820 ILL. COMP. STAT. 305/5(a), 305/11. Exclusivity is properly raised by way of Section 2-619(a)(9). *See Folta v. Ferro Engineering*, 2015 IL 118070, ¶¶7, 10.

The Section 2-619(a)(5) arguments assert that the claims are barred by the applicable statute of limitations. Here, BIPA does not identify a limitations period. Defendants argue the one-year privacy statute of limitations applies, 735 ILL. COMP. STAT. 5/13-201, and in the alternative that the two-year statute for penalties or personal injury claims applies, *id.* 5/13-202. Plaintiffs propose the five-year catchall statute applies. *Id.* 5/13-205. Determining whether the claims are timely requires identifying which statute of limitations applies, which is properly done on a Section 2-619(a)(5) motion. *See O'Toole v. Chi. Zoological Soc'y*, 2015 IL 118254, ¶16.

III. Workers' Compensation Act

The Workers' Compensation Act establishes a comprehensive regime for workplace injuries, providing exclusive relief and precluding all other causes of action. The Act's exclusivity provision has four judicially recognized exceptions. Two of those are relevant here: whether the injury was not accidental, and whether it is compensable under the Act. If either exception is met, the Act's exclusivity provisions do not apply, and the cause of action is permitted.

The Court declines to rule on the first exception concerning the (non)accidental nature of the alleged BIPA violations, because the ramifications of such a ruling extend beyond the questions presented. The Court holds, however, that BIPA injuries lie categorically outside the scope of the Act, and are not compensable. The Act's exclusivity provisions therefore do not apply to bar the cause of action.

A. Statutory Scheme

The Illinois Workers' Compensation Act is often described as a grand bargain between employees and employers.[6] Employees benefit from no-fault liability, which offers an easier path to recovery for workplace injuries. Employers accept this liability in exchange for protection from common-law suits and overly large verdicts. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (Ill. 1990).

Crucial to this scheme is the exclusivity provision of the Act. Section 5(a) provides that "no common law or statutory right to recover damages from the employer . . . is available to any employee who is covered by the provisions of this Act." 820 ILL. COMP. STAT. 305/5(a). Section 11, in turn, provides limitations on the measure of responsibility attributable to an employer—i.e. their liability exposure. *Id.* 305/11.

[6] Though, curiously, the phrase "grand bargain" itself does not appear in Illinois caselaw at all, and only sporadically elsewhere. *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS L. REV. 891, 893 n.4 (2017) (history of phrase).

The practical import of the exclusivity provision is that employees cannot bring common-law suits against an employer unless one of four exceptions is met, which requires the employee to prove:

(1) that the injury was not accidental;
(2) that the injury did not arise from his or her employment;
(3) that the injury was not received during the course of employment; or
(4) that the injury was not compensable under the Act.

Meerbrey, 139 Ill. 2d at 463 (citing *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (Ill. 1980) (formatted for clarity). Unless an exception is met, the claim will fall within the exclusive scope of the Act. In that case, a Section 2-619 dismissal is proper, and the employee must turn to the Workers' Compensation Commission as the proper adjudicating authority.

Here, the parties agree that the second and third exceptions are not at issue: the fingerprinting arose from the employment, and the alleged BIPA violations were received in the course of employment.[7] At issue are the first and fourth exceptions: whether the injury was accidental, and whether it is compensable. If either exception is met, the claim may proceed.

B. Accidental Injury

Defendants argue that, while Plaintiffs allege a negligent violation of BIPA, the first exception requires the injury be *not accidental*, and it is inconsistent to argue a claim is both not an accident and negligent. The analysis is more complex than Defendants' position suggests, and hinges on the implications of what Plaintiffs have pled and the mechanics of their claim.

It is possible for a claim of negligence to include sufficient allegations as to specific intent to meet this exception. But the question of whether that can be done in a BIPA case has ramifications well beyond the scope of the issue at hand. The Court declines to rule on the issue at this time.

1. "Accidental"

In the realm of workers' compensation, "accidental" is not a specifically defined term of art. Rather, it refers to "anything that happens without design or an event which is unforeseen by the person to whom it happens." *Meerbrey*, 139 Ill. 2d at 463 (quoting *Pathfinder Co. v. Industrial Com.*, 62 Ill. 2d 556, 563 (Ill. 1976)). Some cases are self-evident: if the employer directs, encourages, or commits an intentional tort, the exception is met. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 239 (Ill. 1980). Negligence, however, is more difficult.

[7] Other courts have held that, where fingerprinting is made a condition of employment, the BIPA violation manifests *prior* to the term of employment. This implicates, among others, the applicability of the third exception. *See Mims*, *supra* note 5, at pp. 5–6; *Woodard*, *supra* note 5, at p 9. Neither case here presents this theory, but it is worth noting.

Not all negligence cases are barred. *Schusse v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.*, 334 Ill. App. 3d 960, 965 (1st Dist. 2002) (blanket preemption of negligence cases "would be contrary to *Meerbrey*."). But negligence cases do pose a grey area.

The First District recently examined the intersection of negligence and accident in *Garland v. Morgan Stanley*, which concerned a deadly crash of a small aircraft engaged by Morgan Stanley for a business trip. 2013 IL App (1st) 112121, ¶¶5–6. The *Garland* court did not hold that claims of negligence were necessarily accidental within the meaning of the first exception to the Act. It did, however, discuss the relevant standards. *Id.* at ¶¶29–30. The court held "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Id.* at ¶29 (citing *Copass v. Illinois Power Co.*, 211 Ill. App. 3d 205, 214 (4th Dist. 1991)). Without that specific intent, even conduct "beyond aggravated negligence" was insufficient. *Garland*, 2013 IL App (1st) 112121, ¶29 (quoting *Copass*, 211 Ill. App. 3d at 214).

Ultimately, the *Garland* plaintiff proposed a grave negligence claim, containing everything leading up to, but not including, the particular allegation that the employer specifically intended the injury. *Garland*, 2013 IL App (1st) 112121, ¶¶16, 30. The *Garland* court rejected the claim, holding the employer's intention was the essential ingredient: "the employee must show that the employer specifically intended to injure the plaintiff." *Id.* at ¶30 (collecting citations).

Here, and on the face of the pleading, Plaintiffs have an uphill battle, as their claims sound in negligence only.

2. The *Treadwell* Analysis

As of this writing, the Court knows of only one case that has discussed the accident prong within the context of BIPA: *Treadwell v. Power Solutions*, a Northern District case. 2019 U.S. Dist. LEXIS 215467 (N.D. Ill., Dec. 16, 2019).[8] There, the defendant protested there were no specific allegations of specific intent, and without them, the claim could not be accidental. *Id.* at *9. Specifically, the defendant charged that plaintiff had alleged a "series of omissions," rather than any affirmative intent. *Id.*

The court disagreed: the plaintiff alleged the defendant's intent to collect fingerprints; the BIPA violation occurred at the time of collection, without more; and—crucially— defendant was presumed to know the law. *Id.* at **9–10 (citations omitted). The specific allegation that the employer intended to collect fingerprints, coupled with the fact that the employer was presumed to know the action, by itself,

[8] One other case, *Marion v. Ring Container*, touches on the accident prong, holding flatly that the defendant there "has not established that the injuries alleged are . . . accidental . . . . Violation of [BIPA] requires a deliberate act[.]" 19 L 89, at p.2 (Cir. Ct. Kankakee Co., Jan. 24, 2020). Without access to the pleadings, it is unclear whether *Marion* concerned allegations of a *negligent* BIPA violation; without that information, its conclusion is not overly useful. *Treadwell* doesn't specify whether the allegations there pointed to negligence, but its discussion is substantially longer, and provides a more useful point of reference.

would be a violation, meant the allegation of specific intent to collect necessarily included an inferred allegation of specific intent to violate BIPA.

Plaintiffs' briefing predates *Treadwell* but tracks this logic. They argue the decision to require employees to use biometric timeclocks was intentional, and the decision was a result of the purposeful "design" of the employer. This tracks part of the *Meerbrey* definition of "accidental" as "anything that happens without design." *Meerbrey*, 139 Ill. 2d at 463.

But it also fits in with the *Treadwell* analysis. Everyone is presumed to know the law. *Jones v. Bd. of Educ.*, 2013 IL App (1st) 122437, ¶22. This naturally applies to BIPA, even though it lay dormant until recently. If the system will violate BIPA, and Plaintiffs allege the system was intentionally implemented, then that underlying allegation necessarily entails the further allegation that Defendants intended to cause BIPA violations to occur. And *that* is an allegation of intentionality sufficient to trigger the first exception, as the claim would no longer be accidental.

3. Intentionality and BIPA

This is a logical, appealing analysis. And yet the Court hesitates to adopt it, not because it leads to an incorrect conclusion here, but because of its potential ramifications. This *Treadwell* logic applies to the employer's intent *generally*, which interacts with other parts of the case—specifically, the nature of the BIPA claim itself.[9] If installing a timeclock alone is enough to intend to violate BIPA, then any claim for a negligent violation under Section 20(1) would *necessarily* evolve into a claim for an intentional violation under Section 20(2)—for, after all, the installation was intentional, and would be enough to intend the violation itself. 740 ILL. COMP. STAT. 14/20.

It is easy to imagine a negligent violation of BIPA: a supervisor forgets to close out of a secure system, allowing a mustachioed tortfeasor to pilfer the files, using them to commit identity theft. But it is difficult to see how the *Treadwell* analysis permits negligent BIPA claims in the employment context. Perhaps all employment claims are necessarily intentional. Perhaps not. But that investigation ranges well beyond the questions presented in this case, into what exactly the state of mind requirements for BIPA are.

The Court need not resolve these questions. Because the fourth exception is met, the claims survive, and the Court will decline to rule as to the first exception. The nature of negligence may return, but not at this time.

C. Compensability

The Workers' Compensation Act only precludes causes of action that are compensable under the Act. The relevant standard of law here is thinly developed, but this fourth exception requires analyzing the nature of the injury itself to

[9] By comparison, the Court's conclusion in Part III.C *infra* that BIPA claims are not compensable under the Act only applies to the Workers' Compensation Act, and does not "feed back," so to speak, into the claim itself.

determine whether it categorically fits within the Act's scope. BIPA injury is fundamentally different from every other type of injury covered by the Act. Because BIPA categorically does *not* fit under the Act, the fourth exception is met, and the Act does not bar the claim.

1. Identity of Tests

The fourth exception to the Workers' Compensation Act's preclusion regime requires "that the injury was not compensable under the Act." *Meerbrey*, 139 Ill. 2d at 463. Defendants argue an injury is compensable, and thus the exclusivity provision applies, when the injury arises out of the employment, and is incurred in the course of employment. These are, of course, the second and third exceptions. Defendants' position entails that, where the second and third exceptions are not met, the fourth can never be met.

For this proposition, Defendants point to *Sjostrom*, a 1965 case which provides that an injury is compensable if suffered in the line of duty; the "line of duty" test is identical to the "compensability" test; and both are satisfied by a showing that the injury arose "out of and in the course of employment." 33 Ill. 2d 40, 43 (Ill. 1965).[10]

Defendants insist this limited test is still controlling law. They point to a recent case centered on the compensability language: *Folta*. There, on its initial appeal, the defendant proposed to define "compensability" in the same way Defendants do here: "an injury is not compensable only if it does not arise out of and in the course of employment." *Folta v. Ferro Engineering*, 2014 IL App (1st) 123219, ¶29. The First District rejected the definition, holding that to define the fourth exception by reference to the second and third would render that fourth exception "superfluous." *Id.* ¶30. But the Supreme Court reversed, with an extended discussion of compensability that cited, among others, *Sjostrom*. 2015 IL 118070, ¶18.

Defendants conclude this means the First District's ruling is irrelevant, *Sjostrom* is good law, and compensability is essentially a restatement of the second and third exceptions. And because Plaintiffs here conceded the second and third exceptions are not met, Defendants conclude the fourth cannot be, either. But Defendants misconstrue the import of *Folta*, both in terms of what it says and what it means.

i. Scope of Reversal

On a purely technically level, though the Supreme Court reversed the First District's ruling, it did not address the First District's conclusion that the fourth exception had to be something more than a restatement of the second and third exceptions. Indeed, the Supreme Court remarked that the plaintiff there conceded

[10] As noted above, other courts have held that, where fingerprinting is made a condition of employment, it necessarily falls outside of the line of duty. *Supra* note 7. Such a holding would terminate the analysis here, in Plaintiffs' favor. Again, because neither party has raised the issue, the Court declines to address it further.

the injury "was accidental and arose out of and during the course of his employment." *Folta*, 2015 IL 118070, ¶16. If the Court agreed with the defendant there—and Defendants here—that meeting the second and third exceptions was sufficient, then that statement *alone* would be enough to end the case.

Not only does the Court *not* end there, but it uses that proposition to springboard into the meat of its opinion: a lengthy discussion of whether and how recoverability plays into compensability, the main issue upon which the Court reversed. *See id.* at ¶¶25–43. With respect to the First District's characterization of the fourth exception, the Supreme Court's reversal was on other grounds.

ii. A Broader Analysis

More generally, Defendants' reading is too simplistic. We know this because the Supreme Court tells us so in *Folta* itself. The paragraph discussing *Sjostrom* is part of a broader discussion of the Court's compensability caselaw. Indeed, the very next paragraph notes, with respect to *Sjostrom* and similar cases, "Although this court equated 'compensable' with 'line of duty,' the sole question raised in those cases was whether the plaintiff's injuries arose out of or in the course of his employment." After acknowledging the contextual limitations of the *Sjostrom* analysis, the *Folta* court describes how "In another line of cases we further refined our inquiry as to what is meant by compensable by considering whether an employee was covered under the Act where the essence of the harm was a psychological disability, and not a traditional physical injury." *Id.*

These cases consider compensability by looking to the nature of the injury itself. *Pathfinder* was the first, holding psychological injury compensable under the Act. *Pathfinder Co. v. Industrial Com.*, 62 Ill. 2d 556, 563 (Ill. 1976). Its progeny—unquestionably still good law—lead to the classification of "physical-mental" injury, which Plaintiff discusses by way of analogy slightly later on. *See Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, ¶30 (collecting cases and discussing compensability of "physical-mental" injuries).

That entire branch of the caselaw flows from an analysis of the fourth "compensability" exception as requiring something additional: an investigation of the nature of the injury. If the fourth exception was simply a regurgitation of the second and third, then the nature of the injury would be irrelevant, and nearly fifty years of caselaw would be fatally undercut.

Finally, we know Defendants' read of *Folta* is incorrect because the case says so. After recapping its entire compensability caselaw, the *Folta* court concludes "whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." 2015 IL 118070, ¶23. The Court goes on to discuss how recoverability fits in, but it conspicuously omits further discussion of the second or third exceptions. There may be quite a bit of overlap in the scope of the second, third, and fourth exceptions, but it is undeniably clear that, in the Supreme Court's view, compensability requires a separate analysis, one which this Court must now undertake.

2. A Note on Statutory Construction

Both parties spill some ink discussing principles of statutory construction, including whether and how one or the other statutes takes priority by virtue of being older, more specific, and so forth. Defendants propose that the Workers' Compensation Act trumps BIPA, and the exclusivity provision applies; Plaintiffs, unsurprisingly, propose the opposite.

Neither analysis is relevant here. Where the plain language of the statute admits of only one interpretation, it is dispositive of the inquiry. *Hadley v. Ill. Dep't of Corr.*, 224 Ill. 2d 365, 371 (Ill. 2007). Unambiguous statutes must be applied as written, without reference to the tools of statutory construction. *Id.*; *Taylor v. Pekin Ins. Co.*, 231 Ill. 2d 390, 395 (Ill. 2008). Those tools only come into play when there is an ambiguous statute to be constructed. And here, the conflict between the Workers' Compensation Act and BIPA does not arise from what either of them say: there is no ambiguity, and the plain language is largely irrelevant.

The Act does not preempt specific causes of action—nor could it, as it is designed to provide a general statutory scheme that precludes whole swathes of litigation. It is explicitly designed to provide a general rule that may indeed prevail over specific statutory causes of action.

BIPA, in turn, does not say anything about the Act. We know it applies in the employment context, because it notes how releases can be conditions of employment. 740 ILL. COMP. STAT. 14/15. But BIPA says nothing about the extent of its application in the employment context; as Defendants note, even if the Act barred a BIPA claim at law, it would still permit an employee to seek an injunction. *Id.* 14/20(4). BIPA *could* have been excluded from the Act's scope, *see* 410 ILL. COMP. STAT. 305/14 (AIDS Confidentiality Act's non-preemption provision), but the absence of such a provision does not mean that it is automatically preempted.

Statutory construction is simply a poor tool for this analysis. Each statute says what it says, plainly and unambiguously. The question for the Court's consideration cannot be answered by teasing out meaning from the language of the statutes, because neither addresses this type of interaction. Rather, the Court must examine the nature of the underlying cause of action—BIPA—through the rules governing the broader statutory scheme—the Act. It must, in other words, look beyond the language of either statute.

3. Nature of the Injury

Whether an injury is compensable depends on whether the type of injury "categorically fits within the purview of the Act." *Folta*, 2015 IL 118070, ¶23. Relevantly, "The purpose of the Act is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do." *Mytnik v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 152116WC, ¶36 (citing *Orsini v. Industrial Com.*, 117 Ill. 2d 38, 44 (Ill. 1987)).

The problem can be approached first by looking to what the Act covers, and second to what, exactly, a BIPA violation is. Both analyses reach the same conclusion: a BIPA injury is not compensable within the meaning of the Act.

i. Compensable Cases

Defendants are correct that the Act itself does not include a physical injury requirement. Half a century of cases have used various terms for it, but in sum, every type of injury held compensable under the Act includes some nexus to physical injury as a requirement of compensability.

The prototypical incident of workers' compensation is physical injury. This covers everything from discrete bodily injury, *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407, 409 (Ill. 1956), to repetitive stress from picking up items, *Mytnik*, 2016 IL App (1st) 152116WC, to an aircraft crash on a business trip, *Garland*, 2013 IL App (1st) 112121. Pure physical injury is largely self-explanatory, and not otherwise relevant in this case.

The Act's preclusion regime also extends somewhat beyond the employee in question. The exclusivity provisions will bar third-party claims against the employer that arise out of a workplace injury, such as loss of consortium by a spouse. *Bloemer v. Square D Co.*, 8 Ill. App. 3d 371, 373 (1st Dist. 1972). This is because the Act is designed to substitute for remedies "directly or indirectly resulting from injury to an employee," which includes certain derivative-type claims in its overall scheme. *Dobrydnia v. Indiana Group, Inc.*, 209 Ill. App. 3d 1038, 1042 (3d Dist. 1991).

Courts have also held psychological injuries are compensable, including the emotional shock of witnessing another's injury, even though the shock does not cause physical injury, *Pathfinder*, 62 Ill. 2d at 563; emotional distress caused by failure to render aid during a heart attack, *Collier*, 81 Ill. 2d at 237; and emotional distress caused by overworking in an environment of harassment, *Schroeder*, 2013 IL App (1st) 122483, ¶30.

Defendants attempt to circumvent this thread by citing to *Richardson*, which pronounces "the fact that the employee sustained no physical injury or trauma is irrelevant to the applicability of the Act." *Richardson v. County of Cook*, 250 Ill. App. 3d 544, 548 (1st Dist. 1993). The citation is misplaced; the very next line cites *Pathfinder*, which held emotional shock compensable. *Id.* In this context, it is clear *Richardson* simply means that no bodily physical harm occurred, as opposed to mental harm. Indeed, *Richardson* concludes that the injury there—claimed civil rights violations, among others—stemmed from an argument at work about the employee's duties. That mental harm was sufficiently close to the employment to be compensable under the Act. *Id.* at 59.

Richardson is easily explained by later cases, which offer a retrospective gloss on the importance of *Pathfinder*. Psychological injury may be compensable under the Act, and comes in two types: "physical-mental," where a physical event causes mental injury; and "mental-mental," where a specific event causes mental, but not physical, injury. *City of Springfield v. Industrial Comm'n (B.K.)*, 291 Ill. App. 3d 734, 738 (4th Dist. 1997). *Pathfinder* held that "mental-mental" claims could be compensable, even without minor or ephemeral physical injury. *Id.* (discussing *Pathfinder*, 62 Ill. 2d at 564.

In all instances, and regardless of whether a claimant suffers gross bodily harm or psychological damages, which can include a physical or mental manifestation, there is always a physical component involved, even if indirectly. Thus, it can be said that, compensability is tied to the presence of "demonstrable medical evidence of injury." *Toothman v. Hardee's Food Sys.*, 304 Ill. App. 3d 521, 533 (5th Dist. 1999).

None of the types of cases, fact patterns, or causes of action held compensable under the Act include the sort of injury that BIPA presents. The Court does not consider this issue to be covered in any meaningful sense by appellate precedent. Indeed, the fact that nothing like a BIPA injury has previously been held compensable is a strong indication that it is not compensable.

ii. The Nature of a BIPA Injury

From the other side of the inquiry, the Court can examine what a BIPA violation is. BIPA itself is a codification of an individual's "right to privacy in and control over their biometric identifiers and biometric information." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶33. It is, as the First District recently put, "a privacy rights law that applies inside and outside the workplace." *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶30.[11]

The Court discusses the precise nature of a BIPA violation with respect to its privacy implications below. *See* Part IV.B *infra* (1-year statute of limitations). Without engaging in that analysis just yet, the broad strokes of the statute make clear enough that BIPA remedies a type of injury fundamentally different from anything within the Workers' Compensation Act's scope.

BIPA is a unique statute with a unique concern: biometric data. Biometrics are unique and immutable identifiers, and the ramifications of their use are not fully known. *See, e.g.*, 740 ILL. COMP. STAT. 14/5 (legislative findings). BIPA does not constrain the use of biometrics; as Defendants point out, their biometric timeclocks are perfectly legal, and such systems undoubtedly provide concrete benefits to both employer and employee in terms of ease of use, accuracy, and so forth. BIPA does not concern itself with these uses—at least, not directly.

Instead, BIPA protects biometrics by requiring the disclosure of certain types of information, creating a statutory regime under which individuals know, at all times, who has their biometric data, how it is stored, and what will happen to it once the individual's relationship with the collecting entity comes to an end. 740 ILL. COMP. STAT. 14/15. This scheme only functions if it applies to all biometric-collecting entities; because biometrics are unique, one collection exception is one exception too many. And by giving individuals information about how their data is collected, it permits them to make informed decisions about their biometrics. *See* Matthew B. Kugler, *From Identification to Identity Theft: Public Perceptions of*

[11] This language does not necessarily mean that the Workers' Compensation Act's exclusivity provision does not apply. As Defendants astutely point out, BIPA permits injunctive relief. 740 ILL. COMP. STAT. 14/20(4). Even if the Act barred damages claims, employees could still sue for purely injunctive relief.

Biometric Privacy Harms, 10 U.C. IRVINE L. REV. 107, 130–35 (2019) (lengthy discussion of legislative history and purpose of BIPA).

BIPA is not, in other words, aimed at employers in any meaningful way. It applies to payment systems, *see id.* at 130 (discussing Pay By Touch bankruptcy), amusement parks, *see Rosenbach*, 2019 IL 123186, ¶4, and employers equally. It applies both before and after the employment relationship: before, because it can be a condition of employment, which the potential employee can choose to accept or reject, *see* 740 ILL. COMP. STAT. 14/10; and after, because its data destruction requirements can trail for up to three years, *id.* 14/15(a).

BIPA creates a statutory cause of action to vindicate its protections. A violation of those protections alone, without actual damages, much less physical ones, creates a "real and significant" injury. *Rosenbach*, 2019 IL 123186, ¶34. The fact that the injury is complete *without* actual damages is a stark divergence from normal workers' compensation claims, which by definition seek compensation.[12] A BIPA injury is solely a legal injury, without any physical component.[13]

To the extent employers run afoul of BIPA's requirements, the alleged violations are not intrinsically connected to the employment by anything more than chance. Use of biometrics in timeclocks does not convert a BIPA claim to a wage or hours claim. *Liu*, 2019 IL App (1st) 182645, ¶30. Likewise, use of biometrics in the workplace does not convert a BIPA claim to anything reasonably within the scope of workers' compensation, much less categorically so as the caselaw demands.[14]

BIPA is thus similar to a spoliation claim: spoliation claims are not compensable under the Act even if the underlying injury triggering the spoliated litigation *was* covered by the Act. *Schusse*, 334 Ill. App. 3d at 969 (reviewing caselaw).

Because BIPA injuries do not categorically fit within the purview of the Workers' Compensation Act, they are not compensable under the Act. Because BIPA injuries are not compensable under the Act, the fourth exception to the exclusivity provision is satisfied, and the Act will not bar the claim.

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[12] At least one court has founded its ruling on this distinction alone. *Carrasco*, *supra* note 5, at p.2.
[13] The fact that the injury accrues by way of an employee touching a timeclock is both *de minimis* and irrelevant. Biometrics can be collected remotely, as exemplified by facial recognition technology. *See, e.g., Patel v. Facebook, Inc.*, 932 F.3d 1264, (9th Cir. 2019) (facial recognition class settlement).
[14] Plaintiffs point to a number of foreign cases holding that similar privacy and statutory regulation schemes are not preempted by other workers' compensation acts. *See, e.g., Marino v. Arandell Corp.*, 1 F. Supp. 2d 947, 949–50 (E.D. Wis. 1998) (privacy statute); *Busby v. Truswal Systems Corp.*, 551 So. 2d 322, 325 (Ala. 1989) (invasion of privacy); *Vainio v. Brookshire*, 258 Mont. 273, 280 (Mont. 1993) (emotional pain and suffering). None of these are particularly good comparators, as each state's workers' compensation exclusivity provision is drafted slightly differently. Yet it is worth noting that no one else considers this type of injury compensable, as further evidence of its categorical exclusion from the realm of workers' compensation generally.

IV. Statute of Limitations

There are two potentially applicable statutes of limitation: Section 13-201, which provides a one-year period for privacy claims involving publication, and Section 13-202, which applies a two-year period to penal statutes and personal injury claims. BIPA protects privacy by controlling information, and it is the unique nature of that control which gives rise to its unique claims and cause of action.

Section 13-201 does not apply, because none of the claims actually pled involve publication. Furthermore, even if they somehow did, the Court is unconvinced that the "dissemination" language of BIPA is sufficient to constitute "publication" within the meaning of Section 13-201.

Section 13-202 does not apply because BIPA is remedial, not penal. The Supreme Court has laid out a clear test, which the statute does not pass. Furthermore, recent caselaw on the Telephone Consumer Protection Act provides a useful analogy. Finally, BIPA certainly does not present a personal injury.

Because the five-year statute of limitations applies, questions concerning claim accrual are moot, and the Court declines to address them.

A. Selecting a Statute

BIPA does not contain a statute of limitations. Where a cause of action does not identify a limitations period, it must be determined as a matter of law. *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 466 (Ill. 2008). Section 13-205 provides the default rule: "all civil actions not otherwise provided for" are subject to a five-year statute of limitations. 735 ILL. COMP. STAT. 5/13-205. The question then becomes whether another limitations period applies.

Where multiple statutes of limitation apply, the correct statute is determined by—once more—the nature of the injury. *Id.* at 466–67 (quoting, among others, *Armstrong v. Guigler*, 174 Ill. 2d 281, 286–87 (Ill. 1996)). Specifically, this inquiry looks to the legal injury itself, rather than the facts from which it sprung, *id.* at 466 (citing *Armstrong*, 174 Ill. 2d at 286–87), and to the liability imposed, rather than the relief sought, *id.* at 467 (citing *Armstrong*, 174 Ill. 2d at 291). If multiple statues should apply, the more specific statute takes precedence. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 196 (Ill. 1992) (citations omitted).

The Court notes that this is an inquiry of law, not of public policy. *See Bowman*, 229 Ill. 2d at 466–467. Defendants do not explicitly make a policy argument, but they do discuss the policy ramifications of the various competing options.[15] The correct statute of limitations—and, perhaps more specifically, the determination of when each claim accrued, and whether the alleged injuries are singular, serial, or continuous—has a tremendous impact on Defendants' liability.

[15] In this respect, they differ from the defendants in *Robertson v. Hostmark*, who explicitly urged application of the shortest possible limitations period on policy grounds. *Robertson I*, *supra* note 5, at pp. 3–4. Their argument was soundly rejected, and in the dozen written opinions addressing the issue since, the Court found no indication that any other defendants tried to renew it.

The questions of policy and damages Defendants raise are extremely important ones, but they are questions for another day. The issue before the Court is one of the statute of limitations, not of what may come next.

B. Section 13-201: Privacy Claims

The first of two alternative statutes of limitation is Section 13-201:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILL. COMP. STAT. 5/13-201. Defendants offer substantially more specificity in their argument, but the core premise is straightforward: BIPA is primarily concerned with privacy, and so the statute of limitations for privacy claims should apply. Privacy is, after all, in the name. *See, e.g.*, *Rosenbach*, 2019 IL 123186, ¶34 (discussing BIPA's role in protecting privacy rights).

The inquiry here must be specific, because it looks to the nature of the legal injury itself, and the basis for liability. BIPA provides a single cause of action in Section 20, which provides that a party may recover for negligent violations, intentional or reckless violations, fees and costs, and injunctive relief. 740 ILL. COMP. STAT. 14/20(1)–(4). Underlying this single cause of action, BIPA provides five separate proscriptions in Section 15: five discrete violations which each give rise to liability. *Id.* § 14/15(a)–(e).

Each of these violations is a separate injury, and the Court finds it beneficial to analyze each separately. Crucially, Section 13-201 does not apply to privacy claims generally. Rather, it applies to privacy actions involving *publication*. Because none of the pled claims involve publication, Section 13-201 does not apply.

1. Section 15(a) Written Policy Claims

Section 15(a) requires an entity subject to BIPA to develop and publicly promulgate a written policy establishing a retention schedule and destruction policy for all collected biometric data. 740 ILL. COMP. STAT. 14/15(a). It requires that biometric data be destroyed within the earlier of 3 years of the entity's last interaction with the individual from whom information was collected, or when the purpose for collection of such information is satisfied.

The plain language of Section 13-201 is clear and unambiguous: it only governs (a) slander, (b) libel, or (c) "publication of matter violating the right of privacy." 735 ILL. COMP. STAT. 5/13-201. BIPA does not present either a slander or libel claim. The only way Section 13-201 could apply to a Section 15(a) claim, then, is under that third category.

Courts have interpreted Section 13-201's third class of torts to mean that the statute only applies to "privacy torts involving publication." *Benitez v. KFC Nat'l Mgmt. Co.*, 305 Ill. App. 3d 1027, 1034 (2d Dist. 1999). *See id.* at 1035 (plain

language of statute controls, and where tort was neither enumerated by 13-201 nor involved publication, 13-201 did not apply).

Publication is not an element of a Section 15(a) claim. Indeed, it is hard to see how it could be. Section 15(a) requires that entities develop a biometrics policy "made available to the public." 740 ILL. COMP. STAT. 14/15(a). It says nothing about individuals, much less private information. Section 13-201 cannot apply.

2. Section 15(b) Disclosure Claims

Section 15(b) requires an entity to take three actions prior to collecting biometric data: (1) disclose that biometrics are being collected, (2) disclose the purpose of the collection and duration of retention, and (3) obtain a written release for such collection. 740 ILL. COMP. STAT. 14/15(b).

Publication is not an element of a Section 15(b) claim. And, as with Section 15(a) claims, it is hard to see how publication would fit in here, either. The allegations are that Defendants use biometric timekeeping systems for every employee, and BIPA permits them to condition employment on executing a written release. 740 ILL. COMP. STAT. 14/20. This entails that all employees either did, or did not, receive BIPA disclosures or execute BIPA waivers. Thus, the fact that any given employee received a disclosure or executed a waiver would be no more private than the fact of their employment in the first place. Once again, Section 13-201 cannot apply.

3. Section 15(d) Dissemination Claims

Section 15(d) provides that no entity in possession of biometrics may "disclose, redisclose, or otherwise disseminate" those biometrics unless one of four exceptions applies, under which the disclosure is (1) consented to, (2) necessary to complete a financial transaction, (3) required by law, or (4) pursuant to warrant or subpoena. 740 ILL. COMP. STAT. 14/15(d).[16]

The bulk of Defendants' argument on Section 13-201 focuses on the ramifications of Section 15(d)'s disclosure language, and whether dissemination of biometrics would cause the tort to fall within the scope of Section 13-201's "publication" language.[17]

These arguments are particularly curious because Plaintiffs do not raise a Section 15(d) claim. Both Complaints acknowledge the possibility that further dissemination may have occurred, and both Complaints name NCR Corporation as a respondent in discovery, in the belief that NCR may possess information to identify additional entities that may have possessed biometric data. The class definitions are broad enough to encompass any claim under Section 15, if one were

[16] Section 15(c) prohibits profiting by way of biometrics, and is not implicated here, or otherwise suggested by the employment context. 740 ILL. COMP. STAT. 14/15(c). Section 15(e) requires that the information be stored securely. *Id.* § 14/15(e).

[17] The Court uses "dissemination" as shorthand to indicate disclosure, redisclosure, or dissemination within the meaning of Section 15(d). These are three different terms, but for the present discussion, the differences are irrelevant.

made. But nowhere do the Complaints allege that Defendants disseminated biometrics.[18] At the risk of stating the obvious, Section 13-201 does not apply to a claim unpled.

4. Section 15(d)'s Implications

Defendants attempt to salvage their core publication argument by making it anyway, arguing that the Section 15(d) analysis controls, regardless of whether a claim is explicitly made or not. The Court is not convinced. First, Defendants' statutory interpretation would wag the dog by the tail, and is not particularly logical. Second, even if Section 15(d) were dispositive, "dissemination" under BIPA does not equate to "publication" so as to bring any BIPA claim within the scope of Section 13-201.

i. Connecting the Sections

Defendants argue that Sections 15(b) and 15(d) are "on equal footing." They point out that *Rosenbach* characterizes a Section 15(b) violation as a real and significant injury. 2019 IL 123186, ¶34. And, BIPA itself connects all four types of Section 15 violation to the same statutory damages. 740 ILL. COMP. STAT. 14/20(1). Defendants charge that, when *Rosenbach* made the sections "functionally equivalent," the Supreme Court necessarily entailed that all four be lockstepped to Section 13-201's one-year limitations period.

Bluntly, *Rosenbach* said no such thing. It held the Section 15(b) injury real and significant, because of its privacy implications. The only claim on the table in *Rosenbach* was a Section 15(b) claim. 2019 IL 123186, ¶11. Unsurprisingly, it did not discuss Section 15(d), much less equivocate it to anything. Its discussion of the privacy implications of a Section 15(b) claim do not change the fact that Section 13-201 is still contingent on publication—privacy alone is insufficient.

Furthermore, Defendants' own argument is self-defeating. Even if Sections 15(b) and 15(d) were "functionally equivalent"—an interpretation contrary to the plain language of the statute—there is no logical reason why that would entail lockstepping them both to the shorter statute of limitations. Certainly the Court can see none, and Defendants have neither tried to explain nor cited authority in support of their suppositions.

Defendants' attempt to read an illogical web of statutory dependencies into a decision silent on the issue necessarily fails.

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[18] As Plaintiffs note in their briefing, if they subsequently discovered information sufficient to ground a Section 15(d) claim, the discovery rule might be implicated, which is normally a question of fact not suitable for resolution on a Motion to Dismiss. *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 153–54 (Ill. 1985). *See also Heard, supra* note 5, at p. 10 (denying motion to dismiss a Section 15(d) claim, based on factual disputes surrounding timing of when and how frequently dissemination occurred).

ii. Dissemination and Publication

At the core of it, Defendants argue that dissemination under Section 15(d) necessarily entails "publication" within the meaning of Section 13-201. They argue, among other things, that "publication" means any dissemination of private information, and by alleging that Defendants collected fingerprints, Plaintiffs have alleged that their fingerprints have been "published" into the timekeeping systems. Under this logic, because all biometric data must be collected, if collection is publication, then any BIPA claim necessarily entails publication, and triggers Section 13-201.

In order for Section 13-201 to apply, publication must be an element of the claim. *Benitez*, 305 Ill. App. 3d at 1034. Publication at common law generally means disclosure to the public at large. *Cordts v. Chi. Tribune Co.*, 369 Ill. App. 3d 601, 607 (1st Dist. 2006). Publication may be satisfied where the disclosure is to a smaller group of persons with a "special relationship" to the subject. *Id.* at 607–08 (quoting *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 980 (1st Dist. 1990) (itself quoting RESTATEMENT (SECOND) OF TORTS, §652(d), cmt. a (1977))).

Defendants pin their argument on the smaller group theory, citing *Popko* to support their assertion that publication can be satisfied by any communication to a third party, even within a corporation. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 264–65 (1st Dist. 2005). Because other employees were presumably involved with the collection of biometric data, Plaintiffs' biometrics would have been published to those other employees.

Setting aside the fact that these facts are themselves far afield of the Complaints—which do not, it is worth repeating, raise any sort of Section 15(d) claim—*Popko* is not compelling. Its discussion of publication is in the context of defamation, which has a much lower threshold for publication. The Restatement of Torts—which Illinois courts have explicitly adopted for defamation law, *Popko*, 355 Ill. App. 3d at 266—lays out the distinction quite clearly. Communication to a single person is sufficient publication for defamation. RESTATEMENT (SECOND) OF TORTS, §577, cmt. b (1977). But in the privacy context generally, publication must be to the public at large. *Id.* §652D, cmt. a (explicitly distinguishing defamation publicity).

Defendants' other authority is *Blair*, in which the court held Section 13-201 applicable to the Right of Publicity Act, which did not contain a statute of limitations. *Blair v. Nev. Landing P'ship*, 369 Ill. App. 3d 318, 323 (2d Dist. 2006). The Right of Publicity Act did not, however, spring into the world fully formed. Rather, it replaced common-law appropriation of likeness, which was unquestionably subject to Section 13-201. *Id.* at 322–23. *Blair* simply carried through to the statute what had been the common-law rule, and its discussion is not particularly relevant here.

BIPA is a freestanding cause of action, not connected to any common-law rights that came before, and without a preexisting statute of limitations to draw on. Through the lens of publication in the privacy tort context generally, it is clear a Section 15(d) claim, which entails disclosure, redisclosure, or other dissemination of biometrics, does not necessarily create a "publication" within the meaning of Section

13-201. It is certainly possible that a Section 15(d) claim *could* be coupled by publication; for instance, an entity could run a full-page selection of fingerprints in the *Chicago Tribune*.[19] But the element of "dissemination" under Section 15(d) is not tantamount to "publication." And because publication is not an element of the claim, *see Benitez*, 305 Ill. App. 3d at 1034, Section 13-201 does not apply.

C. Section 13-202: Penal Statutes

The second of two alternative statutes of limitation is Section 13-202. It is lengthy, but the operative language is brief:

> Actions . . . for a statutory penalty . . . shall be commenced within 2 years next after the cause of action accrued . . . .

735 ILL. COMP. STAT. 5/13-202. Unlike the Section 13-201 analysis, which looked at each claim individually, the determining factor here is whether BIPA is penal, remedial, or both. Consequently, the focus is not on the specific claims of Section 15, but on the relief permitted under Section 20. 740 ILL. COMP. STAT. 14/20.

1. The *Landis* Test

Determining whether a statute is penal for the purposes of Section 13-202 is a three-part test. A penal statute "must: (1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff." *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 13 (Ill. 2009) (citing *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 738 (2d Dist. 1982)). A statute must meet all three requirements to be considered penal. *Id.* at 15.

The first of the three requirements is satisfied, because BIPA imposes automatic liability. Indeed, *Rosenbach* confirms that the injury is complete and significant at the point in time when the statute is not complied with. 2019 IL 123186, ¶34.

The second of the three requirements is not satisfied. BIPA does not set forth a predetermined amount of damages. Rather, it provides that an injured party may recover the *greater* of liquidated damages, or actual damages. 740 ILL. COMP. STAT. 14/20(1) (for a negligent violation, $,1000), *id.* § 14/20(2) (for an intentional or reckless violation, $5,000). *Rosenbach* held that actual damages need not be stated to sustain a claim, 2019 IL 123186, ¶36, and indeed the Court suspects that most BIPA cases currently pending claim liquidated, rather than actual, damages. But the bare fact remains that the damages provision is not predetermined, but rather depends on the injury suffered.

The third of the three requirements is not satisfied for much the same reason. BIPA permits the recovery of liquidated *or* actual damages. A claim for actual

[19] And, in such a situation, application of Section 13-201 might well be reasonable. *See Webb v. CBS Broad. Inc.*, 2009 U.S. Dist. LEXIS 38597, at **7–8 (N.D. Ill. 2009) (time-barring injury based on publication, but permitting claim against the content itself to stand).

damages would of course be with regard to the actual damages suffered. Notably, the *Landis* test does not discuss what any given plaintiff has pled. Rather, it looks to the statute itself, and what is *possible* under the statute. Because it is possible that a plaintiff's actual damages exceed the liquidated damages, the liability imposed is related to the damages suffered, and this requirement fails. *See also Sternic v. Hunter Props., Inc.*, 344 Ill. App. 3d 915, 918–19 (1st Dist. 2003) (where statutory liability was the greater of actual damages or two months' rent, because the fixed amount was contingent on actual damages, it was related to actual damages).

Because the second and third prongs of the *Landis* test are not met, BIPA is not a penal statute. Section 13-202 cannot therefore apply.

2. *Standard Mutual* and the TCPA

Both parties discuss *Standard Mutual*, a recent Illinois Supreme Court case discussing whether the Telephone Consumer Protection Act was penal or remedial, and concluding that it was remedial. *Std. Mut. Ins. Co. v. Lay*, 2013 IL 114617. BIPA and the TCPA are quite similar mechanically, and the analogy is well-taken. *Standard Mutual* is an extraordinarily good comparator, and an extended discussion is appropriate.

Standard Mutual originated as an insurance dec action. The defendant, Lay, engaged a fax service to send its ads to five thousand Illinois fax machines. 2013 IL 114617, ¶4. Unbeknownst to Lay, that was a TCPA violation, and a class action lawsuit soon followed, which settled for $1.7 million. *Id.* ¶9. Lay tendered the defense to its insurer Standard Mutual, which defended under a reservation of rights. *Id.* ¶¶7, 11. Standard Mutual filed its declaratory action on a theory that the TCPA was a punitive statute, and punitive damages are uninsurable as a matter of law. *Id.* ¶11. Trial and appellate courts agreed, and thus the issue proceeded to the Illinois Supreme Court. *Id.* ¶16.

The TCPA prohibits, among other things, the unsolicited sending of faxes. 47 U.S.C. §227(b)(1)(C). It contains a private right of action, under which a person may seek injunctive relief and file an action "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." *Id.* §227(b)(3)(B). Willful or knowing violations have a multiplier, under which damages may triple. *Id.* §227(b)(3).

The *Standard Mutual* court founded its analysis on the *Landis* test and its three factors. 2013 IL 114617, ¶30 (citing *Landis*, 235 Ill. 2d at 12–13). Examining the purpose of the TCPA, it held in no uncertain terms that the statute was remedial, not penal. *Id.*[20]

Discussing the purpose of the TCPA, the *Standard Mutual* court noted that, though a single fax was a minor harm, the aggregate violation was compensable, and represented by a $500 sum per instance. 2013 IL 114617, ¶31. That $500

[20] Thus, Defendants' critique that *Standard Mutual* was an insurance dec case, rather than a statute of limitations case, falls flat. Regardless of the reason why, it engaged in the exact same analysis a Section 13-202 statute of limitations inquiry would mandate.

amount was intended as, among others, an incentive for private enforcement, because actual losses would be trivial. *Id.* at ¶32. Whether viewed "as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the $500 fixed amount clearly serves more than purely punitive or deterrent goals." *Id.* This took the liquidated damages provision firmly out of the realm of the punitive.

Even the treble damages provision did not change the outcome. By analogy to the Illinois Consumer Fraud Act, because treble damages were one part of the TCPA's broader regulatory scheme, it was a supplemental aid to enforcement, not a punitive provision. *Id.* at ¶33 (quoting *Scott v. Association for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 288 (Ill. 1981)).

The analogies to BIPA are self-evident, and laid out in some detail by Plaintiffs in their briefing. The key operative provisions of each statute are remarkably similar: TCPA permits recovery of "actual monetary loss from such a violation, or . . . $500 in damages for each such violation, whichever is greater," with treble damages on willful or knowing violations, while BIPA permits "liquidated damages of $1,000 or actual damages, whichever is greater," with liquidated damages of $5,000 for intentional or reckless violations. *Compare* 47 U.S.C. §227(b)(3)(B) *with* 740 ILL. COMP. STAT. 14/20(1), (2).

It is clear that, by permitting recovery of liquidated *or actual* damages, BIPA plants itself firmly as remedial, rather than penal. Indeed, other statutes that regulate through private enforcement often share the "greater-of" model by offering liquidated or statutory damages. These include the Illinois Cable Privacy Act, which permits actual, statutory, and punitive damages, 720 ILL. COMP. STAT. 5/16-18(h)(2)(C), 5/16-18(h)(2)(D), 5/16-18(h)(3). *see Joe Hand Promotions, Inc. v. Mooney's Pub, Inc.*, 2014 U.S. Dist. LEXIS 134947, at **20–21 (C.D. Ill. 2014); portions of the Chicago Residential Landlord and Tenant Ordinance, Chi. Muni. Code §§ 5-12-110(e), 5-12-150 (hereafter "CMC"), *see Sternic*, 344 Ill. App. 3d at 918–19 (RLTO provisions not penal), and the AIDS Confidentiality Act, 410 ILL. COMP. STAT. 305/13(1)–(2).[21]

Rosenbach discusses the purpose of BIPA at some length. It concludes that private enforcement of BIPA for statutory violations alone is a necessary component in the statutory scheme to provide "the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." 2019 IL 123186, ¶37. BIPA's purpose, and the liquidated damages it provides, "clearly serve[] more than purely punitive or deterrent goals." *Standard Mutual*, 2013 IL 114617, ¶32. BIPA is remedial.

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[21] Plaintiffs' citation to *Scott* for the proposition that ICFA is remedial is unhelpful. *Scott*, 88 Ill. 2d at 288. ICFA permits of private enforcement only for actual damages. 815 ILL. COMP. STAT. 505/10a(a). The *Attorney General* may additionally seek various civil penalties. *Id.* §505/7(b)–(c). But the AG is not subject to a statute of limitations anyway, so the point is somewhat moot. *Illinois v. Tri-Star Indus. Lighting, Inc.*, 2000 U.S. Dist. LEXIS 14948, **7–8 (N.D. Ill. 2000).

3. *Namur* and Split Identity

Defendants counter with *Namur*, a 1998 case discussing the Chicago Residential Landlord and Tenant Ordinance. *Namur v. Habitat Co.*, 294 Ill. App. 3d 1007 (1st Dist. 1998). In *Namur*, the court considered two RLTO provisions. One provided for damages equal to twice the security deposit, plus five percent. CMC § 5-12-080(f). The other grants a flat $100 for failure to tender an RLTO summary document at renewal. CMC §5-12-170. *Namur* noted that some portions of the RLTO were penal, but the statute also had some remedial purposes. 294 Ill. App. 3d 1010–11 (citations omitted).

Namur held that both specific provisions at issue there were penal: the one specified a formula to calculate damages, and the other was a flat charge. *Id.* at 1011. The fact that damages were calculated depending on the security deposit was irrelevant, because the security deposit was not lost or seized in any way, and did not itself represent damages. It simply provided a way to calculate the number. *Id.*

Defendants posit that Plaintiffs paint with too broad a brush: *Namur* shows that it is possible for a statute to have parallel purposes, penal and remedial alike, and that it is possible to parse out the statute with more granularity than Plaintiffs propose. Curiously, Defendants do not actually discuss what such a split analysis would look like.

On *Namur*'s analysis, the Court does not believe BIPA has such a split identity. Even if it did, *Namur* itself does not suggest that the relevant portions would be penal. And finally, it seems evident that, to whatever extent *Namur* set out a flat rule, it has since been overruled by implication of *Landis* and *Standard Mutual* alike.

First, it is worth noting that *Namur* addressed the RLTO, a sprawling collection of provisions and causes of action. In the RLTO context, cases address the penal-remedial distinction on a section-by-section basis. *Sternic*, 344 Ill. App. 3d at 918 (citing *Namur*). So, while *Namur* parses out the distinctions between sections within a much larger statute, the cause of action remains the smallest unit of analysis. BIPA, by contrast, contains only one cause of action: Section 20. *Namur* never proposed to split up a single cause of action into penal and remedial portions, and the Court sees no reason to do so here.

Second, the ordinances at issue in *Namur* provided for a formula and a flat fine. The formula there was pegged to the security deposit, but had no connection to actual damages. 294 Ill. App. 3d 1011. And the flat fine was exactly that. *Id.* Whereas the RLTO did not refer to or account for actual damages BIPA does, by offering plaintiffs the choice. *Namur*'s analysis simply does not apply.

Third and finally, Defendants' quotation of *Namur* suggests they mean to extract a rule that statutes "are penal because they specify either the amount of damages that can be awarded for violations or the formula by which the amount of damages is to be calculated." *Id.* at 1011. And BIPA sets forth, among other things, fixed liquidated damages. 740 ILL. COMP. STAT. 14/20(1)–(2). To the extent *Namur* may have articulated such a rule—and the Court is unconvinced that it did—it is clearly no longer good law. *Landis* makes clear that the *absence* of actual damages

is a defining factor under the third prong. 235 Ill. 2d at 14. And *Standard Mutual,* of course, holds the TCPA and its alternative damages calculation remedial. 2013 IL 114617, ¶32.

Under the *Landis* test, BIPA is remedial. Such a characterization accords with the conclusion of *Standard Mutual,* and is unchanged by any aspect of *Namur.*

D. Section 13-202: Personal Injury

Section 13-202 is a large provision, and Defendants argue that another portion of its language is also relevant here:

The second of two alternative statutes of limitation is Section 13-202. It is lengthy, but the operative language is brief:

> Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . . .

735 ILL. COMP. STAT. 5/13-202. Defendants advance this argument only briefly, abandoning it on Reply and at hearing, but it bears brief discussion. Because Plaintiffs allege that Defendants negligently violated BIPA, and that the negligent acts caused Plaintiffs injury, it therefore alleges a "personal injury (negligence) claim" subject to Section 13-202's "injury to the person" language.

The flaws in such a position are self-evident, perhaps nowhere more than the bare fact that BIPA has nothing to do with personal injury. *See also* Part III.C *supra* (discussing, at length, how BIPA *differs* from personal injury claim).

More to the point, Section 13-202's "personal injury" language is even narrower than the compensability analysis under the Workers' Compensation Act. "Illinois courts uniformly have interpreted the language in section 13-202 narrowly . . . . In other words, contrary to its express language, section 13-202 does not extend to all personal injury claims." *Smith v. National Health Care Services,* 934 F.2d 95, 97–98 (7th Cir. 1991). This is in part because Section 13-202 lists a great number of torts, the enumeration of which cuts back the scope of "personal injury." *See Berghoff v. R.J. Frisby Mfg. Co., Div. of Western Capital Corp.*, 720 F. Supp. 649, 653 (N.D. Ill. 1989).

BIPA does not present—and, barring some sort of freak electrical short in a fingerprint scanner, appears largely incapable of presenting—a personal injury claim. Section 13-202 does not apply.

Because neither Section 13-201 nor Section 13-202 applies, BIPA is a civil action not otherwise provided for. *See* 735 ILL. COMP. STAT. 5/13-205. Pursuant to Section 13-205, it is subject to a five-year statute of limitations. All Plaintiffs' claims are timely.

E. Accrual of Claims

The final arguments concern when, exactly, the various Plaintiffs' claims accrued. The Court's prior rulings make this issue moot, but the Court sketches the argument here for completeness.

Defendants, quoting familiar claim-accrual language, assert that Plaintiffs' claims accrued when they knew or reasonably should have known of their injury, and that it was wrongfully caused. *E.g.*, *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (Ill. 1981) (citations omitted). Plaintiffs, just like Defendants, are presumed to know the law. *Jones*, 2013 IL App (1st) 122437, ¶22. Therefore, argue Defendants, if Plaintiffs indeed started working, had their biometric data collected, but did not receive sufficient disclosures, they should have known at that time that a BIPA claim had accrued.[22]

Plaintiffs counter with two theories. First, the violation can be viewed as s series of independent acts: each time a finger was scanned, a new BIPA claim accrues. *See Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 349 (Ill. 2002). Thus, though initial violations may have occurred outside the statute of limitations, more recent ones are still timely.

Second, because each collection occurs within the context of continuous employment, the BIPA violation could be viewed as a continuing injury. *See Taylor v. Bd. of Educ.*, 2014 IL App (1st) 123744, ¶46. Under such a theory, the statute of limitations is held in abeyance, and only starts to run when the course of conduct comes to an end.[23]

Here, Plaintiff Owens started her employment in 2014, and filed less than four years later; Plaintiff Garcia started her employment in 2016, and filed just over two years later; Plaintiff Young started his employment in 2017, just over a year before filing. Because the Court has held that BIPA is subject to a five-year statute of limitations, all potential claims are timely, even if the claims accrued on the date employment began. It is therefore not necessary to address the issue of claim accrual at this time.[24]

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[22] It is unclear how, if at all, this analysis would apply to a Section 15(d) dissemination claim, if one were pled. *See* Part IV.B.3 *supra* (no such claims made). Presumably, the discovery rule would be implicated. *See* note 18 *supra*.

[23] The Court observes that its colleagues have favored the second theory, that of the continuing tort. *See Cortez*, *supra* note 5, at pp 7–9; *Woodard*, *supra* note 5, at pp. 14–15. *See also Heard*, *supra* note 5, at p. 10 (continuing tort presents question of fact). *But see Robertson I*, *supra* note 5, at pp. 4–5 (claim accrues at first scan).

[24] The Court recognizes that whether BIPA presents a single continuing injury or a series of repeated injuries has tremendous implications for Plaintiffs' potential recovery—to say nothing of Defendants' exposure. Because resolution of the question is not necessary for the pending motion, the Court declines to do so in this particular procedural posture.

F. Further Proceedings

The Court is aware that a number of the questions treated above are pending before other, superior courts.[25] Because this case was briefed, argued, and taken under advisement prior to those developments, the Court thought it appropriate to dispose of the pending matters.[26]

To the extent further developments may affect these cases, the Court has no doubt that the appropriate parties will file appropriate motions. In light of the constellation of external litigation, however, the Court will stay Defendants' responsive pleading until the next status date, when the parties can advise as to their intended courses of action.

V. Orders

Defendants' Motion to Dismiss is denied in its entirety.

Defendants' obligation to file a responsive pleading is stayed until the next status in this matter. At that time, the Court anticipates setting a pleadings deadline, unless the parties request that proceedings be further stayed.

This matter is set for status on **Friday, June 26, 2020, at 10:00 a.m.** via teleconference. The Court will contact the parties in advance of the hearing and provide specific hearing information.

Chambers staff will email a copy of this Order to the parties.

ENTERED
Judge Anna Loftus
JUN 08 2020
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:

/s/ Anna M. Loftus

Judge Anna M. Loftus, No. 2102
June 8, 2020

[25] The Workers' Compensation Act issue has been certified to the First District in *McDonald II*, and to the Third by *Marion II*. The Section 13-201 one-year statute of limitations has been certified to the First District by *Tims II* and *Cortez*, and to the Third by *Marion II*. The Section 13-202 two-year statute of limitations has certified to the Third District by *Marion II*. And one form of the accrual question has been certified to the First District by *Cortez*, while another certification is imminent in *Robertson III*. The Court is without specific knowledge of the status of those various appeals.

[26] The Court notes that this is one of three concurrently issued written opinions addressing BIPA. The other two are *Young v. Tri-City Foods*, 18 CH 13114 (Cir. Ct. Cook Co., June 8, 2020), which is substantially similar to this one, and *Wells v. Relish Labs*, 19 CH 00987 (Cir. Ct. Cook Co., June 8, 2020), which treats the same issues but is not as closely related.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Joe Young, *individually and on behalf of all others similarly situated,* Plaintiff, v. Tri City Foods, Inc., Defendant.	No. 18 CH 13114 Calendar 15 Hon. Anna M. Loftus Judge Presiding

MEMORANDUM OPINION & ORDER

This case, a proposed class action under the Biometric Information Privacy Act, presents a number of fundamental questions about the BIPA statute itself, its interaction with other legislative schemes, and the nature of a BIPA injury. These questions are raised by way of Motions to Dismiss, which the Court denies.

BIPA is not preempted by the Workers' Compensation Act. A BIPA injury is not the type of injury that is compensable under the Act. Because it is not compensable, the Act's exclusivity provision does not apply.

BIPA is subject to a five-year statute of limitations. The one-year statute of limitations only applies to privacy torts involving publications. Plaintiffs have made no such claim, and even if they did, BIPA does not require publication. The two-year statute of limitations applies to penal statutes. BIPA provides for statutory liquidated damages, but only as part of a broader remedial scheme that permits for actual damages. It is not penal, and the two-year statute does not apply either.

Because neither specialized statute of limitations applies, BIPA is subject to the five-year "catchall" statute of limitations. In light of this holding, the Court need not address when or how the various Plaintiffs' claims accrued, because under a five-year statute of limitations, all claims are timely.

The Motion to Dismiss is denied in its entirety.

I. Background

This opinion discusses two cases: *Owens v. Wendy's*, 18 CH 11423, and *Young v. Tri City Foods*, 18 CH 13114. Each case is a BIPA class action brought by employees; though the parties are different, Plaintiff's counsel, Defendants' counsel, and even the third-party respondent in discovery are the same. Indeed, in almost every aspect relevant here, the cases are essentially the same.[1]

The cases have not been consolidated or transferred, and are not formally connected. Rather, they were both randomly assigned to the same calendar, and have been lockstepped since case management. The parties capitalized on this serendipity and have briefed and argued the (separate, but almost identical) Motions to Dismiss in parallel. The Court's ruling is the same in both cases, and so substantially similar orders will be entered in both.

With that having been said: each Complaint is pled as a putative class action, on behalf of all employees who used a biometric time clock during a particular timeframe. Because the Complaints are framed as such, each individual Plaintiffs' factual circumstance is less relevant—in a proper class, the named plaintiff(s) would largely be fungible, because the underlying legal issues would predominate.

Nevertheless, because no class has been certified, the Court takes a moment to describe the factual allegations each set of Plaintiffs make concerning their respective biometric events. The Court takes the allegations as true for the purposes of the present Motions to Dismiss. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184 (Ill. 1997).

A. *Owens v. Wendy's*, 18 CH 11423

Wendy's is a well-known fast food restaurant chain. When employees first begin working for Wendy's, they are required to have their fingerprints scanned for an employee database. Employees then use fingerprints at their timeclocks to clock in and clock out of work. They also use fingerprints to unlock point-of-sale systems, including cash registers.

The Complaint alleges that Wendy's did not make any biometric disclosures to its employees, including why the information is collected, or to whom it might be disclosed. It also alleges that Wendy's did not provide written policies for retention or destruction of data, or offer guidelines for what happens to that data following an employee's separation.

The two named Plaintiffs, Owens and Garcia, each worked at a Wendy's in Illinois. Owens worked through July 2017; Garcia through July 2016.[2] Upon hiring, their fingerprints were collected; during their employment, they used fingerprint

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[1] The sole exception is with respect to the effect of a two-year statute of limitations on claim accrual, discussed briefly in Part IV.E below. *See* Hrg. Tr. 32:19–33:15 (June 10, 2019).

[2] This Complaint does not provide specific dates when either Plaintiff began their employment. This particular information is not relevant to the disposition of the present Motion. *See* Part IV.E *infra* (accrual of claims moot).

scans to clock in and out and access POS systems. Neither was given biometric disclosures or written policies, and neither executed a release.

Plaintiffs filed suit on September 11, 2018. The Complaint alleges that Wendy's negligently failed to promulgate a retention policy under Section 15(a), or make necessary biometric disclosures under Section 15(b). 740 ILL. COMP. STAT. 14/15(a), (b). These claims cumulate in a single count for negligent violation of BIPA. *Id.* § 14/20(1). The Complaint's proposed class encompasses all Illinois residents whose fingerprints came into Wendy's' possession.

B. *Young v. Tri City Foods*, 18 CH 13114

Tri City Foods is a franchisee for Burger King, another well-known fast food restaurant chain. The substantive allegations are familiar: when employees first begin working for Tri City Foods, their fingerprints are scanned for a database. Employees use fingerprints at their timeclocks to clock in and out of work. This Complaint alleges that Tri City Foods did not make any biometric disclosures, or provide a retention or destruction policy.

The named Plaintiff, Young, worked for Tri City Foods from July 2017 to January 2018. His fingerprints were collected at the beginning of his employment, and he used fingerprints to clock in and out of work. He was not given biometric disclosures or written policies, and did not execute a release.

Plaintiff filed suit on October 22, 2018. The Complaint alleges that Tri City Foods negligently failed to promulgate a retention policy under Section 15(a), and make disclosures under Section 15(b). 740 ILL. COMP. STAT. 14/15(a), (b). As before, it presents a single count for negligent violation of BIPA. *Id.* § 14/20(1). The Complaint's proposed class encompasses all Illinois residents whose biometric data[3] came into Tri City Foods' possession.[4]

C. Procedural Developments

As noted above, though these twin cases were filed separately, they were both randomly assigned to the same calendar, and have proceeded in parallel since initial case management. Both were stayed for a time pending the Illinois Supreme Court's decision in *Rosenbach*, 2019 IL 123186. Once that ruling issued, parallel motions to dismiss were filed, briefed, and argued, with the Court taking the matters under advisement on June 10, 2019.

Since then, Plaintiffs have sought leave to supplement the records with additional authority in the form of recent trial court decisions on these issues in similar cases. After the third such motion, the Court advised the parties to refrain

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[3] BIPA defines "biometric identifier" and "biometric information" separately. 740 ILL. COMP. STAT. 14/10. For ease of reference, and because the difference between the two is not relevant here, the Court refers to both of these terms collectively as "biometric data."

[4] Whereas the *Owens* class specifically refers to fingerprints, the *Young* complaint refers instead to "biometric identifiers or biometric information." It is unclear why the class is more broadly defined, given that *Young* only alleges collection of fingerprints. For ease of reference, the Court refers to the allegations across both cases as fingerprinting generally.

from bringing further ones. The Court is aware of its colleagues' decisions, and no citation is needed to consider such public records.[5]

These decisions are not, of course, binding in any way, nor were they offered as such. Nevertheless, in such a rapidly evolving area of the law as this, where binding authority on these questions does not yet exist, it is appropriate to consider nonbinding persuasive authority. *E.g., Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245, ¶25. Binding or not, "Nothing, however, bars a court from adopting sound reasoning." *People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, ¶27. The Court happens to agree with the majority of its colleagues, but as this opinion demonstrates, its reasons are its own.

Finally, in the *Young* case only, Defendant moved to amend the Motion to Dismiss—which by that point had been fully briefed, argued, taken under advisement, and thrice supplemented—by adding a constitutional challenge. The Court denied that request, without prejudice; these matters are complex enough as they stand.

II. Legal Standards

Both Motions to Dismiss raise identical arguments by way of Section 2-619. Such motions require that the Court accept as true all well-pleaded facts and their attendant inferences. Specifically, Defendants raise arguments under Sections 2-619(a)(9) and (a)(5). 735 ILL. COMP. STAT. 5/2-619.

The Section 2-619(a)(9) arguments raised by Defendant seek a dismissal upon a showing of other affirmative matters, outside the four corners of the complaint, which defeat the claim in whole or in part. *Alford v. Shelton (In re Estate of Shelton)*, 2017 IL 121199, ¶21. Here, the affirmative matter is the exclusivity

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[5] The Court is familiar with twenty-one written decisions from trial courts addressing the Workers' Compensation Act, BIPA's statute of limitations, or both, to wit:
McDonald v. Symphony, 17 CH 11311 (Cir. Ct. Cook Co., June 17, 2019) (Judge Mitchell) (*McDonald I*);
Fluker v. Glanbia, 17 CH 12993 (Cir. Ct. Cook Co., July 11, 2019) (Judge Mitchell);
Robertson v. Hostmark, 18 CH 5194 (Cir. Ct. Cook Co., July 31, 2019) (Judge Cohen) (*Robertson I*);
Mims v. Freedman, 18 CH 9806 (Cir. Ct. Cook Co., Aug. 22, 2019) (Judge Demacopoulos);
Chavez v. Temperature Equipment, 19 CH 2358 (Cir. Ct. Cook Co., Sept. 11, 2019) (Judge Jacobius);
Tims v. Black Horse, 19 CH 3522 (Cir. Ct. Cook Co., Sept. 23, 2019) (Judge Atkins) (*Tims I*);
Roach v. Walmart, 19 CH 1107 (Cir. Ct. Cook Co., Oct. 25, 2019) (Judge Meyerson);
McDonald v. Symphony, 17 CH 11311 (Cir. Ct. Cook Co., Oct. 29, 2019) (Judge Mitchell) (*McDonald II*);
Carrasco v. Freudenberg, 19 L 279 (Cir. Ct. Kane Co., Nov. 15, 2019) (Judge Pheanis);
Cortez v. Headly, 19 CH 4935 (Cir. Ct. Cook Co., Nov. 20, 2019) (Judge Demacopoulos);
Woodard v. Dylan's Candybar, 19 CH 5158 (Cir. Ct. Cook Co., Nov. 20, 2019) (Judge Demacopoulos);
Figueroa v. Tony's Finer Foods, 18 CH 15728 (Cir. Ct. Cook Co., Dec. 10, 2019) (Judge Moreland);
Heard v. THC – North Shore, 17 CH 16917 (Cir. Ct. Cook Co., Dec. 12, 2019) (Judge Valderrama);
Treadwell v. Power, 2019 U.S. Dist. LEXIS 215467 (N.D. Ill. Dec. 16, 2019);
Marion v. Ring Container, 19 L 89 (Cir. Ct. Kankakee Co., Jan. 24, 2020) (Judge Albrecht) (*Marion I*);
Robertson v. Hostmark Hospitality, 18 CH 5194 (Cir. Ct. Cook Co., Jan. 27, 2020) (Judge Cohen) (*Robertson II*);
Tims v. Black Horse, 19 CH 3522 (Cir. Ct. Cook Co., Feb. 26, 2020) (Judge Atkins) (*Tims II*);
Smith v. Top Die, 19 L 248 (Cir. Ct. Winnebago Co., Mar. 12, 2020) (Judge Honzel);
Cortez v. Headly, 19 CH 4935 (Cir. Ct. Cook Co., Mar. 13, 2020) (Judge Demacopoulos);*Marion v. Ring Container*, 19 L 89 (Cir. Ct. Kankakee Co., April 17, 2020) (Judge Albrecht) (*Marion II*); and
Robertson v. Hostmark, 18 CH 5194 (Cir. Ct. Cook Co., May 29, 2020) (Judge Cohen) (*Robertson III*).

provision of the Workers' Compensation Act. 820 ILL. COMP. STAT. 305/5(a), 305/11. Exclusivity is properly raised by way of Section 2-619(a)(9). *See Folta v. Ferro Engineering*, 2015 IL 118070, ¶¶7, 10.

The Section 2-619(a)(5) arguments assert that the claims are barred by the applicable statute of limitations. Here, BIPA does not identify a limitations period. Defendants argue the one-year privacy statute of limitations applies, 735 ILL. COMP. STAT. 5/13-201, and in the alternative that the two-year statute for penalties or personal injury claims applies, *id.* 5/13-202. Plaintiffs propose the five-year catchall statute applies. *Id.* 5/13-205. Determining whether the claims are timely requires identifying which statute of limitations applies, which is properly done on a Section 2-619(a)(5) motion. *See O'Toole v. Chi. Zoological Soc'y*, 2015 IL 118254, ¶16.

III. Workers' Compensation Act

The Workers' Compensation Act establishes a comprehensive regime for workplace injuries, providing exclusive relief and precluding all other causes of action. The Act's exclusivity provision has four judicially recognized exceptions. Two of those are relevant here: whether the injury was not accidental, and whether it is compensable under the Act. If either exception is met, the Act's exclusivity provisions do not apply, and the cause of action is permitted.

The Court declines to rule on the first exception concerning the (non)accidental nature of the alleged BIPA violations, because the ramifications of such a ruling extend beyond the questions presented. The Court holds, however, that BIPA injuries lie categorically outside the scope of the Act, and are not compensable. The Act's exclusivity provisions therefore do not apply to bar the cause of action.

A. Statutory Scheme

The Illinois Workers' Compensation Act is often described as a grand bargain between employees and employers.[6] Employees benefit from no-fault liability, which offers an easier path to recovery for workplace injuries. Employers accept this liability in exchange for protection from common-law suits and overly large verdicts. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (Ill. 1990).

Crucial to this scheme is the exclusivity provision of the Act. Section 5(a) provides that "no common law or statutory right to recover damages from the employer . . . is available to any employee who is covered by the provisions of this Act." 820 ILL. COMP. STAT. 305/5(a). Section 11, in turn, provides limitations on the measure of responsibility attributable to an employer—i.e. their liability exposure. *Id.* 305/11.

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[6] Though, curiously, the phrase "grand bargain" itself does not appear in Illinois caselaw at all, and only sporadically elsewhere. *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS L. REV. 891, 893 n.4 (2017) (history of phrase).

The practical import of the exclusivity provision is that employees cannot bring common-law suits against an employer unless one of four exceptions is met, which requires the employee to prove:

> (1) that the injury was not accidental;
> (2) that the injury did not arise from his or her employment;
> (3) that the injury was not received during the course of employment; or
> (4) that the injury was not compensable under the Act.

Meerbrey, 139 Ill. 2d at 463 (citing *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (Ill. 1980) (formatted for clarity). Unless an exception is met, the claim will fall within the exclusive scope of the Act. In that case, a Section 2-619 dismissal is proper, and the employee must turn to the Workers' Compensation Commission as the proper adjudicating authority.

Here, the parties agree that the second and third exceptions are not at issue: the fingerprinting arose from the employment, and the alleged BIPA violations were received in the course of employment.[7] At issue are the first and fourth exceptions: whether the injury was accidental, and whether it is compensable. If either exception is met, the claim may proceed.

B. Accidental Injury

Defendants argue that, while Plaintiffs allege a negligent violation of BIPA, the first exception requires the injury be *not accidental*, and it is inconsistent to argue a claim is both not an accident and negligent. The analysis is more complex than Defendants' position suggests, and hinges on the implications of what Plaintiffs have pled and the mechanics of their claim.

It is possible for a claim of negligence to include sufficient allegations as to specific intent to meet this exception. But the question of whether that can be done in a BIPA case has ramifications well beyond the scope of the issue at hand. The Court declines to rule on the issue at this time.

1. "Accidental"

In the realm of workers' compensation, "accidental" is not a specifically defined term of art. Rather, it refers to "anything that happens without design or an event which is unforeseen by the person to whom it happens." *Meerbrey*, 139 Ill. 2d at 463 (quoting *Pathfinder Co. v. Industrial Com.*, 62 Ill. 2d 556, 563 (Ill. 1976)). Some cases are self-evident: if the employer directs, encourages, or commits an intentional tort, the exception is met. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 239 (Ill. 1980). Negligence, however, is more difficult.

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[7] Other courts have held that, where fingerprinting is made a condition of employment, the BIPA violation manifests *prior* to the term of employment. This implicates, among others, the applicability of the third exception. *See Mims*, *supra* note 5, at pp. 5–6; *Woodard*, *supra* note 5, at p 9. Neither case here presents this theory, but it is worth noting.

Not all negligence cases are barred. *Schusse v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.*, 334 Ill. App. 3d 960, 965 (1st Dist. 2002) (blanket preemption of negligence cases "would be contrary to *Meerbrey*."). But negligence cases do pose a grey area.

The First District recently examined the intersection of negligence and accident in *Garland v. Morgan Stanley*, which concerned a deadly crash of a small aircraft engaged by Morgan Stanley for a business trip. 2013 IL App (1st) 112121, ¶¶5–6. The *Garland* court did not hold that claims of negligence were necessarily accidental within the meaning of the first exception to the Act. It did, however, discuss the relevant standards. *Id.* at ¶¶29–30. The court held "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Id.* at ¶29 (citing *Copass v. Illinois Power Co.*, 211 Ill. App. 3d 205, 214 (4th Dist. 1991)). Without that specific intent, even conduct "beyond aggravated negligence" was insufficient. *Garland*, 2013 IL App (1st) 112121, ¶29 (quoting *Copass*, 211 Ill. App. 3d at 214).

Ultimately, the *Garland* plaintiff proposed a grave negligence claim, containing everything leading up to, but not including, the particular allegation that the employer specifically intended the injury. *Garland*, 2013 IL App (1st) 112121, ¶¶16, 30. The *Garland* court rejected the claim, holding the employer's intention was the essential ingredient: "the employee must show that the employer specifically intended to injure the plaintiff." *Id.* at ¶30 (collecting citations).

Here, and on the face of the pleading, Plaintiffs have an uphill battle, as their claims sound in negligence only.

2. The *Treadwell* Analysis

As of this writing, the Court knows of only one case that has discussed the accident prong within the context of BIPA: *Treadwell v. Power Solutions*, a Northern District case. 2019 U.S. Dist. LEXIS 215467 (N.D. Ill., Dec. 16, 2019).[8] There, the defendant protested there were no specific allegations of specific intent, and without them, the claim could not be accidental. *Id.* at *9. Specifically, the defendant charged that plaintiff had alleged a "series of omissions," rather than any affirmative intent. *Id.*

The court disagreed: the plaintiff alleged the defendant's intent to collect fingerprints; the BIPA violation occurred at the time of collection, without more; and—crucially— defendant was presumed to know the law. *Id.* at **9–10 (citations omitted). The specific allegation that the employer intended to collect fingerprints, coupled with the fact that the employer was presumed to know the action, by itself,

[8] One other case, *Marion v. Ring Container*, touches on the accident prong, holding flatly that the defendant there "has not established that the injuries alleged are . . . accidental . . . . Violation of [BIPA] requires a deliberate act[.]" 19 L 89, at p.2 (Cir. Ct. Kankakee Co., Jan. 24, 2020). Without access to the pleadings, it is unclear whether *Marion* concerned allegations of a *negligent* BIPA violation; without that information, its conclusion is not overly useful. *Treadwell* doesn't specify whether the allegations there pointed to negligence, but its discussion is substantially longer, and provides a more useful point of reference.

would be a violation, meant the allegation of specific intent to collect necessarily included an inferred allegation of specific intent to violate BIPA.

Plaintiffs' briefing predates *Treadwell* but tracks this logic. They argue the decision to require employees to use biometric timeclocks was intentional, and the decision was a result of the purposeful "design" of the employer. This tracks part of the *Meerbrey* definition of "accidental" as "anything that happens without design." *Meerbrey*, 139 Ill. 2d at 463.

But it also fits in with the *Treadwell* analysis. Everyone is presumed to know the law. *Jones v. Bd. of Educ.*, 2013 IL App (1st) 122437, ¶22. This naturally applies to BIPA, even though it lay dormant until recently. If the system will violate BIPA, and Plaintiffs allege the system was intentionally implemented, then that underlying allegation necessarily entails the further allegation that Defendants intended to cause BIPA violations to occur. And *that* is an allegation of intentionality sufficient to trigger the first exception, as the claim would no longer be accidental.

3. Intentionality and BIPA

This is a logical, appealing analysis. And yet the Court hesitates to adopt it, not because it leads to an incorrect conclusion here, but because of its potential ramifications. This *Treadwell* logic applies to the employer's intent *generally*, which interacts with other parts of the case—specifically, the nature of the BIPA claim itself.[9] If installing a timeclock alone is enough to intend to violate BIPA, then any claim for a negligent violation under Section 20(1) would *necessarily* evolve into a claim for an intentional violation under Section 20(2)—for, after all, the installation was intentional, and would be enough to intend the violation itself. 740 ILL. COMP. STAT. 14/20.

It is easy to imagine a negligent violation of BIPA: a supervisor forgets to close out of a secure system, allowing a mustachioed tortfeasor to pilfer the files, using them to commit identity theft. But it is difficult to see how the *Treadwell* analysis permits negligent BIPA claims in the employment context. Perhaps all employment claims are necessarily intentional. Perhaps not. But that investigation ranges well beyond the questions presented in this case, into what exactly the state of mind requirements for BIPA are.

The Court need not resolve these questions. Because the fourth exception is met, the claims survive, and the Court will decline to rule as to the first exception. The nature of negligence may return, but not at this time.

C. Compensability

The Workers' Compensation Act only precludes causes of action that are compensable under the Act. The relevant standard of law here is thinly developed, but this fourth exception requires analyzing the nature of the injury itself to

[9] By comparison, the Court's conclusion in Part III.C *infra* that BIPA claims are not compensable under the Act only applies to the Workers' Compensation Act, and does not "feed back," so to speak, into the claim itself.

determine whether it categorically fits within the Act's scope. BIPA injury is fundamentally different from every other type of injury covered by the Act. Because BIPA categorically does *not* fit under the Act, the fourth exception is met, and the Act does not bar the claim.

1. Identity of Tests

The fourth exception to the Workers' Compensation Act's preclusion regime requires "that the injury was not compensable under the Act." *Meerbrey*, 139 Ill. 2d at 463. Defendants argue an injury is compensable, and thus the exclusivity provision applies, when the injury arises out of the employment, and is incurred in the course of employment. These are, of course, the second and third exceptions. Defendants' position entails that, where the second and third exceptions are not met, the fourth can never be met.

For this proposition, Defendants point to *Sjostrom*, a 1965 case which provides that an injury is compensable if suffered in the line of duty; the "line of duty" test is identical to the "compensability" test; and both are satisfied by a showing that the injury arose "out of and in the course of employment." 33 Ill. 2d 40, 43 (Ill. 1965).[10]

Defendants insist this limited test is still controlling law. They point to a recent case centered on the compensability language: *Folta*. There, on its initial appeal, the defendant proposed to define "compensability" in the same way Defendants do here: "an injury is not compensable only if it does not arise out of and in the course of employment." *Folta v. Ferro Engineering*, 2014 IL App (1st) 123219, ¶29. The First District rejected the definition, holding that to define the fourth exception by reference to the second and third would render that fourth exception "superfluous." *Id.* ¶30. But the Supreme Court reversed, with an extended discussion of compensability that cited, among others, *Sjostrom*. 2015 IL 118070, ¶18.

Defendants conclude this means the First District's ruling is irrelevant, *Sjostrom* is good law, and compensability is essentially a restatement of the second and third exceptions. And because Plaintiffs here conceded the second and third exceptions are not met, Defendants conclude the fourth cannot be, either. But Defendants misconstrue the import of *Folta*, both in terms of what it says and what it means.

i. Scope of Reversal

On a purely technically level, though the Supreme Court reversed the First District's ruling, it did not address the First District's conclusion that the fourth exception had to be something more than a restatement of the second and third exceptions. Indeed, the Supreme Court remarked that the plaintiff there conceded

[10] As noted above, other courts have held that, where fingerprinting is made a condition of employment, it necessarily falls outside of the line of duty. *Supra* note 7. Such a holding would terminate the analysis here, in Plaintiffs' favor. Again, because neither party has raised the issue, the Court declines to address it further.

the injury "was accidental and arose out of and during the course of his employment." *Folta*, 2015 IL 118070, ¶16. If the Court agreed with the defendant there—and Defendants here—that meeting the second and third exceptions was sufficient, then that statement *alone* would be enough to end the case.

Not only does the Court *not* end there, but it uses that proposition to springboard into the meat of its opinion: a lengthy discussion of whether and how recoverability plays into compensability, the main issue upon which the Court reversed. *See id.* at ¶¶25–43. With respect to the First District's characterization of the fourth exception, the Supreme Court's reversal was on other grounds.

ii. A Broader Analysis

More generally, Defendants' reading is too simplistic. We know this because the Supreme Court tells us so in *Folta* itself. The paragraph discussing *Sjostrom* is part of a broader discussion of the Court's compensability caselaw. Indeed, the very next paragraph notes, with respect to *Sjostrom* and similar cases, "Although this court equated 'compensable' with 'line of duty,' the sole question raised in those cases was whether the plaintiff's injuries arose out of or in the course of his employment." After acknowledging the contextual limitations of the *Sjostrom* analysis, the *Folta* court describes how "In another line of cases we further refined our inquiry as to what is meant by compensable by considering whether an employee was covered under the Act where the essence of the harm was a psychological disability, and not a traditional physical injury." *Id.*

These cases consider compensability by looking to the nature of the injury itself. *Pathfinder* was the first, holding psychological injury compensable under the Act. *Pathfinder Co. v. Industrial Com.*, 62 Ill. 2d 556, 563 (Ill. 1976). Its progeny—unquestionably still good law—lead to the classification of "physical-mental" injury, which Plaintiff discusses by way of analogy slightly later on. *See Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, ¶30 (collecting cases and discussing compensability of "physical-mental" injuries).

That entire branch of the caselaw flows from an analysis of the fourth "compensability" exception as requiring something additional: an investigation of the nature of the injury. If the fourth exception was simply a regurgitation of the second and third, then the nature of the injury would be irrelevant, and nearly fifty years of caselaw would be fatally undercut.

Finally, we know Defendants' read of *Folta* is incorrect because the case says so. After recapping its entire compensability caselaw, the *Folta* court concludes "whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." 2015 IL 118070, ¶23. The Court goes on to discuss how recoverability fits in, but it conspicuously omits further discussion of the second or third exceptions. There may be quite a bit of overlap in the scope of the second, third, and fourth exceptions, but it is undeniably clear that, in the Supreme Court's view, compensability requires a separate analysis, one which this Court must now undertake.

2. A Note on Statutory Construction

Both parties spill some ink discussing principles of statutory construction, including whether and how one or the other statutes takes priority by virtue of being older, more specific, and so forth. Defendants propose that the Workers' Compensation Act trumps BIPA, and the exclusivity provision applies; Plaintiffs, unsurprisingly, propose the opposite.

Neither analysis is relevant here. Where the plain language of the statute admits of only one interpretation, it is dispositive of the inquiry. *Hadley v. Ill. Dep't of Corr.*, 224 Ill. 2d 365, 371 (Ill. 2007). Unambiguous statutes must be applied as written, without reference to the tools of statutory construction. *Id.*; *Taylor v. Pekin Ins. Co.*, 231 Ill. 2d 390, 395 (Ill. 2008). Those tools only come into play when there is an ambiguous statute to be constructed. And here, the conflict between the Workers' Compensation Act and BIPA does not arise from what either of them say: there is no ambiguity, and the plain language is largely irrelevant.

The Act does not preempt specific causes of action—nor could it, as it is designed to provide a general statutory scheme that precludes whole swathes of litigation. It is explicitly designed to provide a general rule that may indeed prevail over specific statutory causes of action.

BIPA, in turn, does not say anything about the Act. We know it applies in the employment context, because it notes how releases can be conditions of employment. 740 ILL. COMP. STAT. 14/15. But BIPA says nothing about the extent of its application in the employment context; as Defendants note, even if the Act barred a BIPA claim at law, it would still permit an employee to seek an injunction. *Id.* 14/20(4). BIPA *could* have been excluded from the Act's scope, *see* 410 ILL. COMP. STAT. 305/14 (AIDS Confidentiality Act's non-preemption provision), but the absence of such a provision does not mean that it is automatically preempted.

Statutory construction is simply a poor tool for this analysis. Each statute says what it says, plainly and unambiguously. The question for the Court's consideration cannot be answered by teasing out meaning from the language of the statutes, because neither addresses this type of interaction. Rather, the Court must examine the nature of the underlying cause of action—BIPA—through the rules governing the broader statutory scheme—the Act. It must, in other words, look beyond the language of either statute.

3. Nature of the Injury

Whether an injury is compensable depends on whether the type of injury "categorically fits within the purview of the Act." *Folta*, 2015 IL 118070, ¶23. Relevantly, "The purpose of the Act is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do." *Mytnik v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 152116WC, ¶36 (citing *Orsini v. Industrial Com.*, 117 Ill. 2d 38, 44 (Ill. 1987)).

The problem can be approached first by looking to what the Act covers, and second to what, exactly, a BIPA violation is. Both analyses reach the same conclusion: a BIPA injury is not compensable within the meaning of the Act.

i. Compensable Cases

Defendants are correct that the Act itself does not include a physical injury requirement. Half a century of cases have used various terms for it, but in sum, every type of injury held compensable under the Act includes some nexus to physical injury as a requirement of compensability.

The prototypical incident of workers' compensation is physical injury. This covers everything from discrete bodily injury, *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407, 409 (Ill. 1956), to repetitive stress from picking up items, *Mytnik*, 2016 IL App (1st) 152116WC, to an aircraft crash on a business trip, *Garland*, 2013 IL App (1st) 112121. Pure physical injury is largely self-explanatory, and not otherwise relevant in this case.

The Act's preclusion regime also extends somewhat beyond the employee in question. The exclusivity provisions will bar third-party claims against the employer that arise out of a workplace injury, such as loss of consortium by a spouse. *Bloemer v. Square D Co.*, 8 Ill. App. 3d 371, 373 (1st Dist. 1972). This is because the Act is designed to substitute for remedies "directly or indirectly resulting from injury to an employee," which includes certain derivative-type claims in its overall scheme. *Dobrydnia v. Indiana Group, Inc.*, 209 Ill. App. 3d 1038, 1042 (3d Dist. 1991).

Courts have also held psychological injuries are compensable, including the emotional shock of witnessing another's injury, even though the shock does not cause physical injury, *Pathfinder*, 62 Ill. 2d at 563; emotional distress caused by failure to render aid during a heart attack, *Collier*, 81 Ill. 2d at 237; and emotional distress caused by overworking in an environment of harassment, *Schroeder*, 2013 IL App (1st) 122483, ¶30.

Defendants attempt to circumvent this thread by citing to *Richardson*, which pronounces "the fact that the employee sustained no physical injury or trauma is irrelevant to the applicability of the Act." *Richardson v. County of Cook*, 250 Ill. App. 3d 544, 548 (1st Dist. 1993). The citation is misplaced; the very next line cites *Pathfinder*, which held emotional shock compensable. *Id.* In this context, it is clear *Richardson* simply means that no bodily physical harm occurred, as opposed to mental harm. Indeed, *Richardson* concludes that the injury there—claimed civil rights violations, among others—stemmed from an argument at work about the employee's duties. That mental harm was sufficiently close to the employment to be compensable under the Act. *Id.* at 59.

Richardson is easily explained by later cases, which offer a retrospective gloss on the importance of *Pathfinder*. Psychological injury may be compensable under the Act, and comes in two types: "physical-mental," where a physical event causes mental injury; and "mental-mental," where a specific event causes mental, but not physical, injury. *City of Springfield v. Industrial Comm'n (B.K.)*, 291 Ill. App. 3d 734, 738 (4th Dist. 1997). *Pathfinder* held that "mental-mental" claims could be compensable, even without minor or ephemeral physical injury. *Id.* (discussing *Pathfinder*, 62 Ill. 2d at 564.

In all instances, and regardless of whether a claimant suffers gross bodily harm or psychological damages, which can include a physical or mental manifestation, there is always a physical component involved, even if indirectly. Thus, it can be said that, compensability is tied to the presence of "demonstrable medical evidence of injury." *Toothman v. Hardee's Food Sys.*, 304 Ill. App. 3d 521, 533 (5th Dist. 1999).

None of the types of cases, fact patterns, or causes of action held compensable under the Act include the sort of injury that BIPA presents. The Court does not consider this issue to be covered in any meaningful sense by appellate precedent. Indeed, the fact that nothing like a BIPA injury has previously been held compensable is a strong indication that it is not compensable.

ii. The Nature of a BIPA Injury

From the other side of the inquiry, the Court can examine what a BIPA violation is. BIPA itself is a codification of an individual's "right to privacy in and control over their biometric identifiers and biometric information." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶33. It is, as the First District recently put, "a privacy rights law that applies inside and outside the workplace." *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶30.[11]

The Court discusses the precise nature of a BIPA violation with respect to its privacy implications below. *See* Part IV.B *infra* (1-year statute of limitations). Without engaging in that analysis just yet, the broad strokes of the statute make clear enough that BIPA remedies a type of injury fundamentally different from anything within the Workers' Compensation Act's scope.

BIPA is a unique statute with a unique concern: biometric data. Biometrics are unique and immutable identifiers, and the ramifications of their use are not fully known. *See, e.g.*, 740 ILL. COMP. STAT. 14/5 (legislative findings). BIPA does not constrain the use of biometrics; as Defendants point out, their biometric timeclocks are perfectly legal, and such systems undoubtedly provide concrete benefits to both employer and employee in terms of ease of use, accuracy, and so forth. BIPA does not concern itself with these uses—at least, not directly.

Instead, BIPA protects biometrics by requiring the disclosure of certain types of information, creating a statutory regime under which individuals know, at all times, who has their biometric data, how it is stored, and what will happen to it once the individual's relationship with the collecting entity comes to an end. 740 ILL. COMP. STAT. 14/15. This scheme only functions if it applies to all biometric-collecting entities; because biometrics are unique, one collection exception is one exception too many. And by giving individuals information about how their data is collected, it permits them to make informed decisions about their biometrics. *See* Matthew B. Kugler, *From Identification to Identity Theft: Public Perceptions of*

[11] This language does not necessarily mean that the Workers' Compensation Act's exclusivity provision does not apply. As Defendants astutely point out, BIPA permits injunctive relief. 740 ILL. COMP. STAT. 14/20(4). Even if the Act barred damages claims, employees could still sue for purely injunctive relief.

Biometric Privacy Harms, 10 U.C. IRVINE L. REV. 107, 130–35 (2019) (lengthy discussion of legislative history and purpose of BIPA).

BIPA is not, in other words, aimed at employers in any meaningful way. It applies to payment systems, *see id.* at 130 (discussing Pay By Touch bankruptcy), amusement parks, *see Rosenbach*, 2019 IL 123186, ¶4, and employers equally. It applies both before and after the employment relationship: before, because it can be a condition of employment, which the potential employee can choose to accept or reject, *see* 740 ILL. COMP. STAT. 14/10; and after, because its data destruction requirements can trail for up to three years, *id.* 14/15(a).

BIPA creates a statutory cause of action to vindicate its protections. A violation of those protections alone, without actual damages, much less physical ones, creates a "real and significant" injury. *Rosenbach*, 2019 IL 123186, ¶34. The fact that the injury is complete *without* actual damages is a stark divergence from normal workers' compensation claims, which by definition seek compensation.[12] A BIPA injury is solely a legal injury, without any physical component.[13]

To the extent employers run afoul of BIPA's requirements, the alleged violations are not intrinsically connected to the employment by anything more than chance. Use of biometrics in timeclocks does not convert a BIPA claim to a wage or hours claim. *Liu*, 2019 IL App (1st) 182645, ¶30. Likewise, use of biometrics in the workplace does not convert a BIPA claim to anything reasonably within the scope of workers' compensation, much less categorically so as the caselaw demands.[14]

BIPA is thus similar to a spoliation claim: spoliation claims are not compensable under the Act, even if the underlying injury triggering the spoliated litigation *was* covered by the Act. *Schusse*, 334 Ill. App. 3d at 969 (reviewing caselaw).

Because BIPA injuries do not categorically fit within the purview of the Workers' Compensation Act, they are not compensable under the Act. Because BIPA injuries are not compensable under the Act, the fourth exception to the exclusivity provision is satisfied, and the Act will not bar the claim.

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[12] At least one court has founded its ruling on this distinction alone. *Carrasco, supra* note 5, at p.2.
[13] The fact that the injury accrues by way of an employee touching a timeclock is both *de minimis* and irrelevant. Biometrics can be collected remotely, as exemplified by facial recognition technology. *See, e.g., Patel v. Facebook, Inc.*, 932 F.3d 1264, (9th Cir. 2019) (facial recognition class settlement).
[14] Plaintiffs point to a number of foreign cases holding that similar privacy and statutory regulation schemes are not preempted by other workers' compensation acts. *See, e.g., Marino v. Arandell Corp.*, 1 F. Supp. 2d 947, 949–50 (E.D. Wis. 1998) (privacy statute); *Busby v. Truswal Systems Corp.*, 551 So. 2d 322, 325 (Ala. 1989) (invasion of privacy); *Vainio v. Brookshire*, 258 Mont. 273, 280 (Mont. 1993) (emotional pain and suffering). None of these are particularly good comparators, as each state's workers' compensation exclusivity provision is drafted slightly differently. Yet it is worth noting that no one else considers this type of injury compensable, as further evidence of its categorical exclusion from the realm of workers' compensation generally.

IV. Statute of Limitations

There are two potentially applicable statutes of limitation: Section 13-201, which provides a one-year period for privacy claims involving publication, and Section 13-202, which applies a two-year period to penal statutes and personal injury claims. BIPA protects privacy by controlling information, and it is the unique nature of that control which gives rise to its unique claims and cause of action.

Section 13-201 does not apply, because none of the claims actually pled involve publication. Furthermore, even if they somehow did, the Court is unconvinced that the "dissemination" language of BIPA is sufficient to constitute "publication" within the meaning of Section 13-201.

Section 13-202 does not apply because BIPA is remedial, not penal. The Supreme Court has laid out a clear test, which the statute does not pass. Furthermore, recent caselaw on the Telephone Consumer Protection Act provides a useful analogy. Finally, BIPA certainly does not present a personal injury.

Because the five-year statute of limitations applies, questions concerning claim accrual are moot, and the Court declines to address them.

A. Selecting a Statute

BIPA does not contain a statute of limitations. Where a cause of action does not identify a limitations period, it must be determined as a matter of law. *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 466 (Ill. 2008). Section 13-205 provides the default rule: "all civil actions not otherwise provided for" are subject to a five-year statute of limitations. 735 ILL. COMP. STAT. 5/13-205. The question then becomes whether another limitations period applies.

Where multiple statutes of limitation apply, the correct statute is determined by—once more—the nature of the injury. *Id.* at 466–67 (quoting, among others, *Armstrong v. Guigler*, 174 Ill. 2d 281, 286–87 (Ill. 1996)). Specifically, this inquiry looks to the legal injury itself, rather than the facts from which it sprung, *id.* at 466 (citing *Armstrong*, 174 Ill. 2d at 286–87), and to the liability imposed, rather than the relief sought, *id.* at 467 (citing *Armstrong*, 174 Ill. 2d at 291). If multiple statues should apply, the more specific statute takes precedence. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 196 (Ill. 1992) (citations omitted).

The Court notes that this is an inquiry of law, not of public policy. *See Bowman*, 229 Ill. 2d at 466–467. Defendants do not explicitly make a policy argument, but they do discuss the policy ramifications of the various competing options.[15] The correct statute of limitations—and, perhaps more specifically, the determination of when each claim accrued, and whether the alleged injuries are singular, serial, or continuous—has a tremendous impact on Defendants' liability.

[15] In this respect, they differ from the defendants in *Robertson v. Hostmark*, who explicitly urged application of the shortest possible limitations period on policy grounds. *Robertson I*, *supra* note 5, at pp. 3–4. Their argument was soundly rejected, and in the dozen written opinions addressing the issue since, the Court found no indication that any other defendants tried to renew it.

The questions of policy and damages Defendants raise are extremely important ones, but they are questions for another day. The issue before the Court is one of the statute of limitations, not of what may come next.

B. Section 13-201: Privacy Claims

The first of two alternative statutes of limitation is Section 13-201:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILL. COMP. STAT. 5/13-201. Defendants offer substantially more specificity in their argument, but the core premise is straightforward: BIPA is primarily concerned with privacy, and so the statute of limitations for privacy claims should apply. Privacy is, after all, in the name. *See, e.g.*, *Rosenbach*, 2019 IL 123186, ¶34 (discussing BIPA's role in protecting privacy rights).

The inquiry here must be specific, because it looks to the nature of the legal injury itself, and the basis for liability. BIPA provides a single cause of action in Section 20, which provides that a party may recover for negligent violations, intentional or reckless violations, fees and costs, and injunctive relief. 740 ILL. COMP. STAT. 14/20(1)–(4). Underlying this single cause of action, BIPA provides five separate proscriptions in Section 15: five discrete violations which each give rise to liability. *Id.* § 14/15(a)–(e).

Each of these violations is a separate injury, and the Court finds it beneficial to analyze each separately. Crucially, Section 13-201 does not apply to privacy claims generally. Rather, it applies to privacy actions involving *publication*. Because none of the pled claims involve publication, Section 13-201 does not apply.

1. Section 15(a) Written Policy Claims

Section 15(a) requires an entity subject to BIPA to develop and publicly promulgate a written policy establishing a retention schedule and destruction policy for all collected biometric data. 740 ILL. COMP. STAT. 14/15(a). It requires that biometric data be destroyed within the earlier of 3 years of the entity's last interaction with the individual from whom information was collected, or when the purpose for collection of such information is satisfied.

The plain language of Section 13-201 is clear and unambiguous: it only governs (a) slander, (b) libel, or (c) "publication of matter violating the right of privacy." 735 ILL. COMP. STAT. 5/13-201. BIPA does not present either a slander or libel claim. The only way Section 13-201 could apply to a Section 15(a) claim, then, is under that third category.

Courts have interpreted Section 13-201's third class of torts to mean that the statute only applies to "privacy torts involving publication." *Benitez v. KFC Nat'l Mgmt. Co.*, 305 Ill. App. 3d 1027, 1034 (2d Dist. 1999). *See id.* at 1035 (plain

language of statute controls, and where tort was neither enumerated by 13-201 nor involved publication, 13-201 did not apply).

Publication is not an element of a Section 15(a) claim. Indeed, it is hard to see how it could be. Section 15(a) requires that entities develop a biometrics policy "made available to the public." 740 ILL. COMP. STAT. 14/15(a). It says nothing about individuals, much less private information. Section 13-201 cannot apply.

2. Section 15(b) Disclosure Claims

Section 15(b) requires an entity to take three actions prior to collecting biometric data: (1) disclose that biometrics are being collected, (2) disclose the purpose of the collection and duration of retention, and (3) obtain a written release for such collection. 740 ILL. COMP. STAT. 14/15(b).

Publication is not an element of a Section 15(b) claim. And, as with Section 15(a) claims, it is hard to see how publication would fit in here, either. The allegations are that Defendants use biometric timekeeping systems for every employee, and BIPA permits them to condition employment on executing a written release. 740 ILL. COMP. STAT. 14/20. This entails that all employees either did, or did not, receive BIPA disclosures or execute BIPA waivers. Thus, the fact that any given employee received a disclosure or executed a waiver would be no more private than the fact of their employment in the first place. Once again, Section 13-201 cannot apply.

3. Section 15(d) Dissemination Claims

Section 15(d) provides that no entity in possession of biometrics may "disclose, redisclose, or otherwise disseminate" those biometrics unless one of four exceptions applies, under which the disclosure is (1) consented to, (2) necessary to complete a financial transaction, (3) required by law, or (4) pursuant to warrant or subpoena. 740 ILL. COMP. STAT. 14/15(d).[16]

The bulk of Defendants' argument on Section 13-201 focuses on the ramifications of Section 15(d)'s disclosure language, and whether dissemination of biometrics would cause the tort to fall within the scope of Section 13-201's "publication" language.[17]

These arguments are particularly curious because Plaintiffs do not raise a Section 15(d) claim. Both Complaints acknowledge the possibility that further dissemination may have occurred, and both Complaints name NCR Corporation as a respondent in discovery, in the belief that NCR may possess information to identify additional entities that may have possessed biometric data. The class definitions are broad enough to encompass any claim under Section 15, if one were

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[16] Section 15(c) prohibits profiting by way of biometrics, and is not implicated here, or otherwise suggested by the employment context. 740 ILL. COMP. STAT. 14/15(c). Section 15(e) requires that the information be stored securely. *Id.* § 14/15(e).

[17] The Court uses "dissemination" as shorthand to indicate disclosure, redisclosure, or dissemination within the meaning of Section 15(d). These are three different terms, but for the present discussion, the differences are irrelevant.

made. But nowhere do the Complaints allege that Defendants disseminated biometrics.[18] At the risk of stating the obvious, Section 13-201 does not apply to a claim unpled.

4. Section 15(d)'s Implications

Defendants attempt to salvage their core publication argument by making it anyway, arguing that the Section 15(d) analysis controls, regardless of whether a claim is explicitly made or not. The Court is not convinced. First, Defendants' statutory interpretation would wag the dog by the tail, and is not particularly logical. Second, even if Section 15(d) were dispositive, "dissemination" under BIPA does not equate to "publication" so as to bring any BIPA claim within the scope of Section 13-201.

i. Connecting the Sections

Defendants argue that Sections 15(b) and 15(d) are "on equal footing." They point out that *Rosenbach* characterizes a Section 15(b) violation as a real and significant injury. 2019 IL 123186, ¶34. And, BIPA itself connects all four types of Section 15 violation to the same statutory damages. 740 ILL. COMP. STAT. 14/20(1). Defendants charge that, when *Rosenbach* made the sections "functionally equivalent," the Supreme Court necessarily entailed that all four be lockstepped to Section 13-201's one-year limitations period.

Bluntly, *Rosenbach* said no such thing. It held the Section 15(b) injury real and significant, because of its privacy implications. The only claim on the table in *Rosenbach* was a Section 15(b) claim. 2019 IL 123186, ¶11. Unsurprisingly, it did not discuss Section 15(d), much less equivocate it to anything. Its discussion of the privacy implications of a Section 15(b) claim do not change the fact that Section 13-201 is still contingent on publication—privacy alone is insufficient.

Furthermore, Defendants' own argument is self-defeating. Even if Sections 15(b) and 15(d) were "functionally equivalent"—an interpretation contrary to the plain language of the statute—there is no logical reason why that would entail lockstepping them both to the shorter statute of limitations. Certainly the Court can see none, and Defendants have neither tried to explain nor cited authority in support of their suppositions.

Defendants' attempt to read an illogical web of statutory dependencies into a decision silent on the issue necessarily fails.

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[18] As Plaintiffs note in their briefing, if they subsequently discovered information sufficient to ground a Section 15(d) claim, the discovery rule might be implicated, which is normally a question of fact not suitable for resolution on a Motion to Dismiss. *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 153–54 (Ill. 1985). *See also Heard, supra* note 5, at p. 10 (denying motion to dismiss a Section 15(d) claim, based on factual disputes surrounding timing of when and how frequently dissemination occurred).

ii. Dissemination and Publication

At the core of it, Defendants argue that dissemination under Section 15(d) necessarily entails "publication" within the meaning of Section 13-201. They argue, among other things, that "publication" means any dissemination of private information, and by alleging that Defendants collected fingerprints, Plaintiffs have alleged that their fingerprints have been "published" into the timekeeping systems. Under this logic, because all biometric data must be collected, if collection is publication, then any BIPA claim necessarily entails publication, and triggers Section 13-201.

In order for Section 13-201 to apply, publication must be an element of the claim. *Benitez*, 305 Ill. App. 3d at 1034. Publication at common law generally means disclosure to the public at large. *Cordts v. Chi. Tribune Co.*, 369 Ill. App. 3d 601, 607 (1st Dist. 2006). Publication may be satisfied where the disclosure is to a smaller group of persons with a "special relationship" to the subject. *Id.* at 607–08 (quoting *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 980 (1st Dist. 1990) (itself quoting RESTATEMENT (SECOND) OF TORTS, §652(d), cmt. a (1977))).

Defendants pin their argument on the smaller group theory, citing *Popko* to support their assertion that publication can be satisfied by any communication to a third party, even within a corporation. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 264–65 (1st Dist. 2005). Because other employees were presumably involved with the collection of biometric data, Plaintiffs' biometrics would have been published to those other employees.

Setting aside the fact that these facts are themselves far afield of the Complaints—which do not, it is worth repeating, raise any sort of Section 15(d) claim—*Popko* is not compelling. Its discussion of publication is in the context of defamation, which has a much lower threshold for publication. The Restatement of Torts—which Illinois courts have explicitly adopted for defamation law, *Popko*, 355 Ill. App. 3d at 266—lays out the distinction quite clearly. Communication to a single person is sufficient publication for defamation. RESTATEMENT (SECOND) OF TORTS, §577, cmt. b (1977). But in the privacy context generally, publication must be to the public at large. *Id.* §652D, cmt. a (explicitly distinguishing defamation publicity).

Defendants' other authority is *Blair*, in which the court held Section 13-201 applicable to the Right of Publicity Act, which did not contain a statute of limitations. *Blair v. Nev. Landing P'ship*, 369 Ill. App. 3d 318, 323 (2d Dist. 2006). The Right of Publicity Act did not, however, spring into the world fully formed. Rather, it replaced common-law appropriation of likeness, which was unquestionably subject to Section 13-201. *Id.* at 322–23. *Blair* simply carried through to the statute what had been the common-law rule, and its discussion is not particularly relevant here.

BIPA is a freestanding cause of action, not connected to any common-law rights that came before, and without a preexisting statute of limitations to draw on. Through the lens of publication in the privacy tort context generally, it is clear a Section 15(d) claim, which entails disclosure, redisclosure, or other dissemination of biometrics, does not necessarily create a "publication" within the meaning of Section

13-201. It is certainly possible that a Section 15(d) claim *could* be coupled by publication; for instance, an entity could run a full-page selection of fingerprints in the *Chicago Tribune*.[19] But the element of "dissemination" under Section 15(d) is not tantamount to "publication." And because publication is not an element of the claim, *see Benitez*, 305 Ill. App. 3d at 1034, Section 13-201 does not apply.

C. Section 13-202: Penal Statutes

The second of two alternative statutes of limitation is Section 13-202. It is lengthy, but the operative language is brief:

> Actions . . . for a statutory penalty . . . shall be commenced within 2 years next after the cause of action accrued . . . .

735 ILL. COMP. STAT. 5/13-202. Unlike the Section 13-201 analysis, which looked at each claim individually, the determining factor here is whether BIPA is penal, remedial, or both. Consequently, the focus is not on the specific claims of Section 15, but on the relief permitted under Section 20. 740 ILL. COMP. STAT. 14/20.

1. The *Landis* Test

Determining whether a statute is penal for the purposes of Section 13-202 is a three-part test. A penal statute "must: (1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff." *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 13 (Ill. 2009) (citing *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 738 (2d Dist. 1982)). A statute must meet all three requirements to be considered penal. *Id.* at 15.

The first of the three requirements is satisfied, because BIPA imposes automatic liability. Indeed, *Rosenbach* confirms that the injury is complete and significant at the point in time when the statute is not complied with. 2019 IL 123186, ¶34.

The second of the three requirements is not satisfied. BIPA does not set forth a predetermined amount of damages. Rather, it provides that an injured party may recover the *greater* of liquidated damages, or actual damages. 740 ILL. COMP. STAT. 14/20(1) (for a negligent violation, $1,000), *id.* § 14/20(2) (for an intentional or reckless violation, $5,000). *Rosenbach* held that actual damages need not be stated to sustain a claim, 2019 IL 123186, ¶36, and indeed the Court suspects that most BIPA cases currently pending claim liquidated, rather than actual, damages. But the bare fact remains that the damages provision is not predetermined, but rather depends on the injury suffered.

The third of the three requirements is not satisfied for much the same reason. BIPA permits the recovery of liquidated *or* actual damages. A claim for actual

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[19] And, in such a situation, application of Section 13-201 might well be reasonable. *See Webb v. CBS Broad. Inc.*, 2009 U.S. Dist. LEXIS 38597, at **7–8 (N.D. Ill. 2009) (time-barring injury based on publication, but permitting claim against the content itself to stand).

damages would of course be with regard to the actual damages suffered. Notably, the *Landis* test does not discuss what any given plaintiff has pled. Rather, it looks to the statute itself, and what is *possible* under the statute. Because it is possible that a plaintiff's actual damages exceed the liquidated damages, the liability imposed is related to the damages suffered, and this requirement fails. *See also Sternic v. Hunter Props., Inc.*, 344 Ill. App. 3d 915, 918–19 (1st Dist. 2003) (where statutory liability was the greater of actual damages or two months' rent, because the fixed amount was contingent on actual damages, it was related to actual damages).

Because the second and third prongs of the *Landis* test are not met, BIPA is not a penal statute. Section 13-202 cannot therefore apply.

2. *Standard Mutual* and the TCPA

Both parties discuss *Standard Mutual*, a recent Illinois Supreme Court case discussing whether the Telephone Consumer Protection Act was penal or remedial, and concluding that it was remedial. *Std. Mut. Ins. Co. v. Lay*, 2013 IL 114617. BIPA and the TCPA are quite similar mechanically, and the analogy is well-taken. *Standard Mutual* is an extraordinarily good comparator, and an extended discussion is appropriate.

Standard Mutual originated as an insurance dec action. The defendant, Lay, engaged a fax service to send its ads to five thousand Illinois fax machines. 2013 IL 114617, ¶4. Unbeknownst to Lay, that was a TCPA violation, and a class action lawsuit soon followed, which settled for $1.7 million. *Id.* ¶9. Lay tendered the defense to its insurer Standard Mutual, which defended under a reservation of rights. *Id.* ¶¶7, 11. Standard Mutual filed its declaratory action on a theory that the TCPA was a punitive statute, and punitive damages are uninsurable as a matter of law. *Id.* ¶11. Trial and appellate courts agreed, and thus the issue proceeded to the Illinois Supreme Court. *Id.* ¶16.

The TCPA prohibits, among other things, the unsolicited sending of faxes. 47 U.S.C. §227(b)(1)(C). It contains a private right of action, under which a person may seek injunctive relief and file an action "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." *Id.* §227(b)(3)(B). Willful or knowing violations have a multiplier, under which damages may triple. *Id.* §227(b)(3).

The *Standard Mutual* court founded its analysis on the *Landis* test and its three factors. 2013 IL 114617, ¶30 (citing *Landis*, 235 Ill. 2d at 12–13). Examining the purpose of the TCPA, it held in no uncertain terms that the statute was remedial, not penal. *Id.*[20]

Discussing the purpose of the TCPA, the *Standard Mutual* court noted that, though a single fax was a minor harm, the aggregate violation was compensable, and represented by a $500 sum per instance. 2013 IL 114617, ¶31. That $500

[20] Thus, Defendants' critique that *Standard Mutual* was an insurance dec case, rather than a statute of limitations case, falls flat. Regardless of the reason why, it engaged in the exact same analysis a Section 13-202 statute of limitations inquiry would mandate.

amount was intended as, among others, an incentive for private enforcement, because actual losses would be trivial. *Id.* at ¶32. Whether viewed "as a liquidated sum for actual harm, or as an incentive for aggrieved parties to enforce the statute, or both, the $500 fixed amount clearly serves more than purely punitive or deterrent goals." *Id.* This took the liquidated damages provision firmly out of the realm of the punitive.

Even the treble damages provision did not change the outcome. By analogy to the Illinois Consumer Fraud Act, because treble damages were one part of the TCPA's broader regulatory scheme, it was a supplemental aid to enforcement, not a punitive provision. *Id.* at ¶33 (quoting *Scott v. Association for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 288 (Ill. 1981)).

The analogies to BIPA are self-evident, and laid out in some detail by Plaintiffs in their briefing. The key operative provisions of each statute are remarkably similar: TCPA permits recovery of "actual monetary loss from such a violation, or . . . $500 in damages for each such violation, whichever is greater," with treble damages on willful or knowing violations, while BIPA permits "liquidated damages of $1,000 or actual damages, whichever is greater," with liquidated damages of $5,000 for intentional or reckless violations. *Compare* 47 U.S.C. §227(b)(3)(B) *with* 740 ILL. COMP. STAT. 14/20(1), (2).

It is clear that, by permitting recovery of liquidated *or actual* damages, BIPA plants itself firmly as remedial, rather than penal. Indeed, other statutes that regulate through private enforcement often share the "greater-of" model by offering liquidated or statutory damages. These include the Illinois Cable Privacy Act, which permits actual, statutory, and punitive damages, 720 ILL. COMP. STAT. 5/16-18(h)(2)(C), 5/16-18(h)(2)(D), 5/16-18(h)(3). *see Joe Hand Promotions, Inc. v. Mooney's Pub, Inc.*, 2014 U.S. Dist. LEXIS 134947, at **20–21 (C.D. Ill. 2014); portions of the Chicago Residential Landlord and Tenant Ordinance, Chi. Muni. Code §§ 5-12-110(e), 5-12-150 (hereafter "CMC"), *see Sternic*, 344 Ill. App. 3d at 918–19 (RLTO provisions not penal), and the AIDS Confidentiality Act, 410 ILL. COMP. STAT. 305/13(1)–(2).[21]

Rosenbach discusses the purpose of BIPA at some length. It concludes that private enforcement of BIPA for statutory violations alone is a necessary component in the statutory scheme to provide "the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." 2019 IL 123186, ¶37. BIPA's purpose, and the liquidated damages it provides, "clearly serve[] more than purely punitive or deterrent goals." *Standard Mutual*, 2013 IL 114617, ¶32. BIPA is remedial.

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[21] Plaintiffs' citation to *Scott* for the proposition that ICFA is remedial is unhelpful. *Scott*, 88 Ill. 2d at 288. ICFA permits of private enforcement only for actual damages. 815 ILL. COMP. STAT. 505/10a(a). The *Attorney General* may additionally seek various civil penalties. *Id.* §505/7(b)–(c). But the AG is not subject to a statute of limitations anyway, so the point is somewhat moot. *Illinois v. Tri-Star Indus. Lighting, Inc.*, 2000 U.S. Dist. LEXIS 14948, **7–8 (N.D. Ill. 2000).

3. *Namur* and Split Identity

Defendants counter with *Namur*, a 1998 case discussing the Chicago Residential Landlord and Tenant Ordinance. *Namur v. Habitat Co.*, 294 Ill. App. 3d 1007 (1st Dist. 1998). In *Namur*, the court considered two RLTO provisions. One provided for damages equal to twice the security deposit, plus five percent. CMC § 5-12-080(f). The other grants a flat $100 for failure to tender an RLTO summary document at renewal. CMC §5-12-170. *Namur* noted that some portions of the RLTO were penal, but the statute also had some remedial purposes. 294 Ill. App. 3d 1010–11 (citations omitted).

Namur held that both specific provisions at issue there were penal: the one specified a formula to calculate damages, and the other was a flat charge. *Id.* at 1011. The fact that damages were calculated depending on the security deposit was irrelevant, because the security deposit was not lost or seized in any way, and did not itself represent damages. It simply provided a way to calculate the number. *Id.*

Defendants posit that Plaintiffs paint with too broad a brush: *Namur* shows that it is possible for a statute to have parallel purposes, penal and remedial alike, and that it is possible to parse out the statute with more granularity than Plaintiffs propose. Curiously, Defendants do not actually discuss what such a split analysis would look like.

On *Namur*'s analysis, the Court does not believe BIPA has such a split identity. Even if it did, *Namur* itself does not suggest that the relevant portions would be penal. And finally, it seems evident that, to whatever extent *Namur* set out a flat rule, it has since been overruled by implication of *Landis* and *Standard Mutual* alike.

First, it is worth noting that *Namur* addressed the RLTO, a sprawling collection of provisions and causes of action. In the RLTO context, cases address the penal-remedial distinction on a section-by-section basis. *Sternic*, 344 Ill. App. 3d at 918 (citing *Namur*). So, while *Namur* parses out the distinctions between sections within a much larger statute, the cause of action remains the smallest unit of analysis. BIPA, by contrast, contains only one cause of action: Section 20. *Namur* never proposed to split up a single cause of action into penal and remedial portions, and the Court sees no reason to do so here.

Second, the ordinances at issue in *Namur* provided for a formula and a flat fine. The formula there was pegged to the security deposit, but had no connection to actual damages. 294 Ill. App. 3d 1011. And the flat fine was exactly that. *Id.* Whereas the RLTO did not refer to or account for actual damages BIPA does, by offering plaintiffs the choice. *Namur*'s analysis simply does not apply.

Third and finally, Defendants' quotation of *Namur* suggests they mean to extract a rule that statutes "are penal because they specify either the amount of damages that can be awarded for violations or the formula by which the amount of damages is to be calculated." *Id.* at 1011. And BIPA sets forth, among other things, fixed liquidated damages. 740 ILL. COMP. STAT. 14/20(1)–(2). To the extent *Namur* may have articulated such a rule—and the Court is unconvinced that it did—it is clearly no longer good law. *Landis* makes clear that the *absence* of actual damages

is a defining factor under the third prong. 235 Ill. 2d at 14. And *Standard Mutual*, of course, holds the TCPA and its alternative damages calculation remedial. 2013 IL 114617, ¶32.

Under the *Landis* test, BIPA is remedial. Such a characterization accords with the conclusion of *Standard Mutual*, and is unchanged by any aspect of *Namur*.

D. Section 13-202: Personal Injury

Section 13-202 is a large provision, and Defendants argue that another portion of its language is also relevant here:

The second of two alternative statutes of limitation is Section 13-202. It is lengthy, but the operative language is brief:

> Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . . .

735 ILL. COMP. STAT. 5/13-202. Defendants advance this argument only briefly, abandoning it on Reply and at hearing, but it bears brief discussion. Because Plaintiffs allege that Defendants negligently violated BIPA, and that the negligent acts caused Plaintiffs injury, it therefore alleges a "personal injury (negligence) claim" subject to Section 13-202's "injury to the person" language.

The flaws in such a position are self-evident, perhaps nowhere more than the bare fact that BIPA has nothing to do with personal injury. *See also* Part III.C *supra* (discussing, at length, how BIPA *differs* from personal injury claim).

More to the point, Section 13-202's "personal injury" language is even narrower than the compensability analysis under the Workers' Compensation Act. "Illinois courts uniformly have interpreted the language in section 13-202 narrowly . . . . In other words, contrary to its express language, section 13-202 does not extend to all personal injury claims." *Smith v. National Health Care Services*, 934 F.2d 95, 97–98 (7th Cir. 1991). This is in part because Section 13-202 lists a great number of torts, the enumeration of which cuts back the scope of "personal injury." *See Berghoff v. R.J. Frisby Mfg. Co., Div. of Western Capital Corp.*, 720 F. Supp. 649, 653 (N.D. Ill. 1989).

BIPA does not present—and, barring some sort of freak electrical short in a fingerprint scanner, appears largely incapable of presenting—a personal injury claim. Section 13-202 does not apply.

Because neither Section 13-201 nor Section 13-202 applies, BIPA is a civil action not otherwise provided for. *See* 735 ILL. COMP. STAT. 5/13-205. Pursuant to Section 13-205, it is subject to a five-year statute of limitations. All Plaintiffs' claims are timely.

E. Accrual of Claims

The final arguments concern when, exactly, the various Plaintiffs' claims accrued. The Court's prior rulings make this issue moot, but the Court sketches the argument here for completeness.

Defendants, quoting familiar claim-accrual language, assert that Plaintiffs' claims accrued when they knew or reasonably should have known of their injury, and that it was wrongfully caused. *E.g.*, *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (Ill. 1981) (citations omitted). Plaintiffs, just like Defendants, are presumed to know the law. *Jones*, 2013 IL App (1st) 122437, ¶22. Therefore, argue Defendants, if Plaintiffs indeed started working, had their biometric data collected, but did not receive sufficient disclosures, they should have known at that time that a BIPA claim had accrued.[22]

Plaintiffs counter with two theories. First, the violation can be viewed as s series of independent acts: each time a finger was scanned, a new BIPA claim accrues. *See Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 349 (Ill. 2002). Thus, though initial violations may have occurred outside the statute of limitations, more recent ones are still timely.

Second, because each collection occurs within the context of continuous employment, the BIPA violation could be viewed as a continuing injury. *See Taylor v. Bd. of Educ.*, 2014 IL App (1st) 123744, ¶46. Under such a theory, the statute of limitations is held in abeyance, and only starts to run when the course of conduct comes to an end.[23]

Here, Plaintiff Owens started her employment in 2014, and filed less than four years later; Plaintiff Garcia started her employment in 2016, and filed just over two years later; Plaintiff Young started his employment in 2017, just over a year before filing. Because the Court has held that BIPA is subject to a five-year statute of limitations, all potential claims are timely, even if the claims accrued on the date employment began. It is therefore not necessary to address the issue of claim accrual at this time.[24]

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[22] It is unclear how, if at all, this analysis would apply to a Section 15(d) dissemination claim, if one were pled. *See* Part IV.B.3 *supra* (no such claims made). Presumably, the discovery rule would be implicated. *See* note 18 *supra*.

[23] The Court observes that its colleagues have favored the second theory, that of the continuing tort. *See Cortez, supra* note 5, at pp 7–9; *Woodard, supra* note 5, at pp. 14–15. *See also Heard, supra* note 5, at p. 10 (continuing tort presents question of fact). *But see Robertson I, supra* note 5, at pp. 4–5 (claim accrues at first scan).

[24] The Court recognizes that whether BIPA presents a single continuing injury or a series of repeated injuries has tremendous implications for Plaintiffs' potential recovery—to say nothing of Defendants' exposure. Because resolution of the question is not necessary for the pending motion, the Court declines to do so in this particular procedural posture.

F. Further Proceedings

The Court is aware that a number of the questions treated above are pending before other, superior courts.[25] Because this case was briefed, argued, and taken under advisement prior to those developments, the Court thought it appropriate to dispose of the pending matters.[26]

To the extent further developments may affect these cases, the Court has no doubt that the appropriate parties will file appropriate motions. In light of the constellation of external litigation, however, the Court will stay Defendants' responsive pleading until the next status date, when the parties can advise as to their intended courses of action.

V. Orders

Defendants' Motion to Dismiss is denied in its entirety.

Defendants' obligation to file a responsive pleading is stayed until the next status in this matter. At that time, the Court anticipates setting a pleadings deadline, unless the parties request that proceedings be further stayed.

This matter is set for status on **Friday, June 26, 2020, at 10:00 a.m.** via teleconference. The Court will contact the parties in advance of the hearing and provide specific hearing information.

Chambers staff will email a copy of this Order to the parties.

ENTERED
Judge Anna Loftus
JUN 08 2020
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:

/s/ Anna M. Loftus

Judge Anna M. Loftus, No. 2102
June 8, 2020

[25] The Workers' Compensation Act issue has been certified to the First District in *McDonald II*, and to the Third by *Marion II*. The Section 13-201 one-year statute of limitations has been certified to the First District by *Tims II* and *Cortez*, and to the Third by *Marion II*. The Section 13-202 two-year statute of limitations has certified to the Third District by *Marion II*. And one form of the accrual question has been certified to the First District by *Cortez*, while another certification is imminent in *Robertson III*. The Court is without specific knowledge of the status of those various appeals.

[26] The Court notes that this is one of three concurrently issued written opinions addressing BIPA. The other two are *Owens v. Wendy's International*, 18 CH 11423 (Cir. Ct. Cook Co., June 8, 2020), which is substantially similar to this one, and *Wells v. Relish Labs*, 19 CH 00987 (Cir. Ct. Cook Co., June 8, 2020), which treats the same issues but is not as closely related.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DAVID A. CHAVEZ, individually and on behalf of all others similarly situated,	
Plaintiffs,	**Case No. 19 CH 2538**
v.	**Judge Moshe Jacobius**
TEMPERATURE EQUIPMENT CORP.,	
Defendant.	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint under 735 ILCS 5/2-619.1.[1] The Court has reviewed the foregoing Motion, Plaintiff's Response, and Defendant's Reply in Support. The Court has also reviewed the relevant statutory and case law.

I. BACKGROUND

Plaintiff, David Chavez, began working for Defendant in June of 2012. (Complaint, ¶ 18.) During the course of Plaintiff's "onboarding process," Defendant required Plaintiff to place his fingers on a fingerprint scanner, at which point Defendant scanned and collected, and stored in an electronic database, digital copies of Plaintiff's fingerprints. (*Id.* at ¶ 19.) Plaintiff worked for Defendant until March of 2017. (*Id.* at ¶ 20.) Plaintiff alleges that, during his employment tenure, Plaintiff was required to place his finger on a fingerprint scanner, which scanned, collected, and stored his fingerprint each time he "clocked" in and out as part of the timekeeping system. (*Id.*)

[1] Also before the Court is Plaintiff's Motion to Disclose Newly Issued Case as Supplemental Authority. Plaintiff seeks to disclose as supplemental authority the July 31, 2019, Memorandum Opinion and Order issued by Judge Neil Cohen in *Robertson v. Hostmark Hospitality Grp.*, Case No. 2018-CH-5194, 2019 Ill. Cir. LEXIS 119 (Cir. Ct. Cook Cty. July 31, 2019). The Court is aware of Judge Cohen's well-considered opinion and finds it persuasive.

Defendant's fingerprint-matching technology would compare Plaintiff's scanned fingerprint against the fingerprint previously stored in Defendant's "fingerprint database," and then grant Plaintiff access to Defendant's facility in order to begin work. (*Id.*)

According to Plaintiff, Plaintiff never consented, agreed or gave permission to Defendant for the collection or storage of his biometric data. (*Id.* at ¶ 21.) Defendant never provided Plaintiff with the requisite statutory disclosures or an opportunity to prohibit or prevent the collection, storage, or use of his biometric identifiers or biometric information. (*Id.* at ¶ 23.) Defendant additionally failed to provide Plaintiff with a retention schedule and/or guidelines for permanently destroying his biometric identifiers and biometric information. (*Id.* at ¶ 25.)

Plaintiff filed his two-count Class Action Complaint on February 26, 2019. In Count I, Plaintiff alleges:

- Defendant systematically collected, used, and stored Plaintiff's and the Class members' biometric identifiers and/or biometric information without first obtaining the written release required by 740 ILCS 14/15(b)(3).
- Upon information and belief, Defendant disclosed Plaintiff's and the Class' biometric identifiers and biometric information to at least one third-party vendor.
- Defendant failed to properly inform Plaintiff or the Class in writing that their biometric identifiers and/or biometric information were being collected, stored, or otherwise obtained, nor did Defendant inform Plaintiff or the Class members in writing of the specific purpose and length of term for which their biometric identifiers and/or biometric information was being collected, stored, and used, as required by 740 ILCS 14/15(b)(1)-(2).
- Defendant does not publicly provide a retention schedule or guidelines for permanently destroying the biometric identifiers and/or biometric information of Plaintiff or the Class members, as required by BIPA.
- Upon information and belief, Defendant lacks retention schedules and guidelines for permanently destroying Plaintiff's and the Class' biometric data and has not and will not destroy Plaintiff's or the Class' biometric data when the initial purpose for collecting or obtaining such data has been satisfied or within three years of personnel's last interactions with the company.

(Complaint, ¶¶ 38, 39, 40, 41, 42.) Plaintiff alleges each instance in which Defendant collected, stored, used, or otherwise obtained Plaintiff's and/or the Class' biometric identifiers and biometric information as described in the Complaint constitutes a separate violation of BIPA. (*Id.* at ¶ 44.)

In Count II, Plaintiff brings a claim for negligence. Plaintiff alleges that Defendant owed Plaintiff and the Class a duty of reasonable care in the collection and use of Plaintiff's and the Class' biometric data. (*Id.* at ¶ 47.) Plaintiff further alleges that Defendant owed Plaintiff and the Class "a heightened duty—under which it assumed a duty to act carefully and not put Plaintiff and the Class at undue risk of harm—because of the relationship of the parties." (*Id.* at ¶ 48.) According to Plaintiff, Defendant breached its duties by:

- Failing to implement reasonable procedural safeguards around the collection and use of Plaintiff's and the Class' biometric identifiers and biometric information.
- Failing to properly inform Plaintiff and the Class in writing of the specific purpose or length for which their fingerprint information was being collected, stored, and used.
- Failing to provide a publicly available retention schedule and guidelines for permanently destroying Plaintiff's and the Class' fingerprint data.

(*Id.* at ¶¶ 49, 50, 51, 52.) Plaintiff further claims that Defendant has not destroyed and will not destroy Plaintiff's or the Class' biometric data when the initial purpose for collecting or obtaining such data has been satisfied within three years of individuals' last interactions with the company. (*Id.* at ¶ 52.) Plaintiff alleges that these violations "have raised a material risk that Plaintiff and the Class' biometric data will be unlawfully accessed by third parties," and that "Defendant's breach of its duties proximately caused and continues to cause an invasion of Plaintiff's and the Class' privacy." (*Id.* at ¶¶ 53, 54.) Plaintiff therefore seeks a declaration that Defendant's conduct constitutes negligence.

For both counts, Plaintiff seeks to represent all "individuals who, while residing in the State of Illinois, had their fingerprints collected, captured, received, or otherwise obtained, and/or

stored" by Defendant. Defendants now move to dismiss Count I of Plaintiff's Complaint pursuant to section 2-619 because it is barred by a one-year statute of limitations for privacy claims. Defendants also move to dismiss Count II of Plaintiff's Complaint pursuant to section 2-615 because it is duplicative of Count I because it arises out of the same operative facts and seeks recovery for the same alleged wrongful conduct.

II. LEGAL STANDARD

Section 2-615 of the Illinois Code of Civil Procedure (the "Code") allows a defendant to challenge the legal sufficiency of a complaint. *Turner v. Mem'l Med. Ctr.*, 233 Ill. 2d 494, 499 (2009). A motion to dismiss under Section 2-615 does not raise affirmative defenses; rather, it only alleges defects on the face of the complaint. *Id.* The question presented by such a motion is whether the well-pleaded facts, and all reasonable inferences that may be drawn therefrom, when taken as true and in a light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). Thus, a cause of action should not be dismissed on the pleadings unless it is clearly apparent no set of facts can be proven that would entitle the plaintiff to recover. *Id.*

However, Illinois is a fact-pleading jurisdiction. *Id.* While this does not require the plaintiff to set forth evidence in the complaint, it does demand the plaintiff allege facts sufficient to bring a claim within a legally recognized cause of action. *Id.* at 499–500. A plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations. *Pooh-Bah Enters. v. Cty. of Cook*, 232 Ill. 2d 463, 473 (2009).

A Section 2-619 motion affords a "'means of obtaining . . . a summary disposition of issues of law or of easily proved issues of fact.'" *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120 (2008) (*quoting Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). Under

this section, a motion to dismiss admits the legal sufficiency of the complaint, but it raises any of nine enumerated defenses which act to defeat the action. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (1st Dist. 2000); *Jones v. Lazerson*, 203 Ill. App. 3d 829, 835 (5th Dist. 1990).

In ruling on a Section 2-619 motion, the court must interpret "all pleadings and supporting documents in the light most favorable to the nonmoving party." *Hubble v. Bi-State Dev. Agency*, 238 Ill. 2d 262, 267 (2010); *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). If the grounds for dismissal or the elements of the defense do not appear on the face of the complaint, the party seeking dismissal must file an affidavit in support of the motion. *Jordan v. Knafel*, 355 Ill. App. 3d 534, 544 (1st Dist. 2005). If facts set forth in an affidavit supporting a motion to dismiss are not contradicted by a counter-affidavit, they will be taken as true "notwithstanding contrary unsupported allegations in the Petitioner's pleadings." *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 907 (1st Dist. 1996). While Section 2-619 allows for the dismissal of a complaint on the basis of issues of law or easily proved issues of fact, disputed questions of fact are reserved for trial proceedings, if necessary. *Advocate Health & Hosps. Corp. v. Bank One, N.A.*, 348 Ill. App 3d 755, 759 (1st Dist. 2004).

III. DISCUSSION

A. Count I: Violations of the Biometric Information Privacy Act

In 2008, Illinois enacted the Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* ("BIPA" or the "Act"), to help regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." *Id.* § 5(g). "Biometric identifier" includes "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* § 10. "Biometric information" means "any information, regardless of how it is captured,

converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.*

Section 15 of BIPA imposes on private entities, like Defendant, obligations regarding the collection, retention, disclosure, and destruction of biometric identifiers and biometric information, including (i) obtaining consent from individuals if the company intends to collect, store, or disclose their personal biometric identifiers, (ii) inform the individuals in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used, (iii) destroying biometric identifiers in a timely manner, and (iv) securely storing biometric identifiers. *Id.* § 15. The Act provides a private right of action that permits a prevailing party to recover damages of $1,000 (or actual damages if greater) for negligent violation of the Act and $5,000 (or actual damages if greater) for intentional or reckless violations, attorneys' fees, costs, and expenses, and injunctive relief, if appropriate. *Id.* § 20.

The Act, however, does not expressly provide for a statute of limitations. Here, Defendant argues that the one-year statute of limitations for invasion of privacy claims should apply to BIPA "because it is a privacy statute that attempts to regulate the disclosure or potential disclosure of biometric information." (MTD, at 3.) Section 13-201 of the Code provides, "[a]ctions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued." 735 ILCS 5/13-201. Plaintiff argues that Section 13-201 applies only to privacy claims involving a publication element.

Statutes of limitation "discourage the presentation of stale claims and . . . encourage diligence in the bringing of actions." *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 265–66 (2001). They "represent society's recognition that predictability and finality are desirable, indeed indispensable, elements of the orderly administration of justice." *Id.* at 266. The Illinois

Supreme Court has held that "'[t]he determination of the applicable 'statute of limitations is governed by the type of injury at issue, irrespective of the pleader's designation of the nature of the action.'" *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008) (quoting *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)). It is the nature of the plaintiff's injury rather than the nature of the facts from which the claim arises which should determine what limitations period should apply. *Travelers*, 229 Ill. 2d at 466. "To determine the true character of a plaintiff's cause of action . . . '[t]he focus of the inquiry is on the nature of the liability and not on the nature of the relief sought.'" *Id.* at 467 (quoting *Armstrong*, 174 Ill. 2d at 291).

Section 20 of BIPA grants any person aggrieved by a violation of BIPA a right of action. 740 ILCS 14/20. The true nature of any potential liability, then, stems from alleged violations of the BIPA statute. While Plaintiff alleges that his privacy rights were violated, this is clearly an action for a violation of the BIPA statute and not an action for slander, libel, or for the publication of matter violating the right to privacy. *Travelers*, 229 Ill. 2d at 466; 735 ILCS 5/13-201. Even assuming *arguendo* that Section 20 of BIPA created an action for violating a right of privacy in one's biometric data, the plain and unambiguous language of Section 13-201 makes it clear that it applies to actions for *publication* of matter violating the right of privacy. 735 ILCS 5/13-201. Publication is not a necessary element for a person to be aggrieved by a violation of BIPA. 740 ILCS 14/20. True, sections 15(d) and (e) require some form of disclosure or "publication" to establish a violation. But no such disclosure or "publication" is required to state a claim under sections 15(a) and (b). That BIPA protects privacy rights does not bring it within the confines of the one-year statute of limitations period that applies only when information is "published," and Defendants have not cited any legal authority to justify the application of Section 13-201 to alleged violations of these other sections of BIPA. Moreover, different statutes of limitations for different

sections of BIPA would lead to absurd results. Section 13-201 does not apply to Plaintiff's BIPA claim.

Although not argued for by Defendant, the Court also finds that the two-year statute of limitations set forth in Section 13-202 does not apply to BIPA claims. Section 13-202 provides that "Actions for . . . a statutory penalty . . . shall be commenced within 2 years next after the cause of action accrued . . . ." 735 ILCS 5/13-202. A statutory penalty is penal in nature if it "(1) impose[s] automatic liability for a violation of its terms; (2) set[s] forth a predetermined amount of damages; and (3) impose[s] damages without regard to the actual damages suffered by the plaintiff." *Landis v. Marc Realty, LLC*, 235 Ill. 2d 1, 13 (2009) (citation omitted).

Here, it is clear that BIPA is a remedial statute, not a penal statute. Section 20 of BIPA does not impose damages without regard to the actual damages suffered by a plaintiff because it allows a plaintiff to recover the greater of his actual damages or the applicable liquidated damages amount. 740 ILCS 14/20. The fact that a plaintiff may be awarded or seeks only liquidated damages does not mean Section 20 is penal in nature.

The Court finds the Illinois Supreme Court's decision in *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, instructive. There, the court analyzed whether the federal Telephone Consumer Protection Act ("TCPA") was remedial or penal. The TCPA allows for private lawsuits and provides fixed statutory damages: a person can bring "an action to recover for actual monetary loss from . . . a violation, or to receive $500 in damages for each such violation, whichever is greater . . . [and] [i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times [that] amount . . . ." *Standard Mutual*, 2013 IL 114617, ¶ 29 (quoting 47 U.S.C. § 227(b)(3)). In holding that the

"manifest purpose of the TCPA is remedial and not penal," the court made three key observations: (1) Congress enacted the TCPA to address a societal concern—telemarketing abuses; (2) Congress intended the liquidated damages available under the TCPA to be, at least in part, an incentive for private parties to enforce the statute; and (3) by providing for treble damages separate from the $500 liquidated damages, Congress indicated that the liquidated damages served additional goals than deterrence and punishment and were not designed to be punitive damages. *Standard Mutual*, 2013 IL 114617, ¶¶ 31–33.

Like the TCPA, BIPA is clearly "within the class of remedial statutes which are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good or cure public evils." *Standard Mutual*, 2013 IL 114617, ¶ 31. Indeed, the Illinois legislature enacted BIPA because it determined that "public welfare, security, and safety [would] be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). BIPA's procedural protections are "particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers – identifiers that cannot be changed if compromised or misused." *Patel v. Facebook, Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018). When a private entity disregards BIPA's procedures, "the right of the individual to maintain her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." *Id.* Thus, by allowing private entities to face liability for violating BIPA, without requiring an individual to show more than a violation of their statutory rights, "those entities have the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 37. Whether Section 20's liquidated damages provisions are viewed "as a liquidated sum for actual harm, or as an

incentive for aggrieved parties to enforce the statute, or both, the [liquidated damages] amount clearly serves more than purely punitive or deterrent goals." *Standard Mutual*, 2013 IL 114617, ¶ 32. Section 13-202 does not apply to Plaintiff's BIPA claims.

Section 13-205 of the Code states, "[A]ll civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205. Because Section 20 does not contain a limiting provision and neither Section 13-201 nor Section 13-202 applies, the Court finds that Section 13-205 provides the applicable statute of limitations for Section 20: five years. *See, e.g.*, *Motague v. George J. London Mem'l Hosp.*, 78 Ill. App. 3d 298, 304 (1st Dist. 1979) (recognizing the general rule that a statutory right of action is a "civil action not otherwise provided for"); *People ex rel. Powles v. Alexander Cty.*, 310 Ill. App. 3d 602, 604 (4th Dist. 1941) ("It has been held that where liability results from a statute, an action to enforce such liability is a 'civil action not otherwise provided for'").

Finally, whether Plaintiff's claims are barred by the five-year statute of limitations involves disputed factual issues that cannot be resolved at this stage of the litigation. For example, Plaintiff alleges that his biometric data was collected and stored during his onboarding process as well as each time he clocked in or out. It is Plaintiff's position that "each instance in which Defendant collected, stored, used, or otherwise obtained" Plaintiff's or the Class' biometric data as described in the complaint constitutes a separate BIPA violation. Defendant, on the other hand, contends that the alleged collection and storage of Plaintiff's biometric data, and the alleged failure to properly warn him about it, occurred when Plaintiff began working for Defendant, in June of 2012. It is also unclear from Plaintiff's Complaint when Defendant disclosed Plaintiffs' and the Class' biometric identifiers and biometric information to a third-party vendor. More information is

required before these disputed factual issues can be resolved. Defendant's Motion to Dismiss pursuant to Section 2-619 is denied.

B. Count II (Negligence)

Count II of Plaintiff's Complaint is a claim for negligence wherein he alleges that Defendant was negligent in its care, collection and use of Plaintiff's biometric data. Without further explication, Defendant argues that Count II should be dismissed "for the same reasons that Count I fails." (MTD, at 8.) In its Reply, Defendant additionally states, "[f]or the same reasons explained in this brief why the exception to the one year statute of limitations for privacy claims—intrusion upon seclusion—is not present here, the negligence claim's similarly fail." (MTD Reply, at 13.) "Indeed," Defendant asserts, "[Plaintiff] cannot simultaneously assert the intentional tort of intrusion upon seclusion and negligence." (*Id.*) This argument is nonsensical. In Count I, Plaintiff is not asserting a claim for intrusion upon seclusion, he is asserting a claim under BIPA. In any event, the Court need not "speculate as to the details of [an] unexplained argument." *Johnson v. Bellwood Sch. Dist. 88*, 2016 U.S. Dist. LEXIS 82866 (N.D. Ill. June 27, 2016). It also declines to conduct legal research in an effort to locate support (to the extent it might exist) for unsupported legal contentions. *See Nelson v. Napolitano*, 657 F.3d 586, 590 (N.D. Ill. 2011) (a court is not "obliged to research and construct legal arguments for parties.").

Defendant also contends that Count II should be dismissed because it is duplicative of Count I. Plaintiff responds the negligence claim contains allegations that Defendant failed to comply with a duty of reasonable care, as well as a heightened duty of are created by the relationship between the parties, owed to Plaintiff, which is not a required element of BIPA.

To state a cause of action for negligence, a plaintiff must adequately plead: (1) the existence of a duty; (2) a breach of that duty; and (3) the breach caused injury to the plaintiff. *Cooney v.*

Chi. Pub. Schools, 407 Ill. App. 3d 358, 361 (1st Dist. 2010). Plaintiff has alleged Defendant has breached its duty under BIPA to exercise reasonable care in the collection and use of his biometric data by, *inter alia*, "failing to implement reasonable procedural safeguards around the collection and use of" Plaintiff's biometric data. (Complaint, ¶ 49.)

In *Dixon v. Washington & Jane Smith Cmty.*, a federal district court denied a motion to dismiss the plaintiff's negligence claim, finding that the plaintiff had sufficiently stated a cause of action for negligence in addition to a BIPA claim by alleging that the defendants had "breached their duty under BIPA to exercise reasonable care in the collection and use of her biometric data 'by failing to implement reasonable procedural safeguards around the collection and use of . . . [her] biometric identifiers and biometric information.'" 2018 U.S. Dist. LEXIS 90344, *44 (N.D. Ill. May 31, 2018). The plaintiff further alleged that this breach proximately caused a violation of her privacy rights, which the court concluded was "a concrete and actual injury." *Id.* The plaintiff, therefore, had "alleged all the elements of a common law negligence claim: the existence of a statutorily-created duty, a breach of that duty, and an actual injury that was proximately caused by that breach." *Id.*

The *Dixon* court, however, did not address whether the plaintiff's negligence claim was duplicative of her BIPA claim. Here, it is clear from Plaintiff's allegations that his negligence cause of action is founded upon the same facts as his BIPA claim. The allegations in Count II are duplicative of Plaintiff's BIPA allegations and do not arise from any negligent conduct or actions that are independent of Defendant's purported BIPA violations. Additionally, Plaintiff does not plead Count II in the alternative. Simply put, Plaintiff is attempting to recast a claim for a statutory violation as a negligence claim. Because Plaintiff's claim of negligence is inextricably linked to his BIPA claim such that there are no allegations supporting an independent basis for a negligence

cause of action apart from the BIPA violations themselves, Count II is merely duplicative of Count I and must be dismissed. *See, e.g., DeGeer v. Gillis*, 707 F. Supp. 2d 784, 795–96 (N.D. Ill. 2010) (collecting cases applying the "well-settled" principle "that duplicative counts in a complaint may be properly dismissed"); *Neade v. Portes*, 193 Ill. 2d 433, 445 (2000) ("While pleading in the alternative is generally permitted . . . duplicate claims are not permitted in the same complaint.") (citation omitted). Count II of Plaintiff's Complaint is dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED:

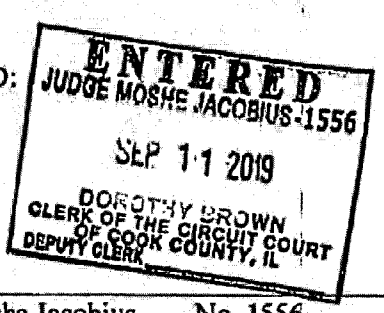
(1) Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619 is DENIED;

(2) Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-615 is GRANTED. Count II of Plaintiff's Complaint is dismissed without prejudice;

(3) Plaintiff shall file his First Amended Complaint within twenty-eight (28) days, should he choose to do so;

(4) This matter is set for a status hearing on 10/16/19 at 10:00 AM in Courtroom 2403.

ENTERED:



Judge Moshe Jacobius No. 1556