No. 127801

In the

Supreme Court of Illinois

JOROME TIMS and ISAAC WATSON, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

BLACK HORSE CARRIERS, INC.,

Defendant-Appellant.

Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-20-0563.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 19 CH 3522.
The Honorable **David B. Atkins**, Judge Presiding.

APPELLEES' REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

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ARGUMENT

I. The Nature of the Injury Under the Act Is the Violation of Its Informed Consent Requirements.

Black Horse does not dispute that the applicable limitations period is governed by the nature of the injury, and that the analysis hinges on the legal injury and liability imposed, rather than the facts from which the injury arises or the relief sought. *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 466-67 (2008) (citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)). Under the plain text of Section 13-201, the one-year limitations period does not categorically apply to any and all privacy claims. Rather, Section 13-201 is expressly limited only to claims for libel, slander or defamation—which indisputably are not codified by the Act—or "for publication of matter violating the right of privacy." 735 ILCS 5/13-201.

Seeking to cram every section of the Act into Section 13-201's one-year limitations period, including those under the discrete sections which lack even a plausible "publication" element, Black Horse argues, *ad nauseam*, that the "purpose" of the Act is what matters, and that its "overriding purpose" is to prevent an invasion of privacy resulting from the potential or actual unauthorized disclosure of an individual's biometric data. (Def.'s Br. at 1-2, 4-12, 18, 19-20, 21-22). In doing so, Black Horse insists that terms like "collection," "possession," and "profiting" are essentially synonymous with the word "disclosure," going so far as to say that "***every section*** of the Privacy Act is concerned with an invasion of privacy that involves publication." (Def.'s Br. at 9) (emphasis added). Black Horse is wrong. None of the Act's sections depend upon any "publication," nor is the term found anywhere in the Act. Black Horse's approach, which urges the Court to

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disregard the plain and ordinary meaning of terms, flies in the face of the well-established rules on statutory construction.

The nature of the injury under the Act is a statutory violation, and a claim for a violation of any of its sections necessarily arises from a private entity's failure to follow its straightforward notice and consent regime. 740 ILCS 14/15; *see also Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶¶ 33-34 ("The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent.").[1] Thus, the Act does not prohibit the collection, possession, use or disclosure of biometric data. Rather, it provides that *before* taking any of these actions, the subjects of collection receive notice and provide informed consent so that they may make informed choices over the collection, use and disclosure of their biometric data. *Id.*; 740 ILCS 14/15(f)-(g). As this Court held, the failure to satisfy the Act's informed consent requirements *is* the injury and it is "real and significant." *Id*. at ¶ 34. Contrary to Black Horse's assertions, the Court does not determine the nature of a statutory injury by examining its legislative history or otherwise attempting to discern its purpose. (Def.'s Br. at 4-7). And even if it were, nowhere in the Act's legislative findings does it state or imply that its sole intent or purpose is to prevent unauthorized disclosure. *See* 740 ILCS 14/5. It is not. Rather, the General Assembly enacted the Act to promote sensible implementation of biometric technology in Illinois while empowering Illinois residents with the right to information and control over how

[1] According to Black Horse, any other view—including the Appellate Court's conclusion on the matter—is a "contrivance." (Def.'s Br. at 11).

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their biometric data was collected, stored, safeguarded, used, disclosed and destroyed. *Id.*; *Rosenbach*, 2019 IL 123186, ¶¶ 34-37.

As the Appellate Court correctly observed, by the express terms of Section 13-201, "publication" is a requisite element to invoke its one-year limitations period. (A15, ¶ 29). While the Act does not codify a tort, statute of limitations analyses for common law privacy torts demonstrate that the common law understanding of "publication" involves communication of information to the public at large. *See Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027 (1st Dist. 1999) (publication is not an element of intrusion upon seclusion privacy tort)[2]; *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 416-17 (1989) ("The basis of the tort [of intrusion upon seclusion] is not publication or publicity. Rather, the core of this tort is the offensive prying into the private domain of another."); *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 737 (2d Dist. 1982) (rejecting application of Section 13-201 to claims brought under the Eavesdropping Act where defendant secretly recorded conversations and divulged information to others because they lacked publication element).

Publication-based privacy claims which are actually governed by Section 13-201 support the same interpretation. *See e.g., Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d

[2] Black Horse argues that two cases in which federal courts found that Section 13-201 applied to certain claims, *Hrubec v. National R.R. Passenger Corp.*, 778 F.Supp. 1431 (N.D. Ill. 1991) (intrusion upon seclusion) and *Juarez v. Ameritech Mobile Communications, Inc.* 746 F. Supp. 798 (N.D. Ill. 1990), *aff'd*, 957 F. 2d 317 (7th Cir. 1992) (invasion of privacy stemming from sexual harassment), are more persuasive here because they stand for the premise that Section 13-201 "should not be read so narrowly as to exclude privacy claims for intrusion upon seclusion." (Def.'s Br. at 16). But as the Appellate Court observed in *Benitez*, "neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion," and it is the plain language of the statute that controls. *Benitez*, 305 Ill. App. 3d at 1035.

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318, 322 (2d. Dist. 2006) (appropriation of name or likeness of another, codified under the Illinois Right of Publicity Act, involves the *publicity* of an individual's name or likeness for commercial benefit); *Kapotas v. Better Government Ass'n*, 2015 IL App (1st) 140534, ¶ 83 (invasion of privacy action for public disclosure of private facts is a defendant's *publicity* of a private fact); *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 20 (the nature of an injury under an invasion of privacy claim for false light is that the plaintiff was placed in a false light *before the public*); *Cordis v. Chi. Tribune Co.*, 369 Ill. App. 3d 601, 607 (1st Dist. 2006) (employer vendor's disclosure of plaintiff's mental health condition to ex-wife met the "special relationship" exception to the requirement that disclosure be made to the general public for invasion of privacy and defamation claims); *Miller v. Motorola*, 202 Ill. App. 3d 976, 980 (1st Dist. 1990) (finding a cause of action for public disclosure of private facts was sufficiently stated where plaintiff alleged that her medical condition was disclosed to several fellow employees without her consent, but not for common-law tort of unreasonable intrusion upon the seclusion of another). And basic dictionary definitions of the terms "for" and "publication" lead to the same result: Section 13-201 encompasses actions where the object or purpose of the suit arises from a defendant's act of bringing before the public a matter violating the right to privacy. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/for (last visited July 5, 2022); Dictionary.com, https://www.dictionary.com/browse/for (last visited July 5, 2022); Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/publication (last visited July 5, 2022); Dictionary.com, https://www.dictionary.com/browse/publication (last visited July 5, 2022).

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When interpreting a statute, the court's "primary objective is to ascertain and give effect to the intent of the statute's drafters." *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, ¶ 34 (citing *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30). As such, "the most reliable indicator of the drafters' intent is the language used in the statute itself, which should be given its plain and ordinary meaning." *Id*.; *Michigan Ave. Nat. Bank v. City of Cook*, 191 Ill. 2d 493, 504 (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."). The word "publication" exists in Section 13-201 but was not included in the Act for a reason. As the Appellate Court accurately found, "had the legislature intended to include any privacy action that merely concerns or pertains to publication, it would have used such broad language rather the narrower 'for publication.'" (A15, ¶ 29). Similarly, the General Assembly, which was aware of Section 13-201 when drafting the Act, could have included the "publication" language necessary to invoke its one-year limitations period. But it chose not to. Black Horse cannot overcome its omission by stating that the statute (and the plain and ordinary meaning of words like "publication") "evolves" and is "elastic." (Def.'s Br. at 13).

In other words, it is not a close call. At the risk of stating the obvious, "publicizing" something is not the same as "collecting," "using," "possessing," or "disclosing" it. Like Plaintiffs, persons aggrieved under the Act can (and usually do) properly state a cause of action without any suggestion that the private entity "publicized" their biometric data. Black Horse's convoluted application of Section 13-201 to all claims for violations of the Act makes sense only if the Court arbitrarily excises the word "publication" from the

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statute. Accordingly, Defendant's attempts to expand Section 13-201's reach to apply to every section of the Act must be rejected.

II. The Plain Text of Sections 15(c) and 15(d) Unquestionably Lack Any Element of "Publication" to State a Cause of Action.

Black Horse states that Section 15(c) of the Act "explicitly restricts a certain type of communication of biometric information: the entity may not disseminate biometric information to any third party for profit." (Def.'s Br. at 10). Simply reading the statute shows this is false. Section 15(c) of the Act does not even mention dissemination, let alone dissemination to "third parties for profit." Rather, it precludes entirely different conduct; namely, "sell[ing], leas[ing], trad[ing], or otherwise profit[ing] from a person's or a customer's biometric identifier or biometric information." 740 ILCS 14/15(c). Under its plain language, Section 15(c) prohibits an entity from profiting off biometrics—something which is easily accomplished without "publicizing" it. For example, if a private entity collects and possesses facial geometry scans and uses this data to enhance or train algorithms for the entity's own, separate facial recognition technology program it then sells to one or more third parties, Section 15(c) is violated *without publicizing* the individual's biometric data. The injury is the entity's receipt of something of value by virtue of its own possession or use of biometrics to turn a profit—not its publication. Because Section 15(c) clearly lacks any element of publication to state a claim, the one-year limitations period under Section 13-201 cannot apply.

Black Horse likewise contends that Section 15(d) of the Act is "explicitly concerned with the publication of biometric information." (Def.'s Br. at 10). But the term "publication" is not in this section, either. Section 15(d) provides that an entity must simply obtain informed consent before disclosing, redisclosing or disseminating a person's

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biometric data. The Act does not prohibit the transfer of biometric data between private entities, and an entity's disclosure, redisclosure or dissemination of a person's biometric data, standing alone, is not an "injury" which could give rise to a cause of action under Section 15(d). This is because the Act *permits* this conduct unless, as Plaintiffs allege, the private entity fails to provide notice and secure informed consent before any third-party disclosure. This fully aligns with the informed consent regime of the Act's other sections, and its requirement that individuals are given the right to choose who collects and possesses their biometric data and to whom it is disclosed. Because Section 15(d) does not require a plaintiff to plead or prove that a private entity disclosed, redisclosed or disseminated their biometric data to the public, the publication element is lacking to invoke Section 13-201. Moreover, and as set forth above, disclosure or dissemination of biometrics in violation of Section 15(d) is not a "publication" as the term is understood in privacy related torts. And the legislature is presumed to know the difference between the words "disclosure" and "publication" (which connotes wider dissemination) and chose the former, likely because even the most private dissemination of biometric data can be as dangerous as publicizing it. *See* 740 ILCS 14/5(c).

Black Horse leans heavily on *West Bend* to support its view that collecting, possessing, using and disclosing biometric data is, for statute of limitations purposes, no different than publicizing it. But Black Horse reads too much into *West Bend*, where the Court was called upon to interpret the terms of an insurance policy—not the Act or Section 13-201. The Court, looking to definitions of "publication" in various contexts, found the term "publication" was ambiguous in the context of the policy at issue, and therefore construed the term strictly against the drafter, as it must. *See Burlinski*, 2020 WL 5253150,

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at *7; *W. Bend Mut. Ins. Co.*, 2021 IL 125978, ¶¶ 38-43. The General Assembly, however, provided no indication that it intended the term "disclosure" to be synonymous with the term "publication" as used in Section 13-201, and its omission from the statute glaringly shows exactly the opposite. While Black Horse urges the Court to rewrite or "add words to [the Act] to change its meaning," this is something it simply cannot do. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511 ¶¶ 48-49.

Lastly, courts must "presume that the legislature did not intend absurd results." *People v. McCarty*, 223 Ill. 2d 109, 126 (2006); *see also In re Marriage of Goesel*, 2017 IL 122046 ¶ 13, 102 N.E.3d 230, 235 (2017). While a publication of biometric data could give rise to a violation of Section 15(d), it is not required to state a claim. In fact, it would be the rare circumstance, given that Plaintiffs—along with the vast majority of claims currently pending under the Act—allege a limited, private disclosure of biometrics to discrete third parties without prior notice or consent. As such, Plaintiffs' Section 15(d) claims for Defendant's failure to obtain consent cannot fall within the narrow confines of Section 13-201.

III. A Five-Year Limitations Period Applies to Every Section of The Act.

With no analysis or support, Black Horse states that Section 13-205 "is not a default statute of limitations which applies whenever a given statute lacks an express limitations period." (Def.'s Br. at 18). Black Horse's assertion is puzzling, given that this Court has explicitly referred to Section 13-205 as a "default" limitations period. *See Henderson Square Condo. Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 50, *opinion modified on denial of reh'g* (Jan. 28, 2016) ("default" five-year limitations period of Section 13-205 applies to "all civil actions not otherwise provided for"); *Gillespie Cmty. Unit Sch. Dist.*

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No. 7, Macoupin Cnty. V. Wright & Co., 2014 IL 115330, ¶¶ 24, 33 ("default" five-year limitations period under Section 13-205 applied to claims for fraudulent misrepresentation brought under 735 ILCS 5/13-214, which does not provide a limitations period for such claims); *see also Sundance Homes, Inc. v. Cnty. of DuPage*, 195 Ill. 2d 257, 280 (2001) (Section 13-205 "sets forth a catch-all statute of limitation for "all civil actions not otherwise provided for""); *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 934 (1st Dist. 1993) (Section 13-205 "catch-all" provision applies to fraudulent misrepresentation claims).

It also ignores the explicit statutory text of Section 13-205, which provides that "all 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 the Act lacks a specific statute of limitations, and neither Section 13-201 nor any other limitation period applies, the five-year limitations period of Section 13-205 applies. *See e.g., Johnson v. Northshore Univ. Healthsystem, Healthport, Inc.*, 405 Ill. App. 3d 1191 (1st Dist. 2011); s*ee also Seaman v. Thompson Elecs. Co.*, 325 Ill. App. 3d 560, 565 (3d Dist. 2001) (Section 13-205 applies to claims brought under the Illinois Prevailing Wage Act because it is silent on a limitations period); *People ex rel. Ill. Dep't of Labor v. Tri State Tours, Inc.*, 342 Ill. App. 3d 842, 848 (1st Dist. 2003) (before a 10-year limitations period was added to the statutory text by amendment, the Illinois Wage Payment and Collection Act was governed by Section 13-205).

Moreover, applying a uniform statute of limitations to all the Act's sections provides certainty, clarity and efficiency for litigants and the judiciary. Inconsistent limitations periods cause confusion for plaintiffs whose rights are violated under the Act

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in multiple ways, but given the inconsistency, one or more of those claims could be time-barred. For example, under the Appellate Court's interpretation, if an entity collects an individual's fingerprints without consent (in violation of Section 15(b)) and discloses her fingerprint data to another entity also without consent (in violation of Section 15(d)), and she brings a lawsuit three years after the collection and disclosure, then her Section 15(d) claim is time-barred, even though both stem from the entity's failure to obtain informed consent. As noted above, it is well established that statutes should be interpreted with the presumption that when the legislature enacted a law, "it did not intend to produce absurd, inconvenient, or unjust results." *In re Marriage of Goesel*, 2017 IL 122046 at ¶ 13. Applying the default five-year limitations period under Section 13-205 consistently across all of the Act's sections aligns with the legislature's intent to implement an informed consent regime to govern a private entity's collection, use and disclosure of biometric data.

Black Horse goes on to contend that a shorter, one-year statute of limitations period should apply to all sections of the Act so that an individual's risk of identity theft will be reduced by suing "promptly" upon being aggrieved. (Def.'s Br. at 19). This assertion is offensive. Employees are not responsible for policing their employer's conduct, through litigation or otherwise. Black Horse, unlike its employees, is deemed with knowledge of the laws to which employers are subject, is solely responsible for its conduct and its consequences.

In the same breath, Black Horse also references the Personal Information Protection Act ("PIPA"), wherein a claim for breach of biometric data is subject to a three-year limitations period under the Illinois Consumer Fraud and Deceptive Business Practices Act, to argue that PIPA complements the Act, therefore mandating a shorter limitations

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period. *Id.* But PIPA expressly includes a limitations period. *See* 815 ILCS § 530/20. And the Court may not arbitrarily adopt the explicit limitations period applied to other statutes.

Lastly, and equally nonsensical, Black Horse contends that a shorter limitations period is proper because the discovery rule could conceivably extend the statutory period by "decades." (Def.'s Br. at 20-21). But the discovery rule could apply in any case regardless of the limitations period, so even if Black Horse's dubious proposition is accurate, a plaintiff could wait "decades" to bring their claim regardless of the Court's ultimate determination on this issue, as he could with *any* cause of action. Indeed, under Black Horse's logic, every statute of limitations for any claim should be no more than a few days or weeks, given that, in its view, the discovery rule could perpetually extend the time to take action.

A shorter statute of limitations period would simply benefit the entity that is violating the law by encouraging noncompliance and limiting exposure, necessarily prejudicing those whom the Act is intended to protect. Defendant's arguments must not be countenanced. The default five-year limitations period provided for under Section 13-205 applies to claims for violations of the Act.

CONCLUSION

For these reasons and those set forth in Plaintiffs-Appellees' Response Brief and Cross Appeal, the Court should answer the certified question by holding that all claims brought under the Act are subject to a five-year statute of limitations under 735 ILCS 5/13-205.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 315(h). The length of the Appellees' Reply Brief in Support of Request for Cross-Relief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service, is 11 pages.

/s/ James B. Zouras
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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

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	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 127801
	)	
BLACK HORSE CARRIERS, INC.,	)	
	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on July 13, 2022, there was electronically filed and served upon the Clerk of the above court the Appellees' Reply in Support of Request for Cross-Relief. On July 13, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ James B. Zouras
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ James B. Zouras
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