No. 129081
IN THE ILLINOIS SUPREME COURT

LUCILLE MOSBY, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 05031 The Honorable Pamela McLean Meyerson, Judge Presiding
YANA MAZYA, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE, *Defendants-Appellants.*	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Alison C. Conlon, Judge Presiding

Appeal from the Illinois Appellate Court, First District, 2022 IL App (1st) 200822
The Honorable Justices Sharon Oden Johnson, Mary L. Mikva, and Raymond W. Mitchell

BRIEF OF DEFENDANTS-APPELLANTS NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, AND BECTON DICKINSON AND COMPANY

ORAL ARGUMENT REQUESTED

Bonnie Keane DelGobbo
Joel Griswold
Amy L. Lenz
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Matthew C. Wolfe
William F. Northrip
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

E-FILED
4/26/2023 2:47 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

POINTS AND AUTHORITIES

I. NATURE OF THE ACTION

This appeal presents a straightforward question of statutory interpretation: whether two categories of "information" separated by a disjunctive "or" cover different types of data. The plain language of the statute at issue, this Court's settled precedent, and long-standing canons of statutory interpretation require that the answer be yes.

The Illinois Biometric Information Privacy Act (the "Privacy Act") regulates the use, collection, and storage of biometric identifiers and biometric information, as those terms are defined under the Act. 740 ILCS 14/10. In its definition of "biometric identifiers," the statute excludes two separate categories of health care-related information entirely from the reach of the Act. It excludes: "information captured from a patient in a health care setting ***or*** information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996" ("HIPAA"). *Id.* (emphasis added). The Privacy Act thus excludes from its reach two separate categories of information relating to health care: (1) information collected from patients (the "Patient Data Exclusion"), and (2) information collected for health care treatment, payment, or operations as those terms of art are defined under HIPAA, *regardless* of the source of that information (the "Health Care Exclusion"). The second category of information – the Health Care Exclusion – is not, by its plain terms, limited to patient data. Nor is it duplicative of the first category; the language is totally different and

addresses a different kind of information. In short, it is not a redundant, throwaway clause.

Contrary to the plain language of the statute, in a split decision, the Illinois Appellate Court, First District held that any health care-related information must be derived from a patient to fall within the Health Care Exclusion because the Privacy Act's reference to "under [HIPAA]" limits *both* the Patient Data Exclusion *and* the Health Care Exclusion to information *protected* under HIPAA, and HIPAA protects only patient information. In other words, the First District majority opinion transforms the Privacy Act's language into a definitional carveout for (1) information from a health care patient or (2) information from a health care patient. Such an interpretation ignores the legislature's purposeful use of a disjunctive "or" to separate two categories of "information." It also impermissibly creates redundancy in the statute. As Justice Mikva set forth in her dissent, the majority opinion renders the second exclusion superfluous and flouts fundamental canons of statutory interpretation.

What's more, if the Court allows the First District's majority opinion to stand, it will have a significant impact on health care providers and their vendors across Illinois that have used finger-scan medication administration systems to facilitate safe health care treatment, payment, and operations—just as they were encouraged to do by the Privacy Act's express reference to HIPAA and by HIPAA regulations and guidance themselves; indeed, those providers and vendors have relied upon that language. Plaintiffs' allegations

make clear that the technology at issue was used only for health care treatment, payment, and operations, as those terms are defined by HIPAA. Plaintiff Lucille Mosby alleges she worked as a registered pediatrics nurse for Ingalls Memorial Hospital, where she used a medstation sold by Becton, Dickinson and Company ("BD") and its finger-scan feature "to access medications for patient care." Similarly, Plaintiff Yana Mazya alleges that she worked as a registered nurse at Northwestern Lake Forest Hospital ("NLFH"), where she used medication dispensing devices and their finger-scan features "to gain authorized access to stored materials." Plaintiff Mazya further alleges NLFH and Northwestern Memorial HealthCare ("NMHC") (NLFH and NMHC collectively, "Northwestern") use the finger scans "to monitor authorized access to stored materials (*i.e.*—medications) by its employees."

Put simply, it is both undisputed and obvious that the medication dispensing systems at issue in this appeal are used for *health care treatment, payment, and operations* as those terms are defined under HIPAA. The technology only needs to be used for one of these purposes to fall within the Health Care Exclusion; here, they involve *all three*. *First*, medication dispensing systems are used to facilitate the dispensing and administration of medications and medical supplies to treat patients (health care treatment). *Second*, the systems generate records that facilitate billing and auditing (health care payment). And *third*, the systems improve patient safety and quality of care by reducing medication errors and ensuring that only authorized personnel dispense medication (health care operations). Because

Plaintiffs allege their finger scans were used for "health care treatment, payment or operations," the finger-scan information at issue in this matter is not regulated by the Privacy Act at all.

To date, Illinois's health care providers and medication dispensing technology providers have relied on the Privacy Act's plain language and associated federal guidance recommending the use of biometric technology to control medications and deliver patient care safely. If the First District's majority interpretation is allowed to stand, both health care providers and their technology providers could face catastrophic liability for conducting their critical, life-saving operations in a safe and secure manner—a result the legislature did not intend. Northwestern and BD therefore respectfully request that this Court follow settled rules of statutory construction and reverse the First District.

II. STATEMENT OF THE ISSUES

Whether the exclusion in Section 10 of the Privacy Act for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to health care workers' information when such information is collected, used or stored for health care "treatment," "payment," or "operations" as those terms are defined under HIPAA?

III. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315. On February 25, 2022, the First District issued its opinion. (A71-87.) On

March 18, 2022, BD, joined in part by Northwestern, filed a joint petition for rehearing. (A88-110.) The First District granted the petition. (A111-112.) On September 30, 2022, the First District modified its opinion. (A113-144.) Pursuant to Rule 315(b)(2), on November 4, 2022, Defendants filed a petition for leave to appeal within 35 days of the modified opinion. (A145-251.) On January 25, 2023, the Illinois Supreme Court granted Defendants' petition for leave to appeal and, therefore, this Court has jurisdiction over this appeal. (A252.)

IV. STATEMENT OF FACTS

A. Plaintiff Mosby

Plaintiff Mosby worked as a registered pediatrics nurse for Ingalls Memorial Hospital and used the BD medstation and its finger-scan device to provide "patient care." (C31 ¶¶ 45-46; C574 ¶¶ 45-46; BD-A012 ¶¶ 54-55.)[1] Plaintiff Mosby alleges that BD violated the Privacy Act by using the medstation scanning device to collect, use and/or store her finger scan data without complying with the Privacy Act's notice and consent provisions and by disclosing her purported biometric data to third parties without first obtaining her written consent.[2] (BD-A017-22 ¶¶ 76-103; C579-83 ¶¶ 67-94.) Mosby acknowledges and does not dispute that the medstations and finger-scan device are used in connection with patient care. (BD-A003 ¶¶ 8-10; BD-A010

[1] The record cited to as "C" refers to Becton Dickinson's Common Law Record on Appeal, filed in the First District. The record cited to as "BD-A" refers to Becton Dickinson's Appendix to its Opening Brief, filed in the First District.

[2] BD denies that the finger-scan feature on its medstation device collects, stores, or uses a biometric identifier or biometric information as those terms are defined by the Privacy Act.

¶ 40; BD-A012 ¶¶ 54-55; C565 ¶¶ 4-5; C571 ¶¶ 34-35; C574 ¶¶ 45-46.) In fact, she expressly alleges that, as part of her role as a nurse, she scanned her finger "to access medications for patient care." (C31 ¶ 46; *see* BD-A012 ¶ 55.)

BD moved to dismiss the Amended Class Action Complaint, arguing, in part, that the finger-scan data allegedly collected, used, and/or stored by the medstation scanning device is excluded from the Privacy Act's definition of "biometric identifier" and the related definition of "biometric information" under the Health Care Exclusion, as provided in Section 10 of the Act. (C599-601; C619-22.) BD also argued this construction aligns with the overall structure and legislative intent to provide certain industry-specific carve-outs for financial institutions, law enforcement, state and local agencies, government contractors, and, as applicable in this case, health care entities such as hospitals and vendors working with hospitals when engaged in health care treatment, payment, or operations. (C600-01; C619-22; C1310-13.)

The trial court denied BD's request for dismissal based on the Health Care Exclusion, but allowed BD leave to appeal under Illinois Supreme Court Rule 308 (C1523-C1623), which the First District granted on June 18, 2020. (BD-A064-66.) The First District initially denied the appeal, (A32), but on BD's petition for leave to appeal, this Court exercised its supervisory authority to direct the First District to address the issue. (A33.)

B. Plaintiff Mazya

Plaintiff Mazya was a Registered Nurse at NLFH. (A45, ¶ 49.) Plaintiff alleges defendants NLFH and NMHC are health care providers. (A36, ¶¶ 2-3.)

Plaintiff Mazya alleges that Northwestern required her to scan her fingers[3] for identification to access "medication dispensing systems (*i.e.* – BD Pyxis and Omnicell)" and "gain authorized access to stored materials," and for Northwestern "to monitor authorized access to stored materials (*i.e.* – medications) by its employees." (A36, ¶¶ 5-6.) Plaintiff Mazya does *not* allege she was unaware her finger scans were being used to access the BD Pyxis and Omnicell medication dispensing systems—indeed, she alleges she knowingly scanned her fingers "multiple times each day" for the express purpose of accessing the BD Pyxis and Omnicell systems for health care treatment and operations. (A43, ¶ 39; A45, ¶ 51.) Rather, she alleges Northwestern failed to give certain notices and obtain consent "in writing." (*E.g.*, A38, ¶ 13; A55, ¶¶ 102-103.) Plaintiff Mazya asserts three counts in her operative complaint, all alleging violations of the Privacy Act. (A52-57.)

Northwestern moved to dismiss Plaintiff Mazya's claims for three separate reasons, one of which bears on this appeal: that the Illinois legislature specifically excluded from the Privacy Act's coverage "information collected, used or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [HIPAA]" and therefore, Plaintiff Mazya failed to state a claim upon which relief could be granted. (R38-39.)[4] Northwestern explained that its use of the medication

[3] Northwestern denies the medication dispensing systems use a biometric identifier or biometric information as those terms are defined by the Privacy Act.

[4] The record cited to as "R" throughout refers to Northwestern's Supporting Record on Appeal filed in the First District.

dispensing systems was part of the health care it provides to patients and that under HIPAA, "health care" is defined broadly to include "care, services, or supplies related to the health of an individual," including the "[s]ale or dispensing of a drug, device equipment, or other item in accordance with a prescription." (R39.)

To verify the identity of an employee who accesses the medication dispensing systems and confirm that the employee has proper authorization, Northwestern offers the employee the option to scan the employee's finger or to use a passcode that the employee must enter manually. (R61, ¶ 11.[5]) The use of finger scans, therefore, is directly related to the dispensing of prescription drugs, as well as the provision, coordination, and management of health care. (R40.) In addition, the records created by the medication dispensing systems allow Northwestern to ensure proper billing for medication. (R61, ¶ 13.) Therefore, the information Northwestern collects through the use of the medication dispensing systems is also for health care operations and payment under HIPAA. (R41.)

Northwestern also argued that the Privacy Act instructs that "[n]othing in [the] Act shall be construed to conflict with . . . [HIPAA] and the rules promulgated under [HIPAA]." (R41.) Therefore, applying the Privacy Act to medication dispensing systems used by hospitals would directly conflict with

[5] Northwestern submitted a declaration in support of the Section 2-619 portion of its motion to dismiss that provided additional information about Northwestern's use of the medication dispensing systems. (R60-62.) Plaintiff Mazya did not attempt to dispute or rebut the declaration.

U.S. Department of Health and Human Services ("HHS") guidance regarding HIPAA. (R41-42.) This is because HHS has recommended that covered entities implement authorization and authentication procedures, including "the use of biometrics, such as fingerprint readers on portable devices" and that covered entities "require something unique to the individual such as a biometric." (R42.)

On November 2, 2020, the trial court denied Northwestern's motion to dismiss, holding that the Health Care Exclusion is limited to information collected from patients and does not extend to information collected from health care workers. (R465-66.) Northwestern subsequently sought interlocutory review of that issue pursuant to Rule 308 on November 30, 2020. (R470.) The trial court initially denied interlocutory review (R854), but later granted review after reconsideration on July 23, 2021 (R1103). The trial court certified a question of law for interlocutory appeal to the First District pursuant to Rule 308. (R1103.)

C. Consolidated Appeal To The First District

The First District granted the *Mosby* petition after the Supreme Court ordered it to do so. (A33.) The First District also granted the *Mazya* petition (A70), and the cases were consolidated on appeal with the First District considering the following questions of law pursuant to Rule 308:

> In *Mosby*: Whether the exclusion in Section 10 of [the Act] for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health

> Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA? (C1873.)
>
> In *Mazya*: Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act's exclusion for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996," 740 ILCS 14/10, when the employees' finger-scan information is used for purposes related to "health care," "treatment," "payment," and/or "operations" as those terms are defined by the HIPAA statute and regulations? (R1103.)

On February 25, 2022, the First District issued an opinion answering the *Mazya* question in the negative, holding the Health Care Exclusion is limited to only patient information. (A71-87.) In doing so, the Court did not address the *Mosby* question or briefing, and it did not substantively discuss: (1) the General Assembly's intentional use of "information" twice, which delineates two distinct categories of information, particularly because these categories of information are separated by a disjunctive "or"; (2) the last antecedent doctrine, which dictates that the prepositional phrase "under HIPAA" modifies only the phrase that immediately precedes it, *i.e.*, "health care treatment, payment, or operations," such that HIPAA's broad definitions

of those terms must be considered; and (3) the ordinary meaning of "under," which is defined as "under the guidance and instruction of"—not "protected by." (A71-87.)

Defendants, therefore, timely filed a petition for rehearing in the First District on March 18, 2022. (A88-110.) The First District granted the petition on June 2, 2022. (A111-112.) On September 30, 2022, after further briefing but without additional oral argument, the First District issued a split opinion affirming its original decision, with Justice Mikva dissenting. (A113-144.)

On November 4, 2022, Defendants petitioned this Court for leave to appeal the First District's modified opinion. (A145-251.) This Court granted Defendants' leave to appeal. (A252.) This appeal followed.

V. STATUTE INVOLVED

Illinois's Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*:

> "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry . . . . Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.
>
> * * *
>
> "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. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

740 ILCS 14/10. The full text of Section 10 is set forth in the Appendix. (A1-4.)

VI. STANDARD OF REVIEW

"By definition, certified questions are questions of law subject to *de novo* review." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. "Questions of statutory construction are questions of law and reviewed *de novo*." *Raab v. Frank*, 2019 IL 124641, ¶ 18. "Under either section [2-615 or 2-619], our standard of review is *de novo*." *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006).

VII. ARGUMENT

The Privacy Act expressly provides that biometric identifiers "do not include . . . information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10. This Court should reverse the First District's opinion and hold that when *any* biometric data—regardless of the source—is used for health care treatment, payment, or operations as defined by HIPAA, such data is not a "biometric identifier" under the Privacy Act. Nothing in the statutory text limits the Health Care Exclusion to patient data. As discussed below, any reading to the contrary conflicts with the plain language of the statute, the Privacy Act's purpose and legislative

history, and federal guidance to health care providers and their technology vendors concerning HIPAA and its implementation in health care settings.

A. Unlike The Patient Data Exclusion, The Privacy Act's Health Care Exclusion Is Not Limited To Patient Biometric Data.

As this Court recently explained in interpreting the same statute at issue here, "[t]he cardinal principle and primary objective in construing a statute is to ascertain and give effect to the intention of the legislature." *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 20. "The best indicator of legislative intent is the statutory language itself, given its plain and ordinary meaning." *Id.*; *see also Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, ¶ 26. The Privacy Act's plain language was overlooked by the majority in the First District. As Justice Mikva noted in her well-reasoned dissent, "[t]he majority ignored important rules of statutory construction" and "overcomplicat[ed] a . . . straightforward reading of [the Health Care Exclusion]." (A138, Mikva, J., dissenting, ¶ 74.)

The First District majority misapplied bedrock rules of statutory construction in three important ways. *First*, the majority failed to read the Privacy Act in accordance with its plain terms. *Second,* the majority ignored the axiomatic rule that statutes should be construed so that no word is rendered superfluous. *Third*, the last antecedent rule "make[s] clear" that the Health Care Exclusion "extends to biometric information collected from health care workers . . . and is not limited . . . to biometric information collected from

patients." (A138, Mikva, J., dissenting, at ¶ 74.) We discuss each in more detail below.

1. By Its Plain Terms And Reference To HIPAA, The Health Care Exclusion Has Its Own Meaning.

Each word in a statute is to be "given a reasonable meaning and not rendered superfluous." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001). This Court has made clear that "[t]he word 'or' is disjunctive. As used in its ordinary sense, the word 'or' marks an alternative indicating the various parts of the sentence which it connects are to be taken separately. In other words, 'or' means 'or.'" *Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 145 (2006) (internal citations omitted); *see also Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134, 1141 (2018) ("[O]r' is 'almost always disjunctive.'" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

Here, the Illinois legislature used the disjunctive "or" to separate the Privacy Act's reference to "information captured from a patient in a health care setting" (the Patient Data Exclusion) from its reference to "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" (The Health Care Exclusion). 740 ILCS 14/10. The Act further reinforces the distinction between the Patient Care Exclusion and the Health Care Exclusion by repeating the word "information" at the beginning of each separate clause. By using "information" twice, the legislature emphasized that each of the two clauses separated by the "or" exempts a different category of "information." Furthermore, and critically, the Health Care Exclusion does *not* include any reference to "patient." Put simply, the two categories of

"information" separated by an "or" are "to be taken separately." *People v. Fieberg*, 147 Ill. 2d 326, 349 (1992). Consequently, information is exempt from the Privacy Act if it satisfies *either* statutory criteria.

Notably, courts have repeatedly recognized that the disjunctive "or" in the statute does, in fact, denote two separate exclusions that address two distinct categories of information. *See Vo v. VSP Retail Dev. Holding, Inc.*, No. 19 C 7187, 2020 WL 1445605, at *2 (N.D. Ill. Mar. 25, 2020) ("To fall under BIPA's health care exemption, the biometric information obtained must either: (1) be obtained from a patient in a health care setting, or (2) be collected, used, or stored in connection with healthcare treatment, payment, or operations under HIPAA."). *See also Delma Warmack-Stillwell v. Christian Dior, Inc.*, No. 22 C 4633, 2023 WL 1928109, at *3 (N.D. Ill. Feb. 10, 2023) (acknowledging that Privacy Act contains two separate health care exclusions); *Svoboda v. Frames for Am., Inc.*, No. 21 C 5509, 2022 WL 410719, at *1, 3 (N.D. Ill. Sept. 8, 2022) (analyzing scope of health care exclusions as two distinct categories of information); *Crumpton v. Octapharma Plasma, Inc.*, 513 F. Supp. 3d 1006, 1016 (N.D. Ill. 2021) (acknowledging "[t]he disjunctive 'or' separating the 'health care setting' and 'information collected, used, or stored for health care treatment' clauses of the exception").

Instead of applying the statute as written, the First District ruled that "the two categories can be seen as protecting: (1) information captured from the patient in a healthcare setting and (2) information that is already protected 'under the federal Health Insurance Portability and Accountability Act of

1996.'" (A131-132 ¶ 60 n.8.) Tellingly, in doing so the majority *changed* the language of the Health Care Exclusion. The actual statutory language does *not* say "information that is already protected" under HIPAA. It says "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10.

Thus, the Court should look to the meaning of health care treatment, payment, or operations under HIPAA. And indeed, HIPAA regulations define each of the key terms used in the Health Care Exclusion: "**Health care**" includes "care, services, or supplies related to the health of an individual," including the "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription," 45 C.F.R. § 160.103; "**Treatment**" includes any activity that involves "the provision, coordination, or management of health care and related services by one or more health care providers," 45 C.F.R. § 164.501; "**Payment**" includes "activities undertaken by . . . [a] health care provider or health plan to obtain or provide reimbursement for the provision of health care," *id.*; and "**Health care operations**" includes, among other things, "patient safety activities," "general administrative activities," and conducting or arranging for "auditing functions, including fraud and abuse detection and compliance programs," *id.*

HIPAA regulations also define the term "Protected health information"—a term *not* used in the Privacy Act—to mean "individually identifiable health information…that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any

other form or medium." 45 C.F.R. § 160.103. Therefore, if the Legislature intended the Health Care Exclusion to cover only information that is already protected under HIPAA, it could have easily used the phrase "protected health information under HIPAA," instead of the broader phrase "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10.

2. The First District's Reading Renders The Health Care Exclusion Redundant And Superfluous.

The First District overlooked the legislature's use of terms of art that appear over and over again in HIPAA regulations and construed the two exclusions in a matter that makes them redundant of each other. Specifically, information gathered from patients, which is covered by the Patient Data Exclusion, *is* "information protected under HIPAA," which is how the First District read the Health Care Exclusion. The majority tried to explain away this redundancy by stating that "[t]he first sub-exclusion or category is for information 'captured'" and "the second sub-exclusion or category is for information that is 'collected, used or stored.'" (A130-131 ¶¶ 58-59.)

However, the redundancy lies not in these verbs but rather in the *information* the First District held the two clauses are excluding—"information gathered from patients" and "information protected under HIPAA." As Justice Mikva explained, "in the majority's reading, all 'information' is patient information. Under this reading, there is simply no reason to use the word 'information' twice in the disjunctive, suggesting that the exclusion is

referencing two different kinds of information." (A141-142, Mikva, J., dissenting, ¶ 84 (citation omitted).)

Furthermore, the distinction that the First District tried to draw between information that is "captured" and information that is "collected, used or stored" makes little sense. In interpreting the Privacy Act, this Court has understood the terms "capturing" and "collecting" to *both* refer to the act of "collecting or capturing the [biometric identifier] every time the employee needs to access" the technology at issue. *Cothron*, 2023 IL 128004, ¶ 23. Additionally, the dictionary defines the verb "capture" as "to record in a permanent file (as in a computer)." Merriam-Webster Dictionary, "capture," https://www.merriam-webster.com/dictionary/captured (last visited April 26, 2023). That is essentially synonymous with the verb "collect," which the dictionary defines as "to bring together from several sources into a single volume or list." Merriam-Webster Dictionary, "collect," https://www.merriam-webster.com/dictionary/collect (last visited April 26, 2023). Thus, the majority's explanation for the two separate clauses does not remedy the problem of redundancy.

As Justice Mikva's dissent correctly explains, "the first part of this provision excludes from the Act's coverage information from a particular source—patients in a health care setting—and the second part excludes information used for particular purposes—healthcare treatment, payment, or operations under HIPAA—regardless of the source of that information" because "[t]he plain language of the statute, and particularly the use of the

words 'from' and 'for,' make this clear." (A138-139, Mikva, J., dissenting, ¶ 75.) There simply is no tenable interpretation of the Privacy Act's text that would limit the Health Care Exclusion to information collected from a patient. The "or" and second "information" mean that *any* information—not just patient information—collected, used, or stored in connection with health care treatment, payment, or operations under HIPAA is exempt from the Privacy Act.

3. The First District Misconstrued The Last-Antecedent Rule.

The First District majority also improperly applied the last antecedent rule. The phrase "under HIPAA" modifies the phrase "health care treatment, payment, or operations." *See People v. Davis*, 199 Ill.2d 130, 138 (2002) ("The fundamental principle of statutory construction known as the last antecedent doctrine provides that relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding. They do not modify those which are more remote."). Where, as here, "under" is used as a preposition, it is defined as "subject to the authority, control, guidance, or instruction of." Merriam-Webster-Dictionary, "under," https://www.merriam-webster.com/dictionary/under (last visited April 26, 2023). Taken together with the last antecedent doctrine, "under HIPAA" means that HIPAA "guides," "controls," and "instructs" the analysis of the meaning of "health care treatment, payment, or operations." Each of these terms is explicitly defined in the HIPAA regulations, *see* Section VII.A.1 *supra*, and Justice Mikva succinctly explained it as follows:

> This triumvirate of healthcare treatment, payment, and operations is repeatedly used to define the activities of covered entities that are the subject of those regulations. *See, e.g.*, 45 C.F.R. § 164.506 (titled "Uses and disclosures to carry out treatment, payment, or health care operations" and employing the phrase "treatment, payment, or health care operations" an additional seven times); *id.* § 164.502 (using the phrase twice); *id.* § 164.504 (using the phrase three times); *id.* § 164.508 (using the phrase once); *id.* § 164.514 (using the phrase once); *id.* § 164.520 (using the phrase twice); *id.* § 164.522 (using the phrase twice); *id.* § 164.528 (using the phrase once); *id.* § 170.210 (using the phrase twice); and *id.* § 170.315 (using the phrase once).

(A140, Mikva, J., dissenting, ¶ 80.)

The First District misapplied the last antecedent rule because it determined "under [HIPAA]" would apply only to the word "operations," rather than to "treatment" and "payment" as well. But "application of the last antecedent rule is always limited by 'the intent of the legislature, as disclosed by the context and reading of the entire statute.'" (A141, Mikva, J., dissenting, ¶ 82 (quoting *In re E.B.*, 231 Ill. 2d 459, 467 (2008).) Here, the context of the statute shows "under [HIPAA]" applies to all three terms—particularly because variations of the phrase "health care treatment, payment, or operations" is commonly used throughout HIPAA regulations. *See Vaughn v. Biomat USA Inc.*, No. 20-cv-4241, 2022 WL 4329094, at *8 (N.D. Ill. Sept. 19,

2022) (rejecting argument "under HIPAA" could modify "only the word 'operations'" because "'treatment, payment, and operations' is a phrase the Illinois General Assembly borrowed from HIPAA regulations").

The First District also erroneously applied the wrong definition of "under." It defined "under" as "below or beneath so as to be . . . covered or protected . . . by." (A133-134, ¶ 63 (citing Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under).) The Merriam-Webster dictionary provides the following examples with the definition adopted by the majority: "under sunny skies"; "under a stern exterior"; and "under cover of darkness." *Id.* In other words, the majority found that "under HIPAA" is like "under the sky," instead of "under the terms of a contract or program." That makes no sense. Defendants' proposed definition is the only logical one; HIPAA does not sit "below or beneath" health care "treatment," "payment," or "operations," like beach chairs under a sunny sky. To the contrary, "HIPAA"—to use the terms stated in Merriam-Webster—guides, controls, and instructs the meaning of "treatment, payment, or operations."

In summary, when the canon against superfluousness and the last antecedent rule are properly applied, the Privacy Act's plain language dictates that the Health Care Exclusion is *not*—and cannot reasonably be—limited to patient data. This Court should, therefore, reverse the First District's erroneous application of these fundamental canons of statutory construction.

B. Medication Dispensing Systems Collect And Use Data For "Health Care Treatment, Payment, Or Operations" Under HIPAA.

The use of finger scans to permit access to medication dispensing stations is a classic example of information used for health care treatment, payment, and operations as those terms are defined by HIPAA. HIPAA, Pub. L. 104-191, 110 Stat. 1936, "is a federal Act intended to provide a baseline of health information privacy protections." *Giangiulio v. Ingalls Mem'l Hosp.*, 365 Ill. App. 3d 823, 839 (1st Dist. 2006). HHS implements HIPAA and promulgates the relevant regulations. *See id.* The regulations provide that a "covered entity" under HIPAA includes "a health care provider who transmits any health information in electronic form." 45 C.F.R. § 160.103. Northwestern is a health care provider and covered entity within the meaning of HIPAA. *See, e.g.*, *Pesoli v. Dep't of Employment Sec.*, 2012 IL App (1st) 111835, ¶ 31 (noting that health care providers like hospitals are covered entities under HIPAA).

In HIPAA terms, hospitals like Northwestern use the medical equipment at issue in this appeal, manufactured by companies like BD with whom the hospitals have HIPAA Business Associate Agreements, for their "health care operations," to facilitate delivery of health care or "treatment" to patients, and for "payment" of that health care. *See supra* § VII.A.1 (discussing HIPAA's definition of these terms). NLFH controls access to prescription medications and medical supplies, including controlled substances such as valium, morphine, or fentanyl, with medication dispensing systems manufactured by companies like BD that provide end-to-end medication

management. (R61, ¶ 9.) Registered nurses and other health care workers, such as Plaintiffs, use the medication dispensing systems to facilitate the dispensing and administration of medications prescribed to patients. (R61 at ¶ 10; C31 ¶ 46; *see* BD-A012 ¶ 55.) To verify the identity of an employee who accesses the medication dispensing system and confirm that the employee has proper authorization, NLFH offers the employee the ability to scan the employee's finger or to use a passcode that the employee enters manually. (R61 at ¶ 11.) This use of finger scans—which serves critical patient safety, security, and auditing functions for the provision of care—is directly related to the dispensing of prescription drugs and medical supplies, as well as the provision, coordination, and management of health care. (R40.) As such, the collection, use, or storage of health care workers' allegedly biometric information is for "health care" and "treatment" that Northwestern provides to its patients, as those terms are defined by HIPAA. *Id.*; *see* 45 C.F.R. § 164.501.

NLFH's use of medication dispensing systems is also part of its health care operations, including billing, auditing, and patient safety activities. (R40.) NLFH uses its medication dispensing systems to record an audit trail, which includes diversion, fraud, and abuse detection. (R61-62, ¶ 12.) The audit trail records critical details that allow providers to ensure the safe handling of controlled substances: which patient received and used the prescription medication; who dispensed and administered the prescription medication; the prescription medication dosage and dosage form; and the amount of the prescription medication returned, wasted, and/or destroyed. (*Id.*) NLFH

maintains the audit trails to comply with hospital, pharmacist, and Drug Enforcement Administration licensing requirements to maintain information securely. (*Id.*) The medication dispensing systems also improve patient safety and quality of care by reducing medication errors, which is a patient safety activity. (*Id.* at ¶ 9); *see* 42 C.F.R. § 3.20 (defining "patient safety activities" to include, among other things, "[e]fforts to improve patient safety and the quality of health care delivery."). In addition, the records created by the medication dispensing systems allow NLFH to ensure that patients are appropriately billed for medications and supplies used for their treatment, and to audit billing to ensure proper billing for medication. (R62, ¶ 13.) Therefore, the *information* Northwestern collects through the use of the medication dispensing systems is also for "*health care operations*" and "*payment*" as those terms are defined by HIPAA. (R41); *see* 45 C.F.R. § 164.501.

Significantly, reversing the First District and answering the certified questions in Northwestern and BD's favor would *not* broadly exempt the entire health care industry from the Privacy Act. The question of whether the Privacy Act exempts *any and all* uses of allegedly biometric information in the health care industry is not before this Court. The question before this Court is much narrower: whether the Privacy Act applies to information collected, used, and stored for very specific purposes—namely, purposes related to "health care," "treatment," "payment," and/or "operations" as those terms are used in and defined under HIPAA and its implementing regulations. Indeed, as Justice Mikva noted, "[i]t is hard to imagine a better example of [information collected

for healthcare treatment and operations] than finger-scan information collected … to ensure that medication is properly dispensed." (A143, Mikva, J., dissenting, ¶ 87.) As Justice Mikva recognized, a hospital employee using a finger scan to access a secured medication dispensing system clearly falls within the Privacy Act's second exclusion for health care-related information. (R39-41.)

C. Excluding Information Used For Health Care Treatment, Payment, Or Operations From The Privacy Act Comports With Federal And Industry Guidance To Health Care Providers.

Because it is unambiguous, the Court's analysis should begin and end with the Privacy Act's plain language. Were the Court to go further and consider the policy and purpose behind the Privacy Act, the Illinois legislature's decision to exclude "information collected, used, or stored for health care treatment, payment, or operations" from the Privacy Act's coverage makes eminently good policy sense and is consistent with both the statute as a whole and its legislative history. Indeed, the Privacy Act itself instructs that "[n]othing in [the] Act shall be construed to conflict with . . . [HIPAA] and the rules promulgated under [HIPAA]." 740 ILCS 14/25(b). Similarly, the Illinois legislature clearly stated that "[the Privacy Act] provides exemptions as necessary *for hospitals*." *See* H.R. 95-276, Gen. Assemb., at 249 (Ill. daily ed. May 30, 2008) (statement of Rep. Ryg) (R80) (emphasis added); *see also Bogseth v. Dr. B. Emanuel*, 261 Ill. App. 3d 685, 690 (1st Dist. 1994) ("An effective means of ascertaining the intent underlying specific legislation is to analyze

the legislative history, including debates of legislators conducted on the floor of the General Assembly.").

Applying the Privacy Act to medication dispensing systems used by hospital workers directly conflicts with HHS guidance regarding HIPAA. HHS guidance makes clear that use of biometric identifiers and biometric information in the health care setting is not just permitted, but favored, because doing so advances HIPAA's public policy and safety goals. Specifically, since at least 2006, HHS has recommended that covered entities implement authorization and authentication procedures, including "the use of biometrics, such as fingerprint readers on portable devices."[6] HHS also recommends that covered entities "require something unique to the individual such as a biometric."[7] In this vein, in 2008, the Department of Commerce's National Institute of Standards and Technology provided instructions for compliance with HIPAA by noting that covered entities could use "some type of biometric identification . . . such as a fingerprint" to ensure the privacy and protection of sensitive patient information.[8]

---

[6] HIPAA Security Guidance at 5, Dep't of Health and Human Servs., (Dec. 28, 2006) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/remoteuse.pdf?language=es.

[7] HIPAA Security Series at 10, Dep't of Health and Human Servs., (Mar. 2007) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/techsafeguards.pdf?language=es.

[8] An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule at 46, Dep't of Commerce, Nat'l Inst. of Standards and Tech., (Oct. 2008) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/nist80066.pdf.

Covered entities have also been encouraged to implement processes to verify that the individual attempting to access information is who they claim to be by providing proof of identity through the use of a password, a smart card, a token, or biometric authentication (fingerprints, voice patterns, etc.). *Id.* Regulations promulgated under the Illinois Pharmacy Practice Act, 225 ILCS 85/18, which requires that pharmacies maintain records of every prescription filled by a prescriber and that prescriber's unique identifier, specify that prescribers may use biometric identification. *See* 77 Ill. Admin. Code § 2080.70(b). Drug Enforcement Agency regulations governing electronic prescriptions for controlled substances similarly contemplate biometric information to ensure that the prescribing provider is in fact the provider licensed to prescribe electronically. 21 C.F.R. § 1311.115(a). Other health care industry associations, such as the American Society of Health-System Pharmacists[9] and the Institute for Safe Medication Practices,[10] recommend the use of biometrics as the *preferred* method for securing access to controlled substances. Thus, Illinois regulators, industry leaders, and the federal government consistently have recommended—some since before the Privacy

[9] American Society of Health-System Pharmacists, ASHP Guidelines on Preventing Diversion of Controlled Substances. *Am. J. Health-Syst Pharm*. 2017; 74:325-48, at p.85 ("For automated dispensing devices, biometric identification with a user ID is preferred over passwords.")

[10] Institute for Safe Medication Practices, Guidelines for the Safe Use of Automated Dispensing Cabinets, available at https://www.ismp.org/resources/guidelines-safe-use-automated-dispensing-cabinets, at Guideline 2.2(a) ("Use biometric identification for ADC [automated dispensing cabinet] access whenever possible.")

Act was passed—the use of fingerprints or other biometrics for authorization and authentication procedures in health care.[11]

In light of this regulation, industry standards, and strong guidance, it makes sense that the Illinois legislature chose to exempt certain uses of biometric technology in health care settings from the Privacy Act's requirements through the exclusion in Section 10. The Privacy Act's Health Care Exclusion allows entities otherwise covered by the Act to freely use biometric technology in accordance with federal and health care industry recommendations to safely and efficiently provide patient care.

Any argument that the Illinois legislature could not have intended to exclude certain specified uses of health care workers' information from the Privacy Act is undermined by the fact that the Act includes other exemptions that are far broader than the Health Care Exclusion. For example, the Privacy Act completely exempts from its coverage any "financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder," and any "contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." 740 ILCS 14/25(c) & (e). It is reasonable to conclude that the Illinois legislature meant to exclude certain specified uses of biometrics in the health care setting,

[11] The Illinois Health Care Worker Background Check Act also requires certain health care employees to undergo fingerprint background checks as a condition of working in health care in this State. 225 ILCS 46/1 *et seq*.

where the legislature also included even broader exemptions for other industries.

Health care is a safety-sensitive and, therefore heavily regulated, industry. The legislature exempted "information collected, used, or stored for health care treatment, payment, or operations," to ensure that the Privacy Act did not interfere with health care providers' ability to deliver health care services safely and effectively. Where Privacy Act claims are based on information collected for "health care," "treatment," "payment," and/or "operations" as those terms are defined under HIPAA, the Privacy Act's Health Care Exclusion applies and exempts such use from the Act's coverage.

VIII. CONCLUSION

Both the Privacy Act's plain language and underlying policy considerations demonstrate that information that is collected, used, or stored for "health care treatment, payment or operations," as those terms are defined by the federal HIPAA statute and regulations, is exempt from the Privacy Act, regardless of whether the information is collected from a patient or from health care workers. Plaintiffs' proposed interpretation, which attempts to limit the Privacy Act's second exclusion for health care-related information to information collected from patients, is contrary to the Privacy Act's plain language and must be rejected. Defendants, therefore, respectfully request that this Court reverse the First District and answer the certified questions in the affirmative.

Dated: April 26, 2023

Respectfully submitted,

/s/*Bonnie Keane DelGobbo*
Bonnie Keane DelGobbo (6309394)
Joel Griswold (6277574)
Amy L. Lenz (6332968)
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
(312) 416-6200
bdelgobbo@bakerlaw.com
jcgriswold@bakerlaw.com
alenz@bakerlaw.com

Attorneys for Defendant-Applicants Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

/s/*Matthew C. Wolfe*
Matthew C. Wolfe (6307345)
William F. Northrip (6315988)
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
(312) 704-7700
mwolfe@shb.com
wnorthrip@shb.com

Attorneys for Defendant-Applicant Becton, Dickinson and Company

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7,052 words.

/s/*Bonnie Keane DelGobbo*

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned attorney certifies that on April 26, 2023 she caused the Brief of Appellants Northwestern Lake Forest Hospital, Northwestern Memorial HealthCare, and Becton, Dickinson Company to be electronically with the Clerk of the Illinois Supreme Court, using the Odyssey eFileIL system, and served upon the following counsel of record via electronic mail:

Ryan F. Stephan
James B. Zouras
Andrew C. Ficzko
Catherine T. Mitchell
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, IL 60601
Tel: (312) 233-1550
Email: rstephan@stephanzouras.com
jzouras@stephanzouras.com
aficzko@stephanzouras.com
cmitchell@stephanzouras.com

Under penalties as provided by law pursuant to Section 109 of the Illinois Code of Civil Procedure, the undersigned attorney certifies that the statements set forth above are true and correct.

/s/*Bonnie Keane DelGobbo*

No. 129081
IN THE ILLINOIS SUPREME COURT

LUCILLE MOSBY, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 05031 The Honorable Pamela McLean Meyerson, Judge Presiding
YANA MAZYA, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE, *Defendants-Appellants.*	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Alison C. Conlon, Judge Presiding

Appeal from the Illinois Appellate Court, First District, 2022 IL App (1st) 200822
The Honorable Justices Sharon Oden Johnson, Mary L. Mikva, and Raymond W. Mitchell

APPENDIX TO BRIEF OF DEFENDANTS-APPELLANTS NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, AND BECTON, DICKINSON, AND COMPANY

ORAL ARGUMENT REQUESTED

Joel Griswold
Bonnie Keane DelGobbo
Amy L. Lenz
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Matthew C. Wolfe
William F. Northrip
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

TABLE OF CONTENTS TO APPENDIX

COMBINED APPENDIX OF DOCUMENTS

Illinois Compiled Statutes

Information maintained by the Legislative Reference Bureau
Updating the database of the Illinois Compiled Statutes (ILCS) is an ongoing process. Recent laws may not yet be included in the ILCS database, but they are found on this site as Public Acts soon after they become law. For information concerning the relationship between statutes and Public Acts, refer to the Guide.

Because the statute database is maintained primarily for legislative drafting purposes, statutory changes are sometimes included in the statute database before they take effect. If the source note at the end of a Section of the statutes includes a Public Act that has not yet taken effect, the version of the law that is currently in effect may have already been removed from the database and you should refer to that Public Act to see the changes made to the current law.

CIVIL LIABILITIES
(740 ILCS 14/) Biometric Information Privacy Act.

(740 ILCS 14/1)
Sec. 1. Short title. This Act may be cited as the Biometric Information Privacy Act.
(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/5)
Sec. 5. Legislative findings; intent. The General Assembly finds all of the following:
(a) The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings.
(b) Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.
(c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, 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.
(d) An overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information.
(e) Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.
(f) The full ramifications of biometric technology are not fully known.
(g) The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.
(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/10)
Sec. 10. Definitions. In this Act:
"Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid

scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

"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. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

"Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property. Examples of confidential and sensitive information include, but are not limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a PIN number, a pass code, a driver's license number, or a social security number.

"Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.

"Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/15)

Sec. 15. Retention; collection; disclosure; destruction.

(a) 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.

(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:

(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.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(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;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/20)

Sec. 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(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;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/25)

Sec. 25. Construction.

(a) Nothing in this Act shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

(b) Nothing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act.

(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder.

(d) Nothing in this Act shall be construed to conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government.

(Source: P.A. 95-994, eff. 10-3-08.)

(740 ILCS 14/30)

Sec. 30. (Repealed).

(Source: P.A. 95-994, eff. 10-3-08. Repealed internally, eff. 1-1-09.)

(740 ILCS 14/99)

Sec. 99. Effective date. This Act takes effect upon becoming law.
(Source: P.A. 95-994, eff. 10-3-08.)

Top

Home | Legislation & Laws | House | Senate | My Legislation | Disclaimers | Email

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Mosby
v.
The Ingalls Memorial Hospital & Becton, Dickson and Co., et al

No. 18 CH 5031

ORDER

This cause coming before the Court on the Motion of Ingalls Memorial Hospital to Dismiss or Strike the Amended Class Action Complaint, pursuant to Section 2-619.1, and the Motion of Becton, Dickonson and Co. Motion to Dismiss the Amended Class Action Complaint, pursuant to Section 2-619.1, the matter being fully briefed, the Court being fully advised in the premises, and oral argument having been presented, IT IS HEREBY ORDED. For the reasons set forth in record:

(1) The motions are granted in part and denied in part, as set forth in the record*
(2) Plaintiff to amend by February 10, 2020.
(3) Defendants to respond to amended pleading by March 9, 2020.
(4) Status set for March 18, 2020 at 10:00 a.m.

* The Amended Complaint being dismissed under §2-615 in its entirety as to defendant Becton, Dickonson & Co; Count III being dismissed under §2-615 as to the Ingalls defendants; all without prejudice. Defendants to file transcript before the next court date.

Attorney No.: 44284
Name: Joseph Strubbe
Atty. for: Ingalls Memorial Hosp.
Address: 222 N. LaSalle
City/State/Zip: Chicago IL 60601
Telephone: 312 609 7765

ENTERED:

Dated: ,

Judge Pamela McLean Meyerson

JAN 13 2020

Judge Judge's No.

Circuit Court – 2097

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

A5

C 1449

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

LUCILLE MOSBY, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	**Case No. 2018-CH-05031**
v.	)	
THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION INC., and BECTON, DICKINSON AND COMPANY	)	
Defendants.	)	

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiff Lucille Mosby ("Plaintiff" or "Mosby") individually and on behalf of all others similarly situated (the "Class"), by and through her attorneys, brings the following Second Amended Class Action Complaint ("Second Amended Complaint") pursuant to the Illinois Code of Civil Procedure, 735 ILCS §§ 5/2-801 and 2-802, against The Ingalls Memorial Hospital ("Ingalls"), UCM Community Health & Hospital Division, Inc., ("Ingalls Health System"), and Becton, Dickinson and Company ("BD") (collectively referred to as "Defendants"), their subsidiaries and affiliates, to redress and curtail Defendants' unlawful collection, use, storage, and disclosure of Plaintiff's sensitive and proprietary biometric data. Plaintiff alleges as follows upon personal knowledge as to herself, her own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

NATURE OF THE ACTION

1. Defendant, The Ingalls Memorial Hospital, is a private hospital located in Harvey, Illinois and operates within the south suburbs of Illinois and in this Circuit.

2. Defendant, Ingalls Health System is a not-for-profit corporation based in the south suburbs of Illinois and in this Circuit. Ingalls Health System owns, manages and operates multiple medical locations and care center within Cook County.

3. Ingalls and Ingalls Health System jointly employed Plaintiff.

4. Defendant Becton, Dickinson and Company is a leading provider of systems and software solutions primarily targeting healthcare facilities like Ingalls and Ingalls Health System. BD sells its products and services to hospitals, pharmacies, healthcare institutions and others.

5. Chief among the products BD manufactures are workstations, medication cabinets, controlled substance managers, and similar systems or devices which require medical professionals and other individual users to scan their fingerprints to access medications. BD markets these products to customers under the banner of its Pyxis product line. Upon information and belief, in Illinois alone, BD provides its Pyxis products to dozens of hospitals and pharmacies, including Ingalls and Ingalls Health System in Chicago, Illinois.

6. Users are required to scan their biometric information, namely their fingerprint, when using BD's Pyxis products to access medication. In the hospital context, there are typically multiple Pyxis devices within a single location. Once a user has registered his or her fingerprint with the system, the users have access to multiple Pyxis dispensers within that hospital.

7. BD products and systems that require fingerprint scans from users include, but are not limited to, the following: the BD Pyxis™ Anesthesia Station ES which uses "[a]dvanced biometric technology" for "[i]ncreased medication security" (*available at* https://www.bd.com/en-us/offerings/capabilities/medication-and-supply-management/medication-and-supply-management-technologies/pyxis-medication-technologies/pyxis-anesthesia-station-es); the BD Pyxis™ Enterprise Server which utilizes a "BioID fingerprint system" to "help reduce data errors

and streamline processes" (*available at* https://www.bd.com/en-us/offerings/capabilities/medication-and-supply-management/medication-and-supply-management-technologies/pyxis-medication-technologies/pyxis-enterprise-server); and most importantly, the product used by the Ingalls Defendants in this case, the BD Pyxis™ MedStation™ ES (*available at* https://www.bd.com/en-us/offerings/capabilities/medication-and-supply-management/medication-and-supply-management-technologies/pyxis-medication-technologies/pyxis-medstation-es-system).

8. When employees, like Plaintiff, are given access to the Pyxis Medstation, they are enrolled in the BD employee database. Ingalls Health System uses the database to monitor access to certain restricted materials, *e.g.*, pharmaceuticals.

9. BD has ongoing access to the biometric data once an individual is enrolled in the database. For example, BD offers hospitals an integrated medication management platform, through which BD provides a single, centralized location for hospital to manage data, along with dedicated support services in which BD can access the biometric data collected. *Available at* https://www.bd.com/en-us/offerings/integrated-solutions/medication-management-solutions.

10. Plaintiff and other authorized employees are required to have their fingerprints scanned by a biometric device within the Pyxis Medstation to access restricted materials.

11. Biometrics are not relegated to esoteric corners of commerce. Many businesses – such as Ingalls and Ingalls Health System – and financial institutions have incorporated biometric applications into their workplace in the form of biometric timeclocks or authenticators, and into consumer products, including such ubiquitous consumer products as checking accounts and cell phones.

12. Unlike ID badges or time cards– which can be changed or replaced if stolen or compromised – fingerprints are unique, permanent biometric identifiers associated with each employee. This exposes employees to serious and irreversible privacy risks. For example, if a database containing fingerprint data or other sensitive, proprietary biometric data is hacked, breached, or otherwise exposed – like in the recent Yahoo, eBay, Google, Equifax, Uber, Home Depot, Panera, Whole Foods, Chipotle, Trump Hotels, Facebook/Cambridge Analytica, and Marriott data breaches or misuses – employees have ***no*** means by which to prevent identity theft, unauthorized tracking or other unlawful or improper use of this highly personal and private information.

13. In 2015, a data breach at the United States Office of Personnel Management exposed the personal identification information, including biometric data, of over 21.5 million federal employees, contractors, and job applicants. U.S. Off. of Personnel Mgmt., *Cybersecurity Incidents* (2018), *available at* www.opm.gov/cybersecurity/cybersecurity-incidents.

14. An illegal market already exists for biometric data. Hackers and identity thieves have targeted Aadhaar, the largest biometric database in the world, which contains the personal and biometric data – including fingerprints, iris scans, and a facial photograph – of over a billion Indian citizens. *See* Vidhi Doshi, *A Security Breach in India Has Left a Billion People at Risk of Identity Theft,* The Washington Post (Jan. 4, 2018), *available at* https://www.washingtonpost.com/news/worldviews/wp/2018/01/04/a-security-breach-in-india-has-left-a-billion-people-at-risk-of-identity-theft/?utm_term=.b3c70259fl38.

15. In January 2018, an Indian newspaper reported that the information housed in Aadhaar was available for purchase for less than $8 and in as little as 10 minutes. Rachna Khaira, *Rs 500, 10 Minutes, and You Have Access to Billion Aadhaar Details*, The Tribune (Jan. 4, 2018),

available at http://www.tribuneindia.com/news/nation/rs-500-10-minutes-and-you-have-access-to-billion-aadhaar-details/523361.html.

16. Recognizing the need to protect its citizens from situations like these, Illinois enacted the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, specifically to regulate companies that collect, store and use Illinois citizens' biometrics, such as fingerprints.

17. Notwithstanding the clear and unequivocal requirements of the law, each Defendant disregarded Plaintiff's and other similarly-situated individuals' statutorily protected privacy rights and unlawfully collected, stored, disseminated, and used their biometric data in violation of BIPA. Specifically, each Defendant has violated and continues to violate BIPA because it did not and continue not to:

a. Properly inform Plaintiff and others similarly situated in writing of the specific purpose and length of time for which their fingerprints are being collected, stored, and used, as required by BIPA;

b. Receive a written release from Plaintiff and others similarly situated to collect, store, or otherwise use their fingerprints, as required by BIPA;

c. Provide a publicly available retention schedule and guidelines for permanently destroying Plaintiff's and other similarly-situated individuals' fingerprints, as required by BIPA; and

d. Obtain consent from Plaintiff and others similarly situated to disclose, redisclose, or otherwise disseminate their fingerprints to a third party as required by BIPA.

18. Accordingly, Plaintiff seeks an Order: (1) declaring that each Defendant's conduct violates BIPA; (2) requiring each Defendant to cease the unlawful activities discussed herein; and (3) awarding statutory damages to Plaintiff and the proposed Class.

PARTIES

19. Plaintiff Lucille Mosby is a natural person and a citizen of the State of Illinois.

20. Defendant The Ingalls Memorial Hospital is an Illinois corporation. Ingalls is registered with the Illinois Secretary of State and conducts business in the State of Illinois, including Cook County.

21. Defendant UCM Community Health & Hospital Division, Inc. is an Illinois corporation. Ingalls Health System is registered with the Illinois Secretary of State and conducts business in the State of Illinois, including Cook County.

22. Defendant Becton, Dickinson and Company is a New Jersey corporation. BD is registered with the Illinois Secretary of State and conducts business in the State of Illinois, including Cook County.

JURISDICTION AND VENUE

23. This Court has jurisdiction over Defendants pursuant to 735 ILCS § 5/2-209 because Defendants conduct business transactions in Illinois, committed the statutory violations alleged herein in Illinois, and are registered to conduct business in Illinois.

24. Venue is proper in Cook County because Defendants are authorized to conduct business in this State, Defendants conduct business transactions in Cook County, and Defendants committed the statutory violations alleged herein in Cook County and throughout Illinois.

FACTUAL BACKGROUND

I. The Biometric Information Privacy Act

25. In the early 2000s, major national corporations started using Chicago and other locations in Illinois to test "new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias." 740 ILCS § 14/5(c). Given its relative infancy, an overwhelming portion of the public became weary of this then-growing yet unregulated technology. *See* 740 ILCS § 14/5.

26. In late 2007, a biometrics company called Pay by Touch, which provided major retailers throughout the State of Illinois with fingerprint scanners to facilitate consumer transactions, filed for bankruptcy. That bankruptcy was alarming to the Illinois Legislature because suddenly there was a serious risk that millions of fingerprint records – which, like other unique biometric identifiers, can be linked to people's sensitive financial and personal data – could now be sold, distributed, or otherwise shared through the bankruptcy proceedings without adequate protections for Illinois citizens. The bankruptcy also highlighted the fact that most consumers who used the company's fingerprint scanners were completely unaware that the scanners were not actually transmitting fingerprint data to the retailer who deployed the scanner, but rather to the now-bankrupt company, and that their unique biometric identifiers could now be sold to unknown third parties.

27. Recognizing the "very serious need [for] protections for the citizens of Illinois when it [came to their] biometric information," Illinois enacted BIPA in 2008. *See* Illinois House Transcript, 2008 Reg. Sess. No. 276; 740 ILCS § 14/5.

28. Additionally, to ensure compliance, BIPA provides that, for each violation, the prevailing party may recover $1,000 or actual damages, whichever is greater, for negligent violations and $5,000, or actual damages, whichever is greater, for intentional or reckless violations. 740 ILCS 14/20.

29. BIPA is an informed consent statute which achieves its goal by making it unlawful for a company to, among other things, collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information, unless it first:

a. Informs the subject in writing that a biometric identifier or biometric information is being collected, stored and used;

b. 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

c. Receives a written release executed by the subject of the biometric identifier or biometric information.

See 740 ILCS § 14/15(b).

30. BIPA specifically applies to employees who work in the State of Illinois. BIPA defines a "written release" specifically "in the context of employment [as] a release executed by an employee as a condition of employment." 740 ILCS 14/10.

31. Biometric identifiers include retina and iris scans, voiceprints, scans of hand and facial geometry, and – most importantly here – fingerprints. *See* 740 ILCS § 14/10. Biometric information is separately defined to include any information based on an individual's biometric identifier that is used to identify an individual. *Id*.

32. BIPA also establishes standards for how companies must handle Illinois citizens' biometric identifiers and biometric information. *See, e.g.*, 740 ILCS § 14/15(c)-(d). For example, BIPA prohibits private entities from disclosing a person's or customer's biometric identifier or biometric information without first obtaining consent for such disclosure. *See* 740 ILCS § 14/15(d)(1).

33. BIPA also prohibits selling, leasing, trading, or otherwise profiting from a person's biometric identifiers or biometric information (740 ILCS § 14/15(c)) and requires companies to develop and comply with 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 such identifiers or information has been

satisfied or within three years of the individual's last interaction with the company, whichever occurs first. 740 ILCS § 14/15(a).

34. The Illinois legislature enacted BIPA due to the increasing use of biometric data in financial and security settings, the general public's hesitation to use biometric information, and – most significantly – the unknown ramifications of biometric technology. Biometrics are biologically unique to the individual and, once compromised, an individual is at heightened risk for identity theft and left without any recourse.

35. BIPA provides individuals with a private right of action, protecting their right to privacy regarding their biometrics as well as protecting their rights to know the precise nature for which their biometrics are used and how they are being stored and ultimately destroyed, allowing individuals to make a truly informed choice. Unlike other statutes that only create a right of action if there is a qualifying data breach, BIPA strictly regulates the manner in which entities may collect, store, use, and disseminate biometrics and creates a private right of action for lack of statutory compliance.

36. Plaintiff, like the Illinois legislature, recognizes how imperative it is to keep biometric information secure. Biometric information, unlike other personal identifiers such as a social security number, cannot be changed or replaced if hacked or stolen.

II. Defendants Violate the Biometric Information Privacy Act.

37. By the time BIPA passed through the Illinois legislature in mid-2008, most companies who had experimented using individuals' biometric data stopped doing so.

38. However, each Defendant failed to take note of the shift in Illinois law governing the collection, use, storage and dissemination of biometric data. As a result, each Defendant continues to collect, store, use and disseminate individuals' biometric data in violation of BIPA.

39. Specifically, when employees are hired to work at Ingalls and/or for Ingalls Health System, Ingalls and/or Ingalls Health Systems requires them to scan their fingerprints to enroll them in the BD employee database(s).

40. Ingalls and Ingalls Health System use and have used software supplied by BD that requires employees to use their fingerprints as a means of authentication. Employees are required to scan their fingerprints each day to access restricted materials within the Pyxis Medstation.

41. When employees enroll their fingerprint data with the BD Pyxis Medstation, Ingalls and Ingalls Health System capture, collect, and store the employee fingerprint data to be used as a template with which to compare future fingerprint scans in order to verify employee identity.

42. Ingalls and Ingalls Health System again collect employee fingerprint data upon each subsequent fingerprint scan.

43. The employees' fingerprint data is disclosed by Ingalls and Ingalls Health System to at least one out-of-state third-party vendor, BD, for example for technical support, and likely others, who host the biometric data in their data centers.

44. BD improperly discloses Ingalls and Ingalls Health System employees' fingerprint data to other, currently unknown, third parties, which host the biometric data in their data centers.

45. Ingalls and Ingalls Health System failed and continue to fail to inform employees that they disclose or disclosed their fingerprints to at least one out-of-state third-party vendor, BD, and likely others; fail to inform employees that they disclose their fingerprints to other, currently unknown, third parties, which host the biometric data in their data centers; fail to inform employees of the purposes and duration for which they collect their sensitive biometric data; and fail to obtain written releases from employees before collecting their fingerprints.

46. BD fails to inform Ingalls and Ingalls Health System employees that it discloses their fingerprint data to other, currently unknown, third parties, which host the biometric data in their data centers; fails to inform Ingalls and Ingalls Health System employees of the purposes and duration for which it collects their sensitive biometric data; and, fails to obtain written releases from Ingalls and Ingalls Health System employees before collecting their fingerprints.

47. Furthermore, each Defendant fails to provide individuals with a written, publicly available policy identifying their retention schedules and guidelines for permanently destroying individuals' fingerprints when the initial purpose for collecting or obtaining their fingerprint data is no longer relevant, as required by BIPA.

48. The Pay by Touch bankruptcy that catalyzed the passage of BIPA, as well as the recent data breaches, highlight why such conduct – where individuals are aware that they are providing biometric identifiers and/or information but not aware of to whom or for what purposes they are doing so – is dangerous. That bankruptcy spurred Illinois citizens and legislators into realizing that it is crucial for individuals to understand when providing biometric identifiers, such as their fingerprints, who exactly is collecting their biometric data, where it will be transmitted and for what purposes, and for how long. Each Defendant disregards these obligations, as well as Plaintiff's and other similarly-situated individuals' statutory rights, and instead unlawfully collects, stores, uses and disseminates individuals' biometric identifiers and information, without ever receiving the individual's informed written consent required by BIPA.

49. Upon information and belief, each Defendant lacks retention schedules and guidelines for permanently destroying Plaintiff's and other similarly-situated individuals' biometric data and has not and will not destroy Plaintiff's and other similarly-situated individuals'

biometric data when the initial purpose for collecting or obtaining such data has been satisfied or within three years of the individual's last interaction with each company.

50. Plaintiff and others similarly situated are not told what might happen to their biometric data if and when any of the Defendants merge with another company or worse, if and when any of Defendants' business folds, or when the other third parties that have received their biometric data businesses fold.

51. Since Defendants neither publish a BIPA-mandated data-retention policy nor disclose the purposes for their collection and use of biometric data, Plaintiff and others similarly situated have no idea the extent to whom each Defendant sells, discloses, re-discloses, or otherwise disseminates their biometric data. Nor are Plaintiff and others similarly situated told the extent to whom each Defendant currently discloses their biometric data, or what might happen to their biometric data in the event of a merger or a bankruptcy.

52. These violations have raised a material risk that Plaintiff's and other similarly-situated individuals' biometric data will be unlawfully accessed by third parties.

53. By and through the actions detailed above, each Defendant disregards Plaintiff's and other similarly-situated individuals' legal rights in violation of BIPA.

III. Plaintiff Lucille Mosby's Experience

54. Plaintiff Lucille Mosby worked as a Registered Pediatrics Nurse at Ingalls Memorial Hospital at the Harvey location located at 1 Ingalls Drive, Harvey, IL 60426. Plaintiff worked for Ingalls Health System from October 1987 to February 2017.

55. As a condition of employment, Plaintiff ***was required*** to scan her fingerprints in order to access medications.

56. Ingalls and Ingalls Health System subsequently stored Plaintiff's fingerprint data in the BD employee database(s).

57. Plaintiff has never been informed, prior to the collection of her biometric identifiers and/or biometric information, of the specific limited purposes or length of time for which each Defendant collected, stored, used and/or disseminated her biometric data.

58. Plaintiff has never been informed of any biometric data retention policy developed by any Defendant, nor has she ever been informed of whether any Defendant will ever permanently delete her biometric data.

59. Plaintiff has never been provided with nor ever signed a written release allowing any Defendant to collect, store, use or disseminate her biometric data.

60. Plaintiff has continuously and repeatedly been exposed to the risks and harmful conditions created by each Defendant's multiple violations of BIPA alleged herein.

61. No amount of time or money can compensate Plaintiff if her biometric data is compromised by the lax procedures through which each Defendant captured, stored, used, and disseminated her and other similarly-situated individuals' biometrics. Moreover, Plaintiff would not have provided her biometric data if she had known that Defendants would retain such information for an indefinite period of time without her consent.

62. A showing of actual damages is not necessary in order to state a claim under BIPA. *See Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 40 ("[A]n individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act").

63. As Plaintiff is not required to allege or prove actual damages in order to state a claim under BIPA, she seeks statutory damages under BIPA as compensation for the injuries caused by each Defendant. *Rosenbach*, 2019 IL 123186, ¶ 40.

CLASS ALLEGATIONS

64. Pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, Plaintiff brings claims on her own behalf and as representatives of all other similarly-situated individuals pursuant to BIPA, 740 ILCS § 14/1, *et seq.*, to recover statutory penalties, prejudgment interest, attorneys' fees and costs, and other damages owed.

65. As discussed *supra*, Section 14/15(b) of BIPA prohibits a company from, among other things, collecting, capturing, purchasing, receiving through trade, or otherwise obtaining a person's or a customer's biometric identifiers or biometric information, unless it first (1) informs the individual in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the individual in writing of the specific purpose and length of time 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. 740 ILCS § 14/15.

66. Plaintiff seeks class certification under the Illinois Code of Civil Procedure, 735 § ILCS 5/2-801 for the following class of similarly-situated individuals under BIPA:

> All individuals working for Ingalls Health System in the State of Illinois who had their fingerprints collected, captured, received, obtained, maintained, stored, disclosed or disseminated by any Defendant during the applicable statutory period.

67. This action is properly maintained as a class action under 735 ILCS § 5/2-801 because:

A. The class is so numerous that joinder of all members is impracticable;

B. There are questions of law or fact that are common to the class;

C. The claims of the Plaintiff are typical of the claims of the class; and,

D. The Plaintiff will fairly and adequately protect the interests of the class.

Numerosity

68. The total number of putative class members exceeds fifty (50) individuals. The exact number of class members can easily be determined from Ingalls Health System's payroll records.

Commonality

69. There is a well-defined commonality of interest in the substantial questions of law and fact concerning and affecting the Class in that Plaintiff and all members of the Class have been harmed by each Defendant's failure to comply with BIPA. The common questions of law and fact include, but are not limited to the following:

A. Whether any Defendant collected, captured, maintained, stored or otherwise obtained Plaintiff's and the Class's biometric identifiers or biometric information;

B. Whether any Defendant properly informed Plaintiff and the Class of its purposes for collecting, using, storing and disseminating their biometric identifiers or biometric information;

C. Whether any Defendant obtained a written release (as defined in 740 ILCS § 14/10) to collect, use, store and disseminate Plaintiff's and the Class's biometric identifiers or biometric information;

D. Whether any Defendant has disclosed or re-disclosed Plaintiff's and the Class's biometric identifiers or biometric information;

E. Whether any Defendant has sold, leased, traded, or otherwise profited from Plaintiff's and the Class's biometric identifiers or biometric information;

F. Whether any Defendant developed 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 three years of their last interaction with the individual,

whichever occurs first;

G. Whether any Defendant complies with any such written policy (if one exists);

H. Whether any Defendant used Plaintiff's and the Class's fingerprints to identify them;

I. Whether any Defendant's violations of BIPA have raised a material risk that Plaintiff's and the Class's biometric data will be unlawfully accessed by third parties;

J. Whether the violations of BIPA were committed negligently; and

K. Whether the violations of BIPA were committed intentionally and/or recklessly.

70. Plaintiff anticipates that Defendants will raise defenses that are common to the class.

Adequacy

71. Plaintiff will fairly and adequately protect the interests of all members of the class, and there are no known conflicts of interest between Plaintiff and class members. Plaintiff, moreover, has retained experienced counsel that are competent in the prosecution of complex litigation and who have extensive experience acting as class counsel.

Typicality

72. The claims asserted by Plaintiff are typical of the class members she seeks to represent. Plaintiff has the same interests and suffers from the same unlawful practices as the class members.

73. Upon information and belief, there are no other class members who have an interest individually controlling the prosecution of his or her individual claims, especially in light of the relatively small value of each claim and the difficulties involved in bringing individual litigation against one's employer. However, if any such class member should become known, he or she can

"opt out" of this action pursuant to 735 ILCS § 5/2-801.

Predominance and Superiority

74. The common questions identified above predominate over any individual issues, which will relate solely to the quantum of relief due to individual class members. A class action is superior to other available means for the fair and efficient adjudication of this controversy because individual joinder of the parties is impracticable. Class action treatment will allow a large number of similarly-situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense if these claims were brought individually. Moreover, as the damages suffered by each class member are relatively small in the sense pertinent to class action analysis, the expenses and burden of individual litigation would make it difficult for individual class members to vindicate their claims.

75. Additionally, important public interests will be served by addressing the matter as a class action. The cost to the court system and the public for the adjudication of individual litigation and claims would be substantially more than if claims are treated as a class action. Prosecution of separate actions by individual class members would create a risk of inconsistent and varying adjudications, establish incompatible standards of conduct for Defendants and/or substantially impair or impede the ability of class members to protect their interests. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can and is empowered to fashion methods to efficiently manage this action as a class action.

FIRST CAUSE OF ACTION
Violation of 740 ILCS § 14/15(a): Failure to Institute, Maintain and Adhere to Publicly-Available Retention Schedule

76. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

77. BIPA mandates that companies in possession of biometric data establish and maintain a satisfactory biometric data retention – and, importantly, deletion – policy. Specifically, those companies must: (i) make publicly available a written policy establishing a retention schedule and guidelines for permanent deletion of biometric data (at most three years after the company's last interaction with the individual); and (ii) actually adhere to that retention schedule and actually delete the biometric information. *See* 740 ILCS § 14/15(a).

78. Each Defendant fails to comply with these BIPA mandates.

79. Each Defendant qualifies as a "private entity" under BIPA. *See* 740 ILCS § 14/10.

80. Plaintiff and the Class are individuals who have had their "biometric identifiers" collected by each Defendant (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS § 14/10.

81. Plaintiff's and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS § 14/10.

82. Each Defendant failed to provide a publicly available retention schedule or guidelines for permanently destroying biometric identifiers and biometric information as specified by BIPA. *See* 740 ILCS § 14/15(a).

83. Upon information and belief, each Defendant lacks retention schedules and guidelines for permanently destroying Plaintiff's and the Class's biometric data and has not and will not destroy Plaintiff's and the Class's biometric data when the initial purpose for collecting or obtaining such data has been satisfied or within three years of the individual's last interaction with the company.

84. On behalf of herself and the Class, Plaintiff seeks: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiff and the Class by

requiring each Defendant to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (3) statutory damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to 740 ILCS 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

SECOND CAUSE OF ACTION
Violation of 740 ILCS § 14/15(b): Failure to Obtain Informed Written Consent and Release Before Obtaining Biometric Identifiers or Information

85. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

86. BIPA requires companies to obtain informed written consent from individuals before acquiring their biometric data. Specifically, BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information unless [the entity] 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 of the biometric identifier or biometric information…" 740 ILCS 14/15(b) (emphasis added).

87. Defendants fail to comply with these BIPA mandates.

88. Each Defendant qualifies as a "private entity" under BIPA. *See* 740 ILCS § 14/10.

89. Plaintiff and the Class are individuals who have had their "biometric identifiers" collected by each Defendant (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS § 14/10.

90. Plaintiff's and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS § 14/10.

91. Each Defendant systematically and automatically collected, used, stored and disseminated Plaintiff's and the Class's biometric identifiers and/or biometric information without first obtaining the written release required by 740 ILCS 14/15(b)(3).

92. Each Defendant did not inform Plaintiff and the Class in writing that their biometric identifiers and/or biometric information were being collected, stored and used, nor did Defendants inform Plaintiff and the Class in writing of the specific purpose(s) and length of term for which their biometric identifiers and/or biometric information were being collected, stored, and used as required by 740 ILCS 14/15(b)(1)-(2).

93. By collecting, storing, and using Plaintiff's and the Class's biometric identifiers and biometric information as described herein, each Defendant violated Plaintiff's and the Class's rights to privacy in their biometric identifiers or biometric information as set forth in BIPA. *See* 740 ILCS 14/1, *et seq*.

94. On behalf of herself and the Class, Plaintiff seeks: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiff and the Class by requiring each Defendant to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (3) statutory damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to 740 ILCS 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

THIRD CAUSE OF ACTION

Violation of 740 ILCS § 14/15(d): Disclosure of Biometric Identifiers and Information Before Obtaining Consent

95. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

96. BIPA prohibits private entities from disclosing a person's or customer's biometric identifier or biometric information without first obtaining consent for that disclosure. *See* 740 ILCS 14/15(d)(1).

97. Defendants fail to comply with this BIPA mandate.

98. Each Defendant qualifies as a "private entity" under BIPA. *See* 740 ILCS § 14/10.

99. Plaintiff and the Class are individuals who have had their "biometric identifiers" collected by each Defendant (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS § 14/10.

100. Plaintiff's and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS § 14/10.

101. Each Defendant systematically and automatically disclosed, redisclosed, or otherwise disseminated Plaintiff's and the Class's biometric identifiers and/or biometric information without first obtaining the consent required by 740 ILCS 14/15(d)(1).

102. By disclosing, redisclosing, or otherwise disseminating Plaintiff's and the Class's biometric identifiers and biometric information as described herein, each Defendant violated Plaintiff's and the Class's rights to privacy in their biometric identifiers or biometric information as set forth in BIPA. *See* 740 ILCS 14/1, *et seq.*

103. On behalf of herself and the Class, Plaintiff seeks: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiff and the Class by requiring each Defendant to comply with BIPA's requirements for the collection, storage, use and dissemination of biometric identifiers and biometric information as described herein; (3) statutory

damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS § 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to 740 ILCS § 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS § 14/20(3).

PRAYER FOR RELIEF

Wherefore, Plaintiff Lucille Mosby respectfully requests that this Court enter an Order:

A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff Lucille Mosby as Class Representative, and appointing Stephan Zouras, LLP, as Class Counsel;

B. Declaring that each Defendant's actions, as set forth above, violate BIPA;

C. Awarding statutory damages of $5,000 for *each* intentional and/or reckless violation of BIPA pursuant to 740 ILCS § 14/20(2) or, in the alternative, statutory damages of $1,000 for *each* negligent violation of BIPA pursuant to 740 ILCS § 14/20(1);

D. Declaring that each Defendant's actions, as set forth above, were intentional or reckless;

E. Awarding injunctive and other equitable relief as is necessary to protect the interests of Plaintiff and the Class, including an Order requiring each Defendant to collect, store, use and disseminate biometric identifiers and/or biometric information in compliance with BIPA;

F. Awarding Plaintiff and the Class their reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS § 14/20(3);

G. Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable; and,

H. Awarding such other and further relief as equity and justice may require.

Date: February 24, 2020

Respectfully Submitted,

/s/ Andrew C. Ficzko
James B. Zouras

Ryan F. Stephan
Andrew C. Ficzko
STEPHAN ZOURAS, LLP
100 N. Riverside Plaza
Suite 2150
Chicago, Illinois 60606
312.233.1550
312.233.1560 *f*
jzouras@stephanzouras.com
rstephan@stephanzouras.com
aficzko@stephanzouras.com
Firm ID: 43734

ATTORNEYS FOR PLAINTIFF

#11

A
D. H.

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

LUCILLE MOSBY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY,

Defendants.

No. 18 CH 05031

Judge Pamela McLean Meyerson

ORDER

This matter coming on to be heard on Defendants' Joint Motion to Certify Question for Interlocutory Appeal Under Illinois Supreme Court Rule 308 and Stay Proceedings, the parties having agreed to a briefing schedule, and the Court having considered the parties' arguments,

IT IS HEREBY FOUND AND ORDERED:

1) This case involves a rapidly-changing area of law. Plaintiff Lucille Mosby, a nurse, brought suit against her former employer (The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc., collectively the "Ingalls Defendants") and a third-party vendor (Becton, Dickinson and Company). Plaintiff alleges she was required to scan her fingerprint in order to access pharmaceuticals in the course of her job duties. She claims Defendants violated the Illinois Biometric Information Privacy Act ("BIPA") by not making the required disclosures and obtaining the required releases before collecting, possessing and disseminating her biometric information.

2) All Defendants filed motions to dismiss, and on January 13, 2020, the Court denied the motions. One of Defendants' arguments was that suit was barred because of this portion of the definition of "biometric identifier" in Section 10 of BIPA, 740 ILCS 14/10:

> Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.

3) After the Court denied the motions, the Ingalls Defendants moved to certify the following question for immediate appeal under Supreme Court Rule 308:

Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers collected, used or stored for health care treatment, payment or operations under HIPAA?

4) Rule 308 provides, in relevant part:

> (a) ***Requests.*** 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.

5) Interlocutory appeals under Rule 308 are to be used sparingly and only in exceptional circumstances. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257-58 (1st Dist. 2002). A question certified under Rule 308 must be a pure question of law.

6) After the Illinois Supreme Court's decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, on a certified question concerning standing under BIPA, appellate courts have been asked to take up certified questions on other BIPA issues. The First District Appellate Court has accepted, and now has pending before it, a certified question on the issue of preclusion under the Illinois Workers Compensation Act ("IWCA") (*McDonald v. Symphony Bronzeville Park, LLC,* 1-19-2398 (1st Dist. 2020). Two judges of the Circuit Court of Cook County have certified the question of the applicable statute of limitations for BIPA claims (*Tims v. Black Horse Carriers*, No. 19 CH 3522 (Feb. 26, 2020) and *Cortez v. Headly Mfg. Co.*,19 CH 04935 (March 13, 2020).

7) As with the issues of IWCA preclusion and the statute of limitations, no appellate court has yet issued an opinion on the extent to which the biometric information of health care workers (as opposed to patients) is excluded from BIPA's coverage. This argues in favor of certification. See *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 32.

8) The Court finds that, although the majority of circuit courts have ruled consistently with this Court—finding that the health care exclusion does not bar the suit—the issue raises a question of law as to which there is substantial ground for difference of opinion. Further, because the answer to the question could determine whether or not the case is dismissed, an immediate appeal may materially advance the ultimate termination of this litigation.

THEREFORE, the Court grants the Ingalls Defendants' motion, with some modification, and certifies the following question for immediate appeal under Illinois Supreme Court Rule 308:

> Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?

9203
4304
4315

This matter is stayed pending further order of the Appellate Court. The status date of July 16, 2020 is stricken. The case is set for status on October 16, 2020 at 10:15 a.m.

Judge Pamela McLean Meyerson

Judge Pamela McLean Meyerson

JUN 18 2020

Circuit Court – 2097

IN THE APPELALTE COURT OF ILLINOIS
FIRST DISTRICT

LUCILLE MOSBY, Plaintiff-Respondent, v. THE INGALLS MEMORIAL HOSPITAL, et al., Defendants-Applicants.	)	No. 1-20-0822

ORDER

THIS MATTER COMING TO BE HEARD on the application of Defendants-Applicants, Ingalls Memorial Hospital, *et.al.*, for Leave to Appeal pursuant to Illinois Supreme Court Rule 308, the Court having considered the application filed by Defendants-Applicants, the response filed by Plaintiff-Respondent, Lucille Mosby, the supporting record and supplements to the record, and the Court being fully advised in the premises;

IT IS HEREBY ORDRED the Court finds the question of law involved does not present a question of law as to which there is a substantial ground for difference of opinion. Therefore, the Application for Leave to Appeal pursuant to Illinois Supreme Court Rule 308, IS DENIED.

ORDER ENTERED

AUG 24 2020

APPELLATE COURT FIRST DISTRICT

Dated: _____

Nathaniel R. Howse, Jr.
JUSTICE

Cynthia Y. Cobbs
JUSTICE

Maureen E. Connors
JUSTICE

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 27, 2021

In re: Lucille Mosby, respondent, v. The Ingalls Memorial Hospital et al., petitioners. Leave to appeal, Appellate Court, First District. 126590

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause and entered the following supervisory order:

> In the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its order in Mosby v. The Ingalls Memorial Hospital, case No. 1-20-0822 (08/24/20), denying the application for leave to appeal pursuant to Rule 308. The appellate court is directed to allow the application for leave to appeal, and to answer the certified question.

The mandate of this Court will issue to the Appellate Court on 03/03/2021.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY,

Respondent,

v.

THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTRON, DICKINSON AND COMPANY,

Petitioners.

18 ch 5031

No. 1-20-0822

ORDER

Pursuant to the supervisory order of the Illinois Supreme Court directing this court to vacate its August 24, 2020 order denying leave to appeal pursuant to Supreme Court Rule 308, allow the application for leave to appeal, and answer the certified question;

IT IS HEREBY ORDERED, the August 24, 2020 order denying leave to appeal is VACATED and the application for leave to appeal is ALLOWED for consideration of the certified question.

ORDER ENTERED

APR 26 2021

APPELLATE COURT FIRST DISTRICT

Dated: _____

Nathaniel R. Howse, Jr.
Justice

Cynthia Y. Cobbs
Justice

Maureen E. Connors
Justice

Return Date: No return date scheduled
Hearing Date: 4/10/2019 10:00 AM - 10:00 AM
Courtroom Number: N/A
Location: District 1 Court
Cook County, IL

FILED
4/10/2019 3:14 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018CH07161

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

YANA MAZYA and TIKI TAYLOR, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	**Case No. 18-CH-07161**
v.	)	
	)	**Honorable Neil H. Cohen**
NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, NORTHWESTERN MEMORIAL HOSPITAL, OMNICELL, INC. and BECTON DICKINSON,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

FIRST AMENDED CLASS ACTION COMPLAINT

Named Plaintiffs, Yana Mazya and Tiki Taylor ("Plaintiffs"), individually and on behalf of all others similarly situated (the "Class"), by and through their attorneys, bring the following Class Action Complaint ("Complaint") pursuant to the Illinois Code of Civil Procedure, 735 ILCS §§ 5/2-801 and 2-802, against Northwestern Medical Lake Forest Hospital, Northwestern Memorial Hospital and Northwestern Memorial HealthCare (together, "Northwestern"), Omnicell, Inc. and Becton, Dickinson and Company ("BD") (collectively, "Defendants"), their subsidiaries and affiliates, to redress and curtail Defendants' unlawful collection, use, storage, and disclosure of Plaintiffs' sensitive biometric data. Plaintiffs allege as follows upon personal knowledge as to themselves, their own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

NATURE OF THE ACTION

1. Defendant Northwestern Memorial Healthcare ("NMHC") is a not-for-profit corporation organized and existing under the laws of the State of Illinois. NMHC, through its subsidiaries, is an academic and integrated healthcare system headquartered in Chicago, Illinois.

2. Defendant Northwestern Medical Lake Forest Hospital ("NLFH") is a not-for-profit corporation organized and existing under the laws of the State of Illinois. NLFH is a community-based hospital located at 1000 N Westmoreland Road, Lake Forest, Illinois 60045. Upon information and belief, NMHC is the hospital's parent company.

3. Defendant Northwestern Memorial Hospital ("NMH") is a not-for-profit corporation organized and existing under the laws of the State of Illinois. NMH is an academic medical center hospital located at 251 E Huron Street, Chicago, Illinois 60611. Upon information and belief, NMHC is the hospital's parent company.

4. When Northwestern hires an employee, he or she is enrolled in an employee database. Northwestern uses the employee database to monitor authorized access to stored materials (*i.e.* – medications) by its employees.

5. Northwestern employees are required to have their fingerprints scanned by a biometric device to be able to gain authorized access to stored materials. (*See, i.e.*, Exhibit A – New Hire Checklist).

6. For example, Northwestern uses medication dispensing systems (*i.e.* – BD Pyxis and Omnicell) that require workers to scan a fingerprint before gaining access to stored materials.

7. Biometrics are not relegated to esoteric corners of commerce. Many businesses – such as Defendants – and financial institutions have incorporated biometric applications into their

workplace in the form of biometric timeclocks or authenticators, and into consumer products, including such ubiquitous consumer products as checking accounts and cell phones.

8. Unlike identification badges – which can be changed or replaced if stolen or compromised – fingerprints are unique, permanent biometric identifiers associated with each employee. This exposes Northwestern employees to serious and irreversible privacy risks. For example, if a database containing fingerprints or other sensitive, proprietary biometric data is hacked, breached, or otherwise exposed – like in the recent Google+, Equifax, Uber, Facebook/Cambridge Analytica, and Marriott data breaches or misuses – employees have ***no*** means by which to prevent identity theft, unauthorized tracking, and other improper or unlawful use of this information.

9. In 2015, a data breach at the United States Office of Personnel Management exposed the personal identification information, including biometric data, of over 21.5 million federal employees, contractors, and job applicants. U.S. Off. of Personnel Mgmt., *Cybersecurity Incidents* (2018), *available at* www.opm.gov/cybersecurity/cybersecurity-incidents.

10. An illegal market already exists for biometric data. Hackers and identity thieves have targeted Aadhaar, the largest biometric database in the world, which contains the personal and biometric data – including handprints, fingerprints, iris scans, and a facial photograph – of over a billion Indian citizens. *See* Vidhi Doshi, *A Security Breach in India Has Left a Billion People at Risk of Identity Theft*, The Washington Post (Jan. 4, 2018), *available at* https://www.washingtonpost.com/news/worldviews/wp/2018/01/04/a-security-breach-in-india-has-left-a-billion-people-at-risk-of-identity-theft/?utm_term=.b3c70259fl38.

11. In January 2018, an Indian newspaper reported that the information housed in Aadhaar was available for purchase for less than $8 and in as little as 10 minutes. Rachna Khaira,

Rs 500, 10 Minutes, and You Have Access to Billion Aadhaar Details, The Tribune (Jan. 4, 2018), *available at* http://www.tribuneindia.com/news/nation/rs-500-10-minutes-and-you-have-access-to-billion-aadhaar-details/523361.html.

12. Recognizing the need to protect its citizens from situations like these, Illinois enacted the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, specifically to regulate the collection and storage of Illinois citizens' biometrics, such as fingerprints.

13. Notwithstanding the clear and unequivocal requirements of the law, Defendants disregard these employees' statutorily protected privacy rights and unlawfully collect, store, use and disseminate their biometric data in violation of BIPA. Specifically, each Defendant has violated and continues to violate BIPA because they did not and continue not to:

a. Properly inform Plaintiffs and others similarly situated in writing of the specific purpose and length of time for which their fingerprints were being collected, stored, and used, as required by BIPA;

b. Receive a written release from Plaintiffs and others similarly situated to collect, store, or otherwise use their fingerprints, as required by BIPA;

c. Provide a publicly available retention schedule and guidelines for permanently destroying Plaintiffs' and other similarly-situated individuals' fingerprints, as required by BIPA; and

d. Obtain consent from Plaintiffs and others similarly situated to disclose, redisclose, or otherwise disseminate their fingerprints to a third party, as required by BIPA.

14. Accordingly, Plaintiffs, on behalf of themselves as well as the putative Class, seek an Order: (1) declaring that Defendants' conduct violates BIPA; (2) requiring Defendants to cease the unlawful activities discussed herein; and (3) awarding liquidated damages to Plaintiffs and the proposed Class.

PARTIES

15. Plaintiff Yana Mazya is a natural person and a citizen of the State of Illinois.

16. Plaintiff Tiki Taylor is a natural person and a citizen of the State of Illinois.

17. Defendant Northwestern Medical Lake Forest Hospital is an Illinois not-for-profit corporation, and a subsidiary of NMHC, that is registered with the Illinois Secretary of State and conducts business in the State of Illinois.

18. Defendant Northwestern Memorial Hospital is an Illinois not-for-profit corporation, and subsidiary of NMHC, that is registered with the Illinois Secretary of State and conducts business in the State of Illinois.

19. Defendant Northwestern Memorial HealthCare is an Illinois not-for-profit corporation that is registered with the Illinois Secretary of State and conducts business in the State of Illinois, including Cook County.

20. Defendant Omnicell, Inc. is a Delaware corporation that is registered to do business in Illinois.

21. Defendant Becton, Dickinson and Company is a New Jersey corporation that is registered to do business in Illinois.

JURISDICTION AND VENUE

22. This Court has jurisdiction over Defendants pursuant to 735 ILCS § 5/2-209 because they conduct business transactions in Illinois, have committed statutory violations and tortious acts in Illinois, and are registered to conduct business in Illinois.

23. Venue is proper in Cook County because Defendants are authorized to conduct business in this State, Defendants conduct business transactions in Cook County, and Defendants committed the statutory violations alleged herein in Cook County and throughout Illinois.

FACTUAL BACKGROUND

I. The Biometric Information Privacy Act.

24. In the early 2000s, major national corporations started using Chicago and other locations in Illinois to test "new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias." 740 ILCS § 14/5(c). Given its relative infancy, an overwhelming portion of the public became weary of this then-growing yet unregulated technology. *See* 740 ILCS § 14/5.

25. In late 2007, a biometrics company called Pay by Touch, which provided major retailers throughout the State of Illinois with fingerprint scanners to facilitate consumer transactions, filed for bankruptcy. That bankruptcy was alarming to the Illinois Legislature because suddenly there was a serious risk that millions of fingerprint records – which, like other unique biometric identifiers, can be linked to people's sensitive financial and personal data – could now be sold, distributed, or otherwise shared through the bankruptcy proceedings without adequate protections for Illinois citizens. The bankruptcy also highlighted the fact that most consumers who used that company's fingerprint scanners were completely unaware that the scanners were not actually transmitting fingerprint data to the retailer who deployed the scanner, but rather to the now-bankrupt company, and that their unique biometric identifiers could now be sold to unknown third parties.

26. Recognizing the "very serious need [for] protections for the citizens of Illinois when it [came to their] biometric information," Illinois enacted BIPA in 2008. *See* Illinois House Transcript, 2008 Reg. Sess. No. 276; 740 ILCS 14/5.

27. Additionally, to ensure compliance, BIPA provides that, for each violation, the prevailing party may recover $1,000 or actual damages, whichever is greater, for negligent

violations and $5,000, or actual damages, whichever is greater, for intentional or reckless violations. 740 ILCS 14/20.

28. BIPA is an informed consent statute which achieves its goal by making it unlawful for a company to, among other things, "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information, unless it first:

a. Informs the subject in writing that a biometric identifier or biometric information is being collected, stored and used;

b. 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

c. Receives a written release executed by the subject of the biometric identifier or biometric information.

See 740 ILCS 14/15(b).

29. BIPA specifically applies to employees who work in the State of Illinois. BIPA defines a "written release" specifically "in the context of employment [as] a release executed by an employee as a condition of employment." 740 ILCS 14/10.

30. Biometric identifiers include retina and iris scans, voiceprints, scans of hand and face geometry, and – most importantly here – fingerprints. *See* 740 ILCS 14/10. Biometric information is separately defined to include any information based on an individual's biometric identifier that is used to identify an individual. *Id*.

31. BIPA also establishes standards for how companies must handle Illinois citizens' biometric identifiers and biometric information. *See, e.g.*, 740 ILCS 14/15(c)-(d). For example, BIPA prohibits private entities from disclosing a person's or customer's biometric identifier or

biometric information without first obtaining consent for such disclosures. *See* 740 ILCS 14/15(d)(1).

32. BIPA also prohibits selling, leasing, trading, or otherwise profiting from a person's biometric identifiers or biometric information (740 ILCS 14/15(c)) and requires companies to develop and comply with 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 such identifiers or information has been satisfied or within three years of the individual's last interaction with the company, whichever occurs first. 740 ILCS 14/15(a).

33. The Illinois legislature enacted BIPA due to the increasing use of biometric data in financial and security settings, the general public's hesitation to use biometric information, and – most significantly – the unknown ramifications of biometric technology. Biometrics are biologically unique to the individual and, once compromised, an individual is at a heightened risk for identity theft and left without any recourse.

34. BIPA provides individuals with a private right of action, protecting their right to privacy regarding their biometrics as well as protecting their rights to know the precise nature for which their biometrics are used and how they are being stored and ultimately destroyed. Unlike other statutes that only create a right of action if there is a qualifying data breach, BIPA strictly regulates the manner in which entities may collect, store, use, and disseminate biometrics and creates a private right of action for lack of statutory compliance.

35. Plaintiffs, like the Illinois legislature, recognize how imperative it is to keep biometric information secure. Biometric information, unlike other personal identifiers such as a social security number, cannot be changed or replaced if hacked or stolen.

II. Defendants Violate the Biometric Information Privacy Act.

36. By the time BIPA passed through the Illinois Legislature in mid-2008, most companies who had experimented using individuals' biometric data stopped doing so.

37. However, Defendants failed to take note of the shift in Illinois law governing the collection, use and dissemination of biometric data. As a result, Defendants continue to collect, store, use and disseminate individuals' biometric data in violation of BIPA.

38. Specifically, when employees are hired, Northwestern requires them to have their fingerprints scanned to enroll them in Northwestern's, BD's Pyxis and/or Omnicell's database(s).

39. Northwestern uses an authentication system that requires employees to use their fingerprint as a means of authentication to gain access to stored materials. Thus, employees have to use their fingerprints multiple times each day whenever they need to access these materials.

40. Upon information and belief, Northwestern fails to inform their employees that it discloses employees' fingerprint data to at least two out-of-state third-party vendors, Omnicell and BD; fails to inform their employees that it discloses their fingerprint data to other, currently unknown, third parties, which host the biometric data in their data centers; fails to inform their employees of the purposes and duration for which it collects employees' sensitive biometric data; and fails to obtain written releases from employees before collecting their fingerprints.

41. Likewise, Omnicell and BD fail to inform Plaintiffs of the purposes and duration for which it collects their sensitive biometric data and fails to obtain written releases from workers before collecting their fingerprints.

42. Furthermore, each Defendant fails to provide employees with a written, publicly available policy identifying their retention schedule and guidelines for permanently destroying

employees' fingerprints when the initial purpose for collecting or obtaining their fingerprints is no longer relevant, as required by BIPA.

43. The Pay by Touch bankruptcy that catalyzed the passage of BIPA, highlights why such conduct – where individuals are aware that they are providing a fingerprint, but not aware of to whom or for what purposes they are doing so – is dangerous. That bankruptcy spurred Illinois citizens and legislators into realizing that it is crucial for individuals to understand when providing biometric identifiers, such as a fingerprint, who exactly is collecting their biometric data, where it will be transmitted, for what purposes, and for how long. Each Defendant disregards these obligations and Plaintiffs' statutory rights and instead unlawfully collects, stores, uses and disseminates Plaintiffs' biometric identifiers and information, without ever receiving the individual's informed written consent required by BIPA.

44. Upon information and belief, each Defendant lacks retention schedules and guidelines for permanently destroying Plaintiffs' and other similarly-situated individuals' biometric data and has not and will not destroy Plaintiffs' and other similarly-situated individuals' biometric data when the initial purpose for collecting or obtaining such data has been satisfied or within three years of the individual's last interaction with each company.

45. Plaintiffs and other similarly-situated individuals are not told what might happen to their biometric data if and when any Defendant merges with another company, or worse, if and when any of the Defendant's entire organization folds.

46. Since Defendants neither publish a BIPA-mandated data retention policy nor disclose the purposes for their collection of biometric data, Northwestern's employees have no idea whether any of the Defendants sell, disclose, re-disclose, or otherwise disseminate their biometric data. Nor are Plaintiffs and the putative Class told to whom either Defendant currently

discloses their biometric data, or what might happen to their biometric data in the event of a merger or a bankruptcy.

47. These violations have raised a material risk that Plaintiffs' and other similarly-situated individuals' biometric data will be unlawfully accessed by third parties.

48. By and through the actions detailed above, Defendants disregard Plaintiffs' and other similarly-situated individuals' legal rights in violation of BIPA.

III. Named Plaintiffs' Experience

49. Named Plaintiff Yana Mazya worked for Northwestern as a registered nurse at Northwestern Memorial Lake Forest Hospital, which is located at 1000 N Westmoreland Road, Lake Forest, Illinois 60045 from November 12, 2012 until December 4, 2017.

50. Named Plaintiff Tiki Taylor worked for Northwestern as a Patient Care Technician at Northwestern Memorial Hospital, which is located at 251 E Huron Street, Chicago, Illinois 60611 from August of 2016 to June of 2017.

51. As a condition of employment with Northwestern, Plaintiffs ***were required*** to scan their fingerprint so Northwestern could use it as an authorization method to allow access to stored materials. (*See, i.e.*, Ex. A).

52. Defendants subsequently stored Plaintiffs' fingerprint data in their BD's Pyxis and/or Omnicell's database(s).

53. Each time Plaintiffs needed to gain access to stored materials, they were required to scan their fingerprint.

54. Plaintiffs have never been informed of the specific limited purposes or length of time for which any Defendant collected, stored, used and/or disseminated their biometric data.

55. Plaintiffs have never been informed of any biometric data retention policy developed by any Defendant, nor have they ever been informed of whether any Defendant will ever permanently delete their biometric data.

56. Plaintiffs have never been informed that their biometric data was being shared with Omnicell, BD and/or any other third-party vendors.

57. Plaintiffs have never been provided with, nor ever signed, a written release allowing any Defendant to collect, store, use or disseminate their biometric data.

58. Plaintiffs have continuously and repeatedly been exposed to the risks and harmful conditions created by each Defendant's violations of BIPA as alleged herein.

59. No amount of time or money can compensate Plaintiffs if their biometric data is compromised by the lax procedures through which Defendants captured, stored, used, and disseminated their and other similarly-situated individuals' biometrics. Moreover, Plaintiffs would not have provided their biometric data to Defendants if they had known that they would retain such information for an indefinite period of time without their consent.

60. A showing of actual damages is not necessary in order to state a claim under BIPA. *See Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 40 ("[A]n individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act"). Nonetheless, Plaintiffs have been aggrieved because they suffered an injury-in-fact based on Defendants' violations of their legal rights. Additionally, Plaintiffs suffered an invasion of a legally protected interest when Defendants secured their personal and private biometric data at a time when they had no right to do so, a gross invasion of their rights to privacy.

BIPA protects workers like Plaintiffs from this precise conduct, and Defendants had no lawful right to secure this data or share it with third parties absent a specific legislative license to do so.

61. Plaintiffs' biometric information is economically valuable, and such value will increase as the commercialization of biometrics continues to grow. As such, Plaintiffs were not sufficiently compensated by Defendants for their retention and use of their and other similarly-situated employees' biometric data. Plaintiffs would not have agreed to work for Defendants for the compensation they received if they had known that Defendants would retain their biometric data indefinitely.

62. Plaintiffs also suffered an informational injury because Defendants failed to provide them with information to which they were entitled by statute. Through BIPA, the Illinois legislature has created a right: an employee's right to receive certain information prior to an employer securing their highly personal, private and proprietary biometric data; and an injury – not receiving this extremely critical information.

63. Plaintiffs also suffered an injury in fact because each Defendant improperly disseminated their biometric identifiers and/or biometric information to third parties, including but not limited to Omnicell and BD, that hosted the biometric data in their data centers, in violation of BIPA.

64. Pursuant to 740 ILCS 14/15(b), Plaintiffs were entitled to receive certain information prior to Defendants securing their biometric data; namely, information advising them of the specific limited purpose(s) and length of time for which each Defendant collects, stores, uses and disseminates their private biometric data; information regarding each Defendant's biometric retention policy; and, a written release allowing each Defendant to collect, store, use and disseminate their private biometric data. By depriving Plaintiffs of this information, Defendants

injured them. *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998).

65. Plaintiffs have plausibly inferred actual and ongoing harm in the form of monetary damages for the value of the collection and retention of their biometric data; in the form of monetary damages by not obtaining additional compensation as a result of being denied access to material information about Defendants' policies and practices; in the form of the unauthorized disclosure of their confidential biometric data to third parties; in the form of interference with their rights to control and possess their confidential biometric data; and in the form of the continuous and ongoing exposure to substantial and irreversible loss of privacy.

66. As Plaintiffs are not required to allege or prove actual damages in order to state a claim under BIPA, they seek statutory damages under BIPA as compensation for the injuries caused by Defendants. *Rosenbach*, 2019 IL 123186, ¶ 40.

CLASS ALLEGATIONS

67. Pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, Plaintiffs bring claims on their own behalf and as representatives of all other similarly-situated individuals pursuant to BIPA, 740 ILCS 14/1, *et seq.*, to recover statutory penalties, prejudgment interest, attorneys' fees and costs, and other damages owed.

68. As discussed *supra*, Section 14/15(b) of BIPA prohibits a company from, among other things, collecting, capturing, purchasing, receiving through trade, or otherwise obtaining a person's or a customer's biometric identifiers or biometric information, unless it first (1) informs the individual in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the individual in writing of the specific purpose and length of time 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. 740 ILCS 14/15.

69. Plaintiffs seek class certification under the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, for the following class of similarly situated workers under BIPA:

> All individuals working for Northwestern in the State of Illinois who had their fingerprints collected, captured, received, obtained, maintained, stored, or disclosed by any Defendant during the applicable statutory period.

70. This action is properly maintained as a class action under 735 ILCS 5/2-801 because:

A. The class is so numerous that joinder of all members is impracticable;

B. There are questions of law or fact that are common to the class;

C. The claims of the Plaintiffs are typical of the claims of the class; and,

D. The Plaintiffs will fairly and adequately protect the interests of the class.

Numerosity

71. The total number of putative class members exceeds fifty (50) individuals. The exact number of class members may easily be determined from Northwestern's database.

Commonality

72. There is a well-defined commonality of interest in the substantial questions of law and fact concerning and affecting the Class in that Plaintiffs and all members of the Class have been harmed by Defendants' failure to comply with BIPA. The common questions of law and fact include, but not limited to the following:

A. Whether any Defendant collected, captured or otherwise obtained Plaintiffs' and the Class's biometric identifiers or biometric information;

B. Whether any Defendant properly informed Plaintiffs and the Class of its purposes for collecting, using, storing and disseminating their biometric identifiers or biometric information;

C. Whether any Defendant obtained a written release (as defined in 740 ILCS 14/10) to collect, use, store and disseminate Plaintiffs' and the Class's biometric identifiers or biometric information;

D. Whether any Defendant has disclosed or re-disclosed Plaintiffs' and the Class's biometric identifiers or biometric information;

E. Whether any Defendant has sold, leased, traded, or otherwise profited from Plaintiffs' and the Class's biometric identifiers or biometric information;

F. Whether any Defendant developed 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 three years of their last interaction with the individual, whichever occurs first;

G. Whether any Defendant complies with any such written policy (if one exists);

H. Whether any Defendant's violations of BIPA have raised a material risk that Plaintiffs' and the putative Class's biometric data will be unlawfully accessed by third parties;

I. Whether any Defendant used Plaintiffs' and the Class's fingerprints to identify them; and

J. Whether the violations of BIPA were committed negligently; and

K. Whether the violations of BIPA were committed intentionally and/or recklessly.

73. Plaintiffs anticipate that Defendants will raise defenses that are common to the class.

Adequacy

74. Plaintiffs will fairly and adequately protect the interests of all members of the class, and there are no known conflicts of interest between Plaintiffs and class members. Plaintiffs, moreover, have retained experienced counsel that are competent in the prosecution of complex litigation and who have extensive experience acting as class counsel.

Typicality

75. The claims asserted by Plaintiffs are typical of the class members they seek to represent. Plaintiffs have the same interests and suffer from the same unlawful practices as the class members.

76. Upon information and belief, there are no other class members who have an interest individually controlling the prosecution of his or her individual claims, especially in light of the relatively small value of each claim and the difficulties involved in bringing individual litigation against one's employer. However, if any such class member should become known, he or she can "opt out" of this action pursuant to 735 ILCS 5/2-801.

Predominance and Superiority

77. The common questions identified above predominate over any individual issues, which will relate solely to the quantum of relief due to individual class members. A class action is superior to other available means for the fair and efficient adjudication of this controversy because individual joinder of the parties is impracticable. Class action treatment will allow a large number of similarly-situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense if these claims were brought individually. Moreover, as the damages suffered by each class member are relatively small in the sense pertinent to class action analysis, the expenses and burden of individual litigation would make it difficult for individual class members to vindicate their claims.

78. Additionally, important public interests will be served by addressing the matter as a class action. The cost to the court system and the public for the adjudication of individual litigation and claims would be substantially more than if claims are treated as a class action. Prosecution of separate actions by individual class members would create a risk of inconsistent

and varying adjudications, establish incompatible standards of conduct for Defendants and/or substantially impair or impede the ability of class members to protect their interests. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can and is empowered to fashion methods to efficiently manage this action as a class action.

FIRST CAUSE OF ACTION
Violation of BIPA Section 15(a): Failure to Institute, Maintain and Adhere to Publicly-Available Retention Schedule

79. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

80. BIPA mandates that companies in possession of biometric data establish and maintain a satisfactory biometric data retention – and, importantly, deletion – policy. Specifically, those companies must: (i) make publicly available a written policy establishing a retention schedule and guidelines for permanent deletion of biometric data (at most three years after the company's last interaction with the individual); and (ii) actually adhere to that retention schedule and actually delete the biometric information. *See* 740 ILCS 14/15(a).

81. Each Defendant fails to comply with these BIPA mandates.

82. Defendant NLFH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

83. Defendant NMHC is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

84. Defendant NMH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

85. Defendant Omnicell, Inc. is a Delaware corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

86. Defendant Becton Dickinson and Company is a New Jersey corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

87. Plaintiffs and the Class are individuals who have had their "biometric identifiers" collected by Defendants (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS 14/10.

88. Plaintiffs' and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS 14/10.

89. Each Defendant has failed to provide a publicly available retention schedule or guidelines for permanently destroying biometric identifiers and biometric information as specified by BIPA. *See* 740 ILCS 14/15(a).

90. Upon information and belief, each Defendant lacks retention schedules and guidelines for permanently destroying Plaintiffs' and the Class's biometric data and have not and will not destroy Plaintiffs' and the Class's biometric data when the initial purpose for collecting or obtaining such data has been satisfied or within three years of the individual's last interaction with the company.

91. On behalf of themselves and the Class, Plaintiffs seek: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiffs and the Class by requiring each Defendant to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (3) statutory damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to 740 ILCS 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

SECOND CAUSE OF ACTION
Violation of BIPA Section 15(b): Failure to Obtain Informed Written Consent and Release Before Obtaining Biometric Identifiers or Information

92. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

93. BIPA requires companies to obtain informed written consent from employees before acquiring their biometric data. Specifically, BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information unless [the entity] 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 of the biometric identifier or biometric information…" 740 ILCS 14/15(b) (emphasis added).

94. Each Defendant fails to comply with these BIPA mandates.

95. Defendant NLFH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

96. Defendant NMHC is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

97. Defendant NMH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

98. Defendant Omnicell, Inc. is a Delaware corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

99. Defendant Becton Dickinson is a New Jersey corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

100. Plaintiffs and the Class are individuals who have had their "biometric identifiers" collected by Defendants (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS 14/10.

101. Plaintiffs' and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS 14/10.

102. Each Defendant systematically and automatically collected, used, and stored Plaintiffs' biometric identifiers and/or biometric information without first obtaining the written release required by 740 ILCS 14/15(b)(3).

103. Each Defendant did not inform Plaintiffs in writing that their biometric identifiers and/or biometric information were being collected, stored, used, and disseminated, nor did any Defendant inform Plaintiffs in writing of the specific purpose and length of term for which their biometric identifiers and/or biometric information were being collected, stored, and used as required by 740 ILCS 14/15(b)(1)-(2).

104. By collecting, storing, and using Plaintiffs' and the Class's biometric identifiers and biometric information as described herein, each Defendant violated Plaintiffs' and the Class's rights to privacy in their biometric identifiers or biometric information as set forth in BIPA. *See* 740 ILCS 14/1, *et seq*.

105. On behalf of themselves and the Class, Plaintiffs seek: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiffs and the Class by requiring each Defendant to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (3) statutory damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to

740 ILCS 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

THIRD CAUSE OF ACTION
Violation of BIPA Section 15(d): Disclosure of Biometric Identifiers and Information Before Obtaining Consent

106. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

107. BIPA prohibits private entities from disclosing a person's or customer's biometric identifier or biometric information without first obtaining consent for that disclosure. *See* 740 ILCS 14/15(d)(1).

108. Each Defendant fails to comply with this BIPA mandate.

109. Defendant NLFH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

110. Defendant NMHC is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

111. Defendant NMH is a limited liability company registered to do business in Illinois and thus qualifies as a "private entity" Under BIPA. *See* 740 ILCS 14/10.

112. Defendant Omnicell, Inc. is a Delaware corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

113. Defendant Becton Dickinson is a New Jersey corporation registered to do business in Illinois and thus qualifies as a "private entity" under BIPA. *See* 740 ILCS 14/10.

114. Plaintiffs and the Class are individuals who have had their "biometric identifiers" collected by Defendants (in the form of their fingerprints), as explained in detail in Sections II and III, *supra*. *See* 740 ILCS 14/10.

115. Plaintiffs' and the Class's biometric identifiers were used to identify them and, therefore, constitute "biometric information" as defined by BIPA. *See* 740 ILCS 14/10.

116. Each Defendant systematically and automatically disclosed, redisclosed, or otherwise disseminated Plaintiffs' biometric identifiers and/or biometric information without first obtaining the consent required by 740 ILCS 14/15(d)(1).

117. By disclosing, redisclosing, or otherwise disseminating Plaintiffs' and the Class's biometric identifiers and biometric information as described herein, each Defendant violated Plaintiffs' and the Class's rights to privacy in their biometric identifiers or biometric information as set forth in BIPA. *See* 740 ILCS 14/1, *et seq*.

118. On behalf of themselves and the Class, Plaintiffs seek: (1) declaratory relief; (2) injunctive and equitable relief as is necessary to protect the interests of Plaintiffs and the Class by requiring each Defendant to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (3) statutory damages of $5,000 for each intentional and/or reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for each negligent violation of BIPA pursuant to 740 ILCS 14/20(1); and (4) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

PRAYER FOR RELIEF

Wherefore, Named Plaintiffs Yana Mazya and Tiki Taylor respectfully request that this Court enter an Order:

A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiffs Yana Mazya and Tiki Taylor as Class Representatives, and appointing Stephan Zouras, LLP, as Class Counsel;

B. Declaring that Defendants' actions, as set forth above, violate BIPA;

C. Awarding statutory damages of $5,000 for *each* reckless violation of BIPA pursuant to 740 ILCS 14/20(2) or, in the alternative, statutory damages of $1,000 for *each* negligent violation of BIPA pursuant to 740 ILCS 14/20(1);

D. Declaring that Defendants' actions, as set forth above, were intentional or reckless;

E. Awarding injunctive and other equitable relief as is necessary to protect the interests of Plaintiffs and the Class, including an Order requiring Defendants to collect, store, use and disseminate biometric identifiers and/or biometric information in compliance with BIPA;

F. Awarding Plaintiffs and the Class their reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3);

G. Awarding Plaintiffs and the Class pre- and post-judgment interest, to the extent allowable; and,

H. Awarding such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Date: April 10, 2019 Respectfully Submitted,

/s/ Catherine T. Mitchell

Ryan F. Stephan
James B. Zouras
Catherine T. Mitchell
Stephan Zouras, LLP
100 N. Riverside Plaza
Suite 2150
Chicago, Illinois 60606
312.233.1550
312.233.1560 *f*
rstephan@stephanzouras.com
jzouras@stephanzouras.com
cmitchell@stephanzouras.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, the attorney, hereby certify that on April 10, 2019, I filed the attached with the Clerk of the Court using the electronic filing system which will send such filing to all attorneys of record.

/s/ Catherine T. Mitchell

Return Date: No return date scheduled
Hearing Date: 4/10/2019 10:00 AM - 10:00 AM
Courtroom Number: N/A
Location: District 1 Court
Cook County, IL

FILED
4/10/2019 3:14 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018CH07161

EXHIBIT A

130127

K. Fiesta

Northwestern Memorial® Hospital

NEW HIRE CHECKLIST

NAME: Yana Mazya START / TRANSFER DATE: 11/12/12

JOB TITLE: RN

RECRUITER: DBC

Requisition #: 76046 Manager / Interview Date: 8-318-

Conviction? Y (N) SSN: ~~[illegible]~~-880367

Previous NM employee? Y (N) ID# _____ DOB: 1/19/1982

Right to Work in the US? (Y) N Marital Status: M

0.6, 1 at

✓ Licensure / Certifications Look Up

✓ Verisys Checked

✓ Offer Letter and On-Boarding Instructions Sent

_____ Talent Plus Test To Manager _____ Result Y / N

STILL NEED FROM CANDIDATE:

_____ Illinois License for RN (or IL Temporary ~~Work Permit~~)

_____ CPR Card

_____ "PASS" Letter for RN Grads

_____ Other Certifications/Licenses:

_____ Educational Degree or Official ~~Transcript~~ diploma

Ref ① completed

Recruiting Coordinator:

✓ Reference: Date Sent: 10/4 Complete: 10/4

✓ Enrolled in BPO 11/12

✓ Enrolled in PCO or PCT Course 11/14

✓ Professional Experience Date 3/1/11

✓ Licensure / Certifications Look Up (2)

✓ Licensure / Certifications Entered

✓ Highest Level of Education Entered

✓ Entered in Person Profiles

✓ Entered in Modify a Person

✓ Hourly/Annual Salary 27.82

✓ Hours and Shift detail 24, 1 PT

_____ Sign-on Bonus: _____

Pay Dates: _____

Date added to spreadsheet: _____

On-Boarding Process:

✓ Employee Health Clearance verified

✓ Fingerprints completed

✓ Criminal Background 3019 entered

_____ Union Card: NO YES

_____ Non-Licensed Direct Patient Caregiver: NO YES

_____ Fee App Completed UCIA

✓ Emergency Contact Information

✓ Tax Data

_____ ImageNow Documents

– Direct Deposit

S:\Datastore01\Human Resources\Staffing\Forms\New Hire Paperwork for Front Desk

APPROVED 11/12/12

A61

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

YANA MAZYA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. NORTHWESTERN LAKE FOREST HOSPITAL, AND NORTHWESTERN MEMORIAL HEALTHCARE, Defendants.	Case No. 18 CH 07161

ORDER

Currently before the Court is the Combined Sections 2-615 and 2-619 Motion to Dismiss of Defendants Northwestern Lake Forest Hospital ("NLFH") and Northwestern Memorial Healthcare ("NMH") (collectively, "Northwestern"). For the reasons stated below, the Court denies Defendants' motion.

Background

On June 6, 2018, Yana Mazya ("Mazya") filed a class action complaint individually and on behalf of those similarly situated alleging that Defendants Northwestern Lake Forest Hospital, Northwestern Memorial Healthcare, Omnicell, Inc., and Becton Dickinson unlawfully collected, used, stored, and disclosed her sensitive biometric data in violation of the Illinois Biometric Information Privacy Act ("BIPA") 740 ILCS 14/1. (Mazya was a nurse at Defendant Northwestern Memorial Lake Forest Hospital from November 12, 2012 through December 4, 2017.)

Based on the allegations of the First Amended Complaint ("FAC"), which are taken as true for purposes of the pending motion, Mazya worked as a registered nurse at Northwestern Memorial Lake Forest Hospital from November 2012 until December 2017. FAC at ¶49. Taylor worked as a Patient Care Technician at Northwestern Memorial Hospital from August of 2016 to June of 2017. FAC at ¶50. As a condition of their employment with Northwestern, Mazya and Taylor were required to scan their fingerprint so Northwestern could use it as an authorization method to allow access to stored materials. FAC at ¶51.

The FAC alleges Defendants violated BIPA Section 15(a): Failure to Institute, Maintain and Adhere to Publicly-Available Retention Schedule (Count I); BIPA Section 15(b): Failure to Obtain Informed Written Consent and Release Before Obtaining Biometric

Identifiers or Information (Count II); Violation of BIPA Section 15(d): and Disclosure of Biometric Identifiers and Information Before Obtaining Consent (Count III).

Northwestern now moves to dismiss to dismiss Mazya's claims pursuant to Section 2-619 for three separate reasons: (1) the Illinois legislature specifically excluded information collected for healthcare treatment, payment, or operations from BIPA; (2) Mazya's claims are barred by the statute of limitations; and (3) Mazya's claims are preempted by the Illinois Workers' Compensation Act. Alternatively, Northwestern argues, if this Court considers Mazya's claims, her claims should be dismissed pursuant to Section 2-615 because she has failed to allege an injury to the rights that were meant to be protected by BIPA. Finally, Northwestern argues that at a minimum, if this Court finds that Mazya has stated any claim at all, her claims for reckless or intentional BIPA violations should be dismissed because they lack any factual support.

Legal Standard

A proper 2-619 motion is a "yes but" motion; it admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense or affirmative matter exists that defeats the claim nevertheless. *Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 40-41. A section 2-615 motion to dismiss, by contrast, challenges the legal sufficiency of a complaint based on facial defects. *City of Chicago v. Beretta U.S.A. Corp*., 213 Ill. 2d 351, 364, 821 N.E.2d 1099 (2004). In reviewing a 2-615 motion, the court accepts as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts, as well as exhibits appended to the complaint, and construes them in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp*., 215 Ill. 2d 1, 11-12 (2005).

Analysis

A. 2-619 Arguments

First, Northwestern argues Mazya's claims must be dismissed under Section 2-619 because BIPA explicitly excludes information collected for healthcare treatment, payment, and operations under HIPAA. BIPA expressly provides that biometric identifiers and information "do not include . . . information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [HIPAA]." 740 ILCS 14/10. Mazya alleges her information was solely used as part of "an authentication system that requires employees to use their fingerprint as a means of authentication to gain access to stored materials," namely "medications" to be administered to patients, and this type of activity and data are already regulated under HIPAA's statutory scheme and therefore excluded under BIPA's regulatory scheme. FAC at ¶¶ 2, 39; *Giangiulio v. Ingalls Mem'l Hosp.*, 365 Ill. App. 3d 823, 839 (1st Dist. 2006). According to Northwestern, its medication dispensing systems collect information for healthcare treatment, payment, and operations currently regulated by HIPAA, and the Illinois Legislature did not intend for BIPA to interfere with a hospital's HIPAA compliance. (BIPA instructs that "[n]othing in [the] Act shall be construed to conflict with . . . the

[HIPAA] and the rules promulgated under [HIPAA]." 740 ILCS 14/25(b); *Bogseth v. Dr. B. Emanuel*, 261 Ill. App. 3d 685, 690 (1st Dist. 1994) ("An effective means of ascertaining the intent underlying specific legislation is to analyze the legislative history, including debates of legislators conducted on the floor of the General Assembly."); *see also* case 2018 CH 001327 *Diaz v. Silver Cross Hospital and Medical Centers* in the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, in which the Court recently granted the defendant's motion to dismiss nearly identical claims.) Northwestern argues that its use of Mazya's finger scans is permissible, and even encouraged, as a means of implementing HIPAA's important public policy and safety goals, and therefore such use is exempted from BIPA's requirements through the carveout in Section 10.

Mazya successfully points out, however, that HIPAA protects patient information, not employee information. To accept Northwestern's notion would leave medical professionals with no protection under BIPA, or HIPAA, from the improper collection and use of their biometric identifiers and information. As such, this Court construes BIPA's exemption of information used under HIPAA as limited to patient information. BIPA's explicit reference to biometric data taken from a *patient* memorializes the intent of the Illinois General Assembly to exclude *patient* biometrics from BIPA's protections -- because those biometrics are already protected by HIPAA -- and not *employee* biometric data. (BIPA's exclusions do not include information which, for example, may be used to operate an X-Ray machine or to access MRI data—it explicitly refers to the actual "image or film" taken from a patient and used to treat a patient.) Looking at BIPA as a whole reveals that if the legislature intended to grant some sweeping, categorical exemption to all covered entities under HIPAA, it knew how to do so, as shown by other provisions that do provide categorical exemptions such as the exemption for financial institutions. In other words, the Illinois General Assembly did not intend to exempt all HIPAA-covered entities from BIPA's security requirements.

Northwestern argues alternatively that Mazya's claims are barred by the statute of limitations because they accrued when she was hired in 2012, and not when she was discharged. Thus, her claims, in Northwestern's view, are barred by any one of the potentially applicable statutes of limitations. 735 ILCS 5/13-201 (one-year statute of limitations applicable to privacy claims); 735 ILCS 5/13-202 (two year statute of limitations applicable to statutory penalties); 735 ILCS 5/13-205 (five-year statute of limitations applicable to all civil actions not otherwise provided for).

Mazya responds that accrual may be examined in one of two ways. The first is to view Northwestern's ongoing collection and storage of Plaintiff's biometric data as a "continuing" injury that does not cease until they stop violating BIPA. Under this theory, "the statute of limitations [does] not begin to run until the date of the last injury or when the tortious acts cease." *Hyon Waste Mgmt. Servs., Inc. v. City of Chicago*, 14 Ill. App. 3d 757, 762-63 (1991) (citation omitted); *see also Accord Taylor v. Bd. of Educ. of City of Chicago*, 2014 IL App (1st) 123744, ¶ 46 ("[U]nder the 'continuing tort' or 'continuing violation' theory, where the tort involves continuous or repeated injurious behavior, by the same actor and of a similar nature, the limitations period is held in abeyance and the plaintiff's cause of action does not accrue until the date the final injury occurs or the tortious acts

cease"). The other way to determine the accrual date is by viewing Northwestern's conduct as a series of independent acts, each of which would "support[] a separate cause of action." *See Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 19 Ill. 2d 325, 349 (2002) (*citing Meyers v. Kissner*, 149 Ill. 2d 1, 10-11 (1992) (continuing private nuisance gave rise over and over again to causes of action, and limitations period merely specified the window in time for which monetary damages may be recovered prior to filing complaint)); *Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990) (where initial statutory violation outside the limitations period is repeated later, each violation begins the limitations period anew, and recovery may be had for at least those violations that occurred within the limitations period). BIPA allows an "aggrieved" person to recover for "each violation" of the law, not just the first. 740 ILCS 14/20; *see also Rosenbach*, 2019 IL 123186, ¶ 36.

According to Mazya, the accrual date under BIPA depends on the nature of the misconduct and specific BIPA requirement violated and is not limited to the first time an entity collects biometric data without notice or consent. Because Northwestern committed repeated, continuing, and ongoing violations of BIPA, according to Mazya, the limitations period accrued only when Northwestern came into compliance (if ever). Furthermore, Mazya has no reason to believe Northwestern permanently destroyed her biometric data when she was terminated, and she further believes Northwestern continues to wrongfully possess her proprietary biometric information.

The Court is not persuaded that Mazya essentially waived her rights under BIPA when she initially offered or continued to offer her biometric data "without complaint" to perform her duties as a nurse at Northwestern. The burden to come into compliance with BIPA is on the collector of the data; there is no burden on the possessor of the data to complain in order for the collector to have to come into compliance. 740 ILCS 14/15. Therefore, the Court rejects Northwestern's theory of accrual as a basis to dismiss the FAC.

As to which statute of limitation should apply, the Court finds persuasive the Court's reasoning in *Burlinski v. Top Golf USA, Inc.*, 2020 U.S. Dist. LEXIS 161371, where the parties' arguments regarding the possible one, two, or five year statute of limitations are nearly identical to the arguments raised here. With regard to the one-year limitations period for privacy claims, none of the requirements in BIPA include a publication element that would fall under 735 ILCS 5/13-201, and none of the cases cited by Northwestern convince the Court that it should construe the notion of a publication so broadly. *Burlinski*, 2020 U.S. Dist. LEXIS 161371, *17. Regarding the two year statute of limitations, the *Burlinski* Court pointed out that statutory BIPA damages are alternative relief to actual damages; such damages are not necessarily automatic or predetermined; such damages are part of BIPA's larger remedial scheme; and BIPA is not a penal statute, even though it provides for statutory damages. 740 ILCS 14/20(2); *Burlinski v. Top Golf USA, Inc*., 2020 U.S. Dist. LEXIS 161371, ¶21. Thus, the two year limitation for personal injury claims set out in 735 ILCS 5/13-202 does not apply to BIPA. As in *Burlinkski*, that leaves the Court with the "catch-all" five year statute of limitations for BIPA claims. 735 ILCS 5/13-205 (providing that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued"); *Burlinski v. Top Golf USA, Inc.*, 2020 U.S. Dist. LEXIS 161371, *22.

The First District Appellate Court recently addressed Northwestern's final argument pursuant to 2-619, and rejected the notion that BIPA claims such as Mazya's are preempted by the Illinois Workers' Compensation Act ("IWCA"). The Court ruled that the "exclusivity provisions of the [IWCA] do not bar a claim for statutory, liquidated damages, where an employer is alleged to have violated an employee's statutory privacy rights under [BIPA], as such a claim is simply not compensable under the [IWCA]." *McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) 192398, ¶27 (Fifth Division). Thus, this Court also rejects such an argument.

B. 2-615 Arguments

Turning to Northwestern's arguments pursuant to Section 2-615, Northwestern argues first that because Mazya was provided an opportunity to withhold legal consent to Northwestern collecting her biometric data before such data were collected, the holdings in *Rosenbach v. Six Flags Entertainment Corp*., 2019 IL 123186 and *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018) do not apply here. Additionally, Northwestern argues, any assertion that fingerprints of healthcare workers implicate privacy interests is belied by the fact that Illinois law requires nurses to provide their fingerprints in order to obtain a nursing license. 225 ILCS 65/50-35; Ill. Admin. Code tit. 68 §§ 1300.300, 320.

As Mazya correctly points out, however, *Rosenbach* does *not* hold that only individuals unaware their biometric data were being collected at the time of the collection have a separate, lower pleading requirement under BIPA compared to individuals who *were* aware their biometric data were collected at the time of the collection. Instead, the Supreme Court rejected the defendant's argument that the plaintiff "suffered no actual or threatened injury and therefore lacked standing to sue" and held that a plaintiff is "aggrieved" by a violation of BIPA and may pursue a cause of action when "a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach [. . .] [and that person or customer is] entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action." *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶33. Additionally, even if an individual knows her biometric data are being collected, that does not mean she legally consents to collection, nor is the collector excused from following statutory requirements to protect the individual's privacy.

Northwestern's other argument under Section 2-615, that Mazya has not pled an intentional or reckless BIPA violation, is similarly not well taken. At the pleading stage, the scienter of the collector of biometric data is irrelevant; it is enough to plead a violation of BIPA's requirements. Scienter is relevant only when it comes to damages, after discovery, and only if the collector is found to be liable for a violation of BIPA. 740 ILCS 14/20.

Conclusion

For the reasons above, Defendants' motion to dismiss the First Amended Complaint is denied and the Defendants are ordered to answer the First Amended Complaint within twenty-eight (28) days of the date of this order. The case is set for status on Monday, December 14, 2020 at 9:30 a.m.

SO ORDERED.

ENTERED:

Judge Alison C. Conlon

DATED: NOV 02 2020

Circuit Court – 2140

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

YANA MAZYA, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**Case No. 2018-CH-07161**
v.	)	
NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE,	)	**Hon. Judge Alison C. Conlon**
Defendants.	)	

ORDER

This matter coming before the Court after full briefing and oral argument on Defendants' Motion to Reconsider the Denial of Rule 308 Certification ("Motion"), the Court being fully advised in the premises, and good cause appearing, IT IS HEREBY ORDERED:

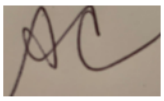
1. The Motion is hereby GRANTED. Pursuant to Illinois Supreme Court Rule 308(a), the Court finds that its November 2, 2020 order denying Defendants' Motion to Dismiss involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. In particular, the Court certifies the following question of law pursuant to Illinois Supreme Court Rule 308(a):

   > Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act's exclusion for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996," 740 ILCS 14/10, when the employees' finger-scan information is used for purposes related to "health care," "treatment," "payment," and/or "operations" as those terms are defined by the HIPAA statute and regulations?

2. This case remains stayed in its entirety.

3. The August 3, 2021 status hearing is stricken.

4. This case is set for further status on _____ at _____.

DATED: _____ ENTERED: 

Judge Alison C. Conlon

JUL 23 2021

Circuit Court – 2140

Prepared By:
BAKER & HOSTETLER LLP
One North Wacker Drive, Suite 4500
Chicago, Illinois 60606
Telephone: (312) 416-6200
Facsimile: (312) 416-6201
Firm No. 46365
Attorneys for Defendants

No. 1-21-0895

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated,	)	
Plaintiff-Respondent,	)	
v.	)	18CH71601
NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE,	)	
Defendants-Petitioners.	)	

ORDER

This case is before the Court on defendants' petition for leave to appeal under Illinois Supreme Court Rule 308, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

(1) Defendants' Application for Leave to Appeal under Illinois Supreme Court Rule 308 is GRANTED.
(2) Defendants' request to consolidate this appeal with appeal number 1-20-0822 *Mosby v. Ingalls Memorial Hospital, et al.* is GRANTED. The parties are allowed to use the common law record and the record on appeal in *Mosby* (No. 1-20-0822).
(3) Defendants shall file a notice of intent to join the *Mosby*-Defendants' opening brief, or file their own opening brief, within 21 days.

ORDER ENTERED

AUG 13 2021

APPELLATE COURT FIRST DISTRICT

Dated: _____

Nathaniel R. Howse, Jr.
Justice

M S McDonnell
Justice

Eileen O'Neill Burke
Justice

2022 IL App (1st) 200822

SIXTH DIVISION
Filing Date February 25, 2022

Nos. 1-20-0822 and 1-21-0895, cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 05031 The Honorable Pamela McLean Meyerson, Judge, Presiding.
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, OMNICELL, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 71601 The Honorable Alison C. Conlon, Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Justices Harris and Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Lucille Mosby filed a class-action suit individually and on behalf of others similarly situated against defendants Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc. (collectively Ingalls), and Becton, Dickinson and Company (BD) (collectively group defendants one). Similarly, plaintiff Yana Mazya filed a class-action suit individually and on behalf of others similarly situated against Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare (collectively group defendants two). During the course of the litigation, group defendants one filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) to have this court answer this certified question:

> "Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?"

¶ 2 Subsequently, group defendants two also filed an interlocutory appeal pursuant to Rule 308 concerning the same issue:

> "Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act's exclusion for 'information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996,' 740 ILCS 14/10, when the

employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations?"

Both group defendants' petitions for leave to appeal were permitted, as discussed in detail below. However, at this time, the only question submitted for this court's review is the question submitted by group defendants two, and we answer the question in the negative.

¶ 3 I. BACKGROUND

¶ 4 A. Mosby

¶ 5 On April 18, 2018, Mosby filed a class-action complaint against Ingalls and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Biometric Information Privacy Act (Act) (740 ILCS 14/15(a)-(d) (West 2018)). Mosby worked as a registered pediatrics nurse at Ingalls Memorial Hospital. As a condition of Mosby's employment, she was required to scan her fingerprint to authenticate her identity and gain access to a medication dispensing system. Mosby alleged that defendants' behavior exposed employees like herself to serious irreversible privacy risks. Mosby alleged that defendants violated the Act by (1) not informing her in writing of the specific purpose and the length of time for which her fingerprints were being collected, stored, and used; (2) failing to provide a publicly available retention schedule and guidelines for permanently destroying Mosby's fingerprints; (3) failing to obtain a written release from Mosby to collect, store, disseminate, or otherwise use her fingerprint; and (4) failing to obtain consent before disclosing Mosby's fingerprints to third-party vendors that host the data.

¶ 6 On May 14, 2019, plaintiff filed an amended class-action complaint that was substantially similar to the original.

¶ 7 On June 5, 2019, defendants filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code of Civil Procedure (Code) or to strike the amended complaint. The motion argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id*. § 2-619(a)(9)) because (1) the biometric data that was collected, used, and/or stored restricted access to protected health information and medication and (2) the data was used for healthcare treatment and operations pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (45 C.F.R. § 164.501 (2018)) and was thereby specifically excluded from the scope of the Act. Defendants argued that, pursuant to section 2-615 (735 ILCS 5/2-615 (West 2018)), Mosby failed to allege any well-pleaded facts regarding any disclosures of her fingerprints.

¶ 8 On January 13, 2020, the circuit court ruled that the exception was limited as to the information protected under HIPAA. To hold otherwise, the court noted, would result in a broad exception for all employees involved in operations that impact patients protected by HIPAA. The circuit court opined that, if the legislature intended to exempt employees entirely, they would have expressly done so. The court denied defendants' motion to dismiss based on this issue. The circuit court dismissed BD from the complaint in its entirety, without prejudice, and found that Mosby failed to state a claim as to how defendants disseminated her biometric information. With authorization of the circuit court, Mosby amended her pleadings on February 24, 2020, which realleged all of the claims contained in the previously dismissed claim.

¶ 9 On March 16, 2020, defendants filed a joint motion to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) and stay proceedings. Defendants argued that the question of whether employee information was also exempt under

the Act was a question of first impression and has never been heard before this court. Defendants argued that the question was one of statutory construction and there existed a substantial ground for a difference of opinion, which made it appropriate to bring under Rule 308. Defendants maintained that raising the question would be beneficial in a variety of ways, such as: (1) it would advance the outcome of the case with prejudice if the Act was interpreted in their favor, (2) judicial economy would be served, and (3) the need for a uniform construction and application of the law would be served. Defendants also requested a stay in the circuit court proceedings because the determination could lead to a dismissal and Mosby would not be prejudiced.

¶ 10 On April 20, 2020, Mosby filed a motion in opposition to defendants' joint motion to certify the question for interlocutory appeal, arguing that substantial grounds for difference of opinion did not exist. Mosby maintained that to hold otherwise would mean that the General Assembly intended to place anyone employed in the healthcare industry into an "unregulated biometric abyss," by having no biometric protections. Mosby argued that defendants did not demonstrate that they faced any hardship or inequity to justify a stay that would outweigh the prejudice she would suffer. Mosby maintained that the prejudice she would suffer if a stay was granted was the denial of pursuing her claim in an expedient manner and, if successful, the collection of damages. Mosby argued that defendants' conduct was ongoing and continuous and every day that passed would compound the injuries that they were inflicting.

¶ 11 On May 4, 2020, defendants filed a joint reply arguing that the proposed certified question was tailored and limited to those circumstances where the biometric data collected from healthcare workers were used for healthcare treatment, payment, or operations under HIPAA. Defendants further argued that the circuit court did not entirely reject its argument and found

it plausible but ultimately concluded that the General Assembly would have been more explicit if the legislative intent was to exclude healthcare employees' biometric data.

¶ 12 On June 18, 2020, the circuit court granted defendants' motion to certify and stay the proceedings. The circuit court ruled that the issue posed by defendants presented a question of law where there was substantial ground for difference of opinion and could ultimately determine whether or not the case should be dismissed.

¶ 13 On July 17, 2020, defendants filed an application for leave to appeal pursuant to Rule 308, which we denied on August 24, 2020. Defendants filed a petition for leave to appeal with the Illinois Supreme Court, on October 30, 2020. On March 3, 2021, the Illinois Supreme Court issued a mandate vacating this court's decision and ordered this court to hear the certified question on appeal. On June 11, 2021, Ingalls filed an unopposed motion for extension of time to file an opening brief, where they informed the circuit court that the parties reached a settlement in principle. [1]

¶ 14 B. Mazya

¶ 15 On April 10, 2019, Yana Mazya and Tiki Taylor filed an amended class-action complaint[2] against Northwestern Lake Forest Hospital, Northwestern Memorial Healthcare, Northwestern Memorial Hospital (collectively Northwestern), Omnicell Inc., and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Mazya was employed as a registered nurse at Northwestern Memorial Lake Forest Hospital, while Taylor worked as a patient care technician at Northwestern Memorial

[1]This agreement was between Ingalls and Mosby, not BD.

[2]The initial complaint that was filed is not provided in the record, which was of no consequence here, because Northwestern Memorial Hospital Taylor and Northwestern Memorial Hospital were not originally parties.

Hospital; both were required to scan their fingerprints to gain access to the medication dispensing system as a condition of their employment. Mazya and Taylor alleged Northwestern disregarded their statutorily protected privacy rights when they unlawfully collected, stored, used, and disseminated their biometric data in violation of the Act. Mazya and Taylor specifically alleged that defendants were in violation of the Act because it failed to (1) inform them in writing of the specific purpose and length of time for which their fingerprints were being collected, stored, and used; (2) receive a written release to collect, store, or otherwise use their fingerprints; (3) provide a publicly available retention schedule and guidelines for permanently destroying their fingerprints; and (4) obtain consent from them to disclose, redisclose, or otherwise disseminate their fingerprints to a third party.

¶ 16 On July 2, 2019, Taylor was dismissed without prejudice from the complaint as her claims were preempted because she was a party to a collective bargaining agreement.[3]

¶ 17 On January 17, 2020, Northwestern[4] filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code. Northwestern argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id.* § 2-619(a)(9)) because the General Assembly specifically excluded information collected from healthcare treatment, payment, or operations in the Act. Northwestern further argued that the complaint should be dismissed pursuant to section 2-615 (*id*. § 2-615) for failure to state a claim because Northwestern did not store or possess her biometric information in violation of the Act when it was used for healthcare treatment, payment, or operations. Northwestern maintained that nothing in the Act was

[3]The dismissal occurred after Northwestern removed this case to the Northern District of Illinois under case number 19 C 3191 (*Mazya v. Northwestern Lake Forest Hospital*, No. 19-CV-3191 (N.D. Ill. June 19, 2019)); the case was subsequently returned to the circuit court.

[4]Defendants Omnicell Inc. and BD were dismissed from this complaint; however, the record does not reflect exactly when that occurred. We will address these defendants collectively as Northwestern for the remainder of this opinion.

intended to interfere with HIPAA and that applying it to their medication dispensing systems would conflict with guidance previously given by the Department of Health and Human Services (HHS), which encouraged the use of biometrics in health. Northwestern argued that Mazya knew her information was being collected and had the power to withhold consent, citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 34, as support. Northwestern further argued that Mazya failed to provide factual allegations supporting her conclusory assertions that Northwestern's conduct was intentional or reckless. Lastly, Northwestern requested that Northwestern Memorial Hospital be dismissed from the proceedings, since Taylor was dismissed.[5]

¶ 18 On March 13, 2020, Mazya filed a response to Northwestern's motion to dismiss, arguing that her claims were actionable because they did not fall under any exemption under the Act and the failure to comply with distinct requirements of the Act was all that she needed to demonstrate. Mazya maintained that the Act's explicit reference to biometric data taken from a patient shows the intent of the General Assembly to exclude patient biometrics from the Act's protection because they were already protected by HIPAA. Mazya further maintained that if the General Assembly wanted to provide a sweeping categorical exemption for hospitals it would have done so as evidenced by the exclusion of financial institutions reflected in section 25(c) of the Act (740 ILCS 14/25(c) (West 2018)).

¶ 19 Northwestern filed a reply on April 3, 2020, arguing that Mazya's interpretation of the Act ignored the disjunctive "or" provided in section 10 of the Act, which connotes two different alternatives, and thus the exemption included employee information. Northwestern maintained

[5]The record reflects that on March 10, 2020, Mazya moved to voluntarily dismiss Northwestern Memorial Hospital from this action; however, the record does not reflect when the motion was granted.

that Mazya failed to rebut their argument that she failed to state a claim because her claims were not supported by the language of the statute and were solely policy-based. Northwestern further maintained that it would be good policy to interpret the statute their way given that the usage of biometric information has been encouraged by the government.

¶ 20 On November 2, 2020, the circuit court denied Northwestern's section 2-619.1 motion. The circuit court found Northwestern's section 2-619 argument unpersuasive because the burden for compliance with the Act falls on the collector of the data, not the provider. Put another way, Mazya did not waive her consent by continuing to offer her biometric data to Northwestern as a condition of her duties as a nurse. The circuit court found that accepting Northwestern's interpretation of the Act would amount to medical professionals having no protections for their biometric information. In regard to Northwestern's section 2-615 arguments, the circuit court found that, to have a viable claim, (1) the claimant need not lack knowledge of the violation, as the violation itself was enough to support the statutory cause of action, and (2) the claimant was not required to plead an intentional or reckless violation of the Act, at that stage of the proceedings.

¶ 21 On November 30, 2020, Northwestern filed a corrected motion for Rule 308 certification and to stay the proceedings. Northwestern argued that there were substantial grounds for difference of opinion given the disjunctive "or" in section 10. Northwestern further argued that the proceedings should be stayed pending this court's decision because our answer to the question could expedite the resolution of the underlying case.

¶ 22 On December 11, 2020, Mazya filed a motion to strike Northwestern's motion for certification and stay. Mazya argued that Northwestern was trying to certify the same question that this court denied in *Mosby v. Ingalls Memorial Hospital*, No. 1-20-0822, which led to the

circuit court's denial of the defendant's section 2-619.1 motion; therefore, the motion to certify was frivolous and did not warrant interlocutory review.

¶ 23 Later, on January 13, 2021, Mazya filed a response in opposition to Northwestern's motion for Rule 308 certification and stay, reiterating her previous arguments and noting that Northwestern had not lodged any new arguments or law on the matter.

¶ 24 On February 9, 2021, Northwestern filed a reply in further support of their Rule 308 motion, informing the circuit court that the Illinois Supreme Court directed this court to vacate its August 24, 2020, order and accept the Rule 308 appeal (*Mosby v. Ingalls Memorial Hospital*, No. 126590 (Ill. Jan. 27, 2021) (supervisory order)).

¶ 25 On February 9, 2021, the circuit court denied Northwestern's Rule 308 motion but stayed the proceedings pending the decision in *Mosby*.

¶ 26 On June 15, 2021, Northwestern filed a motion to reconsider the denial of their Rule 308 certification, arguing that the parties in *Mosby* reached a settlement in principle and that no one would be presenting any arguments on appeal on behalf of a hospital that uses medication dispensing systems secured by finger-scan technology. Mazya responded on June 22, 2021, that plaintiffs were not opposed to the appellate court hearing a certified question.

¶ 27 On July 23, 2021, the circuit court granted the motion to reconsider and stayed the proceedings, noting that the issue involves a question of law as to which there were substantial grounds for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. Accordingly, the circuit court certified its question to this court.

¶ 28 On July 27, 2021, Northwestern filed an application for leave to appeal pursuant to Rule 308 reiterating the arguments they made at the circuit court and requesting that the case be consolidated with *Mosby*. We granted the motion on August 13, 2021.

¶ 29 On August 5, 2021, an *amicus curiae* brief was filed on behalf of the Illinois Health and Hospital Association, Northwestern Memorial Healthcare, and Amita Health (collectively the *amici*), in support of defendants' position. They reiterated defendants' arguments and also argued that interpreting section 10 in favor of plaintiffs regarding the medical supply dispensing systems at issue could result in undesirable consequences for healthcare providers. The *amici* argued that plaintiffs' interpretation could be financially burdensome and result in a lower quality of care for patients.

¶ 30 II. ANALYSIS

¶ 31 On appeal, Northwestern contends that this court should answer the certified question in the affirmative because the plain language of section 10 demonstrates that employee biometric information used in medication dispensing systems is excluded from protections of the Act.

¶ 32 A. Jurisdiction

¶ 33 We have jurisdiction to review the certified question pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). In general, courts of appeal have jurisdiction to review only final judgments entered in the circuit court unless there is a specific statutory exception or rule of the supreme court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Rule 308 is one such exception that allows for the permissive appeal of an interlocutory order certified by the circuit court, as involving a question of law, as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate

termination of the litigation. *Id.* Therefore, we are limited to answering the specific question certified by the circuit court. *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9.

¶ 34 B. Standard of Review

¶ 35 When reviewing a certified question of law pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), we apply a *de novo* standard of review. *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 31. *De novo* review is also appropriate because this resolution turns on a question of statutory construction. *Eighner v. Tiernan*, 2020 IL App (1st) 191369, ¶ 8. "The primary rule of statutory construction is to give effect to the intent of the legislature." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 181 (2007). The statutory language itself is the best evidence of legislative intent, which must be given its plain and ordinary meaning. *Id.* The statute should be read as a whole. *Id.* "Where the meaning of a statute is unclear from a reading of its language, courts may look beyond the statutory language and consider the purpose of the law, the evils it was intended to remedy, and the legislative history of the statute." *Id.*

¶ 36 1. Plain Language

¶ 37 The Act on which the certified question is based defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILCS 14/10 (West 2018). The Act defines "biometric identifiers" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* The parties do not dispute that the fingerprint scan of plaintiff and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as outlined in the Act.

¶ 38 Section 10 of the Act provides exclusions to the protections of the Act; specifically at issue is the following language:

> "Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." *Id.*

While section 25(c) and (e) expressly provides that the Act will not apply to certain entities and persons:

> "(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 [(15 U.S.C. § 6803 (2018))] and the rules promulgated thereunder.
>
> ***
>
> (e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." *Id.* § 25(c), (e).

¶ 39 Northwestern and the *amici* contend that the hospital workers' use of medication dispensing systems falls within the Act's definitional carveouts for health-related information. Northwestern and the *amici* maintain that the medication dispensing system that is at issue in this case is permitted to collect information for "healthcare treatment, payment, or operations" as defined by HIPAA. 45 C.F.R. § 164.501(2) (2018). This includes the fingerprint scan of its employees who facilitate the dispensing and administration of medications proscribed by patients. Northwestern and the *amici* assert that the collection, use, and storage of healthcare

workers' biometric information is for "health care" and "treatment" that Northwestern provides to its patients and those terms are defined by HIPAA. *Id.* Northwestern and the *amici* contend that this medication dispensing system also acts to provide an audit trail, which includes diversion, fraud, and abuse detection. Northwestern and the *amici* assert that this system additionally aids in patient safety, quality of care, and accurate billing. Northwestern and the *amici* contend that the biometric information is collected through the medication dispensing system and is also used for "health care operations" and "payment."

¶ 40 Northwestern and the *amici* contend that the circuit court erred in finding that the carveouts for health-related information apply only to information taken from a patient because the plain language of the Act does not read to limit patient biometric data. Northwestern and the *amici* maintain that biometric identifiers as defined by the Act included an "or" exception as they pertain to health care information. Northwestern and the *amici* assert that "or" is disjunctive and connotes two different alternatives. Northwestern and the *amici* assert that this "or" indicates that a different category of exemptions is allowed and that this is not limited to patient data. Northwestern and the *amici* maintain that, to fall within the exception of the Act, the biometric information obtained must either (1) be obtained in a healthcare setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA.

¶ 41 Plaintiffs contend that the circuit court did not err in holding that Northwestern is not exempt from the Act and that it excludes only patient biometric data from its protections because patient data is already protected by HIPAA. Plaintiffs assert that this would in effect leave thousands of hospital workers unprotected from the risks that the Act was designed to protect against. Plaintiffs assert that Northwestern's interpretation of how "or" creates two

clauses would make sense if the "under HIPAA" language was not present because patient information is the only information governed by HIPAA.

¶ 42 Northwestern's reply brief asserts that the storage of healthcare workers' biometric information, obtained when accessing a medication dispensing system, is for the "health care" and "treatment" of patients as those terms are defined by HIPAA; therefore, the "under HIPAA" language does not exclude this type of information.

¶ 43 We find that the language of the statute is clear and simple disagreement between the parties will not create ambiguity in the statute. *Kaider v. Hamos*, 2012 IL App (1st) 111109, ¶ 11. What is excluded from the protections of section 10 are (1) information from the patient in a healthcare setting and (2) information that is already protected "under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10 (West 2018). Even taking into consideration the disjunctive "or," section 10 still has the same effect of excluding those two classifications of information. Indeed, the disjunctive "or" means that patient information and information under HIPAA are alternatives that are to be considered separately. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 111 (2011).

¶ 44 At oral argument, Northwestern argued that this court should not consider the terminology "under HIPAA" and instead we should consider this as "defined by HIPAA." However, "under HIPAA" is what the Act expressly states, and that cannot be ignored. We are simply unable to rewrite the statute. *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 15. Either way, the biometric information of employees is simply not defined or protected "under HIPAA." Accordingly, the plain language of the statute does not exclude employee information from the Act's protections because they are neither (1) patients nor (2) protected under HIPAA. We further find that, if the legislature intended to create a wide-ranging

exemption for hospitals, it would have done so, since the Act does contain a separate blanket exclusion. This is demonstrated in the Act when the legislature expressly provided that the Act was not to apply to financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and employees, contractors, or subcontractors of local government or the State as provided in section 25. 740 ILCS 14/25 (West 2018).

¶ 45 Northwestern's inclusion of employee's biometric information under the exclusion goes beyond the plain language of the Act. We are unable to rewrite the statute to add provisions or limitations that the legislature did not include. *Zahn*, 2016 IL 120526, ¶ 15. No rule of construction permits this court to declare that the legislature did not mean what the plain language of the statute imports. *Id.* There is simply no provision or reference to the protection of employee biometric data in the Act or in HIPAA. Thus, we will not add employee biometric data as information to be excluded by the Act because it would be contrary to the plain language of the Act. Based thereon, we need not consider other sources in order to find the statutory meaning. *Kaider*, 2012 IL App (1st) 111109, ¶ 11.

¶ 46 III. CONCLUSION

¶ 47 Consistent with the plain language of the Act, we find that the legislature did not exclude employee biometric information from its protections, and we answer the certified question in the negative. We remand this cause for further proceedings consistent with this opinion.

¶ 48 Certified question answered; cause remanded.

No. 1-20-0822

Cite as:	*Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 18-CH-05031, 18-CH-07161; the Hon. Pamela McLean Meyerson and the Hon. Alison C. Conlon, Judges, presiding.
Attorneys for Appellant:	Joseph A. Strubbe, Frederic T. Knape, and Zachary J. Watters, of Vedder Price P.C., and Gary M. Miller, Matthew C. Wolfe, and Elisabeth A. Hutchinson, of Shook, Hardy & Bacon L.L.P., both of Chicago, for appellants Ingalls Memorial Hospital, UCM Community Health & Hospital Division, Inc., and Becton, Dickinson and Company. Joel Griswold and Bonnie Keane DelGobbo, of Baker & Hostetler LLP, of Chicago, for other appellants.
Attorneys for Appellee:	James B. Zouras, Ryan F. Stephan, Andrew C. Ficzko, Catherine T. Mitchell, and Paige L. Smith, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amici Curiae*:**	Michael A. Woods, of Naperville, and Richard H. Tilghman, of Nixon Peabody LLP, and Bonnie Keane DelGobbo and Joel Griswold, of Baker & Hostetler LLP, both of Chicago, for *amici curiae* Illinois Health and Hospital Association *et al.*

E-FILED
Transaction ID: 1-20-0822
File Date: 3/18/2022 3:34 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Nos. 1-20-0822 and 1-21-0895
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 05031 The Honorable Pamela McLean Meyerson, Judge Presiding
YANA MAZYA, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Alison C. Conlon, Judge Presiding

PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS

Joel Griswold
Bonnie Keane DelGobbo
BAKER & HOSTETLER LLP
1 North Wacker Drive
Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Counsel for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

Gary M. Miller
Matthew C. Wolfe
Elisabeth A. Hutchinson
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

Counsel for Becton, Dickinson and Company

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

INTRODUCTION

On February 25, 2022, this Court issued its Opinion in *Mazya v. Northwestern Lake Forest Hospital et al.*, No. 1-21-0895, which was consolidated on appeal with *Mosby v. Ingalls Memorial Hospital et al.*, No. 1-20-0822. *See* 2022 IL App (1st) 200822. Defendants-Appellants Northwestern Lake Forest Hospital and Northwestern Memorial Health Care (together, "Northwestern") and Becton, Dickinson and Company ("BD")[1] respectfully petition the Court for a rehearing, including new oral argument, in this consolidated appeal pursuant to Illinois Supreme Court Rule 367 for two reasons, one procedural and one substantive.

Procedurally, the Court's February 25, 2022 Opinion did not answer the certified question raised by BD and the Ingalls Defendants in the *Mosby* matter.[2] The certified question in *Mosby* is different than the question presented in *Mazya* and should be addressed. It seems the Court thought the *Mosby* interlocutory appeal had been stayed because the Ingalls Defendants

---

[1] Northwestern and BD are referred to herein, collectively, as "Defendants." On March 14, 2022, Ingalls Memorial Hospital and UCM Community Health and Hospital Division, Inc. (together, "Ingalls Defendants") and Plaintiff Mosby's motion for final approval of their settlement agreement was approved by the Circuit Court. Accordingly, the Ingalls Defendants are no longer a party to this litigation and are not participating in this petition or appeal going forward.

[2] Because Northwestern is not a party to the *Mosby* appeal, Northwestern takes no position on the procedural issue raised in this petition, which impacts only the *Mosby* appeal. Northwestern joins in this petition only with respect to the substantive issues raised in this petition, which impact both the *Mosby* and *Mazya* appeals.

had reached a settlement in principle with Plaintiff Mosby. However, both the Ingalls Defendants and BD were active in the appeal before this Court, and BD even appeared at oral argument. The *Mosby* appeal is live, and the parties' certified question remains unanswered. BD thus respectfully requests a ruling on the *Mosby* certified question to proceed in that case.

Substantively, Defendants respectfully suggest the Court's Opinion overlooked or misapprehended Illinois law regarding statutory construction, as well as the plain and ordinary meaning of the words used in the statute. Specifically, these consolidated appeals concern the interpretation of the definitional-based Health Care Exclusion found in Section 10 of the Illinois Biometric Privacy At, 740 ILCS 14/1 *et seq.* (the "Act" or "BIPA").

The Health Care Exclusion excludes from the definition of "biometric identifier" two categories of information: "Biometric identifiers do not include information captured from a patient in a health care setting **or** information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996" ("HIPAA"). 740 ILCS 14/10 (emphasis added). This appeal asks whether the second category of information following the "or" covers alleged biometrics collected from hospital employees in connection with patient health care treatment, payment, or operations as those terms are used in HIPAA.

The Court answered the question in the negative, holding the Health Care Exclusion is limited to only patient information. But in doing so, the Court did not discuss:

i. the General Assembly's intentional use of "information" twice, which delineates two distinct categories of information, particularly because these categories of information are separated by a disjunctive "or";

ii. the last antecedent doctrine, which dictates that the prepositional phrase "under HIPAA" modifies only the phrase that immediately precedes it, *i.e.*, "health care treatment, payment, or operations," such that HIPAA's broad definitions of those terms must be considered; and

iii. the ordinary meaning of "under," which is defined as "under the guidance and instruction of"—not "protected by."

Put simply, "information collected, used, or stored for health care treatment, payment or operations under [HIPAA]" does not mean—and the General Assembly did not use—"information already protected by HIPAA." Said differently, the Health Care Exclusion does not exclude from BIPA's reach "patient information collected in a health care setting or patient information under HIPAA." Such a reading imposes redundancy into BIPA where it does not exist. It also does not align with Illinois Supreme Court

precedent governing plain-language statutory construction. Defendants thus ask this Court to reconsider its Opinion, both procedurally and substantively.

In the alternative, Defendants ask that the Court grant a Certificate of Importance under Illinois Supreme Court Rule 316 such that the Illinois Supreme Court may provide final guidance on this issue. The Supreme Court already indicated its position on the importance of the issue in exercising its supervisory authority to direct this Court to accept BD and the Ingalls Defendants' petition for leave to appeal. The Supreme Court would likely be open to accepting the consolidated appeal from this Court to provide finality to the meaning of a provision that is susceptible to differing, reasonable interpretations and exists in a hotly litigated statute. Indeed, over 1,400 putative class actions have been filed in Illinois state and federal courts since 2017. Resolution from the Supreme Court on the scope of the Health Care Exclusion could be dispositive of many of these cases.

ARGUMENT

This petition concerns both the procedural posture of the *Mosby* appeal and the substance of the Court's Opinion. As explained below, Defendants respectfully ask this Court to reconsider its Opinion in both regards. The Court overlooked not only the procedural posture of the *Mosby* appeal and briefing from the *Mosby* parties, but also key canons of statutory construction and plain language definitions at issue in the Health Care Exclusion. When the plain language of the Exclusion and Illinois canons of statutory construction are properly considered, the Exclusion clearly applies to the

facts at issue in both of these appeals: nurses using finger-scan technology to administer, track, and maintain patient pharmaceuticals and health care records. As such, the data at issue is *not* a "biometric identifier" as the term is defined by the Act.

I. The Certified Question in *Mosby* is Pending before this Court and is Ripe for Resolution.

The Court appears to believe that the parties in the *Mosby* appeal did not submit briefs, and so the question in that appeal was not ripe for resolution when it issued its Opinion. *See Mazya*, 2022 IL App (1st) 200822, ¶¶ 2, 13. However, the certified question in the *Mosby* appeal was fully briefed and should have been ruled upon.

The Ingalls Defendants reached a settlement in principle with Plaintiff Mosby. *Id.* ¶ 13. But the Ingalls Defendants' settlement in principle, as the Court seemed to recognize, did not involve the other defendant-appellant in *Mosby*, BD. *Id.* ¶ 13 n.1. What the Court seems to have overlooked is that the settlement in principle did not change the procedural posture of the *Mosby* appeal. Rather, despite the settlement in principle, the Ingalls Defendants participated in the appeal and submitted joint opening and reply briefs with BD, Plaintiff Mosby filed a response brief, and BD appeared at oral argument.

Because the Court apparently did not understand that the *Mosby* appeal was active and had been fully briefed, it did not address a number of arguments made by BD and the Ingalls Defendants in its ruling. *See id.*

¶¶ 39-45 (addressing only the arguments of "Northwestern and its *amici*"). Nor did it answer the question presented by the *Mosby* litigants, which, on its plain terms, is different than the question certified in *Mazya*. Specifically, the *Mazya* certified question asks whether the Exclusion covers "finger-scan information collected by a healthcare provider from its employees . . . when the employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations." In contrast, the certified question in *Mosby* concerns whether the Exclusion "applies to biometric information of healthcare workers (as opposed to patients) collected, used, or stored for health care treatment, payment or operations under HIPAA." The Court therefore should substantively address the certified question in *Mosby* and explain whether its reasoning in the Opinion extends to the certified question in, and facts of, *Mosby*; and if so, why.

BD therefore respectfully requests that the Court address the arguments made in its briefs and answer the *Mosby* certified question, so the parties may properly proceed in the *Mosby* litigation.

II. Illinois Law Governs Plain Language Interpretation of the Health Care Exclusion.

The substantive question before the Court should begin and end with the plain language of BIPA's Health Care Exclusion: "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10. When this language is properly considered

through the lens of canons of statutory construction set forth by the Illinois Supreme Court, the outcome here is clear: information collected from health care workers using finger-scan technology to administer health care treatment, payment, or operations is *not* within BIPA's definition of "biometric identifier." This is evident for three key reasons overlooked in the Opinion.

First, the Exclusion plainly sets forth two categories of "information," and these two categories of "information" are separated by a disjunctive "or." They must be read separately. The Exclusion cannot be read to mean patient information or patient information. It ignores that the legislature used "or" and twice included the word "information." It also impermissibly creates redundancy in a statute where there is none.

Second, the last antecedent doctrine dictates that the prepositional phrase "under HIPAA" modifies only the phrase or set of words immediately preceding it. Here, that is "health care treatment, payment, or operations." As such, the Court cannot properly analyze the scope of the Health Care Exclusion without reference to how HIPAA defines health care treatment, payment, or operations. When those broad definitions are considered, it is clear that the Health Care Exclusion covers health care worker information when collected for health care treatment, payment, or operations.

Third, this is particularly so because "under" means "subject to the guidance or instruction of." Transforming "*under* HIPAA" to mean "*already*

protected by HIPAA" ignores the plain and ordinary meaning of the word "under."

Statutory construction is, at bottom, an exercise in determining legislative intent. *Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 58. The inquiry thus begins with "[t]he most reliable indicator of legislative intent"—namely, "the language of the statute, which must be given its plain and ordinary meaning." *Haage v. Zavala,* 2021 IL 125918, ¶ 44 (citations omitted). Accordingly, "[w]hen the statutory language is plain and unambiguous, [Illinois courts] may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may [courts] add provisions not found in the law." *Rosenbach v. Six Flags Entm't Corp.,* 2019 IL 123186, ¶ 24. But that is exactly what the Opinion does—it overlooks the grammatical structure of the Exclusion, disregards the plain and ordinary meaning of the words therein, and imposes a limitation not found in BIPA. The Opinion should be reconsidered.[3]

[3] The Opinion also incorrectly stated that "[t]he parties do not dispute that the fingerprint scan of plaintiff and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as outlined in the Act." *Mazya*, 2022 IL App (1st) 200822, ¶ 37. Defendants do dispute this as a factual and legal matter, but the only issues before the Court on Defendants' Rule 308 appeals are the two purely legal questions certified for interlocutory review.

A. Two Uses of "Information" Are Distinct Provisions Separated by a Disjunctive "Or."

The Health Care Exclusion's plain language makes clear that two separate categories of information are carefully carved out from BIPA's reach—one, information from a patient in a health care setting; and two, information collected, used, or stored for health care treatment, payment, or operations under HIPAA.[4] 740 ILCS 14/10. The Exclusion's second category of information is not limited to patient information in the same way it is not a redundant, throwaway clause. To read the Exclusion as such overlooks fundamental principles of statutory construction and rules of grammar.

The Opinion addresses the disjunctive "or" in two sentences: "Even taking into consideration the disjunctive 'or,' section 10 still has the same effect of excluding those two classifications of information. Indeed, the disjunctive 'or' means that patient information and information under HIPAA are alternatives that are to be considered separately." *Mazya*, 2022 IL App (1st) 200822, ¶ 43 (citing *Goldberg v. Brooks,* 409 Ill. App. 3d 106, 111 (2011)). This analysis overlooks that "patient information" already subsumes "information under HIPAA" when the second category of information is interpreted to mean information protected under HIPAA. Such a reading

[4] The Opinion incorrectly summarized Northwestern's argument as being that "to fall within the exception of the Act, the biometric information obtained must either (1) be obtained in a health care setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA." *Mazya*, 2022 IL App (1st) 200822, ¶ 40.

does not offer separate categories of information at all, and under clear Illinois Supreme Court precedent, "[a]s used in its ordinary sense, the word 'or' marks an alternative indicating the various members of the sentence which it connects are to be taken separately." *People v. Fieberg*, 147 Ill. 2d 326, 349 (1992); *see also Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134, 1141 (2018) ("[O]r' is 'almost always disjunctive.'" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

When interpreting the Health Care Exclusion, then, the two categories of "information" separated by an "or" are "to be taken separately." *Fieberg*, 147 Ill. 2d at 349. To this end, the second use of "information" must mean something different than the first because it is separated from it by a disjunctive "or." Had the legislature wanted to limit the second category of information to patient information, *i.e.*, information already protected by HIPAA, it would have connected the two phrases with an "including." It did not. "Including" is nowhere to be found. Instead, the legislature used "or." The Opinion, in its current form, does not address this. *See Vill. of Westmont v. Ill. Mun. Ret. Fund*, 2015 IL App (2d) 141070, ¶ 20 ("It is incorrect to ignore the word 'or.'").

This is particularly so because the Opinion renders the second half of the Health Care Exclusion superfluous. Courts must construe the Health Care Exclusion, like any other statute, "so that each word, clause, and sentence is given a reasonable meaning" without rendering "any portion of

the statute meaningless or void." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001). Said differently, the two clauses must each be read to give effect and independent meaning to each. Yet, if the latter clause of the Health Care Exclusion is deemed to be limited to information collected from patients, "information captured from a patient in a health care setting" would necessarily subsume the distinct clause extending the Exclusion to "information collected, used or stored for health care treatment, payment, or operations." So holding contravenes the Illinois Supreme Court's "fundamental rule of statutory construction that surplusage will not be presumed." *Cosmopolitan Nat. Bank v. Cook Cty.*, 103 Ill. 2d 302, 313 (1984).

Put simply, "each word, clause, or section *must* be given some reasonable meaning, if possible." *Id.* (emphasis added). Giving both clauses their separate, independent meanings is not only entirely possible, it is logical. Had the General Assembly intended to limit the category of information following the word "or" to patient information, it would have done so by omitting the second use of "information" or writing the statute to say "*or patient information* collected, used, or stored for health care treatment, payment, or operations" instead of "*or information*." It did not do so. It is improper to read terms into the statute that are not plainly there. *See Rosenbach*, 2019 IL 123186, ¶ 24 (Courts "may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law.").

In sum, the "or" decouples the two categories of information at issue in the Exclusion, and the second "information" has to mean something different than the first. Both of these grammatical elements were overlooked in the Court's Opinion and should have been properly considered.

B. HIPAA's Definitions of Health Care Treatment, Payment, and Operations Must Guide the Court's Analysis.

As the United States Supreme Court recently explained, "[d]ifficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators writing in 'English prose,'" so "[c]ourts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the 'common understanding' of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021). In accord, the Illinois Supreme Court has described canons of statutory construction as "principles that guide this [C]ourt's construction of statutes," which are to be "utilized in every statutory construction case." *JPMorgan Chase Bank, N.A. v. Earth Foods Inc.,* 238 Ill. 2d 455, 462 (2010); *see also* Black's Law Dictionary, "canon," (11th ed. 2019) (Canons of statutory construction are the tools the Court uses to "grasp the intended meaning of statutory language."). In short, the Court always "necessarily look[s] to canons of statutory construction to glean [the legislature's] intent." *Int'l Ass'n of Fire Fighters v. City of Peoria,* 2022 IL 127040, ¶ 19.

Two such tools of statutory interpretation, *i.e.*, canons, should guide any analysis of the Health Care Exclusion and what the legislature intended

with the phrase "under HIPAA": (1) the last antecedent doctrine, and (2) terms should be given their plain, ordinary meaning. Both were overlooked in the Opinion, and Defendants thus discuss each in turn below.

The Last Antecedent Doctrine. The Illinois Supreme Court has described the last antecedent doctrine as "a long-recognized grammatical canon of statutory construction." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). The doctrine "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them."[5] *Id.* (citing *City of Mount Carmel v. Partee,* 74 Ill. 2d 371, 375 (1979)); *see also* 34 Ill. Law & Prac. Statutes § 66.

Here, then, "under HIPAA" is to be read to modify the phrase that immediately precedes it: "health care treatment, payment, or operations."[6] As such, how HIPAA defines the terms matters and should have been considered

---

[5] The Illinois Supreme Court recognizes this principle always applies "unless the intent of the legislature, as disclosed by the context and reading of the entire statute, requires such an extension or inclusion." *Id.* That is not the case here. The use of "or" and the second "information" make as much clear, as discussed *infra*.

[6] How the Illinois Supreme Court has interpreted the last antecedent doctrine is related to the U.S. Supreme Court doctrine of the "series-qualifer canon," which "instructs that a modifier at the end of a series of nouns or verbs applies to the entire series." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1164 (2021). "Under conventional rules of grammar, when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series." *Id.* (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012)) (cleaned up; internal quotation marks omitted). Whether considered under either paradigm, "under HIPAA" should modify "health care treatment, payment, or operations," and as such, how HIPAA defines those terms is central to the analysis.

by the Court. Indeed, this grammatical canon should be a guiding principle of the Court's analysis given that the Illinois Supreme Court has described the last antecedent doctrine as a "fundamental principle of statutory construction." *People v. Davis*, 199 Ill. 2d 130, 138 (2002); *see also* Black's Law Dictionary, "rule of the last antecedent," (11th ed. 2019) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them.").

Put simply, this principle was overlooked in the Court's Opinion. The meaning of the terms—treatment, payment, and operations—was not explored at all, especially not how such terms are understood in the context of HIPAA. Instead, it appears that the Court only considered what information is already protected by HIPAA. *Mazya*, 2022 IL App (1st) 200822, ¶ 43. This was a mistake under the last antecedent doctrine. It was also a mistake when the plain and ordinary meaning of "under" is examined, as discussed below.

"Under" Means "Subject to the Guidance or Instruction of." In any exercise of statutory construction, the Court should begin by considering the plain and ordinary meaning of all the words at issue. Indeed, as discussed *supra*, this is precisely why "or" and two uses of "information" matter. But this principle is equally important in understanding the phrase "under HIPAA" as used in the Health Care Exclusion. To understand what "under" means, it is proper to first consult a dictionary. *See People v. Chapman,* 2012 IL 111896, ¶ 24 ("When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the

plain and ordinary meaning of the term."); *see also, e.g., Rosenbach,* 2019 IL 123186, ¶ 32 (relying on Merriam-Webster's Collegiate Dictionary when interpreting BIPA's plain language). When that definition of "under" is examined, it is clear that Plaintiffs' argument is untenable.

Where, as here, "under" is used as a preposition, it is defined as "subject to the authority, control, guidance, or instruction of." Merriam-Webster Dictionary, "under," https://www.merriam-webster.com/dictionary/under (last visited Mar. 9, 2022). Taken together with the last antecedent doctrine, then, "under HIPAA" means that the Court should have considered how HIPAA "guides" the analysis of the meaning of "health care treatment, payment, or operations."[7] HIPAA's broad definitions of each of those terms and phrases, as discussed at length in the Defendants' opening and reply briefs, covers the actions taken by health care workers at issue here, and these broad definitions were entirely overlooked by the Court.

In the Opinion, the Court seems to suggest that ignoring how HIPAA defines treatment, payment, and operations is appropriate because the Exclusion does not say "as defined by HIPAA." *Mazya*, 2022 IL App (1st) 200822, ¶ 44. But that is essentially what "under" means—it means under

[7] The Opinion seemed to misunderstand this argument, stating that "the biometric information of employees is simply not defined or protected 'under HIPAA.'" *Mazya*, 2022 IL App (1st) 200822, ¶ 44. However, Defendants have always argued that the terms "health care," "treatment," "payment," and "operations" are defined under HIPAA, not the term "biometric information of employees."

the guidance or instruction of. To guide an analysis of a term, it should be elementary to consider how that term is defined in the statute. Neither treatment, payment, nor operations is a random term—each is a defined term with a specific, broad meaning within HIPAA's statutory scheme. These words were used intentionally by the legislature in drafting the Health Care Exclusion, and they should be given their proper meaning here.

This is particularly so because the Court's alternative reading not only renders half of the Health Care Exclusion superfluous, as discussed *supra*, but the Exclusion also does not say "already protected under HIPAA." *Id.* ¶ 43. It just says "under HIPAA." Because "under" means "subject to the guidance of," the Court should have analyzed how HIPAA guides any analysis of "health care treatment, payment, or operations." It did not.

In sum, when the entirety of the Health Care Exclusion is considered and all of its terms are properly analyzed, including the phrase "health care treatment, payment, or operations" with the guidance provided by HIPAA, Plaintiffs' argument becomes untenable. The General Assembly would not have written a statute to read "biometric identifier does not mean health care patient information or health care patient information." Grammar and fundamental canons of statutory construction were overlooked here, and these guiding canons suggest the Court should reconsider its Opinion and holding therein.

REQUEST FOR CERTIFICATE OF IMPORTANCE

If this Court denies Defendants-Appellants' Petition for Rehearing, Defendants-Appellants respectfully apply to this Court for a Certificate of Importance pursuant to Illinois Supreme Court Rule 316. Defendants-Appellants submit that the following question is appropriate for Illinois Supreme Court review under Rule 316:

> Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to health care workers' information when such information is collected, used or stored for health care "treatment," "payment" or "operations" as those terms are defined under HIPAA?

Authoritative guidance from the Supreme Court would be appropriate given the potentially dispositive nature of the issue, how prolifically BIPA is litigated, and that the Supreme Court has already recognized this question is genuinely uncertain and susceptible to multiple, reasonable interpretations.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that their Petition for Rehearing be granted. In the alternative, Defendants-Appellants respectfully apply for a Certificate of Importance.

Dated: March 18, 2022

Respectfully submitted,

BAKER & HOSTETLER LLP

By: */s/ Bonnie Keane DelGobbo*

Joel Griswold
jcgriswold@bakerlaw.com
Bonnie Keane DelGobbo
bdelgobbo@bakerlaw.com
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Attorneys for Defendants-Appellants Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

SHOOK, HARDY & BACON L.L.P.

By: */s/ Matthew C. Wolfe*

Gary M. Miller (6229867)
gmiller@shb.com
Matthew C. Wolfe (6307345)
mwolfe@shb.com
Elisabeth A. Hutchinson (6338043)
ehutchinson@shb.com
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

Attorneys for Defendant-Appellant Becton, Dickinson and Company

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **March 18, 2022**, I caused a true and correct copy of **PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS** to be electronically filed with the Clerk's Office of the Illinois Appellate Court, First Judicial District, using e-filing provider **Odyssey eFileIL,** which sends notification and a copy of this filing by electronic mail to all counsel of record.

I further certify that I caused a courtesy copy of this filing to be served by electronic mail upon the following:

James B. Zouras
jzouras@stephanzouras.com
Ryan F. Stephan
rstephan@stephanzouras.com
Andrew C. Ficzko
aficzko@stephanzouras.com
Haley R. Jenkins
hjenkins@stephanzouras.com
STEPHAN ZOURAS, LLP
205 North Michigan Avenue
Suite 2560
Chicago, IL 60601

Attorneys for Plaintiffs-Appellees

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the above statements set forth in this instrument are true and correct.

/s/ Matthew C. Wolfe

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Nos. 1-20-0822 and 1-21-0895, cons.

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Beckton, Dickinson and Company, Defendant-Appellant).	)	No. 18 CH 05031
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, and NORTHWESTERN MEMORIAL HEALTHCARE, Defendants-Appellants.	)	No. 18 CH 71601

ORDER

THIS CAUSE having come on to be heard on the Appellants' Petition for Rehearing, and this Court being fully advised in the premises:

IT IS HEREBY ORDERED that:

1. The Appellants' Petition for Rehearing is granted;

2. Pursuant to Illinois Supreme Court Rule 367(d) (Ill. S. Ct. R. 367(d) (eff. Nov. 1, 2017)), we order the Appellees to file a response to the Appellants' Petition for Rehearing within twenty-one (21) days of the entry of this order; and

3. Appellants will have fourteen (14) days thereafter to file a reply.

_/s/ Sharon Oden Johnson____
Justice

_/s/ Sheldon Harris_____
Justice

_/s/ Mary Mikva_____
Justice

ORDER ENTERED

JUN 02 2022

APPELLATE COURT FIRST DISTRICT

2022 IL App (1st) 200822

SIXTH DIVISION
Modified upon grant of petition for rehearing.
September 30, 2022

Nos. 1-20-0822 and 1-21-0895, cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Beckton, Dickinson and Company, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 05031 The Honorable Pamela McLean Meyerson, Judge, Presiding.
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, and NORTHWESTERN MEMORIAL HEALTHCARE, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 18 CH 71601 The Honorable Alison C. Conlon, Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Justice Mitchell concurred in the judgment and opinion.
Presiding Justice Mikva dissented with opinion.

OPINION

¶ 1 Plaintiff Lucille Mosby, a registered nurse, filed a class-action suit individually and on behalf of others similarly situated against defendants Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc. (collectively, Ingalls), and Becton, Dickinson and Company (BD). Similarly, plaintiff Yana Mazya, a registered nurse, filed a class-action suit individually and on behalf of others similarly situated against defendants Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare (collectively Northwestern). Both suits were filed under the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq/*) (West 2018)).

¶ 2 During the course of the *Mosby* litigation, Ingalls and BD filed a petition for leave to file an interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) asking this court to answer the following certified question:

> "Whether the exclusion in Section 10 of [the Act] for 'information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996' [HIPAA] applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?"

¶ 3 Subsequently, Northwestern also filed a petition in the *Mayza* litigation for leave to file a Rule 308 interlocutory appeal concerning a similar issue:

> "Does finger-scan information collected by a health care provider from its employees fall within the [Act's] exclusion for 'information collected, used, or stored for health care

treatment, payment or operations under the federal [HIPAA],' 740 ILCS 14/10, when the employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations?"

¶ 4 While Ingalls and Bd phrase the question as a tautology that presumes certain facts, the parties essentially seek the answer to the same question of whether the biometric information of health care workers is excluded under the Act. We answer "no."

¶ 5 For the reasons explained below, we find that the biometric information of health care workers is not excluded under the Act.

¶ 6 I. BACKGROUND

¶ 7 A. Mosby

¶ 8 On April 18, 2018, Mosby filed a class-action suit against Ingalls and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Mosby worked as a registered pediatrics nurse at Ingalls Memorial Hospital from October 1987 to February 2017. As a condition of her employment with Ingalls, Mosby was required to scan her fingerprint to authenticate her identity and gain access to Pyxis MedStation, a medication dispensing system distributed and marketed by BD. Mosby alleged that she left Ingalls' employ without ever having been provided with a statement of defendants' destruction policy and schedule.

¶ 9 Mosby alleged that defendants' actions exposed employees like herself to serious irreversible privacy risks. Mosby alleged that defendants violated the Act by (1) not informing her in writing of the specific purpose and the length of time for which her fingerprints were being collected, stored, and used; (2) failing to provide a publicly available retention schedule

and guidelines for permanently destroying Mosby's fingerprints; (3) failing to obtain a written release from Mosby to collect, store, disseminate, or otherwise use her fingerprint; and (4) failing to obtain consent before disclosing Mosby's fingerprints to third-party vendors that host the data. On May 14, 2019, plaintiff filed an amended class-action complaint substantially similar to the original.

¶ 10 On June 5, 2019, defendants filed a combined motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code of Civil Procedure (Code) or to strike the amended complaint. The motion argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id*. § 2-619(a)(9)) because (1) the biometric data that was collected, used, and/or stored restricted access to protected health information and medication and (2) the data was used for healthcare treatment and operations pursuant to HIPAA (45 C.F.R. § 164.501 (2018)) and was thereby specifically excluded from the scope of the Act. Defendants argued that, pursuant to section 2-615 (735 ILCS 5/2-615 (West 2018)), Mosby failed to allege any well-pleaded facts regarding any disclosures of her fingerprints.

¶ 11 On January 13, 2020, the circuit court ruled that the exception was limited to the information protected under HIPAA. To hold otherwise, the court noted, would result in a broad exception for all employees involved in operations that impact patients protected by HIPAA. The circuit court opined that, if the legislature intended to exempt employees entirely, it would have expressly done so. The court denied defendants' motion to dismiss based on this issue. The circuit court dismissed BD from the complaint in its entirety, without prejudice, and found that Mosby failed to state a claim as to how defendants disseminated her biometric information. With authorization of the circuit court, Mosby amended her pleadings on

February 24, 2020, which realleged all of the claims contained in the previously dismissed claim.

¶ 12 On March 16, 2020, defendants filed a joint motion to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) and stay proceedings. Defendants argued that the question of whether employee information was also exempt under the Act was a question of first impression and had never been heard before this court. Defendants argued that the question was one of statutory construction and there existed a substantial ground for a difference of opinion, which made it appropriate to bring under Rule 308. Defendants maintained that raising the question would be beneficial in a variety of ways, such as: (1) it would advance the outcome of the case with prejudice if the Act was interpreted in their favor, (2) judicial economy would be served, and (3) the need for a uniform construction and application of the law would be served. Defendants also requested a stay in the circuit court proceedings because the determination could lead to a dismissal and Mosby would not be prejudiced.

¶ 13 On April 20, 2020, Mosby filed a motion in opposition to defendants' joint motion to certify the question for interlocutory appeal, arguing that substantial grounds for difference of opinion did not exist. Mosby maintained that to hold otherwise would mean that the General Assembly intended to place anyone employed in the healthcare industry into an "unregulated biometric abyss," by having no biometric protections. Mosby argued that defendants did not demonstrate that they faced any hardship or inequity to justify a stay that would outweigh the prejudice she would suffer. Mosby maintained that the prejudice she would suffer if a stay was granted was the denial of pursuing her claim in an expedient manner and, if successful, the

collection of damages. Mosby argued that defendants' conduct was ongoing and continuous and every day that passed would compound the injuries that they were inflicting.

¶ 14 On May 4, 2020, defendants filed a joint reply arguing that the proposed certified question was tailored and limited to those circumstances where the biometric data collected from healthcare workers were used for healthcare treatment, payment, or operations under HIPAA. Defendants further argued that the circuit court did not entirely reject its argument and found it plausible but ultimately concluded that the General Assembly would have been more explicit if the legislative intent was to exclude healthcare employees' biometric data.

¶ 15 On June 18, 2020, the circuit court granted defendants' motion to certify and stay the proceedings. The circuit court ruled that the issue posed by defendants presented a question of law where there was substantial ground for difference of opinion and could ultimately determine whether or not the case should be dismissed.

¶ 16 On July 17, 2020, defendants filed an application for leave to appeal pursuant to Rule 308, which we denied on August 24, 2020. Defendants filed a petition for leave to appeal with the Illinois Supreme Court, on October 30, 2020. On March 3, 2021, the Illinois Supreme Court issued a mandate vacating this court's decision and ordered this court to allow the application for leave to appeal. On June 11, 2021, Ingalls filed an unopposed motion for extension of time to file an opening brief, in which it informed the circuit court that Ingalls and Mosby had reached a settlement in principle. This agreement was between Ingalls and Mosby, not BD.

¶ 17 On March 14, 2022, the circuit court granted final approval of the settlement agreement between Ingalls and Mosby. Ingalls then moved in this court to withdraw from this appeal, which we granted on March 30, 2022, leaving BD as the sole defendant-appellant in the Mosby appeal.

¶ 18 B. Mazya

¶ 19 On April 10, 2019, Yana Mazya and Tiki Taylor filed an amended class-action complaint[1] against Northwestern, Omnicell Inc., and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Northwestern used medication dispensing systems distributed by both Omnicell and BD. However, both Omnicell and BD were dismissed from this action,[2] as was Taylor.[3] Taylor was dismissed on July 2, 2019, without prejudice. As a party to a collective bargaining agreement, Taylor's claims were preempted.[4]

¶ 20 Like Mosby, Mazya was also employed as a registered nurse, but at Northwestern Memorial Lake Forest Hospital. Like Mosby, Mazya is no longer employed at this hospital, having also left in 2017. Mayza worked for Northwestern from 2012 until December 2017. Like Mosby, Mazya was required to scan her fingerprint to gain access to a medication dispensing system as a condition of her employment. Like Mosby, Mazya alleged that she left defendant's employ without ever having been provided with a statement of its destruction policy and schedule.

¶ 21 Mazya alleged that Northwestern disregarded her statutorily protected privacy rights by unlawfully collecting, storing, using, and disseminating her biometric data in violation of the Act. Like Mosby, Mazya alleged that defendant was in violation of the Act by failing (1) to

[1]The initial complaint that was filed is not provided in the record, which is of no consequence here, because Northwestern Memorial Hospital Taylor and Northwestern Memorial Hospital were not originally parties.

[2] While Omnicell and BD were dismissed, the record does not reflect exactly when that occurred.

[3] While Mazya was a nurse,Taylor worked as a patient care technician at Northwestern Memorial Hospital.

[4]Taylor's dismissal occurred after Northwestern removed this case to the Northern District of Illinois under case number 19 C 3191 (*Mazya v. Northwestern Lake Forest Hospital*, No. 19-CV-3191 (N.D. Ill. June 19, 2019)); the case was subsequently returned to the circuit court.

inform her in writing of the specific purpose and length of time for which her fingerprints were being collected, stored, and used; (2) to provide a publicly available retention schedule and guidelines for permanently destroying her fingerprints; (3) to obtain a written release to collect, store, or otherwise use her fingerprints; and (4) to obtain consent from her to disclose, redisclose, or otherwise disseminate her fingerprints to a third party.

¶ 22 On January 17, 2020, Northwestern filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code. Northwestern argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id.* § 2-619(a)(9)) because the General Assembly specifically excluded information collected from healthcare treatment, payment, or operations in the Act. Northwestern further argued that the complaint should be dismissed pursuant to section 2-615 (*id*. § 2-615) for failure to state a claim because Northwestern did not store or possess her biometric information in violation of the Act when it was used for healthcare treatment, payment, or operations. Northwestern maintained that nothing in the Act was intended to interfere with HIPAA and that applying it to their medication dispensing systems would conflict with guidance previously given by the Department of Health and Human Services (HHS), which encouraged the use of biometrics in health. Northwestern argued that Mazya knew her information was being collected and had the power to withhold consent, citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 34, as support. Northwestern further argued that Mazya failed to provide factual allegations supporting her conclusory assertions that Northwestern's conduct was intentional or reckless. Lastly, Northwestern

requested that Northwestern Memorial Hospital be dismissed from the proceedings, since Taylor was dismissed.[5]

¶ 23 On March 13, 2020, Mazya filed a response to Northwestern's motion to dismiss, arguing that her claims were actionable because they did not fall under any exemption under the Act and the failure to comply with distinct requirements of the Act was all that she needed to demonstrate. Mazya maintained that the Act's explicit reference to biometric data taken from a patient shows the intent of the General Assembly to exclude patient biometrics from the Act's protection because patients were already protected by HIPAA. Mazya further maintained that if the General Assembly wanted to provide a sweeping categorical exemption for hospitals it would have done so as evidenced by the exclusion of financial institutions reflected in section 25(c) of the Act (740 ILCS 14/25(c) (West 2018)).

¶ 24 Northwestern filed a reply on April 3, 2020, arguing that Mazya's interpretation of the Act ignored the disjunctive "or" provided in section 10 of the Act, which connotes two different alternatives, and thus the exemption included employee information. Northwestern maintained that Mazya failed to rebut its argument that she failed to state a claim because her claims were not supported by the language of the statute and were solely policy-based. Northwestern further maintained that it would be good policy to interpret the statute their way given that the usage of biometric information has been encouraged by the government.

¶ 25 On November 2, 2020, the circuit court denied Northwestern's section 2-619.1 motion. The circuit court found Northwestern's section 2-619 argument unpersuasive because the burden for compliance with the Act falls on the collector of the data, not the provider. Put

[5]The record reflects that on March 10, 2020, Mazya moved to voluntarily dismiss Northwestern Memorial Hospital from this action; however, the record does not reflect when the motion was granted.

another way, Mazya did not waive her consent by continuing to offer her biometric data to Northwestern as a condition of her duties as a nurse. The circuit court found that accepting Northwestern's interpretation of the Act would amount to medical professionals having no protections for their biometric information. In regard to Northwestern's section 2-615 arguments, the circuit court found that, to have a viable claim, (1) the claimant need not lack knowledge of the violation, as the violation itself was enough to support the statutory cause of action, and (2) the claimant was not required to plead an intentional or reckless violation of the Act, at that stage of the proceedings.

¶ 26 On November 30, 2020, Northwestern filed a corrected motion for Rule 308 certification and to stay the proceedings. Northwestern argued that there were substantial grounds for difference of opinion given the disjunctive "or" in section 10. Northwestern further argued that the proceedings should be stayed pending this court's decision because our answer to the question could expedite the resolution of the underlying case.

¶ 27 On December 11, 2020, Mazya filed a motion to strike Northwestern's motion for certification and stay. Mazya argued that Northwestern was trying to certify the same question that this court denied in *Mosby v. Ingalls Memorial Hospital*, No. 1-20-0822. On January 13, 2021, Mazya filed a response in opposition to Northwestern's motion for Rule 308 certification and stay, reiterating her previous arguments and noting that Northwestern had not lodged any new arguments or law on the matter.

¶ 28 On February 9, 2021, Northwestern filed a reply in further support of its Rule 308 motion, informing the circuit court that the Illinois Supreme Court directed this court to vacate its August 24, 2020, order and accept the Rule 308 appeal (*Mosby v. Ingalls Memorial Hospital*, No. 126590 (Ill. Jan. 27, 2021) (supervisory order)). On February 9, 2021, the circuit court

denied Northwestern's Rule 308 motion but stayed the proceedings pending this court's decision in *Mosby*.

¶ 29 On June 15, 2021, Northwestern filed a motion to reconsider the circuit court's denial of its Rule 308 certification, arguing that the hospital defendant in *Mosby* (Ingalls) had reached a settlement in principle with the plaintiff in *Mosby* and, therefore, no one would be presenting any arguments on appeal on behalf of a hospital that used medication dispensing systems secured by finger-scan technology. Mazya responded on June 22, 2021, that she was not opposed to the appellate court hearing a certified question.

¶ 30 On July 23, 2021, the circuit court granted Northwestern's motion to reconsider and stayed the proceedings, noting that the issue involves a question of law as to which there were substantial grounds for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. Accordingly, the circuit court certified its question to this court.

¶ 31 On July 27, 2021, Northwestern filed an application for leave to appeal pursuant to Rule 308 reiterating the arguments it had made at the circuit court and requesting that the case be consolidated with *Mosby*. We granted the motion on August 13, 2021.

¶ 32 After Northwestern filed its consolidation motion, but before this court granted it, we also granted a motion on August 5, 2021, by Northwestern, as well as the Illinois Health and Hospital Association and Amita Health, to file an *amicus curiae* brief in the *Mosby* appeal. Northwestern and the two *amici* reiterated defendants' arguments and observed that "[h]ealth care employs 10% of the state's workforce." They argued that interpreting section 10 in favor of plaintiffs regarding the medical supply dispensing systems at issue could result in

undesirable consequences for healthcare providers, and would be financially burdensome, resulting in a lower quality of care for patients.[6]

¶ 33 C. Petition for Rehearing

¶ 34 On February 25, 2022, this court issued an opinion finding that the exclusion at issue did not apply to biometric information collected by a health care provider from its employees. On March 18, 2022, Northwestern and BD, the only remaining defendants in both appeals, filed a joint petition for rehearing arguing, among other things, (1) that the exclusion sets forth two categories, with the first category relating to patient information and the second category relating to the information of others, such as its employees; (2) that the phrase "under [HIPAA]" in the second category applies to "treatment, payment or operations" rather than to "collected, used or stored"; and (3) that we should use the secondary meaning of "under" in the Merriam-Webster Dictionary, which is "subject to the authority of." We granted the petition for rehearing, ordered additional briefing and now modify our order to address these arguments. For reasons that we explain below, we do not find these arguments persuasive. *Supra* ¶¶ 58-64.

¶ 35 II. ANALYSIS

¶ 36 On appeal, Northwestern, BD and the two amici (collectively, defendants) argue that this court should answer both certified questions in the affirmative, because section 10 of the Act (740 ILCS 14/10 (West 2018) excludes employee biometric information used in medication dispensing systems from the protections of the Act.

¶ 37 A. Jurisdiction

[6] In its brief in the *Mayza* appeal, Northwestern explained that it joined in the *amicus* brief in the *Mosby* appeal only because the deadline for doing so expired before this court granted its Rule 308 petition for leave to appeal.

¶ 38 As a preliminary matter, we observe that Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) provides this court with jurisdiction to review the certified questions on this appeal. "Generally, courts of appeal have jurisdiction to review only final judgments entered in the trial court, absent a statutory exception or rule of the supreme court." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. "Supreme Court Rule 308 provides one such exception." *Luccio*, 2012 IL App (1st) 121153, ¶ 17. "Rule 308 allows for permissive appeal of an interlocutory order certified by the trial court as involving a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate termination of the litigation." *Luccio*, 2012 IL App (1st) 121153, ¶ 17.

¶ 39 "Generally, the scope of our review is limited to the certified question." *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9. However, a reviewing court may disregard words in the question that mischaracterize the issue and consider, instead, "the question remaining." *Moore*, 2012 IL 112788, ¶¶ 11-14 (although the word "unnatural" was present in the certified question, the court disregarded it and considered the remaining question, because this word mischaracterized the issue).

¶ 40 B. Standard of Review and Statutory Construction

¶ 41 When reviewing a certified question of law pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), we apply a *de novo* standard of review. *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 31. *De novo* review means that the reviewing court owes "no deference to the trial court." *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 41. "In addition, we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis and whether or not the trial court's reasoning was correct." *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, ¶ 25. *De novo* review is also appropriate because it applies when

resolution turns, as it does here, on a question of statutory interpretation. *Eighner v. Tiernan*, 2020 IL App (1st) 191369, ¶ 8.

¶ 42 With statutory interpretation, our primary goal is to ascertain and give effect to the intent of the statute's drafters. *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30. The most reliable indicator of the drafters' intent is the language they chose to use in the statute itself. *VC&M, Ltd.*, 2013 IL 114445, ¶ 30. The drafters' language should be given its plain and ordinary meaning, (*VC&M, Ltd.*, 2013 IL 114445, ¶ 30), and the statute that they crafted should be read as a whole (*Watson v. Legacy Healthcare Financial Services, L.L.C.*, 2021 IL App (1st) 210279, ¶ 38 (BIPA must be read in its entirety)). In addition, statutory exclusions are interpreted narrowly when they exclude certain members of the public from enjoying rights given to all. *American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board*, 2014 IL App (1st) 132455, ¶ 31; see also *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶ 15 ("exemptions are read narrowly" so as not to defeat the legislative purpose).

¶ 43 " 'When a statute does not define its own terms, a reviewing court may use a dictionary to ascertain the plain and ordinary meaning of those terms.' " *Watson*, 2021 IL App (1st) 210279, ¶ 36 (citing *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 56 (citing *People v. McChristian*, 2014 IL 115310, ¶ 15, and *People v. Bingham*, 2014 IL 115964))); see also *People v. Chapman*, 2012 IL 111896, ¶ 24 ("When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the plain and ordinary meaning of the term."). This court has previously relied on Merriam-Webster Online Dictionary when interpreting words in this Act, including specifically the words "capture" and

"collect" which are used in the exclusion at issue on this appeal. *Watson*, 2021 IL App (1st) 210279, ¶¶ 58-59.

¶ 44 If the language of the statute is plain and ambiguous, we apply it without resort to any further aids of statutory interpretation. *In re Lance H.*, 2014 IL 114899, ¶ 11; *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 395 (2003); *Maschek*, 2015 IL App (1st) 150520, ¶ 44 ("If the statutory language is clear, we must apply it, without resort to any aids of statutory construction."). "If, and only if, the statutory language is ambiguous" may we "look to other sources to ascertain the legislature's intent," such as the statute's legislative history and debates. *Maschek*, 2015 IL App (1st) 150520, ¶ 44.

¶ 45 C. Biometric Information

¶ 46 For purposes of this appeal, defendants do not dispute that the fingerprints captured here qualify as biometric information as that phrase is defined by the Act.[7]

¶ 47 The Act defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILCS 14/10 (West 2018). The Act defines "biometric identifiers" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* On this appeal, and for the limited purpose of this appeal, the parties do not dispute that the fingerprint scan of plaintiffs and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as defined in the Act.

¶ 48 D. Exclusions at Issue

[7] As BD notes in its brief to this court, "[d]efendants deny Plaintiff's allegations, including *** that the data falls under BIPA's definitions of biometric identifier and information." However, since theses cases were "at the motion to dismiss stage" when these appeals were taken, defendants acknowledge that "[Plaintiff's allegations must be taken as true."

¶ 49 The dispute on this appeal concerns whether the nurses' fingerprints, although biometric information, are nonetheless excluded from the Act's protections..

¶ 50 Section 10 of the Act provides a number of exclusions from the protections of the Act. The following exclusion is the one at the heart of this appeal:

> "Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." *Id.*

Defendants argue that the exclusion above sets forth two categories of excluded information. . In essence, defendants argue that the exclusion should be read as follows:

> "Biometric identifiers do not include
>
> [First category or sub-exclusion] information captured from a patient in a health care setting
>
> or
>
> [Second category or sub-exclusion] information collected used or stored
>
> for health care treatment, payment, or operations
>
> under the federal Health Insurance, Portability and Accountability Act of 1996." *Id*. § 10.

In addition, Section 25 of the Act excludes certain sectors of the workforce:

> "(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 [(15 U.S.C. § 6803 (2018))] and the rules promulgated thereunder.

***

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." *Id*. § 25(c), (e).

¶ 51 E. Parties' Arguments on Appeal

¶ 52 Defendants contend that hospital workers' use of medication dispensing systems falls within section 10's exclusion for health care information. They argue that the medication dispensing systems at issue in this case are permitted to collect information for "healthcare treatment, payment, or operations" as defined by HIPAA. 45 C.F.R. § 164.501(2) (2018). They further argue that this includes the fingerprint scans of employees who facilitate the dispensing and administration of medications prescribed to patients. Defendants assert that the collection, use, and storage of healthcare workers' biometric information is for "health care" and "treatment" that healthcare systems provide to patients, as those terms are defined by HIPAA. *Id.* Defendants contend that medication dispensing systems also act to provide an audit trail, which prevents diversion and fraud, and enables abuse detection. Defendants assert that such a system additionally aids in patient safety, quality of care, and accurate billing. Defendants contend that the nurses' biometric information is collected through the medication dispensing system and used for "health care operations" and "payment."

¶ 53 Defendants contend that the circuit court erred in finding that the exclusion for health care information applies only to information from a patient because the exclusion does not state that it is limited to patient biometric data. Defendants observe that the health care exclusion contains an "or," and they argue that this "or" is disjunctive and connotes two different categories of excluded information. Defendants assert that the second category is not limited

to patient data. Defendants maintain that, to fall within this exclusion of the Act, the biometric information must either (1) be obtained from a patient in a healthcare setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA.

¶ 54 Plaintiffs argue that the Act excludes only patient biometric data from its protections because patient data is already protected by HIPAA. Plaintiffs assert that finding otherwise would leave thousands of hospital workers unprotected from the risks that the Act was designed to protect against. Plaintiffs assert that defendants' interpretation of the second category does not make sense because it states, "under HIPAA" and patient information is the only information governed by HIPAA.

¶ 55 In their reply briefs, defendants argue, among other things, that the storage of healthcare workers' biometric information, obtained when accessing a medication dispensing system, is for the "health care" and "treatment" of patients as those terms are defined by HIPAA; and, therefore, the "under HIPAA" language does not exclude this type of information.

¶ 56 F. Plain Language

¶ 57 We find that the language of the statute is clear.

¶ 58 First, there is no redundancy, as defendants claim results from our interpreting both categories as covering patient information. Defendants' arguments about redundancy overlook the verbs used in the two sub-exclusions or categories. The first sub-exclusion or category is for information "captured." 740 ILCS 14/10 (West 2018). The first couple of definitions of "capture" in the dictionary, such as "to take captive" or "to emphasize," do not apply here. Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/capture (last visited May 9, 2022). However, the secondary meaning of "to record in a permanent file

(as in a computer)" clearly applies here. After this definition, the dictionary provides the following example of its use in a sentence: "The system is used to *capture* data ***." Similarly, in the first category of this exclusion, the information is captured, or recorded in a permanent file, from an individual patient in a healthcare setting.

¶ 59 By contrast, the second sub-exclusion or category is for information that is "collected, used or stored." 740 ILCS 14/10 (West 2018). The first definitions of "collect" in the dictionary are: "to bring together into one body and place," "to gather or exact from a number of persons or sources," and "to gather an accumulation of." Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/collect (last visited May 9, 2022). Thus, after the capture of information from an individual patient in a healthcare setting (described in the first category), that information may be gathered or accumulated from a number of persons into one place. So far in our reading of the statute, there is no redundancy in coverage: the first category covers when the information is captured from a patient in a health care setting; and the second category applies when information is subsequently gathered and accumulated. The second sub-exclusion or category goes on to cover information when, after its capture and accumulation, it is then used or stored. There is simply no redundancy in this statute. While both categories apply to patient information, we cannot overlook the different verbs used to modify the categories of information in the two clauses thereby giving two very different meanings and eliminating any redundancy. 740 ILCS 14/10 (West 2018).

¶ 60 Our interpretation of the two categories tracks closely the two objectives of the Act identified by our supreme court. In *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan*, 2021 IL 125978, our supreme court found that the Act protects an individual in two distinct and important ways. Our highest court found: "the Act codifies (1) an individual's

right to privacy in their biometric identifiers—fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry—and (2) an individual's right to privacy in their biometric information—information based on an individual's biometric identifiers that is then used to identify an individual." Similarly, in the case at bar, the exclusion applies to (1) information as it is captured from the patient in a healthcare setting; and (2) information that is collected, used or stored. [8] There is no redundancy here, even though both clauses refer to patient information, as we explain below.

¶ 61 Second, defendants argue that the "under [HIPAA]" clause applies: (1) not to both types of information; and (2) not to "collected, used or stored"; (3) but only to "treatment, payment or operations." Defendants argue that, since "under [HIPAA]" appears after a disjunctive "or," the clause does not apply to anything that appears before that first "or." For this reason, they assert that it does not apply to both types of information. However, although defendants argue that the "under [HIPAA]" clause applies only to what immediately precedes it, they argue that it applies—not simply to "operations"—but to "treatment, payment *or* operations."[9] (Emphasis added.) Thus, they argue that the first use of "or" means that the clause does not apply to what precedes the "or," but that this same logic does not apply to the statute's second use of "or."[10] We do not find persuasive an argument with an internal contradiction. .

[8] In addition, the two categories can be seen as protecting: (1) information captured from the patient in a healthcare setting and (2) information that is already protected "under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10 (West 2018). The disjunctive "or" means that information as it is captured directly from the patient and information under HIPAA are alternatives to be considered separately. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 111 (2011).

[9] In essence, defendants read the first "or" as disjunctive but the second "or" as conjunctive, thereby, giving two different meanings to the very same word in the very same sentence. *Encino Motorcars, LLC v. Navarro*, -- U.S. --, 138 S.Ct. 1134, 1141-42 (2018) ("it would be odd to read the exemption as starting with" a disjunctive phrasing "and then, halfway through and without warning, switching" to a conjunctive phrasing—"all while using the same word ('or') to signal both meanings").

[10] Defendants here are trying to manipulate the last antecedent doctrine, which provides that qualifying words or phrases apply to the words or phrases immediately preceding them, and not to "more

¶ 62 Defendants argue that, under the series-qualifier canon of statutory construction, a modifier at the end of a series of two or more nouns or verbs applies to the entire series. *Facebook, Inc. v. Duguid*, -- U.S. --, 141 S.Ct. 1163, 1169 (2021). Under that logic, "under [HIPAA" applies to both types of "information." 740 ILCS 14/10 (West 2018). As defendants note, "[u]nder conventional rules of grammar, '[w]hen there is a straightforward, parallel construction that involves all nouns *** in a series,' a modifier at the end of the list 'normally applies to the entire series.' " *Facebook*, 141 S.Ct. at 1169 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012) (Scalia & Garner) (quotation modified in opinion)). In the exclusion at issue, defendants argue that there are two categories of information—in other words, a straightforward parallel construction setting forth two categories of "information." 740 ILCS 14/10 (West 2018). Under the series-qualifier canon argued by defendants, the clause "under [HIPAA," which appears at the end, would, therefore, apply to both types of information in the series—not just to the second type as they argue. 740 ILCS 14/10 (West 2018).

¶ 63 Defendants further argue that "under" means "subject to the *** guidance, or instruction of." Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022). For this definition, defendants rely on the Merriam-Webster Online Dictionary, but they skip the first or primary meaning and utilize instead the second or secondary meaning. However, the first or primary meaning of "under," when used as a preposition as it is here,[11] is "below or beneath so as to be *** covered [or] protected *** by."

remote" words, "unless the intent of the legislature, as disclosed by the context and reading of the entire statute requires such an extension or inclusion." *In re E.B.*, 231 Ill. 2d 459, 467 (2008).

[11] We agree with defendants that, since "under" in this instance is being used as a preposition, it is the second entry for preposition that must be utilized here. Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022).

Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022). The information covered and protected by HIPAA is that of the patients, not the employees. *U.S. v. Bek*, 493 F.3d 790, 802 (2007) (HIPAA protects patient medical records from unauthorized disclosure by creating a procedure for obtaining authority to use them).

¶ 64 At oral argument, Northwestern argued that this court should not consider the terminology "under HIPAA" and instead we should consider this as "defined by HIPAA." However, "under HIPAA" is what the Act expressly states, and that cannot be ignored. We are simply unable to rewrite the statute. *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 15. Either way, the biometric information of employees is simply not defined or protected "under HIPAA." Accordingly, the plain language of the statute does not exclude employee information from the Act's protections because they are neither (1) patients nor (2) protected under HIPAA. We further find that, if the legislature intended to exclude all healthcare workers from the Act's protections, it would have done so. Where the legislators wanted to create blanket exclusions for certain sectors of the workforce, they expressly provided that the Act did not apply either to financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 or to employees, contractors, or subcontractors of local government or the State as provided in section 25. 740 ILCS 14/25(c), (e) (West 2018).[12] No such express, blanket exclusion exists for healthcare workers and we will not rewrite the Act to provide one.

[12] While the Act provides that "nothing" in it "shall be construed to conflict with" HIPAA (740 ILCS 14/25 (b) (West 2018)), that is not the same as a blanket exclusion for healthcare workers. When legislators wanted the Act not to apply at all to a certain sector of the workforce, they explicitly stated that "[n]othing in this Act shall be construed to apply" and then named the institutions that were exempt. By contrast, subsection (b) does not exempt or exclude or even name hospitals or third-party vendors, such as defendants in the appeal at bar. 740 ILCS 14/25 (b) (West 2018),

Northwestern and the *amici* argue that "[h]ealth care employs 10% of the state's workforce." If that is true, then creating such an exclusion would have far reaching implications.[13]

¶ 65 Defendants' attempt to include employee biometric information under this exclusion goes beyond the plain language of the Act. A reviewing court is unable to "rewrite a statute to add provisions or limitations the legislature did not include." *Zahn*, 2016 IL 120526, ¶ 15. "No rule of construction authorizes us to declare that the legislature did not mean what the plain language of the statute imports." *Id.* There is simply no provision or reference to the exclusion of employee biometric data in the Act or its protection in HIPAA. Thus, we will not add employee biometric data as information to be excluded by the Act because it would be contrary to its plain language.

¶ 66 G. Objectives

¶ 67 Part of the plain language of this Act are its objectives, which are stated right in the Act itself. The legislative purpose of this Act is easy to discern because the Act's drafters provided a statutory section entitled: "Legislative findings; intent." 740 ILCS 14/5 (West 2018); *Watson*, 2021 IL App (1st) 210279, ¶ 49 ("The legislative purpose of" BIPA "is easy to discern because the Act's drafters provided a statutory section" stating just that). The section notes that "corporations" are interested in utilizing the new biometric technology. 740 ILCS 14/5(b) (West 2018). However, "[a]n overwhelming majority" of the public are wary. 740 ILCS 14/5(d) (West 2018). The section explains that the public is wary because, "once" a corporation has "compromised" an individual's unique biometric identifier, "the individual has no recourse." 740 ILCS 14/5(c) (West 2018). The purpose of the Act is to reassure a wary

[13] According to its *amicus* brief, Northwestern alone employs "29,800 physicians, nurses, allied health professionals, clinical support staff and administrative employees." In fiscal year 2020, the Northwestern health system had "more than 104,000 inpatient admissions and more than 2.2 million outpatient encounters.

public by providing a means for "regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (West 2018). Finding that the nurses at issue here are covered by the Act vis-a-vis their employers and the MedStation marketing company furthers the stated goals of the Act. The primary purpose of this Act is to protect the secrecy interest of the "individual" in his or her biometric information, such as the finger scans at issue here. *West Bend*, 2021 IL 125978, ¶ 46 ("the Act protects a secrecy interest—here, the right of an individual to keep his or her personal identifying information like fingerprints secret"). Our findings today further that purpose.

¶ 68 Since the language is plain, we need not consider other sources to discern statutory meaning. "[A]bsent ambiguity *** there is no basis to delve into the conference reports or statements of legislators." *Kaider*, 2012 IL App (1st) 111109, ¶ 11. However, as a final matter, we note that, even if we were to consider defendants' legislative-history argument, we would not find it persuasive. Defendants cite the following line from a page of remarks by the House sponsor of the bill, Representative Kathleen Ryg: "[The Act] provides exemptions as necessary for hospitals[.]"[14] 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts /htrans95/09500276.pdf); *Maschek*, 2015 IL App (1st) 150520, ¶ 62 (when interpreting an ambiguous phrase in a statute, courts look especially to the remarks of the bill's sponsor). In the quoted line, Representative Ryg did not assert that the Act provided a blanket exclusion for all healthcare workers; rather she asserted that it provided "exemptions as necessary."[15] Her

[14] In any event, Representative Ryg's comment about "hospitals" does nothing to aid third-party vendors like BD.

[15] "The crafting of specific language often reflects legislative compromise reached after hard fought battles over the means to reach even common goals. Courts should only reluctantly turn to

remark is completely consistent with our finding that the Act excludes from coverage information as it is captured from a patient in a healthcare setting, as well as HIPAA-protected information that is "collected, used or stored." 740 ILCS 14/10 (West 2018). These exclusions are the ones that legislators like Representative Ryg apparently deemed "necessary." Representative Ryg ended her remarks, immediately prior to passage, by stating: "we are in very serious need of protections for the citizens of Illinois when it comes to biometric information." 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts/htrans95/09500276 .pdf); *Maschek*, 2015 IL App (1st) 150520, ¶ 62 ("The remarks made immediately prior to passage are particularly important."). Those citizens include the nurses at issue here.

¶ 69 This court has previously observed that: "Representative's Ryg's remarks establish that the primary impetus behind the bill was to allay the fears of and provide protections for 'thousands of' people who had provided their biometric data for use as identifiers and who were now left 'wondering what will become of' this data. *Watson*, 2021 IL App (1st) 210279, ¶ 64 (quoting 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts/htrans95/09500276 .pdf). "This is the position" that Mosby and Mayza "found [themselves] in, after leaving defendants' employ" in 2017 "without ever having been provided with a statement of defendants' destruction policy and schedule." *Watson*, 2021 IL App (1st) 210279, ¶ 64. Consideration of the legislative history and the Act's objectives leave no doubt that we are reaching the correct finding.

legislative history for fear of upsetting the delicate balance reflected in a finally worded piece of legislation." *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (1989).

¶ 70 III. CONCLUSION

¶ 71 Consistent with the plain language of the Act, we find that the legislature did not exclude health-care employee biometric information from its protections. We remand this cause for further proceedings consistent with this opinion.

¶ 72 Certified questions answered; cause remanded.

¶ 73 PRESIDING JUSTICE MIKVA, dissenting:

¶ 74 Having considered the parties' arguments on rehearing, I must respectfully dissent from the majority's opinion in this case. I am now convinced that the General Assembly *did* intend to exclude from the Act's protections the biometric information of healthcare workers—including finger-scan information collected by those workers' employers—where that information is collected, used, or stored for health care treatment, payment, or operations, as those functions are defined by HIPAA. In my view, plaintiffs and the majority ignore important rules of statutory construction, while overcomplicating a more straightforward reading of this exclusion. For the reasons that follow, I would answer "yes" to the certified questions in these consolidated cases.

¶ 75 The exclusion in section 10 of the Act provides that "[b]iometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [(HIPAA)]." (Emphasis added.) 740 ILCS 14/10 (West 2016). I agree with defendants that the first part of this provision excludes from the Act's coverage information from a particular source—patients in a health care setting—and the second part excludes information used for particular purposes—healthcare

treatment, payment, or operations—regardless of the source of that information. The plain language of the statute, and particularly the use of the words "from" and "for," make this clear.

¶ 76 The majority's interpretation of this exclusion ignores two fundamental rules of statutory construction: the last antecedent rule and the rule that statutes should be construed, wherever possible, such that no word or phrase is rendered superfluous or meaningless. Application of these two basic rules make clear to me that this exclusion extends to biometric information collected from health care workers by their employers—where that information is collected, used, or stored for health care treatment, payment, or operations—and is not limited, as the majority concludes, to biometric information collected from patients.

¶ 77 The last antecedent rule is "a long-recognized grammatical canon of statutory construction." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). That rule "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote." *Id.*

¶ 78 Applying the last antecedent rule, the phrase "under [HIPAA]" in section 10's exclusion applies to "health care treatment, payment, or operations," the phrase that immediately precedes it, rather than to the more remote phrase "information collected, used, or stored." Healthcare treatment, payment and operations are terms of art that are carefully and explicitly defined in HIPAA's implementing regulations. See 45 C.F.R. § 164.501 (titled "Definitions") (West 2016).

¶ 79 Healthcare operations, for example, is defined as "any of the following activities of the covered entity to the extent that the activities are related to covered functions," followed by a

list of six specific activities. *Id.* Treatment and payment are also defined in detail. *Id.* It is these definitions that the exclusion in section 10 is referencing when it says "under HIPAA."

¶ 80 This triumvirate of healthcare treatment, payment, and operations is repeatedly used to define the activities of covered entities that are the subject of those regulations. See, *e.g.*, 45 C.F.R. § 164.506 (titled "Uses and disclosures to carry out treatment, payment, or health care operations" and employing the phrase "treatment, payment, or health care operations" an additional seven times); *id.* § 164.502 (using the phrase twice); *id.* § 164.504 (using the phrase three times); *id.* § 164.508 (using the phrase once); *id.* § 164.514 (using the phrase once); *id.* § 164.520 (using the phrase twice); *id.* § 164.522 (using the phrase twice); *id.* § 164.528 (using the phrase once); *id.* § 170.210 (using the phrase twice); and *id.* § 170.315 (using the phrase once).

¶ 81 As defendants point out, one definition of the word "under" is "subject to the authority, control, guidance, or instruction of." Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/under (last visited Sept. 8, 2022). "Treatment," "payment," and "operations," are "under" HIPAA because a particular meaning is ascribed to each of these terms by HIPAA's implementing regulations. *Under* the provisions of HIPAA, those three terms have definite and well-known meanings that our General Assembly saw no reason to duplicate or reinvent when it drafted the legislation that is the subject of this appeal. Incorporating by reference established definitions in this manner promotes clarity, consistency, and familiarity in the law, a "familiar legislative process" long recognized by our supreme court (*People v. Murray*, 2019 IL 123289, ¶¶ 13, 24 (noting that the statute defining the offense of unlawful possession of a firearm by a street gang member incorporates by reference the definition of a "streetgang" set out in the Illinois Streetgang Terrorism Omnibus Prevention

Act)). The General Assembly has in fact borrowed these same definitions on other occasions, and it has used the phrase "under HIPAA" to do so. *See* 210 ILCS 25/2-134, 2-136, and 2-137 (West 2016) (providing, for purposes of the Illinois Clinical Laboratory and Blood Bank Act, that each of these terms—treatment, payment, and health care operations—"has the meaning ascribed to it *under HIPAA*," and "as specified in 45 CFR 164.501" (emphasis added)).

¶ 82 The majority criticizes defendant's reliance on the last antecedent rule, pointing out that, if the rule was strictly applied, "under [HIPAA]" would apply only to the word "operations." But application of the last antecedent rule is always limited by "the intent of the legislature, as disclosed by the context and reading of the entire statute." *In re E.B.*, 231 Ill. 2d at 467. And here, "treatment," "payment," and "operations" are all closely related and indeed are all HIPAA-defined terms. In this context, "under [HIPAA]" applies to all of these activities. However, if "under HIPAA" applied only to "operations," information collected, used, or stored for health care treatment or payment would still be within the exclusion and thus the exclusion would still apply where the biometric information of health care workers is used for healthcare treatment.

¶ 83 The other bedrock principle that compels my understanding that this exclusion applies to biometric information used for healthcare treatment is that "statutes should be construed so that no word or phrase is rendered superfluous or meaningless." *People v. Parvin*, 125 Ill. 2d 519, 525 (1988). The interpretation offered by the majority reads important words out of the exclusion in section 10 and indeed would render that entire exclusion redundant in light of another exclusion already in BIPA.

¶ 84 First, the majority fails, in my view, to satisfactorily consider the fact that the word "information" is deliberately used twice in this exclusion, first in reference to "information

captured from a patient in a health care setting" and then after the word "or," suggesting that this is a different kind of information, in reference to "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [(HIPAA)]." The majority's explanation is that "captured" is different than "collected" but, in the majority's reading, all "information" is patient information. *Supra* ¶¶ 58-60. Under this reading, there is simply no reason to use the word "information" twice in the disjunctive, suggesting that the exclusion is referencing two different kinds of information.

¶ 85 Moreover, if as the plaintiffs have consistently argued, the purpose of this exclusion is simply to avoid any potential conflict between BIPA and HIPAA, both of which protect privacy, the entire exclusion would be unnecessary. Section 25(b) of BIPA already makes clear that "[n]othing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act." 740 ILCS 14/25 (West 2016).

¶ 86 The majority sidesteps these rules of construction to arrive at an interpretation of the exclusion in section 10 that aligns with its preferred definition of the word "under" as meaning "protected by." See *supra* ¶ 63. It is true that one definition of that word is "covered [or] protected by" (Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/under (last visited Sept. 8, 2022)). I also agree that only patient information is "protected by" HIPAA. But before we decide the meaning of the word "under," we must first determine what phrase that word applies to. The last antecedent rule and the rule against treating language in a statute as superfluous both dictate that "under" HIPAA refers to "healthcare treatment, payment, and operations." None of these activities are "protected" by

HIPAA. Rather, they are activities that are *defined* by HIPAA and that, when engaged in by covered entities, make certain HIPAA regulations applicable.

¶ 87 The majority also reasons that, if the General Assembly intended to create a blanket exclusion for the healthcare industry, it could have drafted one, just as it did for the financial industry (see 740 ILCS 14/25(c) (West 2016)). *Supra* ¶ 64. But defendants are not suggesting that the legislature intended to exempt the healthcare industry as whole. Rather, in their view and mine, this is a far narrower exclusion to allow the healthcare industry to use biometric information for treatment, payment and operations, as those terms are defined by HIPAA. It is hard to imagine a better example of this than finger-scan information collected by those workers' employers to ensure that medication is properly dispensed. Conversely, if the General Assembly intended only to exclude "patient information protected by HIPAA," it certainly could have said just that.

¶ 88 For all of these reasons, I would answer "yes" to the two certified questions.

¶ 89 I respectfully dissent.

No. 1-20-0822

Cite as:	*Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 18-CH-05031, 18-CH-07161; the Hon. Pamela McLean Meyerson and the Hon. Alison C. Conlon, Judges, presiding.
Attorneys for Appellants:	Gary M. Miller, Matthew C. Wolfe, and Elisabeth A. Hutchinson, of Shook, Hardy & Bacon L.L.P., both of Chicago, for appellant Becton, Dickinson and Company. Joel Griswold and Bonnie Keane DelGobbo, of Baker & Hostetler LLP, of Chicago, for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare.
Attorneys for Appellee:	James B. Zouras, Ryan F. Stephan, Andrew C. Ficzko, Catherine T. Mitchell, and Paige L. Smith, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amici Curiae*:**	Michael A. Woods, of Naperville, for *amici curiae* Illinois Health and Hospital Association and Richard H. Tilghman, of Nixon Peabody LLP, of Chicago, for *amici curiae* Alexian Brothers-AHS Midwest Region Health Co. d/b/s AMITA Health.

IN THE ILLINOIS SUPREME COURT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018-CH-05031 The Honorable Judge Pamela McLean Meyerson Judge Presiding
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Judge Alison C. Conlon, Judge Presiding

Application from the Illinois Appellate Court, First District
2022 IL App (1st) 200822
The Honorable Justice Sharon Oden Johnson, Mary L. Mikva, and Raymond W. Mitchell

PETITION OF APPELLANTS NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, and BECTON DICKINSON AND COMPANY FOR LEAVE TO APPEAL PURSUANT TO RULE 315

E-FILED
11/4/2022 4:37 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED IF THE APPLICATION IS ALLOWED

Joel Griswold
Bonnie Keane DelGobbo
BAKER & HOSTETLER LLP
1 North Wacker Drive
Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200
Email: jcgriswold@bakerlaw.com
bdelgobbo@bakerlaw.com

Counsel for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

Gary M. Miller
Matthew C. Wolfe
Elisabeth A. Hutchinson
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700
Email: gmiller@shb.com
mwolfe@shb.com
ehutchinson@shb.com

Counsel for Becton, Dickinson and Company

TABLE OF POINTS AND AUTHORITIES

Page

Page

Page

Page

PRAYER FOR LEAVE TO APPEAL

Defendants Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare (together "Northwestern") and Defendant Becton, Dickinson and Company ("BD") (collectively with Northwestern, "Defendants") are seeking leave to appeal from the Illinois Appellate Court, First District's ("First District") Opinion, 2022 IL App (1st) 200822, in consolidated appeal Nos. 1-20-0822 and 1-21-0895, to the Illinois Supreme Court concerning the proper interpretation of the Biometric Information Privacy Act's ("BIPA"), 740 ILCS 14/1 *et seq*., explicit exclusion for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10. Specifically, Defendants seek a reversal of the First District's Opinion that information of health care workers that is collected, used, or stored for health care treatment, payments, or operations under HIPAA is not excluded under Section 10 of the Biometric Information Privacy Act, as that determination is contrary to basic principles of statutory interpretation.

JURISDICTIONAL STATEMENT

On February 25, 2022, the First District issued its Opinion. (A1) On March 18, 2022, BD, joined in part by Northwestern, filed a joint petition for rehearing. (A18.) The First District granted the petition. (A41.) On September 30, 2022, the First District modified its Opinion. (A43.) Pursuant to Rule 315(b)(2), Defendants are filing this petition within 35 days of the modified Opinion and, therefore, this Court has jurisdiction.

STATUTE INVOLVED

Illinois's Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*:

> "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry . . . . Biometric identifiers do not include information captured from a patient in a health care setting or information

> collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.
>
> * * *
>
> "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. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

740 ILCS 14/10. The full text of Section 10 is set forth in the Appendix. (A75.)

POINTS RELIED UPON FOR REVERSAL

1. The plain language of BIPA's exclusion for "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]" is not limited to patient information.
2. The First District's majority opinion misapplied the canon against superfluousness and the last antecedent rule in reaching an interpretation contrary to BIPA's plain language.
3. The legislature's decision to exempt certain health care uses from BIPA comports with federal and industry guidance to health care providers concerning the use of biometrics in the health care industry.

STATEMENT OF FACTS

I. Plaintiff Mosby

Plaintiff Lucille Mosby ("Plaintiff Mosby") worked as a registered pediatrics nurse for Ingalls Memorial Hospital and used the BD medstation and its finger-scan device to provide "patient care." (C31 ¶¶ 45-46; C574 ¶¶ 45-46*;* BD-A012 ¶¶ 54-55.)[1] Plaintiff

[1] The record cited to as "C" refers to Becton Dickinson's Common Law Record on Appeal, filed in the First District. The record cited to as "BD-A" refers to Becton Dickinson's Appendix to its Opening Brief, filed in the First District.

alleges that BD violated BIPA by using the medstation scanning device to collect, use, and/or store her finger scan data without complying with the notice and consent provisions under BIPA and by disclosing her purported biometric data to third parties without first obtaining her written consent.[2] (BD-A017-22 ¶¶ 76-103; C579-83 ¶¶ 67-94.) Plaintiff acknowledges and does not dispute that the medstations and finger-scan device are used in connection with patient care. (BD-A003 ¶¶ 8-10; BD-A010 ¶ 40; BD-A012 ¶¶ 54-55; C565 ¶¶ 4-5; C571 ¶¶ 34-35; C574 ¶¶ 45-46.) In fact, she expressly alleges that, as part of her role as a nurse, she scanned her finger "to access medications for patient care." (C31 ¶ 46; *see* BD-A012 ¶ 55.)

BD moved to dismiss the Amended Class Action Complaint, arguing, in part, that the finger-scan data allegedly collected, used, and/or stored by the medstation scanning device is excluded from BIPA's definition of "biometric identifier" and the related definition of "biometric information" under the health care exclusion, as provided in Section 10 of the Act. (C599-601; C619-22.) BD also argued this construction aligns with the overall structure and legislative intent to provide certain industry-specific carve-outs for financial institutions, law enforcement, state and local agencies, government contractors, and, as applicable in this case, health care entities such as hospitals and vendors working with hospitals. (C600-01; C619-22; C1310-13.)

The trial court denied BD's request for dismissal based on the health care exclusion. BD filed a joint motion to certify the question regarding the scope of the health care exclusion for interlocutory appeal under Illinois Supreme Court Rule 308, (C1523-C1623),

[2] BD denies that the finger-scan feature on its medstation device collects, stores, or uses a biometric identifier or biometric information as those terms are defined by BIPA.

which the court granted on June 18, 2020. (BD-A064-66.) The First District initially denied the appeal, (A76), but on BD's petition for leave to appeal, the Supreme Court exercised its supervisory authority to direct the First District to address the issue. (A77.)

II. Plaintiff Mazya

Plaintiff Yana Mazya ("Plaintiff Mazya") asserts individual and putative class claims for alleged violations of BIPA related to use of Omnicell and BD medication dispensing systems. Plaintiff Mazya was a Registered Nurse at NLFH. (R11 at ¶ 49.)[3] Plaintiff Mazya alleges that Northwestern required her to scan her fingers[4] for identification to access "medication dispensing systems (i.e. – BD Pyxis and Omnicell)" and "gain authorized access to stored materials," and for Northwestern "to monitor authorized access to stored materials (i.e. – medications) by its employees." (R2 at ¶¶ 4-6.)

Plaintiff alleges Northwestern failed to give certain notices and obtain consent "in writing" to collect the scans of her finger. (*E.g.*, R4 at ¶ 13, R21 at ¶¶ 102-03.) On January 17, 2020, Northwestern moved to dismiss Plaintiff's claims pursuant to Section 2-619 of the Illinois Code of Civil Procedure for three separate reasons, one of which bears on this appeal: that the Illinois legislature specifically excluded from BIPA's coverage "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10. (R28.)

On November 2, 2020, the lower court denied Northwestern's motion to dismiss, holding that the health care exclusion is limited to information collected from patients and

[3] The record cited to as "R" throughout refers to Northwestern's Supporting Record on Appeal filed in the First District.

[4] Northwestern denies the medication dispensing systems use "fingerprints," or any other biometric identifier or biometric information as those terms are defined by BIPA.

does not extend to information collected from health care workers. (R465-66.) Northwestern subsequently sought interlocutory review of that issue pursuant to Rule 308 on November 30, 2020. (R470.) The trial court initially denied interlocutory review (R854), but later granted review after reconsideration on July 23, 2021 (R1103). The lower court certified a question of law for interlocutory appeal to the First District pursuant to Rule 308. (R1103.)

III. Consolidated Appeal To The First District

The First District granted the *Mosby* petition after the Supreme Court ordered it to do so. The First District also granted the *Mazya* petition, and the cases were consolidated on appeal with the First District considering the following questions of law pursuant to Rule 308:

> In *Mosby*: Whether the exclusion in Section 10 of [the Act] for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA? (C1873.)
>
> In *Mazya*: Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act's exclusion for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996," 740 ILCS 14/10, when the employees' finger-scan information is used for purposes related to "health care," "treatment," "payment," and/or "operations" as those terms are defined by the HIPAA statute and regulations? (R1103.)

On February 25, 2022, the First District issued an Opinion answering the certified questions in the negative, holding the health care exclusion is limited to only patient information. (A1.) But in doing so, the Court did not discuss: (1) the General Assembly's intentional use of "information" twice, which delineates two distinct categories of information, particularly because these categories of information are separated by a

disjunctive "or"; (2) the last antecedent doctrine, which dictates that the prepositional phrase "under HIPAA" modifies only the phrase that immediately precedes it, *i.e.,* "health care treatment, payment, or operations," such that HIPAA's broad definitions of those terms must be considered; and (3) the ordinary meaning of "under," which is defined as "under the guidance and instruction of"—not "protected by." (A24.)

Defendants, therefore, timely filed a petition for rehearing in the First District on March 18, 2022. (A18.) The First District granted the petition on June 2, 2022, ordering Plaintiff to file a response by June 23, 2022 and Defendants to file a reply by July 7, 2022. (A41.) On September 30, 2022, without additional oral argument, the First District issued a split opinion affirming its original decision, with Justice Mikva dissenting. (A43.)

Defendants now petition this Court for leave to appeal because this issue is critically important to—and potentially dispositive of BIPA claims brought against—both health care providers, such as Northwestern, that use medication and medical supply dispensing systems in the course of delivering patient care safely and efficiently, and medication dispensing technology providers, such as BD, that manufacture and provide such systems to health care providers across the state. Defendants respectfully request that this Court exercise its discretion to accept their appeal pursuant to Illinois Supreme Court Rule 315.

ARGUMENT

This Court's consideration of the issue presented would (1) resolve the important issue of whether BIPA's plain language, BIPA's legislative history, and federal guidance to health care providers concerning HIPAA establish that the health care exclusion is not limited to information collected from patients; (2) ensure that the First District's opinion is not in conflict with the Illinois Supreme Court and other First District precedent involving fundamental rules of statutory construction; and (3) appropriately exercise the Supreme

Court's supervisory authority. *See* Ill. Sup. Ct. Rule 315. Indeed, this Court recognized the importance of the legal issue presented in this consolidated appeal when it exercised its supervisory authority to direct the First District to accept the *Mosby* certified question in the first instance.

Now with a split decision from the First District and conflicting decisions in the trial courts, this Court is asked to give finality on the scope of BIPA's health care exclusion to both the parties and to Illinois's federal and state courts. When this Court's longstanding canons of interpretation are properly applied, it is clear that the First District erred in its majority opinion—just as Justice Mikva concluded in her dissent.

Clarity on the proper application of these legal doctrines and the scope of BIPA's health care exclusion is necessary not just to correct the First District's error, but also because this case presents recurring and important issues. BIPA litigation is prolific, with at least 1,708 BIPA cases filed in Illinois since 2016, including dozens of cases against health care providers. The parties and the courts need this Court's guidance on what the express exclusion for "health care treatment, payment, or operations," means.

I. The Certified Question Before The Court Is Crucial To The Development Of The Law Because Illinois Courts Are Split On The Correct Interpretation Of BIPA's Exclusion For Health Care-Related Information.

The certified question before the Court is crucial to the rapidly evolving body of biometric privacy law in Illinois because the lower courts are split on the correct interpretation of BIPA's exclusion for health care-related information—a split highlighted by Justice Mikva's dissent in the case below.

While the trial court and First District in *Mazya* and *Mosby* found that BIPA's exclusion for health care-related information applies only to information taken from a

patient,[5] (R466, BD-A041 at 67:14-22), at least two state court trial judges have held the exclusion squarely applies to the same type of information at issue in this case—finger-scan information associated with hospital employees who scanned their fingers to access medication dispensing systems. *See Diaz v. Silver Cross Hosp. and Med. Ctrs.*, Case No. 2018 CH 001327 (Will Cnty.), Aug. 29, 2019 Hr'g Tr. at 4:1-6, 7:7-14, 21:13-24, 23:4-9 (R64); *Diaz v. Silver Cross Hosp. and Med. Ctrs.*, Case No. 2018 CH 001327 (Will Cnty.), July 6, 2020 Hr'g Tr. at 4:12-22 (R973). Others have expressly noted that, on the right factual record, the health care exclusion might apply to the data at issue in this case. *See Peaks-Smith v. St. Anthony Hosp*., No. 2018-CH-07077 (Cir. Ct. Cook Cnty. Jan. 7, 2020) (BD-A100 at 32:1-20) (noting defendant-hospital was not precluded "from later arguing that there was not a violation in connection with the scanning as it relates to the medical supply stations"); *id.* (BD-A102 at 41:5-8) ("[A]gain just to emphasize, I have not decided as a matter of law today that the fingerprint scan taken at that medical station is not exempt.").

Further, courts in the Northern District of Illinois held that "[t]o fall under BIPA's health care exemption, the biometric information obtained must either: (1) be obtained from a patient in a health care setting, or (2) be collected, used, or stored in connection with healthcare treatment, payment, or operations under HIPAA." *Vo v. VSP Retail Dev. Holding, Inc.,* No. 19 C 7187, 2020 U.S. Dist. LEXIS 53916, at *4 (N.D. Ill. Mar. 25, 2020); s*ee also Svoboda v. Frames for Am., Inc.*, No. 21 C 5509, 2022 WL 410719, at *1, 3 (N.D. Ill. Sept. 8, 2022) (analyzing scope of health care exclusions as two distinct

[5] *See also Bruhn v. New Albertson's, Inc.*, 18 CH 01737 (Cir. Ct. Cook Cnty. July 2, 2019) (holding exclusion did not cover employees but noting that decision was a "close call").

categories of information); *Crumpton v. Octapharma Plasma, Inc*., 513 F. Supp. 3d 1006, 1016 (N.D. Ill. 2021) (acknowledging "[t]he disjunctive 'or' separating the 'health care setting' and 'information collected, used, or stored for health care treatment' clauses of the exception").

Some courts' reluctance in finding that the exclusion applies to health care workers stems from a misguided concern about *how much* information would be excluded, and this concern appeared to drive the First District's results-oriented decision. Specifically, the First District held that applying the exclusion to health care workers would provide "a blanket exclusion" for all health care workers, which, in its view, was not the intention of the legislature. (A64, ¶ 64.)

Not so. Answering the issue presented in Defendants' favor would *not* mean that the entire health care industry is broadly exempt from BIPA. Rather, as Defendants have argued, BIPA's text makes clear, and Justice Mikva's dissenting opinion explains, "defendants are not suggesting that the legislature intended to exempt the healthcare industry as whole," but "[r]ather, in their view and mine, this is a far narrower exclusion to allow the healthcare industry to use biometric information for treatment, payment and operations, as those terms are defined by HIPAA." (A73, Mikva, J., dissenting, ¶ 87.)

HIPAA regulations define: "**Health care**" to include "care, services, or supplies related to the health of an individual," including the "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription," 45 C.F.R. § 160.103; "**Treatment**" to include any activity that involves "the provision, coordination, or management of health care and related services by one or more health care providers," 45 C.F.R. § 164.501; "**Payment**" to include "activities undertaken by . . . [a] health care

provider or health plan to obtain or provide reimbursement for the provision of health care," *id.*; and "**Health care operations**" to include, among other things, "patient safety activities" and conducting or arranging for "auditing functions, including fraud and abuse detection and compliance programs," *id.*

Thus, this appeal does *not* present the question of whether BIPA exempts *any and all* uses of allegedly biometric information in the health care industry. Rather, it presents the much narrower question of whether BIPA applies to information collected, used, and stored for very specific purposes—namely, purposes related to "health care," "treatment," "payment," and/or "operations" as those terms are used in and defined under HIPAA and its implementing regulations. As Judge Mikva noted, "[i]t is hard to imagine a better example of this than finger-scan information collected by those workers' employers to ensure that medication is properly dispensed." (A73, Mikva, J., dissenting, ¶ 87.) But although the question presented is narrow, its resolution will provide important guidance relevant to dozens of pending cases throughout Illinois.[6]

II. The Plain Language Of BIPA's Health Care Exclusion Does Not Support An Interpretation That It Is Limited To Patient Biometric Data And Interpreting Otherwise Causes A Conflict With Supreme Court Precedent Involving Fundamental Rules Of Statutory Construction.

In her well-reasoned dissent, Judge Mikva determined "[t]he majority ignored important rules of statutory construction" and "overcomplicat[ed] a . . . straightforward

---

[6] *See, e.g.*, *Singer v. Northwestern Mem. Healthcare et al*., No. 2022-CH-08798 (Ill. Cir. Ct. Cook Cnty.); *Heard v. Becton, Dickinson & Co*., No. 19 C 4158 (N.D. Ill.); *Lorenz v. Morris Hosp. & Healthcare Ctrs*., No. 2021L2 (Ill Cir. Ct. Grundy Cnty.); *Readdy v. Kindred THC Chicago, LLC, et al*., No. 2022-CH-01581 (Ill. Cir. Ct. Cook Cnty.); *Andere v. Amita Health Adventist Med. Ctr Bolingbrook*, No. 2021-L-000893 (Ill. Cir. Ct. Will Cnty.); *Dowell v. Springfield Mem. Hosp. and Mem. Health Sys*., No. 2022-LA-000134 (Ill. Cir. Ct. Sangamon Cnty.); *Peaks-Smith v. St. Anthony Hosp*., No. 2018-CH-07077 (Ill. Cir. Ct. Cook Cnty.).

reading of this exclusion." (A68, Mikva, J., dissenting, ¶ 74). Bedrock rules of statutory construction should have guided the analysis, but they were missed in two important ways. Specifically, the majority ignored (1) the axiomatic rule that statutes should be construed so that no word is rendered superfluous, and (2) the last antecedent rule, which "make[s] clear" that the health care exclusion "extends to biometric information collected from health care workers . . . and is not limited . . . to biometric information collected from patients." (A69, Mikva, J., dissenting, at ¶ 76).

First, the majority's interpretation of the health care exclusion contravenes the fundamental rule of statutory construction that each word in a statute is to be "given a reasonable meaning and not rendered superfluous." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001). This Court has made clear that "[t]he word 'or' is disjunctive. As used in its ordinary sense, the word 'or' marks an alternative indicating the various parts of the sentence which it connects are to be taken separately. In other words, 'or' means 'or.'" *Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 145 (2006) (internal citations omitted). The Illinois legislature chose to separate the statute's reference to "information captured from a patient in a health care setting" from the reference to "information collected, used, or stored for health care treatment, payment, or operations," with an "or." 740 ILCS 14/10. The statute repeats the word "information" at the beginning of each separate clause, further emphasizing that each of the two clauses separated by the "or" exempts a different category of "information." Consequently, information is exempt from BIPA if it meets *either* of those statutory criteria. And, critically, the second exclusion does *not* include any reference to "patient."

Under the majority's interpretation, "the two categories can be seen as protecting: (1) information captured from the patient in a healthcare setting and (2) information that is already protected 'under the federal Health Insurance Portability and Accountability Act of 1996.'"[7] (A62 ¶ 60 n.8.) However, information gathered from patients *is* information protected under HIPAA. The First District tried to explain away this redundancy by stating that "[t]he first sub-exclusion or category is for information 'captured'" and "the second sub-exclusion or category is for information that is 'collected, used or stored.'" (A60-61 ¶¶ 58-59.) However, the redundancy lies not in these verbs but rather in the *information* the First District held the two clauses are excluding—"information gathered from patients" and "information protected under HIPAA." (A71-72, Mikva, J., dissenting, ¶ 84.) As Judge Mikva explained, "in the majority's reading, all 'information' is patient information. Under this reading, there is simply no reason to use the word 'information' twice in the disjunctive, suggesting that the exclusion is referencing two different kinds of information." (A72, Mikva, J., dissenting, ¶ 84 (citation omitted).)

Judge Mikva's dissent correctly explains "the first part of this provision excludes from the Act's coverage information from a particular source—patients in a health care setting—and the second part excludes information used for particular purposes—healthcare treatment, payment, or operations—regardless of the source of that information" because "[t]he plain language of the statute, and particularly the use of the words 'from' and 'for,' make this clear." (A69, Mikva, J., dissenting, ¶ 75.) There simply is no correct

[7] Tellingly, the majority's opinion here *changes* the language of the second definitional exclusion in trying to explain what it covers. The actual statutory language does *not* refer to "information that is already protected" under HIPAA, but rather to "information collected, used, or stored for health care treatment, payment, or operations" under HIPAA. 740 ILCS 14/10.

statutory interpretation of BIPA's text that would limit the second exclusion for health care-related information to information collected from a patient; the "or" necessarily means any information—not just patient information—collected, used, or stored in connection with health care treatment, payment, or operations under HIPAA is exempt from BIPA.

Second, the majority improperly applied the last antecedent rule. Here, the phrase "under HIPAA" modifies the phrase "health care treatment, payment, or operations." Where, as here, "under" is used as a preposition, it is defined as "subject to the authority, control, guidance, or instruction of." Merriam-Webster-Dictionary, "under," https://www.merriam-webster.com/dictionary/under (last visited Oct. 19, 2022). Taken together with the last antecedent doctrine, "under HIPAA" means that HIPAA "guides" the analysis of the meaning of "health care treatment, payment, or operations." As noted above, each of these terms is explicitly defined in the HIPAA regulations. Furthermore, as Judge Mikva recognized:

> This triumvirate of healthcare treatment, payment, and operations is repeatedly used to define the activities of covered entities that are the subject of those regulations. *See, e.g.*, 45 C.F.R. § 164.506 (titled "Uses and disclosures to carry out treatment, payment, or health care operations" and employing the phrase "treatment, payment, or health care operations" an additional seven times); *id.* § 164.502 (using the phrase twice); *id.* § 164.504 (using the phrase three times); *id.* § 164.508 (using the phrase once); *id.* § 164.514 (using the phrase once); *id.* § 164.520 (using the phrase twice); *id.* § 164.522 (using the phrase twice); *id.* § 164.528 (using the phrase once); *id.* § 170.210 (using the phrase twice); and *id.* § 170.315 (using the phrase once).

(A70, ¶ 80.)

The First District misapplied the last antecedent rule because it determined "under [HIPAA]" would apply only to the word "operations," rather than to "treatment" and "payment," as well. But "application of the last antecedent rule is always limited by 'the intent of the legislature, as disclosed by the context and reading of the entire statute.'"

(A71, Mikva, J., dissenting, ¶ 82) (citing *In re E.B.*, 231 Ill. 2d 459, 467 (2008)). Here, the context of the statute shows "under [HIPAA]" applies to all three terms—particularly because variations of the phrase "health care treatment, payment, or operations" is commonly used throughout HIPAA regulations. *See Vaughn v. Biomat USA Inc.*, No. 20-cv-4241, 2022 WL 4329094, at *8 (N.D. Ill. Sept. 19, 2022) (rejecting argument "under HIPAA" could modify "only the word 'operations'" because "'treatment, payment, and operations' is a phrase the Illinois General Assembly borrowed from HIPAA regulations").

The First District also erroneously rejected the above definition of "under," and instead, applied the definition "below or beneath so as to be . . . covered or protected . . . by." (A63-64, ¶ 63) (citing Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under)). The Merriam-Webster dictionary provides the following examples with the definition adopted by the majority: "under sunny skies"; "under a stern exterior"; and "under cover of darkness." *Id.* In other words, the majority found that "under HIPAA" is like "under the sky," instead of "under the terms of a contract or program." This is illogical. Because HIPAA's regulations define the terms at issue (*i.e.*, treatment, payment, or operations), Defendants' proposed definition is the only logical one; HIPAA does not "protect" health care "treatment," "payment," or "operations," **it defines them**. (A69, 72, Mikva, J., dissenting, ¶¶ 78, 86).

In short, when the canon against superfluousness and the last antecedent rule are properly applied, BIPA's plain language dictates that the health care exclusion is *not* limited to patient data. Supreme Court review is necessary here to correct the First District's erroneous application of these fundamental canons of statutory construction.

III. The Legislature's Decision To Exempt Certain Health Care Uses From BIPA Comports With Federal And Industry Guidance To Health Care Providers.

Because BIPA's language is unambiguous, there is no need to look beyond the language of the statute. However, even if the Court were to engage in such exercise, the Illinois legislature's decision to exempt "information collected, used, or stored for health care treatment, payment, or operations" from BIPA's coverage makes eminently good policy sense. In addition to the plain language of BIPA including two independent exclusions, BIPA instructs that "[n]othing in [the] Act shall be construed to conflict with . . . the [HIPAA] and the rules promulgated under [HIPAA]." 740 ILCS 14/25(b). The Illinois legislature clearly stated that "[BIPA] provides exemptions as necessary for hospitals." *See* H.R. 95-276, Gen. Assemb., at 249 (Ill daily ed. May 30, 2008) (statement of Rep. Ryg) (R80); *see also Bogseth v. Dr. B. Emanuel*, 261 Ill.App.3d 685, 690 (1st Dist. 1994) ("An effective means of ascertaining the intent underlying specific legislation is to analyze the legislative history, including debates of legislators conducted on the floor of the General Assembly.").

In addition to conflicting with the plain language of the health care exclusion, applying BIPA to medication dispensing systems used by hospital workers would directly conflict with the Department of Health and Human Services' ("HHS") guidance regarding HIPAA. Since at least 2006, HHS has recommended that covered entities implement authorization and authentication procedures, including "the use of biometrics, such as fingerprint readers on portable devices."[8] HHS has also recommended that covered entities

[8] HIPAA Security Guidance at 5, Dep't of Health and Human Servs., (Dec. 28, 2006) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/remoteuse.pdf?language=es.

"require something unique to the individual such as a biometric. Examples of biometrics include fingerprints, voice patterns, facial patterns or iris patterns."[9] Furthermore, in 2008, the Department of Commerce's National Institute of Standards and Technology provided instructions for compliance with HIPAA by noting that covered entities could use "some type of biometric identification . . . such as a fingerprint" to ensure the privacy and protection of sensitive patient information.[10] Covered entities have also been encouraged to implement processes to verify that the individual attempting to access information is who they claim to be by providing proof of identity through the use of a password, a smart card, a token, or biometric authentication (fingerprints, voice patterns, etc.). *Id.*

HHS guidance makes clear that use of biometric identifiers and biometric information in the health care setting is not just permitted, but favored, as a means of implementing HIPAA's public policy and safety goals. Indeed, the federal government has been recommending—since before BIPA was passed—the use of fingerprints or other biometrics for authorization and authentication procedures in health care. Other health care industry associations, such as the American Society of Health-System Pharmacists[11] and

---

[9] HIPAA Security Series at 10, Dep't of Health and Human Servs., (Mar. 2007) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/techsafeguards.pdf?language=es.

[10] An Introductory Resource Guide for Implementing the Health Insurance Portability and Accountability Act (HIPAA) Security Rule at 46, Dep't of Commerce, Nat'l Inst. of Standards and Tech. (Oct. 2008) available at https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/nist80066.pdf.

[11] American Society of Health-System Pharmacists, ASHP Guidelines on Preventing Diversion of Controlled Substances. *Am. J. Health-Syst Pharm*. 2017; 74:325-48, at p.85 ("For automated dispensing devices, biometric identification with a user ID is preferred over passwords.").

the Institute for Safe Medication Practices,[12] recommend the use of biometrics as the *preferred* method for securing access to controlled substances.

In light of this industry standard and strong guidance, it makes sense that the Illinois legislature chose to exempt certain uses of biometric technology in health care settings from BIPA's requirements through the exclusion in Section 10. BIPA's health care exclusion allows entities covered by BIPA to freely use biometric technology in accordance with federal and health care industry recommendations.

Any argument that the Illinois legislature could not have intended to exclude certain specified uses of health care workers' information from BIPA is further undermined by the fact that BIPA includes other exemptions that are far broader than the health care exclusion. For example, BIPA completely exempts from its coverage any "financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder," and any "contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." 740 ILCS 14/25(c) & (e). It is reasonable to conclude that the Illinois legislature meant to exclude certain specified uses of biometrics in the health care setting, where the legislature also included even broader exemptions for other industries.

Health care is a safety sensitive and therefore heavily regulated industry. It is reasonable that the legislature exempted "information collected, used, or stored for health

---

[12] Institute for Safe Medication Practices, Guidelines for the Safe Use of Automated Dispensing Cabinets, available at https://www.ismp.org/resources/guidelines-safe-use-automated-dispensing-cabinets, at Guideline 2.2(a) ("Use biometric identification for ADC [automated dispensing cabinet] access whenever possible.").

care treatment, payment, or operations," to ensure that BIPA did not interfere with health care providers' ability to deliver health care services safely and effectively. Where BIPA claims are based on information collected for "health care," "treatment," "payment," and/or "operations" as those terms are defined under HIPAA, BIPA's health care exclusion applies and exempts such use from BIPA's coverage.

IV. The First District's Split Opinion Highlights The Need For the Exercise Of The Supreme Court's Supervisory Authority.

The First District's split opinion, with Justice Mikva dissenting, highlights the need for the exercise of the Supreme Court's supervisory authority. Although the majority and dissent both agree that BIPA is an "unambiguous statute," the majority's misapplication of fundamental canons of statutory construction necessitates the Court's intervention so that BIPA is interpreted in the way intended by the Illinois legislature. Therefore, this Court should exercise its supervisory authority to review the First District's opinion and resolve the issues of statutory construction raised in the majority and dissenting opinion.

CONCLUSION

Defendants respectfully request that this Court grant their petition for leave to appeal pursuant to Rule 315. Both BIPA's plain language and underlying policy considerations require that information collected, used, or stored for "health care," "treatment," "payment," or "operations," as those terms are defined under HIPAA and its regulations, is exempt from BIPA. Fundamental principles of statutory construction show this is so regardless of whether the information is collected from a patient or from a health care worker.

Dated: November 4, 2022

Respectfully submitted,

/s/ *Bonnie Keane DelGobbo*
Bonnie Keane DelGobbo (6309394)
Joel Griswold (6277574)
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
(312) 416-6200
Email: bdelgobbo@bakerlaw.com
jcgriswold@bakerlaw.com

Attorneys for Defendant-Applicants Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

/s/ *Matthew C. Wolfe*
Gary M. Miller (6229867)
Matthew C. Wolfe (6307345)
Elisabeth A. Hutchinson (6338043)
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
(312) 704-7700
Email: gmiller@shb.com
mwolfe@shb.com
ehutchinson@shb.com

Attorneys for Defendant-Applicant Becton, Dickinson and Company

RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,286 words.

/s/ *Matthew C. Wolfe*

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on November 4, 2022 he caused the Petition and Appendix of Appellants Northwestern Lake Forest Hospital, Northwestern Memorial HealthCare, and Becton, Dickinson and Company for Leave to Appeal Pursuant to Rule 315 to be electronically filed with the Clerk of the Illinois Supreme Court, using the Odyssey eFileIL system, and served upon the following counsel of record via electronic mail:

Ryan F. Stephan
James B. Zouras
Andrew C. Ficzko
Catherine T. Mitchell
Paige L. Smith
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, IL 60601
Tel: (312) 233-1550
Email: rstephan@stephanzouras.com
jzouras@stephanzouras.com
aficzko@stephanzouras.com
cmitchell@stephanzouras.com
psmith@stephanzouras.com

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned attorney certifies that the statements set forth above are true and correct.

/s/ *Matthew C. Wolfe*

IN THE ILLINOIS SUPREME COURT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants-Appellants.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018-CH-05031 The Honorable Judge Pamela McLean Meyerson Judge Presiding
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE Defendants-Appellants.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Judge Alison C. Conlon, Judge Presiding

Application from the Illinois Appellate Court, First District
2022 IL App (1st) 200822
The Honorable Justice Sharon Oden Johnson, Mary L. Mikva, and Raymond W. Mitchell

APPENDIX TO RULE 315 PETITION FOR LEAVE TO APPEAL OF APPELLANTS NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, AND BECTON DICKINSON AND COMPANY

ORAL ARGUMENT REQUESTED IF THE APPLICATION IS ALLOWED

Joel Griswold
Bonnie Keane DelGobbo
BAKER & HOSTETLER LLP
1 North Wacker Drive
Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200
Email: jcgriswold@bakerlaw.com
bdelgobbo@bakerlaw.com

Counsel for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

Gary M. Miller
Matthew C. Wolfe
Elisabeth A. Hutchinson
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700
Email: gmiller@shb.com
mwolfe@shb.com
ehutchinson@shb.com

Counsel for Becton, Dickinson and Company

TABLE OF CONTENTS TO APPENDIX

Page

2022 IL App (1st) 200822

SIXTH DIVISION
Filing Date February 25, 2022

Nos. 1-20-0822 and 1-21-0895, cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 05031 The Honorable Pamela McLean Meyerson, Judge, Presiding.

YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, NORTHWESTERN MEMORIAL HEALTHCARE, OMNICELL, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 71601 The Honorable Alison C. Conlon, Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Justices Harris and Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Lucille Mosby filed a class-action suit individually and on behalf of others similarly situated against defendants Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc. (collectively Ingalls), and Becton, Dickinson and Company (BD) (collectively group defendants one). Similarly, plaintiff Yana Mazya filed a class-action suit individually and on behalf of others similarly situated against Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare (collectively group defendants two). During the course of the litigation, group defendants one filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) to have this court answer this certified question:

> "Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?"

¶ 2 Subsequently, group defendants two also filed an interlocutory appeal pursuant to Rule 308 concerning the same issue:

> "Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act's exclusion for 'information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996,' 740 ILCS 14/10, when the

employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations?"

Both group defendants' petitions for leave to appeal were permitted, as discussed in detail below. However, at this time, the only question submitted for this court's review is the question submitted by group defendants two, and we answer the question in the negative.

¶ 3 I. BACKGROUND

¶ 4 A. Mosby

¶ 5 On April 18, 2018, Mosby filed a class-action complaint against Ingalls and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Biometric Information Privacy Act (Act) (740 ILCS 14/15(a)-(d) (West 2018)). Mosby worked as a registered pediatrics nurse at Ingalls Memorial Hospital. As a condition of Mosby's employment, she was required to scan her fingerprint to authenticate her identity and gain access to a medication dispensing system. Mosby alleged that defendants' behavior exposed employees like herself to serious irreversible privacy risks. Mosby alleged that defendants violated the Act by (1) not informing her in writing of the specific purpose and the length of time for which her fingerprints were being collected, stored, and used; (2) failing to provide a publicly available retention schedule and guidelines for permanently destroying Mosby's fingerprints; (3) failing to obtain a written release from Mosby to collect, store, disseminate, or otherwise use her fingerprint; and (4) failing to obtain consent before disclosing Mosby's fingerprints to third-party vendors that host the data.

¶ 6 On May 14, 2019, plaintiff filed an amended class-action complaint that was substantially similar to the original.

¶ 7 On June 5, 2019, defendants filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code of Civil Procedure (Code) or to strike the amended complaint. The motion argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id*. § 2-619(a)(9)) because (1) the biometric data that was collected, used, and/or stored restricted access to protected health information and medication and (2) the data was used for healthcare treatment and operations pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (45 C.F.R. § 164.501 (2018)) and was thereby specifically excluded from the scope of the Act. Defendants argued that, pursuant to section 2-615 (735 ILCS 5/2-615 (West 2018)), Mosby failed to allege any well-pleaded facts regarding any disclosures of her fingerprints.

¶ 8 On January 13, 2020, the circuit court ruled that the exception was limited as to the information protected under HIPAA. To hold otherwise, the court noted, would result in a broad exception for all employees involved in operations that impact patients protected by HIPAA. The circuit court opined that, if the legislature intended to exempt employees entirely, they would have expressly done so. The court denied defendants' motion to dismiss based on this issue. The circuit court dismissed BD from the complaint in its entirety, without prejudice, and found that Mosby failed to state a claim as to how defendants disseminated her biometric information. With authorization of the circuit court, Mosby amended her pleadings on February 24, 2020, which realleged all of the claims contained in the previously dismissed claim.

¶ 9 On March 16, 2020, defendants filed a joint motion to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) and stay proceedings. Defendants argued that the question of whether employee information was also exempt under

the Act was a question of first impression and has never been heard before this court. Defendants argued that the question was one of statutory construction and there existed a substantial ground for a difference of opinion, which made it appropriate to bring under Rule 308. Defendants maintained that raising the question would be beneficial in a variety of ways, such as: (1) it would advance the outcome of the case with prejudice if the Act was interpreted in their favor, (2) judicial economy would be served, and (3) the need for a uniform construction and application of the law would be served. Defendants also requested a stay in the circuit court proceedings because the determination could lead to a dismissal and Mosby would not be prejudiced.

¶ 10 On April 20, 2020, Mosby filed a motion in opposition to defendants' joint motion to certify the question for interlocutory appeal, arguing that substantial grounds for difference of opinion did not exist. Mosby maintained that to hold otherwise would mean that the General Assembly intended to place anyone employed in the healthcare industry into an "unregulated biometric abyss," by having no biometric protections. Mosby argued that defendants did not demonstrate that they faced any hardship or inequity to justify a stay that would outweigh the prejudice she would suffer. Mosby maintained that the prejudice she would suffer if a stay was granted was the denial of pursuing her claim in an expedient manner and, if successful, the collection of damages. Mosby argued that defendants' conduct was ongoing and continuous and every day that passed would compound the injuries that they were inflicting.

¶ 11 On May 4, 2020, defendants filed a joint reply arguing that the proposed certified question was tailored and limited to those circumstances where the biometric data collected from healthcare workers were used for healthcare treatment, payment, or operations under HIPAA. Defendants further argued that the circuit court did not entirely reject its argument and found

it plausible but ultimately concluded that the General Assembly would have been more explicit if the legislative intent was to exclude healthcare employees' biometric data.

¶ 12 On June 18, 2020, the circuit court granted defendants' motion to certify and stay the proceedings. The circuit court ruled that the issue posed by defendants presented a question of law where there was substantial ground for difference of opinion and could ultimately determine whether or not the case should be dismissed.

¶ 13 On July 17, 2020, defendants filed an application for leave to appeal pursuant to Rule 308, which we denied on August 24, 2020. Defendants filed a petition for leave to appeal with the Illinois Supreme Court, on October 30, 2020. On March 3, 2021, the Illinois Supreme Court issued a mandate vacating this court's decision and ordered this court to hear the certified question on appeal. On June 11, 2021, Ingalls filed an unopposed motion for extension of time to file an opening brief, where they informed the circuit court that the parties reached a settlement in principle. [1]

¶ 14 B. Mazya

¶ 15 On April 10, 2019, Yana Mazya and Tiki Taylor filed an amended class-action complaint[2] against Northwestern Lake Forest Hospital, Northwestern Memorial Healthcare, Northwestern Memorial Hospital (collectively Northwestern), Omnicell Inc., and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Mazya was employed as a registered nurse at Northwestern Memorial Lake Forest Hospital, while Taylor worked as a patient care technician at Northwestern Memorial

[1]This agreement was between Ingalls and Mosby, not BD.

[2]The initial complaint that was filed is not provided in the record, which was of no consequence here, because Northwestern Memorial Hospital Taylor and Northwestern Memorial Hospital were not originally parties.

Hospital; both were required to scan their fingerprints to gain access to the medication dispensing system as a condition of their employment. Mazya and Taylor alleged Northwestern disregarded their statutorily protected privacy rights when they unlawfully collected, stored, used, and disseminated their biometric data in violation of the Act. Mazya and Taylor specifically alleged that defendants were in violation of the Act because it failed to (1) inform them in writing of the specific purpose and length of time for which their fingerprints were being collected, stored, and used; (2) receive a written release to collect, store, or otherwise use their fingerprints; (3) provide a publicly available retention schedule and guidelines for permanently destroying their fingerprints; and (4) obtain consent from them to disclose, redisclose, or otherwise disseminate their fingerprints to a third party.

¶ 16 On July 2, 2019, Taylor was dismissed without prejudice from the complaint as her claims were preempted because she was a party to a collective bargaining agreement.[3]

¶ 17 On January 17, 2020, Northwestern[4] filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code. Northwestern argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id.* § 2-619(a)(9)) because the General Assembly specifically excluded information collected from healthcare treatment, payment, or operations in the Act. Northwestern further argued that the complaint should be dismissed pursuant to section 2-615 (*id*. § 2-615) for failure to state a claim because Northwestern did not store or possess her biometric information in violation of the Act when it was used for healthcare treatment, payment, or operations. Northwestern maintained that nothing in the Act was

[3]The dismissal occurred after Northwestern removed this case to the Northern District of Illinois under case number 19 C 3191 (*Mazya v. Northwestern Lake Forest Hospital*, No. 19-CV-3191 (N.D. Ill. June 19, 2019)); the case was subsequently returned to the circuit court.

[4]Defendants Omnicell Inc. and BD were dismissed from this complaint; however, the record does not reflect exactly when that occurred. We will address these defendants collectively as Northwestern for the remainder of this opinion.

intended to interfere with HIPAA and that applying it to their medication dispensing systems would conflict with guidance previously given by the Department of Health and Human Services (HHS), which encouraged the use of biometrics in health. Northwestern argued that Mazya knew her information was being collected and had the power to withhold consent, citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 34, as support. Northwestern further argued that Mazya failed to provide factual allegations supporting her conclusory assertions that Northwestern's conduct was intentional or reckless. Lastly, Northwestern requested that Northwestern Memorial Hospital be dismissed from the proceedings, since Taylor was dismissed.[5]

¶ 18 On March 13, 2020, Mazya filed a response to Northwestern's motion to dismiss, arguing that her claims were actionable because they did not fall under any exemption under the Act and the failure to comply with distinct requirements of the Act was all that she needed to demonstrate. Mazya maintained that the Act's explicit reference to biometric data taken from a patient shows the intent of the General Assembly to exclude patient biometrics from the Act's protection because they were already protected by HIPAA. Mazya further maintained that if the General Assembly wanted to provide a sweeping categorical exemption for hospitals it would have done so as evidenced by the exclusion of financial institutions reflected in section 25(c) of the Act (740 ILCS 14/25(c) (West 2018)).

¶ 19 Northwestern filed a reply on April 3, 2020, arguing that Mazya's interpretation of the Act ignored the disjunctive "or" provided in section 10 of the Act, which connotes two different alternatives, and thus the exemption included employee information. Northwestern maintained

[5]The record reflects that on March 10, 2020, Mazya moved to voluntarily dismiss Northwestern Memorial Hospital from this action; however, the record does not reflect when the motion was granted.

that Mazya failed to rebut their argument that she failed to state a claim because her claims were not supported by the language of the statute and were solely policy-based. Northwestern further maintained that it would be good policy to interpret the statute their way given that the usage of biometric information has been encouraged by the government.

¶ 20 On November 2, 2020, the circuit court denied Northwestern's section 2-619.1 motion. The circuit court found Northwestern's section 2-619 argument unpersuasive because the burden for compliance with the Act falls on the collector of the data, not the provider. Put another way, Mazya did not waive her consent by continuing to offer her biometric data to Northwestern as a condition of her duties as a nurse. The circuit court found that accepting Northwestern's interpretation of the Act would amount to medical professionals having no protections for their biometric information. In regard to Northwestern's section 2-615 arguments, the circuit court found that, to have a viable claim, (1) the claimant need not lack knowledge of the violation, as the violation itself was enough to support the statutory cause of action, and (2) the claimant was not required to plead an intentional or reckless violation of the Act, at that stage of the proceedings.

¶ 21 On November 30, 2020, Northwestern filed a corrected motion for Rule 308 certification and to stay the proceedings. Northwestern argued that there were substantial grounds for difference of opinion given the disjunctive "or" in section 10. Northwestern further argued that the proceedings should be stayed pending this court's decision because our answer to the question could expedite the resolution of the underlying case.

¶ 22 On December 11, 2020, Mazya filed a motion to strike Northwestern's motion for certification and stay. Mazya argued that Northwestern was trying to certify the same question that this court denied in *Mosby v. Ingalls Memorial Hospital*, No. 1-20-0822, which led to the

circuit court's denial of the defendant's section 2-619.1 motion; therefore, the motion to certify was frivolous and did not warrant interlocutory review.

¶ 23 Later, on January 13, 2021, Mazya filed a response in opposition to Northwestern's motion for Rule 308 certification and stay, reiterating her previous arguments and noting that Northwestern had not lodged any new arguments or law on the matter.

¶ 24 On February 9, 2021, Northwestern filed a reply in further support of their Rule 308 motion, informing the circuit court that the Illinois Supreme Court directed this court to vacate its August 24, 2020, order and accept the Rule 308 appeal (*Mosby v. Ingalls Memorial Hospital*, No. 126590 (Ill. Jan. 27, 2021) (supervisory order)).

¶ 25 On February 9, 2021, the circuit court denied Northwestern's Rule 308 motion but stayed the proceedings pending the decision in *Mosby*.

¶ 26 On June 15, 2021, Northwestern filed a motion to reconsider the denial of their Rule 308 certification, arguing that the parties in *Mosby* reached a settlement in principle and that no one would be presenting any arguments on appeal on behalf of a hospital that uses medication dispensing systems secured by finger-scan technology. Mazya responded on June 22, 2021, that plaintiffs were not opposed to the appellate court hearing a certified question.

¶ 27 On July 23, 2021, the circuit court granted the motion to reconsider and stayed the proceedings, noting that the issue involves a question of law as to which there were substantial grounds for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. Accordingly, the circuit court certified its question to this court.

¶ 28 On July 27, 2021, Northwestern filed an application for leave to appeal pursuant to Rule 308 reiterating the arguments they made at the circuit court and requesting that the case be consolidated with *Mosby*. We granted the motion on August 13, 2021.

¶ 29 On August 5, 2021, an *amicus curiae* brief was filed on behalf of the Illinois Health and Hospital Association, Northwestern Memorial Healthcare, and Amita Health (collectively the *amici*), in support of defendants' position. They reiterated defendants' arguments and also argued that interpreting section 10 in favor of plaintiffs regarding the medical supply dispensing systems at issue could result in undesirable consequences for healthcare providers. The *amici* argued that plaintiffs' interpretation could be financially burdensome and result in a lower quality of care for patients.

¶ 30 II. ANALYSIS

¶ 31 On appeal, Northwestern contends that this court should answer the certified question in the affirmative because the plain language of section 10 demonstrates that employee biometric information used in medication dispensing systems is excluded from protections of the Act.

¶ 32 A. Jurisdiction

¶ 33 We have jurisdiction to review the certified question pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). In general, courts of appeal have jurisdiction to review only final judgments entered in the circuit court unless there is a specific statutory exception or rule of the supreme court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Rule 308 is one such exception that allows for the permissive appeal of an interlocutory order certified by the circuit court, as involving a question of law, as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate

termination of the litigation. *Id.* Therefore, we are limited to answering the specific question certified by the circuit court. *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9.

¶ 34 B. Standard of Review

¶ 35 When reviewing a certified question of law pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), we apply a *de novo* standard of review. *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 31. *De novo* review is also appropriate because this resolution turns on a question of statutory construction. *Eighner v. Tiernan*, 2020 IL App (1st) 191369, ¶ 8. "The primary rule of statutory construction is to give effect to the intent of the legislature." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 181 (2007). The statutory language itself is the best evidence of legislative intent, which must be given its plain and ordinary meaning. *Id.* The statute should be read as a whole. *Id.* "Where the meaning of a statute is unclear from a reading of its language, courts may look beyond the statutory language and consider the purpose of the law, the evils it was intended to remedy, and the legislative history of the statute." *Id.*

¶ 36 1. Plain Language

¶ 37 The Act on which the certified question is based defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILCS 14/10 (West 2018). The Act defines "biometric identifiers" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* The parties do not dispute that the fingerprint scan of plaintiff and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as outlined in the Act.

¶ 38 Section 10 of the Act provides exclusions to the protections of the Act; specifically at issue is the following language:

> "Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." *Id.*

While section 25(c) and (e) expressly provides that the Act will not apply to certain entities and persons:

> "(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 [(15 U.S.C. § 6803 (2018))] and the rules promulgated thereunder.
>
> ***
>
> (e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." *Id.* § 25(c), (e).

¶ 39 Northwestern and the *amici* contend that the hospital workers' use of medication dispensing systems falls within the Act's definitional carveouts for health-related information. Northwestern and the *amici* maintain that the medication dispensing system that is at issue in this case is permitted to collect information for "healthcare treatment, payment, or operations" as defined by HIPAA. 45 C.F.R. § 164.501(2) (2018). This includes the fingerprint scan of its employees who facilitate the dispensing and administration of medications proscribed by patients. Northwestern and the *amici* assert that the collection, use, and storage of healthcare

workers' biometric information is for "health care" and "treatment" that Northwestern provides to its patients and those terms are defined by HIPAA. *Id.* Northwestern and the *amici* contend that this medication dispensing system also acts to provide an audit trail, which includes diversion, fraud, and abuse detection. Northwestern and the *amici* assert that this system additionally aids in patient safety, quality of care, and accurate billing. Northwestern and the *amici* contend that the biometric information is collected through the medication dispensing system and is also used for "health care operations" and "payment."

¶ 40 Northwestern and the *amici* contend that the circuit court erred in finding that the carveouts for health-related information apply only to information taken from a patient because the plain language of the Act does not read to limit patient biometric data. Northwestern and the *amici* maintain that biometric identifiers as defined by the Act included an "or" exception as they pertain to health care information. Northwestern and the *amici* assert that "or" is disjunctive and connotes two different alternatives. Northwestern and the *amici* assert that this "or" indicates that a different category of exemptions is allowed and that this is not limited to patient data. Northwestern and the *amici* maintain that, to fall within the exception of the Act, the biometric information obtained must either (1) be obtained in a healthcare setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA.

¶ 41 Plaintiffs contend that the circuit court did not err in holding that Northwestern is not exempt from the Act and that it excludes only patient biometric data from its protections because patient data is already protected by HIPAA. Plaintiffs assert that this would in effect leave thousands of hospital workers unprotected from the risks that the Act was designed to protect against. Plaintiffs assert that Northwestern's interpretation of how "or" creates two

clauses would make sense if the "under HIPAA" language was not present because patient information is the only information governed by HIPAA.

¶ 42 Northwestern's reply brief asserts that the storage of healthcare workers' biometric information, obtained when accessing a medication dispensing system, is for the "health care" and "treatment" of patients as those terms are defined by HIPAA; therefore, the "under HIPAA" language does not exclude this type of information.

¶ 43 We find that the language of the statute is clear and simple disagreement between the parties will not create ambiguity in the statute. *Kaider v. Hamos*, 2012 IL App (1st) 111109, ¶ 11. What is excluded from the protections of section 10 are (1) information from the patient in a healthcare setting and (2) information that is already protected "under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10 (West 2018). Even taking into consideration the disjunctive "or," section 10 still has the same effect of excluding those two classifications of information. Indeed, the disjunctive "or" means that patient information and information under HIPAA are alternatives that are to be considered separately. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 111 (2011).

¶ 44 At oral argument, Northwestern argued that this court should not consider the terminology "under HIPAA" and instead we should consider this as "defined by HIPAA." However, "under HIPAA" is what the Act expressly states, and that cannot be ignored. We are simply unable to rewrite the statute. *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 15. Either way, the biometric information of employees is simply not defined or protected "under HIPAA." Accordingly, the plain language of the statute does not exclude employee information from the Act's protections because they are neither (1) patients nor (2) protected under HIPAA. We further find that, if the legislature intended to create a wide-ranging

exemption for hospitals, it would have done so, since the Act does contain a separate blanket exclusion. This is demonstrated in the Act when the legislature expressly provided that the Act was not to apply to financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and employees, contractors, or subcontractors of local government or the State as provided in section 25. 740 ILCS 14/25 (West 2018).

¶ 45 Northwestern's inclusion of employee's biometric information under the exclusion goes beyond the plain language of the Act. We are unable to rewrite the statute to add provisions or limitations that the legislature did not include. *Zahn*, 2016 IL 120526, ¶ 15. No rule of construction permits this court to declare that the legislature did not mean what the plain language of the statute imports. *Id.* There is simply no provision or reference to the protection of employee biometric data in the Act or in HIPAA. Thus, we will not add employee biometric data as information to be excluded by the Act because it would be contrary to the plain language of the Act. Based thereon, we need not consider other sources in order to find the statutory meaning. *Kaider*, 2012 IL App (1st) 111109, ¶ 11.

¶ 46 III. CONCLUSION

¶ 47 Consistent with the plain language of the Act, we find that the legislature did not exclude employee biometric information from its protections, and we answer the certified question in the negative. We remand this cause for further proceedings consistent with this opinion.

¶ 48 Certified question answered; cause remanded.

No. 1-20-0822

Cite as:	*Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 18-CH-05031, 18-CH-07161; the Hon. Pamela McLean Meyerson and the Hon. Alison C. Conlon, Judges, presiding.
Attorneys for Appellant:	Joseph A. Strubbe, Frederic T. Knape, and Zachary J. Watters, of Vedder Price P.C., and Gary M. Miller, Matthew C. Wolfe, and Elisabeth A. Hutchinson, of Shook, Hardy & Bacon L.L.P., both of Chicago, for appellants Ingalls Memorial Hospital, UCM Community Health & Hospital Division, Inc., and Becton, Dickinson and Company. Joel Griswold and Bonnie Keane DelGobbo, of Baker & Hostetler LLP, of Chicago, for other appellants.
Attorneys for Appellee:	James B. Zouras, Ryan F. Stephan, Andrew C. Ficzko, Catherine T. Mitchell, and Paige L. Smith, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amici Curiae*:**	Michael A. Woods, of Naperville, and Richard H. Tilghman, of Nixon Peabody LLP, and Bonnie Keane DelGobbo and Joel Griswold, of Baker & Hostetler LLP, both of Chicago, for *amici curiae* Illinois Health and Hospital Association *et al.*

E-FILED
Transaction ID: 1-20-0822
File Date: 3/18/2022 3:34 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Nos. 1-20-0822 and 1-21-0895
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 05031 The Honorable Pamela McLean Meyerson, Judge Presiding
YANA MAZYA, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE, *Defendants-Appellants*.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division Case No. 2018 CH 07161 The Honorable Alison C. Conlon, Judge Presiding

PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS

Joel Griswold
Bonnie Keane DelGobbo
BAKER & HOSTETLER LLP
1 North Wacker Drive
Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Counsel for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

Gary M. Miller
Matthew C. Wolfe
Elisabeth A. Hutchinson
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

Counsel for Becton, Dickinson and Company

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

INTRODUCTION

On February 25, 2022, this Court issued its Opinion in *Mazya v. Northwestern Lake Forest Hospital et al.*, No. 1-21-0895, which was consolidated on appeal with *Mosby v. Ingalls Memorial Hospital et al.*, No. 1-20-0822. *See* 2022 IL App (1st) 200822. Defendants-Appellants Northwestern Lake Forest Hospital and Northwestern Memorial Health Care (together, "Northwestern") and Becton, Dickinson and Company ("BD")[1] respectfully petition the Court for a rehearing, including new oral argument, in this consolidated appeal pursuant to Illinois Supreme Court Rule 367 for two reasons, one procedural and one substantive.

Procedurally, the Court's February 25, 2022 Opinion did not answer the certified question raised by BD and the Ingalls Defendants in the *Mosby* matter.[2] The certified question in *Mosby* is different than the question presented in *Mazya* and should be addressed. It seems the Court thought the *Mosby* interlocutory appeal had been stayed because the Ingalls Defendants

---

[1] Northwestern and BD are referred to herein, collectively, as "Defendants." On March 14, 2022, Ingalls Memorial Hospital and UCM Community Health and Hospital Division, Inc. (together, "Ingalls Defendants") and Plaintiff Mosby's motion for final approval of their settlement agreement was approved by the Circuit Court. Accordingly, the Ingalls Defendants are no longer a party to this litigation and are not participating in this petition or appeal going forward.

[2] Because Northwestern is not a party to the *Mosby* appeal, Northwestern takes no position on the procedural issue raised in this petition, which impacts only the *Mosby* appeal. Northwestern joins in this petition only with respect to the substantive issues raised in this petition, which impact both the *Mosby* and *Mazya* appeals.

had reached a settlement in principle with Plaintiff Mosby. However, both the Ingalls Defendants and BD were active in the appeal before this Court, and BD even appeared at oral argument. The *Mosby* appeal is live, and the parties' certified question remains unanswered. BD thus respectfully requests a ruling on the *Mosby* certified question to proceed in that case.

Substantively, Defendants respectfully suggest the Court's Opinion overlooked or misapprehended Illinois law regarding statutory construction, as well as the plain and ordinary meaning of the words used in the statute. Specifically, these consolidated appeals concern the interpretation of the definitional-based Health Care Exclusion found in Section 10 of the Illinois Biometric Privacy At, 740 ILCS 14/1 *et seq.* (the "Act" or "BIPA").

The Health Care Exclusion excludes from the definition of "biometric identifier" two categories of information: "Biometric identifiers do not include information captured from a patient in a health care setting **or** information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996" ("HIPAA"). 740 ILCS 14/10 (emphasis added). This appeal asks whether the second category of information following the "or" covers alleged biometrics collected from hospital employees in connection with patient health care treatment, payment, or operations as those terms are used in HIPAA.

The Court answered the question in the negative, holding the Health Care Exclusion is limited to only patient information. But in doing so, the Court did not discuss:

i. the General Assembly's intentional use of "information" twice, which delineates two distinct categories of information, particularly because these categories of information are separated by a disjunctive "or";

ii. the last antecedent doctrine, which dictates that the prepositional phrase "under HIPAA" modifies only the phrase that immediately precedes it, *i.e.*, "health care treatment, payment, or operations," such that HIPAA's broad definitions of those terms must be considered; and

iii. the ordinary meaning of "under," which is defined as "under the guidance and instruction of"—not "protected by."

Put simply, "information collected, used, or stored for health care treatment, payment or operations under [HIPAA]" does not mean—and the General Assembly did not use—"information already protected by HIPAA." Said differently, the Health Care Exclusion does not exclude from BIPA's reach "patient information collected in a health care setting or patient information under HIPAA." Such a reading imposes redundancy into BIPA where it does not exist. It also does not align with Illinois Supreme Court

precedent governing plain-language statutory construction. Defendants thus ask this Court to reconsider its Opinion, both procedurally and substantively.

In the alternative, Defendants ask that the Court grant a Certificate of Importance under Illinois Supreme Court Rule 316 such that the Illinois Supreme Court may provide final guidance on this issue. The Supreme Court already indicated its position on the importance of the issue in exercising its supervisory authority to direct this Court to accept BD and the Ingalls Defendants' petition for leave to appeal. The Supreme Court would likely be open to accepting the consolidated appeal from this Court to provide finality to the meaning of a provision that is susceptible to differing, reasonable interpretations and exists in a hotly litigated statute. Indeed, over 1,400 putative class actions have been filed in Illinois state and federal courts since 2017. Resolution from the Supreme Court on the scope of the Health Care Exclusion could be dispositive of many of these cases.

ARGUMENT

This petition concerns both the procedural posture of the *Mosby* appeal and the substance of the Court's Opinion. As explained below, Defendants respectfully ask this Court to reconsider its Opinion in both regards. The Court overlooked not only the procedural posture of the *Mosby* appeal and briefing from the *Mosby* parties, but also key canons of statutory construction and plain language definitions at issue in the Health Care Exclusion. When the plain language of the Exclusion and Illinois canons of statutory construction are properly considered, the Exclusion clearly applies to the

facts at issue in both of these appeals: nurses using finger-scan technology to administer, track, and maintain patient pharmaceuticals and health care records. As such, the data at issue is *not* a "biometric identifier" as the term is defined by the Act.

I. The Certified Question in *Mosby* is Pending before this Court and is Ripe for Resolution.

The Court appears to believe that the parties in the *Mosby* appeal did not submit briefs, and so the question in that appeal was not ripe for resolution when it issued its Opinion. *See Mazya*, 2022 IL App (1st) 200822, ¶¶ 2, 13. However, the certified question in the *Mosby* appeal was fully briefed and should have been ruled upon.

The Ingalls Defendants reached a settlement in principle with Plaintiff Mosby. *Id.* ¶ 13. But the Ingalls Defendants' settlement in principle, as the Court seemed to recognize, did not involve the other defendant-appellant in *Mosby*, BD. *Id.* ¶ 13 n.1. What the Court seems to have overlooked is that the settlement in principle did not change the procedural posture of the *Mosby* appeal. Rather, despite the settlement in principle, the Ingalls Defendants participated in the appeal and submitted joint opening and reply briefs with BD, Plaintiff Mosby filed a response brief, and BD appeared at oral argument.

Because the Court apparently did not understand that the *Mosby* appeal was active and had been fully briefed, it did not address a number of arguments made by BD and the Ingalls Defendants in its ruling. *See id.*

¶¶ 39-45 (addressing only the arguments of "Northwestern and its *amici*"). Nor did it answer the question presented by the *Mosby* litigants, which, on its plain terms, is different than the question certified in *Mazya*. Specifically, the *Mazya* certified question asks whether the Exclusion covers "finger-scan information collected by a healthcare provider from its employees . . . when the employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations." In contrast, the certified question in *Mosby* concerns whether the Exclusion "applies to biometric information of healthcare workers (as opposed to patients) collected, used, or stored for health care treatment, payment or operations under HIPAA." The Court therefore should substantively address the certified question in *Mosby* and explain whether its reasoning in the Opinion extends to the certified question in, and facts of, *Mosby*; and if so, why.

BD therefore respectfully requests that the Court address the arguments made in its briefs and answer the *Mosby* certified question, so the parties may properly proceed in the *Mosby* litigation.

II. Illinois Law Governs Plain Language Interpretation of the Health Care Exclusion.

The substantive question before the Court should begin and end with the plain language of BIPA's Health Care Exclusion: "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 740 ILCS 14/10. When this language is properly considered

through the lens of canons of statutory construction set forth by the Illinois Supreme Court, the outcome here is clear: information collected from health care workers using finger-scan technology to administer health care treatment, payment, or operations is *not* within BIPA's definition of "biometric identifier." This is evident for three key reasons overlooked in the Opinion.

First, the Exclusion plainly sets forth two categories of "information," and these two categories of "information" are separated by a disjunctive "or." They must be read separately. The Exclusion cannot be read to mean patient information or patient information. It ignores that the legislature used "or" and twice included the word "information." It also impermissibly creates redundancy in a statute where there is none.

Second, the last antecedent doctrine dictates that the prepositional phrase "under HIPAA" modifies only the phrase or set of words immediately preceding it. Here, that is "health care treatment, payment, or operations." As such, the Court cannot properly analyze the scope of the Health Care Exclusion without reference to how HIPAA defines health care treatment, payment, or operations. When those broad definitions are considered, it is clear that the Health Care Exclusion covers health care worker information when collected for health care treatment, payment, or operations.

Third, this is particularly so because "under" means "subject to the guidance or instruction of." Transforming "*under* HIPAA" to mean "*already*

protected by HIPAA" ignores the plain and ordinary meaning of the word "under."

Statutory construction is, at bottom, an exercise in determining legislative intent. *Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 58. The inquiry thus begins with "[t]he most reliable indicator of legislative intent"—namely, "the language of the statute, which must be given its plain and ordinary meaning." *Haage v. Zavala,* 2021 IL 125918, ¶ 44 (citations omitted). Accordingly, "[w]hen the statutory language is plain and unambiguous, [Illinois courts] may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may [courts] add provisions not found in the law." *Rosenbach v. Six Flags Entm't Corp.,* 2019 IL 123186, ¶ 24. But that is exactly what the Opinion does—it overlooks the grammatical structure of the Exclusion, disregards the plain and ordinary meaning of the words therein, and imposes a limitation not found in BIPA. The Opinion should be reconsidered.[3]

[3] The Opinion also incorrectly stated that "[t]he parties do not dispute that the fingerprint scan of plaintiff and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as outlined in the Act." *Mazya*, 2022 IL App (1st) 200822, ¶ 37. Defendants do dispute this as a factual and legal matter, but the only issues before the Court on Defendants' Rule 308 appeals are the two purely legal questions certified for interlocutory review.

A. Two Uses of "Information" Are Distinct Provisions Separated by a Disjunctive "Or."

The Health Care Exclusion's plain language makes clear that two separate categories of information are carefully carved out from BIPA's reach—one, information from a patient in a health care setting; and two, information collected, used, or stored for health care treatment, payment, or operations under HIPAA.[4] 740 ILCS 14/10. The Exclusion's second category of information is not limited to patient information in the same way it is not a redundant, throwaway clause. To read the Exclusion as such overlooks fundamental principles of statutory construction and rules of grammar.

The Opinion addresses the disjunctive "or" in two sentences: "Even taking into consideration the disjunctive 'or,' section 10 still has the same effect of excluding those two classifications of information. Indeed, the disjunctive 'or' means that patient information and information under HIPAA are alternatives that are to be considered separately." *Mazya*, 2022 IL App (1st) 200822, ¶ 43 (citing *Goldberg v. Brooks,* 409 Ill. App. 3d 106, 111 (2011)). This analysis overlooks that "patient information" already subsumes "information under HIPAA" when the second category of information is interpreted to mean information protected under HIPAA. Such a reading

[4] The Opinion incorrectly summarized Northwestern's argument as being that "to fall within the exception of the Act, the biometric information obtained must either (1) be obtained in a health care setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA." *Mazya*, 2022 IL App (1st) 200822, ¶ 40.

does not offer separate categories of information at all, and under clear Illinois Supreme Court precedent, "[a]s used in its ordinary sense, the word 'or' marks an alternative indicating the various members of the sentence which it connects are to be taken separately." *People v. Fieberg*, 147 Ill. 2d 326, 349 (1992); *see also Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134, 1141 (2018) ("[O]r' is 'almost always disjunctive.'" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

When interpreting the Health Care Exclusion, then, the two categories of "information" separated by an "or" are "to be taken separately." *Fieberg*, 147 Ill. 2d at 349. To this end, the second use of "information" must mean something different than the first because it is separated from it by a disjunctive "or." Had the legislature wanted to limit the second category of information to patient information, *i.e.*, information already protected by HIPAA, it would have connected the two phrases with an "including." It did not. "Including" is nowhere to be found. Instead, the legislature used "or." The Opinion, in its current form, does not address this. *See Vill. of Westmont v. Ill. Mun. Ret. Fund*, 2015 IL App (2d) 141070, ¶ 20 ("It is incorrect to ignore the word 'or.'").

This is particularly so because the Opinion renders the second half of the Health Care Exclusion superfluous. Courts must construe the Health Care Exclusion, like any other statute, "so that each word, clause, and sentence is given a reasonable meaning" without rendering "any portion of

the statute meaningless or void." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001). Said differently, the two clauses must each be read to give effect and independent meaning to each. Yet, if the latter clause of the Health Care Exclusion is deemed to be limited to information collected from patients, "information captured from a patient in a health care setting" would necessarily subsume the distinct clause extending the Exclusion to "information collected, used or stored for health care treatment, payment, or operations." So holding contravenes the Illinois Supreme Court's "fundamental rule of statutory construction that surplusage will not be presumed." *Cosmopolitan Nat. Bank v. Cook Cty.*, 103 Ill. 2d 302, 313 (1984).

Put simply, "each word, clause, or section *must* be given some reasonable meaning, if possible." *Id.* (emphasis added). Giving both clauses their separate, independent meanings is not only entirely possible, it is logical. Had the General Assembly intended to limit the category of information following the word "or" to patient information, it would have done so by omitting the second use of "information" or writing the statute to say "*or patient information* collected, used, or stored for health care treatment, payment, or operations" instead of "*or information*." It did not do so. It is improper to read terms into the statute that are not plainly there. *See Rosenbach*, 2019 IL 123186, ¶ 24 (Courts "may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law.").

In sum, the "or" decouples the two categories of information at issue in the Exclusion, and the second "information" has to mean something different than the first. Both of these grammatical elements were overlooked in the Court's Opinion and should have been properly considered.

B. HIPAA's Definitions of Health Care Treatment, Payment, and Operations Must Guide the Court's Analysis.

As the United States Supreme Court recently explained, "[d]ifficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators writing in 'English prose,'" so "[c]ourts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the 'common understanding' of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021). In accord, the Illinois Supreme Court has described canons of statutory construction as "principles that guide this [C]ourt's construction of statutes," which are to be "utilized in every statutory construction case." *JPMorgan Chase Bank, N.A. v. Earth Foods Inc.,* 238 Ill. 2d 455, 462 (2010); *see also* Black's Law Dictionary, "canon," (11th ed. 2019) (Canons of statutory construction are the tools the Court uses to "grasp the intended meaning of statutory language."). In short, the Court always "necessarily look[s] to canons of statutory construction to glean [the legislature's] intent." *Int'l Ass'n of Fire Fighters v. City of Peoria,* 2022 IL 127040, ¶ 19.

Two such tools of statutory interpretation, *i.e.*, canons, should guide any analysis of the Health Care Exclusion and what the legislature intended

with the phrase "under HIPAA": (1) the last antecedent doctrine, and (2) terms should be given their plain, ordinary meaning. Both were overlooked in the Opinion, and Defendants thus discuss each in turn below.

The Last Antecedent Doctrine. The Illinois Supreme Court has described the last antecedent doctrine as "a long-recognized grammatical canon of statutory construction." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). The doctrine "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them."[5] *Id.* (citing *City of Mount Carmel v. Partee,* 74 Ill. 2d 371, 375 (1979)); *see also* 34 Ill. Law & Prac. Statutes § 66.

Here, then, "under HIPAA" is to be read to modify the phrase that immediately precedes it: "health care treatment, payment, or operations."[6] As such, how HIPAA defines the terms matters and should have been considered

---

[5] The Illinois Supreme Court recognizes this principle always applies "unless the intent of the legislature, as disclosed by the context and reading of the entire statute, requires such an extension or inclusion." *Id.* That is not the case here. The use of "or" and the second "information" make as much clear, as discussed *infra*.

[6] How the Illinois Supreme Court has interpreted the last antecedent doctrine is related to the U.S. Supreme Court doctrine of the "series-qualifer canon," which "instructs that a modifier at the end of a series of nouns or verbs applies to the entire series." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1164 (2021). "Under conventional rules of grammar, when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series." *Id.* (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012)) (cleaned up; internal quotation marks omitted). Whether considered under either paradigm, "under HIPAA" should modify "health care treatment, payment, or operations," and as such, how HIPAA defines those terms is central to the analysis.

by the Court. Indeed, this grammatical canon should be a guiding principle of the Court's analysis given that the Illinois Supreme Court has described the last antecedent doctrine as a "fundamental principle of statutory construction." *People v. Davis*, 199 Ill. 2d 130, 138 (2002); *see also* Black's Law Dictionary, "rule of the last antecedent," (11th ed. 2019) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them.").

Put simply, this principle was overlooked in the Court's Opinion. The meaning of the terms—treatment, payment, and operations—was not explored at all, especially not how such terms are understood in the context of HIPAA. Instead, it appears that the Court only considered what information is already protected by HIPAA. *Mazya*, 2022 IL App (1st) 200822, ¶ 43. This was a mistake under the last antecedent doctrine. It was also a mistake when the plain and ordinary meaning of "under" is examined, as discussed below.

"Under" Means "Subject to the Guidance or Instruction of." In any exercise of statutory construction, the Court should begin by considering the plain and ordinary meaning of all the words at issue. Indeed, as discussed *supra*, this is precisely why "or" and two uses of "information" matter. But this principle is equally important in understanding the phrase "under HIPAA" as used in the Health Care Exclusion. To understand what "under" means, it is proper to first consult a dictionary. *See People v. Chapman,* 2012 IL 111896, ¶ 24 ("When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the

plain and ordinary meaning of the term."); *see also, e.g., Rosenbach,* 2019 IL 123186, ¶ 32 (relying on Merriam-Webster's Collegiate Dictionary when interpreting BIPA's plain language). When that definition of "under" is examined, it is clear that Plaintiffs' argument is untenable.

Where, as here, "under" is used as a preposition, it is defined as "subject to the authority, control, guidance, or instruction of." Merriam-Webster Dictionary, "under," https://www.merriam-webster.com/dictionary/under (last visited Mar. 9, 2022). Taken together with the last antecedent doctrine, then, "under HIPAA" means that the Court should have considered how HIPAA "guides" the analysis of the meaning of "health care treatment, payment, or operations."[7] HIPAA's broad definitions of each of those terms and phrases, as discussed at length in the Defendants' opening and reply briefs, covers the actions taken by health care workers at issue here, and these broad definitions were entirely overlooked by the Court.

In the Opinion, the Court seems to suggest that ignoring how HIPAA defines treatment, payment, and operations is appropriate because the Exclusion does not say "as defined by HIPAA." *Mazya*, 2022 IL App (1st) 200822, ¶ 44. But that is essentially what "under" means—it means under

[7] The Opinion seemed to misunderstand this argument, stating that "the biometric information of employees is simply not defined or protected 'under HIPAA.'" *Mazya*, 2022 IL App (1st) 200822, ¶ 44. However, Defendants have always argued that the terms "health care," "treatment," "payment," and "operations" are defined under HIPAA, not the term "biometric information of employees."

the guidance or instruction of. To guide an analysis of a term, it should be elementary to consider how that term is defined in the statute. Neither treatment, payment, nor operations is a random term—each is a defined term with a specific, broad meaning within HIPAA's statutory scheme. These words were used intentionally by the legislature in drafting the Health Care Exclusion, and they should be given their proper meaning here.

This is particularly so because the Court's alternative reading not only renders half of the Health Care Exclusion superfluous, as discussed *supra*, but the Exclusion also does not say "already protected under HIPAA." *Id.* ¶ 43. It just says "under HIPAA." Because "under" means "subject to the guidance of," the Court should have analyzed how HIPAA guides any analysis of "health care treatment, payment, or operations." It did not.

In sum, when the entirety of the Health Care Exclusion is considered and all of its terms are properly analyzed, including the phrase "health care treatment, payment, or operations" with the guidance provided by HIPAA, Plaintiffs' argument becomes untenable. The General Assembly would not have written a statute to read "biometric identifier does not mean health care patient information or health care patient information." Grammar and fundamental canons of statutory construction were overlooked here, and these guiding canons suggest the Court should reconsider its Opinion and holding therein.

REQUEST FOR CERTIFICATE OF IMPORTANCE

If this Court denies Defendants-Appellants' Petition for Rehearing, Defendants-Appellants respectfully apply to this Court for a Certificate of Importance pursuant to Illinois Supreme Court Rule 316. Defendants-Appellants submit that the following question is appropriate for Illinois Supreme Court review under Rule 316:

> Whether the exclusion in Section 10 of BIPA for "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" applies to health care workers' information when such information is collected, used or stored for health care "treatment," "payment" or "operations" as those terms are defined under HIPAA?

Authoritative guidance from the Supreme Court would be appropriate given the potentially dispositive nature of the issue, how prolifically BIPA is litigated, and that the Supreme Court has already recognized this question is genuinely uncertain and susceptible to multiple, reasonable interpretations.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that their Petition for Rehearing be granted. In the alternative, Defendants-Appellants respectfully apply for a Certificate of Importance.

Dated: March 18, 2022

Respectfully submitted,

BAKER & HOSTETLER LLP

By: */s/ Bonnie Keane DelGobbo*

Joel Griswold
jcgriswold@bakerlaw.com
Bonnie Keane DelGobbo
bdelgobbo@bakerlaw.com
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
Tel: (312) 416-6200

Attorneys for Defendants-Appellants Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

SHOOK, HARDY & BACON L.L.P.

By: */s/ Matthew C. Wolfe*

Gary M. Miller (6229867)
gmiller@shb.com
Matthew C. Wolfe (6307345)
mwolfe@shb.com
Elisabeth A. Hutchinson (6338043)
ehutchinson@shb.com
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, IL 60606
Tel: (312) 704-7700

Attorneys for Defendant-Appellant Becton, Dickinson and Company

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **March 18, 2022**, I caused a true and correct copy of **PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS** to be electronically filed with the Clerk's Office of the Illinois Appellate Court, First Judicial District, using e-filing provider **Odyssey eFileIL,** which sends notification and a copy of this filing by electronic mail to all counsel of record.

I further certify that I caused a courtesy copy of this filing to be served by electronic mail upon the following:

James B. Zouras
jzouras@stephanzouras.com
Ryan F. Stephan
rstephan@stephanzouras.com
Andrew C. Ficzko
aficzko@stephanzouras.com
Haley R. Jenkins
hjenkins@stephanzouras.com
STEPHAN ZOURAS, LLP
205 North Michigan Avenue
Suite 2560
Chicago, IL 60601

Attorneys for Plaintiffs-Appellees

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the above statements set forth in this instrument are true and correct.

/s/ Matthew C. Wolfe

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Nos. 1-20-0822 and 1-21-0895, cons.

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Beckton, Dickinson and Company, Defendant-Appellant).	)	No. 18 CH 05031
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, and NORTHWESTERN MEMORIAL HEALTHCARE, Defendants-Appellants.	)	No. 18 CH 71601

ORDER

THIS CAUSE having come on to be heard on the Appellants' Petition for Rehearing, and this Court being fully advised in the premises:

IT IS HEREBY ORDERED that:

1. The Appellants' Petition for Rehearing is granted;

2. Pursuant to Illinois Supreme Court Rule 367(d) (Ill. S. Ct. R. 367(d) (eff. Nov. 1, 2017)), we order the Appellees to file a response to the Appellants' Petition for Rehearing within twenty-one (21) days of the entry of this order; and

3. Appellants will have fourteen (14) days thereafter to file a reply.

_/s/ Sharon Oden Johnson____
Justice

_/s/ Sheldon Harris_____
Justice

_/s/ Mary Mikva_____
Justice

ORDER ENTERED

JUN 02 2022

APPELLATE COURT FIRST DISTRICT

2022 IL App (1st) 200822

SIXTH DIVISION
Modified upon grant of petition for rehearing.
September 30, 2022

Nos. 1-20-0822 and 1-21-0895, cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. THE INGALLS MEMORIAL HOSPITAL, UCM COMMUNITY HEALTH & HOSPITAL DIVISION, INC., and BECTON, DICKINSON AND COMPANY, Defendants (Beckton, Dickinson and Company, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 18 CH 05031 The Honorable Pamela McLean Meyerson, Judge, Presiding.
YANA MAZYA, Individually, and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. NORTHWESTERN LAKE FOREST HOSPITAL, and NORTHWESTERN MEMORIAL HEALTHCARE, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 18 CH 71601 The Honorable Alison C. Conlon, Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Justice Mitchell concurred in the judgment and opinion.
Presiding Justice Mikva dissented with opinion.

OPINION

¶ 1 Plaintiff Lucille Mosby, a registered nurse, filed a class-action suit individually and on behalf of others similarly situated against defendants Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc. (collectively, Ingalls), and Becton, Dickinson and Company (BD). Similarly, plaintiff Yana Mazya, a registered nurse, filed a class-action suit individually and on behalf of others similarly situated against defendants Northwestern Lake Forest Hospital and Northwestern Memorial Healthcare (collectively Northwestern). Both suits were filed under the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq/*) (West 2018)).

¶ 2 During the course of the *Mosby* litigation, Ingalls and BD filed a petition for leave to file an interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) asking this court to answer the following certified question:

> "Whether the exclusion in Section 10 of [the Act] for 'information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996' [HIPAA] applies to biometric information of health care workers (as opposed to patients) collected, used or stored for health care treatment, payment or operations under HIPAA?"

¶ 3 Subsequently, Northwestern also filed a petition in the *Mayza* litigation for leave to file a Rule 308 interlocutory appeal concerning a similar issue:

> "Does finger-scan information collected by a health care provider from its employees fall within the [Act's] exclusion for 'information collected, used, or stored for health care

treatment, payment or operations under the federal [HIPAA],' 740 ILCS 14/10, when the employee's finger-scan information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' and/or 'operations' as those terms are defined by the HIPAA statute and regulations?"

¶ 4 While Ingalls and Bd phrase the question as a tautology that presumes certain facts, the parties essentially seek the answer to the same question of whether the biometric information of health care workers is excluded under the Act. We answer "no."

¶ 5 For the reasons explained below, we find that the biometric information of health care workers is not excluded under the Act.

¶ 6 I. BACKGROUND

¶ 7 A. Mosby

¶ 8 On April 18, 2018, Mosby filed a class-action suit against Ingalls and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Mosby worked as a registered pediatrics nurse at Ingalls Memorial Hospital from October 1987 to February 2017. As a condition of her employment with Ingalls, Mosby was required to scan her fingerprint to authenticate her identity and gain access to Pyxis MedStation, a medication dispensing system distributed and marketed by BD. Mosby alleged that she left Ingalls' employ without ever having been provided with a statement of defendants' destruction policy and schedule.

¶ 9 Mosby alleged that defendants' actions exposed employees like herself to serious irreversible privacy risks. Mosby alleged that defendants violated the Act by (1) not informing her in writing of the specific purpose and the length of time for which her fingerprints were being collected, stored, and used; (2) failing to provide a publicly available retention schedule

and guidelines for permanently destroying Mosby's fingerprints; (3) failing to obtain a written release from Mosby to collect, store, disseminate, or otherwise use her fingerprint; and (4) failing to obtain consent before disclosing Mosby's fingerprints to third-party vendors that host the data. On May 14, 2019, plaintiff filed an amended class-action complaint substantially similar to the original.

¶ 10 On June 5, 2019, defendants filed a combined motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code of Civil Procedure (Code) or to strike the amended complaint. The motion argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id*. § 2-619(a)(9)) because (1) the biometric data that was collected, used, and/or stored restricted access to protected health information and medication and (2) the data was used for healthcare treatment and operations pursuant to HIPAA (45 C.F.R. § 164.501 (2018)) and was thereby specifically excluded from the scope of the Act. Defendants argued that, pursuant to section 2-615 (735 ILCS 5/2-615 (West 2018)), Mosby failed to allege any well-pleaded facts regarding any disclosures of her fingerprints.

¶ 11 On January 13, 2020, the circuit court ruled that the exception was limited to the information protected under HIPAA. To hold otherwise, the court noted, would result in a broad exception for all employees involved in operations that impact patients protected by HIPAA. The circuit court opined that, if the legislature intended to exempt employees entirely, it would have expressly done so. The court denied defendants' motion to dismiss based on this issue. The circuit court dismissed BD from the complaint in its entirety, without prejudice, and found that Mosby failed to state a claim as to how defendants disseminated her biometric information. With authorization of the circuit court, Mosby amended her pleadings on

February 24, 2020, which realleged all of the claims contained in the previously dismissed claim.

¶ 12 On March 16, 2020, defendants filed a joint motion to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) and stay proceedings. Defendants argued that the question of whether employee information was also exempt under the Act was a question of first impression and had never been heard before this court. Defendants argued that the question was one of statutory construction and there existed a substantial ground for a difference of opinion, which made it appropriate to bring under Rule 308. Defendants maintained that raising the question would be beneficial in a variety of ways, such as: (1) it would advance the outcome of the case with prejudice if the Act was interpreted in their favor, (2) judicial economy would be served, and (3) the need for a uniform construction and application of the law would be served. Defendants also requested a stay in the circuit court proceedings because the determination could lead to a dismissal and Mosby would not be prejudiced.

¶ 13 On April 20, 2020, Mosby filed a motion in opposition to defendants' joint motion to certify the question for interlocutory appeal, arguing that substantial grounds for difference of opinion did not exist. Mosby maintained that to hold otherwise would mean that the General Assembly intended to place anyone employed in the healthcare industry into an "unregulated biometric abyss," by having no biometric protections. Mosby argued that defendants did not demonstrate that they faced any hardship or inequity to justify a stay that would outweigh the prejudice she would suffer. Mosby maintained that the prejudice she would suffer if a stay was granted was the denial of pursuing her claim in an expedient manner and, if successful, the

collection of damages. Mosby argued that defendants' conduct was ongoing and continuous and every day that passed would compound the injuries that they were inflicting.

¶ 14 On May 4, 2020, defendants filed a joint reply arguing that the proposed certified question was tailored and limited to those circumstances where the biometric data collected from healthcare workers were used for healthcare treatment, payment, or operations under HIPAA. Defendants further argued that the circuit court did not entirely reject its argument and found it plausible but ultimately concluded that the General Assembly would have been more explicit if the legislative intent was to exclude healthcare employees' biometric data.

¶ 15 On June 18, 2020, the circuit court granted defendants' motion to certify and stay the proceedings. The circuit court ruled that the issue posed by defendants presented a question of law where there was substantial ground for difference of opinion and could ultimately determine whether or not the case should be dismissed.

¶ 16 On July 17, 2020, defendants filed an application for leave to appeal pursuant to Rule 308, which we denied on August 24, 2020. Defendants filed a petition for leave to appeal with the Illinois Supreme Court, on October 30, 2020. On March 3, 2021, the Illinois Supreme Court issued a mandate vacating this court's decision and ordered this court to allow the application for leave to appeal. On June 11, 2021, Ingalls filed an unopposed motion for extension of time to file an opening brief, in which it informed the circuit court that Ingalls and Mosby had reached a settlement in principle. This agreement was between Ingalls and Mosby, not BD.

¶ 17 On March 14, 2022, the circuit court granted final approval of the settlement agreement between Ingalls and Mosby. Ingalls then moved in this court to withdraw from this appeal, which we granted on March 30, 2022, leaving BD as the sole defendant-appellant in the Mosby appeal.

¶ 18 B. Mazya

¶ 19 On April 10, 2019, Yana Mazya and Tiki Taylor filed an amended class-action complaint[1] against Northwestern, Omnicell Inc., and BD seeking redress for each defendant's violations pursuant to section 15(a)-(d) of the Act (740 ILCS 14/15(a)-(d) (West 2018)). Northwestern used medication dispensing systems distributed by both Omnicell and BD. However, both Omnicell and BD were dismissed from this action,[2] as was Taylor.[3] Taylor was dismissed on July 2, 2019, without prejudice. As a party to a collective bargaining agreement, Taylor's claims were preempted.[4]

¶ 20 Like Mosby, Mazya was also employed as a registered nurse, but at Northwestern Memorial Lake Forest Hospital. Like Mosby, Mazya is no longer employed at this hospital, having also left in 2017. Mayza worked for Northwestern from 2012 until December 2017. Like Mosby, Mazya was required to scan her fingerprint to gain access to a medication dispensing system as a condition of her employment. Like Mosby, Mazya alleged that she left defendant's employ without ever having been provided with a statement of its destruction policy and schedule.

¶ 21 Mazya alleged that Northwestern disregarded her statutorily protected privacy rights by unlawfully collecting, storing, using, and disseminating her biometric data in violation of the Act. Like Mosby, Mazya alleged that defendant was in violation of the Act by failing (1) to

[1]The initial complaint that was filed is not provided in the record, which is of no consequence here, because Northwestern Memorial Hospital Taylor and Northwestern Memorial Hospital were not originally parties.

[2] While Omnicell and BD were dismissed, the record does not reflect exactly when that occurred.

[3] While Mazya was a nurse,Taylor worked as a patient care technician at Northwestern Memorial Hospital.

[4]Taylor's dismissal occurred after Northwestern removed this case to the Northern District of Illinois under case number 19 C 3191 (*Mazya v. Northwestern Lake Forest Hospital*, No. 19-CV-3191 (N.D. Ill. June 19, 2019)); the case was subsequently returned to the circuit court.

inform her in writing of the specific purpose and length of time for which her fingerprints were being collected, stored, and used; (2) to provide a publicly available retention schedule and guidelines for permanently destroying her fingerprints; (3) to obtain a written release to collect, store, or otherwise use her fingerprints; and (4) to obtain consent from her to disclose, redisclose, or otherwise disseminate her fingerprints to a third party.

¶ 22 On January 17, 2020, Northwestern filed a motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2018)) of the Code. Northwestern argued that the complaint should be dismissed pursuant to section 2-619(a)(9) (*id.* § 2-619(a)(9)) because the General Assembly specifically excluded information collected from healthcare treatment, payment, or operations in the Act. Northwestern further argued that the complaint should be dismissed pursuant to section 2-615 (*id*. § 2-615) for failure to state a claim because Northwestern did not store or possess her biometric information in violation of the Act when it was used for healthcare treatment, payment, or operations. Northwestern maintained that nothing in the Act was intended to interfere with HIPAA and that applying it to their medication dispensing systems would conflict with guidance previously given by the Department of Health and Human Services (HHS), which encouraged the use of biometrics in health. Northwestern argued that Mazya knew her information was being collected and had the power to withhold consent, citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 34, as support. Northwestern further argued that Mazya failed to provide factual allegations supporting her conclusory assertions that Northwestern's conduct was intentional or reckless. Lastly, Northwestern

requested that Northwestern Memorial Hospital be dismissed from the proceedings, since Taylor was dismissed.[5]

¶ 23 On March 13, 2020, Mazya filed a response to Northwestern's motion to dismiss, arguing that her claims were actionable because they did not fall under any exemption under the Act and the failure to comply with distinct requirements of the Act was all that she needed to demonstrate. Mazya maintained that the Act's explicit reference to biometric data taken from a patient shows the intent of the General Assembly to exclude patient biometrics from the Act's protection because patients were already protected by HIPAA. Mazya further maintained that if the General Assembly wanted to provide a sweeping categorical exemption for hospitals it would have done so as evidenced by the exclusion of financial institutions reflected in section 25(c) of the Act (740 ILCS 14/25(c) (West 2018)).

¶ 24 Northwestern filed a reply on April 3, 2020, arguing that Mazya's interpretation of the Act ignored the disjunctive "or" provided in section 10 of the Act, which connotes two different alternatives, and thus the exemption included employee information. Northwestern maintained that Mazya failed to rebut its argument that she failed to state a claim because her claims were not supported by the language of the statute and were solely policy-based. Northwestern further maintained that it would be good policy to interpret the statute their way given that the usage of biometric information has been encouraged by the government.

¶ 25 On November 2, 2020, the circuit court denied Northwestern's section 2-619.1 motion. The circuit court found Northwestern's section 2-619 argument unpersuasive because the burden for compliance with the Act falls on the collector of the data, not the provider. Put

[5]The record reflects that on March 10, 2020, Mazya moved to voluntarily dismiss Northwestern Memorial Hospital from this action; however, the record does not reflect when the motion was granted.

another way, Mazya did not waive her consent by continuing to offer her biometric data to Northwestern as a condition of her duties as a nurse. The circuit court found that accepting Northwestern's interpretation of the Act would amount to medical professionals having no protections for their biometric information. In regard to Northwestern's section 2-615 arguments, the circuit court found that, to have a viable claim, (1) the claimant need not lack knowledge of the violation, as the violation itself was enough to support the statutory cause of action, and (2) the claimant was not required to plead an intentional or reckless violation of the Act, at that stage of the proceedings.

¶ 26 On November 30, 2020, Northwestern filed a corrected motion for Rule 308 certification and to stay the proceedings. Northwestern argued that there were substantial grounds for difference of opinion given the disjunctive "or" in section 10. Northwestern further argued that the proceedings should be stayed pending this court's decision because our answer to the question could expedite the resolution of the underlying case.

¶ 27 On December 11, 2020, Mazya filed a motion to strike Northwestern's motion for certification and stay. Mazya argued that Northwestern was trying to certify the same question that this court denied in *Mosby v. Ingalls Memorial Hospital*, No. 1-20-0822. On January 13, 2021, Mazya filed a response in opposition to Northwestern's motion for Rule 308 certification and stay, reiterating her previous arguments and noting that Northwestern had not lodged any new arguments or law on the matter.

¶ 28 On February 9, 2021, Northwestern filed a reply in further support of its Rule 308 motion, informing the circuit court that the Illinois Supreme Court directed this court to vacate its August 24, 2020, order and accept the Rule 308 appeal (*Mosby v. Ingalls Memorial Hospital*, No. 126590 (Ill. Jan. 27, 2021) (supervisory order)). On February 9, 2021, the circuit court

denied Northwestern's Rule 308 motion but stayed the proceedings pending this court's decision in *Mosby*.

¶ 29 On June 15, 2021, Northwestern filed a motion to reconsider the circuit court's denial of its Rule 308 certification, arguing that the hospital defendant in *Mosby* (Ingalls) had reached a settlement in principle with the plaintiff in *Mosby* and, therefore, no one would be presenting any arguments on appeal on behalf of a hospital that used medication dispensing systems secured by finger-scan technology. Mazya responded on June 22, 2021, that she was not opposed to the appellate court hearing a certified question.

¶ 30 On July 23, 2021, the circuit court granted Northwestern's motion to reconsider and stayed the proceedings, noting that the issue involves a question of law as to which there were substantial grounds for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. Accordingly, the circuit court certified its question to this court.

¶ 31 On July 27, 2021, Northwestern filed an application for leave to appeal pursuant to Rule 308 reiterating the arguments it had made at the circuit court and requesting that the case be consolidated with *Mosby*. We granted the motion on August 13, 2021.

¶ 32 After Northwestern filed its consolidation motion, but before this court granted it, we also granted a motion on August 5, 2021, by Northwestern, as well as the Illinois Health and Hospital Association and Amita Health, to file an *amicus curiae* brief in the *Mosby* appeal. Northwestern and the two *amici* reiterated defendants' arguments and observed that "[h]ealth care employs 10% of the state's workforce." They argued that interpreting section 10 in favor of plaintiffs regarding the medical supply dispensing systems at issue could result in

undesirable consequences for healthcare providers, and would be financially burdensome, resulting in a lower quality of care for patients.[6]

¶ 33 C. Petition for Rehearing

¶ 34 On February 25, 2022, this court issued an opinion finding that the exclusion at issue did not apply to biometric information collected by a health care provider from its employees. On March 18, 2022, Northwestern and BD, the only remaining defendants in both appeals, filed a joint petition for rehearing arguing, among other things, (1) that the exclusion sets forth two categories, with the first category relating to patient information and the second category relating to the information of others, such as its employees; (2) that the phrase "under [HIPAA]" in the second category applies to "treatment, payment or operations" rather than to "collected, used or stored"; and (3) that we should use the secondary meaning of "under" in the Merriam-Webster Dictionary, which is "subject to the authority of." We granted the petition for rehearing, ordered additional briefing and now modify our order to address these arguments. For reasons that we explain below, we do not find these arguments persuasive. *Supra* ¶¶ 58-64.

¶ 35 II. ANALYSIS

¶ 36 On appeal, Northwestern, BD and the two amici (collectively, defendants) argue that this court should answer both certified questions in the affirmative, because section 10 of the Act (740 ILCS 14/10 (West 2018) excludes employee biometric information used in medication dispensing systems from the protections of the Act.

¶ 37 A. Jurisdiction

[6] In its brief in the *Mayza* appeal, Northwestern explained that it joined in the *amicus* brief in the *Mosby* appeal only because the deadline for doing so expired before this court granted its Rule 308 petition for leave to appeal.

¶ 38 As a preliminary matter, we observe that Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019) provides this court with jurisdiction to review the certified questions on this appeal. "Generally, courts of appeal have jurisdiction to review only final judgments entered in the trial court, absent a statutory exception or rule of the supreme court." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. "Supreme Court Rule 308 provides one such exception." *Luccio*, 2012 IL App (1st) 121153, ¶ 17. "Rule 308 allows for permissive appeal of an interlocutory order certified by the trial court as involving a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate termination of the litigation." *Luccio*, 2012 IL App (1st) 121153, ¶ 17.

¶ 39 "Generally, the scope of our review is limited to the certified question." *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9. However, a reviewing court may disregard words in the question that mischaracterize the issue and consider, instead, "the question remaining." *Moore*, 2012 IL 112788, ¶¶ 11-14 (although the word "unnatural" was present in the certified question, the court disregarded it and considered the remaining question, because this word mischaracterized the issue).

¶ 40 B. Standard of Review and Statutory Construction

¶ 41 When reviewing a certified question of law pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), we apply a *de novo* standard of review. *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 31. *De novo* review means that the reviewing court owes "no deference to the trial court." *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 41. "In addition, we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis and whether or not the trial court's reasoning was correct." *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, ¶ 25. *De novo* review is also appropriate because it applies when

resolution turns, as it does here, on a question of statutory interpretation. *Eighner v. Tiernan*, 2020 IL App (1st) 191369, ¶ 8.

¶ 42 With statutory interpretation, our primary goal is to ascertain and give effect to the intent of the statute's drafters. *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30. The most reliable indicator of the drafters' intent is the language they chose to use in the statute itself. *VC&M, Ltd.*, 2013 IL 114445, ¶ 30. The drafters' language should be given its plain and ordinary meaning, (*VC&M, Ltd.*, 2013 IL 114445, ¶ 30), and the statute that they crafted should be read as a whole (*Watson v. Legacy Healthcare Financial Services, L.L.C.*, 2021 IL App (1st) 210279, ¶ 38 (BIPA must be read in its entirety)). In addition, statutory exclusions are interpreted narrowly when they exclude certain members of the public from enjoying rights given to all. *American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board*, 2014 IL App (1st) 132455, ¶ 31; see also *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶ 15 ("exemptions are read narrowly" so as not to defeat the legislative purpose).

¶ 43 " 'When a statute does not define its own terms, a reviewing court may use a dictionary to ascertain the plain and ordinary meaning of those terms.' " *Watson*, 2021 IL App (1st) 210279, ¶ 36 (citing *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 56 (citing *People v. McChristian*, 2014 IL 115310, ¶ 15, and *People v. Bingham*, 2014 IL 115964))); see also *People v. Chapman*, 2012 IL 111896, ¶ 24 ("When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the plain and ordinary meaning of the term."). This court has previously relied on Merriam-Webster Online Dictionary when interpreting words in this Act, including specifically the words "capture" and

"collect" which are used in the exclusion at issue on this appeal. *Watson*, 2021 IL App (1st) 210279, ¶¶ 58-59.

¶ 44 If the language of the statute is plain and ambiguous, we apply it without resort to any further aids of statutory interpretation. *In re Lance H.*, 2014 IL 114899, ¶ 11; *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 395 (2003); *Maschek*, 2015 IL App (1st) 150520, ¶ 44 ("If the statutory language is clear, we must apply it, without resort to any aids of statutory construction."). "If, and only if, the statutory language is ambiguous" may we "look to other sources to ascertain the legislature's intent," such as the statute's legislative history and debates. *Maschek*, 2015 IL App (1st) 150520, ¶ 44.

¶ 45 C. Biometric Information

¶ 46 For purposes of this appeal, defendants do not dispute that the fingerprints captured here qualify as biometric information as that phrase is defined by the Act.[7]

¶ 47 The Act defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILCS 14/10 (West 2018). The Act defines "biometric identifiers" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* On this appeal, and for the limited purpose of this appeal, the parties do not dispute that the fingerprint scan of plaintiffs and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as defined in the Act.

¶ 48 D. Exclusions at Issue

[7] As BD notes in its brief to this court, "[d]efendants deny Plaintiff's allegations, including *** that the data falls under BIPA's definitions of biometric identifier and information." However, since theses cases were "at the motion to dismiss stage" when these appeals were taken, defendants acknowledge that "[Plaintiff's allegations must be taken as true."

¶ 49 The dispute on this appeal concerns whether the nurses' fingerprints, although biometric information, are nonetheless excluded from the Act's protections..

¶ 50 Section 10 of the Act provides a number of exclusions from the protections of the Act. The following exclusion is the one at the heart of this appeal:

> "Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996." *Id.*

Defendants argue that the exclusion above sets forth two categories of excluded information. . In essence, defendants argue that the exclusion should be read as follows:

> "Biometric identifiers do not include
>
> [First category or sub-exclusion] information captured from a patient in a health care setting
>
> or
>
> [Second category or sub-exclusion] information collected used or stored
>
> for health care treatment, payment, or operations
>
> under the federal Health Insurance, Portability and Accountability Act of 1996." *Id*. § 10.

In addition, Section 25 of the Act excludes certain sectors of the workforce:

> "(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 [(15 U.S.C. § 6803 (2018))] and the rules promulgated thereunder.

***

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." *Id*. § 25(c), (e).

¶ 51 E. Parties' Arguments on Appeal

¶ 52 Defendants contend that hospital workers' use of medication dispensing systems falls within section 10's exclusion for health care information. They argue that the medication dispensing systems at issue in this case are permitted to collect information for "healthcare treatment, payment, or operations" as defined by HIPAA. 45 C.F.R. § 164.501(2) (2018). They further argue that this includes the fingerprint scans of employees who facilitate the dispensing and administration of medications prescribed to patients. Defendants assert that the collection, use, and storage of healthcare workers' biometric information is for "health care" and "treatment" that healthcare systems provide to patients, as those terms are defined by HIPAA. *Id.* Defendants contend that medication dispensing systems also act to provide an audit trail, which prevents diversion and fraud, and enables abuse detection. Defendants assert that such a system additionally aids in patient safety, quality of care, and accurate billing. Defendants contend that the nurses' biometric information is collected through the medication dispensing system and used for "health care operations" and "payment."

¶ 53 Defendants contend that the circuit court erred in finding that the exclusion for health care information applies only to information from a patient because the exclusion does not state that it is limited to patient biometric data. Defendants observe that the health care exclusion contains an "or," and they argue that this "or" is disjunctive and connotes two different categories of excluded information. Defendants assert that the second category is not limited

to patient data. Defendants maintain that, to fall within this exclusion of the Act, the biometric information must either (1) be obtained from a patient in a healthcare setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA.

¶ 54 Plaintiffs argue that the Act excludes only patient biometric data from its protections because patient data is already protected by HIPAA. Plaintiffs assert that finding otherwise would leave thousands of hospital workers unprotected from the risks that the Act was designed to protect against. Plaintiffs assert that defendants' interpretation of the second category does not make sense because it states, "under HIPAA" and patient information is the only information governed by HIPAA.

¶ 55 In their reply briefs, defendants argue, among other things, that the storage of healthcare workers' biometric information, obtained when accessing a medication dispensing system, is for the "health care" and "treatment" of patients as those terms are defined by HIPAA; and, therefore, the "under HIPAA" language does not exclude this type of information.

¶ 56 F. Plain Language

¶ 57 We find that the language of the statute is clear.

¶ 58 First, there is no redundancy, as defendants claim results from our interpreting both categories as covering patient information. Defendants' arguments about redundancy overlook the verbs used in the two sub-exclusions or categories. The first sub-exclusion or category is for information "captured." 740 ILCS 14/10 (West 2018). The first couple of definitions of "capture" in the dictionary, such as "to take captive" or "to emphasize," do not apply here. Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/capture (last visited May 9, 2022). However, the secondary meaning of "to record in a permanent file

(as in a computer)" clearly applies here. After this definition, the dictionary provides the following example of its use in a sentence: "The system is used to *capture* data ***." Similarly, in the first category of this exclusion, the information is captured, or recorded in a permanent file, from an individual patient in a healthcare setting.

¶ 59 By contrast, the second sub-exclusion or category is for information that is "collected, used or stored." 740 ILCS 14/10 (West 2018). The first definitions of "collect" in the dictionary are: "to bring together into one body and place," "to gather or exact from a number of persons or sources," and "to gather an accumulation of." Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/collect (last visited May 9, 2022). Thus, after the capture of information from an individual patient in a healthcare setting (described in the first category), that information may be gathered or accumulated from a number of persons into one place. So far in our reading of the statute, there is no redundancy in coverage: the first category covers when the information is captured from a patient in a health care setting; and the second category applies when information is subsequently gathered and accumulated. The second sub-exclusion or category goes on to cover information when, after its capture and accumulation, it is then used or stored. There is simply no redundancy in this statute. While both categories apply to patient information, we cannot overlook the different verbs used to modify the categories of information in the two clauses thereby giving two very different meanings and eliminating any redundancy. 740 ILCS 14/10 (West 2018).

¶ 60 Our interpretation of the two categories tracks closely the two objectives of the Act identified by our supreme court. In *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan*, 2021 IL 125978, our supreme court found that the Act protects an individual in two distinct and important ways. Our highest court found: "the Act codifies (1) an individual's

right to privacy in their biometric identifiers—fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry—and (2) an individual's right to privacy in their biometric information—information based on an individual's biometric identifiers that is then used to identify an individual." Similarly, in the case at bar, the exclusion applies to (1) information as it is captured from the patient in a healthcare setting; and (2) information that is collected, used or stored. [8] There is no redundancy here, even though both clauses refer to patient information, as we explain below.

¶ 61 Second, defendants argue that the "under [HIPAA]" clause applies: (1) not to both types of information; and (2) not to "collected, used or stored"; (3) but only to "treatment, payment or operations." Defendants argue that, since "under [HIPAA]" appears after a disjunctive "or," the clause does not apply to anything that appears before that first "or." For this reason, they assert that it does not apply to both types of information. However, although defendants argue that the "under [HIPAA]" clause applies only to what immediately precedes it, they argue that it applies—not simply to "operations"—but to "treatment, payment *or* operations."[9] (Emphasis added.) Thus, they argue that the first use of "or" means that the clause does not apply to what precedes the "or," but that this same logic does not apply to the statute's second use of "or."[10] We do not find persuasive an argument with an internal contradiction. .

[8] In addition, the two categories can be seen as protecting: (1) information captured from the patient in a healthcare setting and (2) information that is already protected "under the federal Health Insurance Portability and Accountability Act of 1996." 740 ILCS 14/10 (West 2018). The disjunctive "or" means that information as it is captured directly from the patient and information under HIPAA are alternatives to be considered separately. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 111 (2011).

[9] In essence, defendants read the first "or" as disjunctive but the second "or" as conjunctive, thereby, giving two different meanings to the very same word in the very same sentence. *Encino Motorcars, LLC v. Navarro*, -- U.S. --, 138 S.Ct. 1134, 1141-42 (2018) ("it would be odd to read the exemption as starting with" a disjunctive phrasing "and then, halfway through and without warning, switching" to a conjunctive phrasing—"all while using the same word ('or') to signal both meanings").

[10] Defendants here are trying to manipulate the last antecedent doctrine, which provides that qualifying words or phrases apply to the words or phrases immediately preceding them, and not to "more

¶ 62 Defendants argue that, under the series-qualifier canon of statutory construction, a modifier at the end of a series of two or more nouns or verbs applies to the entire series. *Facebook, Inc. v. Duguid*, -- U.S. --, 141 S.Ct. 1163, 1169 (2021). Under that logic, "under [HIPAA" applies to both types of "information." 740 ILCS 14/10 (West 2018). As defendants note, "[u]nder conventional rules of grammar, '[w]hen there is a straightforward, parallel construction that involves all nouns *** in a series,' a modifier at the end of the list 'normally applies to the entire series.' " *Facebook*, 141 S.Ct. at 1169 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012) (Scalia & Garner) (quotation modified in opinion)). In the exclusion at issue, defendants argue that there are two categories of information—in other words, a straightforward parallel construction setting forth two categories of "information." 740 ILCS 14/10 (West 2018). Under the series-qualifier canon argued by defendants, the clause "under [HIPAA," which appears at the end, would, therefore, apply to both types of information in the series—not just to the second type as they argue. 740 ILCS 14/10 (West 2018).

¶ 63 Defendants further argue that "under" means "subject to the *** guidance, or instruction of." Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022). For this definition, defendants rely on the Merriam-Webster Online Dictionary, but they skip the first or primary meaning and utilize instead the second or secondary meaning. However, the first or primary meaning of "under," when used as a preposition as it is here,[11] is "below or beneath so as to be *** covered [or] protected *** by."

remote" words, "unless the intent of the legislature, as disclosed by the context and reading of the entire statute requires such an extension or inclusion." *In re E.B.*, 231 Ill. 2d 459, 467 (2008).

[11] We agree with defendants that, since "under" in this instance is being used as a preposition, it is the second entry for preposition that must be utilized here. Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022).

Merriam-Webster Online Dictionary, https://ww.merriam-webster.com/dictionary/under (last visited May 9, 2022). The information covered and protected by HIPAA is that of the patients, not the employees. *U.S. v. Bek*, 493 F.3d 790, 802 (2007) (HIPAA protects patient medical records from unauthorized disclosure by creating a procedure for obtaining authority to use them).

¶ 64 At oral argument, Northwestern argued that this court should not consider the terminology "under HIPAA" and instead we should consider this as "defined by HIPAA." However, "under HIPAA" is what the Act expressly states, and that cannot be ignored. We are simply unable to rewrite the statute. *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 15. Either way, the biometric information of employees is simply not defined or protected "under HIPAA." Accordingly, the plain language of the statute does not exclude employee information from the Act's protections because they are neither (1) patients nor (2) protected under HIPAA. We further find that, if the legislature intended to exclude all healthcare workers from the Act's protections, it would have done so. Where the legislators wanted to create blanket exclusions for certain sectors of the workforce, they expressly provided that the Act did not apply either to financial institutions subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 or to employees, contractors, or subcontractors of local government or the State as provided in section 25. 740 ILCS 14/25(c), (e) (West 2018).[12] No such express, blanket exclusion exists for healthcare workers and we will not rewrite the Act to provide one.

[12] While the Act provides that "nothing" in it "shall be construed to conflict with" HIPAA (740 ILCS 14/25 (b) (West 2018)), that is not the same as a blanket exclusion for healthcare workers. When legislators wanted the Act not to apply at all to a certain sector of the workforce, they explicitly stated that "[n]othing in this Act shall be construed to apply" and then named the institutions that were exempt. By contrast, subsection (b) does not exempt or exclude or even name hospitals or third-party vendors, such as defendants in the appeal at bar. 740 ILCS 14/25 (b) (West 2018),

Northwestern and the *amici* argue that "[h]ealth care employs 10% of the state's workforce." If that is true, then creating such an exclusion would have far reaching implications.[13]

¶ 65 Defendants' attempt to include employee biometric information under this exclusion goes beyond the plain language of the Act. A reviewing court is unable to "rewrite a statute to add provisions or limitations the legislature did not include." *Zahn*, 2016 IL 120526, ¶ 15. "No rule of construction authorizes us to declare that the legislature did not mean what the plain language of the statute imports." *Id.* There is simply no provision or reference to the exclusion of employee biometric data in the Act or its protection in HIPAA. Thus, we will not add employee biometric data as information to be excluded by the Act because it would be contrary to its plain language.

¶ 66 G. Objectives

¶ 67 Part of the plain language of this Act are its objectives, which are stated right in the Act itself. The legislative purpose of this Act is easy to discern because the Act's drafters provided a statutory section entitled: "Legislative findings; intent." 740 ILCS 14/5 (West 2018); *Watson*, 2021 IL App (1st) 210279, ¶ 49 ("The legislative purpose of" BIPA "is easy to discern because the Act's drafters provided a statutory section" stating just that). The section notes that "corporations" are interested in utilizing the new biometric technology. 740 ILCS 14/5(b) (West 2018). However, "[a]n overwhelming majority" of the public are wary. 740 ILCS 14/5(d) (West 2018). The section explains that the public is wary because, "once" a corporation has "compromised" an individual's unique biometric identifier, "the individual has no recourse." 740 ILCS 14/5(c) (West 2018). The purpose of the Act is to reassure a wary

[13] According to its *amicus* brief, Northwestern alone employs "29,800 physicians, nurses, allied health professionals, clinical support staff and administrative employees." In fiscal year 2020, the Northwestern health system had "more than 104,000 inpatient admissions and more than 2.2 million outpatient encounters.

public by providing a means for "regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (West 2018). Finding that the nurses at issue here are covered by the Act vis-a-vis their employers and the MedStation marketing company furthers the stated goals of the Act. The primary purpose of this Act is to protect the secrecy interest of the "individual" in his or her biometric information, such as the finger scans at issue here. *West Bend*, 2021 IL 125978, ¶ 46 ("the Act protects a secrecy interest—here, the right of an individual to keep his or her personal identifying information like fingerprints secret"). Our findings today further that purpose.

¶ 68 Since the language is plain, we need not consider other sources to discern statutory meaning. "[A]bsent ambiguity *** there is no basis to delve into the conference reports or statements of legislators." *Kaider*, 2012 IL App (1st) 111109, ¶ 11. However, as a final matter, we note that, even if we were to consider defendants' legislative-history argument, we would not find it persuasive. Defendants cite the following line from a page of remarks by the House sponsor of the bill, Representative Kathleen Ryg: "[The Act] provides exemptions as necessary for hospitals[.]"[14] 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts /htrans95/09500276.pdf); *Maschek*, 2015 IL App (1st) 150520, ¶ 62 (when interpreting an ambiguous phrase in a statute, courts look especially to the remarks of the bill's sponsor). In the quoted line, Representative Ryg did not assert that the Act provided a blanket exclusion for all healthcare workers; rather she asserted that it provided "exemptions as necessary."[15] Her

[14] In any event, Representative Ryg's comment about "hospitals" does nothing to aid third-party vendors like BD.

[15] "The crafting of specific language often reflects legislative compromise reached after hard fought battles over the means to reach even common goals. Courts should only reluctantly turn to

remark is completely consistent with our finding that the Act excludes from coverage information as it is captured from a patient in a healthcare setting, as well as HIPAA-protected information that is "collected, used or stored." 740 ILCS 14/10 (West 2018). These exclusions are the ones that legislators like Representative Ryg apparently deemed "necessary." Representative Ryg ended her remarks, immediately prior to passage, by stating: "we are in very serious need of protections for the citizens of Illinois when it comes to biometric information." 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts/htrans95/09500276 .pdf); *Maschek*, 2015 IL App (1st) 150520, ¶ 62 ("The remarks made immediately prior to passage are particularly important."). Those citizens include the nurses at issue here.

¶ 69 This court has previously observed that: "Representative's Ryg's remarks establish that the primary impetus behind the bill was to allay the fears of and provide protections for 'thousands of' people who had provided their biometric data for use as identifiers and who were now left 'wondering what will become of' this data. *Watson*, 2021 IL App (1st) 210279, ¶ 64 (quoting 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg) (found at http://www.ilga.gov/house/transcripts/htrans95/09500276 .pdf). "This is the position" that Mosby and Mayza "found [themselves] in, after leaving defendants' employ" in 2017 "without ever having been provided with a statement of defendants' destruction policy and schedule." *Watson*, 2021 IL App (1st) 210279, ¶ 64. Consideration of the legislative history and the Act's objectives leave no doubt that we are reaching the correct finding.

legislative history for fear of upsetting the delicate balance reflected in a finally worded piece of legislation." *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (1989).

¶ 70 III. CONCLUSION

¶ 71 Consistent with the plain language of the Act, we find that the legislature did not exclude health-care employee biometric information from its protections. We remand this cause for further proceedings consistent with this opinion.

¶ 72 Certified questions answered; cause remanded.

¶ 73 PRESIDING JUSTICE MIKVA, dissenting:

¶ 74 Having considered the parties' arguments on rehearing, I must respectfully dissent from the majority's opinion in this case. I am now convinced that the General Assembly *did* intend to exclude from the Act's protections the biometric information of healthcare workers—including finger-scan information collected by those workers' employers—where that information is collected, used, or stored for health care treatment, payment, or operations, as those functions are defined by HIPAA. In my view, plaintiffs and the majority ignore important rules of statutory construction, while overcomplicating a more straightforward reading of this exclusion. For the reasons that follow, I would answer "yes" to the certified questions in these consolidated cases.

¶ 75 The exclusion in section 10 of the Act provides that "[b]iometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [(HIPAA)]." (Emphasis added.) 740 ILCS 14/10 (West 2016). I agree with defendants that the first part of this provision excludes from the Act's coverage information from a particular source—patients in a health care setting—and the second part excludes information used for particular purposes—healthcare

treatment, payment, or operations—regardless of the source of that information. The plain language of the statute, and particularly the use of the words "from" and "for," make this clear.

¶ 76 The majority's interpretation of this exclusion ignores two fundamental rules of statutory construction: the last antecedent rule and the rule that statutes should be construed, wherever possible, such that no word or phrase is rendered superfluous or meaningless. Application of these two basic rules make clear to me that this exclusion extends to biometric information collected from health care workers by their employers—where that information is collected, used, or stored for health care treatment, payment, or operations—and is not limited, as the majority concludes, to biometric information collected from patients.

¶ 77 The last antecedent rule is "a long-recognized grammatical canon of statutory construction." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). That rule "provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote." *Id.*

¶ 78 Applying the last antecedent rule, the phrase "under [HIPAA]" in section 10's exclusion applies to "health care treatment, payment, or operations," the phrase that immediately precedes it, rather than to the more remote phrase "information collected, used, or stored." Healthcare treatment, payment and operations are terms of art that are carefully and explicitly defined in HIPAA's implementing regulations. See 45 C.F.R. § 164.501 (titled "Definitions") (West 2016).

¶ 79 Healthcare operations, for example, is defined as "any of the following activities of the covered entity to the extent that the activities are related to covered functions," followed by a

list of six specific activities. *Id.* Treatment and payment are also defined in detail. *Id.* It is these definitions that the exclusion in section 10 is referencing when it says "under HIPAA."

¶ 80 This triumvirate of healthcare treatment, payment, and operations is repeatedly used to define the activities of covered entities that are the subject of those regulations. See, *e.g.*, 45 C.F.R. § 164.506 (titled "Uses and disclosures to carry out treatment, payment, or health care operations" and employing the phrase "treatment, payment, or health care operations" an additional seven times); *id.* § 164.502 (using the phrase twice); *id.* § 164.504 (using the phrase three times); *id.* § 164.508 (using the phrase once); *id.* § 164.514 (using the phrase once); *id.* § 164.520 (using the phrase twice); *id.* § 164.522 (using the phrase twice); *id.* § 164.528 (using the phrase once); *id.* § 170.210 (using the phrase twice); and *id.* § 170.315 (using the phrase once).

¶ 81 As defendants point out, one definition of the word "under" is "subject to the authority, control, guidance, or instruction of." Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/under (last visited Sept. 8, 2022). "Treatment," "payment," and "operations," are "under" HIPAA because a particular meaning is ascribed to each of these terms by HIPAA's implementing regulations. *Under* the provisions of HIPAA, those three terms have definite and well-known meanings that our General Assembly saw no reason to duplicate or reinvent when it drafted the legislation that is the subject of this appeal. Incorporating by reference established definitions in this manner promotes clarity, consistency, and familiarity in the law, a "familiar legislative process" long recognized by our supreme court (*People v. Murray*, 2019 IL 123289, ¶¶ 13, 24 (noting that the statute defining the offense of unlawful possession of a firearm by a street gang member incorporates by reference the definition of a "streetgang" set out in the Illinois Streetgang Terrorism Omnibus Prevention

Act)). The General Assembly has in fact borrowed these same definitions on other occasions, and it has used the phrase "under HIPAA" to do so. *See* 210 ILCS 25/2-134, 2-136, and 2-137 (West 2016) (providing, for purposes of the Illinois Clinical Laboratory and Blood Bank Act, that each of these terms—treatment, payment, and health care operations—"has the meaning ascribed to it *under HIPAA*," and "as specified in 45 CFR 164.501" (emphasis added)).

¶ 82 The majority criticizes defendant's reliance on the last antecedent rule, pointing out that, if the rule was strictly applied, "under [HIPAA]" would apply only to the word "operations." But application of the last antecedent rule is always limited by "the intent of the legislature, as disclosed by the context and reading of the entire statute." *In re E.B.*, 231 Ill. 2d at 467. And here, "treatment," "payment," and "operations" are all closely related and indeed are all HIPAA-defined terms. In this context, "under [HIPAA]" applies to all of these activities. However, if "under HIPAA" applied only to "operations," information collected, used, or stored for health care treatment or payment would still be within the exclusion and thus the exclusion would still apply where the biometric information of health care workers is used for healthcare treatment.

¶ 83 The other bedrock principle that compels my understanding that this exclusion applies to biometric information used for healthcare treatment is that "statutes should be construed so that no word or phrase is rendered superfluous or meaningless." *People v. Parvin*, 125 Ill. 2d 519, 525 (1988). The interpretation offered by the majority reads important words out of the exclusion in section 10 and indeed would render that entire exclusion redundant in light of another exclusion already in BIPA.

¶ 84 First, the majority fails, in my view, to satisfactorily consider the fact that the word "information" is deliberately used twice in this exclusion, first in reference to "information

captured from a patient in a health care setting" and then after the word "or," suggesting that this is a different kind of information, in reference to "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [(HIPAA)]." The majority's explanation is that "captured" is different than "collected" but, in the majority's reading, all "information" is patient information. *Supra* ¶¶ 58-60. Under this reading, there is simply no reason to use the word "information" twice in the disjunctive, suggesting that the exclusion is referencing two different kinds of information.

¶ 85 Moreover, if as the plaintiffs have consistently argued, the purpose of this exclusion is simply to avoid any potential conflict between BIPA and HIPAA, both of which protect privacy, the entire exclusion would be unnecessary. Section 25(b) of BIPA already makes clear that "[n]othing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act." 740 ILCS 14/25 (West 2016).

¶ 86 The majority sidesteps these rules of construction to arrive at an interpretation of the exclusion in section 10 that aligns with its preferred definition of the word "under" as meaning "protected by." See *supra* ¶ 63. It is true that one definition of that word is "covered [or] protected by" (Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/under (last visited Sept. 8, 2022)). I also agree that only patient information is "protected by" HIPAA. But before we decide the meaning of the word "under," we must first determine what phrase that word applies to. The last antecedent rule and the rule against treating language in a statute as superfluous both dictate that "under" HIPAA refers to "healthcare treatment, payment, and operations." None of these activities are "protected" by

HIPAA. Rather, they are activities that are *defined* by HIPAA and that, when engaged in by covered entities, make certain HIPAA regulations applicable.

¶ 87 The majority also reasons that, if the General Assembly intended to create a blanket exclusion for the healthcare industry, it could have drafted one, just as it did for the financial industry (see 740 ILCS 14/25(c) (West 2016)). *Supra* ¶ 64. But defendants are not suggesting that the legislature intended to exempt the healthcare industry as whole. Rather, in their view and mine, this is a far narrower exclusion to allow the healthcare industry to use biometric information for treatment, payment and operations, as those terms are defined by HIPAA. It is hard to imagine a better example of this than finger-scan information collected by those workers' employers to ensure that medication is properly dispensed. Conversely, if the General Assembly intended only to exclude "patient information protected by HIPAA," it certainly could have said just that.

¶ 88 For all of these reasons, I would answer "yes" to the two certified questions.

¶ 89 I respectfully dissent.

No. 1-20-0822

Cite as:	*Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 18-CH-05031, 18-CH-07161; the Hon. Pamela McLean Meyerson and the Hon. Alison C. Conlon, Judges, presiding.
Attorneys for Appellants:	Gary M. Miller, Matthew C. Wolfe, and Elisabeth A. Hutchinson, of Shook, Hardy & Bacon L.L.P., both of Chicago, for appellant Becton, Dickinson and Company. Joel Griswold and Bonnie Keane DelGobbo, of Baker & Hostetler LLP, of Chicago, for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare.
Attorneys for Appellee:	James B. Zouras, Ryan F. Stephan, Andrew C. Ficzko, Catherine T. Mitchell, and Paige L. Smith, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amici Curiae*:**	Michael A. Woods, of Naperville, for *amici curiae* Illinois Health and Hospital Association and Richard H. Tilghman, of Nixon Peabody LLP, of Chicago, for *amici curiae* Alexian Brothers-AHS Midwest Region Health Co. d/b/s AMITA Health.

(740 ILCS 14/10)

Sec 10 Definitions In this Act

"Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

"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. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

"Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property. Examples of confidential and sensitive information include, but are not limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a PIN number, a pass code, a driver's license number, or a social security number.

"Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.

"Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

(Source: P.A. 95-994, eff. 10-3-08.)

IN THE APPELALTE COURT OF ILLINOIS
FIRST DISTRICT

LUCILLE MOSBY,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	No. 1-20-0822
	)	
THE INGALLS MEMORIAL HOSPITAL, et al.,	)	
	)	
Defendants-Applicants.	)	

ORDER

THIS MATTER COMING TO BE HEARD on the application of Defendants-Applicants, Ingalls Memorial Hospital, *et.al.*, for Leave to Appeal pursuant to Illinois Supreme Court Rule 308, the Court having considered the application filed by Defendants-Applicants, the response filed by Plaintiff-Respondent, Lucille Mosby, the supporting record and supplements to the record, and the Court being fully advised in the premises;

IT IS HEREBY ORDRED the Court finds the question of law involved does not present a question of law as to which there is a substantial ground for difference of opinion. Therefore, the Application for Leave to Appeal pursuant to Illinois Supreme Court Rule 308, IS DENIED.

ORDER ENTERED

AUG 24 2020

APPELLATE COURT FIRST DISTRICT

Dated:_____

Nathaniel R. Howse, Jr.
JUSTICE

Cynthia Y. Cobbs
JUSTICE

Maureen E. Connors
JUSTICE

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 27, 2021

In re: Lucille Mosby, respondent, v. The Ingalls Memorial Hospital et al., petitioners. Leave to appeal, Appellate Court, First District. 126590

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause and entered the following supervisory order:

> In the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its order in Mosby v. The Ingalls Memorial Hospital, case No. 1-20-0822 (08/24/20), denying the application for leave to appeal pursuant to Rule 308. The appellate court is directed to allow the application for leave to appeal, and to answer the certified question.

The mandate of this Court will issue to the Appellate Court on 03/03/2021.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 25, 2023

In re: Lucille Mosby, Indv., etc., et al., Appellees, v. The Ingalls Memorial Hospital et al. (Becton, Dickinson and Company et al., Appellants). Appeal, Appellate Court, First District.
129081

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

E-FILED
Transaction ID: 1-20-0822
File Date: 7/17/2020 11:50 AM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Case No. __–____–_____

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY,

Plaintiff-Respondent,

v.

THE INGALLS MEMORIAL HOSPITAL, et al.,

Defendants-Applicants.

Application from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
Case No. 2018 CH 05031
The Honorable Pamela McLean Meyerson, Judge Presiding

SUPPORTING RECORD – VOLUME I

Joseph A. Strubbe (6191136)
jstrubbe@vedderprice.com
Frederic T. Knape (6256217)
fknape@vedderprice.com
Zachary J. Watters (6310675)
zwatters@vedderprice.com
VEDDER PRICE P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
T: +1 312 609 7500
Firm ID No. 44284

Attorneys for Defendants-Applicants The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.

Gary M. Miller (6229867)
gmiller@shb.com
Matthew C. Wolfe (6307345)
mwolfe@shb.com
Erika A. Dirk (6329612)
eadirk@shb.com
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, Illinois 60606
T: + 312 704 7700
Firm ID No. 58950

Attorneys for Defendant-Applicant Becton, Dickinson and Company

TABLE OF CONTENTS OF THE SUPPORTING RECORD	
VOLUME I	
	Page
Class Action Complaint filed April 18, 2018	1
Order dated May 14, 2019 granting motion for leave to amend Complaint	23
Amended Class Action Complaint filed May 14, 2019	24
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Section 2-619.1 Motion to Dismiss Or, Alternatively, to Strike Amended Class Action Complaint filed June 5, 2019	46
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Memorandum of Law In Support of Section 2-619.1 Motion to Dismiss Or, Alternatively, to Strike Amended Class Action Complaint filed June 5, 2019	51
Plaintiff's Opposition to Defendants The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Motion to Dismiss Plaintiff's Amended Class Action Complaint filed September 27, 2019	78
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Reply In Support of Section 2-619.1 Motion To Dismiss Or, Alternatively, To Strike Amended Class Action Complaint filed October 18, 2019	182
Defendant Becton, Dickinson and Company's Motion To Dismiss Plaintiff's Amended Class Action Complaint filed June 5, 2019	281
Defendant Becton, Dickinson and Company's Memorandum In Support Of Its Motion To Dismiss Plaintiff's Amended Class Action Complaint filed June 5, 2019	283
Plaintiff's Opposition To Defendant Becton, Dickinson And Company's Motion To Dismiss Plaintiff's Amended Class Action Complaint filed September 27, 2019	304
Defendant Becton, Dickinson And Company's Reply In Support Of Its Motion To Dismiss filed October 18, 2019	408

TABLE OF CONTENTS OF THE SUPPORTING RECORD	
VOLUME II	
Order entered January 13, 2020 regarding Defendants' Motions to Dismiss	519
The Ingalls Memorial Hospital And UCM Community Health & Hospital Division, Inc.'s Notice Of Filing Of Transcript filed January 29, 2020	520
Second Amended Class Action Complaint filed February 24, 2020	563
Defendants' Joint Motion To Certify Question For Interlocutory Appeal Under Illinois Supreme Court Rule 308 And Stay Proceedings filed March 16, 2020	586
Plaintiff's Opposition To Defendants' Joint Motion To Certify Question For Interlocutory Appeal Under Illinois Supreme Court Rule 308 And Stay Proceedings filed April 20, 2020	687
Defendants' Joint Reply In Support Of Motion To Certify Question For Interlocutory Appeal Under Illinois Supreme Court Rule 308 And Stay Proceedings filed May 4, 2020	912
Order dated June 18, 2020 granting Joint Motion to Certify	923

E-FILED
Transaction ID: 1-20-0822
File Date: 7/17/2020 11:50 AM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Case No. __–____–_____

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCILLE MOSBY,

Plaintiff-Respondent,

v.

THE INGALLS MEMORIAL HOSPITAL, et al.,

Defendants-Applicants.

Application from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
Case No. 2018 CH 05031
The Honorable Pamela McLean Meyerson, Judge Presiding

SUPPORTING RECORD – VOLUME II

Joseph A. Strubbe (6191136)
jstrubbe@vedderprice.com
Frederic T. Knape (6256217)
fknape@vedderprice.com
Zachary J. Watters (6310675)
zwatters@vedderprice.com
VEDDER PRICE P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
T: +1 312 609 7500
Firm ID No. 44284

Attorneys for Defendants-Applicants The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.

Gary M. Miller (6229867)
gmiller@shb.com
Matthew C. Wolfe (6307345)
mwolfe@shb.com
Erika A. Dirk (6329612)
eadirk@shb.com
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive
Suite 4700
Chicago, Illinois 60606
T: + 312 704 7700
Firm ID No. 58950

Attorneys for Defendant-Applicant Becton, Dickinson and Company

TABLE OF CONTENTS OF THE SUPPORTING RECORD	
VOLUME I	
	Page
Class Action Complaint filed April 18, 2018	1
Order dated May 14, 2019 granting motion for leave to amend Complaint	23
Amended Class Action Complaint filed May 14, 2019	24
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Section 2-619.1 Motion to Dismiss Or, Alternatively, to Strike Amended Class Action Complaint filed June 5, 2019	46
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Memorandum of Law In Support of Section 2-619.1 Motion to Dismiss Or, Alternatively, to Strike Amended Class Action Complaint filed June 5, 2019	51
Plaintiff's Opposition to Defendants The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Motion to Dismiss Plaintiff's Amended Class Action Complaint filed September 27, 2019	78
The Ingalls Memorial Hospital and UCM Community Health & Hospital Division, Inc.'s Reply In Support of Section 2-619.1 Motion To Dismiss Or, Alternatively, To Strike Amended Class Action Complaint filed October 18, 2019	182
Defendant Becton, Dickinson and Company's Motion To Dismiss Plaintiff's Amended Class Action Complaint filed June 5, 2019	281
Defendant Becton, Dickinson and Company's Memorandum In Support Of Its Motion To Dismiss Plaintiff's Amended Class Action Complaint filed June 5, 2019	283
Plaintiff's Opposition To Defendant Becton, Dickinson And Company's Motion To Dismiss Plaintiff's Amended Class Action Complaint filed September 27, 2019	304
Defendant Becton, Dickinson And Company's Reply In Support Of Its Motion To Dismiss filed October 18, 2019	408

E-FILED
Transaction ID: 1-21-0895
File Date: 8/4/2021 1:12 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

Case No. 1-21-0895

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YANA MAZYA, individually and on behalf of all other similarly situated,

Plaintiff-Respondent,

v.

NORTHWESTERN LAKE FOREST HOSPITAL and
NORTHWESTERN MEMORIAL HEALTHCARE,

Defendants-Applicants.

Rule 308 Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division
Case No. 2018 CH 07161
The Honorable Alison C. Conlon, Judge Presiding

SUPPORTING RECORD

Bonnie Keane DelGobbo
ARDC #6309394
Joel Griswold
ARDC # 6277574
BAKER & HOSTETLER LLP
1 North Wacker Drive, Suite 4500
Chicago, IL 60606
(312) 416-6200
bdelgobbo@bakerlaw.com
jcgriswold@bakerlaw.com

Attorneys for Northwestern Lake Forest Hospital and Northwestern Memorial HealthCare

Case No. 1-21-0895

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YANA MAZYA, individually and on behalf of all other similarly situated,

Plaintiff-Respondent,

v.

NORTHWESTERN LAKE FOREST HOSPITAL and NORTHWESTERN MEMORIAL HEALTHCARE,

Defendants-Applicants.

Rule 308 Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division
Case No. 2018 CH 07161
The Honorable Alison C. Conlon, Judge Presiding

AFFIDAVIT OF BONNIE KEANE DELGOBBO
CERTIFYING RULE 328 SUPPORTING RECORD

I, Bonnie Keane DelGobbo, an attorney for the petitioning party, hereby state the following under penalties as provided by 735 ILCS 5/1-109 of the Code of Civil Procedure:

1. I represent Northwestern Lake Forest Hospital ("NLFH") and Northwestern Memorial HealthCare ("NMHC", collectively "Northwestern") in the above-captioned matter.

2. I prepared the Supporting Record for Northwestern's application for leave to appeal pursuant to Supreme Court Rules 308, 321, and 328 (the "Supporting Record").

3. The Supporting Record includes true and correct copies of:

   a. the relevant pleadings, motions, and supporting exhibits as they were served by or provided to our office;

   b. the relevant orders entered in the lower court; and

c. the report of proceedings from relevant hearings as they were provided to our office by the court reporter.

4. I certify that the contents of the Supporting Record are true and correct copies of the documents as they appear in the trial court record.

5. I am competent to testify to the matters stated in this affidavit.

6. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

Dated: July 27, 2021

/s/Bonnie Keane DelGobbo
Bonnie Keane DelGobbo

TABLE OF CONTENTS

Page