No. 127801

IN THE
SUPREME COURT OF ILLINOIS

Jorome Tims and Isaac Watson, individually and on behalf of a class of similarly situated persons, *Plaintiffs-Appellees,* v. Black Horse Carriers, Inc., *Defendant-Appellant.*	Rule 315(a) Appeal from the First District Appellate Court, No. 1-20-0563; There Heard on Appeal from the Circuit Court of Cook County, Illinois, No. 19 CH 3522 The Honorable David B. Atkins, Judge Presiding

APPELLANT'S ADDITIONAL BRIEF

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E-FILED
3/22/2022 5:28 PM
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NATURE OF THE CASE

Plaintiffs Jorome Tims and Isaac Watson brought this putative class action against their former employer, defendant Black Horse Carriers, Inc., for alleged violations of the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*. (the Privacy Act). Black Horse moved to dismiss the complaint based on the one-year statute of limitations for privacy actions, 735 ILCS 5/13-201, because both the nature of plaintiffs' injury and the liability imposed involve the publication of matter violating the right of privacy.

The circuit court denied the motion to dismiss. It held section 13-201 did not apply and the legislature's failure to specify a statute of limitations for Privacy Act claims meant plaintiffs' action was governed by the five-year residual limitations period for "all civil actions not otherwise provided for," 735 ILCS 5/13-205. Nevertheless, the circuit court certified a question of law to the appellate court pursuant to Rule 308 that asked whether the one-year limitations period for privacy actions or the five-year residual limitations period applied to Privacy Act claims.

The appellate court allowed the Rule 308 application and found that both limitations periods applied. It held the one-year limitations period applied to allegations a defendant disclosed the plaintiff's biometric data in violation of sections 15(c) and 15(d) of the Privacy Act, and the five-year limitations period applied to allegations a defendant lacked safeguards to protect the data from publication in violation of sections 15(a), 15(b) and 15(e).

ISSUE PRESENTED FOR REVIEW

Whether the limitations period set forth in 735 ILCS 5/13-201 ("Defamation – Privacy") or in 735 ILCS 5/13-205 applies to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*

STATEMENT OF JURISDICTION

Jurisdiction in the appellate court was based on Supreme Court Rule 308. Both the circuit court and the appellate court found that this case presents a question of law over which there is a substantial ground for difference of opinion and that an immediate appeal would advance the ultimate termination of the litigation.

Jurisdiction in this Court is based on Supreme Court Rule 315(a), which provides for permissive review of a final decision of the appellate court. The appellate court's decision was published on September 17, 2021. *See Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563. Black Horse filed a timely petition for leave to appeal on October 22, 2021. This Court allowed the petition for leave to appeal on January 26, 2022.

STATUTES INVOLVED

The full text of the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*, and the relevant provisions section 13 of the Limitations Act, 735 ILCS 5/13-201 and 735 ILCS 5/13-205, are set forth in the Appendix to this brief.

STATEMENT OF FACTS

On March 18, 2019, plaintiff Jorome Tims filed a complaint against his former employer, defendant Black Horse Carriers, that asserted claims under the Biometric Information Privacy Act. (SR 1-22.) The Privacy Act regulates the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). "Biometric identifier" includes "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10.

The complaint alleged Black Horse required its employees to use a timeclock that collected their fingerprints as an authentication method. (SR 10.) Plaintiff claimed Black Horse violated the Privacy Act because it: (1) failed to maintain a publicly available biometric information retention and destruction policy to protect plaintiff's biometric information from publication, in violation of section 15(a); (2) failed to obtain plaintiff's consent to collect his biometric information, in violation of section 15(b); and (3) disclosed plaintiff's biometric information to third parties, in violation of section 15(d). (SR 16-21.)

In addition to his individual claims, plaintiff sought to represent a class of individuals who worked for Black Horse and had their fingerprints "collected, captured, received, obtained, maintained, stored or disclosed" by Black Horse "during the applicable statutory period." (SR 13.) Plaintiff sought

damages for "actual and ongoing harm," including "the continuous and ongoing exposure to substantial and irreversible loss of privacy." (SR 11-12.)

Black Horse moved to dismiss the complaint as untimely, citing the one-year statute of limitations in section 13-201 of the Code of Civil Procedure, 735 ILCS 5/13-201. (SR 23-59.) Black Horse argued section 13-201 governs actions for the publication of matter that violates a right of privacy and that the purpose of the Privacy Act is both to prevent and redress the publication of private matter. (SR 30-35.)

Plaintiff agreed "BIPA is a privacy statute," but argued the five-year residual statute of limitations should apply to his claims. (SR 63-67.) Plaintiff contended the one-year limitations period applied only to privacy claims in which publication was a required element of the cause of action, and that the Privacy Act "does not involve the publication of biometric data, nor was it intended to regulate the publication of biometric data." (SR 65.)

The circuit court denied Black Horse's motion to dismiss. (SR 168-70.) It held the privacy statute of limitations in section 13-201 did not apply because "this action is premised on Plaintiff's claims that Defendant violated BIPA; not that Defendant has generally invaded Plaintiff's privacy or defamed him." (SR 169.) It reasoned that the five-year residual statute of limitations applied by "default" because the Privacy Act "does not provide an explicitly stated statute of limitations." (SR 170.)

Plaintiff subsequently amended his complaint to name Isaac Watson as an additional plaintiff and class representative. (SR 171-92.) Aside from the dates Tims and Watson were employed by Black Horse, their claims were the same. (SR 180.)

Black Horse answered the amended complaint and asked the circuit court to either reconsider its ruling or certify the limitations question for interlocutory appeal pursuant to Supreme Court Rule 308. (SR 193-240.) Black Horse argued that the nature of its liability determined the applicable statute of limitations, not the facts or elements of plaintiffs' cause of action, and that all of the duties imposed by the Privacy Act involved the publication of matter that violates a privacy right. (SR at 227-30.)

The circuit court denied the motion to reconsider but certified the following Rule 308 question for interlocutory appeal: "Whether the limitations periods set forth in 735 ILCS 5/13-201 ("Defamation – Privacy") or 735 ILCS 5/13-205 apply to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*" (SR at 286.)

The appellate court granted Black Horse's application for leave to appeal and, on September 17, 2021, answered the certified question. The appellate court held that a cause of action under the Privacy Act is governed by two statutes of limitations, section 13-201 (one year) and 13-205 (five years), depending on which subsection of the Act the plaintiff alleges was violated.

The court reasoned that the one-year limitations period in section 13-201 applies to claims based on sections 15(c) and 15(d) of the Privacy Act, "where publication or disclosure of biometric data is clearly an element" of the claim. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 32. The court found the five-year limitations period in section 13-205 applies to claims based on sections 15(a), 15(b) and 15(e) of the Privacy Act, because those sections "have absolutely no element of publication or dissemination." *Id.* ¶ 31.

ARGUMENT

ALL ACTIONS BROUGHT UNDER THE PRIVACY ACT ARE GOVERNED BY THE PRIVACY STATUTE OF LIMITATIONS

A. The standard of review is *de novo*.

Whether a particular statute of limitations applies to a cause of action is a legal question this Court reviews *de novo*. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 345 (2002); *see also Yang v. City of Chi.*, 195 Ill. 2d 96, 103 (2001) (certified question involving interpretation of a statute is a question of law subject to *de novo* review).

B. An objective standard determines the applicable limitations period.

When the issue is which of two or more statutes of limitation applies to a cause of action, this Court has "long held that 'it is the nature of the plaintiff's injury rather than the nature of the facts from which the claim arises which should determine what limitations period should apply.'" *Travelers*

Casualty & Surety Co. v. Bowman, 229 Ill. 2d 461, 466 (2007), citing *Armstrong v. Guigle*, 174 Ill. 2d 281, 286-87 (1996), quoting *Mitchell v. White Motor Co.*, 58 Ill. 2d 159, 162 (1974), and citing *Handtoffski v. Chi. Consolidated Traction Co.*, 274 Ill. 282 (1916).

To determine the "true character" of a plaintiff's injury for purposes of identifying the applicable statute of limitations, "[t]he focus of the inquiry is on the nature of the liability . . ." *Travelers*, 229 Ill. 2d at 467. The case that coined this test over a century ago was *Handtoffski*. It explained that "the limitations are not based upon the form of the particular action named but on the particular injury sued for or upon the obligation out of which the action grows." *Handtoffski*, 274 Ill. at 285.

This Court has consistently ruled that the *Handtoffski* test disregards "the pleader's designation of the nature of the action" as well as "the nature of the facts from which the claim arises." *Travelers*, 229 Ill. 2d at 466; *Armstrong*, 174 Ill. 2d at 286-87. The elimination of these considerations produces an objective standard for categorizing cases under the Limitations Act that serves the interests of plaintiffs and defendants alike.

As the Court explained in *Armstrong*, an objective test based on the "true character" of the injury and the "nature of the liability" ensures a plaintiff cannot "circumvent a shorter period of limitations, or attempt to breathe new life into a stale claim, merely by means of artful pleading." 174 Ill. 2d at 287. Likewise, the Court's objective standard ensures a defendant cannot

circumvent a longer limitations period based on the facts alleged or the plaintiff's designation of the cause of action. *See e.g. Travelers*, 229 Ill. 2d at 470. Indeed, this Court's jurisprudence is permeated by a consistent refusal to allow the facts or allegations in a complaint, or the "form" of the action, to dictate which limitations period applies. It is the core or "gravamen" of the cause of action that controls.

In *Handtoffski*, for example, a streetcar lurched forward just as the plaintiff boarded. The handle he grasped broke free and he was thrown to the ground. The plaintiff claimed his action was for breach of an implied contract of carriage ("*assumpsit*") and therefore subject to a five-year limitations period, not the two-year limitations for tort actions ("*ex delicto*") raised by the defendant. This Court rejected the plaintiff's argument. It held "[t]he form of the action had nothing to do with the fixing of the limitation," and if the complaint's designation of the claim was allowed to control, it would "create arbitrarily a longer period of liability" for a personal injury action. 274 Ill. at 288.

Eighty years later, *Armstrong* relied on *Handtoffski* to hold that the plaintiff's claim for breach of fiduciary duty was not subject to the ten-year limitations period for actions on written contracts merely because the plaintiff alleged the duties the defendants breached were implied by the parties' written agreement. 174 Ill. 2d at 286, 294. "To adopt such a simplistic and formulaic approach would elevate form over substance, and in the process

would undermine the court's obligation to look behind the allegations in a complaint to discover the true character of plaintiffs' cause of action." 174 Ill. 2d at 290.

Similarly, in *Rozny v. Marnul*, 43 Ill. 2d 54 (1969), this Court rejected the plaintiffs' contention that the 10-year statute of limitations should govern an action for tortious misrepresentation even though a land surveyor's guarantee of accuracy was in writing. In reaching its decision, this Court stressed that "to hold the written contract statute of limitations applicable to this action[] would be incompatible with our emphasis upon the fact that the basis of liability affirmed herein is not contractual in nature." 43 Ill. 2d at 69.

Yet another example is *Mitchell v. White Motor Co.*, 58 Ill. 2d 159 (1974). That case involved a man who was injured when the hood of a vehicle made by the defendant fell on him. The issue was whether his wife's claim for loss of consortium was subject to a two-year or a five-year limitations period. The Court found the longer limitations period applied. It reasoned that the nature of the injury was to the "marital relationship" rather than any direct personal injury to the wife. "We think that it is the nature of the plaintiff's injury rather than the nature of the facts from which the claim arises which should determine what limitations period should apply." 58 Ill. 2d at 162.[1]

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[1] *Mitchell* was ultimately superseded by 735 ILCS 5/13-203, which establishes that the limitations period for a loss of consortium claim is governed by the same limitations period applicable to the underlying injury.

Finally, in *Travelers Cas. & Surety Co. v. Bowman*, 229 Ill. 2d 461 (2008), the plaintiff insurance company paid to complete certain work undertaken by the defendants' construction company. The insurer sought indemnity from the defendants as guarantors of the insurer's performance bond.

The defendants argued the action was time-barred by the four-year limitations period for actions based on the construction of improvements to real property. According to the defendants, it was their partial performance of the construction work that formed the basis of the indemnity claim, and therefore the action grew out of "the design, planning, supervision, observation or management of construction or construction of an improvement to real property," under section 13-214(a). The insurer contended the action was subject to the ten-year limitations period for written contracts.

This Court held that the longer limitations period for written contracts applied because "the liability at issue emanates not from construction-related activity but, rather, from the breach of a contractual obligation to indemnify." 229 Ill. 2d at 470; *see also Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 414 (2009) (nature of injury was childhood sexual abuse, and therefore shorter five-year residual limitations period did not apply to plaintiff's fraud claim).

The fundamental error in the appellate court's decision in this case is its failure to use the analytical framework this Court has prescribed when the issue is competing limitations periods. The appellate court did not consider

any of these precedents and made no attempt to examine the nature of plaintiffs' injury or the liability imposed by the Privacy Act. As a result, the appellate court did exactly what *Handtoffski*, *Armstrong*, *Rozny*, *Mitchell* and *Travelers* all said a court should *not* do. It relied on the form of the action to determine the applicable limitations period, focusing strictly on whether the complaint alleged a "publication" or disclosure of plaintiffs' biometric data instead of looking behind the allegations to determine the true character of the claim. Indeed, the appellate court explicitly defied *Mitchell's* instruction to look to the "nature of the plaintiff's injury rather than the nature of the facts from which the claim arises" when it focused exclusively on the facts that gave rise to the particular Privacy Act violation to determine the applicable statute of limitations.

The appellate court's approach undermines the purpose of the objective standard that determines the applicable limitations period and produces an absurd result. It allows a plaintiff to circumvent the shorter limitations period of section 13-201 merely by pleading a violation of one subsection of the Privacy Act instead of another. This makes the Privacy Act subject to two different limitations periods even though the liability imposed under each subsection is the same and there is but one privacy interest affected – the protection of plaintiffs' biometric data from disclosure.

Except in instances where the legislature has specified that different limitations periods apply to different components of a statute,[2] Black Horse has found no case in which a complaint based on a statutory violation was held to be simultaneously subject to two different limitations periods.

C. The true character of plaintiffs' injury is an invasion of privacy which involves publication.

When the proper objective standard is applied, the true character of plaintiffs' injury becomes clear -- it is a privacy injury which involves the actual or potential publication of biometric data. *See West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan*, 2021 IL 125978, ¶ 46 (holding that the Privacy Act "protects a secrecy interest—here, the right of an individual to keep his or her personal identifying information like fingerprints secret.").

The privacy injury involves publication because the Privacy Act regulates both the actual disclosure of biometric data and the exercise of control over the secrecy of biometric data. Maintaining secrecy is the essence of the action, which is why the complaint specifically cites both the actual exposure of plaintiffs' biometric information to third parties and plaintiffs' "ongoing" concern that defendant's failure to properly safeguard their biometric data will result in further disclosures. (SR 9, 12.)

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[2] For example, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2614, provides both a three-year and a one-year limitations period, depending on the section of the statute that has been violated. The Truth in Lending Act, 15 U.S.C. § 1640(e), uses the same structure.

The imposition of liability for a defendant's failure to properly manage the risk of publication of biometric data and maintain its secrecy is a theme this Court reinforced in both *McDonald v. Symphony Bronzeville*, 2022 IL 126511, and *Rosenbach v. Six Flags Entertainment Corp*., 2019 IL 123186. *McDonald* described the duties imposed on a defendant as "prophylactic measures to prevent compromise of an individual's biometrics." 2022 IL 126511, ¶ 43. *Rosenbach* stressed that the liability imposed by the Privacy Act "insure[s] that . . . biometric identifiers and biometric information are properly honored and protected to begin with, before they are or can be compromised . . . That is the point of the law." 2019 IL 123186, ¶¶ 36, 37; see also *Sekura v. Krishna Schaumburg Tan, Inc*., 2018 IL App (1st) 180175, ¶ 70 (entire purpose of the Act is "to prevent an unauthorized disclosure[.]").

These decisions are a reflection of the statute's statement of legislative intent, which focuses on preserving a plaintiff's ability to control the secrecy of their biometrics. The statute provides remedies in the form of monetary compensation and injunctive relief to redress the actual publication of private matter and to prevent its wrongful disclosure. See 740 ILCS 14/5(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.").

All five requirements of the Privacy Act's section 15 are concerned with controlling the publication of matter that violates a privacy right. Sections

15(c) and 15(d) impose liability when there is a disclosure of biometric data to a third party. *Santa's Best Craft, LLC v. Zurich Am. Ins. Co.*, 408 Ill. App. 3d 173, 185 (1st Dist. 2010) (publish means to disclose). Sections 15(a), 15(b) and 15(e) impose liability on a defendant for its failure to employ safeguards to prevent publication or disclosure. As this Court noted in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, the liability is the same no matter which requirement a defendant violates: "[W]hen a private entity fails to comply with *one* of section 15's requirements, that violation constitutes an invasion, impairment, or denial" of the privacy rights created by the statute. *Rosenbach*, ¶ 33 (emphasis added).

In the context of deciding the applicable limitations period, this Court has explained that the nature of the injury and the liability imposed "cannot be viewed in a vacuum." *Orlak v. Loyola University Health Sys.*, 228 Ill. 2d 1, 16 (2007.) Statutes are evaluated as a whole, with each provision construed in connection with every other section. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 216-17 (2008).

The appellate court's holding that the privacy statute of limitations applies only to affirmative disclosures that violate sections 15(c) and 15(d) of the Privacy Act construes section 15's requirements piecemeal and overlooks how sections 15(a) through 15(e) all work together to control secrecy – to achieve the legislature's goal of "heading off" the problem of publication before it occurs "and cannot be undone." That is "the point of the law."

Rosenbach, ¶¶ 36, 37. This includes the duty to obtain a person's consent to the collection of their biometric data under section 15(b), a threshold step that eliminates the risk of publication if consent is withheld.

Viewed as a whole, the true character of the injury under the Privacy Act is not just the actual publication of a plaintiff's biometric data under sections 15(c) and 15(d), but the prevention of wrongful publication or disclosure through the use of safeguards specified by sections 15(a), 15(b) and 15(e). "[T]he obligation out of which the action grows" is plainly "for the publication of matter violating the right of privacy" *Handtoffski*, 274 Ill. at 285; 735 ILCS 5/13-201.

D. Section 13-201 applies to any action that involves control over the dissemination of false or private information.

Section 13-201 of the Limitations Act is entitled "Defamation – Privacy." It provides that "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued." 735 ILCS 5/13-201.

A statute's reach cannot be determined without first knowing what the statute covers. *People v. Minnis*, 2016 IL 119563, ¶ 25 (citing *United States v. Stevens*, 559 U.S. 460, 474 (2010)). When presented with an issue of statutory construction, the primary objective is to ascertain and give effect to the intent of the legislature. *Oswald v. Hamer*, 2018 IL 122203, ¶ 10. The most reliable

indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Id.*

The statute's language cannot be read in isolation and must be viewed as a whole, with the words and phrases construed in light of other relevant statutory provisions. *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund*, 2018 IL 122793, ¶ 35. Each word, clause, and sentence must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Oswald*, 2018 IL 122203, ¶ 10.

Additionally, it is presumed that the legislature did not intend to create absurd, inconvenient, or unjust results. *Carmichael*, 2018 IL 122793, ¶ 35; *Minnis*, 2016 IL 119563, ¶ 25. It is also proper to consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Carmichael*, 2018 IL 122793, ¶ 35; *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25.

Section 13-201's use of the words "Defamation -- Privacy" in its title signals an intent to address two categories of actions that share a common denominator – a person's right to control the dissemination of information about them that may be either false or private. Whether the claim is slander, libel or the publication of matter that violates a privacy interest, the bedrock interest that unifies the category of cases to which section 13-201 applies is the prevention of wrongful disclosures. *See Land v. Board of Education*, 202 Ill. 2d

414, 429-30 (2002) (statute's title is properly considered when it is consistent with construction of statutory language and does not "undo" or "limit[] the text.").

In *People v. Austin*, 2019 IL 123910, this Court recognized that privacy is not a static concept. It is constantly evolving, particularly in response to technological advancements. *Austin* explained that "[t]he entire field of privacy law is based on the recognition that some types of information are more sensitive than others, the disclosure of which can and should be regulated." 2019 IL 123910, ¶ 50. The court cited examples of how the legislature has acted to expand the protection of an individual's interest in leading a private life beyond the four common law invasion of privacy torts.[3] Those examples included the privacy of medical records (410 ILCS 50/3(d)), biometric data (740 ILCS 14/15), social security numbers (5 ILCS 179/10) and the nonconsensual dissemination of private sexual images (720 ILCS 5/11-23.5(b)). Other examples are the appropriation of one's name or likeness (765 ILCS 1075); and AIDS confidentiality (410 ILCS 305).

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[3] The four common-law invasion of privacy torts are: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) a public disclosure of private facts; and (4) publicity that reasonably places another in a false light before the public. *See Lovgren v. Citizens First National Bank*, 126 Ill. 2d 411, 416 (1989); *see also Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 33; Restatement (2d) of Torts, §§ 652B-652E.

All of these privacy actions, whether common law or statutory, and whether for defamation or secrecy, vindicate the right to control and prevent the "publication" of information that may be unflattering and hurtful, or intimate and private. And with near unanimity, all have been held subject to the one-year limitations period of section 13-201. As *Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77, 105 (1996), broadly declared in a case that involved both defamation and privacy claims, "[t]he limitations period for invasion of privacy claims and for defamation claims is one year after the cause of action accrues." *See also Leopold v. Levin*, 45 Ill. 2d 434, 444 (1970) (one year for misappropriation of an individual's likeness); *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 323 (2006) (one-year statute of limitations applies to claims under Illinois Right of Publicity Act); *Poulos v. Lutheran Soc. Servs. Of Illinois, Inc.*, 312 Ill. App. 3d 731, 745 (2000) (false light); *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 745-46 (1986) (public disclosure of private facts).

The appellate court's decision in *Blair* is particularly relevant here. *Blair* concerned the Illinois Right of Publicity Act, which parallels the Privacy Act in multiple respects, including the remedies available, the goal of preventing the dissemination of identifying information, and the absence of any express statute of limitations. The *Blair* court, after categorizing the plaintiff's action as one involving a privacy interest, held it was subject to section 13-201's one-year limitations period. 369 Ill. App. 3d at 323.

The Privacy Act was passed on the heels of the *Blair* decision, just two years later. "The legislature is presumed to be aware of judicial decisions interpreting legislation." *Pielet v. Pielet*, 2012 IL 112064, ¶ 48. There is also a presumption "that several statutes relating to the same subject . . . are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious." *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 540 (2011).

Given the courts' consistent application of section 13-201's one-year limitations period to both common law and statutory actions brought to exert control over the dissemination of false or secret information, and the near-identity of the interests embodied by Privacy Act and the Illinois Right of Publicity Act, it is reasonable to presume that the legislature acted with the understanding and intent that the Privacy Act and the IRPA would be construed in the same harmonious spirit under the Limitations Act.

The appellate court departed from this Court's well-settled approach to statutory construction. Instead, it held section 13-201 applies strictly to privacy cases in which "publication" is an element of the cause of action, citing only the Second District Appellate Court's decision in *Benitez v. KFC National Mgt. Co.*, 305 Ill. App. 3d 1027 (2d Dist. 1999). It then went on to conclude that the only Privacy Act claims that are subject to section 13-201's one-year limitations period are those which allege an affirmative disclosure of the plaintiff's

biometric data under sections 15(c) and 15(d). This analysis was fundamentally flawed in two respects.

First, as explained in Argument B, *supra*, the test for determining which statute of limitations applies is an objective one that disregards the form and elements of the cause of action. It was therefore improper for the appellate court to focus exclusively on the elements of plaintiffs' cause of action to define the scope of section 13-201.

Second, this Court is "wary" of narrow "categorical holdings" like the appellate court's ruling in this case. *Austin*, 2019 IL 123910, ¶ 65. Courts are "not bound by the literal language of a particular clause of the statute that might defeat" the legislature's clearly expressed intent. *Uldrych*, 239 Ill. 2d at 540. There is no reason to believe that the legislature intended the phrase "for publication" to limit section 13-201's application to only "affirmative disclosures" of secret information when the gravamen of a privacy injury is the loss of control over disclosures.

Rather, the grammatical structure of section 13-201 supports a broader interpretation of the phrase "for publication," one that includes actions like this one whose purpose is to exert control over the publication of private matter. "Publication" is a noun that refers to "the act or process of publishing."[4] Here, it is modified by the preposition "for," a "function word"

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[4] *https://www.merriam-webster.com/dictionary/publication*.

that means "concerning" or "involving."[5] The plain meaning of section 13-201, therefore, is that the one-year limitations period applies to any action that "[concerns or involves the act or process of publishing] matter that affects a right of privacy."

The "act or process of publishing" includes control over the collection, use, handling, retention and storage of information. These are the acts the Privacy Act regulates to achieve its remedial purpose. The words "for publication" therefore refer not just to the affirmative disclosure of information, but to the exercise of a person's right to control the dissemination of their private information.

This broad interpretation of the words "for publication" is consistent with the legislature's use of the words "Defamation – Privacy" in the title to express its intent to apply a one-year limitations period to the entire genre of actions in which control over the disclosure of false or secret information is the overriding concern. *See Land*, 202 Ill. 2d at 430 (title is properly considered when it supports rather than limits the interpretation of statutory text).

A broad interpretation of "for publication" is also consistent with *West Bend*, 2021 IL 125978, which not only held that a Privacy Act section 15(d) claim involves publication, but that "the term 'publication' has *at least* two

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[5] *https://www.merriam-webster.com/dictionary/for#:~:text=Definition%20of%20for%20(Entry%202,for*

definitions." *Id.* at ¶ 43 (emphasis added). If the legislature had intended section 13-201 to apply only to affirmative publications, it could have used the same terms the insurer used in *West Bend.* But it did not. Instead, it purposely used broader language.

Thus, even if the appellate court's reliance on *Benitez* was correct and a privacy action must involve publication to fall within section 13-201's one-year limitations period, a suit to enforce safeguards that will prevent publication, and which includes the remedy of injunctive relief, is just as much an action "for publication of matter violating the right of privacy" as one that seeks money damages for the affirmative disclosure of private information.

This Court's decision in *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, is instructive. In *Riseborough*, the plaintiff-insurer's complaint alleged that the defendant-law firm fraudulently misrepresented that its client, a construction contractor, authorized a settlement with the insurer. The issue was whether the suit brought by the non-client insurer was governed by the statute of repose for legal malpractice actions, 735 ILCS 5/13-214.3.

The appellate court held the insurer's suit did not "arise out of the performance of professional services" within the meaning of the repose statute because the professional services that were the subject of the action were not performed for the plaintiff-insurer "as a client." It also held that the insurer's claims were designated not as legal malpractice claims, but as "breach of implied warranty of authority, fraudulent misrepresentation, and negligent

misrepresentation," which "were distinct from legal malpractice." *Riseborough*, 2014 IL 114271, ¶ 18.

This Court reversed. Initially, the Court observed that there was nothing in the language of the repose statute that required the plaintiff to be a client of the attorney who rendered services. The Court then went on to explain that under the statutory language, it was "nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney." 2014 IL 114271, ¶ 19.

The Court also found that the appellate court's "narrow reading" of the statute as one concerned with only "legal malpractice" was unjustified. The statute did not mention "legal malpractice." Instead, the statute broadly covered acts or omissions arising out of the "performance of professional services." *Id.* at ¶ 23 ("A court may not read into a statute any limitations or conditions which are not expressed in the plain language of the statute.").

Section 13-201 is not as broadly worded as the legal malpractice repose statute. That is partially due to the difference between statutes of limitation and repose. But the same principles of statutory construction apply and, grammatically, the language of the privacy limitations statute does not restrict its application to only the affirmative disclosure of matter that violates a right of privacy. Rather, the statute applies broadly to any action that involves a

plaintiff's attempt to exert control over the publication of matter that violates a privacy right.

A suit in which the plaintiffs' injury centers on both an actual publication and the prevention of wrongful publication fits comfortably within the statute's plain language and intent. Indeed, it would be absurd to restrict the one-year limitations period to actions that allege only the affirmative disclosure of private information when *preventing* the wrongful disclosure of private information is the more important and compelling concern.

E. The one-year limitations period for privacy actions advances the public policy that animates the Privacy Act.

Black Horse's research has not revealed any legislative history or jurisprudence that explains why the Illinois legislature chose a one-year limitations period for actions that involve libel, slander and the publication of information that violates privacy rights. However, the issue was discussed by the Kansas Court of Appeals in the context of a case similar to this one.

In *Meyer Land & Cattle Co. v. Lincoln County Conservation District*, 29 Kan. App. 2d 746, 31 P.3d 970 (2001), the plaintiff built a lagoon on a plot of land contemplated for use as a cattle yard. The defendant, a local conservation district, complained to the department of health about possible groundwater contamination from cattle waste. But then the defendant sent copies of its

written complaint to every conservation district in the state and various state agencies and public officials.

The plaintiff filed suit alleging tortious interference with contract, defamation and conspiracy. The issue was whether its claims were governed by the one-year limitations period for defamation cases or the two-year limitations period for tortious interference. Like Illinois, Kansas courts determine the applicable limitations period by "look[ing] through the form to the substance of each cause of action." 29 Kan. App. 2d at 749, 31 P.2d at 974. The court held "[t]hese misrepresentation-based claims all rest upon the core claim that the letter is a lie, all are essentially allegations of defamation, and all are similarly time barred." 29 Kan. App. 2d at 751, 31 P.2d at 975.

The Kansas court's rationale for applying only one limitations period to the complaint instead of two, as the appellate court did in this case, was the legislature's "policy reasons" for "giv[ing] torts short or long statutes of limitations." *Id.* at 29 Kan. App. 2d at 976-7, 31 P.2d at 754. The court explained that the "gravamen of a cause of action for tortious interference with a contract relationship is defamation," making "prompt investigation" essential while "evidence is still fresh in the minds of prospective witnesses" and before "the content of the statements fade[s] from the[ir] mind[s]." *Id.*, citing *Evans v. Philadelphia Newspapers, Inc.*, 411 Pa. Super. 244, 249-50, 601 A.2d 330 (1991).

The Privacy Act implicates very similar concerns. The statute's statement of legislative intent, like each of this Court's recent decisions on the Act, emphasizes that "[b]iometrics are biologically unique to the individual" and "once compromised, the individual has no recourse, [and] is at heightened risk for identity theft . . ." 740 ILCS 14/5(c). That is why the Privacy Act not only provides for the recovery of money damages, but for injunctive relief, as well. 740 ILCS 14/20(4).

A shorter statute of limitations comports with the legislative history of the Privacy Act because it was designed to address biometric data protection at the outset. This statutory scheme was made explicit when twenty-one current and former members of the Illinois General Assembly, which included the Privacy Act's chief sponsors and then-state senator and current Attorney General Kwame Raoul, filed an *amicus* brief in *Rosenbach,* 2019 IL 123186.

The legislators stated in their motion for leave to file the *amicus* brief that they wished to provide the Court with a first-hand perspective about the General Assembly's understanding of privacy and the ways in which statutes like the Privacy Act operate. (SR 117-20.) The legislators argued that the Privacy Act "strikes a careful balance in an attempt to protect a particular kind of privacy." (SR at 129.) They emphasized how the legislature had "enacted a robust array of privacy protections" in the last few decades, (SR at 132), and how the Privacy Act was a "direct descendant of this tradition." (SR at 133.)

Notably, the *amici* pointed out that the Privacy Act was necessary legislation because it addressed privacy protections at the outset, instead of adopting a wait-and-see approach. It "addresses the circumstances surrounding collection of biometric data" and "provides a means for consumers to maintain control over their information and prevent future harm." (SR 140.) The Act "encourages enforcement *before* anything bad happens." (SR 139) (emphasis in original).

Significantly, the *amici* contrasted the upfront-focused Privacy Act with another statute, the Personal Information Protection Act ("PIPA"). (SR 139.) PIPA strives for some of the same goals—protecting stored biometric data—but PIPA "recognizes that bad things do happen, and enacts procedures for what to do in those circumstances." (SR 140.) PIPA's "*ex post* protection backstops the important up-front protections provided by" the Privacy Act. (SR 140.) Thus, the Privacy Act was designed to protect potential threats to the secrecy of biometric information at the outset, and its legislative history suggests a shorter statute of limitations to deal with this upfront concern.

Moreover, PIPA is enforceable "only in an action under the Consumer Fraud Act" (SR 139), which means that it has a three-year statute of limitations, 815 ILCS 505/10a(e). The appellate court's holding in this case that the Privacy Act has a five-year statute of limitations for some of its sections means that the upfront-focused Privacy Act would have a *longer* statute of

limitations than PIPA—its "backstop" complimentary statute. That would be an absurd result.

Just as the prompt investigation of defamatory statements is essential to preserve their content before it is lost or forgotten, prompt action on a Privacy Act violation – particularly where inadequate safeguards against publication are at issue – is essential to securing the protections the Act was intended to provide. A policy that permits a five-year delay to redress the improper collection, use and storage of biometric data dramatically increases the risk that the data will be compromised. Conversely, a one-year limitations period may not benefit the plaintiffs in this particular case, but it will unquestionably serve the interests of all future plaintiffs by "head[ing] off such problems" long before they occur. *Rosenbach*, ¶¶ 36, 37.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, Black Horse Carriers, Inc., respectfully requests that this Court reverse the judgment of the appellate court and answer the certified question by finding that the one-year limitations period in 735 ILCS 5/13-201 governs all actions under the Biometric Information Privacy Act.

Respectfully submitted,

/s/Joshua G. Vincent

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Dated March 22, 2022

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents with points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 6,666 words.

/s/Joshua G. Vincent

APPENDIX

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

JEROME TIMS, Plaintiff, v. BLACK HORSE CARRIERS, INC., Defendant.	No. 2019-CH-03522 Calendar 16 Judge David B. Atkins

MEMORANDUM OPINION AND ORDER

THIS CASE COMING TO BE HEARD on Defendant Black Horse Carrier, Inc.'s motion to dismiss pursuant to 735 ILCS 5/2-619, the Court, having considered the briefs submitted and being fully advised in the premises,

HEREBY FINDS AND ORDERS that:

Background

This action arises from Plaintiff Jerome Tims' claims against Defendant for violations of the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1. Specifically, Plaintiff alleges that Defendant (1) fails to maintain a publicly-accessible policy about its biometric data retention, (2) failed to secure written consent before it collected its employees' biometric data, and (3) disclosed its employees' biometric data to third parties without first obtaining consent. Plaintiff was employed as a supervisor at Defendant's Bolingbrook, Illinois location from June of 2017 to January of 2018. At all times relevant, as a condition of employment, Defendant required employees to scan their fingerprints so Defendant could more easily track employees' time-worked. Plaintiff filed this action on May 18, 2019.

Legal Standard

Motions to dismiss pursuant 735 ILCS 5/2-619 raise defects, defenses, or some other affirmative matter that defeat a claim.[1] In doing so, the motion "admits the legal sufficiency of the plaintiff's allegations."[2] The "affirmative matter" must be apparent on the face of the complaint or supported by affidavits or other evidentiary materials.[3] "Affirmative matter" either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained

[1] *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008).
[2] *Miner v. Fashion Enters*, 342 Ill. App. 3d 405, 413 (2003).
[3] *John Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 37.

in or inferred from the complaint.[4] The court must deny a 2-619 motion to dismiss if a material and genuine disputed question of fact exists.[5]

Discussion

Defendant contends that Plaintiff's Complaint should be dismissed because it is untimely, arguing that because BIPA is a privacy statute, the one-year statute of limitations set forth in 735 ILCS 5/13-201 should apply. Indeed, both parties acknowledge that BIPA, itself, does not include a statute of limitations. The Illinois Supreme Court has held that "[t]he determination of the applicable statute of limitations is governed by the type of injury at issue, irrespective of the pleader's designation of the nature of the action."[6]

Given BIPA's relative short existence to date, there is not much case law on this particularly issue. Indeed, as Plaintiff contends in his response to the motion to dismiss, a Cook County Circuit Court has only just recently addressed this very topic.[7] In *Robertson v. Hostmark Hospitality Group, Inc., et al.*, the circuit court specifically rejected the argument that the statute of limitations contained in 735 ILCS 5/13-201 is applicable to violations of BIPA because Section 13-201 applied to privacy torts involving publication.[8] The circuit court in *Robertson* reasoned that while the plaintiff alleged that his biometric data had been effectively published via dissemination, there was no authority to justify the general application of Section 13-201 to violations of BIPA.[9] Like in *Robertson*, this action is premised on Plaintiff's claims that Defendant violated BIPA; not that Defendant has generally invaded Plaintiff's privacy or defamed him.[10] While certainly not bound by the ruling in *Robertson*, this Court finds no reason to disagree with the circuit court in that case,

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[4] See *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008).
[5] *Brown v. ACMI Pop Div.*, 375 Ill. App. 3d 276, 286 (2007).
[6] *Travelers Casualty & Surety Co. v. Bowman*, 229, Ill. 2d 461, 466 (2008) ("To determine the true character of a plaintiff's cause of action," the court should focus its inquiry "on the nature of the liability and not on the nature of the relief sought.") (quoting *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)).
[7] See *Robertson v. Hostmark Hospitality Group, Inc., et al.*, No 2018-CH-05194 (Cir. Ct. Cook County, July 31, 2019).
[8] *Id.* at *7-8.
[9] *Id.* at *8.
[10] Defendant's reliance on the Appellate Court's reasoning in *Neikirk v. Cent. Ill. Light Co.*, 128 Ill. App. 3d 1069 (3d Dist. 1984), wherein the court applied the two-year personal injury statute of limitations to an action brought under the Illinois Public Utility Act, is misplaced where the plaintiff in *Neikirk* sued for direct personal injuries, in addition to statutory violations. Here, Plaintiff's Complaint is derived entirely from his allegations that Defendant violated BIPA.

or the plain and unambiguous language in Section 13-201.[11] [12] The Court is not persuaded by Defendant's argument regarding Section 13-201's applicability here.[13]

In the absence of the inclusion of a statute of limitations in BIPA, the Court must look to 735 ILCS 5/13-205. Section 13-205 explicitly states that "... all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."[14] Here, Plaintiff has brought a civil action against Defendant pursuant to a statute that does not provide an explicitly stated statute of limitations. By default, Section 13-205's "catchall" statute of limitations is applicable. Because Plaintiff filed this action less than two years after he was initially employed by Defendant, the Court need not address whether the statute of limitations began to toll at the beginning of Plaintiff's employment or at the end of his employment. In either event, Plaintiff's action was timely filed within five years of when the cause of his action accrued.

WHEREFORE, the Court DENIES Defendant Black Horse Carrier, Inc.'s motion to dismiss. This case is set for management and status on November 14, 2019 at 10:30 a.m. in courtroom 2102.

JUDGE DAVID B. ATKINS

ENTERED: SEP 23 2019
Circuit Court-1879

Judge David B. Atkins

The Court.

[11] "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced without one year next after the cause of action accrued." 735 ILCS 5/13-201.
[12] The Court notes that another Cook County Circuit Court, in *Chavez v. Temperature Equipment Corp.*, No. 2019-CH-02538 (Cir. Ct. Cook County, September 11, 2019), has since addressed this very same topic, and, based on the very same reasons offered by the court in *Robertson*, also found Section 13-201 inapplicable to actions brought for alleged violations of BIPA.
[13] "Statutes are to be construed in a manner that avoids absurd or unjust results." *Croissant v. Joliet Park Dist.*, 141 Ill. 2d 449, 455 (1990).
[14] 735 ILCS 5/13-205.

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

JOROME TIMS, individually and on behalf of all others similarly situated, Plaintiff, v. BLACK HORSE CARRIERS, Defendant.	No. 2019-CH-03522 Calendar 16 Judge David B. Atkins

ORDER

THIS CASE COMING TO BE HEARD on Defendant's Motion to Reconsider, or in the Alternative for Appellate Certification, the court having reviewed the written submissions and being fully advised in the premises,

THE COURT HEREBY FINDS AND ORDERS:

1. Defendant Black Horse Carriers now seeks reconsideration of this court's September 23, 2019 Order denying its Motion to Dismiss, finding that §13-205's "catch-all" 5-year statute of limitations applied and thus Plaintiff's action was timely filed. The court further found that §13-201's 1-year limitations period did not apply to Plaintiff's statutory BIPA claims.

2. As before, Plaintiff's reliance on *Travelers Cas. and Sur. Co. v. Bowman*[1] is misplaced. The Illinois Supreme Court has not held that a 1-year limitations period applies to statutory claims under BIPA, particularly where such claims do not require any publication of the relevant information. Like this court, many courts in this Circuit have found[2] that the 1-year period set forth in §13-201 does not apply in BIPA cases, but rather §13-205's "catch-all" provision is applicable. Accordingly, Defendant's Motion to Reconsider is denied insofar as the court declines to reconsider its substantive ruling in the September 23, 2019 Order.

3. Nevertheless, the court finds Appellate certification of the question is appropriate. As noted above, there is no direct authority in Illinois on what statute of limitations properly applies to claims under BIPA, and the issue has arisen in numerous such cases at the trial level, including this one. Especially in light of the impact a 1-year vs. 5-year period would have on the facts of this case, some guidance on the matter would

[1] 229 Il. 2d 461 (2008)

[2] See, e.g. *Robertson v. Hostmark Hospitality Group*, 18 CH 5194 (Cir. Ct. Cook Cty. July 31, 2019); *Van Jacobs v. New World Van Lines*, 19 CH 02619 (Cir. Ct. Cook Cty. October 29, 2019); and numerous others cited in full in Plaintiff's response to the instant Motion.

materially advance this litigation. The Motion is therefore granted in part in that the court hereby certifies the following question to the Illinois Appellate Court pursuant to Illinois Supreme Court Rule 308: whether the limitations periods set forth in 735 ILCS 5/13-201 ("Defamation – Privacy") or 735 ILCS 5/13-205 apply to claims brought under the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*

JUDGE DAVID B. ATKINS
ENTERED:
FEB 26 2020
Circuit Court-1879

Judge David B. Atkins

The court.

No. 1-20-0563

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOROME TIMS, and ISAAC WATSON, Individually and on Behalf of a Class of Similarly Situated Persons, Plaintiffs-Respondents, v. BLACK HORSE CARRIERS, INC., Defendant-Petitioner.	)	Appeal from the Circuit Court of Cook County No. 19 CH 3522 Honorable David B. Atkins, Judge Presiding

ORDER

Justices Mikva, Cunningham, Connors, and Harris order as follows:

This matter coming to be heard on defendant-petitioner Black Horse Carriers, Inc.'s petition for leave to appeal pursuant to Illinois Supreme Court Rule 308(a);

IT IS HEREBY ORDERED: the petition for leave to appeal is GRANTED.

ORDER ENTERED

APR 23 2020

APPELLATE COURT FIRST DISTRICT

2021 IL App (1st) 200563

FIRST DISTRICT
SIXTH DIVISION
September 17, 2021

No. 1-20-0563

JOROME TIMS and ISAAC WATSON, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 19 CH 3522
BLACK HORSE CARRIERS, INC.,	)	Honorable David B. Atkins,
Defendant-Appellant.	)	Judge presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justice Mikva and Justice Oden Johnson concurred in the judgment and opinion.

OPINION

¶ 1 This case concerns a class action brought by plaintiffs Jorome Tims and Isaac Watson against defendant Black Horse Carriers, Inc., under the Biometric Information Privacy Act (Act). 740 ILCS 14/1 *et seq* (West 2018). Defendant brings this interlocutory appeal from circuit court orders denying its motion to dismiss on limitation grounds, denying reconsideration of the same, and certifying a question to this court: whether the limitation period in section 13-201 or section 13-205 of the Code of Civil Procedure (Code) applies to claims under the Act. 735 ILCS 5/13-201, 13-205 (West 2018). On appeal, defendant contends that the one-year limitation period under section 13-201 governs claims under the Act, while plaintiffs contend that the five-year period in section 13-205 governs. As explained below, we answer the certified question as follows: section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018).

¶ 2 I. JURISDICTION

¶ 3 Plaintiffs filed and amended their complaint in 2019 and the trial court denied defendant's motion to dismiss in September 2019. The court denied reconsideration and certified the aforesaid question to this court on February 26, 2020. Defendant applied to this court for leave to appeal on March 27, 2020, which we granted on April 23, 2020. Thus, we have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019), governing interlocutory appeals upon certified questions of law.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff Tims filed his class action complaint in March 2019, raising claims under section 15 of the Act. 740 ILCS 14/15 (West 2018). The complaint alleged that Tims worked for defendant from June 2017 until January 2018. It alleged that defendant scanned and was still scanning the fingerprints of all employees, including plaintiff, and was using and had used fingerprint scanning in its employee timekeeping. "Defendant continues to collect, store, use, and disseminate individual[s'] biometric data in violation of the" Act.

¶ 6 All counts alleged that defendant had violated and was violating the Act by not (a) properly informing plaintiff and other employees of the purpose and length of defendant's storage and use of their fingerprints; (b) receiving a written release from plaintiff and other employees to collect, store, and use their fingerprints; (c) providing a retention schedule and guidelines for destroying the fingerprints of plaintiff and other employees; or (d) obtaining consent from plaintiff and other employees to disclose or disseminate their fingerprints to third parties.

¶ 7 The first count alleged that defendant violated section 15(a) by failing to institute, maintain, and adhere to a retention schedule for biometric data. The second count alleged that it violated section 15(b) by failing to obtain informed written consent and release before obtaining biometric data. The third count alleged that it violated section 15(d) by disclosing or disseminating biometric

data without first obtaining consent. Each count sought a declaratory judgment, injunctive relief, statutory damages for each violation of the Act, and attorney fees and costs.

¶ 8 Defendant appeared and, in June 2019, filed a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)), alleging that the complaint was filed outside the limitation period. The motion noted that the Act itself has no limitation provision and argued that the one-year limitation period for privacy actions under Code section 13-201 applies to causes of action under the Act because the Act's purpose is privacy protection.

¶ 9 Plaintiff Tims responded to the motion to dismiss, arguing that the Act's purpose is to create a prophylactic regulatory system to prevent or deter security breaches regarding biometric data. Plaintiff argued that, in the absence of a limitation period in the Act, the 5-year period in section 13-205 for all civil actions not otherwise provided for should apply to the Act. Plaintiff argued that the one-year period in section 13-201 does not govern all privacy claims but only those privacy claims with a publication element, while the Act does not have a publication element. Plaintiff noted that defendant's motion did not claim destruction or deletion of plaintiff's biometric information so that the alleged violations of the Act regarding plaintiff were ongoing or continuing.

¶ 10 Defendant replied in support of its motion to dismiss, arguing that a privacy claim involving publication as provided in section 13-201 need not require publication as an element. Defendant argued that publication for purposes of section 13-201 consists of disclosure to any third party and that the Act involves publication because it prevents the disclosure or publication of biometric information. Defendant argued that adopting plaintiff's argument would entail applying section 13-201 to the provisions in the Act requiring publication and section 13-205 to the provisions that did not require publication. Lastly, defendant argued that there was no ongoing violation because the alleged violation occurred when plaintiff's fingerprints were initially scanned

for defendant's timekeeping system without his written release and the subsequent fingerprint scannings as he clocked into and out of work were merely continuing ill effects from that violation.

¶ 11 In September 2019, the trial court denied defendant's motion to dismiss. Noting that plaintiff Tims was claiming that defendant violated the Act, rather than claiming a general invasion of his privacy or defamation, the court found section 13-201 inapplicable and instead applied the catchall limitation provision in section 13-205 to the Act, which did not have its own limitation period. The complaint was therefore timely, as it was filed within five years of plaintiff's claim accruing, whether that was at the beginning or the end of his employment by defendant.

¶ 12 Later in September 2019, the complaint was amended to add Isaac Watson as a plaintiff, alleging that Watson was employed by defendant from December 2017 until December 2018.

¶ 13 In December 2019, defendant moved for reconsideration of the denial of its motion to dismiss, reiterating its argument that section 13-201 applies to the Act because both statutes concern the right to privacy. The motion also asked the court to certify to this court the question of which limitation period applies to the Act. Plaintiffs responded, arguing that reconsideration and certification were unnecessary, as the denial of the motion to dismiss was not erroneous.

¶ 14 On February 26, 2020, the trial court denied reconsideration but certified the question of whether the limitation period in section 13-201 or section 13-205 applies to claims under the Act.

¶ 15 III. ANALYSIS

¶ 16 The trial court has certified to this court the question of whether the one-year limitation period in section 13-201 or the five-year limitation period in section 13-205 governs claims under the Act. Defendant and *amicus* the Illinois Chamber of Commerce contend that the Act concerns privacy and section 13-201 governs privacy actions. Plaintiffs contend that section 13-201 governs privacy actions only where publication is an element and that publication is not an element of actions under the Act, so that the default limitation period of section 13-205 should apply.

¶ 17 An appeal pursuant to Rule 308 on certified questions presents a question of law subject to *de novo* review. *Sharpe v. Westmoreland*, 2020 IL 124863, ¶ 6.

¶ 18 A. Limitation Statutes

¶ 19 The applicability of a statute of limitation to a cause of action presents a legal question subject to *de novo* review, and the sole concern in determining which limitation period applies is ascertaining and effectuating the legislature's intent. *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 540 (2011). In ascertaining legislative intent, that intent is best determined from the plain and ordinary meaning of the statutory language. *Sharpe*, 2020 IL 124863, ¶ 10. If the language is plain and unambiguous, we shall not read into the statute exceptions, limitations, or conditions the legislature did not express. *Id.* ¶ 14. Similarly, when legislative intent can be ascertained from the statutory language, it must be effectuated without resorting to aids for construction such as legislative history. *Id.* ¶ 13.

¶ 20 Section 13-201 establishes a one-year limitation period for "[a]ctions for slander, libel or for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018). Under the common law, publication means communication to both a single party and the public at large. *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 42.

¶ 21 Courts have recognized two types of privacy interests in the right to privacy: secrecy ("the right to keep certain information confidential") and seclusion ("the right to be left alone and protecting a person from another's prying into their physical boundaries or affairs"). *Id.* ¶ 45. The "core of the tort of intrusion upon seclusion is the offensive prying into the private domain of another" rather than publication. *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027, 1033 (1999). Thus, section 13-201 does not apply to intrusion upon seclusion. *Id.* at 1034. Conversely, section 13-201 applies to public disclosure of private facts, appropriation of the name or likeness of another, and false-light publicity. *Id.*

> "Publication is an element of each of the three former torts, whereas publication is not an element of unreasonable intrusion upon the seclusion of another. [Citation.] The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication [citations]." *Id.*

¶ 22 Section 13-205 provides for a five-year limitation period for, in relevant part, "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 2018).

¶ 23 B. The Act

¶ 24 The Act includes findings that "[b]iometrics *** are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft" and that "public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(c), (g) (West 2018). As our supreme court has stated, the Act:

> "imposes numerous restrictions on how private entities collect, retain, disclose, and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information. Under the Act, any person 'aggrieved' by a violation of its provisions 'shall have a right of action *** against an offending party' and 'may recover for each violation' the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate." *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 1 (quoting 740 ILCS 14/20 (West 2016)).

¶ 25 The Act works "by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected" and by "subjecting private entities who fail to follow the statute's requirements to substantial

potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law [citation] whether or not actual damages, beyond violation of the law's provisions, can be shown." *Id.* ¶ 36 (quoting 740 ILCS 14/20 (West 2016)). When a private entity violates the Act, " 'the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.' " *Id.* ¶ 34 (quoting *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018)).

> "Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. [Citation.] The duties imposed on private entities by section 15 of the Act [citation] regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, 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." *Id.* ¶ 33 (citing 740 ILCS 14/15 (West 2016)).

¶ 26 In particular, the Act imposes on private entities possessing biometric identifiers or information duties to (a) "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"; (b) inform a person in writing that biometric identifiers or information are being collected or stored, the purpose therefor, and the period it will be stored or used, and obtain written release; (c) not "sell, lease, trade, or otherwise profit from" a person's biometric identifier or information; (d) not "disclose, redisclose, or otherwise disseminate" a person's biometric identifier

or information without consent, request, or authorization of the subject, a legal requirement of disclosure, or a court order; and (e) "store, transmit, and protect from disclosure all biometric identifiers and *** information using the reasonable standard of care" and "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." 740 ILCS 14/15 (West 2018). The Act thus protects a privacy right of secrecy, "the right of an individual to keep his or her personal identifying information like fingerprints secret." *West Bend Mutual Insurance Co.*, 2021 IL 125978, ¶ 46.

¶ 27 To enforce these duties, "[a]ny person aggrieved by a violation of this Act shall have a right of action" and "may recover for each violation" (1) $1000 liquidated damages or actual damages, whichever is greater, for negligent violations; (2) $5000 liquidated damages or actual damages, whichever is greater, for intentional or reckless violations; (3) reasonable attorney fees and costs; and (4) other relief including injunctions. 740 ILCS 14/20 (West 2018). A person aggrieved by a violation of the Act need not allege or show "actual injury or adverse effect, beyond violation of his or her rights under the Act." *Rosenbach*, 2019 IL 123186, ¶ 40.

¶ 28 C. Analysis

¶ 29 Here, we find from the language of section 13-201 including actions "for publication of matter violating the right of privacy" (735 ILCS 5/13-201 (West 2018)) and from our decision in *Benitez* that section 13-201 does not encompass all privacy actions but only those where publication is an element or inherent part of the action. Had the legislature intended to include all privacy actions, it would have written something like "actions for slander, libel, or privacy" or "actions for slander, libel or violations of the right of privacy." Similarly, had the legislature intended to include any privacy action that merely concerns or pertains to publication, it would have used such broad language rather the narrower "for publication." Logically, an action *for* something has that thing as a necessary part or element of the action.

¶ 30 Turning to the Act, section 15 imposes various duties upon which an aggrieved person may bring an action under section 20. Though all relate to protecting biometric data, each duty is separate and distinct. A private entity could violate one of the duties while adhering to the others, and an aggrieved person would have a cause of action for violation of that duty. Moreover, as section 20 provides that a "prevailing party may recover for each violation" (740 ILCS 14/20 (West 2018)), a plaintiff who alleges and eventually proves violation of multiple duties could collect multiple recoveries of liquidated damages. *Id.* § 20(1), (2).

¶ 31 While all these duties concern privacy, at least three of them have absolutely no element of publication or dissemination. A private party would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines, section 15(b) by collecting or obtaining biometric data without written notice and release, or section 15(e) by not taking reasonable care in storing, transmitting, and protecting biometric data. *Id.* § 15(a), (b), (e). A plaintiff could therefore bring an action under the Act alleging violations of section 15(a), (b), and/or (e) without having to allege or prove that the defendant private entity published or disclosed any biometric data to any person or entity beyond or outside itself. Stated another way, an action under section 15(a), (b), or (e) of the Act is not an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 32 Conversely, publication or disclosure of biometric data is clearly an element of an action under section 15(d) of the Act, which is violated by disclosing or otherwise disseminating such data absent specified prerequisites such as consent or a court order. 740 ILCS 14/15(d) (West 2018). Section 15(c) similarly forbids a private party to "sell, lease, trade, or otherwise profit from" biometric data (*id.* § 15(c)), which entails a publication, conveyance, or dissemination of such data. In other words, an action under section 15(c) or (d) *is* an action "for publication of matter violating the right of privacy." 735 ILCS 5/13-201 (West 2018).

¶ 33 We therefore find that section 13-201 governs actions under section 15(c) and (d) of the Act while section 13-205 governs actions under sections 15(a), (b), and (e) of the Act. As we are answering the certified question based on the relevant statutory language, which is not ambiguous, we need not resort to, and shall not address, aids of construction such as legislative history.

¶ 34 IV. CONCLUSION

¶ 35 Accordingly, we answer the certified question: Code section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act. 740 ILCS 14/15 (West 2018). We remand this cause to the circuit court for further proceedings consistent with this opinion.

¶ 36 Certified question answered; cause remanded.

No. 1-20-0563	
Cite as:	*Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-CH-3522; the Hon. David B. Atkins, Judge, presiding.
Attorneys for Appellant:	David M. Schultz, John P. Ryan, Adam R. Vaught, and Louis J. Manetti Jr., of Hinshaw & Culbertson LLP, of Chicago, for appellant.
Attorneys for Appellee:	Ryan F. Stephan, James B. Zouras, and Catherine T. Mitchell, of Stephan Zouras, LLP, of Chicago, for appellees.
***Amicus Curiae*:**	Melissa A. Siebert and Matthew C. Wolfe, of Shook, Hardy & Bacon LLP, of Chicago, for *amicus curiae* Illinois Chamber of Commerce.

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January 26, 2022

In re: Jorome Tims et al., etc., Appellees, v. Black Horse Carriers, Inc., Appellant. Appeal, Appellate Court, First District.
127801

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.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

STATUTES INVOLVED

735 ILCS 5/13-201 provides:

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

735 ILCS 5/13-205 provides:

Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

The Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*,

provides, in relevant part:

Section 14/5: 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.

Section 14/10 - 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.

Section 14/15 - 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.

Section 14/20 - 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.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he electronically filed via Odyssey eFileIL defendant-appellant's Additional Brief with the Clerk of the Supreme Court of Illinois, on the 22nd day of March, 2022.

In addition, the undersigned certifies that the foregoing Additional Brief was served via email on the 22nd day of March, 2022, before 5:00 p.m., to counsel of record listed below:

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Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Joshua G. Vincent