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MLB's biometric ticketing move runs headlong into high court ruling

B iometric identification of fans entering sports venues isn't the future, it's now a reality.

Major League Baseball has been piloting biometric ticketing at a handful of ballparks and is expanding the practice to its other venues this year.

At the same time, an expansive new ruling by the Illinois Supreme Court about who has standing to sue under the state's Biometric Information Privacy Act could open the floodgates on litigation by fans who feel their privacy is being violated.

The MLB, airport security company Clear and Tickets.com, the MLB's wholly owned ticketing tech provider, are joining forces to put fans' biometric information to work.

Baseball fans can now tap or swipe a finger to enter the ballpark at designated gates for quicker entry using Clear's biometric identity platform and Tickets.com's application programming interface. Also in the works is the ability to pay for concessions with biometric information, including verifying the ages of customers buying alcoholic drinks.

Biometric technology identifies individuals using their unique physical characteristics, including their fingerprints, faces, retinas and voice. While the MLB program marks the first time a U.S. major sports league is using biometrics to identify fans, businesses have been using biometric data for security purposes for years.

Employers have been using biometric authentication to clock in and out of work and to access company laptops and other devices for some time. In fact, according to the Society for Human Resource Management, fingerprint scanning is the most common type of biometric authentication employers use, followed by facial recognition.

SPORTS MARKETING PLAYBOOK



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Moreover, at least one major venue has been quietly using facial-recognition technology for security purposes. New York's Madison Square Garden scans the faces of individuals entering the entertainment complex and compares the images to a database of photos. The New York Times reported last year.

The collection and use of biometric information does raise questions about the protection of individuals' privacy, precisely because what makes using biometric data an effective security

measure also increases the risk for identity theft. Unlike other personal information, biometric data is a unique identifier that cannot be changed.

The Illinois Supreme Court's decision at the end of January could herald a new wave of biometric identification litigation and prompt the MLB to take a closer look at its biometric scanning processes.

Because the use of biometric technology is cutting edge, regulation hasn't quite caught up. Illinois is one of only three states that have passed laws to protect

biometric information, and so far, no federal legislation has been enacted.

Illinois passed its biometric act in 2008 to prohibit the collection of a person's biometric information without his or her consent. Under the act, individuals must be informed that their biometric data is being collected, the purpose of the collection and how long it will be used and stored.

Individuals also have to provide written consent before their biometric data can be collected.

Texas and Washington state have passed similar legislation but the Illinois law is the only one that includes a private right of action. That makes Illinois the epicenter of litigation over unauthorized collection of biometric data.

To date, a number of proposed class actions have been filed by

employees alleging their employers are improperly collecting and using their fingerprints as well as suits by consumers, including against photo-sharing platforms like Facebook and Shutterfly, asserting that they are misusing their facial recognition technology.

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The state high court held in *Rosenbach v. Six Flags Entertainment Corp.* that a plaintiff does not need to claim actual harm in order to bring a suit under the act, providing the long-awaited answer to the question of whether a party is an "aggrieved party" under the statute if the only injury alleged is the collection of data without the proper disclosures and consent.

In *Rosenbach*, a mother sued a theme park for violating the Illinois act after her son was fingerprinted without his written consent to access a season pass she had purchased for him. The theme park also failed to disclose what it does with the biometric data it collects.

The trial court rejected the theme park's motion to dismiss for failure to state a claim, but agreed to certify for interlocutory appeal the question of whether a person "aggrieved" by an act violation must allege "some actual harm."

On appeal, the 2nd District Appellate Court reversed, holding that a plaintiff must allege actual harm as a result of the alleged violation, although the harm did not need to be an economic injury.

The Illinois Supreme Court reversed the appellate court's decision, holding that the violation of a legal right without an allegation of actual harm was enough

to confer standing to file suit under the act. Citing to *Glos v. People*, a case from 1913, the court pointed to the definition of an “aggrieved party” as either a person who has suffered a pecuniary harm or one who has had “a legal right invaded by the act complained of ...”

Therefore, when a private entity fails to comply with the act’s requirements for consent and disclosure, 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.”

Requiring individuals to wait until they have suffered a compensable injury beyond the violation of their statutory rights before they can file suit to seek recourse would go against the act’s preventative purposes, the court pointed out.

The MLB and other leagues considering adding biometric identification technology to venues can learn from the *Rosenbach* litigation. As the mother in that case argued, after the theme park fingerprinted her son it retained his biometric identifiers and information but never publicly disclosed what it did with the information or how long it

would be kept.

The theme park also failed to provide a written policy to the public explaining its guidelines for retaining and destroying visitors’ biometric identifiers and biometric information.

As the MLB expands biometric ticketing and concession sales to other ballparks, and other leagues inevitably follow, additional states including Alaska, Connecticut, Montana and New Hampshire are considering their own biometric legislation. As states introduce their own measures, it’s very likely that the sports organizations will have to deal with different regulations

imposed in different jurisdictions.

It remains to be seen whether the federal government will introduce its own biometric regulations.

While legislative and legal processes are both relatively slow moving, the evolution of new technology is not. The sports world has shown a willingness to embrace innovative and increasingly sophisticated technology to engage fans and increase revenue.

As privacy and security concerns continue to emerge, sports organizations must be aware that legal issues will follow.