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BIPA – an ideal "no injury" class action

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Takeaway: Last year, we reported on a Seventh Circuit decision endorsing a "no injury" pleading strategy for violations of Illinois's Biometric Information Privacy Act (BIPA). The strategy, calculated to prevent the removal of a BIPA class action to federal court, avoids any allegation of an Article III injury and therefore eliminates federal subject-matter jurisdiction. *See BIPA class actions: Seventh Circuit endorses pleading strategy calculated to avoid removal to federal court* (January 29, 2021). Recently, the Illinois Supreme Court endorsed this strategy to avoid another legal obstacle – the exclusivity provisions of Illinois's Workers' Compensation Act (WCA). *See McDonald v. Symphony Bronzeville Park, LLC,* ---N.E.3d ----, 2022 IL 126511, 2022 WL 318649 (Feb. 3, 2022). BIPA thus provides a class action plaintiff with the best of at least three worlds: (1) no injury required to state a claim; (2) the preferred venue of class action defendants – federal court – can be avoided entirely; and (3) the class can recover potentially staggering liquidated damages – $1,000 for each negligent violation and $5,000 for each reckless or intentional violation.

BIPA, a privacy statute enacted in 2008, regulates "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 2022 IL 126511 ¶ 20 (quoting 740 ILCS 14/5(g)). BIPA defines "[b]iometric identifier" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," and "[b]iometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.*

Section 20 of BIPA provides that a plaintiff may recover liquidated damages or actual damages, "whichever is greater," for a violation of its procedural requirements. *Id.* ¶ 23. Marquita McDonald originally sought both actual damages – for mental anguish – and liquidated damages, from her employer in connection with the collection and use of her fingerprints for an employee time-keeping system. The class defendants raised a number of defenses, including the defense that plaintiff's alleged injuries related to her work and thus triggered the exclusivity provisions of the WCA. The plaintiff then amended her complaint to eliminate her claim for mental anguish, making it clear that she and the class alleged no actual damages at all and instead only sought the recovery of liquidated damages.

Both the circuit court and intermediate appellate court (on a petition for interlocutory appeal) agreed that the exclusivity provisions of the WCA did not preclude McDonald's claims. The Illinois Supreme Court granted the defendants' petition to appeal and agreed with the rulings of the two lower courts. According the Illinois Supreme Court, because the exclusivity provisions of the WCA depend on the type of *injury* alleged, and because employees could not recover BIPA's liquidated damages under the WCA, the WCA exclusivity bar does not apply: "[W]e conclude that McDonald may pursue her Privacy Act claims on her behalf and on behalf of the putative class in an action in the circuit court, rather than through a claim before the Workers' Compensation Commission, because McDonald's and the putative class's alleged injury is not one that 'categorically fits within the purview of the [WCA].' Because the

injury alleged is not the type of injury compensable in a workers' compensation proceeding, McDonald's lawsuit is not preempted by the exclusive-remedy provisions of the [WCA]." *Id*. ¶ 50 (citation omitted). In a specially concurring opinion, Justice Michael J. Burke noted the opportunity for "pleading gamesmanship" in alleging BIPA claims: "I agree with the majority that the injury as alleged is not compensable under the [WCA] because, quite simply, there is no injury. … McDonald and the putative class have not suffered a physical, emotional, or financial injury. We know this because McDonald amended her complaint to remove any allegation that she suffered mental anguish from the purported violations of [BIPA]. The operative, amended complaint sought recovery of liquidated damages, not any actual damages. … Had McDonald persisted in her allegation of mental anguish, the exclusivity provisions of the [WCA] would have barred her claim. But by denying the existence of an injury, McDonald preserved her cause of action under [BIPA]. This opportunity for gamesmanship in pleading highlights the incongruity of applying the [WCA]'s exclusivity provisions to [BIPA] claims that allege actual injuries but not to those that allege technical violations." *Id*. ¶¶ 57-59 (Burke, J., specially concurring).

As Justice Burke observed, this "no injury" paradigm appeared to be "totally inconsistent" with the Illinois Supreme Court's prior holding that "a technical violation of the Privacy Act is a 'real and significant' injury," for purposes of a BIPA claimant meeting the "aggrieved" requirement for bringing a private claim under the statute. *Id.* ¶ 60 (quoting *Rosenbach v. Six Flags Entm't Corp.* , 2019 WL 123186 ¶ 34, 432 Ill. Dec. 654, 129 N.E.3d 1197).