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February 2022

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Illinois Supreme Court Reaffirms Stringency of BIPA, Ruling that Related Claims Are Not Preempted by the Illinois Workers' Compensation Act

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For the second time in three years, the Illinois Supreme Court has addressed a critical question regarding one of the broadest biometric statutes in the country, the Illinois Biometric Information Protection Act, 740 ILCS 14/1 *et seq.* ("BIPA"), and confirmed that the statute's stringency overrides potential pleading challenges.[1] On February 3, 2022, the Illinois Supreme Court held in *McDonald v. Symphony Bronzeville Park, LLC, et al.*, 2022 IL 126511 that the Illinois Workers Compensation Act ("IWCA") does not preclude claims for statutory damages under BIPA. *McDonald* had been the impetus for numerous stays of BIPA cases against employers in both federal and state courts. In the wake of the Illinois Supreme Court's recent decision, most of these stays will be lifted and an increasing number of class action litigation filings may soon follow.

BIPA

Not yet 15 years old, BIPA has evolved into one of the Plaintiff bar's favorite bases for class action litigation in Illinois, and inspired similar legislation in other states across the country. BIPA "imposes restriction on how private entities . . . collect, retain, use, disclose, and destroy 'biometric identifiers' and 'biometric information.'"[2] "Biometric identifiers" include "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," while "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."[3]

Unique among other currently enacted biometric statutes, BIPA provides a private right of action to any person "aggrieved by a violation" of BIPA, whereby such a person may seek damages, attorneys' fees and costs, and injunctive relief.[4] Consequently, it is imperative that any private entity subject to BIPA adequately inform people about the entity's biometric collection practices and obtain written consent before "collecting, capturing, purchasing, receiving through trade, or otherwise obtaining a person's or a customer's biometric identifier or biometric information."[5]

The *McDonald* Opinion

In *McDonald*, the plaintiff ("Ms. McDonald") alleges that her former employer, Symphony Bronzeville Park ("Bronzeville"), required her to use a fingerprint time-keeping system, but did not provide her with

a written release obtaining her consent for collecting her fingerprints, or adequately inform her of the purposes for the collection or the length of time that her biometric information would be stored.[6] Ms. McDonald asserts her claim on behalf of a putative class of current and former employees of Bronzeville who likewise had to use the fingerprint time-keeping system.

Bronzeville filed motions to dismiss the class action complaint, asserting, *inter alia*, that the BIPA claims were barred by the exclusive remedy provision of the IWCA, as set forth in Sections 5(a) and 11 of the IWCA.[7] The Cook County Circuit Court denied Bronzeville's motions to dismiss, finding that the loss of the ability to maintain privacy rights is not covered by the IWCA because it is neither a psychological nor a physical injury.[8] The Circuit Court further held that because BIPA defines "written release" in an employment context, BIPA must apply to employer violations in the workplace.[9]

Bronzeville subsequently filed a motion for reconsideration or, alternatively, a motion to certify questions for immediate appeal pursuant to Illinois Supreme Court Rule 308(a). The Circuit Court denied the motion for reconsideration but certified the following question for interlocutory appeal: "Do[ ] the exclusivity provisions of the [IWCA] bar a claim for statutory damages under [BIPA] where an employer is alleged to have violated an employee's statutory privacy rights under [BIPA]?"[10]

The First District Appellate Court answered the certified question in the negative, and remanded the case back to the Circuit Court. Per the Appellate Court, "'a claim by an employee against an employer for liquidated damages under [BIPA]—available without any further compensable actual damages being alleged or sustained and designed in part to have a preventative and deterrent effect—[does not] represent[ ] the type of injury that categorically fits within the purview of the [IWCA], which is a remedial statute designed to provide financial protection for workers that have sustained an actual injury.'"[11]

On January 27, 2021, the Illinois Supreme Court granted a petition from Bronzeville for leave to appeal, and, on February 3, 2022, affirmed the lower courts' conclusions that the IWCA does not preempt employee litigation against Illinois employers under BIPA.

Specifically, in *McDonald*, the Illinois Supreme Court held that the IWCA's exclusivity provisions only apply to "compensable" injuries, generally denoted by having an impact on an employee's capacity to perform employment-related duties.[12] Although the Court had previously held in *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 13 Ill. 2d 460, 463 (1958), that the IWCA precluded a statutory action brought by an employee against an employer, the Court distinguished *Gannon* as involving a different statute and a physical injury suffered by an employee in the course of his employment.[13]

Additionally, like the Cook County Circuit Court, the Illinois Supreme Court found that the language of BIPA shows legislative intent for the statute to apply in employment contexts, notwithstanding the IWCA. In particular, the Court pointed to Section 10 of BIPA, which defines "written release" as "a release executed by an employee as a condition of employment."[14]

Significance of *McDonald*

The Illinois Supreme Court's holding in *McDonald* potentially forecloses a key employer argument for early dismissal of BIPA claims, though, as the Seventh Circuit explained in *Fernandez v. Kerry, Inc.*, No. 21-1067 (7th Cir. Sept. 20, 2021), another preemption defense remains available under the federal Labor Management Relations Act, 29 U.S.C. § 185, for BIPA claims asserted by union employees.[15]

McDonald also reinforces a counterintuitive principle in BIPA jurisprudence that has developed since the Court's first significant holding addressing BIPA, *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL

123186: employees may be able to move BIPA claims past the pleading stage merely by alleging to have a substantial grievance with their employers under BIPA, but without specifically alleging a "compensable" injury under the IWCA.

McDonald will no doubt result in the near-term lifting of stays and resumed litigation in a variety of BIPA cases, and that may in turn drive further evolution of the BIPA landscape. Indeed, one case that has been stayed pending the Illinois Supreme Court's opinion in *McDonald—Marion v. Ring Container Technologies, LLC*, No. 3-20-0184 (Ill. App. 3d)—has the potential to upend the status quo regarding the question of what statute of limitations applies to claims under BIPA given that the statute itself is silent. That status quo is borne entirely from a recent holding by the First District Appellate Court. *See Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563 (Sept. 17, 2021) (holding that a one-year limitations period governs actions under Sections 15(c) and (d) of BIPA, while a five-year statute of limitations applies to actions under Sections 15(a), (b), and (e) of BIPA). Should the Third District Appellate Court reach a different conclusion in *Marion* than the First District did in *Tims*, the Illinois Supreme Court will again be tasked with clarifying BIPA, and have another opportunity to relieve courts of expanding dockets and private entities of potential litigation burdens.

For private entities that collect, capture, purchase, process, store, receive through trade, use, or otherwise obtain biometric identifiers or biometric information in Illinois or from persons in Illinois, the *McDonald* decision and its potential downstream effects are likely to result in heightened risk of BIPA litigation. Hence, stakeholders in such entities should consult with experienced counsel on best practices for drafting, revising, and publishing policies, notices, and consents, and on effective litigation strategy.

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[1] *See Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 (holding that plaintiffs need not allege actual injury or adverse effect to state a claim under BIPA).

[2] *See McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, at pg. 7, ¶ 21.

[3] 740 ILCS 14/10.

[4] 740 ILCS 14/20.

[5] 740 ILCS 14/15(b).

[6] *See McDonald*, 2022 IL 126511, at pgs. 2-3, ¶¶ 3-4.

[7] *See id.*, ¶ 7.

[8] *See id.*, ¶ 8.

[9] *Id.*

[10] *See id.*, ¶¶ 9-10.

[11] *See id.*, ¶ 13.

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[12] *See id.*, ¶ 41.

[13] *See id.*, ¶ 26.

[14] *See id.*, ¶¶ 21, 45; 740 ILCS 14/10.

[15] *See Fernandez v. Kerry, Inc.*, No. 21-1067 (7th Cir. Sept. 20, 2021).