

Seventh Circuit Court of Appeals Finds Coverage for BIPA Lawsuit Under CGL Policy¹

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On June 15, 2023, the United States Court of Appeals for the Seventh Circuit issued the first federal appellate-level decision on coverage for lawsuits filed under Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 141 *et seq.*² BIPA "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."³ In 2019, the Illinois Supreme Court held that a violation of BIPA by itself is enough to entitle an "aggrieved person" to pursue relief without showing they suffered an actual injury.⁴ Since then, a veritable tsunami of BIPA litigation has inundated courts in Illinois and other jurisdictions, and the defendants have turned to their insurers for defense and indemnity under a variety of policies, including commercial general liability ("CGL") policies.

In *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*,⁵ the Illinois Supreme Court held that a general liability insurer had a duty to defend the insured in a BIPA lawsuit under the policy's "personal and advertising injury" coverage. This part of the policy covers, among other things, "oral or written publication of material that violates a person's right of privacy."⁶ The court found that the insured's alleged disclosure of the plaintiff's biometric information to a third party in violation of BIPA was a "publication" of material that potentially violated the plaintiff's right of privacy.⁷

The Illinois Supreme Court further held that an exclusion in the policy entitled "Violation of Statutes that Govern E-Mails, Fax, Phone Calls or Other Methods of Sending Material or Information" did not negate the insurer's duty to defend. This exclusion stated that the policy did not apply to "personal injury" or "advertising injury":

Arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

¹ The opinions expressed are those of the author and do not necessarily reflect the views of his employer, its clients, or any of their respective affiliates. This article is for general information purposes only and is not intended to be and should not be taken as legal advice.

² *Citizens Ins. Co. of Am. v. Wynndalco Enters., LLC*, 70 F.4th 987 (2023).

³ *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197, 1199-1200 (Ill. 2019).

⁴ *Id.*

⁵ 183 N.E.3d 47 (Ill. 2021).

⁶ *Id.* at 51.

⁷ *Id.* at 59.

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.⁸

The Illinois Supreme Court rejected the insurer's argument that BIPA fell within the third "catch-all" category in the exclusion because it prohibited or limited the disclosure of biometric information. The court found that by limiting the laws within this category to ones "other than the TCPA or CAN-SPAM Act of 2003," the exclusion only encompassed laws that were similar to the TCPA and the CAN-SPAM Act of 2003 under the interpretive principle of *ejusdem generis*.⁹ The court noted that the exclusion's title indicated that it was only intended to apply to methods of communication, and that the TCPA and CAN-SPAM Act of 2003 similarly only prohibited or limited certain communication methods.¹⁰ BIPA, by contrast, does not regulate methods of communication, but rather prohibits or limits the collection, use, safeguarding, handling, storage, retention and destruction of biometric information.¹¹ The court found that BIPA was not similar enough to the TCPA or the CAN-SPAM Act of 2003 to fall within the exclusion under *ejusdem generis*, and therefore the exclusion did not bar coverage for the BIPA lawsuit.¹²

The *West Bend* decision was far from the last word regarding coverage for BIPA lawsuits under CGL policies. Insurers have continued to deny coverage under several exclusions found in CGL policies, including: (1) "Recording and Distribution of Material in Violation of Law," also called "Distribution of Material in Violation of Statutes"; (2) "Employment-Related Practices"; and (3) "Access or Disclosure of Confidential or Personal Information."¹³ Many coverage lawsuits, most in the federal Northern District of Illinois, ensued.¹⁴ The federal courts have issued conflicting decisions on whether these exclusions barred coverage for BIPA lawsuits, leading to continued uncertainty for insurers and insureds.¹⁵

Now, in the *Wynndalco* case, the Seventh Circuit has eliminated, or at least reduced, some of that uncertainty with respect to the "Recording and Distribution" exclusion. *Wynndalco* is an Illinois-based information technology and consulting firm that was sued in two class actions alleging violations of BIPA from *Wynndalco* providing "Clearview AI" facial recognition technology to the Chicago Police Department.¹⁶ *Wynndalco* tendered the lawsuits to its CGL insurer, Citizens, which denied coverage based on an exclusion in the policy entitled "Distribution of Material in Violation of Statute."¹⁷ That exclusion stated that the insurance did not apply to:

"[P]ersonal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

⁸ *Id.* at 52.

⁹ *Id.* at 60-61.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Angela Elbert, *et al.*, "What is BIPA and is there Insurance Coverage For It? Should I Even Care if I'm not in Illinois?", presented at the American College of Coverage Counsel's 2023 Annual Meeting (May 11-12, 2023).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Wynndalco*, 70 F.4th at 990.

¹⁷ *Id.* at 993.

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment or addition to such law; or
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any other laws, statutes, ordinances, or regulations, that address, prohibit or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.¹⁸

Readers will note that this exclusion is similar to the one at issue in the *West Bend* case, except that it expands the list of statutes to include FCRA and FACTA and adds “printing, dissemination, disposal, collecting, [and] recording” to the “catch-all” section. Citizens argued that these changes made the exclusion broad enough to encompass BIPA and thus exclude coverage for the class actions against Wynndalco. The Seventh Circuit disagreed and found that the exclusion was ambiguous in scope.¹⁹ The court noted that the policy’s “personal and advertising injury” provision broadly purports to cover many types of injuries and causes of action, including ones based on statutes such as the Illinois Libel and Slander Act, the Uniform Deceptive Trade Practices Act, the federal Lanham and Copyright Acts, and the Illinois Trademark Registration and Protection Act.²⁰ All of these statutes concern the recording, sending, transmitting, communication, etc. of material or information and thus violations of these laws would be excluded under Citizens’ broad reading of the exclusion’s catch-all provision.²¹ The court was concerned that if read broadly, the exclusion “would, as a practical matter, all but eliminate coverage for certain claims that are largely, if not exclusively, statutory in nature.”²² The court thus found the catch-all provision to be ambiguous because “the broad language … purports to take away with one hand what the policy purports to give with the other in defining covered personal and advertising injuries.”²³

Citizens attempted to save the exclusion by arguing that it was limited to statutory causes of action related to privacy.²⁴ The Seventh Circuit rejected this argument as well, pointing out that nowhere in the exclusion does it say that it is limited to privacy. The court observed that, in order to find a privacy limitation, one has to “look[] beyond the facially expansive sweep of the catch-all provision and attempt[] to divine potential limiting clues from the nature of the statutes cited immediately prior to the catch-all provision.”²⁵ In other words, Citizens’ argument requires that

¹⁸ *Id.*

¹⁹ *Id.* at 997-98.

²⁰ *Id.* at 997.

²¹ *Id.*

²² *Id.* at 998.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

the catch-all provision does not mean what it purports to say and is therefore ambiguous. Under Illinois law, ambiguous policy language must be read narrowly and in favor of coverage.²⁶

The Seventh Circuit then found that the interpretive canons of *ejusdem generis* and *noscitur a sociis* did not resolve the ambiguity in the exclusion.²⁷ The resulting clash between the “personal and advertising injury” coverage grant and the “Distribution of Material” exclusion had to be resolved in favor of Wynndalco. Therefore, the court found that the exclusion did not negate Citizens’ duty to defend Wynndalco in the underlying class action.²⁸

It remains to be seen how appellate courts will rule on the exclusions for “Employment-Related Practices” and “Access or Disclosure of Confidential or Personal Information” that insurers have relied on to deny coverage for BIPA lawsuits. The Seventh Circuit’s decision in *Wynndalco* nevertheless provides much needed guidance to insurers and insureds regarding their rights and obligations under general liability policies with respect to BIPA.

²⁶ *Id.* at 999.

²⁷ *Id.* at 1002-04.

²⁸ *Id.* at 1004-05.