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Ill. Biometric Claim Case Highlights Core Insurance Principles

By **Emily Garrison** (March 23, 2021, 6:40 PM EDT)


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A flood of cases under the Illinois Biometric Information Privacy Act have been filed in the past several years, and the lawsuits keep coming.

When the law passed in 2008, Illinois became the first U.S. state to regulate the collection of biometric information — a move that triggered a host of legal considerations, including whether there is insurance coverage for claims under BIPA. These considerations impact businesses across sectors and go well beyond narrower data security and privacy considerations for tech and biotech companies.

Two weeks ago, the Illinois Supreme Court heard oral argument in West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan Inc., a closely watched case involving general liability insurance coverage for BIPA claims.

West Bend Mutual Insurance Co. is seeking to reverse the decisions of the Cook County Circuit Court and the First District Illinois Appellate Court that it has a duty to defend its insured, Krishna Schaumburg Tan, in a proposed consumer class action alleging violations of BIPA.

Questioning by the justices during oral argument was limited, but the few questions posed by the court touched on three core principles of insurance policy interpretation that transcend the dispute between West Bend and Krishna:

- In a court's determination of the duty to defend, the underlying complaint is to be liberally construed in favor of the insured;
- If the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer; and
- Undefined terms in an insurance policy are to be construed with reference to the average, ordinary, normal, reasonable person.

The court's questioning reminds practitioners on all sides that these principles are not merely adages that policyholder lawyers recite for their own amusement, even in cases involving new technologies or new laws. Rather, they are fundamental principles of law that must be applied, and should not be overlooked, in any coverage dispute. And in the case of West Bend v. Krishna, they should result in an affirmance of the well-reasoned opinions of the lower courts.

Brief Background

The decisions by the lower courts in West Bend v. Krishna are the first of their kind in Illinois to address insurance coverage under general liability insurance policies for lawsuits brought under BIPA.

In the underlying proposed class action filed by Klaudia Sekura against Krishna, Sekura alleged that she signed up for a membership with Krishna, a franchisee of L.A. Tan, that she was enrolled by Krishna in the L.A. Tan corporate membership database at that time, and that Krishna required her to provide a scan of her fingerprint.

Sekura further alleged that Krishna disclosed her fingerprint data to an out-of-state third-party vendor, SunLync, without her consent in violation of Section 15(d)(1) of BIPA, 740 ILCS 14/15(d)(1).

After Krishna tendered the complaint, West Bend sought a declaration that it had no duty to defend Krishna against Sekura's allegations. The trial court and First District Appellate Court found in favor of Krishna. Both courts determined that the claims in the underlying action fell within the policies' coverage for personal injury as a "publication which violates a person's right to privacy."

In so holding, the courts rejected West Bend's argument that there was no alleged publication because, according to West Bend, publication requires communication of information to the public at large, not simply a single third party (in this case, SunLync).

The courts also rejected West Bend's argument that even if the allegations in the underlying complaint do allege a personal injury, the violation of statutes exclusion applies to bar coverage.

Core Insurance Coverage Principles on Display

In the limited but targeted questions asked during the oral argument in West Bend's appeal of the lower courts' decisions — all directed to West Bend's attorney — the Illinois Supreme Court honed in on principles of policy construction and interpretation that have long been recognized by courts in Illinois and across the country.

First, Chief Justice Anne Burke's questioning related to the scope of the allegations in the underlying lawsuit. Specifically, she asked West Bend's counsel about the fact that the vendor "was going to be using this information for the national enrollment … the national membership database, so other people would have access to this national database."

Although a footnote in Sekura's appellee brief confirms that "Ms. Sekura also implicitly alleged that Krishna Tan disclosed her fingerprints to other third parties in order to incorporate her information into the larger L.A. Tan Enterprises corporate database," West Bend's attorney responded to Chief Justice Burke by claiming that "none of that is alleged in the complaint."

West Bend's attorney later argued that "the duty to defend is determined by the allegations of the complaint, not what could have been alleged or might have occurred."

The threshold for a duty to defend is low, however, and West Bend's attempt to strictly and narrowly limit the scope of the allegations is contrary to Illinois law. Rather, it has long been the law in Illinois that the allegations in the underlying pleading must be liberally construed in favor of the insured and any doubt with regard to such duty is to be resolved in favor of the insured.[1]

An insurer may not justifiably refuse to defend an action against its insured "unless it is clear from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage."[2]

Thus, even if West Bend's interpretation of publication as requiring a communication to more than one individual were accepted, Chief Justice Burke's questioning suggests that a reasonable inference can be made from the allegations of the complaint that there was such a publication.[3]

Second, Justice Michael Burke touched on another core coverage principle when he asked West Bend's attorney about West Bend's argument that a reasonable insured should recognize that publication means something different in the context of defamation than it does in the context of privacy right, even though the term is undefined in both sections of the policy.

Justice Burke inquired of West Bend: "Doesn't that create an ambiguity that would then be construed against the insurance company?"

In this question, Justice Burke was referring to the long recognized principle that "[i]f the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer."[4]

Neither the appellate court nor the trial court found it necessary to reach the question of ambiguity in holding that that West Bend has a duty to defend, but Justice Burke's question highlights that an ambiguity may exist in West Bend's policy in connection with this dispute.[5]

Third, in connection with West Bend's argument that the term "publication" as used in the personal injury coverage of the policy requires communication of information to the public at large, Justice Michael Burke posed the following hypothetical to West Bend:

> You talk about the expectation of the policyholder. If the policyholder in this case, the company, takes all of its clients biometric information, every single client they have, and they sell it to one vendor, there is no coverage? But if they take one client's biometric information and sell it to numerous other vendors, then there is coverage? … And a reasonable policyholder would understand the difference? [6]

Justice Burke's hypothetical and question raise the long-standing principle that courts interpreting insurance policies should look to what a reasonable person would understand the plain, ordinary meaning of undefined terms in the policy to be, and use that understanding in interpreting the policy.[7]

When the lower courts applied this principle to the undefined term "publication" in the West Bend policy, they determined that common understandings and dictionary definitions of "publication" clearly include both the broad sharing of information to multiple recipients "and a more limited sharing of information with a single third party." [8]

In so holding, the lower courts rejected West Bend's argument that the Illinois Supreme Court's decision in Valley Forge v. Swiderski somehow conclusively and narrowly defined "publication" to only mean the communication or distribution of information to the public.[9]

As the appellate court aptly concluded, "it is clear to us that the supreme court did not define the term 'publication' as being limited to requiring communication to any number of persons."[10]

Rather, the Supreme Court looked to what a reasonable person would understand the plain, ordinary meaning of the word "publication" to be, and applied that understanding to the particular facts of that case.[11] The narrowly tailored decision in Valley Forge does not alter any principles of insurance law, nor does it support the argument advanced by West Bend.

Final Thoughts

Like any litigation, the onslaught of BIPA lawsuits must be defended, even if they contain meritless allegations. And like any lawsuit that must be defended, that defense can be costly. Insurance may be available to help cover that defense. Coverage may be provided by general liability policies, like the policies at issue in West Bend v. Krishna.

Depending on the facts of the case, other types of policies, such as cyber, employer liability or media liability policies, could also provide coverage. The policyholder-friendly principles discussed above will apply in all events, and the Illinois Supreme Court has now reminded us that they should not be overlooked by companies, courts or attorneys in analyzing insurance coverage under Illinois law.

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[1] U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co ., 578 N.E.2d 926, 930, 144 Ill.2d 64, 74 (Ill. 1991); see also United Services Auto. Ass'n v. Dare , 830 N.E.2d 670, 678, 357 Ill.App.3d 955, 963 (Ill.App. 2005).

[2] Wilkin Insulation Co., 578 N.E.2d at 930, 144 Ill.2d at 73.

[3] The issue of extrinsic evidence was not addressed by the parties or the Court and is outside the scope of this article. But it is important to note here that if such extrinsic evidence were available, it should be considered in a duty to defend analysis, as the Illinois Supreme Court has declined to "limit the source of an insurer's duty to defend 'solely' to the content of the underlying complaint in all cases." Pekin Ins. Co. v. Wilson , 930 N.E.2d 1011, 1019, 237 Ill.2d 446, 458 (Ill. 2010).

[4] See, e.g., Gillen v. State Farm Mutual Automobile Insurance Co ., 830 N.E.2d 575, 582, 215 Ill.2d 381, 393 (Ill. 2005) ("Undefined terms will be given their plain, ordinary and popular meaning, i.e., they will be construed with reference to the average, ordinary, normal, reasonable person").

[5] In reaching its decision, the Appellate Court did refer to the related principle that "if West Bend wished the term 'publication' to be limited to communication of information to a large number of people, it could have explicitly defined it as such in its policy. But it did not, choosing instead not to provide any definition of 'publication.' 'There is a strong presumption against provisions that easily could have been included in the contract but were not.'" West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc ., 2020 IL App

(1st) 191834, ¶ 37, 2020 WL 1330494, at *6 (Ill.App. 2020).

[6] Justice Rita Garman similarly touched on a reasonable policyholder's expectations and understanding when she asked: "Why isn't the vendor – the third party vendor – public?"

[7] Gillen, 830 N.E.2d at 582, 215 Ill.2d at 393.

[8] Krishna Schaumburg Tan, 2020 IL App (1st) 191834, ¶ 35, 2020 WL 1330494, at *5.

[9] Valley Forge involved a lawsuit against the insured for violating the Telephone Consumer Protection Act of 1991. The Illinois Supreme Court acknowledged that the insurers had abandoned an argument that faxed advertisements were not "publications," but nonetheless "observe[d]" that the underlying complaint "alleges conduct by [the insured] that amounted to 'publication' in the plain and ordinary sense of the word. By faxing advertisements to the proposed class of fax recipients as alleged in [the underlying] complaint, [the insured] published the advertisements in both the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public." Valley Forge Ins. Co. v. Swiderski Electronics, Inc. , 860 N.E.2d 307, 317 223 Ill. 2d 352, 367 (Ill. 2006).

[10] Id. at ¶ 33, *5. The Appellate Court further noted that it was "[p]utting aside whether the discussion in Valley Forge is a holding or is mere dicta." Id.

[11] Id.