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Why 7th Circ.'s BIPA Insurance Analysis Is Significant

By **John Vishneski and Adrienne Kitchen** (July 6, 2023, 2:40 PM EDT)

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The U.S. Court of Appeals for the Seventh Circuit recently **issued** the first appellate opinion on one of the three major exclusions raised by the commercial general liability insurers faced with a duty to defend alleged violations of Illinois' Biometric Information Privacy Act, or BIPA.

The three major exclusions the carriers raised are the violation of statutes, access or disclosure of personal information, and the employment-related practices.

On June 15, the Seventh Circuit in Citizens Insurance Co. of America v. Wynndalco Enterprises LLC upheld the U.S. District Court for the Northern District of Illinois' ruling that an insurer must defend an IT vendor against two proposed class actions alleging BIPA violations because the policy's violation of statutes exclusion's broad catchall provision was ambiguous.[1]

In 2021, the Illinois Supreme Court ruled favorably for the policyholder in West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan Inc. on an older version of the same violation of statutes exclusion, which only listed Telephone Consumer Protection Act and CAN-SPAM violations.[2]

Carriers introduced the violations of statutes exclusion in 2006 following decisions around the country in which courts held that violations of the TCPA qualified as "personal injury" under liability policies.

Over time, carriers added other federal statutes to the exclusion including the CAN-SPAM Act of 2003 and the Fair Credit Reporting Act.

Wynndalco effectively nullifies the more recent version of the exclusion called distribution of material in violation of statutes.

The Seventh Circuit's reasoning is different from those in trial court opinions. Trial courts have found, utilizing ejusdem generis, that BIPA does not share enough similarities with the statutes listed in the exclusion for it to apply unambiguously.

Instead of just relying on ejusdem generis, the Seventh Circuit specifically weighed the express invasion of privacy coverage in the personal and advertising injury coverage grants against a catchall provision in the violation of statutes exclusion.

The catchall provision contains a list of statutes that are not clearly tied together to address the same type of harm, and so the court found that giving coverage with one hand and taking away with the other — using an exclusion that does not even mention the right of privacy — creates an ambiguity that had to be construed in favor of the insured.

Wynndalco is the latest in a long line of Seventh Circuit opinions starting with the 1987 ruling in Tews Funeral Home Inc. v. Ohio Casualty Insurance Co. that employs the principle that carriers cannot give with one hand and take away with the other.[3]

Factual Background

The vendor Wynndalco assisted an artificial intelligence company called Clearview AI in selling its facial scan database to the Chicago Police Department.

Clearview AI obtained more than 3 billion photographs from social media and content-sharing and digital payment platforms, converted them into biometric facial recognition identifiers, collected both the images and the biometric counterparts, and created a facial recognition app to allow users to identify individuals by uploading a photograph of that individual to the app.

Clearview AI marketed the app to law enforcement agencies, and the Chicago Police Department gained access to it via a two-year contract with Wynndalco.

Two putative class actions alleged that Wynndalco violated BIPA, which states:

> No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

BIPA also requires specific types of notice to the subject for capturing, collecting, storing and using biometric identifiers or biometric information.

The Seventh Circuit's Reasoning

Wynndalco was covered by a business owner's policy issued to it by Citizens, which covered personal or advertising injury. The policy also included a distribution of material in violation of statutes exclusion, which excludes coverage for:

> "personal and 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) … ; or
>
> (2) The CAN-SPAM Act of 2003 … ; or
>
> (3) The Fair Credit Reporting Act (FCRA), and … 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.

Citizens argued that BIPA claims were excluded by the catchall.[4] The Seventh Circuit disagreed, explaining that reading

> the catch-all provision literally and broadly would essentially exclude from the policy's coverage injuries resulting from all such statutory prohibitions, as they all have to do with the recording, distribution, and so forth of information and material. … such a reading would, as a practical matter, all but eliminate coverage for certain claims that are largely, if not exclusively, statutory in nature (intellectual property claims in particular) and that the policy by its express terms otherwise purports to cover.[5]

The Seventh Circuit noted that the Citizens exclusion was similar to that in Krishna, but noted important differences, including that the title in Wynndalco was broader — referring to the distribution in violation of statutes, without any limitations like those in Krishna, the express inclusion of the FCRA and FACTA, and the broader catchall phrase.

The panel explained that the listed statutes all protect privacy, but nothing in the provision points to privacy as its focus:

> Only by engaging in a relatively sophisticated and nuanced examination of the four statutes singled out by the exclusion and the interests they protect might one be able to identify generic privacy as a theme that unifies those statutes and infer that the catch-all provision,

> notwithstanding its sweeping language, should be limited to other statutes that likewise address some aspect of personal privacy, be it seclusion, secrecy, or some other form of privacy … That gives the ejusdem generis canon entirely too much work to do.[6]

Finally, the panel noted that noscitur a sociis failed for the same reasons. Accordingly, this exclusion does not, and cannot, exclude coverage.

Conclusion

Wynndalco is the most recent in a line of cases recognizing defense coverage for allegations of BIPA violations and demonstrating why the common "violation of statute" type exclusions simply do not, and cannot, apply to bar coverage.

Ironically, policyholders have prevailed in trial court battles using ejusdem generis and noscitur a sociis to demonstrate that each of the big three exclusions does not apply to BIPA because the laundry list before the catchall is not tied together by a principle that would include BIPA.

Here, Citizens sought to save its distribution of material in violation of statutes exclusion by itself employing ejusdem generis and noscitur a sociis to argue that the laundry list was tied together by protection against invasions of privacy and are therefore not overly broad — they do not exclude all sorts of other personal injury and advertising injury offenses — and on point regarding BIPA.

The court rejected this argument because the exclusion read literally is much broader than invasion of privacy and in fact does exclude the invasion of privacy offense as well as most other personal and advertising injury offenses. Hence, those interpretive principles could not narrow the exclusion enough to save it from swallowing the coverage.

The reasoning in Wynndalco stated simply is that it is deceptive for one part of the policy to specifically provide coverage for invasion of privacy and for another part of the policy to take away most of that coverage with a vague exclusionary catchall after a laundry list.

Even if the catchall read literally does take away the specifically provided coverage, the courts will not enforce such a deceptive exclusion.

That reasoning could equally be applied to the catchall in the employment practices exclusion and in the disclosure of personal information exclusion, which foreshadows future appellate opinions favoring policyholders with respect to those exclusions.

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[1] Citizens Ins. Co. of Am. v. Wynndalco Enter., LLC , 2023 U.S. App. LEXIS 14834 (7th Cir. Jun. 15, 2023).

[2] West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan , 183 N.E.3d 47 (Ill. 2021).

[3] Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co ., 832 F.2d 1037 (7th Cir. 1987).

[4] Wynndalco Enter., 2023 U.S. App. LEXIS 14834, at *19.

[5] Id. at *20.

[6] Id. at *37-38.