LEGAL DEVELOPMENTS INVOLVING THE "PERSONAL AND ADVERTISING INJURY" COVERAGE'S RECORDING AND DISTRIBUTION EXCLUSION AND ACCESS OR DISCLOSURE EXCLUSION

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I. INTRODUCTION

Wiretapping. Website tracking. Biometrics. As technologies continue to evolve, companies are facing an increasing variety of privacy-related lawsuits. And faced with such lawsuits, companies are looking to their insurance as potential funding sources for defense and indemnity. One such potential insurance source is the "personal and advertising injury" coverage of their liability policies.

Whether a liability policy's "personal and advertising injury" coverage extends to privacy claims is a question courts throughout the country are being called upon to answer. And in some instances, these courts are being asked to factor into their assessment two exclusions: the "Recording and Distribution of Material in Violation of Law Exclusion" (the "Recording and Distribution" exclusion); and the "Exclusion – Access or Disclosure of Confidential or Personal Information and Data-Related Liability – With Limited Bodily Injury Exception" (the "Access or Disclosure" exclusion). But what impact do these exclusions have on the courts' coverage determinations?

This article will survey recent legal developments involving the construction of the Recording and Distribution exclusion and the Access or Disclosure exclusion. It will discuss each of the exclusions and explain their unique terms and provisions. Before doing so, however, the article will first introduce readers to the "personal and advertising injury" liability coverage and discuss how courts have construed its scope in the context of privacy claims.

II. AN OVERVIEW OF THE PERSONAL AND ADVERTISING INJURY LIABILITY COVERAGE'S PRIVACY OFFENSE

Unlike a liability policy's "bodily injury" and "property damage" coverages, "personal and advertising injury" liability coverage typically is not based on an accidental "occurrence." Instead, for the coverage to potentially apply, there must be a claim seeking damages for injury caused by one of the offenses listed in the policy's definition of "personal and advertising injury."

While liability policies can differ, many define "personal and advertising injury" to mean injury, including consequential "bodily injury", arising out of certain offenses – among them, the "oral or written publication, in any manner, of material that violates a person's right of privacy" or a similar type of offense (the "privacy offense"). The privacy offense has two components. It requires: (1) a violation of a person's right of privacy; (2) caused by a

publication of material. Whether the privacy offense encompasses a particular type of claim often presents a question of law for the court to decide.

In answering that question, some courts have found the offense to encompass the group of common law torts that concern the invasion of an individual's privacy. *See, e.g., Microbrightfield, Inc. v. Peerless Ins. Co.*, File No. 2:05–CV–207, 2006 WL 8436228, *4 (D. Vt. Oct. 4, 2006) (applying Vermont law); *Rodan Enterprises, Inc. v. Sirius Am. Ins. Co*., No. C05-04643 MJJ, 2006 WL 8459712 (N.D. Cal. Nov. 15, 2006) (applying California law). Although not recognized in every jurisdiction, the Restatement (Second) of Torts § 652A lists the four basic "invasion of privacy" torts as: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places another in a false light before the public.

Additionally, numerous courts have determined that the privacy offense's scope can encompass the insured's alleged violation of certain statutes, provided the statute at issue concerns an individual's privacy interests. For example, in finding that the privacy offense potentially encompassed an insured's alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq. ("BIPA"), the Illinois Supreme Court noted that BIPA's purpose was to protect individuals from having their biometric information collected, captured, purchased, received through trade, or otherwise obtained or disseminated by a private company without first providing the necessary approvals. *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc*., 183 N.E.3d 47, 61 (Ill. 2021) (applying Illinois law),

The Ninth Circuit Court of Appeals took a similar analytical approach in *Brighton Collectibles, LLC v. Certain Underwriters at Lloyd's London*, 798 Fed.Appx. 144 (9th Cir. March 16, 2020). There, the court held that the privacy offense potentially encompassed allegations that the insured had collected and sold the personal information of its customers to third-party marketers in violation of California's Song-Beverly Credit Card Act, Cal. Civ. Code § 1747.08. In doing so, the Ninth Circuit noted that the California Supreme Court had specifically found that the statute's overriding purpose was to protect consumer privacy.

III. THE EXCLUSIONS

Whether the privacy offense potentially encompasses a particular claim is only the start of the coverage inquiry, however. An insurance policy often presents other requirements that must be satisfied, among them, that the "personal and advertising injury" offense arise out of a named insured's business and be committed in the policy's coverage territory during the ~~policy's~~ policy period.

Because the "personal and advertising injury" coverage is also subject to various exclusions, they too are a factor in the coverage inquiry. And as will be seen, various courts have found both the Recording and Distribution exclusion and the Access or Disclosure exclusion to be particularly relevant in assessing whether the "personal and advertising injury" coverage extends to a particular privacy claim.

A. The Recording and Distribution Exclusion

The Recording and Distribution exclusion is often included among the exclusions listed in commercial general liability or umbrella liability coverage forms. For example, the Insurance Services Office, Inc. includes it as Exclusion 2.p. under Coverage B – Personal and Advertising Injury Liability of its Commercial General Liability Form CG 00 01 04 13.

For the Recording and Distribution exclusion to apply, the "personal and advertising injury" must arise out of an act or omission that violates, or is alleged to violate, a statute, ordinance or regulation listed in the exclusion's subparagraphs. These enactments include: the Telephone Consumer Protection Act ("TCPA") (subparagraph (1)); the CAN-SPAM Act of 2003 ("CAN-SPAM Act") (subparagraph (2)); and the Fair Credit Reporting Act ("FCRA") and its amendments, including the Fair and Accurate Credit Transactions Act ("FACTA") (subparagraph (3)). In addition, subparagraph (4) of the exclusion extends to any federal, state or local statute, ordinance or regulation, other than those listed in subparagraphs (1)-(3), that addresses, prohibits, or limits the dissemination, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Courts have had little trouble applying the Recording and Distribution exclusion to the insured's alleged violation of statutes expressly listed in subparagraphs (1)-(3) of the exclusion. In determining whether subparagraph (4) applies to a particular statute not listed in the exclusion, however, the courts have focused their attention on the purpose of the statute at issue.

For example, in *Nationwide Mutual Fire Ins. Co. v. Nagle & Assoc., P.A.*, 588 F. Supp.3d 680 (W.D.N.C. 2022) (applying North Carolina law), a North Carolina federal court concluded that subparagraph (4) of the Recording and Distribution exclusion applied to the insured's alleged violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq*. (the "DPPA"). In making its determination, the *Nationwide* court noted that the DPPA "bans disclosure, absent a driver's consent, of 'personal information,' e.g., names, addresses, or telephone numbers, as well as 'highly restricted personal information,' e.g., photographs, social security numbers, and medical or disability information." *Id.*, 588 F. Supp. at 682 (internal citations omitted). Finding the DPPA to be a federal statute that prohibits or limits the dissemination, sending, transmitting, communicating, or distribution of material or information, the *Nationwide* court determined that the DPPA fell within subparagraph (4) of the exclusion's unambiguous terms. The court therefore held the exclusion barred any coverage obligation owing the insured in connection with the DPPA lawsuit. *Id.*, 588 F. Supp. at 689.

Likewise, in *Massachusetts Bay Ins. Co. v. Impact Fulfillment Services, LLC*, No. 1:20CV926, 2021 WL 4392061 (M.D.N.C. Sept. 24, 2021) (applying North Carolina law), the North Carolina federal court concluded that subparagraph (4) of the exclusion applied to preclude coverage for BIPA claims brought against an insured. In doing so, the court noted that BIPA's substance "regulates the retention, collection, disclosure, and destruction of biometric identifiers or biometric information." *Id*. at *6 (citing 740 Ill. Comp. Stat. 14/15). Because

subparagraph (4) encompassed statutes that concerned the "collect[ion]" and "dissemination" of information, the *Massachusetts Bay* court found the Recording and Distribution exclusion to be "consonant with BIPA's prohibition against collection and disclosure of biometric identifiers and biometric information." *Id*.

In further support of its coverage determination, the *Massachusetts Bay* court turned its attention to the types of statutes listed in subparagraphs (1)-(3) of the exclusion, observing that the TCPA, the CAN-SPAM Act, the FCRA and FACTA each protect a person's privacy interest, albeit in different ways. Because it believed BIPA to be the "same kind, character and nature" as those listed in the exclusion, the court found the Recording and Distribution to exclude any duty the insurer had to defend or indemnify the insured in the underlying BIPA class action. *Id*. at *7.

The Seventh Circuit Court of Appeals reached a different conclusion in construing a substantially similar conclusion in the context of a BIPA lawsuit in *Citizens Ins. Co. of Am. v. Wynndalco Enters., LLC*, 70 F.4th 987 (7th Cir. 2023) (applying Illinois law). The Seventh Circuit acknowledged that subparagraph (4) of the exclusion could be construed to encompass a wide variety of statutes, including BIPA. But it found that such a broad construction would impermissibly "swallow" much of the insured's "personal and advertising injury" coverage. *Id*. at 997–98.

The court was also unwilling to narrowly construe the exclusion's application to privacy statutes, reasoning "there was no hint of privacy" in the exclusion's language. Further, the Seventh Circuit believed such a reading would narrow the "sweeping language" in a manner inconsistent with subparagraph (4)'s plain terms. *Id*. at 998–99. Finding the exclusion to be ambiguous, the Seventh Circuit construed it against the insurer, and held that the insurer was obligated to defend the insured in the underlying BIPA litigation. *Id*. at 1004–05.

Months later, the Illinois Appellate Court, First District, was called upon to construe the application of the Recording and Distribution exclusion to BIPA claims, just as the Seventh Circuit had been. *Nat'l Fire Ins. Co. of Hartford v. Visual Pak Co., Inc*., 2023 IL App (1st) 221160 (Ill. App. Ct. Dec. 19, 2023), leave to appeal denied, 238 N.E.3d 303. And in doing so, the Illinois Appellate Court held that the exclusion unambiguously precluded coverage for BIPA claims.

In *Visual Pak*, the Illinois Appellate Court acknowledged that the Seventh Circuit reached the opposite conclusion in *Wynndalco*. But the Illinois Appellate Court emphasized that it was not bound by the Seventh Circuit's interpretation of Illinois law. Moreover, the court declined to follow the Seventh Circuit's decision because it believed *Wynndalco* was wrongly decided.

The Illinois Appellate Court found it "simply impossible to deny" that subparagraph (4) of the exclusion described the substance of BIPA, which concerns the collection, dissemination, and disposal of biometric identifiers and information. Additionally, the court found that, because the TCPA and the CAN-SPAM Act (referenced in subparagraphs (1)-(2)) address a

consumer's freedom from unwanted solicitations, and the FCRA and FACTA (referenced in subparagraph (3)) protect a consumer's confidentiality in their financial information, a common theme of privacy ran throughout the Recording and Distribution exclusion. The Illinois Appellate Court opined that, whether applying subparagraph (4) by its plain and ordinary language, or using the canon of *ejusdem generis* to ascertain a common theme to limit subparagraph (4)'s scope to statutes or other laws that protect personal privacy, it would still find that the exclusion encompassed BIPA.

While the Seventh Circuit opined in *Wynndalco* that such a construction of subparagraph (4) would swallow the "personal and advertising injury" coverage, effectively making the coverage illusory, the Illinois Appellate Court disagreed. It explained that, under Illinois law, it is only when an exclusion swallows coverage *completely* that the coverage is deemed illusory. And the Illinois Appellate Court concluded that this was not the case here, opining that, while the exclusion would apply to statutory causes of action, it would not encompass common law causes of action. The court therefore held that the Recording and Distribution exclusion applied to preclude the insurer's duty to defend the insured in the BIPA lawsuit.

Since *Visual Pak*, the Illinois Appellate Court has maintained its determination that the Recording and Distribution exclusion applies to BIPA claims. *See, e.g., Ohio Sec. Ins. Co. v. Wexford Home Corp.*, 2024 IL App (1st) 232311-U (Ill. App. Ct. Dec. 2, 2024), leave to appeal denied, 256 N.E.3d 987. In *Wexford*, the Illinois Appellate Court continued to align itself with *Visual Pak*, emphasizing that the court saw "no reason to depart from its thorough and well-reasoned analysis." *Id*. at *8.

Notably, the Seventh Circuit has likewise re-affirmed its view that, as respects its application to claims brought under BIPA, the Recording and Distribution exclusion and its subparagraph (4) are ambiguous. In *Citizens Ins. Co. v. Mullins Food Products, Inc.*, 135 F.4th 1082 (7th Cir. 2025), the Seventh Circuit declined to follow the Illinois Appellate Court's *Visual Pak* decision and instead embraced an analytical framework consistent with *Wynndalco*. As the court explained, "Here, what gives us the best indication of what types of 'recording' and 'distribution' [subparagraph (4)] was meant to capture are the three statutes identified immediately prior to the catchall," i.e., the TCPA, the CAN-SPAM Act, the FCRA and FACTA. *Id.*, 135 F.4th at 1094, n. 5. Finding those statutes to be "very different from BIPA," *Id.*, the Seventh Circuit concluded that Recording and Distribution exclusion did not preclude defense or indemnity for the underlying BIPA litigation.

B. The Access or Disclosure Exclusion

The Access or Disclosure exclusion, which is often added to liability policies by endorsement, excludes coverage for "personal and advertising injury" arising out of any "access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information . . . ." The exclusion's application is determined, not by the type of statute or

legislative enactment the insured is alleged to have violated, but rather, by the type of information the insured is alleged to have accessed or disclosed.

Where the "personal and advertising injury" arises from the type of information expressly listed in the exclusion, the Access or Disclosure exclusion's application is a relatively linear exercise. *See, e.g., Great American Insurance Company v. Beyond Gravity Media Inc.,* 560 F. Supp.3d 1024 (S.D. Tex. 2021) (applying Texas law) (Access or Disclosure exclusion eliminated insurer's duty to defend insured against allegations the insured misappropriated another's confidential information and trade secrets); *Aram Logistics v. U.S. Liab. Ins. Co.*, Case No. 3:23-cv-01869-H-DEB, 2024 WL 390076 (S.D. Cal. Jan. 31, 2024) (applying California law) (finding Access or Disclosure exclusion to be unambiguous and that it precluded coverage for underlying lawsuit, where each cause of action was based on the insured's alleged misappropriation of the underlying plaintiff's trade secrets and confidential information); *Cooper v. Westfield Ins. Co.*, 488 F. Supp.3d 430 (S.D.W. Va. 2020) (applying West Virginia law) (allegations concerning the insured's alleged disclosure of employee's health information fell "squarely within the plain language" of the Access or Disclosure exclusion).

In other contexts, ~~the touchstone of~~ the exclusion's application has turned on whether the information at issue is confidential or personal, or otherwise nonpublic.

Whereas the Seventh Circuit has been unwilling to find that the Recording and Distribution exclusion applies to BIPA claims, it has taken a different approach concerning the application of the Access or Disclosure exclusion to such claims. In *Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, 102 F.4th 438, 440–41 (7th Cir. 2024) (applying Illinois law), the Seventh Circuit held that the Access or Disclosure exclusion excluded coverage for BIPA claims and that it did so unambiguously. Finding the exclusion's application to BIPA claims to be straightforward, the Seventh Circuit observed that the ordinary understanding of an individual's "confidential or personal information" plainly includes their biometric identifiers. *Id*.

The insured argued that the exclusion was nevertheless ambiguous. It noted that the exclusion listed patents among the categories of information to which the exclusion applied. Because patents are public, the insured argued that the patent's inclusion in the exclusion created an ambiguity that nullified the exclusion's application. Rejecting this argument, the Seventh Circuit emphasized:

> True, the list contains mismatched items. But how does this create ambiguity about either the opening phrase ("any person's or organization's confidential or personal information") or the catchall "any other type of nonpublic information")? Sticking one blue item into a list that begins "all red items including …" and closes "plus anything pink" does not nullify the language's application to ruby-colored things.

Id. at 441 (citation omitted).

In its *Citizens Ins. Co. v. Mullins Food Products* decision, discussed above, the Seventh Circuit reaffirmed its coverage determination in *Thermoflex*, which "leaves no doubt that the Access or Disclosure Exclusion bars coverage for BIPA claims." 135 F.4th at 1092. Although the insured asked the Seventh Circuit to certify to the Illinois Supreme Court the question of the Access or Disclosure exclusion's application to BIPA claims, the Seventh Circuit saw "no need" to do so. It explained that, because "[t]he Access or Disclosure Exclusion is clear on its face … we are confident that the Illinois Supreme Court would find, as we have, that it excludes coverage for BIPA claims." *Id.*, 135 F.4th at 1091. *See also Phoenix Ins. Co. v. Ackercamps.com LLC*, Case No. 3:23-cv-3303-DWD, 2025 WL 2799377 (S.D. Ill. Set. 30, 2025) (applying Illinois law) (finding the Access or Disclosure exclusion "clearly and effectively" eliminated coverage for BIPA claims based on facial geometry).

IV. CONCLUSION

This article, which expresses the opinions of the author and does not necessarily reflect the views of Nicolaides Fink Thorpe Michaelides Sullivan LLP or its clients, was prepared to provide the reader with an overview of recent legal developments involving the construction (and, in some instances, the application) of the Recording and Distribution exclusion and the Access or Disclosure exclusion in the context of certain types of privacy claims involving a liability policy's "personal and advertising injury" coverage.

Whether a particular claim or suit potentially implicates the privacy offense or is excluded from coverage by the Recording and Distribution exclusion and/or the Access or Disclosure exclusion, is necessarily a case-specific inquiry. The unique factual allegations of a claim or suit, and the specific terms and provisions of the insurer's policy, must always be weighed and assessed. Additionally, because courts in different jurisdictions can vary their approaches in answering the coverage issues they consider, choice of law should also be weighed. By keeping abreast of developments, however, practitioners can appreciate the types of insurance coverage issues various privacy claims can create.