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Illinois – Appellate Court Finds Duty To Defend BIPA Claim

BY: Brian C. Bassett

In *West Bend Mutual Ins. Co. v. Krishna Schaumburg Tan, Inc.*, the Illinois Appellate Court affirmed the district court's decision holding that West Bend owed Krishna a duty to defend in an underlying BIPA lawsuit filed by a Ms. Sekura that alleged Krishna provided fingerprint data to a third party in violation of Ms. Sekura's privacy rights. The court determined that the allegations in the underlying complaint fell under the policies' definitions of "personal injury" and that the violation of statutes exclusion did not preclude coverage.

The two West Bend policies relevant to the underlying lawsuit provided that West Bend would defend Krishna in a lawsuit that alleged a "personal injury" which the policies defined as "injury, other than 'bodily injury,' arising out of * * * oral or written publication of material that violates a person's right of privacy." The policies failed to define "publication", and the parties argued that the duty to defend turned on the meaning of "publication". West Bend relied on the Illinois Supreme Court decision in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.* in arguing that "publication" requires communication of information to the public and not solely to a single third party. The court rejected that interpretation and analyzed *Valley Forge* extensively. The court determined that West Bend inappropriately grasped onto a portion of the language in *Valley Forge*. The court followed the Supreme Court in *Valley Forge* and looked at what a reasonable person would understand as the plain, ordinary meaning of the word "publication" and consulted dictionary definitions. According to the court, the common understanding and dictionary definitions included the limited sharing of information with a single third party. Therefore, the claims in the underlying complaint could potentially be covered by the policies and West Bend had a duty to defend Krishna under the "personal injury" coverage provision.

West Bend then argued that even if the allegations in the underlying claim fell within the "personal injury" definition, coverage was barred by a violation of statutes exclusion. The underlying complaint alleged violations of rights under the Biometric Information Privacy Act. West Bend argued that the policy exclusion specifically barred coverage for personal injuries that violate the TCPA, the CAN-SPAM Act of 2003 or "any statute, ordinance or regulation * * * that prohibits or limits the sending, transmitting, communication or distribution of material or information." The court pointed out that the full title of the exclusion is "Violation of Statutes That Govern E-Mails, Fax, Phone Calls or Other Method of Sending Material or Information" and that the exclusion barred coverage for violations of a very limited type of statute – those that govern methods of communication and not those that limit the sending or sharing of information. The court found that the Biometric Information Privacy Act was not one that regulates methods of communication and therefore the exclusion did not apply to bar coverage to Krishna. The court affirmed the lower court's decision finding that a duty to defend exists.