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Insurance Law Alert

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Privacy Alert:

Another Illinois Court Addresses Scope Of Coverage For BIPA Claims, Concluding That Two Exclusions Bar Coverage

As discussed in previous Alerts, the Illinois Supreme Court and several Illinois district courts have addressed whether certain policy exclusions bar coverage for claims alleging violations of the Biometric Information Privacy Act ("BIPA"). *See* March and April 2022 Alerts; May and October 2021 Alerts. Last month, another Illinois district court weighed in, ruling that two commerical general liability policy exclusions precluded coverage for the underlying BIPA claims. *Cont'l Western Ins. Co. v. Cheese Merchants of Am., LLC*, 2022 WL 4483886 (N.D. Ill. Sept. 27, 2022).

The underlying complaint alleged that Cheese Merchants' use of a biometric time tracking system that scans employees' hands for authentication violates the BIPA. Continental Western argued it had no duty to defend the suit based on three policy exclusions: (1) an employment-related practices exclusion; (2) a disclosure of personal information exclusion; and (3) a violation of law exclusion. The court concluded that the first exclusion did not apply but that the latter two did.

The employment-related practices exclusion applied to "Employment-related practices, policies, acts or omissions such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person." The court noted that while using one's hand to clock in and out of work might seem like a practice related to employment, the "complete text and the overall structure of the provision" indicates that hand scanning is not a practice encompassed by the exclusion. In particular, the court explained that everything else listed in the exclusion related to mistreatment targeted at a specific employee, rather than a company-wide policy. As the court noted, other Illinois courts have similarly deemed this exclusion inapplicable to BIPA claims.

The disclosure of personal information exclusion excluded coverage "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." Emphasizing the breadth of the language in this provision, the court concluded that BIPA claims are precisely about protecting personal information. The court rejected Cheese Merchants' assertion that the list of examples included in the exclusion indicated that it was intended to apply only to information associated with protected trade secrets, financial information or health information. The court explained that the list of examples was illustrative, not exhaustive, and deemed the exclusion unambiguous in light of the catch-all phrase "or any other type of nonpublic information." Other Illinois courts are split as to whether similar exclusions bar coverage for BIPA claims.

The violation of law exclusion barred coverage for claims:

> arising directly or indirectly out of any action or omission that violates or is alleged to violate: (1) The Telephone Consumer Protection Act (TCPA) . . . (2) The CAN-SPAM Act of 2003 . . . (3) The Fair Credit Reporting Act (FCRA), including the Fair and Accurate Credit Transactions Act (FACTA) . . . or (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

The Illinois Supreme Court and numerous other Illinois district courts, faced with a similar exclusion, have concluded that it

does not apply to BIPA claims. However, the *Cheese Merchants* court ruled that this "broad" and "sweeping" exclusion—particularly the fourth catch-all provision, applies squarely to such claims. The court rejected Cheese Merchants' assertion that under the principle of *ejusdem generis*, the catch-all provision should be limited in scope to items of a similar nature to those expressly listed. The court explained that *ejusdem generis* typically applies only when there is "room for doubt about the sweep of the text." Here, however, the court noted that the catch-all component of the exclusion "goes to great lengths to emphasize its expansiveness." In addition, the court held that *ejusdem generis* does not apply because that canon of interpretation depends on the existence of a discernable theme common among the specific examples listed. The court held that the present exclusion lacked such a common thread, noting that while the TCPA and CAN-SPAM Act of 2003 both generally protect privacy by regulating against unwanted communications, the FCRA relates to the safekeeping of financial information. Finally, the court noted that even if a very generalized theme of "statutes that protect privacy" could be inferred from the language, it would be "at such a high level of generality that it would sweep in BIPA."

The court expressly distinguished *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 183 N.E.3d 47 (Ill. 2021) (discussed in our May 2021 Alert), in which the Illinois Supreme Court ruled that a violation of statutes exclusion did not apply to BIPA claims. The exclusion in that case did not reference the FCRA—a distinction the court deemed "meaningfully different." The court stated:

> The Illinois Supreme Court confronted an exclusion with a strong thematic current running through all of the specific examples. . . . But here, the exclusion covers two types of privacy statutes: two statues that protect privacy when communicating with consumers . . . and one statute that protects the privacy of information given by consumers. The inclusion of the FCRA expands the scope of the exclusion. And it signals that the general provision is not limited to communicating with consumers.

Coverage Alerts:

New York Court Rules That War Exclusion Bars Coverage For Claims Against Financial Institution

A New York district court ruled that an insurer had no duty to defend or indemnify claims against Western Union, finding that a war exclusion squarely applied to bar coverage. *Hartford Fire Ins. Co. v. W. Union Co.*, 2022 WL 4386836 (S.D.N.Y. Sept. 22, 2022).

The coverage dispute arose out of an attack on a Malaysian airline that resulted in the death of an American college student. The student's family sued Western Union and other financial institutions, alleging that they provided financial support to the Donetsk People's Republic ("DPR"), a Russian-backed separatist group in Ukraine responsible for the attack. Western Union tendered the lawsuit to Hartford, seeking coverage under a general liability policy. Hartford denied coverage on the basis of a war exclusion that applied to bodily injury or property damage arising directly or indirectly out of "(1) War, including undeclared or civil war; (2) Warlike action by a military force . . . ; or (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these."

Applying Colorado law, the court held that the exclusion unambiguously precluded coverage for the underlying claims. In particular, the court explained that it need not decide whether the claims arose out of "war" or "warlike action" because they clearly stemmed from an "insurrection." In so ruling, the court emphasized that the underlying complaint alleged that the DPR engaged in a

violent uprising in order to create a "proto-state" through control of territory in eastern Ukraine. The court deemed it irrelevant that other allegations in the complaint gave rise to the possibility that the DPR had other motives for the attack, noting that its objective of overthrowing the Ukrainian government was its primary purpose.

The court further held that coverage was barred in any event by a financial services exclusion, which applied to bodily injury "resulting from the rendering of or the failure to render financial services." Because the underlying complaint alleged that Western Union's role in the attack stemmed solely from its financial support to the DPR, the court concluded that the exclusion plainly applied—regardless of whether Western Union allegedly provided non-financial support as well.

The applicability of a war exclusion is at the heart another coverage dispute, *Mondelez Int'l, Inc. v. Zurich Am. Ins. Co.*, 2018 WL 4941760 (Ind. Cir. Ct.). There, Zurich cited a war-related exclusion in denying coverage for a claim arising out of a 2017 malware attack that affected the policyholder's servers and computers. The parties settled this matter last week.

Florida Court Rules That Three Lawsuits Against Policyholder Are Subject To Single Limit Under Related Claims Provision

A Florida district court ruled that three lawsuits brought against a policyholder across different policy periods were "related claims" and therefore subject to a single policy limit. *Assoc. Indus. Ins. Co., Inc. v. Slattery, Sobel & Decamp, LLP*, No. 6:22-cv-80 (M.D. Fla. Sept. 14, 2022).

Time share developers brought three lawsuits against the policyholder, asserting claims of tortious interference with contract, unfair and deceptive trade practices and civil conspiracy, based on its alleged participation in a timeshare exit scheme. The insurer defended the claims under a reservation of rights, but brought the present action seeking a declaration that it had no further duty to defend or indemnify. According to the insurer, the underlying suits constitute a single claim under the professional liability policies, subject to a single limit of liability, which had already been exhausted. The court agreed and ruled in the insurer's favor.

Each of the consecutive policies at issue included a provision stating that: "Claims alleging, based upon, arising out of or attributable to the same Wrongful Act(s) or Interrelated Wrongful Acts shall be treated as a single Claim." The policies further provided that "All such claims, whenever made . . . shall be subject to the Limit of Liability and Retention set forth in such policy." Applying this language, the court concluded that all three suits against the policyholder were a single claim. The court explained that each claim arose from the same allegations of false and misleading advertising, following "an identical pattern," aimed at achieving the same goal.

Because the record indicated that the limit of liability had been exhausted through payment of claim expenses, the court ruled that the insurer's duty to defend the policyholder was terminated.

Insurer Must Defend Nuisance Claim Against Landfill Operator, Says Indiana Court

An Indiana district court ruled that an insurer was obligated to defend a nuisance suit against its policyholder, finding that the claims alleged a covered occurrence. *Savers Prop. & Cas. Ins. Co. v. Rockhill Ins. Co.*, 2022 WL 9461874 (S.D. Ind. Oct. 14, 2022).

Residents of a town filed a class action lawsuit, seeking injunctive relief and monetary damages based on the policyholder's allegedly negligent and intentional conduct in operating its landfill. The complaint alleged that the improper construction and maintenance of the landfill resulted in the release of noxious

odors, pollutants and contaminants in the surrounding area.

The court concluded that the complaint alleged an "occurrence," defined by the policy as "an accident, including continuous repeated exposure to substantially the same general harmful conditions." In so ruling, the court rejected the insurer's contention that the alleged damage at issue was caused by a professional error or omission, and thus outside the scope of general liability coverage. The court explained: "The Underlying Plaintiffs are not alleging a failure to perform a contractual duty or failure to meet a contractual standard of care; they are alleging a breach of the duty not to create a nuisance that interferes with the Underlying Plaintiffs' use and enjoyment of their property."

The court also ruled that the professional services exclusion did not relieve the insurer of its duty to defend. Under Indiana law, a professional service means "any business activity . . . which involves specialized knowledge, labor or skill which is predominantly mental or intellectual as opposed to physical or manual in nature." The court noted that while some of the allegations in the complaint related to the policyholder's "highly regulated" activities as a "sophisticated landfill operator," other allegations (such as "the simple act of improperly covering the waste with dirt") were acts of basic manual labor rather than professional services.

Reinsurance Alert:

Second Circuit Rules That Reinsurer Is Bound By Cedent's Underlying Allocation

Affirming a New York district court decision, the Second Circuit ruled that a reinsurer was obligated to indemnify its cedent's underlying settlement payments, rejecting the reinsurer's assertion that the settlement was outside the scope of coverage under the cedent's excess policy and the reinsurance policy. *Fireman's Fund Ins. Co. v. OneBeacon Ins. Co.*, No. 20-4282 (2d Cir. Sept. 15, 2022).

Fireman's Fund issued excess policies to ASARCO that conditioned payment on exhaustion of underlying insurance. One excess policy was reinsured by OneBeacon, as successor-in-interest to the original reinsurer. OneBeacon denied coverage for Fireman's Fund's underlying settlement payments, arguing that it violated the exhaustion requirement of its excess policies because it allocated a portion of the payment to a policy without first exhausting the full policy limits of underlying excess policies.

As discussed in our October 2020 Alert, a New York district court rejected OneBeacon's assertion, ruling that it was bound by Fireman's Fund's allocation decision pursuant to a follow the settlements clause. More specifically, the district court explained that the exhaustion requirement in Fireman's Fund's policy was ambiguous, and therefore under New York precedent, could be met through a below-limits settlement of the underlying policy so long as the total covered losses exceeded the policy's attachment point. The district court also rejected OneBeacon's contention that the reinsurance policy itself required payment of policy limits in full by underlying primary and excess polices before reinsurance coverage would attach.

The Second Circuit affirmed, ruling that the exhaustion provisions at issue did not unambiguously require underlying insurers to pay full underlying limits and instead, permitted exhaustion by a below-limits settlement. The court explained that a Payment of Loss provision did not define "exhaustion" or specifically require actual payment. Additionally, the court held that a Limit of Liability provision, which did require exhaustion of limits "solely by reason

of losses paid thereunder," was irrelevant to this case because that provision applies only when underlying aggregate limits of liability have been reduced or exhausted by previous per-occurrence claims, requiring that excess insurer to provide coverage at a lower attachment point, which was not the case here.

OneBeacon also argued that Fireman's Fund was judicially estopped from arguing that the exhaustion provision was ambiguous because it took a "clearly inconsistent" position in other litigation. The court rejected this assertion, concluding that the position taken by Fireman's Fund in other cases was not inconsistent with its current interpretation of the exhaustion requirement.

Finally, the Second Circuit ruled that the OneBeacon's reinsurance policy did not require full payment of the underlying limits of liability by the underlying insurers before reinsurance coverage attached. The relevant provision in the policy provided that there was no reinsurance coverage "for any loss under $78 million." The court explained that, "reminiscent of the exhaustion issue," the reinsurance policy's attachment point is not contingent upon payment by underlying insurers; rather, the reinsurance policy applies once the policyholder's covered losses exceed $78 million.

Bad Faith Alert:

Nebraska Supreme Court Rules That Assignee Of Policy Benefits May Not Bring First-Party Bad Faith Claims Against Property Insurer

The Nebraska Supreme Court ruled that a contractor, as assignee of insurance benefits, may not assert first-party bad faith claims against a property insurer. *Millard Gutter Co. v. Shelter Mutual Ins. Co.*, 312 Neb. 606 (2022).

Millard Gutter, as assignee of various insured property owners who had sustained storm-related losses, sued Shelter Mutual Insurance. The complaint alleged breach of contract and bad faith claims. Shelter Mutual argued that Millard Gutter lacked standing to bring the bad faith claim. A district court agreed and dismissed the suit.

Addressing this matter of first impression under Nebraska law, the Nebraska Supreme Court ruled that a policyholder cannot validly assign to a non-policyholder an existing tort claim of first-party bad faith. The court noted that while "the law generally supports the assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services," such as legal malpractice claims. The court concluded that these same limitations apply to first-party bad faith claims, holding that while "the proceeds from such an action are assignable absent a statute to the contrary, . . . the right to prosecute or control such an action cannot be validly assigned."

The court also rejected Millard Gutter's alternative argument that it had standing because it was asserting its own claim for first-party bad faith against Shelter Mutual Insurance. The court explained that no duty of good faith and fair dealing was owed to Millard Gutter because such duties are dependent upon a contractual relationship between a policyholder and insurer.

COVID-19 Alert:

Another State Supreme Court Rejects Coverage For Pandemic-Related Losses

As discussed in previous Alerts, the highest courts in Washington, Oklahoma, Massachusetts, Iowa, Wisconsin and South Carolina have all ruled that pandemic-related business losses are not covered under property policies. This month, the Delaware Supreme Court joined this growing consensus in *APX Operating Co., LLC v. HDI Global Ins. Co.*, 2022 WL 5056431 (Del. Oct. 5, 2022).

The lower court had granted the insurer's motion to dismiss, finding that even assuming (without deciding) that the claims alleged "direct physical loss or direct physical harm," there was no coverage because a pollution and contamination exclusion unambiguously barred coverage. The Delaware Supreme Court affirmed the dismissal in a summary order.

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Euromoney's *Benchmark Litigation* 2023 recognized Simpson Thacher's Insurance Litigation Department as Tier 1. *Benchmark Litigation* reports that Simpson Thacher "boasts a long history as one of New York's, and the country's, most esteemed full-service legal brands."

Lynn Neuner, Global Co-Chair of the Firm's Litigation Department, was selected for the fifth consecutive year by Euromoney's *Benchmark Litigation* as one of the "Top 100 Trial Lawyers." The list highlights elite trial attorneys in the United States who are selected based on client and peer review. Earlier this year, Lynn was recognized for the fourth consecutive year as one of *Benchmark*'s "Top 10 Women In Litigation" in the United States, which identifies leading women litigators on the basis of their trial acumen, the strength of their client and peer reviews and their proven achievements.

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