PLUNKETT COONEY

Damages, BIPA Coverage Update

December 16, 2024

Damages – Ohio

Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London
--- N.E.3d ---, 2024 WL 5049193 (Ohio Dec. 10, 2024)

The Ohio Supreme Court reversed the decision of the Eighth District Court of Appeals of Ohio that ruled payments into an abatement fund qualify as damages under commercial general liability policies. The Ohio Supreme Court concluded that a payment to an abatement fund does not constitute "damages" as that term is understood under the policies.

In 2000, Santa Clara, California, sued Sherwin-Williams Company (Sherwin-Williams) and other paint companies for their role in promoting and selling lead-based paint. In 2013, the companies, including Sherwin-Williams, were ordered to pay jointly and severally $1.5 billion into an abatement fund to be administered by the State of California. The abatement plan was intended to prevent future harm by providing testing, remediation, repair and education of families and homeowners on lead-poisoning prevention. Through further appeals, the paint companies were able to reduce the award into the abatement fund to $403 million.

In 2006, Sherwin-Williams filed a declaratory judgment action in Ohio against its insurers as it related to a separate Rhode Island lawsuit alleging damages for the promotion and sale of lead-based paint. The insurers succeeded in that suit and obtained a stay until a final determination in the California suit. After the abatement award, the stay was lifted, and Sherwin-Williams amended its complaint seeking coverage collectively against Certain Underwriters at Lloyd's, London, Certain London Market Companies, and Certain Domestic Insurers for the California lawsuit. The trial court granted summary judgment to the insurers and held that the abatement award did not constitute "damages" under the policy. The appellate court reversed.

The Ohio Supreme Court held that the policies cover compensation for past harms, not for eliminating future harms. The Supreme Court highlighted the fact that the abatement order did not compensate for past bodily harm or physical damage. Instead, it was intended to eliminate future harm, and therefore, was not covered under the policies.

By: Joshua LaBar

BIPA Coverage – Illinois

Ohio Security Ins. Co. v. Wexford Home Corp.
2024 IL App (1st) 232311-U, 2024 WL 4930408 (Dec. 2, 2024)

The Illinois Court of Appeals, First District, First Division reversed the trial court's order granting summary judgment in favor of the insured, Wexford Home Corporation (Wexford), finding that the recording-and-distribution exclusions contained in the general and umbrella liability policies applied to preclude all defense and indemnification coverage for an underlying class action lawsuit in which it was alleged that Wexford violated the Illinois Biometric Information Privacy Act (BIPA).

Manuel Marin (Marin), individually and on behalf of a putative class of Wexford's current and former employees, sued Wexford, claiming that Wexford used its employees' biometric information (i.e., fingerprints collected via a fingerprint scanning machine), to confirm that employees were at work in violation of BIPA because Wexford failed to provide any written notice to its employees, did not obtain consent to collect biometric information, and/or failed to implement any of the requisite statutory guidelines for destroying, retaining, sharing, disclosing and/or disseminating the biometric information to third parties.

Ohio Security Insurance Company insured Wexford under general liability policies, and the Ohio Casualty Insurance Company insured Wexford under an umbrella liability policy. The insurers filed a declaratory judgment action regarding their duty to defend and indemnify Wexford in the underlying class action lawsuit. The parties filed cross motions for judgment on the pleadings. The trial court granted Wexford's motion, finding that the insurers owed a duty to defend Wexford in the underlying action.

The insurers appealed, contending that the following three exclusions precluded coverage for the underlying action: (1) recording and distribution of material or information in violation of law; (2) exclusion-access or disclosure of confidential information and data related liability with limited bodily injury exception; and (3) employment-related practices.

The Illinois Court of Appeals agreed with the insurers, finding that the policies' "recording-and-distribution" exclusion applied to preclude defense and indemnification coverage for the underlying class action based on a previous ruling by the appellate court in a similar case, *Nat'l. Fire Ins. Co. of Hartford v. Visual Park Co., Inc.*, 243 N.E.2d 888 (Ill. App. 1st Dist. 2023), *lv. to appeal denied*, 238 N. E.3d 303 (Ill. 2024), which was issued after the trial court found in favor of Wexford.

The appellate court, citing to *Visual Park*, determined that BIPA violations fell within the plain language of the recording-and-distribution exclusion's catch-all provision, which included violations of statutes that address, prohibit or limit the disposal, collecting, and recording of material or information. The appellate court continued its analysis as it did in *Visual Park* by looking to the canons of construction

and invoking the doctrine of *ejusdem generis*. In doing so, the appellate court considered the title of the exclusion, which referenced the recording of information and the four statutes contained in the exclusion that addressed, in different ways, personal privacy, and found that it would be reasonable to read into the exclusion statutes that protect personal privacy, including BIPA.

Because the recording-and-distribution exclusion applied to preclude all liability coverage for the underlying suit, the appellate court declined to consider the applicability of the other two exclusions.

By: Amy L. Diviney