PLUNKETT COONEY

Violation of Statutes Exclusion, Priority of Coverage, Bad-Faith Liability Coverage Update

July 5, 2023

Violation of Statutes Exclusion / BIPA – Seventh Circuit (Illinois Law)

Citizens Ins. Co. of America v. Wynndalco Enterprises, LLC
No. 22-2313, 2023 WL 4004766 (7th Cir. June 15, 2023)

The U.S. Court of Appeals for the Seventh Circuitaffirmed the federal district court's decision granting summary judgment in favor of Wynndalco Enterprises, LLC (Wynndalco) and against Citizens Insurance Company of America (Citizens) in a case in which Wynndalco sought insurance coverage arising out of two putative class action lawsuits alleging violations of the Illinois Biometric Information Privacy Act (BIPA).The appellate court concluded that the violation-of-statutes exclusion in the Citizen's policy was ambiguous and did not preclude coverage for the lawsuits.

Wynndalco is an information technology services and consulting firm. It acted as a middleman between Clearview AI, an artificial intelligence firm that specialized in facial recognition software, and the Chicago Police Department. Clearview AI sold a facial recognition application to Wynndalco, which in turn sold it to the Chicago Police Department. This application stored billions of photographs of individuals from the internet and converted those images into biometric facial recognition identifiers using proprietary algorithms. The application could be used to determine the identity of a person based on a single photograph.

The two lawsuits alleged that Wynndalco's role in the transaction violated BIPA, which codified an individual's right of privacy in and control over biometric identifiers and biometric information. After Wynndalco notified Citizens of the lawsuits and requested a defense, Citizens filed a declaratory judgment action seeking a determination that it did not owe Wynndalco a defense or indemnity because coverage is precluded under the policy's violation-of-statutes exclusion. In pertinent part, the exclusion provides a catch-all provision that excludes from coverage personal and advertising injury arising directly or indirectly out of any action or omission that violates or is alleged to violate "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." The district court granted summary judgment in favor of Wynndalco, concluding that the exclusion was ambiguous and had to be construed against Citizens.

The appellate court agreed and concluded that the exclusion was ambiguous because "[r]eading the exclusion's 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." It further explained that a "plain-text reading of that provision would swallow a substantial portion of the coverage that the policy otherwise explicitly purports to provide in defining a covered 'personal or advertising injury.'" Therefore, the appellate court resolved the ambiguity against the insurer and in favor of the insured and affirmed summary judgment in favor of Wynndalco.

By: Joshua LaBar

Bad-Faith Liability – U.S.D.C. Northern District of Indiana (Indiana Law)

Indiana GRQ, LLC v. Am. Guarantee & Liab. Ins. Co.
No. 3:21-CV-227 DRL, 2023 WL 4073738 (N.D. Ind. June 20, 2023)

The U.S. District Court for the Northern District of Indiana upheld a jury verdict that awarded punitive damages against the defendant insurers, finding that an award of damages for breach of contract also constituted an award of compensatory damages for bad faith, making punitive damages recoverable under the law. The district court further held that the punitive damages cap applied to each defendant individually.

Indiana GRQ, LLC (GRQ) owned a factory building in South Bend, Indiana. The factory sustained damage in 2016 due to a rainstorm event that caused the release of PCBs. GRQ sought coverage from its insurers, but they denied GRQ's claim. GRQ commenced a declaratory judgment action against the insurers in June 2020, alleging breach of contract and bad faith and seeking compensatory and punitive damages. In May 2023, after an eight-day trial, the jury found the insurers liable under both contract and tort theories and awarded nearly $25 million in compensatory damages and $12.5 million in punitive damages against each insurer.

In post-trial briefing, the insurers argued that punitive damages could not be awarded because the jury did not render a separate verdict award for compensatory damages arising out of the insurers' bad faith. The district court rejected this argument, noting that "[t]hat was unnecessary when the compensatory damages, as they often are in these cases, were coextensive to the contract claim (or at least overlapping) … and indeed was unadvisable when the law forecloses a duplicative recovery."

The insurers further asked the district court to impose the statutory cap on punitive damages to the total amount of punitive damages awarded against the defendants as a group. GRQ argued that the statutory cap should apply individually to each insurer and not be capped in the aggregate. The district

court agreed with GRQ, holding that the statute providing for the cap contemplates that the award will be made against an individual defendant. The district court reasoned that "this makes perfect sense given that the purpose of punitive damages is to deter and punish an individual's wrongful conduct."

Accordingly, the cap limited punitive damages to three times the compensatory damage award, but as against each individual defendant. The district court further noted that the verdict form asked the jury to "decide the amount that 'will fairly compensate Indiana GRQ for any damages that were responsibly caused by that insurer's bad faith conduct.'" Thus, the district court upheld the punitive damage award as to each individual defendant.

By: Stephanie Brochert

Priority of Coverage – Michigan Court of Appeals

Motor City Heating & Cooling, Inc. v. Secura Supreme Ins. Co.
Case Nos. 358031, 358629, 2023 WL 4140367 (Mich. Ct. App. June 22, 2023)

The Michigan Court of Appeals affirmed the trial court's ruling that a CGL policy issued by Secura Supreme Insurance Company (Secura) was primary over a contractor's pollution liability policy issued by Westchester Surplus Lines Insurance Company (Westchester).

The priority of coverage dispute arose from an underlying lawsuit against the insured, Motor City Heating & Cooling, Inc., that involved allegations of carbon monoxide poisoning from a furnace that the insured repaired. The insured tendered the underlying suit to both carriers. Initially, Secura undertook the defense, but Westchester took over after Secura withdrew.

On appeal, Secura argued that to determine priority, the court should apply the "total policy insuring intent" test or the "closest to the risk" test. While Secura acknowledged that Michigan appellate courts have not formally adopted either test, it relied on a decision from the Michigan Supreme Court, *Frankenmuth Mut. Ins. Co., Inc. v. Continental Ins. Co.*, 537 N.W.2d 879 (Mich. 1995), for support. Specifically, Secura argued that *Frankenmuth* recognized the rationale of the tests in the following analysis from the Supreme Court: "However, where there is a policy more specifically tailored to the circumstances of the claim, it would be appropriate to designate that policy as the primary insurer and for that insurer to defend to the limits of its policy and be responsible for the accompanying defense costs."

The appellate court disagreed with Secura, finding that it must first "look to the plain language of the policies to determine which insurer is primarily responsible for covering an insured, i.e., tendering a defense, in accordance with the parties' intent as expressed in the policies." "Only where it is 'difficult to clearly designate a primary insurer,' or the competing 'other insurance' clauses are irreconcilable,

might it be necessary to consider which policy is more specifically tailored to the claim or equitably apportion coverage."

In examining the Secura policy's "other insurance" clause, the appellate court reasoned that none of the enumerated exceptions applied, such that Secura was primary. The appellate court then examined the Westchester policy's "other insurance" clause and found that because other insurance was available to the insured, the Westchester policy was excess. The appellate court ultimately ruled that "because the 'other insurance' provisions are reconcilable and provide that Secura is the primary insurer, we reject Secura's invitation to ignore the policies' plain language and instead apply the 'total policy insuring test' or the 'closest to the risk' test. This conclusion honors the parties' intent to the greatest extent possible."