Illinois Supreme Court Finds Tanning Salon Is Entitled to a Defense in BIPA Suit

The Illinois Supreme Court held that a suit accusing a tanning salon of sharing biometric information in violation of an Illinois statute alleged a privacy violation claim within a policy's "personal injury" coverage and that disclosure to a single entity satisfied the policy's publication requirement. The court also found that a "violation of statutes" exclusion did not apply because the Illinois statute was not of the same kind as the statutes refenced in the exclusion.

The Case

Plaintiff filed a class-action suit alleging that a tanning salon violated Illinois' Biometric Information Privacy Act (BIPA) when it scanned customers' fingerprints and disclosed the scans to an out-of-state third-party vendor. The tanning salon tendered the claim to its liability insurer, who denied coverage. The matter was litigated, and the tanning salon prevailed at both the trial appellate court levels. The Illinois Supreme Court agreed to hear the case.

The Decision

The insurer argued that the complaint did not fall within the policy's "personal injury" or "advertising injury" coverage because it did not allege a publication of material that violates a person's right of privacy. The insurer argued that "publication" means communication to the public at large, and that disclosure to a single party cannot be considered publication.

The policy did not define the term "publication," so the court looked to the plain and ordinary meaning of the term. Reviewing dictionary definitions, the court found that the term

means both communication to a single party and communication to the public at large. It also found that legal treatises and the Restatement (Second) of Torts supported this interpretation. Thus, it found that "publication" as used in the insurance policy included a communication with a single party, such as the third-party vendor here.

The insurance policy also did not define the phrase "right of privacy." So, the court embarked on a similar analysis. It observed that the right to privacy includes two primary interests: seclusion and secrecy. It also noted that BIPA codifies an individual's right to privacy in their biometric identifiers (fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry) and biometric information (information based on an individual's biometric identifiers that is then used to identify an individual). The court determined that BIPA protects a secrecy interest – the right of an individual to keep his or her personal identifying information like fingerprints secret.

Thus, it found that plaintiff's claim that the tanning salon shared her biometric identifiers and information with a third-party vendor stated a potential violation of plaintiff's right to privacy within the meaning of the insurance policy.

The court next considered whether the policy's "violation of statutes" exclusion applied. Under that exclusion, the policy did not apply to (1) the Telephone Consumer Protection Act (TCPA), (2) the CAN-SPAM Act, and (3) statutes "other than" the TCPA or CAN-SPAM Act that prohibit or limit the communication of information.

The insurer argued that the exclusion bars coverage for plaintiff's claim because it applies to statutes that prohibit the communicating of information and BIPA limits the communication of biometric information. The tanning salon asserted the doctrine of *ejusdem generis* – a rule of construction providing that where general words follow an enumeration of persons or things, by

words of a particular and specific meaning, such general words are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. It argued that the exclusion applied only to statutes that regulate methods of communication like telephone calls, faxes, and e-mails.

The Illinois Supreme Court sided with the tanning salon. It noted that the statutes identified in the exclusion regulate the use of certain methods of communication. The TCPA regulates telephone calls and faxes, while CAN-SPAM regulates the use of electronic mail. BIPA, on the other hand, does not regulate methods of communication but regulates the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information. The court construed the "other than" language to mean other statutes of the same general kind that regulate methods of communication like the TCPA and CAN-SPAM. Since BIPA is not a statute of the same kind as the TCPA and CAN-SPAM, the court found that the exclusion did not apply.

The case is *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.,* No. 125978 (Ill. May 20, 2021).

Eleventh Circuit Finds That Two-Year Delay in Reporting Claim to Insurer Bars Coverage Under Georgia Law

The Eleventh Circuit, applying Georgia law, held that the insureds' two-year delay in notifying their carriers about a murder and assault claim barred coverage as a matter of law.

The Case

In December 2015, a murder and assault occurred at an apartment complex owned by East Perimeter Pointe Apartments, LP in Decatur, Georgia. Within hours of learning about the

shooting, a manager at the apartment complex emailed an incident report to the general counsel of the property manager, Ventron Management LLC, and its registered agent. The email asked Ventron to forward the notice to all affected insurers. However, almost two years passed before East Perimeter or Ventron notified their primary and excess insurers, Mt. Hawley Insurance Company and Lexington Insurance Company, about the murder and assault.

An endorsement to the Mt. Hawley policy stated: "[i]n the event of any occurrence that may result in a claim against this policy, the insured will immediately report such occurrence and cooperate fully with the . . . claim adjusting company[.]" The Lexington Policy stated: "You must see to it that we are notified as soon as practicable of an 'occurrence' that may result in a claim or 'suit' under this policy."

Lawsuits were later filed in Georgia state court against East Perimeter and Ventron Management, LLC, alleging that they negligently provided security. Mt. Hawley and Lexington then sought a declaration in Georgia federal court that their insureds' untimely notice violated a condition precedent of the policies. Both sides moved for summary judgment. Applying Georgia common law, the district court ruled that the insureds' two-year delay in notifying their insurers about the incidents barred coverage as a matter of law. Ventron and East Perimeter appealed.

The Decision

The Eleventh Circuit affirmed.

Under Georgia law, insurers are not obligated to defend an insured or provide coverage if the insured unreasonably failed to comply with a conditional notice requirement. There is no requirement that the insurer demonstrate that the late notice caused substantial prejudice.

Ventron argued that its delay in providing notice was justified because it was not aware of the existence of coverage under the Mt. Hawley policy. The court rejected this argument. The

court noted that Ventron was a property management company engaged in the business of managing apartment complexes. Considering both the nature of its business and the fact that someone was murdered on a property that it managed, the court agreed with the district court that something more than mere ignorance was required of Ventron for its late notice to be excused.

The court also rejected East Perimeter's argument that it could not have given Mt. Hawley notice earlier because it first learned of the incidents when it was sued. But the court found that Ventron was East Perimeter's agent and that Ventron received notice on the day of the assault and murder because. In the court's view, notice to the agent on the day of the incidents constituted notice to the principal on the same day.

The court also rejected East Perimeter's argument that it was not required to notify Lexington, as its excess insurer, because it did not have any knowledge that the claim would exceed the limits of the Mt. Hawley primary policy. The court recognized that there are times where notice may not be required because "an event is so trivial or inconsequential that a court may properly conclude as a matter of law that no reasonable person would think that a claim could arise." But murder and brutal assaults, the court emphasized, are neither trivial nor inconsequential.

The court found that neither Ventron nor East Perimeter provided a reasonable excuse for their delayed notice. Accordingly, the Eleventh Circuit affirmed the district court's order that neither Mt. Hawley nor Lexington were required to defend or indemnify East Perimeter or Ventron for the incidents.

The case is *Mt. Hawley Ins. Co. v. East Perimeter Pointe Apts*., No. 19-13824 (11th Cir. May 27, 2021).

No Duty to Defend Pharmaceutical Distributor in Opioid Suit, Kentucky Federal District Court Finds

In interpreting the phrase "because of" interchangeably with "for," a federal judge from the Western District of Kentucky found that an insurer had no duty to defend or indemnify a pharmaceutical company in opioid litigation brought by numerous states and private health care providers. As plaintiffs in those cases sought to recover economic losses in treating opioid victims, rather than damages for bodily injuries to plaintiffs themselves, the court found the company's liability coverage was not implicated.

The Case

Many liability policies provide that they will pay sums that the insured becomes legally obligated to pay "as damages because of bodily injury."

Quest, a pharmaceutical distributor, was sued by municipalities and private health clinics for economic costs they incurred due to Quest's alleged improper distribution of opioids. Quest acknowledged that in none of the 77 suits did plaintiffs themselves claim to have suffered bodily injury. But Quest argued that since the basis for plaintiffs' claims are costs incurred due to bodily injuries of opioid victims, the claims seek damages because of bodily injury. Quest sought a defense from its liability insurer in each suit.

The insurer denied it had any defense obligation because plaintiffs have not asserted a claim for bodily injury.

The dispute turned on construction of the phrase "because of."

The Decision

Quest argued that the phrase "because of bodily injury" is broadly interpreted and pointed to case law to support its argument. But the court rejected those cases because they were either

non-binding decisions from other jurisdictions or were based on the interpretation of the phrase "arising out of," which the court found to be inapplicable where the policy before it did not use that terminology. The court instead found that Kentucky courts used the phrase "because of" interchangeably with "for." Therefore, it read the policy as providing coverage for damages for bodily injury.

The court then observed that none of the plaintiffs were seeking damages for bodily injury they suffered themselves. The underlying plaintiffs, the court reasoned, do not need to demonstrate that their citizens or patients experienced bodily injury to prove their claims. Those allegations merely "put a human touch" on the claims.

The court acknowledged that other courts, including the Seventh Circuit, have found similar economic losses to be damages because of bodily injury, but rejected those cases because they interpreted the "because of" language more broadly than "for bodily injury." Applying Kentucky law, the court found that the insurer had no duty to defend or indemnify Quest for the opioid suits.

The case is *Motorists Mut. Ins. Co. v. Quest Pharms., Inc.,* No. 5:19-cv-00187-TBR (W.D. Ky. May 5, 2021).

Federal Court in Pennsylvania Finds That Forgery or Alteration Coverage Provision Did Not Apply to Non-Negotiable Documents Like Fraudulent Wire Instructions

A federal court in Pennsylvania held that a Forgery or Alteration coverage provision did not apply to non-negotiable documents like a fraudulent wire transfer instruction, especially where the policy alternatively offered coverage for losses caused by a fraudulent instruction, which coverage the policyholder did not purchase.

The Case

The policyholder, Ryeco, LLC, was a fruit and vegetable receiver and distributor in Philadelphia. In early 2018, hackers used Ryeco's email system to send wire transfer instructions to its bank directing hundreds of thousands of dollars from its bank account to the hackers. The hackers apparently cut and pasted signatures of the business's officers from other wire transfer forms and inserted them into Wire Transfer Authorization Forms.

Ryeco had purchased insurance from Selective Insurance Company against Forgery or Alteration, which limited coverage to losses from forged or altered "checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain." Selective offered other coverage, known as Funds Transfer Fraud coverage, for losses caused by fraudulent instructions to forward funds or computer theft. Ryeco did not purchase the Funds Transfer Fraud coverage. Nonetheless, Ryeco demanded the full policy limits from Selective under the Forgery or Alteration endorsements. Selective denied coverage, claiming that the Forgery or Alteration provision did not apply to fraudulent instructions to wire money.

Ryeco sued Selective for breach of contract and other claims in federal court in Pennsylvania. The parties cross-moved for summary judgment.

Ryeco acknowledged that the Funds Transfer Fraud coverage would have provided coverage if Ryeco had purchased it but argued that the Forgery or Alteration provision also provided coverage.

Selective argued that the Forgery or Alteration provision was triggered only where there is a forgery of a check, draft, promissory note or similar written promise, order or direction to pay a sum certain either made or drawn by or drawn upon Ryeco or its agent. It contended that the provision's reference to "similar written promises, orders or directions to pay a sum certain"

referred to a negotiable instruction. Selective asserted that the Wire Transfer Authorization Forms could not be presented to a bank and negotiated for payment.

Ryeco responded that Selective was inserting a "negotiable instrument" requirement into the policy where none existed.

The Decision

The court granted summary judgment to Selective. Applying Pennsylvania law, the court held that the Wire Transfer Authorization Forms authorizing the bank to make the wire transfers were not "similar written promises, orders, or directions to pay a certain sum of 'money'" because they were not similar to checks, drafts, or promissory notes. The court disagreed that this interpretation inserted a "negotiable instrument" requirement into the policy where none existed.

The court applied the interpretive principle *ejusdem generis,* meaning general terms following specific terms are constructed like those specifically listed. Because "checks, drafts, [or] promissory notes" are all negotiable instructions, the court found that the Forgery or Alteration coverage only applied to such instruments.

Most prior cases interpreting Forgery or Alteration provisions involved forged emails fraudulently directing (essentially tricking) a company employee to execute a wire transfer believing the direction to do so came from a legitimate authority. The court found that the Wire Transfer Authorization Forms were similar in kind to such emails. The court considered the Wire Transfer Authorization Forms to be non-negotiable directions to a bank to do something.

The court also held that to apply the Forgery and Alteration provision where the Funds Transfer Fraud provision also applied would not harmonize the policy as a whole. The court noted that the term "fraudulent instruction" in the Funds Transfer Fraud provision covered a written instruction "*other than* those described in the Forgery or Alteration" provision. (Emphasis added

by court). The court concluded that the various commercial crime coverages applied to different risks and specifically exclude overlapping coverage.

Lastly, the court disagreed that Ryeco's agreement with the bank to "honor" Ryeco's Wire Transfer Authorization Forms somehow converted the Forms into something like a check, draft, or promissory note. The court explained that the bank and Ryeco merely agreed as to the method of notice for a wire transfer, which did not transfer otherwise non-negotiable direction into something like a check, draft, or promissory note.

Accordingly, the court granted Selective's motion for summary judgment and denied Ryeco's motion for summary judgment.

The case is *Ryeco, LLC v. Selective Ins. Co.*, 20-CV-3182 (E.D. Pa. May 13, 2021).

Federal Court Applying Pennsylvania and New York Law Finds No Coverage for Class Action Alleging Defective Cookware on Basis That Complaint Alleged Faulty Workmanship, Not Unforeseeable Consequences

A federal judge from the Eastern District of Pennsylvania held that a class action complaint seeking damages for marketing and manufacturing defective cookware did not allege an "occurrence" within the meaning of a liability policy.

The Case

In March 2020, individual plaintiffs filed a putative class action complaint in California federal court against Tristar Products, Inc. over its sale of allegedly defective cookware. The class action sought to certify a nationwide class, or in the alternative, three subclasses consisting of California, New York, and Pennsylvania residents. Plaintiffs in the underlying action allege that Tristar manufactured, marketed, and distributed a line of purportedly non-stick cookware called

Copper Chef Signature Cookware, which contrary to Tristar's representations, did not work because they would lose their non-stick functionality shortly after purchase, and would scratch, chip and peel, leaving customers with a pan to which everything sticks.

Tristar sought coverage from its commercial general liability insurers, Evanston Insurance Company, Hiscox (a Lloyd's syndicate), and Westchester Surplus Lines Insurance Company. The insurers agreed to defend Tristar under a reservation of rights. The insurers then filed a declaratory judgment action in federal court in Pennsylvania. The insurers contended that the underlying complaint alleged a "faulty workmanship" claim rather an "active malfunction" that would be a covered occurrence under Pennsylvania law. The Evanston policy, however, contained a New York choice of law provision. All parties moved for judgment on the pleadings.

The Decision

The court agreed with the insurers and granted them judgment on the pleadings. The court noted that the underlying complaint asserted that the pans' inability to retain their non-stick feature constituted an allegation that they were unsuited for their intended use and were not what the putative class members bargained for. The court concluded that the same conclusion applied for both Pennsylvania and New York law.

In the court's view, the fact that complaints about the pans were widespread indicated that their deficient nature was part and parcel of the pans themselves. The court said it was immaterial that Tristar did not enter into a formal contract with its customers. Rather, it was the alleged unsuitability of the pans for their intended purpose that was controlling.

For these reasons, the court concluded that the underlying complaint alleged faulty workmanship on Tristar's part, which primarily concerned Tristar's own deficient products – the

Copper Chef pans. Thus, the court concluded that there was no duty to defend or indemnify Tristar in the underlying lawsuit.

The case is *Evanston Ins. Co. v. Tristar Prods.,* 20-cv-01934 (E.D. Pa. May 3, 2021).

Federal Court in Connecticut Finds Animal Liability Exclusion Bars Coverage for Lawsuit Related to Pit Bull Attack

A federal court in Connecticut held that an animal liability exclusion in a commercial general liability policy applied to a personal injury lawsuit arising from an attack by a pit bull.

The Case

In January 2015, while visiting tenants at an apartment complex, plaintiff, a minor, was attacked by a pit bull and suffered injuries. Plaintiff sued the property managers, Donavan Realty Corporation LLC and Kingsley Spencer, for negligence in failing to keep the premises safe from dangerous conditions. Plaintiff also sued the dog owners for negligence and strict liability.

Donovan Realty and Spencer had a commercial general liability policy with MESA Underwriters Specialty Insurance Company ("MUSIC"). The policy contained an exclusion for "all liability claims relating to or arising from animals, including the failure to train, supervise, or control animal(s)."

The parties to the personal injury action agreed to a stipulated judgment in the amount of $250,000. Pursuant to the judgment, Donavan Realty assigned its interests in the MUSIC policy to the plaintiff.

Plaintiff then sued MUSIC in Connecticut state court seeking a declaratory judgment finding that MUSIC was obligated to pay the full amount of the judgment.   MUSIC removed the action to federal court. The parties cross-moved for summary judgment.

MUSIC asserted the animal liability exclusion. Plaintiff argued the exclusion did not apply because the underlying "suit" was not a "liability claim" and did not relate to or arise from animals. Plaintiff argued the terms "suit" and "claim" had distinct meanings under the policy and that the animal liability exclusion applied only to "claims."

The Decision

The court granted MUSIC's motion and denied the plaintiff's motion. Applying Connecticut law, the court rejected the plaintiff's argument that the animal liability exclusion did not apply because the underlying lawsuit was not a "liability claim."   Because the policy did not define the terms "claim" or "liability claim," the court resorted to dictionary definitions. Combining these definitions, the court found that a "liability claim" was a demand for money due under the law. In the court's view, this was the precise nature of the underlying lawsuit.

The court also held that even though the policy used the terms "claim" and "suit" at different points, there was no reasonable definition of "liability claims" not inclusive of suits. The court reasoned that plaintiff's close reading of the policy merely attempted to introduce an ambiguity where none existed and contravened the principle that policies should be construed as layman would understand them, not as sophisticated underwriting or counsel would understand them. The court was also not persuaded by plaintiff's "unremarkable observation" that MUSIC could have used different language in the animal liability exclusion to achieve its desired result.

Further, the court disagreed with the claimant's contention that the underlying lawsuit did not arise from animals insofar as it arose from the insureds' negligence in maintaining the property.   In other words, that fault was predicated on the insureds' lack of control over the premises, rather than lack of control over the dog. The court found that it would "strain reason to

the breaking point to conclude that the lawsuit did not ‘arise from’ or ‘relate to’ animals” given the broad reading of the phrases “relating to” or “arising from” given by courts.

Accordingly, because the underlying lawsuit was a liability claim that arose from or related to animals, the court held that the policy’s animal liability exclusion applied to the underlying lawsuit. MUSIC therefore did not have a duty to defend or indemnify.

The case is *Williams v. MESA Underwriters Specialty Ins. Co.,* 19-CV-01772 (D. Conn. May 8, 2021).

California District Court Grants Excess Insurers’ Motion to Dismiss Breach of Contract, Bad Faith, and Equitable Contribution Claims

Finding that the policyholder failed to demonstrate that the insurance underlying an excess policy had been exhausted, the Central District of California granted the excess insurer’s motion to dismiss a breach of contract and bad faith claim. The court also dismissed a claim for equitable contribution on behalf of the primary insurer because the primary and excess insurers did not share the same level of coverage.

The Case

Consumers sued Vizio over its Smart TV’s. Vizio ultimately settled the suits for $17 million. Vizio then sued its excess insurer, Arch – who Vizio claimed failed to timely accept or deny its claim – for breach of contract and bad faith.

Vizio had a primary policy with Navigators with liability limits of $5 million, subject to a $100,000 self-insured retention. It also had an excess follow form policy with Arch.

In its complaint, Vizio alleges that Chubb, who issued a primary policy, paid a confidential amount on behalf of Vizio to effectuate the Smart TV litigation settlement. Vizio alleged that the

amounts Chubb and Vizio collectively paid exceeded the underlying limit of the Arch policy, and thus, it was entitled to reimbursement from Arch. Vizio also sought to stand in the shoes of Chubb and pursue a claim for equitable contribution against Arch.

Arch moved to dismiss all counts.

The Decision

The court granted Arch’s motion.

The Arch excess policy provided that the underlying limit shall be exhausted by payment of covered loss by the insurers of the underlying insurance.

The court found that Vizio’s breach of contract claim failed for two reasons. First, Vizio had not sufficiently alleged that the underlying limit was exhausted. It was impossible to discern how much Vizio and Chubb each paid toward the Smart TV litigation settlement. Second, Vizio's contention that Arch breached the insurance contract by not timely accepting or denying Vizio's claim lacked merit because there was no duty to defend – Vizio's silence "was not wrongful or a breach of the policy."

As Arch did not breach the insurance contract, the court dismissed Vizio’s count for breach of the implied covenant of good faith and fair dealing.

Finally, the court dismissed Vizio’s claim for equitable contribution. It’s unclear if Vizio obtained an assignment of Chubb’s rights, but the right to equitable contribution simply does not exist where the insurers do not share the same level of coverage. As Chubb was a primary insurer, it could not obtain equitable contribution from an excess insurer.

The case is *Vizio, Inc. v. Navigators Ins. Co.,* Case No. 2:20-cv-06864-ODW (ASx) (C.D. Cal. May 4, 2021).

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