



7TH CIRCUIT HOLDS CATCH-ALL PROVISION IN VIOLATION OF STATUTES EXCLUSION DOES NOT EXCLUDE COVERAGE FOR BIPA CLAIMS

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On June 15, 2023, the U.S. Court of Appeals for the Seventh Circuit held that an insurance policy's broad catch-all exclusion for alleged statutory violations does not exclude coverage for alleged violations of Illinois' Biometric Information Privacy Act ("BIPA"). *Citizens Ins. Co. of Am. v. Wynndalco Enterprises, LLC*, ___ F. 4th ____, 2023 U.S. App LEXIS 14834 (7th Cir. June 15, 2023). In *Wynndalco*, the Seventh Circuit affirmed a Northern District of Illinois court's ruling that the insurance company (Citizens) was obligated to defend its insured (Wynndalco) in two putative class actions alleging BIPA violations.

In the District Court, Citizens did not dispute that alleged BIPA violations fall within the policy's definition of "personal or advertising injury," for which coverage was provided through a policy issued on October 2, 2019. Citizens sought a declaration, however, that coverage for such personal or advertising injury is excluded from coverage under an exclusion titled: "Distribution of Material in Violation of Statutes" (the "Violation of Statutes Exclusion").

The Violation of Statutes Exclusion excludes coverage for "personal or advertising injury' 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 Transaction Act (FACTA); or
- (4) 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 "Catch-All Provision").

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Citizens argued that BIPA claims are excluded from coverage under the Catch-All Provision in the Violation of Statutes Exclusion. The District Court held that the Catch-All Provision was “intractably ambiguous,” such that Citizens could not affirmatively establish that the claims against Wynndalco were excluded from coverage. 595 F. Supp.3d 668, 676 (N.D. Ill. 2022).

The Seventh Circuit agreed with the District Court “that a plain-text reading of the [Violation of Statutes] Exclusion gives rise to an ambiguity with respect to what the policy does or does not cover.” The policy provides coverage for various personal and advertising injuries, including libel, slander, copyright and trade dress infringement, which are all injuries that are subject to, or potentially subject to, statutory causes of action. “Reading the [Violation of Statutes] 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.”

The Seventh Circuit explained that “such a reading would, as a practical matter, all but eliminate coverage for certain claims that are largely, if not exclusively, statutory in nature...and that the policy by its express terms purports to cover.”

“[T]his conflict between the competing policy provisions granting and excluding coverage gives rise to an ambiguity: the broad language of the catch-all exclusion purports to take away with one hand what the policy purports to give with the other in defining covered personal and advertising injuries.”

The Seventh Circuit rejected Citizens’ argument that the Catch-All Provision can be limited to only statutory causes of action related to privacy, like the three listed statutes address. The Seventh Circuit noted that the Catch-All Provision does not include the word “privacy;” on its face limit its reach to statutory causes of action related to privacy; and Citizens previously argued that the provision should be applied broadly to “any” alleged statutory violation. “There is nothing in the language of the exclusion – be it in the title or in any of the provisions that follow – which points to privacy as the focus of the exclusion.”

The Seventh Circuit construed the ambiguity of the Catch-All Exclusion against Citizens and in favor of the insured, concluding that Citizens owes Wynndalco a duty to defend the putative BIPA class actions. The Illinois Supreme Court previously held that a slightly different catch-all provision in a violation of statutes exclusion did not unambiguously exclude coverage for a BIPA claim in *West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978. The Seventh Circuit discussed *Krishna Tan* while explaining that differences in the language of the exclusions required a unique analysis, which ultimately led to the same result.

The takeaways from the Wynndalco decision (along with *Krishna Tan*) for policyholders are:

- Do not accept a coverage denial under a catch-all provision of a violation of statutes exclusion on its face, relating to BIPA or any other statute not expressly listed. Multiple Illinois court decision have now held that such catch-all provisions are ambiguous as applied to the relevant facts, requiring a unique analysis of the policy language at issue, which can lead to a contract construction in favor of the insured and coverage.



- The decisions in Wynndalco and Krishna Tan, among others, have led and will lead insurance companies to revise violation of statutes exclusions to specifically exclude coverage for BIPA claims and other privacy-related claims.

- Even if recent and future insurance policies contain such exclusions, the Illinois Supreme Court recently held that BIPA claims are subject to a five-year statute of limitations. *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801. As such, new BIPA claims could date back five years to a time before BIPA and specific privacy exclusions were included in violation of statutes exclusions in applicable insurance policies.

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