

August 22, 2022

## District Court Finds “Violation of Laws” Exclusion Precludes Coverage for Illinois BIPA Suit Under Insurer’s EPL Coverage

BY: Jason Taylor

Recently, an Illinois District Court found that a “violation of laws” exclusion precluded coverage for an employee’s putative class-action lawsuit alleging violation of Illinois’ Biometric Information Privacy Act (“BIPA”), 740 ILCS 14/1 et seq. (“BIPA”). *Church Mutual Insurance Company v. Prairie Village Supportive Living, LLC et al.*, 21-cv-3752 (N.D. Ill Aug. 11, 2022), involved an insurance coverage dispute between Church Mutual Insurance Company (“Church Mutual”), and its insured, Defendant Prairie Village Supportive Living, LLC, a/k/a Eagle’s View Supportive Living (“Prairie Village”), related to an underlying putative class action lawsuit commenced against Prairie Village by its former employee, Brian Field. Field asserted claims on behalf of himself and a putative class of individuals alleging that Prairie Village unlawfully collected, used, and disseminated biometric identifiers in violation of BIPA. Church Mutual sought a declaration that it had no duty to defend or indemnify Prairie Village with respect to Field’s lawsuit and moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

Church Mutual issued four policies to Prairie Village between April 2018 and April 2022, which included Employment Practices Liability (“EPL”) Coverage and General Liability (“GL”) Coverage. Church Mutual argued Field’s allegations established it did not owe Prairie Village a defense or indemnification under the following exclusions: (1) an exclusion for “violations of laws applicable to employers” within the EPL coverage; (2) the “employment related practices” exclusion within the GL coverage; and (3) the Cyber Liability Exclusion (i.e., “Statutory Violation Exclusion”) in the GL coverage.

Initially, Church Mutual argued that the EPL coverage part clearly provided that if the at-issue loss arises solely from a claim of injury constituting a “wrongful employment practice,” only the EPL coverage is relevant and no other coverage part applies. “Wrongful employment practice” was defined, in relevant part, as “any actual or alleged . . . [e]mployment related false arrest, wrongful detention or imprisonment, malicious prosecution, libel, slander, defamation of character, or invasion of privacy.” According to the District Court, the insured did not directly address or refute this point, nor did it argue that Field’s claims did not arise from a “wrongful employment practice” as defined under the EPL coverage part. Accordingly, the Court agreed that Field’s BIPA claims alleged a “wrongful employment practice” and that the EPL coverage was the only coverage that applied. As such, discussion of the GL coverage or related exclusions was not necessary, and was not addressed by the Court.

Turning to the EPL coverage, the policy included a “violation of laws applicable to employers exclusion” which precluded coverage for any claim arising out of ERISA or similar statute, as well as “[a]ny claim based on, attributable to, or arising out of any violation of any insured’s responsibilities or duties required by any other federal, state, or local statutes, rules, or regulations . . . .” Church Mutual argued that BIPA is one of those “other statutes” because it imposes responsibilities or duties on Prairie Village with respect to employee privacy. On the other hand, the exclusion did not apply to claims under Title VII, the ADA, the ADEA, the FMLA, the Equal Pay Act, the Pregnancy Discrimination Act, the Immigration and Reform and Control Act, the Genetic Information Nondiscrimination Act, “or to any rules or regulations promulgated under any of the foregoing and amendments thereto or any similar provisions of any federal, state, or local law.” The insured argued BIPA is “similar” to the specifically identified exempted laws because it “protects employee rights” and is thus “aligned” with those laws. The District Court sided with Church Mutual.

The District Court recognized that no other BIPA case out of the Northern District (or any other) had construed either EPL coverage in this context, or this exclusion specifically. According to the Court, “Standing alone, the word ‘similar’ partakes of the vagueness of other verbal signifiers of matters of degree, such as ‘substantial,’ ‘significant,’ and ‘probable.’ But context can give it a precise meaning.” If someone were to add BIPA to the list of exempted statutes, “it would stick out like a sore thumb.” However, the enumerated laws proscribed discrimination in one form or another and were applicable to (although not limited to) employers. The Court agreed with Church Mutual that the provisions of BIPA are not “similar” to any of the enumerated laws, as BIPA has nothing to do with discrimination. Rather, in the Court’s view, BIPA imposes responsibilities on all “private entities”—including employers—and “regulates the collection, use, storage, and retention of biometric identifiers and information.” *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 55 (citing 740 ILCS 14/5(g)). In other words, the District Court reasoned that BIPA is categorically different from the enumerated exempted statutes.

The District Court also rejected the insured’s argument that the insurer’s reading of the exclusion would render EPL coverage “nearly worthless, because every potential statutory claim that conceivably could be covered as an employment practice would also be excluded as based on a law applicable to an employer.” The District Court held that the insured’s contention was belied by the plain language of exclusion, which explicitly provided that certain statutory claims are covered under the policy. According to the Court, the underlying facts related to this case were directly related to Prairie Village’s alleged violation of the responsibilities, obligations, or duties imposed by BIPA. As such, the District Court concluded that the “violation of laws applicable to employers” exclusion under the EPL coverage barred Church Mutual’s duty to defend its insured in the underlying *Field* lawsuit. And because Church Mutual owed no duty to defend, it also owed no duty to indemnify.