No. 125978

In the

Supreme Court of Illinois

WEST BEND MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

KRISHNA SCHAUMBURG TAN, INC.
and KLAUDIA SEKURA,

Defendants-Appellees.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-19-1834.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 2016 CH 7994.
The Honorable **Franklin U. Valderrama**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT WEST BEND MUTUAL INSURANCE COMPANY

THOMAS F. LUCAS
(tlucas@mckenna-law.com)
KRISTIN D. TAURAS
MCKENNA STORER
33 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 558-3900

Counsel for Appellant
West Bend Mutual Insurance Company

ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

This action was brought by WEST BEND MUTUAL INSURANCE COMPANY ("WEST BEND") to obtain a declaratory judgment that WEST BEND did not have a duty to defend or indemnify KRISHNA SCHAUMBURG TAN, INC. ("KRISHNA") in a lawsuit brought by KLAUDIA SEKURA ("SEKURA") under certain Businessowners Liability Insurance Policies WEST BEND issued to KRISHNA. The Circuit Court granted summary judgment to KRISHNA and SEKURA on the duty to defend, and denied summary judgment to WEST BEND. The Appellate Court affirmed the rulings of the Circuit Court in an opinion issued on March 20, 2020. There are no questions raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the "personal injury" coverage for claims involving the publication of material that violates a person's right of privacy requires allegations that the insured communicated or distributed material to the public.

2. Whether an allegation that an insured violated the Biometric Information Privacy Act, 740 ILCS 14/1, et seq. ("BIPA"), when it communicated a person's biometric data to an out-of-state vendor falls within an insurance policy exclusion for the Distribution of Material in Violation of Statutes.

STATEMENT OF JURISDICTION

The Appellate Court issued its opinion on March 20, 2020 under 2020 IL App (1st) 191834. (App. at A28). This Court allowed WEST BEND's Petition for Leave to Appeal on September 30, 2020. This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

STATEMENT OF FACTS

The Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.,* commonly known as BIPA, was enacted in 2008. In *Rosenbach v*. *Six Flags Entertainment Corp.,* 2019 IL 123186, ¶ 33, this Court construed BIPA as giving individuals a statutory right to privacy in their biometric information. The contours of this right are provided by § 15 of the Act, which imposes duties regarding the collection, retention, disclosure, and destruction of a person's biometric information and provides statutory damages for each violation of the Act. *Id.* BIPA's restrictions on the disclosure of biometric information are set forth in § 15(d) which states:

> "(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or the redisclosure;
>
> (2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;
>
> (3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or
>
> (4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction." 740 ILCS 14/15(d).

In 2015, SEKURA signed up for a membership at KRISHNA, an L.A. Tan franchise. (R.C 32). Membership included enrollment in L.A. TAN's national database which allowed members to use L.A. TAN's salons throughout the United States. The enrollment process included scanning a member's fingerprints. (R.C 31). In 2016, SEKURA filed a class action lawsuit against KRISHNA alleging that KRISHNA violated BIPA by failing to comply with the

statutory provisions relating to the collection of biometric data and by disclosing biometric information to an out-of-state vendor, SunLync. (R.C 25-41). The relief sought in SEKURA's class action complaint included an award of statutory damages of $1,000 for each BIPA violation, pursuant to 740 ILCS 14/20(1). (R.C 40).

In addition to alleging the violation of BIPA, SEKURA's Complaint included counts for unjust enrichment and negligence. (R.C 38-40). The unjust enrichment and negligence claims were based on the same conduct supporting SEKURA's BIPA claim. However, the negligence claim included allegations of mental anguish and mental injury. (R.C 39-40).

KRISHNA tendered the *Sekura* Complaint to WEST BEND, seeking a defense under several Businessowners Liability Policies WEST BEND issued to KRISHNA covering the policy periods December 1, 2014 to December 1, 2015 and December 1, 2015 to December 1, 2016. (R.C 42-361). The WEST BEND Policies provided coverage for "bodily injury," "personal injury" and "advertising injury." (R.C 16-17). The "personal injury" and "advertising injury" coverage applied to certain specified offenses, including the "oral or written publication of material that violates a person's right of privacy." (R.C 18, R.C 193, R.C 318).

The WEST BEND Policies contained an endorsement which added an exclusion for the distribution of material in violation of statutes. (R.C 19-20). This exclusion states:

> **"EXCLUSION – VIOLATION OF STATUTES THAT GOVERN EMAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION**
>
> * * *
>
> This insurance does not apply to:
>
> **DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES**
>
> 'Bodily injury', 'property damage', 'personal injury' 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), including any amendment of or addition to such law; or
> **(2)** The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
> **(3)** Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information." (R.C 169, R.C 322).

The WEST BEND Policy for the 2015-16 policy year contained an endorsement which provided limited data compromise coverage. (R.C 223-230). The endorsement provided limited coverage for the loss, theft, accidental release or accidental publication of personal information and was subject to several conditions, including that the insured provide notifications and services to affected individuals.

WEST BEND agreed to defend KRISHNA in the *Sekura* lawsuit subject to a reservation of rights. (R.C 20-21). Additionally, WEST BEND filed a declaratory judgment action seeking a declaration that it did not have a duty to defend or indemnify KRISHNA in the *Sekura* lawsuit. (R.C 14). The WEST BEND Declaratory Judgment Complaint alleged that the *Sekura* Complaint did not come within the policies' coverage for several reasons. WEST BEND

contended that the "personal injury" coverage was not applicable because SEKURA did not allege the publication by KRISHNA of material that violated a person's right of privacy. (R.C 21). WEST BEND also argued that SEKURA's emotional distress claim did not trigger potential "bodily injury" coverage. (R.C 21). Regarding the data compromise coverage which was included in the 2015-16 Policy, WEST BEND contended that this limited coverage was unavailable because the *Sekura* Complaint did not allege the theft, loss, accidental release or accidental publication of personal data, and because the conditions applicable to the coverage had not been met. (R.C 22). Finally, WEST BEND alleged that if the Court concluded that the *Sekura* Complaint was potentially covered, then the Violation of Statutes exclusion applied to bar coverage for the *Sekura* lawsuit. (R.C 22).

KRISHNA and SEKURA filed Answers to WEST BEND's Complaint for Declaratory Judgment. (R.C 375, R.C 409). Additionally, KRISHNA filed a Counterclaim which included a claim for attorneys' fees and costs under § 155 of the Insurance Code, 215 ILCS 5/155. (R.C 409).

The parties engaged in limited written discovery, and then filed cross-motions for summary judgment. On May 14, 2018, the Circuit Court filed a Memorandum and Order which ruled on the parties' cross-motions for summary judgment. (App. at A1, R.C 800). After rejecting Defendants' argument for a stay of the declaratory judgment action based on *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187 (1976), the Circuit Court addressed whether the allegations of the *Sekura* Complaint potentially triggered the "personal injury"

coverage for injury caused by the publication of material that violates a person's right of privacy. (R.C 808). WEST BEND argued that the issue was controlled by this Court's opinion in *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.,* 223 Ill.2d 352, 366-67 (2006), where this Court construed the term "publication" to mean the communication or distribution of information to the public. Since the *Sekura* Complaint's allegation relating to the disclosure of biometric information was limited to the disclosure to a third-party vendor, WEST BEND contended that the complaint did not allege the communication or distribution of material to the public and, therefore, did not come within the "invasion of privacy" coverage. (R.C 810).

KRISHNA argued and the Circuit Court agreed that the term publication "simply means the dissemination of information." (R.C 812). Applying this definition to the allegations of the *Sekura* Complaint, the Circuit Court found that the complaint alleged the publication of material that violated a person's right of privacy. (R.C 813-14).

After finding that the underlying complaint alleged "publication" as the Circuit Court defined the term, the Circuit Court considered whether the Violation of Statutes exclusion applied to bar coverage for the *Sekura* lawsuit. (R.C 814). Here, WEST BEND argued that if the Court concluded that the underlying Complaint alleged "publication," then the exclusion applied because BIPA was a statute that prohibited or limited the communication of information. (R.C 814). KRISHNA argued that the endorsement providing limited data compromised coverage trumped the Violation of Statutes exclusion. (R.C 814). SEKURA

contended that the exclusion did not apply to BIPA, but only to statutes similar to the Telephone Consumer Protection Act ("TCPA"). Both Defendants also argued that the exclusion was ambiguous and must be construed in favor of coverage. (R.C 814-15). The Circuit Court concluded that the Violation of Statutes exclusion was inapplicable because it determined that BIPA was not a statute which prohibited the communication of information and, even if it did, BIPA does not regulate the methods used for sending biometric information. (R.C 814-815).

The First District Appellate Court affirmed the Circuit Court's judgment. (App. at A28). On the "publication" issue, the Appellate Court rejected WEST BEND's argument based on *Valley Forge*. (App. at A36, ¶ 29). The Appellate Court did not read *Valley Forge* as defining "publication" to include "requiring communication to any number of persons." (App. at A37, ¶ 33). Rather, the Appellate Court held that "publication" for the "invasion of privacy" coverage included sharing information with "a single third party." (App. at A38, ¶ 35). Based on this construction, the Appellate Court held that the term "publication" encompassed SEKURA's allegation that KRISHNA provided her biometric information to a third-party vendor and therefore the *Sekura* Complaint was potentially covered. (App. at A39, ¶. 38).

Regarding the Violation of Statutes exclusion, the Appellate Court found that the exclusion only applied to statutes that regulated the methods of communicating information. (App. at A40, ¶ 42). Since BIPA was not concerned with regulating methods of communicating biometric information, the Appellate Court held that the Violation of Statutes exclusion was inapplicable. (App. at A41,

¶ 45).[1] WEST BEND filed a timely Petition for Leave to Appeal from the opinion of the Appellate Court which this Court allowed on September 30, 2020.

ARGUMENT

Standard of Review

The standard of review for the issues presented in this appeal is *de novo.* The Circuit Court decided the insurance coverage issues in this case on the parties' Cross-Motions for Summary Judgment. The Appellate Court applied a *de novo* standard of review to the Circuit Court's rulings, citing *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22. (App. at A34, ¶ 21). Furthermore, this case involves the construction of provisions contained in an insurance policy which is a question of law reviewed *de novo. Travelers Insurance Co. v. Eljer Manufacturing, Inc.,* 197 Ill.2d 278 (2001).

I. Rules of Construction

The rules of construction applicable to an insurance policy are well settled in Illinois. These rules were summarized by this Court in *American States Insurance Co. v. Koloms,* 177 Ill.2d 473, 479-80 (1997):

> "A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning. Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the

[1] In light of its determination that there is potential coverage under the policy, the Appellate Court held that it was unnecessary to consider the application of the endorsement for limited data compromise coverage. (App. at A42, ¶ 47).

> overall purpose of the contract. Finally, the construction of an insurance policy is a question of law subject to *de novo* review." (Citations omitted).

The rules applicable to an insurer's duty to defend are also well settled in Illinois. An insurer's duty to defend exists if the facts alleged in the underlying complaint fall within, or potentially within, the coverage of the policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill.2d 90, 107-08 (1992). "Both the policy terms and the allegations in the underlying complaint are liberally construed in favor of the insured, and any doubts and ambiguities are resolved against the insurer." *State Farm Fire & Casualty Co. v. Perez,* 387 Ill.App.3d 549, 553 (1st Dist. 2008). "However, the general rules that favor the insured must 'yield to the paramount rule of reasonable construction which guides all contract interpretations.'" *Amerisure Mutual Insurance Co. v. Microplastics, Inc.,* 622 F.3d 806, 811 (7th Cir. 2010), quoting *Western States Insurance Co. v. Bobo,* 268 Ill.App.3d 513, 516 (5th Dist. 1994). Additionally, it is the actual allegations, not some hypothetical version which must be construed, and while the court should read the allegations liberally, they should not be bent entirely out of shape in order to find potential coverage. *Steadfast Insurance Co. v. Caremark Rx, Inc.,* 359 Ill.App.3d 749, 761 (1st Dist. 2005); *Lagestee-Mulder, Inc. v. Consolidated Insurance Co.,* 682 F.3d 1054, 1059 (7th Cir. 2012). In this case, the Appellate Court misapplied these rules when it found that the *Sekura* Complaint potentially came within the WEST BEND Policies' "personal injury" coverage, triggering a duty to defend, and this ruling should be reversed.

II. SEKURA's Complaint Does Not Come Within the "Personal Injury" Coverage for the Publication of Material that Violates a Person's Right of Privacy

A. The *Sekura* Complaint Does Not Allege "Publication" As the Term is Used in the "Invasion of Privacy" Coverage

The "personal injury" coverage of the WEST BEND Policies applies to injury arising out of certain specified offenses, one of which is the "oral or written publication of material that violates a person's right of privacy." (R.C 193, R.C 318). The *Sekura* Complaint alleged that KRISHNA violated BIPA by disclosing SEKURA's fingerprint data to an out-of-state vendor, SunLync. (R.C 37). No other allegation relating to the disclosure of information is contained in the complaint. Relying on this Court's definition of "publication," which is set forth in *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.,* 223 Ill.2d 352 (2006), WEST BEND denied coverage to KRISHNA for the *Sekura* lawsuit. In *Valley Forge,* the Court defined "publication" to mean the communication or distribution of information to the public. 223 Ill.2d at 366-67. The *Sekura* Complaint did not contain allegations suggesting the public disclosure of biometric information by KRISHNA and, therefore, the complaint is not potentially covered under the "personal injury" coverage.

The lower courts believed that WEST BEND misread *Valley Forge*, that publication merely meant communication of information, and therefore the alleged disclosure of biometric information to a single third-party vendor potentially came within the "invasion of privacy" coverage. But the lower courts' interpretation of "publication" is not how this Court defined the term, an error

which must be corrected to arrive at the proper determination of WEST BEND's duty to defend KRISHNA in the *Sekura* lawsuit.

The flaw in the lower courts' interpretation of "publication" and their misreading of this Court's *Valley Forge* opinion is apparent from an examination of both the Appellate Court and Supreme Court Opinions in *Valley Forge. Valley Forge* involved insurance coverage for a class action lawsuit which alleged that Swiderski Electronics violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000) ("TCPA"), by sending unsolicited fax advertisements. 223 Ill.2d at 355. Swiderski sought coverage for the lawsuit from Valley Forge and Continental Casualty, whose policies included advertising injury coverage for the "oral or written publication . . . of material that violates a person's right of privacy." 223 Ill.2d at 657. One of the issues addressed by both the Appellate Court and Supreme Court in *Valley Forge* was whether a TCPA claim involved a violation of a person's right of privacy which could be covered by the insurance policy. 223 Ill.2d at 366. The insurers argued that the right of privacy contemplated by the insurance coverage involved the publication of material that revealed personal information, i.e. an invasion of a secrecy interest. Defining the coverage as only applicable to claims involving an invasion of a person's secrecy interests took a TCPA claim outside of the scope of coverage because the TCPA is not concerned with the disclosure of private information. 223 Ill.2d at 360-61. Rather, a TCPA claim interferes with a person's seclusion interest which is invaded by receipt of unsolicited fax advertisement. 223 Ill.2d at 364-65.

The Appellate Court and Supreme Court in *Valley Forge* determined that the right of privacy contemplated by the insurance coverage involved both an interest in secrecy and an interest in seclusion; thus, a TCPA claim fell within the coverage for claims involving the oral or written publication of material that violates a person's right of privacy. 223 Ill.2d at 367-68.

In the Appellate Court, the insurers argued that a TCPA claim was not covered because sending an unsolicited fax advertisement to a person did not involve the publication of information which invaded the person's right of privacy. In this regard, the insurers argued that "publication" required communication to someone other than the complaining party, i.e., a third party, which was not the type of conduct alleged in a TCPA violation. However, the Appellate Court refused to restrict the term "publication" as used in the insurance policy to communications to a third party. *Valley Forge,* 359 Ill.App.3d 872, 885-86 (2nd Dist. 2005).

When the case reached this Court, the insurers did not press their argument that "publication" required communication to someone other than the complaining party. 223 Ill.2d at 367. Nevertheless, this Court felt it necessary to address the meaning of "publication" to provide a coherent interpretation of the policy coverage. *Id.*

Since the term "publication" was not defined in the policy, this Court referred to several dictionary definitions to find the plain, ordinary and popular meaning of the term. *Id*. at 366-67. From these sources the Court selected the following definitions:

> "Webster's Third New International Dictionary defines 'publication' as 'communication (as of news or information) to the public,' and alternatively, as 'the act or process of issuing copies . . . for general distribution to the public.' Webster's Third New International Dictionary 1836 (2002). Likewise, Black's Law Dictionary defines 'publication' as '[g]enerally, the act of declaring or announcing to the public' and, alternatively, as '[t]he offering or distribution of copies of a work to the public.' Black's Law Dictionary 1264 (8th Ed. 2004)." *Valley Forge Ins. Co.*, 223 Ill.2d at 366-67.

Applying these definitions of the term "publication" to the allegations of the underlying complaint, this Court determined that the underlying complaint alleged "publication" stating:

> "By faxing advertisements to the proposed class of fax recipients as alleged in Rizzo's Complaint, Swiderski published the advertisements both in the general sense of communicating information *to the public* and in the sense of distributing copies of the advertisements *to the public*." *Valley Forge Ins. Co.*, 223 Ill.2d at 367. (Emphasis added.)

In the case at bar, WEST BEND relied on this Court's definition of "publication" in *Valley Forge*, as well as the Court's application of the definition to the allegations in the underlying complaint to show that the *Sekura* Complaint did not allege "publication" because the alleged communication to a single third-party vendor did not allege communication to the public. The Appellate Court disagreed with WEST BEND's reading of *Valley Forge*, stating, "[i]t is clear to us that the supreme court did not define the term 'publication' as being limited to requiring communication to any number of persons." (App. at A37, ¶ 33). But the only way the Appellate Court's reading of the *Valley Forge* opinion can be correct is by ignoring this Court's use of the words "to the public."

When analyzing the *Valley Forge* opinion, it is important to note that the claim under consideration, an alleged TCPA violation, did not involve the

invasion of a secrecy interest, i.e., disclosure of private information to the public, but the invasion of a person's privacy interest in seclusion. The Appellate Court and Supreme Court agreed that both aspects of the right of privacy, secrecy and seclusion, came within the "invasion of privacy" coverage. But to properly understand the coverage, this Court felt it necessary to define the term "publication." *Valley Forge*, 223 Ill.2d at 366-67. In *Founders Insurance Co. v. Munoz*, 237 Ill.2d 424, 433 (2010), the Court stated, "When construing the language of an insurance policy, we must assume that every provision was intended to serve a purpose." This principle was applied by the Court in *Valley Forge* when it determined that the term "publication" for the "invasion of privacy" coverage was intended to connote communication "to the public."

Contrary to the views of the lower courts in this case, this Court's *Valley Forge* opinion shows that the use of the term "publication" in the "invasion of privacy" coverage meant that something more than simply an invasion of privacy was necessary to trigger potential coverage. What was needed were allegations of conduct indicating more generalized public communication or distribution of information by the insured. This Court found what was needed for the "publication" requirement of the "invasion of privacy" coverage in the class action allegations: "By faxing advertisements to the proposed class of fax recipients, as alleged in Rizzo's Complaint, Swiderski published the advertisements both in the general sense of communicating information *to the public* and in the sense of distributing copies of the advertisements *to the public*." *Valley Forge,* 223 Ill.2d at 369. (Emphasis added.) The *Sekura* Complaint fails to allege anything

approaching public disclosure by KRISHNA, limited as it is to alleging the communication of biometric information to a single third party. Therefore, the complaint fails to fulfill the "publication" requirement of the "invasion of privacy" coverage.

The Illinois Supreme Court is not alone in concluding that "publication" for the "invasion of privacy" coverage means the communication or distribution of information to the public. See *One Beacon Am. Ins. Co. v. Urban Outfitters, Inc.*, 21 F.Supp.3d 426 (E.D. Pa 2014) aff'd., 625 Fed.Appx. 117 (3rd Cir. 2015); *Ticknor v. Rouse's Enterprises, LLC*, 2 F.Supp.3d 882, 893-94 (E.D. La. 2014); *Creative Hospitality Ventures, Inc. v. United States Liab. Ins. Co.*, 444 Fed. Appx. 370 (11th Cir. 2011); *Whole Enchilada, Inc. v. Travelers Property Cas. Co*., 581 F.Supp.2d 677, 696-98 (W.D. Pa. 2008).[2] However, the lower court's interpretation of the term "publication" as simply meaning the dissemination of information is not consistent with this Court's definition because it deletes the "to the public" requirement. Further, while it cannot be disputed that an allegation that KRISHNA communicated SEKURA's fingerprint information to SunLync would come within the lower court's definition of "publication," this same allegation does not infer or suggest a communication or distribution of SEKURA's fingerprint information to the public. Therefore, contrary to the Appellate Court's finding, the *Sekura* Complaint fails to come within the "personal injury" coverage

[2] In *Travelers Indemnity Co. v. Portal Healthcare Solutions, LLC,* 35 F.Supp.3d 765, 770 (E.D. Va. 2014), aff'd, 644 Fed.Appx. 245 (4th Cir. 2016), the court found that a claim involving the exposure of medical records to on-line searches satisfied the "publication" requirement based on a definition of "publication" from Webster's *Third New International Dictionary* as "to place before the public (as through a mass medium)."

because the Complaint does not allege the *publication* by KRISHNA of material that violated a person's right of privacy. For this reason, the Appellate Court erred by affirming the entry of summary judgment in favor of KRISHNA and SEKURA on the duty to defend, and its judgment should be reversed.

B. Construing "Publication" as Used in the "Invasion of Privacy" Coverage in the Same Way as the Term is Used in the "Defamation" Coverage was Error

The Appellate Court's definition of the term "publication" for the "invasion of privacy" coverage was influenced in large part by the use of the term "publication" in the "defamation" coverage. The dictionary definitions chosen by the Appellate Court to construe the term "publication" reflect this influence. The Appellate Court selected a Black's Law Dictionary definition of "publication" applicable to "defamation," i.e., communication to a single person, as an aid in construing the term for the "invasion of privacy" coverage. (App. at A38, ¶ 35). [3] But the dictionary definitions selected by this Court did not include the Black's Law Dictionary definition applicable to "defamation" selected by the Appellate Court. Rather, this Court selected dictionary definitions of "publication" which included the requirement of a communication "to the public." *Valley Forge,* 223 Ill.2d at 366-67. Significantly, the common-law definition of "invasion of privacy" includes this same public disclosure requirement.

In *Roehrborn v. Lambert*, 277 Ill.App.3d 181 (1st Dist. 1995), the court discussed the difference between the publicity requirement in the common-law

[3] The Appellate Court stated that its interpretation of "publication" was based on "common understandings and dictionary definitions" of the term. (App. at A38, ¶ 35). However, the Appellate Court failed to provide a source for the "common understandings" it relied on for the meaning of "publication."

torts of invasion of privacy and defamation. The court cited Comment a of the Restatement (Second) of Torts, § 652D which recognizes this difference:

> "Comment a explains that the 'publicity' requirement for this tort is different from the 'publication' requirement for defamation; "publication" in defamation requires only that the matter be communicated to a third person; 'publicity' in this invasion of privacy tort means communicating the matter to the public at large or to so many persons that the matter must be regarded as one of general knowledge. Restatement (Second) of Torts, § 652D, comment a, at 384. (1977)." *Roehrborn*, 277 Ill.App.3d at 184.

Roehrborn involved an action for invasion of privacy by a probationary officer against the chief of police for disclosing the results of a polygraph test and psychological evaluations to the administrator of a training institute. *Roehrborn*, 277 Ill.App.3d at 183. The appellate court affirmed the dismissal of the invasion of privacy claim because the plaintiff failed to satisfy the publication element of the tort. *Id*., at 184-85. (Disclosure to one person "did not satisfy the publicity requirement for public disclosure of private facts."). See also, *Wynne v. Loyola University of Chicago*, 318 Ill.App.3d 443, 453 (1st Dist. 2000) ("[T]he publication element of public disclosure was too limited to support this action.").

Clearly, this Court's definition of "publication" for the "invasion of privacy" coverage, which required communication to the public, was consistent with *Roehrborn's* and the Restatement's treatment of the term for the "invasion of privacy" tort. In this case, however, the Appellate Court held that the term "publication" for the "invasion of privacy" coverage meant both communication to the public and communication to a single person because the term was used in both the "invasion of privacy" coverage and the "defamation" coverage. It was significant to the Appellate Court that these coverages followed sequentially in

the policies' definition of "personal injury," which specifies the offenses coming within the coverage. (App.at A39, ¶ 36). The Appellate Court supported this interpretation of "publication" by reference to the rule of construction that a word or phrase used "in one part is presumed to have the same meaning when it is used in another part of a policy." (App. at A39, ¶ 36, quoting *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 19).

But the rule of construction which the Appellate Court should have applied to this analysis is that a policy term should be construed in the context of its use in the policy provision. *ZRL Corp. v. Great Central Ins. Co*., 156 Ill.App.3d 856, 859 (1st Dist. 1987) ("[W]ords or phrases should be defined in the context of associated words or phrases in accordance with the maxim *noscitur a sociis*: 'it is known from its associates.'"). When this rule is applied, the term "publication" in the context of the "invasion of privacy" coverage should be construed differently from construing the term in the context of the "defamation" coverage. After all, these offenses are listed separately in the policies' "personal injury" definition. Had the "defamation" and "invasion of privacy" offenses been combined into one provision (i.e., oral or written publication of material that slanders or libels a person or organization or invades a person's right of privacy), the Appellate Court's construction of "publication" would be reasonable. But the offenses are listed separately in the policies and treated differently at common law. Therefore, construing "publication" differently, in the context of its use in the "defamation" and "invasion of privacy" coverages is the only reasonable interpretation of these coverages.

Furthermore, courts will often consider the common law treatment of a "personal injury" offense as a guide to their interpretation of a policy's coverage for that offense. In *Sanders v. Illinois Union Ins. Co.,* 2019 IL 124565, this Court was called upon to decide when the offense of "malicious prosecution" occurred in order to determine whether the insurer was required to cover the underlying lawsuit. The opinion cites cases which hold that the insurance policy did not adopt the common-law elements of the tort of malicious prosecution; nevertheless, this Court looked to the common-law definition of the tort to decide when the offense occurred for purposes of the coverage. *Sanders*, 2019 IL 124565, ¶ 27 ("[W]e conclude that the word offense in the insurance policy refers to the wrongful conduct underlying the malicious prosecution."). In *Spiegel v. Zurich Ins. Co.*, 293 Ill.App.3d 129 (1st Dist. 1997), which is cited in *Sanders,* the court considered whether the imposition of sanctions against an insured attorney came within the coverage for "malicious prosecution." The court looked to the common-law treatment of malicious prosecution to find that a sanctions claim was not covered. *Spiegel*, 293 Ill.App.3d at 135 ("The common law tort of malicious prosecution contains significant strictures and rules … we find that a claim of malicious prosecution is not equivalent to sanctions imposed by a court for purposes of insurance coverage."). *Spiegel* was followed in *William J. Templeman Co. v. Liberty Mutual Ins. Co*., 316 Ill.App.3d 379, 390 (1st Dist. 2000), where the court stated:

> "We find the meaning of the term 'malicious prosecution' in this case is clear and unambiguous. The term has long denoted a separate and independent tort catalogued and discussed by Blackstone in the eighteenth century … The clear import of that

> term denotes coverage for an insured who is sued for the established tort of malicious prosecution."

In *Lexmark International, Inc. v. Transportation Ins. Co.,* 327 Ill.App.3d 128 (1st Dist. 2001), the court considered whether an underlying complaint contained allegations which came within an insurance policy's coverage for "product disparagement." As an aid in defining the term "disparagement" as used in the policy, the court cited *Crinkley v. Dow Jones & Co.,* 67 Ill.App.3d 869, 877 (1st Dist. 1978), which provided the common-law definition of disparagement. ("Disparagement has been defined as 'words which criticize the quality of one's goods or services.'). *Lexmark*, 327 Ill.App.3d at 140.

Finally, in *BASF AG v. Great American Assur. Co.*, 522 F.3d 813 (7th Cir. 2008), the court considered whether an insured, sued for fraud and deceptive trade practices for the marketing of a drug, was potentially covered by its umbrella policies' coverage for libel, slander or disparagement. The underlying complaints did not allege claims sounding in any of these torts; therefore, the court examined the allegations to determine if they "sketched out a claim for the offenses of slander, libel, or disparagement, which are covered by the umbrella policies." *BASF*, 522 F.3d at 820. The Seventh Circuit considered how the Illinois courts treated these torts, in particular the requirement that the false statement must be made about the plaintiff, and concluded that the underlying complaints did not contain allegations which triggered potential coverage. *Id.*

Courts from outside of Illinois have also looked to the common-law treatment of the "personal injury" and "advertising injury" offenses when construing these coverages. See, *Defender Security Co. v. First Mercury Ins.*

Co., 803 F.3d 327 (7th Cir. 2015)(invasion of privacy); *Whole Enchilada, Inc. v. Travelers*, 581 F.Supp.2d 677 (W.D. Pa. 2008)(invasion of privacy); *Global NAPS, Inc. v. Federal Ins. Co.*, 336 F.3d 59 (1st Cir. 2003) (malicious prosecution); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545 (1992)(unfair competition); *Standard Fire Ins. Co. v. Peoples Church of Fresno*, 985 F.2d 446 (9th Cir. 1993)(unfair competition); *A-Mark Financial v. CIGNA Property Casualty Cos.*, 34 Cal.App.4th 1179 (1995)(unfair competition); *Heil Co. v. Hartford Accident & Indemnity Co.*, 937 F.Supp. 1355 (E.D. Wis. 1996)(unfair competition); *Qsp, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 773 A.2d 906 (2001)(defamation, disparagement, malicious prosecution, unfair competition); and *Henderson v. USF&G Co.*, 346 N.C. 741, 488 S.E.2d 234 (1997)(unfair competition). These courts, like this Court in *Sanders v. Illinois Union Ins. Co.*, 2019 IL 124565, look to the common-law treatment of the "personal injury" and "advertising injury" offenses so that the coverage is not expanded beyond what was contemplated by the parties when they entered into the insurance contracts. *BASF*, 522 F.3d at 822-23, citing *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 395 (1993).

Construing "publication" as used in the context of the "invasion of privacy" coverage, and as the term is applied to the common-law "invasion of privacy" tort, leads to one conclusion - "publication" for the "invasion of privacy" coverage means communication to the public, which is how this Court construed "publication" in *Valley Forge*. Had the Appellate Court followed this Court's lead, it would have held that the *Sekura* Complaint does not potentially come within the

"invasion of privacy" coverage because the alleged communication of biometric information to a single third-party vender is not communication to the public. The Appellate Court's failure to follow *Valley Forge* was error which should be corrected by reversing the judgment of the Appellate Court.

III. The Exclusion for the Distribution of Material in Violation of Statutes Bars Coverage for the *Sekura* Complaint

In Section II of this Brief, WEST BEND showed that the "personal injury" coverage was not available for the *Sekura* lawsuit because the underlying complaint did not allege the "publication" by KRISHNA of information that violated a person's right of privacy. Nevertheless, WEST BEND argued below that if it is determined that "publication" was alleged, then coverage is precluded by the policy exclusion applicable to claims involving the distribution of material in violation of statutes. The lower courts held that the Violation of Statutes exclusion did not apply to alleged violations of BIPA. (App. at A41, ¶ 45, R.C 819). However, when the provisions of the Violation of Statutes exclusion and BIPA are read in conjunction with SEKURA's allegation that KRISHNA violated BIPA by disclosing SEKURA's biometric information, it is clear that this allegation falls squarely within the Violation of Statutes exclusion. Therefore, the lower courts' contrary rulings must be reversed.

The Violation of Statutes exclusion is set forth in full below:

> **"EXCLUSION – VIOLATION OF STATUTES THAT GOVERN EMAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION**
>
> * * *

This insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

'Bodily injury', 'property damage', 'personal injury' 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), including any amendment of or addition to such law; or
(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information." (R.C 169, R.C 322).

Distilled to its essence, the exclusion applies to "'personal injury'… arising directly or indirectly out of any action or omission that violates or is alleged to violate . . . any statute, ordinance or regulation . . . that prohibits or limits the sending, transmitting, communicating or distribution, of material or information." The exclusion applies in this case because SEKURA alleged that KRISHNA violated BIPA when it disclosed her fingerprints to SunLync; and BIPA, by its clear terms, is a statute that prohibits or limits the communication of information. However, the Circuit Court found that the Violation of Statutes exclusion was inapplicable because it concluded that BIPA was not a statute that prohibited or limited the communication of information. (R.C 818). The Appellate Court did not adopt the Circuit Court's interpretation of BIPA, no doubt because this Court, in *Rosenbach v. Six Flags Entertainment Corp.,* 2019 IL 123186, interpreted BIPA as imposing duties on private entities regarding the disclosure of biometric information. *Rosenbach*, 2019 IL 123186, ¶ 33. But the Appellate Court agreed with the Circuit Court that the exclusion only applied to statutes that governed

methods of communicating information, and BIPA does not prohibit methods of communication. (App. at A41, ¶ 45).

The Appellate Court's interpretation of the Violation of Statutes exclusion was contrary to several well-established rules of construction. In *Valley Forge Ins. Co. v. Swiderski Electronics, Inc*., 223 Ill.2d 352, 362 (2006) this Court stated "an insurance policy is to be construed as a whole, giving effect to every provision, if possible, because it must be presumed that every provision was intended to serve a purpose." Additionally, an insurance policy must not be interpreted in such a manner that nullifies provisions of the policy. *Atwood v. St. Paul Ins. Co.,* 363 Ill.App.3d 861, 864 (2nd Dist. 2006). By limiting the application of the exclusion to statutes which specify methods of communication, the Appellate Court violated these rules of construction because it nullified ¶ 3 of the exclusion, the "catch-all" provision.

The Appellate Court explained its interpretation of the Violation of Statutes exclusion by referring to the exclusion's title and its specific reference to TCPA and CAN-SPAM in ¶¶ 1 and 2 of the exclusion's text. (App. at A40, ¶ 43). But ¶ 3 makes no reference to methods of communication. Also, while the exclusion refers to TCPA and CAN-SPAM which involve specific methods of communication, the conduct prohibited by these statutes is not the sending of the fax or email, *per se* (i.e., the method of communication), but the sending of a fax or email that invades the recipient's privacy (TCPA) or deceives the recipient (CAN-SPAM). Focusing on the purposes served by the two statutes specified in the Violation of Statutes exclusion shows that ¶ 3 thereof, the "catch-all"

provision, was intended to ensure that statutes coming within the exclusion's purview were those, like BIPA, that sought to prevent injury caused by the communication of information, regardless of the specific method of communication used.

Finally, it must be remembered that under Illinois law, there is no difference between a BIPA claim and a TCPA claim when it comes to the "invasion of privacy" coverage. Both involve alleged invasions of privacy, the difference being the nature of the right invaded (i.e., secrecy or security). But in either case, the right is invaded by the alleged communication. Reading the Violation of Statutes exclusion as a whole, there is no difference between its application to a TCPA claim or a BIPA claim. The Illinois Courts have applied subsection (1) of the Violation of Statutes exclusion to TCPA claims and alternative claims alleging consumer fraud and conversion. See, *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873; *Illinois Casualty Co. v. West Dundee China Palace Rest., Inc.*, 2015 IL App (2d) 150016; *G.M. Sign, Inc. v. State Farm Fire & Cas. Co.,* 2014 IL App (2d) 130593. Subsection (3) of the Violation of Statutes exclusion, applicable to other statutes which prohibit or limit the communication of information, clearly applies to BIPA violations alleging the improper communication of biometric information. To conclude, as the Appellate Court did, that the Violation of Statutes exclusion is only concerned with methods of communication misconstrues the language of the exclusion. A plain reading of BIPA and the Violation of Statutes exclusion shows that an alleged BIPA violation for improperly communicating biometric information falls within the terms of the

exclusion because it alleges the violation of a statute that prohibits or limits the communication of information. Had the Appellate Court correctly interpreted the exclusion, it would have concluded that the exclusion barred coverage for the *Sekura* Complaint. Therefore, the Appellate Court's erroneous interpretation and application of the Violation of Statutes exclusion should be reversed.

CONCLUSION

For the foregoing reasons, WEST BEND requests that this Court reverse the judgment of the First District Appellate Court as it relates to the duty to defend and the application of the Violation of Statutes exclusion, and remand the case to the Circuit Court of Cook County with directions to enter summary judgment in favor of WEST BEND and against the Defendants.

Respectfully submitted,

By:

/s/ Thomas F. Lucas
One of the Attorneys for Plaintiff/
Appellant, WEST BEND MUTUAL
INSURANCE COMPANY

Thomas F. Lucas, Esq.
Kristin D. Tauras, Esq.
McKenna Storer
33 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 558-3900
Service@mckenna-law.com
tlucas@mckenna-law.com
ktauras@mckenna-law.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 26 pages.

/s/ Thomas F. Lucas
Thomas F. Lucas

APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

WEST BEND MUTUAL INSURANCE COMPANY, Plaintiff/Counter-defendant, v. KRISHNA SCHAUMBURG TAN, INC., AND KLAUDIA SEKURA, Defendants/Counter-plaintiffs.	Case No. 16 CH 7994 Honorable Franklin U. Valderrama Calendar 03

MEMORANDUM OPINION AND ORDER

This matter coming to be heard on West Bend Mutual Insurance Company's Motion for Summary Judgment and Krishna Schaumburg Tan, Inc.'s Cross-Motion for Summary Judgment. For the reasons that follow, West Bend's Motion is denied and Krishna Schaumburg Tan's Motion is granted in part and denied in part.

STATEMENT OF THE CASE

A person's biometric data includes traits which constitute unique identifiers of that person—such as the person's fingerprints or her facial geometry. As such, a person's biometric identifiers form part of a distinctive kind of data which is particularly sensitive. Given the fact that a person's biometric identifiers are both unique and irreplaceable—unlike a social security number which can be changed if it becomes compromised—a few state legislatures across the country have enacted laws requiring private entities which collect biometric information to inform the people from whom they are collecting the information about the security measures which will be utilized to protect their biometric data. These laws also require entities collecting biometric information to take certain measures to prevent undue disclosures of biometric information to third parties. Illinois is one such state.

In 2008, the Illinois General Assembly enacted the Biometric Information Privacy Act ("BIPA"), which provides measures private entities must follow if they intend to collect people's biometric information and places restrictions on the disclosure of this information to third parties. 740 ILCS 14/1 et seq. (West 2014). While the BIPA was enacted several years ago, it is only recently that the technology which enables entities to collect and use biometric data in numerous ways and for myriad purposes has evolved and proliferated exponentially. The rapid increase in the indiscriminate use of these technologies has, as a result, given rise to numerous lawsuits across the state involving BIPA and its implication in different contexts. This is one of those cases.

BACKGROUND

Plaintiff, West Bend Mutual Insurance Company ("West Bend"), is an insurance company organized under the laws of Wisconsin and authorized to issue policies of insurance in the State of Illinois. Defendant, Krishna Schaumburg Tan, Inc. ("Krishna"), is an Illinois corporation and a tanning salon which is a franchisee of L.A. Tan Enterprises, Inc. ("L.A. Tan"). West Bend issued a "Businessowners Liability Policy" to Krishna (policy number NAD0969996), for the period of December 1, 2014 to December 2015 and December 1, 2015 to December 1, 2016 (the "Policy").[1]

As a franchisee of L.A. Tan, Krishna enrolls its customers in L.A. Tan's national membership database, which allows customers to use any L.A. Tan franchisee salon in the country. To enroll in the database, customers must have their fingerprints scanned at the salon. In April of 2015, Defendant Klaudia Sekura ("Sekura") signed up for a membership at Krishna's tanning salon and her fingerprints were scanned.

On April 7, 2016 Sekura filed a class action lawsuit against Krishna for violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 et seq. (West 2014) (the "Underlying Lawsuit" or "Underlying Complaint"), alleging that Krishna violated BIPA through the improper collection of fingerprints and through the disclosure of her fingerprints to an out-of-state, third-party vendor.

Krishna made a tender to West Bend, seeking a defense and indemnity under the Policy. West Bend agreed to defend Krishna, subject to a reservation of rights. West Bend then filed a complaint for declaratory judgment ("Complaint") seeking, among other things, a declaration that it does not have a duty to defend or indemnify Krishna in the underlying lawsuit. Krishna, in turn, filed an answer and a Counterclaim, alleging Count I: Declaratory Judgement: Duty to Defend; and Count II: Statutory Bad Faith for Vexatious and Unreasonable Conduct.

Thereafter, West Bend filed a Motion for Summary Judgment and Krishna filed a Cross-Motion for Summary Judgment, both of which are fully briefed and presently before the Court.

CROSS MOTIONS FOR SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014); *Safeway Ins. Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1st Dist. 1999). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th

[1] The parties refer to two "policies" rather than a single "policy." Upon review of the exhibits attached to the Complaint, it appears that there are two operative policies, one for the time period of December 1, 2014 to December 1, 2015December 01, 2015 to December 1, 2016. The parties have not argued that the two policies are materially different in any manner, and as such, to avoid confusion, the Court will refer to the policies in conjunction as the "Policy."

Dist. 2000). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. *Dockery ex rel. Dockery v. Ortiz*, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Id.* The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his or her case in response to a motion for summary judgment, he or she must present a factual basis that would arguably entitle him or her to judgment under the applicable law. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980).

Where cross-motions for summary judgment are filed, the parties acknowledge that only a question of law is at issue and invite the court to decide the issues based on the record. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). However, even where parties file cross-motions for summary judgment, the court is not obligated to grant summary judgment. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 949 (2d Dist. 2009). It is possible that neither party alleged facts that, even if undisputed, are sufficient to warrant judgment as a matter of law. *Id.*

DISCUSSION

I. Arguments

West Bend's Motion for Summary Judgment and Krishna's Cross-Motion For Summary Judgment

West Bend argues[2] that there is no genuine issue of material fact that there is no coverage under the Policy. The crux of West Bend's motion is that disclosure of Sekura's biometric information to a third-party vendor or an insured's franchisor as alleged in the Underlying Complaint does not constitute "publication" as defined under Illinois law, and as such, it is excluded under the Policy's coverage of "advertising injur[ies]" or "personal inju[ries]." West Bend argues by analogy that the Illinois Supreme Court, in the context of a similar lawsuit involving the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") held that "publication" means communication to the public at large, citing *Valley Forge Ins. Co. v. Swiderski Electronics,* 223 Ill. 2d 352, (2006). According to West Bend, Krishna's only disclosure was to a third-party vendor called Sun Lync, which does not constitute publication under *Valley Forge*. Additionally, West Bend posits that Krishna's second theory under which it would be entitled to coverage—under the "Illinois Data Compromise Coverage Endorsement" of the Policy (the "Endorsement")—only applies in case the data at issue becomes compromised, a fact which Sekura has not alleged in the Underlying Complaint. West Bend further asserts that the third theory under which Krishna seeks coverage is also inapplicable, as Krishna's alleged released biometric information to Sun Lync was intentional, citing *Aetna Casualty & Surety Co. v. Freyer*, 89 Ill. App. 3d 617, 619 (1st Dist. 1980). Next, West Bend contends that Krishna is

[2] In support of its Motion, West Bend submits: a copy of the Policy's "Businessowners Property Endorsements and Miscellaneous Premiums." Krishna also submits the same to its Cross-Motion for Summary Judgment.

not covered under the Policy's coverage for bodily injury, as there is no such allegation in the Underlying Complaint. Instead, notes West Bend, Sekura only alleges mental anguish and mental injury.

Finally, West Bend asserts that, as to Krishna's Counterclaim, West Bend, in filing a declaratory judgment action and defending Krishna under a reservation of rights, has not acted in a vexatious or unreasonable manner. Moreover, maintains West Bend, since there is no potential coverage for Krishna under the Policy, Krishna cannot maintain a Section 155 claim against it, citing *West Bend Mutual Insurance Co v. Rosemont Exposition Services, Inc.*, 378 Ill. App. 3d 478, 493 (1st Dist. 2007).

Krishna counters that the term "publication" is not defined in the Policy and as such, the Court must apply the dictionary definition of the term to ascertain its meaning, citing *Valley Forge,* 223 Ill. 2d at 367. Krishna maintains that West Bend's interpretation of *Valley Forge* is incorrect, as in that case the Illinois Supreme Court held that the term "publication" was to be interpreted under the standard of what the average person would understand "publication" to be. *Id.* at 885. The word "publication" asserts Krishna, as understood by a reasonable insured includes the transmission of information regardless of whether the information is transmitted to a third party, citing *Park University Enterprises, Inc. v. Am. Cas. Co. of Reading*, 314 F. Supp. 2d 1094, 1107 (D. Kan. 2004); and *Western Rim Investment Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 846-47 (N.D. Tex. 2003). According to Krishna, such interpretation includes publication of material which is wrongfully disclosed to third parties, citing *TIG Insurance Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex. App. 2004). Krishna further contends that examination of this issue in the context of TCPA cases such as *Valley Forge* only lends further support to Krishna's argument as such cases generally involve the transmission of information between two parties only.

Moreover, asserts Krishna, any determination by this Court regarding the issue of dissemination to third parties would be improper because it would preclude plaintiffs in the Underlying Lawsuit from seeking damages, citing *Maryland Casualty Co. v. Peppers*, 64 Ill 2d 187, 193 (1976).

As to the issue of whether the Endorsement provides coverage, Krishna responds that West Bend erroneously relies on a provision—Section 1 of the Endorsement—which only relates to the insured's duty to notify West Bend of the occurrence, in support of its argument that the Endorsement precludes coverage. According to Krishna, such a scenario in the present case would be impossible, as Krishna would not have known of the alleged BIPA violation until the lawsuit was filed.

Sekura filed a brief joining Krishna's Cross-Motion in part. In her brief, Sekrura argues that the Court should stay this matter pending resolution of the Underlying Lawsuit because a determination of whether Krishna engaged in "publication" of Sekura's biometric information constitutes a material issue which must be resolved in the Underlying Lawsuit, citing *State Farm Mutual Ins. Co. v. Pfiel*, 304 Ill. App. 3d 831, 834 (1st Dist. 1999), among others. According to Sekura, the Court must decline to resolve the issue of "publication" as this question is critical to resolution of the Underlying Lawsuit, citing *Ich v. Shelborne*, No. 03 CH 14159 (Cir. Ct. Cook

Cty. Oct. 31, 2007); and *St. Paul Mercury Ins. Co. Foster*, 268 F. Supp. 2d 1035, 1046 (C.D. Ill. 2003).

As to Sekura's brief, West Bend responds that *Pfiel* actually supports West Bend's position and that the issue in this case is not whether Krishna disclosed biometric information in violation of BIPA but rather, whether the facts alleged in the Underlying Complaint constitute publication as alleged in the West Bend policy. Also, the remainder of cases cited by Sekura, posits West Bend, are distinguishable.

As to Krishna's response, West Bend replies that (1) Krishna failed to show that the Underlying Complaint alleges publication of Sekura's biometric information in violation of her right to privacy through disclosure of the information to the public; (2) the question of what constitutes "publication" for purposes of coverage under the Policy does not determine an ultimate issue in the Underlying Lawsuit; (3) Krishna has failed to show that there is coverage pursuant to the Policy's Illinois Data Compromise Endorsement; and (4) Krishna has failed to show that it is entitled to attorney's fees pursuant to Section 155.

According to West Bend, Krishna erroneously relies on the Appellate Court's interpretation of the term "publication" in *Valley Forge*, because West Bend's position is that the Illinois Supreme Court's interpretation of the term "publication" is controlling in this case, citing *Valley Forge*, 223 Ill. App. 3d 872, 879 (2d Dist. 2005). Since, pursuant to the Supreme Court opinion in *Valley Forge*, Krishna cannot show that Underlying Complaint contains allegations of publication to the public at large, there is no coverage under the Policy.

West Bend contends that Krishna's assertion that there is a possibility Sekura may have to show dissemination in the Underlying Lawsuit is irrelevant, as the only thing the Court considers in making a determination of coverage are the allegations in the Underlying Complaint. West Bend notes that in any event (1) the Underlying Lawsuit is based on an allegation of a violation of BIPA which does not require dissemination and (2) the issue in this action is whether the facts alleged in the Underlying Complaint allege "publication" under the Policy, citing *Fidelity & Casualty Co. v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301 (1st Dist. 1983), among others.

As for Krishna's Section 155 claim, West Bend asserts that Krishna is not entitled to attorney's fees under Section 155 because it has failed to show that (1) there is a basis for coverage under the Policy and that (2) West Bend denied coverage in bad faith, citing *Valdovinos v. Gallant Insurance Co.*, 314 Ill. App. 3d 1018, 1021 (1st Dist. 2000).

Krishna replies that contrary to West Bend's assertion, the Underlying Lawsuit depends on a finding that biometric data was disseminated. According to Krishna, if the Court finds that the Underlying Complaint does not allege "publication," Sekura will be precluded from proving this issue, citing *Pekin Ins. Co. v. Rozak/ADC, LLC*, 402 Ill. App. 3d 1055, 1063 (1st Dist. 2010). Moreover, contends Krishna, the Endorsement expands coverage to information which has been lost, stolen, accidentally released or accidentally published.

West Bend's Sur-Reply and Krishna's "Responsive Brief" as to the issue of the "Distribution of Material in Violation of Statutes" Exclusion

West Bend filed a Sur-Reply raising an additional basis under which it believes it does not have a duty to defend or indemnify Krishna. According to West Bend, even if the Court finds that the allegations of the Underlying Complaint contain facts entitling it to coverage for "personal injury" for publication of material in violation of a Sekura's privacy, then the Policy's Exclusion applicable to "distribution of material in violation of statutes" ("Exclusion") bars coverage, citing *G.M Sign, Inc., v. State Farm Fire & Casualty Co.*, 2014 IL App (2d) 130593; *Illinois Casualty Co. v. West Dundee China Palace Restaurant Inc.*, 2015 IL App (2d) 150016; and *Big 5 Sporting Goods Corp. v. Zurich American Insurance Co.*, 957 F. Supp. 2d 1135 (C.D. Cal. 2013).

Krishna replies that the Court limited its "Responsive Brief" to the question of whether the cases cited by Krishna as to the issue of whether the Exclusion applies are distinguishable, to which Krishna asserts they are. According to Krishna, the Policy in this case, unlike the policies at issue in *G.M. Sign* and *Illinois Casualty* involved policies with a similar endorsement. Moreover, protests, Krishna, this argument by West Bend is a bad faith attempt to avoid coverage, as Krishna merely raised this argument after briefing on the present motions had concluded.

Sekura filed a brief in opposition to West Bend's Sur-Reply. Sekura asserts that the Exclusion is intended to apply to the violation of statutes addressing the transmission of "spam" communications, not informed-consent statutes such as BIPA. According to Sekura, the plain language of the Exclusion when read in its totality, reveals that it is meant to address the transmission of spam *en masse*, it is therefore inapplicable in the BIPA context. Specifically, Sekura notes that the Exclusion lists the TCPA and the Controlling the Assault of Non-Solicited Pornography And Marketing (CAN SPAM Act) of 2003, as well as the catchall "other items," which indicates that the other statutes are meant to regulate the transmission of spam, citing *Stepnicka v. Grant Park 2 LLC*, 2013 IL App (1st) 113229-U, ¶ 71, an unpublished opinion. Sekura maintains that under general principles of contract interpretation, the Exclusion applies to those statutes meant to regulate spam, to which BIPA bears no meaningful similarity. BIPA, asserts Sekura, bears no significant similarity to statutes such as the CAN SPAM Act, as BIPA is an informed consent statute intended to address the ramifications of biometric technology. According to Sekura, BIPA is intended to address many aspects related to the collection of biometric data, of which unauthorized disclosure is but a factor. Sekura notes that in the event the Court finds the Exclusion to be ambiguous, the Court must construe the language in the Exclusion in favor of the insured, citing *Am. Econ. Ins. Co. v. DePaul Univ.*, 383 Ill. App. 3d 172, 178 (2008).

Moreover, asserts Sekura, West Bend's interpretation of the Exclusion leads to absurd results and renders other provisions of the Policy illusory. Sekura notes that in interpreting the Policy the Court must avoid an interpretation which in essence leads to illusory coverage, citing *Ill. Farmers Ins. Co. v. Keyser*, 2011 IL App (3d) 090484, ¶ 14. According to Sekura, adopting West Bend's interpretation of the Exclusion would preclude coverage for violations of any

statute which limits communications of any kind, such as the Trade Secrets Act, and the Federal Health Insurance Portability and Accountability Act. Moreover, contends Sekura, adopting West Bend's interpretation of the Exclusion would preclude coverage for violations of the Illinois Libel and Slander Act, thus contradicting a different provision in the Policy which extends coverage precisely to liability as a result of publication of libelous or slandering material.

Finally, Sekura argues that West Bend has a duty to defend Krishna because the Exclusion does not preclude coverage for Sekura's claim for negligence in the Underlying Complaint. According to Sekura, her negligence claim arises independently of the alleged BIPA violation, and since the Exclusion does not preclude coverage for a negligence claim, West Bend has a duty to defend, citing *G.M. Sign,* 2014 IL App (2d) 130593, ¶ 28; *Hooper v. Cnty. Of Cook,* 366 Ill. App. 3d 1, 6-7 (1st Dist. 2006); and *Illinois Tool Works v. Travelers Cas. & Sur. Co.*, 2015 IL App (1st) 132350, ¶ 34.

I. Peppers Doctrine

As a threshold matter, the Court addresses whether a resolution of the meaning of "publication" for purposes of the Policy is improper under the *Peppers* doctrine. *Peppers*, 64 Ill. 2d 187.

In its motion, West Bend argues that there is no coverage under the Policies because Sekura did not allege "publication" in the Underlying Complaint "as the term is defined under Illinois law." West Bend's Mot. at 7. Both Krishna and Sekura argue that a determination of whether she alleged "publication" would necessarily decide an issue of ultimate fact in the Underlying Lawsuit which is improper pursuant to the *Peppers* doctrine. Specifically, Krishna asserts that "Sekura and the class [in the Underlying Lawsuit] will need to show further dissemination to prove actual injury in the underlying action to make a case for damages. Any determination [in this Court] that affects a finding of further dissemination in the underlying case will impede the principal action." Krishna's Cross-Motion at 13. Further, Sekura contends that due to the *Peppers* issue, the Court should stay this matter pending resolution of the Underlying Lawsuit.

As to this issue, West Bend replies that the present "declaratory judgment action does not decide whether Krishna disclosed biometric information in violation of BIPA. Rather, this Court will decide whether the facts alleged constitute 'publication' as the term is used in the West Bend Policy." West Bend Resp. at 3.

Under the *Peppers* doctrine, it is not proper for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties in the underlying lawsuit. *Peppers*, 64 Ill 2d 187; *Allstate Ins. Co. v. Kovar,* 363 Ill. App. 3d 493, 501 (2d Dist. 2006). "This proscription specifically precludes determination of any ultimate facts upon which liability or recovery might be predicated in the underlying case." *Sentry Ins. v. Cont'l Cas. Co.*, 2017 IL App (1s) 161785, ¶ 43. An "ultimate fact" in the underlying action for purposes of the *Peppers* doctrine is "an issue crucial to the insured's liability in the personal injury action" or an issue on which punitive damages could be assessed. *Id.* at ¶ 44. In cases in which the *Peppers*

doctrine is at issue, the court may order a stay of the declaratory action pending resolution of the underlying case. *Motorola Sols., Inc. v. Zurich Ins. Co.*, 2017 IL App (1st) 161465, ¶ 41-2.

The relevant language at issue in the Policy is found within the definition of "personal injury," which includes "oral or written publication of material that violates a person's right to privacy." While Krishna and Sekura assert that resolution of the issue of "publication which violates a person's right to privacy" for purposes of the present action would implicate the *Peppers* doctrine, neither Krishna nor Sekura point the Court to any specific cause of action or legal theory in the Underlying Complaint which would give rise to a *Peppers* issue. No matter, in making this determination the Court first examines the allegations of the Underlying Complaint to determine whether resolution of the question of what constitutes "publication which violates a person's right to privacy" under the Policy would preclude resolution of an ultimate issue of fact in the Underlying Lawsuit.

Sekura asserts three causes of action in the Underlying Complaint: (1) Violation of 740 ILCS 14/1, *et seq.* (violation of the BIPA); (2) Unjust Enrichment; and (3) Negligence. The general allegations of the Underlying Complaint assert that, through its manner of collecting and in disclosing customers' biometric data, Krishna "not only disregards its customers' privacy rights, but it also violates the BIPA." Sekura Cmplt., ¶ 29. In the count for violation of the BIPA, Sekura alleges, among other things, that BIPA "prohibits private entities from from *disclosing* a person's or customer's biometric identifier or biometric information without first obtaining consent for that disclosure", and that "Krishna... disclosed Plaintiff's and the Class's biometric identifiers... to SunLync, an out-of-state third party vendor." Sekura Complt., 12, ¶ 48, 55. (emphasis added). In her count for unjust enrichment, Sekura alleges that due to Krishna's non-compliance with the BIPA, Krishna "should not be allowed to retain the full amount of money Plaintiff and the Class paid to Krishna[.]" Sekura Cmplt., ¶ 64. Finally, as to the negligence count, Sekura alleges that Krishna had a duty to act carefully and not place Plaintiff at risk of harm, and that Krishna "breached its duties by failing to implement procedural safeguards around the *collection and use* of Plaintiff's biometric identifiers..." and by "failing to properly inform Plaintiff in writing of the specific purpose or length of time for which her fingerprints were being collected, stored and used." Sekura Cmplt., ¶¶ 69, 70 (emphasis added).

The Court fails to surmise in which way deciding the issue of what is "publication in a manner that violates a person's right to privacy" would decide an issue of ultimate fact in the Underlying Lawsuit. The Underlying Complaint contains allegations of Krishna's disregard for its customers' privacy rights, and about Krishna's disclosure of the biometric information to SunLync. While Krishna asserts that this Court's "finding" of "further dissemination" would resolve an ultimate issue of fact in the Underlying Lawsuit, the Court's task in determining coverage is not to make a factual finding as to whether SunLync "disseminated" Sekura's biometric information to other parties, nor is it to decide what "dissemination" is. The Court's narrow inquiry is whether the allegations of the Underlying Complaint fall potentially within the Policy's coverage for "publication which violates a person's right to privacy."

Upon examining the allegations in the Underlying Complaint the Court notes that while Sekura does allege disregard for her privacy and improper disclosure of her biometric information, nowhere in the Underlying Complaint does Sekura assert any cause of action

specifically based on a theory of publication in violation of her right to privacy. As such, the Court agrees with West Bend that a determination of this issue will not decide an ultimate issue of fact in the Underlying Lawsuit and does not implicate the *Peppers* doctrine.

II. Publication in Violation of a Person's Right to Privacy

Having dispensed with the foregoing issue, the Court now turns to the Policy. The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993).

In a declaratory judgment action in which the issue before the court is whether the insurer's duty to defend arises, "the court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy." *Wilson*, 237 Ill. 2d at 455. This is known as the eight-corner rule. *Pekin Ins. Co. v. Illinois Cement*, 2016 IL App (3d) 140469 ¶ 28. The insurer has a duty to defend "if the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage." *Wilson*, 237 Ill. 2d at 455. "The underlying complaints and insurance policies must be liberally construed in favor of the insured." *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 74 (1991). Thus, "[a]n insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Id.* at 73. Additionally, an insurer has a duty to defend its insured even if only one of several theories of recovery in the underlying complaint against the insured is within the potential coverage of the policy. *Id.*

In construing a policy, the court's primary function is to ascertain and give effect to the intention of the parties as expressed in the policy language. *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Because insurance contracts are issued under given circumstances, they are not to be interpreted in a factual vacuum. *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 223 Ill. 2d 407, 417 (2006). An insurance contract, like any other, is to be interpreted from an examination of the complete document and not an isolated part. *Cobbins v. Gen. Accident Fire & Life Assurance Corp., Ltd.*, 53 Ill. 2d 285, 290 (1972). To ascertain the meaning of a policy, the court must construe it as a whole, taking into account the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). A policy must be construed in conjunction with endorsements in order to determine the meaning and effect of the insurance contract. *Pekin Ins. Co. v. Recurrent Training Ctr., Inc.*, 409 Ill. App. 3d 114, 119 (1st Dist. 2011). If the provisions of a policy and an attached endorsement conflict, the terms and conditions of the endorsement control and supersede the conflicting policy provisions. *Id.* The parties to an insurance contract may incorporate in it such provisions, not in violation of law, as they choose; and it is the duty of the courts to construe and enforce the contract as made. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 381 (2007). Courts are not warranted, however, under the cloak of construction, in making a new contract for the parties. *Id.*

If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning and the policy will be applied as written, unless it contravenes public policy. *Rich*, 226 Ill. 2d at 371. If the words used in the insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *Id.* That is especially true with respect to provisions that limit or exclude coverage. *Id.* A contract is not rendered ambiguous, however, merely because the parties disagree on its meaning. *Id.* at 372. A court will consider only reasonable interpretations of the policy language and will not strain to find an ambiguity where none exists. *Id.* Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, that rule of construction only comes into play when the policy is ambiguous. *Id.*

The Court now turns to the relevant language in the Policy, which states:

A. Coverage

1. Business Liability

***

a. This insurance applies:

**

(2) To:

(a) 'Personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(b) 'Advertising injury' caused by an offense committed in the course of advertising your goods, products or services…

***

13. 'Personal Injury' means injury, other than 'bodily injury', arising out of one or more of the following offenses:

***

e. Oral or written publication of material that violates a person's right of privacy.

***

THIS ENDORSEMENT CHANGES THE POLICY…

SECTION 1 – RESPONSE EXPENSES
DATA COMPROMISE COVERED CAUSE OF LOSS

Coverage under this Data Compromise cover-age endorsement applies only if all of the following conditions are met:

1. There has been a "personal data compromise"; and
2. Such "personal data compromise" is first discovered by you during the policy period for which this Data Compromise Coverage endorsement is applicable; and

> 3. Such "personal data compromise" is reported to use within 60 days after the date it is first discovered by you.
>
> ***
>
> EXCLUSION-VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION
>
> ***
>
> This insurance does not apply to:
>
> DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES
>
> "Bodily injury" , "property damage", "personal injury" 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), including any amendment of or in addition to such law; or (2) the CAN-SPAM Act of 2003, including any amendment of or addition to such law; or (3) any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information."

Pl. Cmplt., Ex.[3]

In the Underlying Complaint, Sekura alleges that she enrolled in a membership with Krishna in April 2015. Sekura further alleges that Krishna requires consumers to allow it to scan their fingerprints when they first sign up. The fingerprints are then scanned to enroll customers in L.A. Tan's national database. According to Sekura, Krishna does not inform customers that "it discloses their fingerprint data to an out-of-state third party vendor (SunLync)[.]" Sekura Complt., at 7, ¶ 24. Sekura further alleges that Krishna's customers are not informed to whom Krishna discloses their fingerprint data. Additionally, Sekura alleges that "[b]y and through [these] actions, Krishna not only disregards its customers' privacy rights, but also violates the BIPA." Sekura Cmplt., at 8, ¶ 29.

While the Underlying Complaint contains allegations that Krishna disclosed Sekura's biometric information in violation of her right to privacy, the parties disagree as to whether these allegations fall within the definition of "publication which violates a person's right to privacy." Specifically, the parties dispute the meaning of the word "publication." As the parties note, the Policy does not define what constitutes "publication," and present separate arguments as to how the Court should interpret the term.

West Bend contends that pursuant to the Illinois Supreme Court's decision in *Valley Forge*, the Court should construe the word "publication" as "defined under Illinois law" to mean "communication or distribution of information to the public at large." 223 Ill. 2d 352. Accordingly, reasons West Bend, the allegations in the Underlying Complaint that Sekura's biometric information was only disclosed by Krishna to SunLync—a third party—are not sufficient to constitute "publication," citing *Valley Forge*, among other cases.

[3] The exhibits attached to the Complaint are not numbered or labeled.

Krishna, on the other hand, argues that *Valley Forge*, supports the proposition that the rules applicable to the interpretation of an insurance contract preclude such a limited interpretation of the term "publication." According to Krishna, the proper inquiry is whether a reasonable person in the position of an insured could construe the word as the communication of material, regardless of whether the information is subsequently communicated to a third party, citing the Appellate Court's decision in *Valley Forge*, as well as *TIG*, and *Park University Enterprises*, among other cases.

West Bend urges the Court to interpret the term "publication" as the "[distribution] of biometric data to the public" purportedly as defined by the Illinois Supreme Court in *Valley Forge*. West Bend Resp. at 3. By this, West Bend advances two propositions by implication; first, that the Illinois Supreme Court in *Valley Forge* reached a different definition of the term "publication" than that of the Appellate Court, and second, that this Court *must* adopt a legal definition of the term "publication" in interpreting the Policy. These propositions, however, are incorrect.

The issue in *Valley Forge* concerned the construction of an insurance policy's "Personal and Advertising Injury" provision, specifically, whether allegations in the underlying class action lawsuit relating to the receipt of unwanted fax advertisements in violation of the TCPA constituted "oral or written publication, in any manner, of material that violates a person's right of privacy." 223 Ill. App. 3d at 875-6. The Circuit Court and the Appellate Court both held that the insurer in that case had a duty to defend. In so holding, the Appellate Court construed the term "publication" using the reasonable person in the position of the insured standard and rejected the insurer's argument that the term "publication" was limited to material that wrongfully discloses private facts to third parties. *Id.* at 885-6. In rejecting the insurer's position, the Appellate Court specifically noted that if the insurer wanted the word "publication" to narrowly apply only to "material sent to a third party" it could have stated so explicitly in its policy. *Id.* at 886.

The insurers appealed and the Illinois Supreme Court *affirmed* the Appellate Court's decision. *Valley Forge*, 233 Ill. 2d at 355. As Krishna correctly observes, the Supreme Court noted that the insurers "abandoned the argument they made before the Appellate Court that the conduct alleged... did not constitute 'publication.'" *Id.* Nevertheless, in the interest of interpreting the clause at issue, the Supreme Court found that the underlying complaint sufficiently alleged "publication." *Id.* at 367. Adopting the "plain, ordinary and popular" meaning of the word, the Supreme Court concluded that "by faxing advertisements to the proposed class of fax recipients [the underlying defendant] published the advertisements both in the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public." *Id.* at 367.

Nowhere in the Supreme Court's opinion in *Valley Forge* does the court adopt a different definition of publication than that which the Appellate Court adopted. While West Bend would have this Court imply that by using the phrase "communicating information *to the public*" the Supreme Court meant to insert a qualifier to the number or the type of people to whom the information at issue was disclosed, the Supreme Court did no such thing. This becomes apparent

upon examining both the Appellate Court and the Supreme Court opinions, which reveal that the courts both employed the "reasonable person in the position of the insured" standard. Specifically, the Appellate Court in *Valley Forge* found that the term publication, construed under the standard of a reasonable person in the position of the insured did not require "that the scope of 'publication' be limited to material sent to a third party" and that if the insurers wished to restrict the term in such manner, it should have explicitly stated so in the policy. *Valley Forge*, 233 Ill. 2d at 885-6.

Similarly, in this case, if West Bend desired to restrict the scope of the term "publication" to encompass the transmission of the biometric information at issue to a certain number or type of people or entities namely, the "public," it should have explicitly stated so in its Policy. As the Appellate Court in *Valley Forge* stated, "the insurer has the capacity to draft intelligible contracts, and the inexpert layperson will not be charged with the responsibility of formulating independent, technical, legal opinions regarding what coverage he is buying." *Id.* at 886. Therefore, in light of the foregoing, the Court agrees with Krishna that in the absence of a definition of "publication" in the Policy, the Court must turn to the "plain, ordinary, and popular meaning," of the term *Valley Forge*, 223 Ill. 2d 352 at 366 (citing *Outboard Marine Corp v. Liberty*, 154 Ill. 2d 90, 115 (1992)).

As such, the Court first examines the dictionary definition of the word "publish." The Merriam-Webster dictionary defines the word "publish" as "to make generally known; to make public announcement of; to disseminate to the public; to produce or release for distribution." Merriam Webster, (https://www.merriam-webster.com/dictionary/publish_.) Black's Law Dictionary defines "publish" as: "to make public; to circulate; to make known to people in general. To issue; to put into circulation. To utter; to present... an advising to the public or making known of something to the public for a purpose." 1233 Black's Law Dictionary (6th ed. 1990). Based on these two common definitions, the Court finds that the term "publication" in the West Bend Policy as understood by a reasonable person in the position of Krishna simply means the dissemination of information.

The parties do not address or dispute the second part of the relevant clause in the Policy, that is, as to the meaning of the terms "material" and "right to privacy." However, to fully ascertain the full meaning of the entire clause at issue, the Court will also construe the meaning of those terms under the reasonable insured standard. In doing so, the Court once again turns to the dictionary definitions of "material" and "right to privacy."

The Merriam-Webster dictionary defines "material" in part as: "something (such as data) that may be worked in to a more finished form... something used for or made the object of study... MATTER, writing *materials*" (https://www.merriam-webster.com/dictionary/material). Black's Law Dictionary does not define the term "materials" but rather provides the definition of "matter" which does not provide guidance in interpreting the term in the present context.[4]

The Merriam-Webster dictionary defines "privacy" as: "the quality or state of being apart from company or observation : SECLUSION; freedom from unauthorized intrusion * one's right to

[4] Black's Law Dictionary defines "matter" in part as: "Substantial facts forming basis of claim or defense; facts material to issue; substance as distinguished from form..." 978 Black's Law Dictionary (6th ed. 1990).

privacy... a private matter : SECRET." (https://www.merriam-webster.com/dictionary/privacy). Black's Law Dictionary defines "the right to privacy" as "the right of a person and the person's property to be free from unwarranted public scrutiny or exposure," and refers to the entry addressing invasion of privacy: "an unjustified exploitation of one's personality or intrusion into one' s personal activities," which includes "invasion of privacy by disclosure of private facts." Black's Law Dictionary 1350, 843 (8th ed. 2004).

As such, having set forth the foregoing construction of the relevant Policy language, the Court now turns to the relevant allegations in the Underlying Complaint. First, as to whether the allegations of the Underlying Complaint fall within or potentially within the meaning of "publication" as the "communication of information," the Court finds that they do. In the Underlying Complaint, Sekura alleges that "when customers first purchase services at [Krishna's salon] they are required to have their fingerprints scanned to enroll them in L.A. Enterprises, Inc.'s national membership database." Sekura Cmplt., at ¶ 23. Sekura further alleges that Krishna "stored Sekura's fingerprint data in its databases," and subsequently "disclosed [Sekura's] and the Class's biometric identifiers and biometric information to SunLync, an out-of-state third party vendor." *Id.* at ¶¶ 33, 55. The Court finds that these allegations fall within the scope of "publication" as Krishna's communication of information—Sekura's fingerprints—to SunLync.

As to the remaining terms, the Underlying Complaint further states:

> In late 2007, a biometrics company called Pay by Touch that provided major retailers throughout the State of Illinois with fingerprint scanners... filed for bankruptcy. That Bankruptcy was alarming to the Illinois Legislature because suddenly there was a serious risk that millions of fingerprint records—which, like other unique biometric identifiers, can be linked to people's sensitive financial and persona data—could now be sold, distributed, or otherwise shared through the bankruptcy proceedings without adequate protections for Illinois citizens. The bankruptcy also highlighted the fact that most consumers who had used that company's fingerprint scanners were completely unaware that the scanners were not actually transmitting fingerprint data to the retailer who deployed the canner, but rather to the now-bankrupt company, and that their unique biometric identifiers could now be sold to unknown third parties. Recognizing the "very serious need [for] protections for the citizens of Illinois when it [came to their] biometric information", Illinois enacted the BIPA in 2008."

Sekura Cmplt., at ¶ 15 (emphasis added).

In construing the relevant Policy language pursuant to the reasonable person in the position of the insured standard, the Court finds that giving the words in the Policy the plain, ordinary meaning attributed to them, that Krishna could reasonably construe the term "material" as including information which can encompass fingerprint data. Also, Krishna could reasonably construe the term "which violates a person's right to privacy" to encompass the unauthorized publication of sensitive personal information which is kept private—such as someone's fingerprints. The allegations unequivocally state that Krishna disclosed Sekura's fingerprints to SunLync, amongst other things, without Sekura's consent. In sum, the Court finds that the

foregoing allegations in the Underlying Complaint as to the nature of biometric information such as fingerprints fall squarely within the Policy's language of "publication which violates a person's right to privacy."

III. Whether the Exclusion Precludes Coverage

Having determined that the allegations of the Underlying Complaint fall within the Policy, the issue before the Court is whether the Exclusion precludes coverage.

In its "Sur-Reply Raising the Distribution of Material in Violation of Statutes," West Bend argues that if the Court were to find that the Underlying Complaint alleges publication, coverage is nonetheless precluded under the Policy's Exclusion which bars coverage in instances in which the insured has violated certain statutes. West Bend contends that in the Underlying Complaint Sekura alleges that Krishna violated the BIPA by disclosing biometric information to SunLync, and that this allegation falls squarely within the Exclusion, which explicitly excludes coverage for violations of a statute that prohibits or limits sending, transmitting, communicating or distributing information. According to West Bend, Illinois courts have routinely held that this Exclusion applies in cases involving violations of the TCPA, citing *G.M Sign, Inc.*, 2014 IL App (2d) 130593, *Illinois Casualty*, 2015 IL App (2d) 150016, and three-non Illinois state cases, *Big 5 Sporting Goods*, 957 F. Supp. 2d 1135, *Addison Automatics, Inc. v. Hartford Casualty Insurance Co.*, 2015 U.S. Dist. LEXIS 42526, and *Regent Insurance Co. v. Integrated Pain Management, S.C.*, 2016 U.S. Dist. LEXIS 130291 (E.D. Mo. 2016). Since, BIPA much as the TCPA, reasons West Bend, regulates the transmission of information, the Exclusion applies in this case.

Krishna counters that both *G.M Sign* and *Illinois Casualty* are distinguishable because in this case, the Policy's Endorsement trumps the Exclusion. West Bend's argument that the Exclusion precludes coverage in this case, according to Krishna, is misguided because the Endorsement in the Policies explicitly provides coverage for a civil proceeding "arising from a 'personal data compromise' or the 'violation of a governmental statute or regulation.'" Krishna thus contends that the Exclusion and the Endorsement cannot be reconciled, and as such, the Endorsement controls. Moreover, contends Krishna, *G.M. Sign* and *Illinois Casualty* are also distinguishable, as those cases did not involve policies containing the Endorsement presently at issue in the West Bend Policy.

Sekura contends that contrary to West Bend's argument, the Exclusion is inapplicable in this case. According to Sekura, the Exclusion precludes coverage for violations of statutes such as the TCPA and the CAN-SPAM Act which primarily regulate *methods* of sending large amounts of information through email, fax, or phone, or in other words, the mass distribution of "spam." Sekura notes that although the Exclusion contains "catch all" language, the Exclusion nonetheless specifically names statutes such as the TCPA and CAN-SPAM Act, and that as such, the Court should construe the "catch all" as addressing statutes which are similar to the TCPA and CAN SPAM ACT, citing *Stepnicka v. Grant Park 2 LLC*, 2013 IL App (1st) 112339-U ¶ 71. Sekura next asserts that in applying the foregoing reasoning, the language in the Exclusion is rendered ambiguous as to whether it precludes coverage for violations of statutes such as BIPA. Rather, posits Sekura, it is likely that the Exclusion bars coverage for statutes which are similar

to the TCPA, such as the Junk Fax Prevention Act of 2005, Pub. L. 109-21, 110 Stat. 359 (2005), or to state statutes which are analogues of the TCPA. The BIPA, asserts Sekura, bears no meaningful similarity to the TCPA or the CAN-SPAM Act because BIPA's purpose is not to regulate the distribution of "spam." Rather, urges Sekura, BIPA addresses the "retention, collection, destruction, sale, trade, lease, disclosure, re-disclosure, and storage" of biometric information. As such, the prohibition of unauthorized disclosure of biometric information, posits Sekura, is only one ancillary aspect of the comprehensive nature of an informed consent statute such as BIPA. In any event, notes Sekura, since the Exclusion is ambiguous as to what statutes it applies, the Court must construe such ambiguity in Krishna's favor, citing *Am. Econ. Ins. Co. v. DePaul Univ.*, 383 Ill. App. 3d 172, 178 (1st Dist. 2008).

Sekura joins Krishna's argument and contends that West Bend's reliance on *G.M Sign* and *Big 5 Sporting Goods* is misplaced. Sekura maintains that the court in *G.M. Sign* merely held that a similar exclusion precluded coverage for the sending of faxes by an insured in violation of the TCPA. As to *Big 5*, Sekura asserts that in that case, the allegations in the underlying complaint raised statutory privacy claims when the exclusion at issue explicitly precluded coverage for violations of a person's right to privacy as created by a state or federal act. Sekura argues that in the present case, unlike in *Big 5*, there is a provision which instead *explicitly* provides coverage for the publication of material that violates a person's right to privacy.

Additionally, Sekura posits that adopting West Bend's interpretation of the Exclusion leads to absurd results and would render interpretation of other provisions in the Policies nonsensical. According to Sekura, if the Court were to read the Exclusion as precluding coverage for the violation of *any* statute limiting communication of any kind, the Exclusion would preclude coverage for violations of statutes such as the Trade Secrets Act, the Federal Patent Act, the Federal Health Insurance Portability and Accountability Act and the Illinois Slander and Libel Act. As to the latter, Sekura notes that the Policy explicitly provides coverage for liability arising out of "oral or written publication of material that slanders or libels a person" and that in adopting West Bend's interpretation of the Exclusion as barring coverage for violation of any statute, would read the absurd result of nullifying the Policy's express coverage of libel and slander, citing *Ill. Farmers Ins. Co. v. Keyser*, 2011 IL App (3d) 90484, ¶ 15.

Finally, Sekura argues that her negligence claim arises independently of the alleged BIPA violation, and since the Exclusion does not preclude coverage for a negligence claim, West Bend has a duty to defend, citing *G.M. Sign, Inc.*, 2014 IL App (2d) 130593, ¶ 28; *Hooper v. Cnty. Of Cook*, 366 Ill. App. 3d 1, 6-7 (1st Dist. 2006); and *Illinois Tool Works*, 2015 IL App (1st) 132350, ¶ 34.

Before turning to the substance of the present issue, the Court addresses two ancillary matters. First, Sekura cites to *Stepnicka*, 2013 IL App (1st) 113229-U in support of her position. Orders entered pursuant to Illinois Supreme Court Rule 23 are "not precedential and not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. Sup. Ct., R. 23. Sekura however, has not argued, nor does the Court find, that her citation to *Stepnicka* was to support a contention of double jeopardy, *res judicata*, collateral estoppel or law of the case. As such, citation to *Stepnicka* is improper and a violation of Rule 23.

Second, West Bend relies extensively on non-Illinois state court opinions to support its arguments. The Court understands that due to the novel nature of the issue there is scant authority from Illinois state courts addressing it. Nevertheless, non-Illinois state court opinions are at best persuasive and are not binding on this Court. *See Mekertichian v. Mercedes-Benz U.S.A.*, 347 Ill. App. 3d 828, 835 (1st Dist. 2004); *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 26; *Cont'l Western Ins. Co. v. Knox County EMS, Inc.*, 2016 IL App (1st) 143083, ¶ 44.

Turning to the substance of the matter, the Court first agrees with Sekura that the cases West Bend cites in support of its argument are distinguishable and provide no aid in the Court's evaluation of the issue presently before it. *G.M. Sign* and *Illinois Casualty* are cases in which the underlying complaints alleged violations of the TCPA and in which the policies at issue contained an exclusion explicitly precluding coverage for TCPA violations. 2014 IL App (2d) 130593; 2015 IL App (2d) 150016. As to the other cases which West Bend cites in support of its argument, those cases present issues wholly different from the one at hand in this case. *Big 5 Sporting Goods* concerns whether an underlying complaint alleging violation of the California Song-Beverly Act of 1991 prohibiting corporations which accept credit cards from requesting cardholders' personal identification information fell within exclusions limiting or prohibiting the sending of information. 957 F. Supp. 2d 1135. *Addison Automatics* concerned whether allegations in the underlying lawsuit of unauthorized sending of faxes in violation of the TCPA fell within an exclusion precluding coverage explicitly for violations of the TCPA. 2015 U.S. Dist. LEXIS 42526. And *Regent Insurance* also involved allegations in the underlying lawsuit of violation of the TCPA in light of an exclusion in the relevant policies explicitly precluding coverage for violations of the TPCA. 2016 U.S. Dist. LEXIS 130291. Additionally, as the Court previously noted non-Illinois state cases which are not binding on this Court.

The issue at hand is whether the allegations of Krishna's violation of the BIPA in the Underlying Complaint fall within the Policy's Exclusion which bars coverage for violation of statutes that govern methods of sending materials or information. The Court turns once more to the relevant language in the Exclusion, which states:

> EXCLUSION-VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION
> ***
> This insurance does not apply to:
>
> DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES
>
> "Bodily injury" , "property damage", "personal injury" 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), including any amendment of or in addition to such law; or (2) the CAN-SPAM Act of 2003, including any amendment of or addition to such law; or (3) any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Next, the Court turns to the relevant language of the BIPA, which states as follows:

The General Assembly finds all of the following:

***

(g) The public welfare, security, and safety will be served by regulating the *collection, use, safeguarding, handling, storage, retention, and destruction* of biometric identifiers and information.

***

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:

(1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

740 ILCS 14/5-15 (West 2014).

A threshold issue is thus, whether BIPA is a statute that is in essence intended to prohibit or limit "the sending, transmitting, communicating or distribution of material or information." The Court finds that it is not.

In construing a statute, a court's task is to "ascertain and give effect to the legislature's intent," the most reliable indicator of which is "the language of the statute, which is to be given its plain and ordinary meaning." *Solon v. Midwest Med. Records Ass'n*, 236 Ill. 2d 433, 440 (2010). To determine the plain meaning of statutory terms, a court should "consider the statute in its entirety, the subject it addresses, and the apparent intent of the legislature in enacting it." *Id.*

The General Assembly included its findings within the text of the BIPA itself, and specifically stated its intent in enacting the statute: "Legislative findings; intent... the public welfare, security, and safety will be served by regulating the *collection, use, safeguarding, handling, storage, retention, and destruction* of biometric identifiers and information." 740 ILCS 14/5(g) (West 2014) (emphasis added). Absent from the stated regulatory purpose is any language indicating that the intent of the BIPA is to prohibit the transmission of biometric data. As the Illinois Appellate Court stated in *Rosenbach v. Six Flags Entm't Corp.*, the BIPA is a statute which "provide[s] the standards of conduct for private entities in connection with the *collection and possession* of biometric identifiers and biometric information." 2017 IL App (2d) 170317, ¶ 4 (emphasis added). The BIPA's provisions as to the "standards of conduct for private entities" handling biometric information is consistent with its nature as informed consent statute. In other words the BIPA does not explicitly prohibit the "sending, transmitting, communicating or distribution of material or information[,]" the BIPA merely provides that an entity wishing to disclose a customer's biometric information may do so, as long as the entity secures the customer's informed consent. 740 ILCS 14/15(d)(1) (West 2014).

Even if the BIPA were a statute intended to prohibit or limit the "sending, transmitting, communicating or distributing" of biometric information, the Court finds nonetheless that allegations of violations of BIPA do not fall within the Exclusion.

First, while West Bend would have the Court read the "catch all" clause at issue in isolation and without consideration of the rest of the language in the Exclusion to conclude that it applies to BIPA, the Court is not free to do so, as such an interpretation would be inconsistent with well-established principles applicable to the construction of contracts and insurance policies. If the Court were to interpret the "catch all" clause disregarding the rest of the relevant text in the Exclusion to conclude that it in fact bars coverage for violations of "any statute" prohibiting the distribution, the Court would effectively render the reminder of the text in the exclusion meaningless. The Exclusion specifically states that it applies to "violation[s] of statutes that govern e-emails, fax, phone calls or other *methods of sending* material or information" (emphasis added). If the Court were to adopt the interpretation of the "catch all" clause as West Bend proposes, the Court would in effect be nullifying the part of the Exclusion which states that it applies specifically to statutes governing *methods of* sending information. This is something the Court is not at liberty to do, as such interpretation "offends a well-settled principle of contract construction: a contract must not be interpreted in a manner that nullifies provisions of that contract." *Atwood v. St. Paul Fire & Marine Ins. Co.*, 363 Ill. App. 3d 861, 864 (2d Dist. 2006). "[A] court will not interpret an agreement in a way that would nullify its provisions or render them meaningless." *First Bank & Trust Co. v. Vill. of Orland Hills*, 338 Ill. App. 3d 35, 40 (1st Dist. 2003).

An examination of the entirety of the Exclusion further provides support for Sekura's contention that it is meant to exclude coverage for the violation of statutes which are specifically concerned with *the methods* of sending information. The Exclusion specifically lists the TCPA as one such statute. The intent of the TCPA is to "protect the privacy interests of residential telephone customers by restricting unsolicited automated telephone calls to the home, and facilitating interstate commerce *by restricting certain uses of fax machines and automatic dialers.*" *Standard Mutual Insurance Company v. Lay*, 2013 IL 114617, ¶ 27 (emphasis added).

Thus, in reading the totality of the text in the Exclusion, the Court agrees with Sekura that the BIPA is not a statute *governing the methods* of sending materials or information, such that an alleged violation of the BIPA would fall within the Exclusion. Tellingly, West Bend does not address how, in its view, the BIPA is a statute which governs *e-mails, fax, phone calls or other methods* of sending material or information as set forth in the Exclusion. Also, the Court's own examination of the BIPA did not reveal that the BIPA concerns the *methods* of sending biometric information, for example, through fax, e-mail or other means. Moreover, if West Bend wished the Exclusion to apply to any statute which *regulates* the distribution of information, regardless of whether the statute *governs methods* of sending the information, it should have drafted the Policy in such manner, as "the insurer has the capacity to draft intelligible contracts." *Gillen v. State Farm Must. Auto Ins. Co.*, 2015 Ill. 2d 381, 396 (2005). In conclusion, the Court finds that the allegations of the Underlying Complaint do not fall within the Exclusion.

Having found that the Exclusion does not apply and that the allegations in the Underlying Complaint falls squarely within the Policy's coverage, the Court need not address the issue of whether the Policy provides coverage under the Endorsement.

IV. Section 155 Sanctions

Lastly, Krishna contends that West Bend's denial of coverage is subject to sanctions pursuant to Section 155 of the Insurance Code. However the entirety of Krishna's argument in support of this contention is within the context of West Bend's argument as to the issue of the Endorsement. That is, according to Krishna, West Bend's contention that Krishna must have given notice to West Bend as to a "data compromise." Krishna asserts it was unable to notify West Bend, as Krishna itself had no notice of a data compromise until the Underlying Lawsuit was filed. As such, Krishna contends that West Bend is refusing coverage in an arbitrary manner, and that its behavior constitutes "capricious denial of coverage of the worst order and worthy of a Section 155 finding." Krishna's Cross Mot. at 15.

West Bend responds that since there is no coverage for the Underlying Lawsuit, Krishna cannot recover under Section 155, citing *West Bend Mutual Ins. Co. v. Rosemont Exposition Services, Inc.*, 378 Ill. App. 3d 478, 493 (1st Dist. 2007). Nevertheless, asserts West Bend, even if the Court were to find that Krishna is entitled to coverage, West Bend has engaged in a bona fide coverage dispute, as it merely relied on the Illinois Supreme Court's interpretation of applicable policy language, and has not engaged in vexatious and unreasonable conduct, citing *Baxter International, Inc. v. American Guarantee and Liability Insurance Co.*, 369 Ill. App. 3d 700, 710 (1s Dist. 2007); and *West Bend Mutual Insurance Company v. Norton*, 406 Ill. App. 3d 471, 745 (3d Dist. 2010).

Section 155 states:

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> > (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
> >
> > (b) $60,000;
> >
> > (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.
>
> (2) Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account

> of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.

215 ILCS 5/155 (West 2014).

Illinois policy discourages stingy coverage determinations through its estoppel doctrine and through the attorney's fees provision of the Illinois Insurance Code. *See Phila. Indemn. Ins. Co. v. Chi. Title Ins. Co.*, 771 F.3d 391, 401 (7th Cir. 2014). As such, section 155 provides an extracontractual remedy to policyholders whose insurer refuses to recognize liability or pay a claim under a valid insurance policy in a vexatious and unreasonable manner. *Lyon Metal Prods. L.L.C. v. Prot. Mut. Ins. Co.*, 321 Ill. App. 330, 338 (2d Dist. 2001). The Court makes such a determination only after considering the totality of the circumstances. *Mohr v. Dix Mut. County Fire Ins. Co.*, 143 Ill. App. 3d 989, 998 (4th Dist. 1986). As such, whether an insurer's actions are vexatious and unreasonable is a question of fact. *See Cook v. AAA Life Ins. Co.*, 2014 IL App (1st) 123700, ¶ 48.

The Court finds that Krishna's bare assertion that West Bend has engaged in what constitutes a "capricious" denial of coverage insufficient to meet the Section 155 standard. As such, the Court denies Krishna's motion as to this issue.

CONCLUSION

For the foregoing reasons, the Court denies West Bend's Motion for Summary Judgment as to its Complaint for Declaratory Judgment. The Court grants Krishna's Cross-Motion for Summary Judgment as to Count I of its Counterclaim and denies the Cross-Motion as to Count II of its Counterclaim.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSES VALDERRAMA-1968
MAY 14 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Franklin U. Valderrama

DATED: May 14, 2018

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

WEST BEND MUTUAL INSURANCE COMPANY
v.
KRISHNA SCHAUMBURG TAN, INC. et al.

No. 16 CH 7994

ORDER

THIS MATTER COMING FORTH ON PLAINTIFF WEST BEND MUTUAL INSURANCE COMPANY'S EMERGENCY MOTION FOR A RULE 304(a) FINDING REGARDING THE COURT'S MAY 14, 2018 MEMORANDUM OPINION AND ORDER, DUE NOTICE GIVEN, THE COURT FULLY ADVISED IN THE PREMISES;

IT IS HEREBY ORDERED THAT:

THE COURT INTENDING TO GRANT WEST BEND'S MOTION FOR SUMMARY JUDGMENT ON COUNT II OF KRISHNA'S COUNTERCLAIM AMENDS TODAY ITS MAY 14, 2018 MEMORANDUM OPINION AND ORDER TO INCLUDE THE FOLLOWING:

"THE COURT GRANTS WEST BEND'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT II OF KRISHNA'S COUNTERCLAIM."

THIS ORDER IS FINAL.

Attorney No.: 25017
Name: BRANDT | PRETZEL & STOUFFER, CHTD.
Atty. for: KRISHNA SCHAUMBURG TAN
Address: ONE SOUTH WACKER DRIVE, SUITE 2500
City/State/Zip: CHICAGO, IL. 60606
Telephone: 312-578-7457

ENTERED:
ENTERED
JUDGE FRANKLIN ULYSSES VALDERRAMA-1968
JUN 13 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dated:

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

West Bend Mutual Ins Co
v.
Keishna Schaumburg Tan, Inc. and Klaudia Sekura

No. 2016CH07994

ORDER

This cause coming before the court on plaintiff West Bend's motion for a Rule 304(a) Finding, due notice having been given and the court being fully advised in the premises,

It is Hereby Ordered that:

Plaintiff's motion is granted and the court hereby finds that there is no just reason to delay enforcement or appeal of its orders dated May 14, 2018 and June 13, 2018.

Attorney No.: 04927
Name: Tom Lucas
Atty. for: Plaintiff
Address: 33 N. LaSalle
City/State/Zip: Chicago, IL 60602
Telephone: 312-558-3977

ENTERED: ENTERED JUDGE FRANKLIN [illegible] 1968
Dated: AUG 28 2019
DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

66315-95-121 ID No. 04927

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WEST BEND MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. KRISHNA SCHAUMBURG TAN, INC. and KLAUDIA SEKURA, Defendants-Appellees.	Appeal from the Circuit Court of Cook County, Illinois Case No. 2016 CH 07994 The Hon. Franklin Valderrama Judge Presiding

NOTICE OF APPEAL

Plaintiff-Appellant, WEST BEND MUTUAL INSURANCE COMPANY, by its attorneys, McKENNA STORER, hereby appeals to the Appellate Court of Illinois for the First District from the following orders entered in this matter in the Circuit Court of Cook County, Illinois:

The Order of May 14, 2018 as amended on June 13, 2018, granting Defendant-Appellee, KRISHNA SCHAUMBURG TAN, INC.'s ("KRISHNA") Motion for Summary Judgment on Count I of its Counterclaim and denying Plaintiff-Appellant, WEST BEND MUTUAL INSURANCE COMPANY's ("WEST BEND") Motion for Summary Judgment on its Complaint for Declaratory Judgment. The May 14, 2018 and June 13, 2018 Orders were made appealable by the Circuit Court's finding no just reason to delay enforcement or appeal of these Orders as set forth in the order dated August 28, 2019.

By this appeal, Plaintiff-Appellant will ask the Appellate Court to reverse the Order of May 14, 2018 as amended on June 13, 2018 to the extent that it granted KRISHNA's Cross-Motion for Summary Judgment on Count I of KRISHNA's Counterclaim and denied summary judgment to WEST BEND, and remand the cause with directions to enter summary judgment in favor of WEST BEND and against KRISHNA on WEST BEND's Complaint for a Declaratory Judgment and on Count I of KRISHNA's Counterclaim, or for such other and further relief as the Appellate Court may deem proper.

Respectfully submitted,

By:

/s/ Thomas F. Lucas
Thomas F. Lucas, Attorney for Plaintiff-Appellant, WEST BEND MUTUAL INSURANCE COMPANY

Thomas F. Lucas, Esq.
McKenna Storer
33 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 558-3900
Firm I. D. No. 04927
Service@McKenna-law.com
tlucas@McKenna-law.com
kpurkey@McKenna-law.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, deposes and states that on **September 9, 2019**, there was electronically filed with the Clerk of the Circuit Court of Cook County, through File and Serve Illinois, the foregoing **Notice of Appeal**. The undersigned further states that he caused to be served a copy of the **Notice of Appeal** by File and Serve, Illinois and by email to the below listed Attorneys of Record on **September 9, 2019**. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Attorney for Defendant-Appellee, Krishna Schaumburg Tan, Inc.
Peter G. Syregelas, Esq.
Pretzel & Stouffer, Chartered
One South Wacker Drive
Suite 2500
Chicago, Illinois 60606
312/578-7548 (Phone)
312/346-8242 (Fax)
psyregelas@pretzel-stouffer.com

Attorneys for Defendant-Appellee, Klaudia Sekura
Jay Edelson, Esq.
Alex Tievsky, Esq.
Ryan Andrews, Esq.
Edelson PC
350 North LaSalle Street
13th Floor
Chicago, Illinois 60654
312/589-6370 (Phone)
312/589-6378 (Fax)
jedelson@edelson.com
Atievsky@edelson.com
Randrews@edelson.com

/s/ Thomas F. Lucas
Thomas F. Lucas, IL- No. 03122691
McKenna Storer
33 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
312/558-3900 (Phone)
tlucas@mckenna-law.com
Attorney for Plaintiff-Appellant

2020 IL App (1st) 191834

SIXTH DIVISION
March 20, 2020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 1-19-1834

WEST BEND MUTUAL INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant/Cross-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 16 CH 7994
KRISHNA SCHAUMBURG TAN, INC., and	)	
KLAUDIA SEKURA,	)	
	)	
Defendants-Appellees,	)	Honorable
	)	Franklin Ulyses Valderrama
(Krishna Schaumburg Tan, Inc., Cross-Appellant).	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Connors and Harris concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff West Bend Mutual Insurance Company (West Bend) appeals from the circuit court's partial grant of summary judgment in favor of defendants—its insured, Krishna Schaumburg Tan, Inc. (Krishna), and Klaudia Sekura, who sued Krishna for violating her statutory rights to privacy. Krishna sought coverage from West Bend in connection with that suit. West Bend agreed to defend Krishna under a reservation of rights, then filed the instant case, seeking a declaration that it had no duty to defend or indemnify Krishna. In its partial grant of summary

judgment for defendants, the circuit court found that West Bend had a duty to defend Krishna in the underlying lawsuit. Krishna has also filed a cross-appeal from the circuit court's grant of summary judgment in favor of West Bend on the issue of relief for a bad-faith denial of coverage under section 155 of the Insurance Code (215 ILCS 5/155 (West 2016)). For the following reasons, we affirm the rulings of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 A. The Policies

¶ 4 The policies relevant to this appeal were issued by West Bend to Krishna, effective December 1, 2014, to December 1, 2015, and December 1, 2015, to December 1, 2016 (policies). Although there are two separate policies, the relevant provisions are identical except where noted. Under the "Businessowners Liability Coverage Form," the policies provided that West Bend would pay "those sums that [Krishna] becomes legally obligated to pay as damages because of *** 'personal injury' *** to which this insurance applies" and that West Bend would have a duty to defend Krishna against "any 'suit' seeking those damages." The policies further provided that the coverage would apply to " 'personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you."

¶ 5 The policies defined "[p]ersonal injury" as:

> "[I]njury, other than 'bodily injury,' arising out of one or more of the following offenses:
>
> * * *
>
> d. Oral or written publication of material that slanders or libels a person or organization ***; or
>
> e. Oral or written publication of material that violates a person's right of

privacy."

¶ 6 The policies included an exclusion (violation of statutes exclusion) that provided as follows:

"EXCLUSION – VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION

* * *

This insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

'Bodily injury', 'property damage', 'personal injury' 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), including any amendment of or addition to such law; or

(2) The CAN-SPAM ACT of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information."

¶ 7 The 2015-2016 policy also included an endorsement titled "Illinois Data Compromise Coverage" (data compromise endorsement). That endorsement provided "an Additional Coverage" for "personal data compromise" under certain conditions. The definition section of that endorsement read as follows:

> 7. 'Personal Data Compromise' means the loss, theft, accidental release or accidental publication of 'personally identifying information' or 'personally sensitive information' as respects one or more 'affected individuals.' *** This definition is subject to the following provisions:
>
> * * *
>
> b. 'Personal Data Compromise' includes disposal or abandonment of 'personally identifying information' or 'personally sensitive information' without appropriate safeguards such as shredding or destruction, subject to the following provisions:
>
> 1) The failure to use appropriate safeguards must be accidental and not reckless or deliberate."

¶ 8 The parties' arguments focus on these three provisions of the policies: the coverage for suits seeking damages for personal injury based on publication of material that violates a right to privacy, the violation of statutes exclusion, and the data compromise endorsement.

¶ 9 B. The Underlying Lawsuit

¶ 10 Ms. Sekura filed her proposed class action complaint against Krishna in April 2016, alleging in part that Krishna had violated her rights and the rights of those similarly situated under the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq.* (West 2014)). According to Ms. Sekura's complaint, Krishna is an Illinois corporation and a franchisee of L.A. Tan Enterprises, Inc. Ms. Sekura alleged that when someone first purchases a service at Krishna, that customer is enrolled in the L.A. Tan national membership database to allow them to use their membership at any L.A. Tan location. Ms. Sekura further alleged that "Krishna Tan's customers are required to have their fingerprints scanned" for the purpose of verifying their identification.

Ms. Sekura alleged that she signed up for a membership with Krishna in April 2015, that she was enrolled by Krishna in the L.A. Tan corporate membership database at that time, and that Krishna required her to provide a scan of her fingerprint. Ms. Sekura further stated that she was never provided with, nor signed, a written release allowing Krishna to disclose her biometric data to any third party.

¶ 11 Ms. Sekura alleged that Krishna violated the Act by, among other things, disclosing her fingerprint data to an out-of-state third-party vendor, SunLync, without her consent in violation of section 15(d)(1) of the Act (740 ILCS 14/15(d)(1) (West 2014)).

¶ 12 Ms. Sekura alleged three claims in total: (1) violation of the Act, for which she sought an injunction, statutory damages, and attorney fees; (2) unjust enrichment, for which she sought restitution; and (3) negligence based on Krishna's violation of the Act, for which she sought damages for mental anguish and mental injury.

¶ 13 C. Procedural History

¶ 14 On June 14, 2016, West Bend filed its complaint for declaratory judgment against Krishna and Ms. Sekura. According to the complaint, Krishna tendered Ms. Sekura's complaint to West Bend, seeking a defense and indemnity under its policies, and West Bend agreed to defend Krishna under a reservation of rights. West Bend then sought a declaration that it had no such duties. West Bend argued that Ms. Sekura's lawsuit was not covered by the policies either because (1) her underlying allegations did not describe an "advertising injury" or a "personal injury," (2) her allegations did not qualify for coverage under the data compromise endorsement, and (3) in the alternative, coverage for the underlying lawsuit was barred by the policies' violation of statutes exclusion.

¶ 15 On January 18, 2017, Krishna filed an answer and counterclaim in response to West Bend's

complaint. In the counterclaim, Krishna sought a declaration that West Bend had a duty to defend it in the underlying lawsuit and also counterclaimed for attorney fees under section 155 of the Insurance Code (215 ILCS 5/155 (West 2016)). The counterclaim alleged that Ms. Sekura's complaint "clearly create[d] the potential that West Bend ha[d] an obligation to provide a defense to Krishna," that West Bend's argument to the contrary had no good faith basis in law or fact, and that West Bend's refusal to recognize its obligation to defend Krishna was vexatious and unreasonable.

¶ 16 In the fall of 2017, the parties filed cross-motions for summary judgment. Following a hearing on those motions, on May 14, 2018, the circuit court issued a 22-page written order. The court denied West Bend's motion in part and granted Krishna's motion in part, finding that West Bend had a duty to defend Krishna against Ms. Sekura's claims. The circuit court found that those claims fell within the policies' coverage for "personal injury" as a "publication which violates a person's right to privacy" and that the noted exclusion did not preclude coverage. The court declined to reach the issue of whether the endorsement applied.

¶ 17 The circuit court denied Krishna's motion for summary judgment with respect to its request for damages pursuant to section 155 of the Insurance Code and granted West Bend's motion for summary judgment on this counterclaim, finding that "Krishna's bare assertion that West Bend ha[d] engaged in what constitute[d] a 'capricious' denial of coverage [wa]s insufficient to meet the [s]ection 155 standard."

¶ 18 II. JURISDICTION

¶ 19 West Bend appealed, and Krishna cross-appealed. Initially, this court dismissed those appeals for a lack of jurisdiction because the case was still pending relative to the duty to indemnify. On August 28, 2019, the circuit court granted West Bend's request for a finding under

Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason to delay enforcement or appeal of its orders dated May 14, 2018. On September 9, 2019, West Bend filed its notice of appeal from the circuit court's orders of May 14, 2018. Krishna filed its notice of cross-appeal from the same orders on the same day. We thus have jurisdiction pursuant to Rule 304(a).

¶ 20 III. ANALYSIS

¶ 21 This case was resolved in the circuit court on cross-motions for summary judgment. "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). We review *de novo* a circuit court's rulings on cross-motions for summary judgment. *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22. This is also our standard of review here because this case turns on interpreting the policies, which is a question of law that we always review *de novo*. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292 (2001).

¶ 22 A. West Bend's Appeal

¶ 23 In its appeal, West Bend argues that the court erred in finding it had a duty to defend Krishna because (1) the allegations in the underlying complaint do not come within the policies' definition of "personal injury," (2) even if the allegations in the underlying complaint do allege a "personal injury," the violation of statutes exclusion applies to bar coverage, and (3) the data compromise endorsement is inapplicable to the underlying allegations.

¶ 24 In response, Krishna and Ms. Sekura argue that the circuit court's finding a duty to defend was proper because (1) the underlying allegations do potentially fall under the policies' definition of "personal injury," (2) the violation of statutes exclusion does not apply, and (3) the data

compromise endorsement does apply and also provides coverage. Because the issue of the duty to defend can be resolved based on the first two issues, we do not reach this third issue on West Bend's appeal.

¶ 25 1. The Underlying Complaint Alleged a Personal Injury

¶ 26 We first consider whether the allegations in Ms. Sekura's complaint potentially come within the policies' definition of "personal injury." "Because an insurance policy is a contract, the rules applicable to contract interpretation govern the interpretation of an insurance policy." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). The court's primary objective in interpreting an insurance policy is "to ascertain and give effect to the intentions of the parties as expressed by the language of the policy." *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362 (2006). "To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy" and the allegations "must be liberally construed in favor of the insured." *Id.* at 363. If the underlying allegations "fall within, or potentially within, the policy's coverage, the insurer is obligated to defend its insured." *Id.*

¶ 27 West Bend's policies provided that West Bend would defend Krishna in a lawsuit that alleged a "personal injury," which the policies defined as "injury, other than 'bodily injury,' arising out of *** oral or written publication of material that violates a person's right of privacy." The parties argue, and we agree, that whether West Bend has a duty to defend specifically turns on the meaning of "publication" in the policies.

¶ 28 In the underlying complaint, Ms. Sekura alleged that Krishna violated the Act by providing her fingerprint data to a single third-party vendor, SunLync. The parties agree that this is the allegation that could potentially be considered "publication." The policies do not define the term

"publication." "Undefined terms will be given their plain, ordinary and popular meaning, *i.e.*, they will be construed with reference to the average, ordinary, normal, reasonable person." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 (2005). "If the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer." *Id.*

¶ 29 West Bend relies on our supreme court's decision in *Valley Forge* to support its argument that "publication" requires communication of information to the public at large, not simply a single third party, and that Ms. Sekura's allegation therefore does not charge Krishna with a "publication." We reject West Bend's argument that in *Valley Forge* our supreme court "defined" "publication" in the narrow manner that West Bend contends is controlling.

¶ 30 The underlying plaintiff in *Valley Forge* brought a proposed class action lawsuit against the insured for violating the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227 *et seq.* (2000)) by faxing advertisements to the proposed plaintiffs "without first obtaining the recipients' permission to do so." *Valley Forge*, 223 Ill. 2d at 355. The insurers argued that they had no duty to defend the insured in the underlying lawsuit because the claims in that lawsuit were not covered by their policies as an "advertising injury." *Id.* at 358. The policies defined an "advertising injury" as "written *** publication *** of material that violates a person's right of privacy." (Internal quotation marks omitted.) *Id.* at 364.

¶ 31 The circuit and appellate courts found that the insurers had a duty to defend. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 359 Ill. App. 3d 872, 875 (2005). Before the appellate court, the parties argued about the definition of "publication," specifically with respect to what scope of distribution was required. The insurers argued that " 'publication' in the context of the polic[ies] require[d] injurious communication to a third party," not simply an injurious

communication to the party itself. *Id.* at 885.

¶ 32 On appeal, our supreme court also looked to the dictionary definitions of the term "publication." The court acknowledged that the insurers had "abandoned" their argument that the underlying allegations "did not constitute 'publication,' " but decided to discuss the issue nonetheless:

> "[I]n the interest of coherently interpreting all the relevant terms of the 'advertising injury' provision, we observe that [the underlying] complaint alleges conduct by [the insured] that amounted to 'publication' in the plain and ordinary sense of the word. By faxing advertisements to the proposed class of fax recipients as alleged in [the underlying] complaint, [the insured] published the advertisements in both the general sense of communicating information to the public and in the sense of distributing copies of the advertisements to the public." *Id.* at 367.

¶ 33 West Bend seizes on this communicating "to the public" language in *Valley Forge* to argue that our supreme court conclusively "defined 'publication' to mean the communication or distribution of information to the public." Putting aside whether the discussion in *Valley Forge* is a holding or is mere *dicta*, it is clear to us that the supreme court did not define the term "publication" as being limited to requiring communication to any number of persons. Rather, the court recognized that "publication" included the actions alleged in the underlying complaint—sending numerous unsolicited faxes to the plaintiffs in the underlying case. Our supreme court specifically recognized that the complaint in the underlying case alleged a violation of the "fax recipient's privacy interest in seclusion" and that there was "publication" by "faxing advertisements to the proposed class of fax recipients." *Id.* at 366-67.

¶ 34 As the circuit court observed in this case, both the appellate and supreme courts in *Valley*

Forge looked to what a reasonable person would understand the plain, ordinary meaning of the word "publication" to be and consulted dictionary definitions and common understanding. *Id.* at 367; *Valley Forge*, 359 Ill. App. 3d at 885. As our supreme court recognized in *Valley Forge*, where policy terms are not defined, the courts must give them their "plain, ordinary, and popular meanings," consulting "dictionary definitions." *Valley Forge*, 223 Ill. 2d at 366 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 115-17 (1992)).

¶ 35 Common understandings and dictionary definitions of "publication" clearly include both the broad sharing of information to multiple recipients that the court viewed a "publication" in *Valley Forge* and a more limited sharing of information with a single third party. The Oxford English Dictionary, for example, defines "publication" as both "[t]he action of making something publicly known" and "*Law.* Notification or communication to a third party or to a limited number of people regarded as representative of the public." Oxford English Dictionary (3d ed. 2007). Black's Law Dictionary defines "publication" as "[g]enerally, the act of declaring or announcing to the public" and, in the defamation context, as "communication of defamatory words to someone other than the person defamed" and says specifically that " '[a] letter sent to a single individual is sufficient.' " Black's Law Dictionary (11th ed. 2019) (quoting Rollin M. Perkins & Ronald N. Boyce, Criminal Law 489 (3d ed. 1982)).

¶ 36 To the extent that West Bend suggests that "publication" means something different in the context of defamation than it does in the context of privacy rights, the policies use the exact same terminology of "[o]ral or written publication of material" as the basis for both a defamation-related injury and a privacy-related injury. These two definitions are immediately sequential in the policies. When construing insurance policies, " 'it is a general rule that absent language to the contrary, a word or phrase in one part is presumed to have the same meaning when it is used in

another part of a policy.' " *Universal Underwriters Insurance Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 19 (quoting *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 123 (1973)). This should be particularly true where, as here, the two policy provisions are in the same section of the policies.

¶ 37 We also note that if West Bend wished the term "publication" to be limited to communication of information to a large number of people, it could have explicitly defined it as such in its policy. But it did not, choosing instead not to provide any definition of "publication." "There is a strong presumption against provisions that easily could have been included in the contract but were not." *Wright v. Chicago Title Insurance Co.*, 196 Ill. App. 3d 920, 925 (1990).

¶ 38 The parties do not dispute that Ms. Sekura alleges facts that fit within the rest of the "personal injury" definition—that there was a provision of material in violation of her right to privacy. Because a common understanding of "publication" encompasses Krishna's act of providing Ms. Sekura's fingerprint data to a third party, there also exists potential that Ms. Sekura's claim against Krishna is covered by the policies. As such, West Bend has a duty to defend Krishna against the underlying complaint pursuant to the "personal injury" coverage provision.

¶ 39 2. The Violation of Statutes Exclusion Does Not Apply to Bar Coverage

¶ 40 West Bend next argues that, even if we find Ms. Sekura's allegations come within the "personal injury" provision of the policies, coverage is barred by the violation of statutes exclusion. This exclusion specifically bars coverage for personal injuries "arising directly or indirectly out of any action or omission that violates or is alleged to violate" the TCPA, the CAN-SPAM Act of 2003 (15 U.S.C. § 7701 *et seq*. (2012)), or "[a]ny statute, ordinance or regulation *** that prohibits or limits the sending, transmitting, communication or distribution of material or information."

¶ 41 West Bend argues that this exclusion applies because the Act is a statute that "prohibits or limits the sending *** of material or information." West Bend relies on section 15(d) of the Act, which provides that "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless" at least one of four specific conditions are met. 740 ILCS 14/15(d) (West 2014). West Bend claims that "[t]he only way to read" this section is that it "limits or prohibits the communication of biometric information unless the conditions set forth therein are met."

¶ 42 The violation of statutes exclusion read in its entirety makes clear, however, that it was not intended to bar coverage for a violation of a statute like the Act. In fact, the exclusion is meant to bar coverage for the violation of a very limited type of statute that is evidenced first from the exclusion's title which West Bend conveniently shortens to "Violation of Statutes." The title, as a whole, is: "Violation of Statutes *That Govern E-Mails, Fax, Phone Calls or Other Method of Sending Material or Information*." (Emphasis added.) The title makes clear that the exclusion applies to statutes that govern certain *methods* of communication, *i.e.*, e-mails, faxes, and phone calls, not to other statutes that limit the sending or sharing of certain information.

¶ 43 The text of the exclusion can easily be read consistently with the title. The exclusion *explicitly* applies to the TCPA and the CAN-SPAM Act—both statutes that regulate certain *methods* of communication. See, *e.g.*, *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 27 ("The purposes of the TCPA are to protect the privacy interests of residential telephone customers by restricting unsolicited automated telephone calls to the home, and facilitating interstate commerce by restricting certain uses of fax machines and automatic dialers."); *Martin v. CCH, Inc.*, 784 F. Supp. 2d 1000, 1004 (N.D. Ill. 2011) (noting that the

purpose of the CAN-SPAM Act is to, in part, " 'prohibit senders of [e-mail] for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages' " (quoting S. Rep. No. 108-102, at 1 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2348). So only after listing two specific statutes—the violation of which the exclusion applies to—each with a clear purpose of governing methods of communication such as e-mails and phone calls, does the exclusion include a final catch-all provision for a statute "that prohibits or limits the sending, transmitting, communication or distribution of material or information." In light of the title and the two specific statutes listed in the exclusion, the more reasonable reading of this third item is that it is meant to encompass any State or local statutes, rules, or ordinances that, like the TCPA and the CAN-SPAM Act, regulate *methods* of communication.

¶ 44 We are also unconvinced by West Bend's argument that the exclusion was meant to apply to statutes that "lend themselves to class action litigation [and] pose serious insurance risks." Nothing in the exclusion's language suggests that was the purpose of the exclusion and if West Bend wanted the exclusion to have such an application, it could have written it so. As we stated above, "[t]here is a strong presumption against provisions that easily could have been included in the contract but were not." *Wright*, 196 Ill. App. 3d at 925.

¶ 45 In short, the violation of statutes exclusion applies to bar coverage to violations of statutes that regulate *methods* of communication. The Act says nothing about methods of communication. It instead regulates "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (West 2014). As Ms. Sekura's complaint alleges a violation of the Act, this exclusion does not apply to bar coverage to Krishna.

¶ 46 3. We Need Not Reach the Data Compromise Endorsement Issue

¶ 47 Because Ms. Sekura's allegations against Krishna potentially fall within the policies' definition of "personal injury" and the violation of statutes exclusion does not apply to bar coverage, we need not consider whether the data compromise endorsement would also provide coverage. West Bend has a duty to defend Krishna against Ms. Sekura's lawsuit, and the circuit court correctly granted summary judgment in favor of defendants on that issue.

¶ 48 B. Krishna's Cross-Appeal

¶ 49 On cross-appeal, Krishna argues that the circuit court erred in finding that West Bend did not violate section 155 of the Insurance Code (215 ILCS 5/155 (West 2016)). Initially, the parties disagree about the standard of review on this issue. Krishna argues that we should review this issue *de novo*, while West Bend argues that an abuse of discretion standard should be used. As we recently recognized in *Evergreen Real Estate Service, LLC v. Hanover Insurance Co.*, 2019 IL App (1st) 181867, ¶¶34-35, Illinois courts have used both standards in reviewing section 155 rulings. See *id.* (and cases cited therein). Like the *Evergreen* court, however, we need not decide which standard of review is appropriate because, here, under either standard, we find the circuit court did not err in denying Krishna's request for relief under section 155.

¶ 50 Section 155 provides "that an insured may collect attorney fees and costs where an insurer creates a 'vexatious and unreasonable' delay in settling a claim." *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 31 (quoting 215 ILCS 5/155(1) (West 2010)).When deciding whether an insurer's conduct was vexatious and unreasonable, "[a] court should consider the totality of the circumstances" "including the insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his property." (Internal quotation marks omitted.) *Id*. But where a *bona fide* coverage dispute exists, section 155 costs and

sanctions are inappropriate. *Id.* ¶ 32. A *bona fide* dispute "is on that is real, actual, genuine, and not feigned." (Internal quotation marks omitted.) *Id.* If an insurer reasonably relied upon such a *bona fide* dispute, that insurer did not act vexatiously or unreasonably. *Id.*

¶ 51 On appeal, Krishna only argues for section 155 damages based on the data compromise endorsement, apparently conceding that West Bend's other defenses to coverage, while not successful, were *bona fide*. Neither the circuit court nor this court have considered the issue of whether coverage is even available under the endorsement.

¶ 52 Under the endorsement, coverage is provided for a civil suit based on a "personal data compromise." The endorsement defines "personal data compromise" as "the loss, theft, accidental release or accidental publication of 'personally identifying information' or 'personally sensitive information.' " The endorsement also provides that "personal data compromise" "includes disposal or abandonment of 'personally identifying information' or 'personally sensitive information' without appropriate safeguards such as shredding or destruction." The endorsement also states that "[t]he failure to use appropriate safeguards must be accidental and not reckless or deliberate." The endorsement does not define "accidental," but the parties point out that the term "accident" has been consistently defined by Illinois courts as "an unforeseen occurrence." *Aetna Casualty & Surety Co. v. Freyer*, 89 Ill. App. 3d 617, 619 (1980).

¶ 53 Krishna now argues that there is no *bona fide* defense to coverage under this endorsement. Krishna's articulation as to why the endorsement provides coverage was not put forward until its reply brief on the cross-appeal. For that reason alone, we could disregard it. See Ill. S. Ct. R. 341(h)(7) ("points not argued are forfeited and shall not be raised in the reply brief"). We choose to address this argument, as forfeiture is a limitation on the parties, not on the court. *City of Highland Park v. Bryan*, 2019 IL App (2d) 180662, ¶ 19. But we note that Krishna's delay in

articulating this understanding of the endorsement undermines any suggestion this is an obvious and irrefutable interpretation of the endorsement.

¶ 54 Krishna's argument for coverage under the endorsement is that Ms. Sekura's complaint alleges a "personal data compromise" by "disposal" of Ms. Sekura's personally identifying or personally sensitive information to SunLync without appropriate safeguards. According to Krishna, the appropriate "safeguards" would have been following the data protection requirements of the Act, and the complaint alleges that the negligent failure to take note of changes in the law was "accidental."

¶ 55 Krishna's interpretation of the endorsement hinges on an interpretation of disposal as including the deliberate sharing of Ms. Sekura's data with SunLync. It also would require an interpretation that "safeguards such as shredding or destruction" includes following new legal requirements. A court would have to also find that "accidental" means the failure to keep up on the law. None of these interpretations are necessarily correct and West Bend has compelling arguments to the contrary.

¶ 56 For example, West Bend argues that there is nothing in Ms. Sekura's complaint that suggests that the lack of safeguards in this transfer of her biometric information was "accidental." Instead, as West Bend points out, Krishna was alleged to have collected and used Ms. Sekura's biometric data as part of its membership program and thus there was nothing "unforeseen" about it. Certainly, keeping up on the law is different than shredding or destroying confidential data so it is not at all clear that following the Act is a "safeguard" in the sense that word is used in the endorsement. In short, there is nothing in this interpretation that is so compelling that it renders West Bend's defense frivolous or without merit. It is clear to us that West Bend has a *bona fide* argument for why the endorsement does not apply. Therefore, fees, costs, and damages under

section 155 are not appropriate.

¶ 57 VI. CONCLUSION

¶ 58 Ms. Sekura's allegations that Krishna violated the Act when it provided her fingerprint data to a third party potentially fall within the policies' definition of "personal injury," and Krishna is not barred from coverage by the violation of statutes exclusion. West Bend thus has a duty to defend Krishna in the underlying lawsuit. Additionally, there is a *bona fide* dispute as to whether Krishna would be entitled to coverage under the data compromise endorsement; therefore, Krishna

No. 125978

IN THE
SUPREME COURT OF ILLINOIS

WEST BEND MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

KRISHNA SCHAUMBURG TAN, INC. and KLAUDIA SEKURA,

Defendants-Appellees.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

WEST BEND MUTUAL INSURANCE CO.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 125978
	)	
KRISHNA SCHAUMBURG TAN, INC., et al.,	)	
	)	
Defendants-Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on November 6, 2020, there was electronically filed and served upon the Clerk of the above court the Brief of Plaintiff-Appellant. Service of the Brief will be accomplished by email as well as electronically through the filing manager, File and Serve Illinois, to the following counsel of record:

Richard M. Burgland, Esq.
Pretzel & Stouffer, Chartered
One South Wacker Drive
Suite 2500
Chicago, Illinois 60606
rburgland@pretzel-stouffer.com

Jay Edelson, Esq.
Alex Tievsky, Esq.
Ryan Andrews, Esq.
Benjamin S. Thomassen, Esq.
Edelson PC
350 North LaSalle Street, 13th Floor
Chicago, Illinois 60654
Jedelson@edelson.com
Atievsky@edelson.com
Randrews@edelson.com
Bthomassen@edelson.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Thomas F. Lucas
Thomas F. Lucas

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Thomas F. Lucas
Thomas F. Lucas