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

BRIEF AND ARGUMENT OF DEFENDANT-APPELLEE KLAUDIA SEKURA

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NATURE OF THE ACTION

This insurance coverage dispute concerns a lawsuit brought by Defendant-Appellee Klaudia Sekura, who alleges that Defendant-Appellee Krishna Schaumburg Tan, Inc. ("Krishna Tan") collected, used, and disclosed her private biometric data in violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*. After Krishna Tan sought coverage from its insurer, Plaintiff-Appellant West Bend Mutual Insurance Company filed a declaratory action in the Circuit Court seeking an order establishing that it had no duty to defend or indemnify Krishna Tan. But because the applicable insurance policy covers an insured's "oral or written publication of material in violation of a person's right of privacy" and because Ms. Sekura alleges that Krishna Tan disclosed her biometric data to a third party, both the Circuit Court and, on review, the Appellate Court held that Ms. Sekura's case falls or potentially falls within the scope of coverage and was not covered by the policy's exclusion of certain statutory claims. The lower courts therefore held that West Bend had a duty to defend Krishna Tan and granted/affirmed summary judgment in favor of Krishna Tan and Ms. Sekura. West Bend now appeals the order of the Appellate Court. Because the matter was initially resolved on cross-motions for summary judgment, no questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether an insurance policy covering the "publication of

material in violation of a person's right of privacy" creates a duty to defend an insured against a lawsuit alleging that the insured disclosed a person's biometric data to a third party in violation of the Biometric Information Privacy Act.

2. Whether claims brought under the Biometric Information Privacy Act fall within an insurance policy exclusion that bars coverage for claims brought under statutes "that govern[] e-mails, fax, phone calls or other methods of sending material or information."

STATEMENT OF FACTS

In the class action lawsuit underlying this coverage action, Ms. Sekura alleged that the insured, Krishna Tan, collected, stored, and disclosed her and others' fingerprints in violation of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.* (C 26-42.) Specifically, Ms. Sekura alleged that when she purchased a tanning membership from Krishna Tan, it scanned her fingerprint and transmitted her biometric information to third parties, including an out-of-state vendor. (C 33-34.) Because Krishna Tan did not obtain informed written permission to collect, use, and disclose her biometric data, Ms. Sekura sued under the BIPA. (C 37-39.) She also raised common law claims for negligence and unjust enrichment. (C 39-41.)

Krishna Tan sought coverage under a Businessowners Liability Policy (the "Policy") that it had purchased from West Bend. (C 21-22.) West Bend, in

turn, filed a declaratory judgment action against Krishan Tan and Ms. Sekura as a necessary party, asking that the Circuit Court find that it had no duty to defend or indemnify Krishna Tan in Ms. Sekura's case. (C 15-25.) Following a short discovery period, West Bend and Krishna Tan filed cross-motions for summary judgment on the issue of coverage. (C 525-36, 557-73.) Krishna Tan additionally sought summary judgment on its counterclaim for sanctions under Section 155 of the Insurance code, 215 ILCS 5/155. (C 572-73.)[1] Ms. Sekura joined Krishna Tan's motion on the issue of coverage. (C 587-90.)

On May 14, 2018, the Circuit Court granted summary judgment on the issue of coverage in favor of Krishna Tan. (A 22.) The Circuit Court made two relevant holdings. First, because Ms. Sekura alleged that Krishna Tan disclosed her biometric data to a third party, her lawsuit fell within the Policy's coverage for suits alleging an insured's "publication of material that violates a person's right of privacy." (A 14-15.) Second, Ms. Sekura's case, which is anchored by a claim under the BIPA, did not fall within the Policy's Exclusion for an insured's violation of statutes that "govern[] e-mails, fax, phone calls or other methods of sending material or information," such as the Telephone Consumer Protection Act ("TCPA") and Controlling the Assault of

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[1] Section 155 of the Insurance Code provides that where "there is in issue the liability of a company on a policy … of insurance … and it appears to the court that such action … is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs," along with other monetary relief. 215 ILCS 5/155(1).

Non-solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"). (A 15-20.)

On appeal, the First District Appellate Court affirmed the decision of the Circuit Court.[2] On the primary issue of coverage, the Appellate Court agreed that because Ms. Sekura alleged that Krishna Tan provided her biometric data to a third party, her lawsuit was potentially covered by the Policy and, in turn, West Bend had a duty to defend under the Policy's "personal injury" coverage. (A 39 ¶ 38.) As to the Policy's statutory exclusion, the Appellate Court agreed that because the BIPA "says nothing about methods of communication," the "exclusion does not apply to bar coverage to Krishna." (*Id.* ¶ 45.)

On September 30, 2020, this Court allowed West Bend's petition for leave to appeal the Appellate Court's decision.

ARGUMENT

To determine an insurer's duty to defend, a court compares the allegations of an underlying complaint to the policy. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (citations omitted). In so doing, the allegations "must be liberally construed in favor of the insured." *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 363 (2006). "If the facts alleged in the underlying complaint fall within, or potentially within,

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[2] The First District addressed the merits of West Bend's appeal following a Rule 304(a) finding entered by the Circuit Court on August 28, 2019. (A 24; A 33-34 ¶ 19.)

the policy's coverage, the insurer's duty to defend arises." *Pekin*, 237 Ill. 2d at 455. (citing *American States Insurance Co. v. Koloms,* 177 Ill. 2d 473, 479 (1997)).

Here, the Appellate Court correctly held that because Ms. Sekura's lawsuit alleges that Krishna Tan communicated her private biometric data to a third party without her informed written consent, she alleges a "publication" offense potentially covered by West Bend's Policy. (A 39 ¶ 38.) The Policy covers an insured's "oral or written publication of material that violates a person's right of privacy." (C 194, C 319.) Because all parties agree that Ms. Sekura's lawsuit alleges Krishna Tan's disclosure of "material" (her biometric data) in a manner that allegedly violated her right of privacy (as set out in the BIPA), the only question is whether that disclosure constitutes a "publication" under the Policy. Resolution of that issue is straightforward because the common, ordinary meaning of that term covers communications to third parties—a conclusion that has been recognized by multiple courts from multiple states in multiple insurance coverage disputes. Further, while the Policy contains an exclusion barring coverage for an insured's conduct that is alleged to violate the TCPA, CAN-SPAM Act, or other statutes that "govern e-mails, fax, phone calls or other methods of sending material or information" (the "Policy Exclusion"), (C 170, C 323), the BIPA is a statute that governs none of those things. As such, and particularly under the liberal construction required to be given to the Policy and underlying complaint in

Krishna Tan's favor, there's little question that the Appellate Court—like the Circuit Court before it—reached the correct result.

West Bend once again makes two arguments on appeal, but neither supports reversal. First, it argues that the term "publication," as used in the Policy's "Invasion of Privacy" coverage, can only mean broad, generalized "to the public" disseminations. But as discussed herein, West Bend's position is contrary to an ordinary, common understanding of the term and has no support in the law (including in this Court's decision in *Valley Forge Insurance Co.*, 223 Ill. 2d 352) or the Policy's text. At best, West Bend presents a case of an ambiguous contract term that, under Illinois law, must be construed in favor of coverage. Second, West Bend argues that even if Ms. Sekura's lawsuit against Krishna Tan alleges a covered "publication" offense, the Appellate Court erred in holding that her claim does not fall within the Policy exclusion for certain statutory violations. But West Bend's suggestion that the Appellate Court misinterpreted the Exclusion's reach is fatally selective; contrary to the approach taken by the Appellate Court (and the Trial Court before it), West Bend still refuses to account for the entirety of the Exclusion's text and, in turn, presents no reason to stray from the Appellate Court's commonsense interpretation.

For all these reasons this Court should affirm the Appellate Court's holding that the Policy potentially covers Ms. Sekura's lawsuit.

I. MS. SEKURA'S COMPLAINT ALLEGES A COVERED "PUBLICATION" OFFENSE.

West Bend's Policy provides coverage for personal injuries "arising out of [an insured's] . . . [o]ral or written publication of material that violates a person's right of privacy." (C 194, C 319.) Here, Ms. Sekura's lawsuit alleges just such a covered "publication" under the Policy: that Krishna Tan disclosed her fingerprint data to SunLync, an out-of-state third-party vendor, without her consent. (C 31-33.)[3] As the Appellate Court correctly held, these allegations "potentially fall within the [Policy's] definition of 'personal injury' . . . [and] West Bend thus has a duty to defend Krishna in the underlying lawsuit." (A 45 ¶ 58.)

West Bend disagrees. As it did before the Trial and Appellate Courts, West Bend relies on a strict and limiting view of this Court's decision in *Valley Forge*, arguing that any covered publication offense must include "allegations of conduct indicating more generalized public communication or distribution of information by the insured." (Pl. Br. at 14.) But once again, West Bend's narrow reading of the word "publication" is neither supported by common dictionary definitions and the case law, nor consistent with the Policy's text.

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[3] Ms. Sekura also implicitly alleged that Krishna Tan disclosed her fingerprints to other third parties in order to incorporate her information into the larger L.A. Tan Enterprises corporate database. (C 32.)

A. Dictionaries and case law do not support West Bend's limited reading of "publication."

Because the Policy does not define "publication," the Court uses its "plain and ordinary meaning," *Sanders v. Illinois Union Insurance Co.*, 2019 IL 124565, ¶ 23 (citing *Pekin Insurance Co.*, 237 Ill. 2d at 455-56), and construes the term with reference to the "average, ordinary, normal, reasonable person," *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 437 (2010) (quoting *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 (2005)). To accomplish this, "[the Court] look[s] to [the term's] dictionary definitions." *Valley Forge Insurance*, 223 Ill. 2d at 366 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 115–17 (1992); *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 393 (1993)).

Webster's Dictionary and Black's Law Dictionary—the two sources consulted by this Court in *Valley Forge* to interpret the word "publication"—provide several definitions for the term. Those definitions of course encompass the "communication (as of news or information) to the public," along with other acts of "general distribution." *Valley Forge*, 223 Ill. 2d at 366-67 (citing Webster's Third New International Dictionary 1836 (2002); Black's Law Dictionary 1264 (8th ed. 2004)). But the definitions of "publication" encompass other disclosures, including disclosures made to a single third party, such as defamatory statements or other "limited" or "private" publications. See PUBLICATION, Black's Law Dictionary (10th ed.

2014) (discussing and distinguishing between "general" and "limited" (or "private") publications, and explaining that, in the defamation context, "[a] private and confidential communication to a single individual is sufficient.") (internal citation omitted). As the Appellate Court observed, other dictionaries follow this trend, defining publication as both "[t]he action of making something publicly known . . . and [n]otification or communication to a third party or to a limited number of people regarded as representative of the public." (A 38 ¶ 35 (quoting Oxford English Dictionary (3d ed. 2007).) Accord *Defender Security Co. v. First Mercury Insurance Co.*, 803 F.3d 327, 331-32 (7th Cir. 2015) (quoting *OED Online* (Oxford University Press, June 2015)).

Indeed, Black's Law Dictionary explicitly rejects West Bend's reading of a generalized public communication requirement into the word "publication," noting that while publication "might be in the form of a book, pamphlet or newspaper, … nothing of that nature is required. A letter sent to a single individual is sufficient." PUBLICATION, Black's Law Dictionary. This is not a nuanced point: even the decisions previously cited by West Bend (but now conveniently omitted in its briefing before this Court) emphasized that this is how, as a matter of "[c]ommon sense … a lay person would understand the term 'publication' … ." See, *e.g.*, *Springdale Donuts, Inc. v. Aetna Casualty & Surety Co. of Illinois*, 247 Conn. 801, 810, 724 A.2d 1117, 1122 (1999)) ("Common sense dictates that a lay person would understand

the term 'publication' to mean the communication of words to a third person."). Thus, and as the Appellate Court summed up, "[c]ommon 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." (A 38 ¶ 35.) See also *Defender Security Co.*, 803 F.3d at 331-32 ("All of those definitions [from Black's, Webster's, and the OED] share a commonality: they describe the release of information by the party holding it.").

Indeed, that dictionary definitions of "publication" encompass *both* broad public disseminations and disclosures to a single individual does not help West Bend. To the extent those definitions are inconsistent with one another, the Policy's use of the term is, at worst, ambiguous, and therefore must be construed in favor of coverage. See *Gillen*, 215 Ill. 2d at 396 (quoting *Employers Insurance of Wausau v. Ehlco Liquidating Trust et al.*, 186 Ill. 2d 127, 141(1999)) ("Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow… . Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.") While the courts below found in favor of coverage without discussing the term's potentially conflicting definitions, other courts have concluded that the term is ambiguous and interpreted it accordingly. See *Park University Enterprises,*

Inc. v. American Casualty Co. of Reading, PA., 314 F. Supp. 2d 1094, 1107 (D. Kan. 2004), *aff'd sub nom. Park University Enterprises, Inc. v. American Casualty Co. Of Reading, PA*, 442 F.3d 1239 (10th Cir. 2006) ("The court determines that the word 'publication' is ambiguous. More than one possible meaning exists for the word.").

West Bend's argument relies entirely on this Court's opinion in *Valley Forge* but extends the decision far beyond its intended reach. In *Valley Forge*, the Court considered whether an insurer had a duty to defend its insured in a TCPA action relating to the plaintiff's receipt of unsolicited facsimile advertisements directly from the defendant-insured. 223 Ill. 2d at 354-55. The relevant insurance policy "afford[ed] coverage for liability resulting from an insured's 'written … publication … of material that violates a person's right of privacy,'" which led the Court to construe the undefined policy term "publication." *Id.* at 360, 366-67.[4] In so doing, this Court observed that Webster's and Black's Law Dictionary included definitions of "publication" that referenced the communication of information "to the public." *Id.* at 366-67. But as the Appellate Court recognized, no part of this Court's opinion suggests that the term "publication" was defined "as being limited to requiring communication to any number of persons." (A 37 ¶ 33.) As other courts have recognized, any such limitations are "flatly contradicted by *Valley*

[4] In the appellate court, the insurer had argued that the conduct alleged in the underlying complaint was not a "publication," but abandoned that argument before this Court. *Id.* at 316-17.

Forge, in which a single fax transmission to a single recipient constituted 'publication.'" *Pietras v. Sentry Insurance Co.*, No. 06 C 3576, 2007 WL 715759, at *3 (N.D. Ill. Mar. 6, 2007) (Kennelly, J.) ("*Valley Forge* expressly holds that 'publication' in a policy … includes communication to as few as one person, thereby resulting in coverage for violations of a statute invoking privacy interests[.]").

It makes sense that in *Valley Forge* this Court—as in the three federal FACTA cases cited by West Bend (Pl. Br. at 15 (citing *Ticknor v. Rouse's Enterprises, LLC*, 2 F. Supp.3d 882, 893-94 (E.D. La. 2014); *Creative Hospitality Ventures, Inc. v. U.S. Liability Insurance Co.*, 444 Fed. App'x 370 (11th Cir. 2011); and *Whole Enchilada, Inc. v. Travelers Property Casualty Co.*, 581 F.Supp.2d 677, 696-98 (W.D. Pa. 2008)))—focused its inquiry on broader "to the public" definitions of the term.[5] The Fair and Accurate Credit Transmissions Act—or FACTA—requires that electronically-printed credit and debit card receipts not display certain aspects of the customer's account information. No more than the last five digits of the customer's card number

[5] The case of *One Beacon American Insurance Co. v. Urban Outfitters, Inc.*, also cited by West Bend follows the *Whole Enchilada* opinion's construction of the term "publication." 21 F. Supp. 3d 426, 437 (E.D. Pa. 2014), *aff'd,* 625 F. App'x 177 (3d Cir. 2015) (citing *Whole Enchilada*, 581 F. Supp. 2d at 697). And like the Appellate Court here, (A 38 ¶ 35), and the Seventh Circuit in *Defender Security Co.*, 803 F.3d at 331-32, the *One Beacon* decision cited to the Oxford English Dictionary to support that a publication could include a disclosure "even to a limited number of people," 21 F. Supp. 3d at 437.

can be printed. 15 U.S.C. § 1681c(g). Nor can the receipt include the card's expiration date. *Id.* Each of West Bend's cited FACTA cases concerned a defendant-insured's provision of an allegedly non-FACTA credit card complaint receipt directly to a plaintiff. *Ticknor*, 2 F. Supp. 3d at 886; *Creative Hospitality Ventures*, 444 F. App'x at 371-72; *Whole Enchilada*, 581 F. Supp. 2d at 683.

Unlike this case, where Krishna Tan disclosed Ms. Sekura's biometrics to a third party, neither *Valley Forge* nor any of the FACTA coverage actions cited by West Bend addressed allegations of any *third-party* communication. Rather, each of the cases addressed a communication made directly from the defendant to the plaintiff. This included the plaintiff's receipt of fax spam *directly from* the defendant in *Valley Forge*, and the various plaintiffs' receipts of allegedly non-FACTA-compliant credit card retail receipts *directly from* the defendant businesses in *Ticknor*, *Creative Hospital Ventures*, and *Whole Enchilada*. For "publication" coverage to apply in any of these cases, the character of the underlying party-to-party communications was significant: If a given communication was part of a broader, public campaign—as was the case in *Valley Forge*, where the fax advertisement received by the plaintiff was part of a massive advertising campaign—"publication" coverage might apply. If it was an isolated communication from the defendant to the plaintiff—as is the case in every FACTA case concerning a business's provision of a non-compliant receipt to one, and only one,

customer—the underlying claim could not possibly trigger "publication" coverage. See *Creative Hospitality Ventures*, 444 Fed. App'x at 376 (citation omitted) (Contrasting "blast-fax" cases and holding that "providing a customer a contemporaneous record of a retail transaction involves no dissemination of information to the general public"). In other words, there was no reason for the respective courts in those cases, including this Court in *Valley Forge*, to discuss whether a third-party disclosure of information might be covered by the applicable insurance policies, because no definition of "publication" would plausibly cover a one-off, direct defendant-to-plaintiff communication that was not also part of a broader public campaign. In short, West Bend places far too much weight on issues that simply weren't before the deciding courts.

Because both dictionaries and the case law recognize that "publication" is not limited to widespread public dissemination and can include disclosure to a single individual, and because Ms. Sekura's complaint alleges that Krishna Tan communicated her private biometric data to at least one third party, the Policy's coverage of lawsuits alleging various "publication" offenses applies.

B. West Bend's interpretation is not consistent with the Policy.

In addition to finding no support in dictionaries or the law, West Bend's narrow reading of "publication" is also not supported by the Policy's text. Here, the Policy uses an identical phrase—the "oral or written

publication of material"—to identify the scope of coverage for both privacy- and defamation-related offenses:

> 13. "Personal injury" means injury, 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 disparages a person's or organization's goods, products or services; or
>
> e. **Oral or written publication of material** that violates a person's right of privacy.

(C 194 (emphasis added).) Without limiting or qualifying language, there's nothing to suggest that the scope of covered *privacy*-related "publication" offenses should be any greater or less than the scope of covered *defamation*-related "publication" offenses. *Cedar Park Cemetery Association v. Village of Calumet Park*, 398 Ill. 324, 334 (1947) (citing *Chicago Home for Girls v. Carr*, 300 Ill. 478 (1921)) ("Unless a contrary intent is evident, words used in one sense in one part of a contract are deemed of like significance in another part."). The Appellate Court reached this same conclusion, additionally noting that the result "should be particularly true where, as here, the two policy provisions are in the same section of the policies." (A 38-39 ¶ 36 (citing *Universal Underwriters Insurance Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 19).) And because defamation-related publication can include dissemination to a single individual, see PUBLICATION, Black's Law Dictionary (including as a definition of "publication" "[t]he communication of defamatory words to someone other than the person defamed"), so then must

privacy-related publication. Indeed, just as an individual can be defamed by the publication of libelous content to a single other person, so too can that person's privacy be invaded by the publication of private information (such as biometric data) to a single individual.

As the Appellate Court noted, (A 39 ¶ 37 (citing *Wright v. Chicago Title Insurance Co.*, 196 Ill. App. 3d 920, 925 (1990)), if West Bend wanted privacy-related "publication" to cover only an insured's distribution of material to the public at large, as the drafter of the Policy, it could and should have done so. *Outboard Marine Corp.*, 154 Ill. 2d at 117 ("If the insurer had desired to restrict coverage [in a specific manner,] … it could have easily included among its exclusionary provisions an exclusion pertaining to [that subject]."). Accord *Gillen*, 215 Ill. 2d at 395 (citing *Manchester Insurance & Indemnity Co. v. Universal Underwriters Insurance Co.*, 5 Ill. App. 3d 847, 855 (1972) (" '[I]nexpert layperson' will not be charged with 'the responsibility of making or procuring independent technical legal opinions regarding what coverage they are buying' and 'are entitled to rely on language which purports to cover'"); *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co. of North America*, 411 Ill. 325, 334 (1952) ("Courts should not adopt gossamer distinctions which the average [person] for whom the policy is written cannot possibly be expected to understand"); See also *Park University*, 314 F. Supp. 2d at 1106 ("If [the Insurer] intended to limit the scope of 'publication' … it should have so-stated in the policy."). Indeed, the Policy reflects that West

Bend had this goal and requirement in mind. The Policy's "Exclusions" section specifically identifies various excluded "publications," including an insured's (i) knowing publication of false material and (ii) publication of material "whose first publication took place before the beginning of the policy period," both of which would (West Bend would presumably agree) equally modify the Policy's coverage for broad- and small-scale publications. (C 187.) But while West Bend could have drafted additional exclusions along the lines it now suggests, it did not do so. The insured cannot be faulted for that decision.

For its part, West Bend criticizes the Appellate Court for treating the identical term "oral or written publication of material" consistently throughout the Policy. (Pl. Br. at 17-18; A 36.) West Bend instead suggests that the term "publication" should be limited by the common law torts of defamation or the public disclosure of private facts, depending on where it appears in the Policy. (Pl. Br. 17-18.) But West Bend is wrong on multiple levels. As a threshold matter, requiring the insured to make technical, legal distinctions between identical terms that appear throughout a single section of a single insurance policy (i.e., depending on where they appear) conflicts with this Court's instruction that "[u]ndefined 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*, 215 Ill. 2d at 393 (citing *Outboard Marine Corp.*, 154 Ill. 2d at 115). Thus, any suggestion that

Krishna Tan should have understood the term "publication" as relating to or being constrained by specific elements of specific common law torts, depending on where the term appeared in the Policy, is unfounded. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 359 Ill. App. 3d 872, 886, *aff'd*, 223 Ill. 2d 352 (2006) ("[T]he inexpert layperson will not be charged with the responsibility of formulating independent, technical, legal opinions regarding what coverage he is buying.").

And even if an insured could be charged with developing nuanced legal understandings of an insurance policy's terms, West Bend's suggestion that the coverage at issue here must be understood only in reference to the "common law tort" of "invasion of privacy" lacks any basis in the Policy's text. (See Pl. Br. at 16.) Indeed, and contrary to West Bend's presentation, there is no "invasion of privacy" tort. Rather, the term "invasion of privacy"—as West Bend uses it in its brief—is a catchall term used by the Restatement (Second) of Torts § 652 to refer to four independent causes of action at common law. *Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 184 (1st Dist. 1995) (citing Restatement (Second) of Torts §§ 652B, 652C, 652D, 652E, at 378–94 (1977)) ("The Restatement (Second) of Torts enumerates the following types of an invasion of privacy …"). One of those is the common law tort for the public disclosure of private facts, which, as West Bend notes, includes a "publicity" element requiring a broad, "to the public" dissemination, rather than a disclosure to only a single person. (Pl. Br. at 16-17 (quoting *Roehrborn*, 277

Ill. App. 3d at 184 (discussing the difference between the publication and publicity elements of the torts of defamation and public disclosure of private facts, respectively)).) If the Policy were drafted to specifically cover publications resulting in an insured's public disclosure of private facts (*i.e.*, rather than privacy-related "publications" more generally), West Bend's argument might carry some weight. As West Bend's collected cases point out, it is elementary that where the factual allegations of an underlying complaint do not state, or potentially state, a claim for a covered offense, there is no coverage. See, *e.g.*, *Spiegel v. Zurich Ins. Co.*, 293 Ill. App. 3d 129, 134-35 (1st Dist. 1997) (determining whether underlying allegations potentially state a claim for the specifically covered offense of "malicious prosecution"); *BASF AG v. Great American Assurance Co.*, 522 F.3d 813, 822 (7th Cir. 2008) (determining whether underlying allegations potentially state a claim for the specifically covered offenses of "slander, libel, or disparagement").

But here, West Bend's "invasion of privacy" coverage is not limited to the insured's public disclosure of private facts or any of the other torts specifically set out in the Restatement (Second) of Torts § 652. Rather, and as even West Bend agrees, its coverage extends to an insured's violations of the BIPA. (A 39 ¶ 38.) And because a *single* unauthorized disclosure to a *single* third party is sufficient to "injur[e] … [a plaintiff's] legal right to privacy of her own biometric information," *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶¶ 76-77, *appeal denied*, 119 N.E.3d 1034 (Ill.

2019), there is nothing in the Policy—whether from a lay or legal perspective—to limit the "invasion of privacy" coverage to only mass, "to the public" disseminations of information (*i.e.*, in line with the elements for the tort for the public disclosure of private facts), as West Bend suggests. (See A 39 ¶ 37 (quoting *Wright v. Chicago Title Insurance Co.*, 196 Ill. App. 3d 920, 925 (1990) ("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 … 'There is a strong presumption against provisions that easily could have been included in the contract but were not.'").) As such, there is every reason to treat the term "publication" identically between the Policy's coverage for defamation and privacy-related offenses because, in both instances, wide- and small-scale disclosures can give rise to covered offenses.

II. THE POLICY'S STATUTORY EXCLUSION DOES NOT PRECLUDE COVERAGE.

The Appellate Court also agreed that Ms. Sekura's BIPA claim did not fall within the Policy's Exclusion for certain statutory violations. The Exclusion denies coverage for an insured's violation of statutes that, like the TCPA and the CAN-SPAM Act, govern "e-mails, fax, phone calls or other methods of sending material or information." (C 170.) But because the BIPA says nothing about the "methods" through which an entity might "send[] material or information," the Exclusion has no bearing on Ms. Sekura's claim against Krishna Tan.

A. The Exclusion does not apply to claims under statutes like the BIPA that do not govern "methods" of sending material or information.

The Exclusion reads as follows:

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

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS LIABILITY COVERAGE FORM

The following exclusion is added to **Section B**. EXCLUSIONS

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.

(C 170.)

Like any other contract, when interpreting insurance policies "effect must be given to all of the language so that provisions which appear to be conflicting or inconsistent may be reconciled and harmonized." *In re Halas*, 104 Ill. 2d 83, 92–93, (1984) (citing *St. Paul Fire & Marine Insurance Co. v. Frankart*, 69 Ill. 2d 209, 216 (1977)). As such, the Court "assume[s] that

every provision was intended to serve a purpose." *Founders*, 237 Ill. 2d at 433. This holistic attention requires that items in lists or series be read in context of the entire list or series. See *Z.R.L. Corp. v. Great Central Insurance Co.*, 156 Ill. App. 3d 856, 859 (1987). Thus, when a provision specifies several classes of items followed by catchall language that "embraces 'other' persons or things, the word 'other' will generally be read as 'other such like[.]'" *Farley v. Marion Power Shovel Co.*, 60 Ill. 2d 432, 436 (1975) (quoting *People v. Capuzi*, 20 Ill. 2d 486, 493-94 (1960)).

Guided by these principles, part (3) of the Exclusion cannot be read to unambiguously exclude coverage of violations of the BIPA. Rather, and as the Appellate Court noted, it can "easily be read" consistent with the rest of the Policy Exclusion as excluding coverage for violations of other statutes that—like the TCPA and the CAN-SPAM Act, and consistent with the Exclusion's qualifying title—regulate "e-mails, fax, phone calls or other methods of sending material or information." (A 40-41 ¶ 43.) See *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 27 (citing *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 13) ("Congress enacted the TCPA to address telemarketing abuses attributable to the use of automated telephone calls to devices including telephones, cellular telephones, and fax machines. 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. 2004) (quoting S. Rep. No. 108-102 at 1 (2003)) (a "stated purpose[] of the CAN-SPAM Act … [is to] prohibit senders of electronic mail (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"). Such similar statutes would include, for example, the Junk Fax Prevention Act of 2005, Pub. L. 109–21, 119 Stat. 359 (2005), or any of the nation's myriad state-level TCPA analogues.

But the BIPA does not fall under the Exclusion because—unlike the TCPA or the CAN-SPAM Act—it "says nothing about methods of communication." (A 41 ¶ 45.) The "primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature." *Solon v. Midwest Med. Records Association*, 236 Ill. 2d 433, 440 (2010) (citing *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009)). In the case of BIPA, this intent is "easy to discern because the legislators provided a section in the Act entitled: 'Legislative findings; intent.'" *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 58. Section 5 of the BIPA explains that the legislature enacted BIPA to "regulat[e] the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). It elsewhere identifies the limited circumstances in which an entity may disclose biometric data in its possession. 740 ILCS 14/15(d).

But nowhere does the BIPA say a single word about regulating any *method* through which the disclosure of biometric data might occur. (A 41 ¶ 45.) In short, the BIPA does not govern a method of sending material or information, nor does it bear any meaningful similarity to the mass marketing and solicitation prohibitions set out by statutes like the TCPA and the CAN-SPAM Act. It therefore falls outside the Exclusion's scope.

West Bend argues that this treatment of the statute fails to consider the Policy Exclusion as a whole and "nullifies provisions of the policy" because, West Bend says, the Exclusion "makes no reference to methods of communication." (Pl. Br. at 24.) But despite its purported reliance on basic cannons of contract interpretation, West Bend makes no effort whatsoever to address the overt language of the Exclusion itself. As the Appellate Court correctly summed up:

> [O]nly 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 emails and phone calls, does the exclusion include a final catch-all provision … . 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 CAN-SPAM Act, regulate *methods* of communication.

(A 41 ¶ 43.) In other words, West Bend would have the Court ignore both the Exclusion's title and the plain connection between that title and the Exclusion's two identified statutes, both of which are laws that expressly regulate methods of communication. It is *West Bend*—not the Appellate

Court—that seeks to read the Exclusion's catchall provision in isolation and nullify the Exclusion's title and stated purpose.

Once again, as the Policy's drafter, West Bend could have written the Exclusion differently. It could have stated, for example, that the Exclusion broadly applies to any statute that "*regulates* the distribution of information, regardless of whether the statute *governs methods* of sending the information." (A 20 (emphasis in original).) Drafting the Policy in that way would have significantly shifted the Exclusion's relatively narrow scope to instead include a broad swath of potentially excluded statutory violations, including, among many others, violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681c (limiting information that may be included in disclosed consumer reports); the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.512 (limiting covered entities' ability to use and disclose protected health information); the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.* (regulating many aspects of communications between advertisers and consumers); and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (defining "racketeering activity" to include, *inter alia*, mail and wire fraud). West Bend could also have included a provision stating that the Policy's and endorsements' various titles (including the Exclusion's title) were provided for convenience or reference purposes only and should not be used by any party when interpreting the Policy's scope of coverage. See, *e.g.*, *Conagra, Inc. v. Arkwright Mutual*

Insurance Co., 64 F. Supp. 2d 754, 764 n.6 (N.D. Ill. 1999) (refusing to "draw any inference from [a provision's] title because the Arkwright Policy states that 'the title of the various paragraphs of this form (and of endorsements attached to the Policy) are solely for reference and shall not in any way affect the provisions to which they relate.'"). But because the Exclusion must be enforced as written, not as West Bend now *wishes* it was written, West Bend's recommendation that the Exclusion be selectively interpreted and enforced must be rejected.

B. West Bend's comparison between the TCPA and BIPA is irrelevant because it lacks any connection to the Exclusion's text.

As a final argument, West Bend suggests that because the TCPA and BIPA have other similarities (such as protecting a consumer's right to privacy), when "[r]eading the Violation of Statutes exclusion as a whole, there is no difference between its application to a TCPA or a BIPA claim." (Pl. Br. at 25.) But the comparison West Bend identifies has no relation to—and in fact ignores—the Exclusion's text, which states that it only applies to statutes that govern the methods of sending communications or information. (C 170.) Because "a policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific," the argument fails. *Gillen*, 215 Ill. 2d at 393. Besides, there is a clear difference in the Exclusion's "application to a TCPA or a BIPA claim:" the former is *specifically* excluded by the Policy but the latter is not.

(C 170.) Thus, West Bend's reliance on cases also dealing with insurance policies that specifically exclude TCPA violations, along with common law claims "arising from" such violations, has no bearing on any issue before the Court. See *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶¶ 4, 77-78, *appeal denied,* 60 N.E.3d 872 (Ill. 2016) (addressing policy exclusion that explicitly applied to any claims arising out of the TCPA, and additionally excluding coverage for common law claims that "were nothing more than a rephrasing of the conduct alleged in [the TCPA count]."); *Illinois Casualty Co. v. West Dundee China Palace Restaurant, Inc.*, 2015 IL App (2d) 150016, ¶¶ 18-20 (same); *G.M. Sign, Inc. v. State Farm Fire & Casualty Co.*, 2014 IL App (2d) 130593, ¶¶ 27-30, *as modified on denial of reh'g* (Sept. 2, 2014) (same). Ms. Sekura's claim "arises from" her right to privacy in her biometric information, as guaranteed by the BIPA—*not* from the TCPA, CAN-SPAM Act, or any other statute that governs the methods of sending material or information.

Because the Court can only enforce the Exclusion as written, it does not bar coverage for Ms. Sekura's lawsuit against Krishna Tan.

CONCLUSION

West Bend does not identify any case in support of its position, cannot reconcile its argument with the Policy's explicit text, and does not present any reason for this Court to reach a result different from that of the Appellate Court. This Court should affirm.

Dated: December 22, 2020

Respectfully submitted,

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, is 6,758 words.

Dated: December 22, 2020 s/ Benjamin S. Thomassen

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

NOTICE OF FILING and PROOF OF SERVICE

PLEASE TAKE NOTICE that Defendant-Appellee Klaudia Sekura filed the foregoing Brief and Argument of Defendant-Appellee Klaudia Sekura in the above-captioned action December 22, 2020.

I, Benjamin S. Thomassen, an attorney, hereby certify that on December 22, 2020 at Chicago, Illinois, I filed this notice by electronic means with the Clerk of the Supreme Court of Illinois, and that I served the same upon the following persons through a Court approved electronic filing service provider:

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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 certificate of service are true and correct.

s/ Benjamin S. Thomassen

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