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.

## REPLY 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*

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## ARGUMENT

### THE *SEKURA* COMPLAINT DOES NOT ALLEGE PUBLICATION

The coverage dispute in this case centers on the meaning of the term "publication" as used in the insurance policy's coverage for the "publication of material that violates a person's right of privacy." There is no dispute regarding the factual allegations of the underlying complaint which precipitated this coverage action. As the Appellate Court stated, "In the underlying complaint, Ms. Sekura alleged that Krishna violated [BIPA] by providing her fingerprint data to a single third-party vender, SunLync. The parties agree that this is the allegation that could potentially be considered 'publication'." (A35, ¶ 28). Similarly, in *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 2, the appellate court read the *Sekura* complaint as alleging a single disclosure by Krishna to a third-party vendor. ("In Count I, plaintiff Sekura alleged that defendant, Krishna Schaumburg Tan, Inc., violated the Biometric Information Privacy Act … by collecting plaintiff's fingerprints without providing the statutorily required disclosures … and by disclosing her fingerprints to an out-of-state, third-party vendor."). West Bend argues that a single third-party disclosure by Krishna does not constitute "publication" for the "invasion of privacy" coverage because it does not allege that Krishna disclosed biometric information to the public. West Bend's principal support for this argument is *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.,* 223 Ill.2d 352, 366-67 (2006), where this Court interpreted the term "publication" for the "invasion of privacy" coverage to mean communication or distribution of information to the public.

The Appellate Court rejected West Bend's argument that "publication" for the "invasion of privacy" coverage meant communication to the public, not simply communication to a single third-party (A 36, ¶ 29), and Appellees proffer several arguments in support of the Appellate Court's ruling. But the Appellate Court and Appellees are wrong, both in their understanding of the *Valley Forge* opinion and in their interpretation of the term "publication" as used in the "invasion of privacy" coverage.

Appellees accuse West Bend of supporting its interpretation of "publication" with a "strict," "limiting," and "narrow" reading of *Valley Forge*. (Sekura's Brief, p. 7). [1] However, the opinion itself refutes this assertion. It is not a "narrow" reading of *Valley Forge* to note that the dictionary definitions of "publication" selected by this Court to find the plain, ordinary and popular meaning of the term all encompassed communication to the public. Rather, the Court's selected dictionary definitions were the following: "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*.' (citation). 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*.' (citation)." *Valley Forge*, 223 Ill.2d at 366-67. (emphasis added). Nor is it a "strict" reading of the opinion to point out that this Court did

[1] Krishna adopted the arguments contained in Sekura's brief. (Krishna's Brief, p. 15, p. 17).

not reference the definitions selected by the Appellate Court which state that "publication" can mean communication to a single third-party. (See, A 38, ¶ 35).

Finally, West Bend is not relying on a "narrow" reading of *Valley Forge* when it argues that this Court's application of the term "publication" to the allegations of the underlying complaint leaves no doubt that this Court interpreted the term to mean communication to the public. In this regard, this Court stated; "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 367. Review of the *Valley Forge* opinion shows that West Bend's interpretation is correct, and the Appellate Court's failure to follow *Valley Forge* in this case was error, requiring reversal.

Appellees cite *Defender Security Co. v. First Mercury Ins. Co.,* 803 F.3d 327 (7th Cir. 2015) as an example of a case where the court cited the Oxford English Dictionary definition of "publication," which includes communication to a single third-party; a definition quoted by the Appellate Court (but not by this Court in *Valley Forge*). But in *Defender Security* the Seventh Circuit recognized that under Indiana law, "publication" could mean communication to a single third-party in the defamation context. *Defender Security*, 803 F.3d at 333. ("[I]n the defamation context, Indiana law requires that the defamatory material be communicated to a third party to be actionable."). Illinois defamation law similarly

requires publication to a third-party, see *Green v. Rogers*, 234 Ill.2d 478 (2009), but there is no suggestion that Sekura alleged defamation by Krishna.

In a footnote, Appellees states that one of the cases cited by West Bend, *OneBeacon America Ins. Co. v. Urban Outfitters, Inc*., 21 F.Supp.3d 426 (E.D. Pa. 2014), supports the Appellate Court's interpretation of "publication" because the opinion also cites the Oxford English Dictionary definition cited by the Appellate Court. (Sekura's Brief, p. 12, fn. 5). However, Appellees' attempt to find support from *Urban Outfitters* fails. Before referencing the Oxford English Dictionary definition of "publication," the *Urban Outfitters* opinion quoted definitions of "publication" from Black's Law Dictionary and Merriam-Webster, which define the term as communication to the public. 21 F.Supp.3d at 437. The court then stated, "Our dictionary of choice likewise makes clear that promulgation to the public, even to a limited number of people, is the essence of publication. XII *The Oxford English Dictionary* 782 (2nd ed. 1989)." *Id*. Finally, the *Urban Outfitters* opinion referenced Pennsylvania law, under which "publication" for "invasion of privacy" requires that "a matter [be] made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Urban Outfitters* at 437, quoting *Harris by Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1384 (Pa. Super. 1984).

Based on the dictionary definitions and the common-law treatment of "publication," the *Urban Outfitters* court concluded that the underlying complaint, which involved a retailer's collection of zip code data, did not come within the

"invasion of privacy" coverage because the complaint did not allege that the retailer publicly disseminated the customers' information. *Urban Outfitters*, 21 F.3d at 437. Clearly, the court's interpretation and application of the term "publication" in *Urban Outfitters* provides no support for Appellees' assertion that "publication" for "invasion of privacy" can include a communication to a single third-party. Rather, the interpretation and application of the term "publication" in *Urban Outfitters* as meaning communication to the public is identical to that of this Court in *Valley Forge*.

Appellees' also claim that West Bend is stretching *Valley Forge* beyond its intended reach when it applies the opinion's definition of "publication" to the allegations of the *Sekura* complaint. (Sekura's Brief, p. 11). However, nowhere in the *Valley Forge* opinion does the Court suggest that its interpretation of the "invasion of privacy" coverage generally or the term "publication" specifically was intended to apply solely to the parties to that case. Additionally, when the Court construed the "invasion of privacy" coverage, it interpreted the terms "publication," "material," and "right of privacy" all "in the interest of coherently interpreting all the relevant terms." *Valley Forge*, 223 Ill.2d at 366-67. It is doubtful that the Court intended that its opinion should have limited application when it took such pains to interpret the coverage. On the contrary, it must be presumed that the Court intended its interpretation to apply to all cases where the "invasion of privacy" coverage was at issue.

Appellees' attempt to distinguish *Valley Forge* and the FACTA cases cited by West Bend by arguing that the *Sekura* complaint alleges the disclosure to a

third-party, whereas in *Valley Forge* and the FACTA cases, the disclosure was to the "victim." [2] In a statement that contradicts Appellees' argument (and the Appellate Court's holding) that "publication" can mean both communication to the public and communication to a third-party, Appellees' state that *Valley Forge* does not address whether a third-party communication might be covered "because no definition of 'publication' would plausibly cover a one-off, direct defendant-to-plaintiff communication that was not part of a broader public campaign." (Sekura's Brief, p. 14). However, in addition to undercutting Appellees' argument that "publication" for "invasion of privacy" coverage means communication to the public and communication to a single third-party, Appellees' third-party disclosure distinction loses sight of the fact that the appellate court in *Valley Forge* rejected this argument. In the appellate court, the insurers' argued that the "invasion of privacy" coverage only applied to third-party communications, and did not apply where the insured's offending communication was made to the "victim," but the appellate court refused to recognize this distinction. See *Valley Forge*, 359 Ill.App.3d 872, 885-86 (2nd Dist. 2006).

Additionally, the fact that Sekura alleges a third-party disclosure by Krishna does not affect the interpretation of the term "publication" because, in *Valley Forge*, this Court determined that the "invasion of privacy" coverage applied to invasions of secrecy and security interests. *Valley Forge*, 223 Ill.2d at

[2] The FACTA cases cited by West Bend, *Whole Enchilada, Inc. v. Travelers Property Casualty Co.,* 581 F.Supp.2d 677 (W.D. Pa. 2008), *Creative Hospitality Ventures Inc. v. United States Liability Ins. Co*., 444 Fed. Appx. 370 (11th Cir. 2011), *Ticknor v. Rouse's Enterprises, LLC*, 2 F.Supp.3d 882 (E.D. La. 2014), considered "invasion of privacy" coverage for alleged violations of the Fair and Accurate Credit Card Transaction Act (FACTA), 15 U.S.C. § 1681c(g)(1).

368 ("[the] 'right of privacy' connotes both an interest in seclusion and an interest in the secrecy of personal information."). Thus, the "third-party" verses "direct-to-victim" distinction has nothing to do with the "publication" element of the "invasion of privacy" coverage. Rather, this distinction determines whether the privacy interest which the insured allegedly violated by its communication was a secrecy interest or a seclusion interest.

*Valley Forge* is an example of a case in which an insured's "direct-to-victim" communication triggered "invasion of privacy" coverage because the insured allegedly communicated information to the public. The FACTA cases are examples of "direct-to-victim" communications which do not trigger "invasion of privacy" coverage because of an absence of allegations of communication to the public. In *Whole Enchilada, Inc. v. Travelers Property Casualty Co*., 581 F.Supp.2d 677 (W.D. Pa. 2008), the court found that the alleged FACTA violation (providing a credit card user with a receipt which included the card's expiration date) did not come within the "right of privacy" coverage because handing a credit cardholder a receipt "does not allege that the cardholder's information was in any way made generally known, announced publicly, disseminated to the public, or released for distribution." 581 F.Supp.2d at 697.

In *Ticknor v. Rouse's Enterprises, LLC*, 2 F. Supp. 3d 882, 895 (E.D. La. 2014), the court stated that the FACTA allegations did not involve an invasion of the plaintiffs' right to privacy in seclusion ("The plaintiffs' right to be left alone was not intruded upon by Rouse's alleged FACTA violations"). Significantly, in *Ticknor* the court noted that the coverage analysis for FACTA cases differed from

the evaluation of a TCPA blast-fax case, like *Valley Forge,* because "unlike blast faxing, the transactions giving rise to the plaintiffs' FACTA claims do not involve mass distribution of material to the general public or an intrusion into an individuals' right to be left alone." *Ticknor*, at 895.

*Creative Hospitality Ventures*, *Inc. v. United States Liability Ins. Co.,* 444 Fed. Appx. 370 (11th Cir. 2011), which was relied on by the court in *Ticknor*, is instructive because of the court's interpretation of the term "publication" for the "invasion of privacy" coverage. Like the other FACTA cases cited by West Bend, the court in *Creative Hospitality* found that the alleged FACTA violations did not come within the "invasion of privacy" coverage because the allegations did not allege the dissemination of information to the public. *Creative Publication*, 444 Fed. Appx. at 376. For its definition of "publication," the Eleventh Circuit looked to the Florida Supreme Court's definition of the term in *Penzer v. Transportation Insurance Co.,* 29 So.3d 1000 (Fla. 2010).

Like *Valley Forge, Penzer* considered whether a TCPA blast-fax class-action lawsuit came within the coverage for the "publication of material that invades a person's right of privacy." Also like *Valley Forge*, the *Penzer* court concluded that a TCPA blast-fax class-action suit alleged "publication" for the "invasion of privacy" coverage, and reached this conclusion for the same reason; the insured's distribution of unsolicited fax advertisements to the proposed class of fax recipients was the communication of information to the public. Thus, in *Penzer*, the court stated, "sending 24,000 unsolicited blast-facsimile advertisements to Mr. Penzer and others is included in the broad definition of

'publication' because it constitutes a communication of information disseminated to the public and it is 'the act or process of issuing copies … for general distribution to the public.'" *Penzer*, 29 So.3d at 1005-06. Similarly, in *Valley Forge*, this Court stated, "Rizzo's complaint alleges conduct by Swiderski 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 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." 223 Ill.2d at 367. Thus, *Valley Forge* and *Penzer* show that a complaint must allege that an insured communicated information to the public, not just to a single third-party, to meet the "publication" element of the "invasion of privacy" coverage.

Furthermore, the FACTA cases cited by West Bend, as well as *Valley Forge* and *Penzer*, refute Appellees' contention that "publication" for the "invasion of privacy" coverage should be defined differently depending on whether the privacy interest allegedly invaded by the insured's communication is a secrecy interest or a security interest. On the contrary, these cases establish that regardless of the nature of the interest invaded, i.e. whether a third-party disclosure (secrecy) or a communication directly to the "victim" (seclusion), to be potentially covered by the policy's coverage for the "publication of material that invades a person's right of privacy," the complaint must allege that the insured communicated with the public, not simply with a single third-party. Therefore, the *Sekura* complaint, which only alleges that Krishna disclosed Sekura's biometric

information to a single third-party, not disclosure to the public, does not come within the "invasion of privacy" coverage.

Appellees contend that construing "publication" for the "invasion of privacy" coverage to include communication to a single third-party is supported by the policy's use of the term in both the defamation and "invasion of privacy" coverages. Appellees believe that treating the term differently for the different coverages is a "technical, legal distinction" that an ordinary, reasonable insured would not be expected to understand. (Sekura's Brief, p. 17-18). However, the Appellate Court acknowledged that Black's Law Dictionary makes this distinction: "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.'" (A38, ¶ 35) (emphasis added). As this Court stated in *Valley Forge*, courts look to dictionary definitions for the "plain, ordinary, and popular meaning" of terms. *Valley Forge*, 223 Ill.2d at 366, and cases cited therein. Therefore, since dictionary definitions of "publication" distinguish between its use in the defamation context from other uses, it must be assumed that applying the more general "to the public" definition to "publication" in the "invasion of privacy" context would comport with the ordinary, popular meaning of the term, and would, therefore, be understandable to a reasonable insured.

The Appellees do not dispute that courts will often consult the common-law treatment of the "Advertising and Personal Injury Coverage" offenses when construing this part of the policy. Instead, they contend that West Bend is trying

to recast the "invasion of privacy" coverage as limited to claims alleging the "public disclosure of private facts." What Appellees miss when making this argument is that, while cases such as *Roehrborn v. Lambert*, 277 Ill.App.3d 181 (1st Dist. 1995) describe several types of invasion of privacy, a complaint alleging the violation of any of these privacy rights, to be potentially covered, requires an allegation that the insured communicated or distributed material to the public (i.e., publication), which resulted in the invasion of privacy.

In *Roehrborn*, the court stated, "The Restatement (Second) of Torts enumerates the following types of an invasion of privacy: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) a public disclosure of private facts; and (4) publicity which unreasonably places another in a false light." 277 Ill.App.3d at 184. *Valley Forge* makes clear that a complaint involving the first of the invasion of privacy torts, "intrusion on seclusion," must allege communication to the public, to come within the "invasion of privacy" coverage. In this case West Bend is arguing, consistent with *Valley Forge*, that for coverage to apply to the third type of invasion of privacy, "public disclosure of private facts," the complaint must allege communication to the public. This is also how "publication" is defined for the "intrusion on seclusion" tort. See, *Roehrborn,* 277 Ill.App.3d at 184-84. If this case involved the fourth type of invasion of privacy, "placing another in a false light," West Bend would argue that communication to the public must be alleged

to trigger coverage, which, again, is consistent with how the common law treats the tort. See *Kurczaba v. Pollock*, 318 Ill.App.3d 686, 695-700 (1st Dist. 2000).[3]

Thus, Appellees' attempt to recast West Bend's argument fails because *Valley Forge* teaches that whether the privacy tort alleged in a complaint involves an insured's "intrusion on seclusion" or "public disclosure of private facts" communication to the public by the insured, i.e. publication, must be alleged to trigger "invasion of privacy" coverage. In this case, the *Sekura* complaint does not allege that Krishna disclosed her biometric information to the public; therefore, the complaint does not come within the "invasion of privacy" coverage, and the Appellate Court's contrary holding was error, requiring reversal.

## THE "VIOLATION OF STATUTES" EXCLUSION BARS COVERAGE FOR THE *SEKURA* COMPLAINT

Both sides support their argument regarding the application of the "Violation of Statutes" exclusion by reference to the rule of construction that the exclusion must be read as a whole, and both sides accuse the other of violating this principle in their respective interpretations of the exclusion. Appellees interpret the exclusion as limited to statutes which, like TCPA and CAN-SPAM, prohibit specific methods of communicating information. West Bend, on the other hand, argues that the exclusion applies to allegations of "personal injury" caused by the violation of TCPA, CAN-SPAM, and other statutes which limit or prohibit

[3] The second type of invasion of privacy listed in *Roehrborn*, "appropriation of another's name or likeness," no longer exists in Illinois, having been replaced by the Right of Publicity Act, 765 ILCS 1075/1, *et seq*. See *Trannel v. Prairie Ridge Media, Inc*., 2013 IL App (2d) 120725, ¶ 14. Nevertheless, violation of the statute presumably includes a "publication" element because it prohibits the "public use" or "holding out" of an individual's identity. 765 ILCS 1075/5.

the communication of information. Appellees dispute West Bend's interpretation, claiming West Bend's reliance on ¶ 3 of the exclusion fails to account for ¶ 1, ¶ 2 and the exclusion's title. Appellees support their argument by relying on the *ejusdem generis* doctrine. They do not mention the doctrine by name, but their reference to *Farley v. Marion Power Shovel Co., Inc*., 60 Ill.2d 432 (1975) shows their argument is grounded on this rule. (Sekura's Brief, p. 22).

According to Appellees, the use of "other" in ¶ 3, which follows the specific reference to TCPA in ¶ 1 and CAN-SPAM in ¶ 2, means that ¶ 3 is limited to statutes which, like TCPA and CAN-SPAM, prohibit specific methods of communication. However, on closer examination of *Farley,* it is clear that Appellees cannot rely on *ejusdem generis* to support their interpretation of the exclusion.

In *Farley*, the court stated, "The doctrine of *ejusdem generis* is that where a statute or document specifically enumerates several classes of persons or things and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* 'with,' and not superior to or different from those specifically enumerated." *Farley,* 60 Ill.2d at 436, quoting *People v. Capuzi*, 20 Ill.2d 486, 493-94 (1960). The statute under consideration in *Farley* was the Structural Work Act, 28 Ill. Rev. Stat. ¶ 60-69, which applied to "any house, building, bridge, viaduct or other structure." The issue in *Farley* was whether a large, self-propelled power shovel was a "structure" under the Act. The court applied

*ejusdem generis* to find that the power shovel was not an "other structure" like a "house, building, bridge or viaduct." *Farley*, 60 Ill.2d at 436.

In this case, the exclusion is not written like the Structural Work Act which was construed in *Farley*. If the exclusion were written as applying to TCPA, CAN-SPAM, or other statutes that limit or prohibit the communication of information, Appellees' reliance on *ejusdem generis* might be appropriate. But the term "other" does not immediately follow TCPA and CAN-SPAM in the exclusion. On the contrary, ¶ 3 states that it applies to statutes "other than" TCPA and CAN-SPAM, meaning different from those specific statutes. Thus, Appellees' contention that the statutes coming within ¶ 3 must be ones which, like TCPA and CAN-SPAM, prohibit specific methods of communicating information, is not supported by the clear language of the exclusion or by the *ejusdem generis* doctrine.

Appellees profess to read the exclusion as a whole, but their focus on the word "methods" in the exclusion's title shows otherwise and betrays a violation of the rule that "all of the provisions, rather than an isolated part, should be examined." *Rich v. Principal Life Ins. Co.,* 226 Ill.2d 359, 371 (2007). [4] Focusing on the term "methods" in the title and arguing that it limits the application of ¶ 3 of the exclusion to only those statutes that specify prohibited methods of communication is an overly restrictive interpretation of the exclusion. There can be no dispute that the word "methods" does not appear in ¶ 3. Additionally, it is

[4] Focusing on the term "methods" in the exclusion's title also violates the rule of statutory construction that words of a heading will not control over the more specific words of the text. *Illinois Bell Telephone Co. v. Illinois Commerce Commission,* 362 Ill. App. 3d 652, 661-62 (4th Dist. 2005).

undisputed that the purpose of the TCPA is to protect a person's right to privacy. *Standard Mutual Ins. Co. v. Lay,* 2013 IL 114617, ¶ 33. This Court has found that BIPA serves the same purpose. *Rosenbach v. Six Flags Entertainment Corp*., 2019 IL 123186, ¶ 33. These privacy rights can be violated under the TCPA by sending an unsolicited fax ad and under BIPA by disclosing biometric information. The purpose of the exclusion is to remove from coverage "personal injury" claims which are based on the violation of these types of statutes.

Appellees make much of the fact that BIPA does not specify the prohibited method of disclosing biometric data. However, neither this fact, nor the fact that the *Sekura* complaint does not specify how Sekura's biometric information was disclosed to SunLync, mean that the complaint falls outside of the provisions of the exclusion. By its clear terms, the exclusion applies because Sekura alleges that she suffered "personal injury" arising out of Krishna's disclosure of her biometric information, in violation of BIPA, regardless of the method in which the disclosure occurred. For this reason, Appellees' arguments should be rejected and the Appellate Court's holding that the exclusion is inapplicable should be reversed.

## THE DATA COMPROMISE ENDORSEMENT IS INAPPLICABLE

Krishna's brief quotes extensively from the Appellate Court opinion and adopts Sekura's arguments on "publication" and the "violation of statutes" exclusion. However, Krishna's brief includes an argument which was not made by Sekura; that West Bend's duty to defend was triggered by the "Illinois Data Compromise Endorsement." (Krishna's Brief, p. 18). In addition to not being

raised by Sekura, this is an issue that the Appellate Court and Circuit Court decided not to address. (A 42, ¶¶ 46-47; R.C 820).

The "Illinois Data Compromise Endorsement," which was included in the 2015-16 policy, provided limited coverage for Section 1 - Response Expenses and Section 2 – Defense and Liability which relate to a "personal data compromise." (R.C 223). These sections each carry an annual aggregate limit of $50,000. (*Id*.). Krishna argues that West Bend's duty to defend was triggered under Section 2 – Defense and Liability, because the *Sekura* complaint meets the definition of a "data compromise suit."

In the Circuit Court, West Bend alleged that the endorsement was inapplicable because the *Sekura* complaint did not allege a "personal data compromise" and because Krishna could not fulfill the conditions applicable to the coverage provided by the endorsement. (R.C 19-24). The endorsement defines "personal data compromise" as "the loss, theft, accidental release or accidental publication" of protected information. (R.C 229). Although the Appellate Court passed on deciding whether the endorsement applied, the Appellate Court affirmed the Circuit Court's refusal to award § 155 attorney fees and penalties, because the Appellate Court was not persuaded by Krishna's argument that the *Sekura* complaint potentially alleged "personal data compromise" as defined in the endorsement. (A 44-45, ¶¶ 54-57).

Krishna's brief quotes the provisions of the "Illinois Data Compromise Endorsement" and acknowledges that the conditions applicable to Section 1 – Response Expenses, also apply to Section 2 – Defense and Liability. (Krishna's

Brief, p. 4-5). These conditions include that a "personal data compromise" has occurred and that the insured provided notifications and services to those affected by the "personal data compromise." (R.C 223-25). Krishna argues that Section 2 of the endorsement is applicable because the *Sekura* complaint is a "data compromise suit," but Krishna makes no attempt to show that it can comply with the conditions applicable to both Section 1 and Section 2 of the endorsement. Since Krishna fails to establish in this Court that the limited coverage provided by the "Illinois Data Compromise Endorsement" is applicable to the *Sekura* complaint, this Court, like the Appellate Court, should pass on Krishna's claim for a defense under the endorsement.

## CONCLUSION

For the foregoing reasons, as well as for the reasons stated by West Bend in its Brief on Appeal, West Bend respectfully 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 West Bend and against Appellees.

Respectfully submitted,

*/s/ Thomas F. Lucas*
One of the Attorneys for 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

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 17 pages.

*/s/ Thomas F. Lucas*
Thomas F. Lucas

**NOTICE OF FILING and PROOF OF SERVICE**

In the Supreme Court of Illinois

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

The undersigned, being first duly sworn, deposes and states that on January 15, 2021, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Plaintiff-Appellant. Service of the Reply 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 Reply 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