All Stop: Ruling on the Applicability of Exclusion to BIPA Claims Delayed

March 5, 2019

The fallout from the Illinois Supreme Court's January 25, 2019, opinion in Rosenbach v. Six Flags Entertainment Corp., 19 IL 12316, continues. Rosenbach settled the dispute of who qualifies as an “aggrieved person” under the Illinois Biometric Information Privacy Act (“BIPA”), and in doing so opened the floodgates for this litigation to proliferate. The immediate result was a sharp increase in the filing of BIPA class actions as well as the lifting of stays of the numerous cases pending that were awaiting the Rosenbach ruling.

A secondary consequence of Rosenbach is the quest for insurance coverage on which BIPA defendants will now embark. But the insurance industry already litigated the availability for these types of statutory violations (at least under general liability policies) in response to the wave of class actions filed under the Telephone Consumer Protection Act (“TCPA”). The patchwork of inconsistent decisions across the country relating to whether or not there was a duty to defend eventually gave way to the “Recording and Distribution of Material in Violation of Law” exclusion which specifically referenced the TCPA, the CAN-SPAM Act of 2003, the Fair Credit Reporting Act (“FCRA”), and the Fair and Accurate Credit Transaction Act (“FACTA”) as being exempted from liability coverage. The exclusion (first introduced in 2006) contains a catchall that states that the exclusion also applies to violations of any “federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.”

BIPA, enacted by the Illinois legislature in 2008, regulates the collection, storage and use of biometric information of Illinois citizens. 740 ILCS 14/1, et seq. The catchall to the above-referenced exclusion would appear on its face to encompass BIPA violations.

A BIPA class action was filed in Illinois in June 2018 against a California-based defendant. The defendant tendered its defense to its commercial general liability insurer which accepted subject to a reservation of rights citing, among other things, that catchall part of the above-referenced exclusion. The insurer filed a declaratory judgment complaint in August 2018 in the District Court for the Northern District of California. The insured moved to stay the coverage case. Invoking a court's inherent power to stay, the District Court granted the motion in an order entered on February 12, 2019. See Zurich Am. Ins. Co. v. Omnicell, Inc., No. 18-CV-5345, 2019 U.S. Dist. LEXIS 22907 (N.D. Cal. Feb. 12, 2019). The declaratory judgment action is now stayed pending the outcome of the underlying class action which was recently resumed in Illinois following Rosenbach.

The stay means the insurer in Omnicell will be required to fund the defense through settlement or trial before the applicability of the catchall provision the insurance industry arguably intended to apply to this very type of claim is adjudicated. The proliferation of BIPA class actions, however, all but guarantees that other insurers will file declaratory judgment actions seeking construction of this catchall provision. A declaration relating to this provision may not be imminent, but it is just a matter of time.

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