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3 Insurance Appeals To Watch At State High Courts In March

By **Jeff Sistrunk**

Law360 (February 26, 2021, 2:28 PM EST) -- Key insurance issues are on the menu for three state high courts in March, with the Illinois Supreme Court slated to consider whether biometric privacy suits trigger liability insurance, the Indiana high court set to weigh the NCAA's $25 million antitrust coverage battle and Ohio's justices poised to mull coverage for faulty product parts.

Here, Law360 breaks down the three cases in advance of this month's hearings.

Ill. High Court Weighs Biometric Suit Coverage

The Illinois Supreme Court will hear arguments on March 10 in West Bend Mutual Insurance Co.'s appeal of a lower court's novel ruling that it must defend a tanning salon in a proposed class action brought under the state's restrictive Biometric Information Privacy Act.

West Bend is aiming to upend a state appeals panel's **first-of-its-kind March 2020 decision** upholding a trial court ruling that obligated it to defend Krishna Schaumburg Tan Inc. in the proposed BIPA class action, which accused the salon of flouting BIPA by storing and distributing customers' fingerprint data without their consent.

The appellate panel found that the underlying action, filed by Krishna customer Klaudia Sekura, triggered West Bend's defense obligation under a section of the salon's commercial general liability policy covering personal injury claims stemming from the publication of information that violates an individual's privacy rights. The publication requirement was fulfilled by Sekura's claim that Krishna disclosed her fingerprints to a single third-party vendor, the panel held, rebuffing West Bend's contention that a publication must involve the broad disclosure of information to the public at large.

In briefs filed with the Illinois Supreme Court, West Bend asserted that the appeals panel's holding runs afoul of the state high court's 2006 opinion in Valley Forge Insurance Co. v. Swiderski Electronics, which construed the word "publication" to mean the "communication or distribution of information to the public."

"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 vendor is not communication to the public," the insurer argued.

West Bend also took exception with the appellate panel's refusal to apply an exclusion in Krishna's policy for claims stemming from the violation of statutes or regulations that prohibit or limit the "sending, transmission, communication or distribution of" information.

The panel pointed out in its decision that the exclusion's title indicates it applies to statutes, such as the Telephone Consumer Protection Act and CAN-SPAM Act, that govern "emails, fax, phone calls or other methods of sending material or information." BIPA, while it restricts the sending of

certain biometric information, does not regulate the use of any specific methods of communication, the panel found.

West Bend, however, argued that the appeals panel applied an overly narrow interpretation of the exclusion, which, according to the insurer, is not limited to statutes that regulate communication methods.

"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," the insurer contended.

Krishna and Sekura countered in separate filings with the Illinois high court that the appellate panel's findings were sound and comported with fundamental principles of insurance policy interpretation. They noted that the appeals panel rejected West Bend's insistence that the Swiderski opinion "conclusively defined" a publication as a broad communication of information to the public at large. Instead, the panel properly recognized that the term can also encompass a "more limited sharing" with a single third party, Krishna and Sekura argued.

In addition, Krishna and Sekura asserted that West Bend is trying to convince the Illinois justices to adopt an overbroad interpretation of the "violation of statutes" exclusion that is unsupported by the actual exclusionary language.

"Once again, as the policy's drafter, West Bend could have written the exclusion differently," Sekura's attorneys wrote in her brief. "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.'"

West Bend is represented by Thomas F. Lucas and Kristin D. Tauras of McKenna Storer.

Krishna is represented by Richard M. Burgland of Pretzel & Stouffer Chartered.

Sekura is represented by Ryan D. Andrews, Roger Perlstadt, Benjamin S. Thomassen and Alexander G. Tievsky of Edelson PC.

The case is West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan Inc. et al., number 125978, in the Illinois Supreme Court.

Ind. Justices Mull NCAA's Appeal in $25M Antitrust Coverage Row

On March 11, the Indiana Supreme Court will weigh the NCAA's appeal of a lower court decision axing its bid to force its excess directors and officers insurers to pay $25 million toward its defense of an antitrust suit over limits on student-athletes' compensation, in a case that involves a heavily litigated D&O policy exclusion.

The NCAA has asked the Indiana justices to reverse a state appeals panel's **July ruling** affirming that it is not entitled to coverage from Federal Insurance Co., Illinois National Insurance Co. or Westchester Fire Insurance Co. under a series of excess D&O policies it purchased for a period spanning September 2012 through September 2014.

The organization hopes to put the insurers on the hook for a large chunk of its defense bill in the case of Jenkins v. NCAA, which challenged rules in major college sports that limit payment to players and has been stayed since 2018 pending a final judgment in **multidistrict litigation over the same issue**.

However, the excess policies contain a "related wrongful acts" exclusion for any claims rooted in the "the same or related wrongful act alleged or contained" in any claim that the association previously reported to another insurer before the policy period.

The excess insurers contended — and the Indiana appeals panel agreed — that the exclusion

applies because Jenkins shares a "common nucleus of facts" with the case of White v. NCAA, which more narrowly contested the organization's rules capping student-athletes' financial aid and was settled in 2008. Although the suits differ in content and scope, the panel said that, at the bottom, they both revolve around accusations that NCAA bylaws impermissibly restrict student-athletes' compensation in violation of the Sherman Antitrust Act.

In its petition to transfer the case to the Indiana Supreme Court, the NCAA said the appellate panel's interpretation of the word "related" — which appears in many similar "related wrongful acts" exclusions in D&O policies — cannot stand because it is so broad that, if "applied literally," it would erase all the excess policies' coverage.

The organization asserted that the Indiana high court has adopted a general rule that overbroad policy terms cannot negate coverage, pointing to the court's 1996 decision American States Insurance Co. v. Kiger and 2012 ruling in State Auto v. Flexdar. In both those cases, the state justices refused to enforce pollution exclusions that they deemed overbroad and therefore ambiguous.

"The court should apply the same basic contract principles applied in Kiger, Flexdar, and other Indiana coverage cases," the NCAA argued. "'Related' is ambiguous, because applied literally it negates virtually all coverage, and its reasonable reach is unclear."

The NCAA further argued that the Jenkins and White actions are not related under any reasonable interpretation of that term.

"White accepted the NCAA's regulatory model, seeking only to tweak one part of it. Jenkins seeks to overthrow that model, to erase the distinction between college sports and professional sports," the organization said.

In their opposition to the NCAA's petition, the excess insurers shot back that the Kiger and Flexdar decisions are limited to cases involving pollution exclusions and did not create a standard rule applicable to all insurance policy provisions. Moreover, they argued, the appeals panel properly ruled that the related wrongful acts exclusion was unambiguous and clearly applies.

"Under the NCAA's rationale, the failure to explicitly define and list all possible scenarios where insurance policy terms apply would automatically render such terms ambiguous," the insurers contended.

Both parties garnered amicus briefs supporting their stances.

Backing the NCAA, the nonprofit policyholder advocacy group United Policyholders cautioned the Indiana Supreme Court that the appellate panel's "broad reading of the exclusion violates settled Indiana rules of insurance policy interpretation, and threatens to curtail or eliminate coverage for Indiana policyholders" under similar policies.

Conversely, the Complex Insurance Claims Litigation Association, an insurance industry trade group, wrote in support of the excess insurers that the arguments made by the NCAA and United Policyholders would "make it virtually impossible for insurers to enforce any contract exclusion."

The NCAA is represented by George M. Plews and Sean M. Hirschten of Plews Shadley Racher & Braun LLP.

The insurers are represented by Stephen J. Peters and David I. Rubin of Kroger Gardis & Regas LLP, David T. Brown of Kaufman Dolowich & Voluck LLP and Marianne G. May and Daren McNally of Clyde & Co.

United Policyholders is represented by Andrew J. Detherage, Charles P. Edwards and Christian P. Jones of Barnes & Thornburg LLP.

The Complex Insurance Claims Litigation Association is represented by Jeffrey C. Gerish of Plunkett Cooney.

The case is National Collegiate Athletic Association v. Ace American Insurance Co. et al., number 19A-PL-1313 in the Indiana Supreme Court.

Ohio High Court Considers Coverage for Faulty Product Parts

In a case of first impression in the Buckeye State, the Ohio Supreme Court will hear arguments on March 4 in a dispute over whether the inclusion of a policyholder's allegedly faulty component in a product results in property damage that is covered by liability insurance.

Motorists Mutual Insurance Co. has asked the Ohio high court to reverse a state appeals panel's January 2020 decision obligating it to defend policyholder Ironics Inc. against claims that a tainted coloring agent it sold to a glass bottle manufacturer caused 1,850 tons of bottles to have to be scrapped. Ironics has attributed the contamination of the agent by metal fragments to a shoddy screening process by another company.

Motorists Mutual declined to defend Ironics against bottle maker Owens-Brockway's claims, insisting that Ironics' supplying of the contaminated coloring agent, known as tube scale, was not an accidental "occurrence" under commercial general liability and umbrella policies it sold the company. Moreover, the insurer argued that Owens-Brockway's bottles did not sustain any damage when the tainted tube scale was added to them.

The insurance company convinced a trial court that Ironics is not entitled to coverage under either policy, but in January 2020, a state appellate panel reversed in part.

The panel agreed with the lower court that the CGL policy doesn't apply, but found that Motorists Mutual's defense duty was triggered under the umbrella policy, which defined an occurrence more broadly, to include not only accidents but also "events" and "happenings." It said Ironics' allegedly faulty work qualified as an event, and because the company did not expect or intend the tube scale to be contaminated, defense coverage is available.

In urging the Ohio high court to reverse the appeals panel's ruling on the umbrella policy, Motorists Mutual asserted that Ironics' situation lacks the element of "fortuity" — that is, a chance, unforeseen occurrence — that is central to the very concept of liability insurance. The insurer said the more expansive occurrence definition in the umbrella policy does not eliminate this fortuity requirement.

The insurer also suggested that the state justices follow the reasoning of a **2016 Wisconsin Supreme Court decision** in a case called Pharmacal, which held that the inclusion of a policyholder's defective ingredient in a product doesn't cause covered damage to third-party property for purposes of liability coverage. The Pharmacal opinion found that, if the ingredient supplied by the policyholder cannot be separated from the final "integrated" product, any damage to that product will be considered damage to the policyholder's own property, which is not covered.

Using this rationale, Motorists Mutual said Ironics is not entitled to coverage here because Owens-Brockway has not alleged harm to "property other than the glass produced with the contaminated tube scale."

Ironics countered that the insurer is essentially attempting to rewrite its umbrella policy, and said the Wisconsin high court's Pharmacal decision should have no bearing on a coverage dispute in Ohio.

"Contrary to [the insurer's] position, there is no language in Motorists' umbrella policy clearly stating that the incorporation of an insured's defective ingredient into another's final integrated product does not constitute 'property damage,' and thus is not covered," Ironics argued.

United Policyholders filed an amicus brief supporting Ironics, saying a decision in Motorists Mutual's favor would "set a dangerous new precedent" permitting insurers "to engage in post-loss underwriting restricting" policies' coverage.

On the other hand, the Ohio Insurance Institute, a Buckeye State insurance trade group, warned in an amicus brief backing Motorists Mutual that a decision affirming the appeals court's holding on the umbrella policy would create an "unwarranted and unprecedented" expansion of coverage for liability policies in the state.

Motorists Mutual is represented by Merle D. Evans III and Jack B. Cooper of Milligan Pusateri Co. LPA.

Ironics is represented by Theodore M. Dunn Jr. of Buckley King LPA.

The Ohio Insurance Institute is represented by Natalia Steele of Vorys Sater Seymour and Pease LLP.

United Policyholders is represented by its own Amy Bach, Stacy R.C. Berliner and P. Wesley Lambert of Brouse McDowell LPA and William G. Passannante and John M. Leonard of Anderson Kill PC.

The case is Motorists Mutual Insurance Co. v. Ironics Inc. et al., number 2020-0306, in the Ohio Supreme Court.

--Editing by Katherine Rautenberg.
