



Barclay Damon Live Presents Cyber Sip™
Episode 34: “Biometric Privacy Claims—Tips to Limit Your Exposure,” With Bryan McCarthy
Speakers: Kevin Szczepanski, Barclay Damon,
and Bryan McCarthy, Transatlantic Reinsurance Company

[Kevin Szczepanski]: Hey, everyone, this is a *Barclay Damon Live* broadcast of the *Cyber Sip*. Practical talk about cybersecurity. I’m your host, Kevin Szczepanski. Let’s talk.

[Kevin]: Hey, everyone. We’re back again with Bryan McCarthy, senior complex claims examiner for TransRe, where he handles reinsurance claims. Bryan, the last time you were on *Cyber Sip*, we talked about what’s up with BIPA for everything from what are biometrics to what the statute covers, the potential risks. And we ended on the subject of risk management. In other words, what a company can do to limit its exposure for these biometric privacy claims, claims that come from businesses that do not properly handle fingerprints, retinal scans, and other biometric data under the Illinois Biometric Information Privacy Act. So I wanted to have you come back on to talk to us a little bit about how companies can protect themselves through insurance coverage; the types of coverage claims you’re seeing. But before we get to that, I know you have something to read for us and I want to let you get to that first.

[Bryan]: Thank you so much, Kevin, and absolutely thank you for having me back. So just before we begin, I just have a disclaimer. So the information contained herein represents the opinions and views of the presenter. Does not necessarily represent the views or opinions of Transatlantic Reinsurance Company, TransRe, or its affiliates. It has been made available for informational and educational purposes only and is not intended as legal advice. Neither the presenter nor TransRe make any representations or warranties with respect to the accuracy, applicability, fitness, or completeness of the information presented. And TransRe and the presenter hereby disclaim any and all liability to any party for any damages arising from any use of or reliance on this presentation. No part of the presentation may be reproduced, published, or posted without the written permission of TransRe.

[Kevin]: Thanks for that, Bryan. And again, thanks for coming on.

[Bryan]: Thanks Kevin. So, you know, excellent question. I think we closed last time where we’re talking about, you know, the importance of everyone being on the same page, the carrier, the broker, and the insured, right, and to have a conversation early on to determine if the insured company is subject to BIPA and if so, what is the intent for insurance coverage? Where should the coverage fall in the program?

[Kevin]: Right. Bryan, I think we should review that last issue you mentioned one more time. Are you subject to BIPA? And as we talked on our last episode together, certainly you are subject to the statute if you are a company that’s headquartered in Illinois. But that’s not the only type of company that has to comply. What other types of companies could be subject to BIPA?

[Bryan]: Yeah, and I think that is that is an issue that has caused some challenges for companies that may not have realized that. So, you know, the way I remember it is the statute is designed to protect Illinois residents. Right. So as a company doing... headquartered in Illinois, subject to it, doing business in Illinois, subject to it, and even to the extent you’re a company that’s transacting business with Illinois residents, you still need to be aware of it and be in compliance.



[Kevin]: Right. So if you're a business, for example, that's a vendor to a company in Illinois, let's say you provide point of sale or POS services to an Illinois restaurant you're going to be subject to—and that POS machine in turn collects biometric data like fingerprints for employees as they punch in and punch out—your company will be subject to BIPA, even if you've never set foot in the state of Illinois. And if you're outside the state of Illinois, but you collect the biometric data of Illinois residents, you'll be subject to that statute again, even if you've never set foot in the state. So thank you for that clarification, Bryan. I think that comes as a surprise to companies when they find themselves on the wrong end of a lawsuit under BIPA.

[Bryan]: Yeah, no, that's right. And, you know, maybe the easy, easiest way to remember that is just to think of the fact that, you know, it's designed to protect the Illinois residents. So if you're transacting with Illinois residents, you need to be mindful of it.

[Kevin]: So once you know that you're a company that's potentially at risk for violating BIPA, I suppose one of the next things you need to know is what the scope of coverage is under your insurance policy. So, Bryan, let's talk about that now. What types of insurance policies potentially provide coverage for BIPA claims?

[Bryan]: Oh, sure, Kevin. You know, typically general liability policies, cyber policies, and employers' policies. The focus on much of the coverage litigation has been on the general liability policies. And my understanding of that is the reason for that is they have the most complete "duty to defend." So if there was a preference, I think it would be to place it on the general liability policy for an insured.

[Kevin]: So let's talk about the general liability policies, Bryan, because I know that's your chief focus when it comes to these claims at TransRe. What are some of the more common coverage issues that come up? I happen to have here a sample coverage form from ISO and I'm presuming that the key coverage issues are going to come up not under coverage A of the policy, which covers bodily injury or property damage, but under coverage B, which covers personal injury or advertising injury, right?

[Bryan]: That's right. Coverage B, you know, my personal favorite as we've talked about. So, you know, typically and again, each policy may be different, right? So they have to be analyzed according to their own terms. Right. But if we're talking generally on a... on the standard form where the potential coverage could come in is under coverage B, where under the definition of personal and advertising injury, you have an oral or written publication of any kind that invades a person's right of privacy. So ...and the Illinois court has addressed this. And in at least one case, I think it's West Bend Mutual, they have said that at least for the purposes of a duty to defend, the publication element was met under the coverage B, and it was a potential violation of a person's right to privacy. So if we think about that, right, if there is a technical violation of the BIPA statute or a section of it, let's say with the written compliance or the data storage provision or something, if someone's data was not handled appropriately under the statute, that is arguably a violation of their right of privacy. And that can get you through the insuring agreement for coverage B on the general liability policy potentially.

[Kevin]: Right. So you can satisfy the publication requirement of that particular offense, oral or written publication of material that violates a person's right to privacy. You can satisfy that publication requirement if you simply...let's say you're the restaurant, if you share that data with the POS vendor or if you as the POS vendor are storing that biometric data and you haven't disclosed to the Illinois resident that you're doing so or gotten their written consent. It seems like the courts in Illinois have interpreted BIPA very (and the definition of publication), exceedingly broadly.

[Bryan]: Yeah, Kevin, that's a great point. And I think it was in that same case that the Illinois Supreme Court said that the publication element was met by publishing it to one entity. Does not have to be to the public at large.



[Kevin]: So on one hand, the BIPA statute is very broad and can cause trouble for businesses, especially those who don't know they may be collecting biometric data from Illinois residents. But on the other hand, the Illinois courts have come back and, in interpreting what insurance coverage may be available to those businesses, they have interpreted the coverage provisions broadly. So it seems as though on one hand, a lot of businesses have been ensnared in BIPA, but on the other hand, the courts have come back and said, well, but you have insurance coverage to protect you.

[Bryan]: That's generally correct. Kevin. Yeah, and you know, a lot of the...some of the issues at least have not cycled their way entirely through the court system to the Illinois Supreme Court. So, for example, there was... there has been litigation over various exclusions. Right.

[Kevin]: Let's talk about that. Bryan, I was going to ask you about that now. One of them is the exclusion for access or disclosure of confidential or personal information. Right. What's your experience been with that? What are some of the other exclusions that come up in determining coverage for BIPA claims under a general liability policy?

[Bryan]: Oh, sure. The access or disclosure exclusion is a key one. Also, the violation of a statute exclusion has been litigated and as well as the...excuse me, the employment liability exclusion.

[Kevin]: Let's run down those... each of those quickly. Bryan, the access or disclosure of confidential or personal information. This one I'm just reading from an old ISO form. Every form is different, but this exclusion bars coverage for personal injury or advertising injury arising out of any access to or disclosure of any person's or organization's, confidential or personal information. On its face, that sounds like a pretty solid exclusion for a carrier to raise in response to a BIPA claim.

[Bryan]: You might think so. And I think perhaps rightly so. But what we have there is, I believe that Northern District, not yet the Illinois Supreme Court—has ruled that that type of exclusion and again, a particular type of that exclusion was not sufficient to bar coverage completely, at least under the duty to defend standards. So I think the current state of the law there is the...at least a district court... has the Northern District has said for the purposes of duty to defend, that's not sufficient for denial on the access or disclosure. Again, that will probably work its way up against the Supreme Court.

[Kevin]: May work its way up in Illinois, and there may be other states that will be interpreting that exclusion... in New York or California or Texas, for example. So more to come there. I'm sure. The second exclusion you mentioned is the violation of a statute exclusion. Now, on one hand, it seems obvious that that would apply because BIPA is a statute. But what have you seen in terms of court decisions on the scope of that exclusion?

[Bryan]: Yeah, I mean, I think some of the challenges with that exclusion, depending on the wording, right, it may encompass, you know, other excuse me, other statutes besides just BIPA. And a court may have an issue with a lack of specificity, perhaps. But I think that issue has been resolved for us. The Illinois Supreme Court has ruled as to the violation of statute exclusion, that it's not sufficient for a denial, is not appropriate, and at least for duty to defend standards. So a carrier had advanced that argument and did not prevail. So I think that's the current state of the law on that issue.

[Kevin]: So unlike the access or disclosure exclusion, the Illinois Supreme Court has ruled on the scope of the violation of the statute exclusion. And the answer is no. That exclusion does not apply. You mention one more, though, and I'll just call it the employment exclusion.

[Bryan]: Sorry. Yeah, I misspoke. The employment related practices exclusion was the third.

[Kevin]: Yeah. Talk to us about that one. So how does that exclusion come up and has it been tested in court yet?



[Bryan]: Well, you know, I think one of the arguments is, especially for these cases that we had talked about last time, where it's about clocking in and clocking out at work where you give your fingerprint and that matches your time for payroll, etc., argument can be made that that is related to employment right. Now, there is currently a split, I believe, in the Illinois court system on that exclusion. There was one court that upheld it in terms of appropriate for denying claim. Another did not. So again, it's a little unsettled until I believe the... I don't know if the Illinois Supreme Court has taken that up, but it as I understand it, it has not ruled. So nothing from the high court on that yet.

[Kevin]: Right. You know, talking about these disputes is important because we're seeing them being litigated in the courts, not just the underlying BIPA claims themselves, but the insurance coverage disputes arising out of the BIPA claims. And you and I work on those claims, but I can't help but think if I'm in the audience and I'm a business owner, the question I would have is, all right, I understand these disputes are out there and some of these exclusions may apply, but I don't want to have to deal with that. I want to know up front what policies I have and which one or combination of policies is meant to apply. And then what, you know, heaven forbid I get sued. I want the right policy to respond, to defend me, to indemnify me. And I don't want to have to litigate my right to insurance coverage. Have you seen that, Bryan? And if you have, what's the best way to deal with that issue up front, ahead of time, before it devolves into a dispute?

Bryan: No, sure. And we were joking earlier, right. I mean, you could have a scenario where unintentionally, perhaps two lines of coverage are triggered, right, for the same insured.

[Kevin]: Right.

[Bryan]: And then you may have an issue where you're looking at other insurance clauses. And, you know, I'm not aware of any Hollywood court drama or TV drama that focused on, you know, battling...dueling insurance clauses, other insurance clauses. So nobody really wants to get into that. Right. That dispute. So, you know, like you're suggesting, I think, Kevin, having a conversation early between carrier or carriers perhaps, insured, and broker to be very specific about, you know, if we believe that we're subject to BIPA, where do we want the coverage to fall within our program? And let's say, for example, it's determined that, you know, we want ...the parties all agree that coverage will fall under the cyber. Right. Let's just say that, well, then, to be clear, perhaps the solution is on the GL policy, broker insured insurer all agree we're going to have a specific exclusion that specifically is for BIPA. So we're not going to rely on access or disclosure or violation of generic if not violation of statute or employment practices. We're going to be explicit in saying this is an exclusion just for BIPA. So that may be one approach. But I think more importantly than an exclusion is all the parties reaching an agreement in terms of what the intent is and drafting policies accordingly.

[Kevin]: So just as we talked in our last episode about BIPA itself, there are ways to deal with it up front, understanding whether you're subject to the statute, having the right security controls in place and having that conversation with the carrier in advance, that's really critical. And it goes a long way in eliminating whatever uncertainty there might be in the event that your organization does get sued in a BIPA lawsuit and you're turning to your broker and your insurance carriers asking which one of you is going to step up and provide the defense and the indemnification.

[Bryan]: That's right. Nobody really wants to be in that position. And it can be avoided. Right. If the conversation is had beforehand.

[Kevin]: Yeah, it can be. I think that's a good place to end our conversation. Bryan, thank you so much for coming back to talk to us about insurance coverage for BIPA claims.

[Bryan]: Oh, Kevin, thank you so much. Really appreciate the opportunity and great to see you again. Thank you.



[Kevin]: Oh, it's great to see you. And promise me you'll come back for another episode sometime. I'm sure we will find a subject that is important to discuss.

[Bryan]: That would be great. Thanks, Kevin.

[Kevin]: All right. Thanks, Bryan. And thanks to all of you for joining us on this episode of Cyber Sip. We'll be back soon with another episode. Stay tuned.

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