

Duty to Defend, Access or Disclosure Exclusion Coverage Update

October 15, 2025

Duty to Defend – Eleventh Circuit (Georgia Law)

Medmarc Cas. Ins. Co. v. Fellows Labriola LLP

No. 25-10837, 2025 WL 2886733 (11th Cir. Oct. 10, 2025)

The U.S. Court of Appeals for the Eleventh Circuit upheld the U.S. District Court for the Northern District of Georgia's order granting defendants' Fellows Labriola LLP and Steven Kushner's (collectively Fellows) Rule 12(b)(6) motion and dismissing Medmarc Casualty Insurance Company's (Medmarc) declaratory judgment complaint.

This insurance coverage dispute arose when a legal malpractice suit was brought against Fellows by Zankhana Patel (Zankhana) and her company, PNP Amusement (PNP). The legal malpractice suit was brought after the state of Georgia filed a RICO and civil forfeiture action against Zankhana, PNP, Zankhana's then spouse, Manoj Patel (Manoj), Manoj's company, Krishna Amusement (KA), and others. Although a fee agreement was executed for Fellows to represent Zankhana, PNP, Manoj, and KA in the RICO action, the agreement signed by Zankhana and PNP did not reference conflicts of interest, and no one advised Zankhana or PNP of any conflict of interests with the joint representation.

The RICO action settled, and the defendants' assets were sold at auction generating about \$11 million, which Kushner distributed without first determining which portions of the proceeds belonged to Zankhana and PNP. Manoj subsequently filed for divorce. Zankhana and PNP did not receive any funds from the receiver or proceeds from the auction, nor did they receive funds and other assets that Fellows had transferred to Manoj, including a BMW and jewelry. As such, Zankhana and PNP sued Fellows and Kushner for legal malpractice, breach of fiduciary duty, breach of contract, punitive damages, and attorney fees and expenses. The legal malpractice suit was premised on the wrongful distribution of assets and failure to advise of potential conflicts of interest.

Medmarc issued a lawyers professional liability insurance policy to Fellows that was in effect when the malpractice case was filed. The policy contains a misappropriation exclusion that bars coverage for "any claim[s] or other request[s] involving or relating to any conversion, improper commingling, or misappropriation whether by an Insured or any other person, and whether intentionally or not, of client funds or trust account funds or funds of any other person held by any Insured in any capacity."

Medmarc filed a complaint for declaratory judgment seeking a declaration that it had no duty to defend or indemnify Fellows in the malpractice lawsuit. Medmarc alleged that the misappropriation exclusion applies to preclude all coverage for Fellows. Fellows filed a motion to dismiss under Fed. R. Civ. P. 12 (b)(6), arguing that the misappropriation exclusion does not apply to all of the claims alleged in the malpractice suit and that the duty to indemnify is not yet ripe for the court to decide. The trial court granted Fellows' motion and Medmarc timely appealed.

The appellate court, applying Georgia law, upheld the trial court's order, finding that Medmarc had a duty to defend Fellows in the malpractice lawsuit as some of the alleged claims fell outside the misappropriation exclusion and within coverage, including the allegations pertaining to conflicts of interest. While Medmarc argued on appeal that it does not have a duty to defend because the suit against Fellows contains one claim and that one claim falls under the misappropriation exclusion, the appellate court disagreed, noting that Medmarc did not raise this argument in the lower court, and even if it had, it was unpersuasive because there were multiple claims raised in the malpractice suit.

With regard to the duty to indemnify Fellows, the appellate court agreed with the lower court's finding that this claim is not ripe until the malpractice suit, which remains pending, is resolved. Accordingly, the appellate court affirmed the district court's order dismissing the declaratory judgment action of Medmarc.

By: Amy Diviney

Access or Disclosure Exclusion – S.D. Illinois (Illinois Law)

The Phoenix Ins. Co. v. Ackercamps.Com LLC

No. 3:23-Cv-3303, 2025 WL 2799377 (S.D. Ill. Sept. 30, 2025)

The U.S. District Court for the Southern District of Illinois granted summary judgement in favor of The Phoenix Insurance Company, Travelers Casualty Insurance Company of America, The Travelers Indemnity Company and Travelers Property Casualty Company of America (collectively, Travelers), declaring that it had no duty to defend or indemnify Ackercamps.com LLC (Ackercamps) in a suit alleging that Ackercamps had violated the Illinois Biometric Information Privacy Act (BIPA).

Ackercamps contracted with summer youth camps in Illinois to provide campers' parents with online access to photos from the summer camp. Ackercamps' software was equipped with facial recognition software, which analyzed the facial geometry of children in photos and then notified the parents whenever their child's photo was posted in the galleries. In 2022, Ackercamps was sued under the Illinois BIPA, or 740 ILCS 14/1, et. seq., which regulates the collection, storage and use of biometric identifiers, including facial geometry. Ackercamps put its commercial general liability and umbrella insurer, Travelers, on notice of the suit, but Travelers denied coverage. In August 2023, Ackercamps

reached a tentative settlement, but Travelers maintained its denial of coverage.

The umbrella policy issued by Travelers provided coverage for damages otherwise available through the underlying primary insurance, subject to the terms, exclusions and definitions of the primary policies. Ackercamps' two primary policies contained an access or disclosure of confidential or personal information exclusion, which provides that the insurance does not apply to personal or advertising injury arising out of any access to or disclosure of any person's or organization's confidential or personal information.

Travelers filed suit, seeking a declaration that it had no duty to defend or indemnify, relying, in part, upon the case of *Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, 102 F.4th 438 (7th Cir. 2024), in which the court concluded that the ordinary understanding of "confidential or personal information" includes information derived from facial geometry. Subsequently, in a similar 2025 case, an insured was sued in Illinois state court for violating BIPA, and summary judgment was granted to its insurer based upon the same access or disclosure exclusion. In response, Ackercamps argued that the coverage grant "expressly and specifically covers photographs or likeness" and, therefore, the exclusion effectively consumes that grant of coverage, thereby making the coverage illusory.

The trial court utilized Illinois state law's approach to construction and interpretation of contracts: "Construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. If the policy language is unambiguous, it will be applied as written, unless it contravenes public policy. An ambiguity exists when the policy language is subject to more than one reasonable interpretation." The trial court granted Travelers' summary judgement motion, finding that the access or disclosure exclusion applied to the BIPA lawsuit because the subject of the lawsuit against Ackercamps was its collection and retention of biometric information and not the publication of the information, which would have been covered. Further, the trial court found that Ackercamps did not prove how the exclusion made the grant of coverage illusory where, by example, the policy would cover publication but not the retention or collection act.

By: Shantinique Brooks