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IN THE
COURT OF APPEALS OF INDIANA

Illinois Casualty Company,

Appellant-Plaintiff,

v.

B&S of Fort Wayne Inc., Showgirl III, Inc., Reba Enterprises LLC, Jessica Burciaga, Jessica Hinton, Jamie Middleton Eason, Lucy Pinder, Abigail Ratchford, Emily Scott, Denise Trlica, Sara Underwood, Jennifer Walcott Archuletta, Paola Canas, Camila Davalos, Mariana Davalos, Jaime Edmondson, Cielo Jean Gibson, Hillary Hepner, Krystal Hipwell, Melanie Iglesias, Joanna Krupa, Arianny Celeste Lopez, Brooke

January 11, 2023

Court of Appeals Case No. 22A-PL-432

Appeal from the Allen Superior Court

The Honorable Craig J. Bobay, Judge

Trial Court Cause No. 02D02-2107-PL-273

Marrin, Ursula Mayes, Carrie Minter, Anya Monzikova, Andra Cheri Moreland Caitlin O'Connor, Lina Posada, Laurie Romeo, Ina Schnitzer, Cora Skinner, Alana Souza, Irina Voronina, Jennifer Zharinova, and Rachel Koren,

Appellees-Defendants.

Tavitas, Judge.

Case Summary

[1] Illinois Casualty Company ("ICC") appeals the trial court's grant of a motion to compel arbitration filed by the assignees ("Models") of various business insurance policies that ICC issued to B&S of Fort Wayne, Inc. ("B&S"), Showgirl III, Inc., and Reba Enterprises, LLC (collectively, "Insured Clubs"). Models are thirty-three professional models from around the world. Models claim that Insured Clubs, who owned two strip clubs in Fort Wayne, used the Models' photographs in Insured Clubs' advertisements without the Models' permissions and that the Insured Clubs posted those advertisements on their social media accounts between December 2014 and October 2020.

[2] In October 2020, Models filed a federal court complaint against the Insured Clubs. ICC denied coverage to the Insured Clubs, and Models reached a Settlement Agreement with the Insured Clubs in the federal court litigation

whereby Insured Clubs assigned their rights, claims, and causes of action against ICC to Models in the Settlement Agreement.

[3] After the Settlement Agreement was reached, but before a consent judgment was entered by the federal court, ICC filed a complaint for declaratory judgment in state court against the Insured Clubs and Models. Models claim that they are entitled to arbitration on the declaratory judgment claims because some of ICC's policies with Insured Clubs contained an arbitration provision in a Cyber Protection Endorsement. The trial court granted the Models' motion to compel arbitration.

[4] On appeal, ICC argues that the trial court erred by granting Models' motion to compel arbitration. We agree and conclude that the arbitration agreement clearly and unambiguously does not apply to the parties' dispute for two reasons. With respect to the Models with pre-2016 claims, the Policies at issue do not contain an arbitration provision. With respect to Models with 2016 and later claims, the arbitration provision applies only to claims brought under the Cyber Protection Endorsement, and the Models did not bring timely claims under the Cyber Protection Endorsement. Accordingly, we conclude that the trial court erred by granting the Models' motion to compel arbitration, and we reverse and remand.[1]

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[1] We held oral argument on November 18, 2022, at the Blue Chip Casino in Michigan City during the Defense Trial Counsel of Indiana ("DTCI") Annual Conference. We thank counsel for their excellent advocacy and DTCI and Blue Chip Casino for hosting our Appeals on Wheels oral argument.

Issue

[5] ICC raises several issues on appeal. We find one issue dispositive, which we restate as whether the parties' dispute falls within the scope of the arbitration provision.

Facts

Underlying Litigation

[6] Insured Clubs are owners of two strip clubs in Fort Wayne, Indiana. Models are thirty-three professional models from around the world who claim that Insured Clubs used the Models' photographs in Insured Clubs' advertisements without the Models' permissions and that the Insured Clubs posted those advertisements on their social media accounts between December 2014 and October 2020. In October 2020, eight Models filed a complaint against the Insured Clubs in the United States District Court, Northern District of Indiana, and alleged that the Insured Clubs improperly used the Models' images in violation of the federal Lanham Act, *see* 15 U.S.C. § 1125; in violation of the Indiana right of publicity statute, *see* Indiana Code Chapter 32-36-1; and that the acts constituted unjust enrichment. *See Burciaga et al. v. B & S of Fort Wayne Inc. et al.*, Case No. 1:20-cv-000367. The Models amended their complaint in December 2020 to add additional Models. The Models filed a second amended complaint in April 2021 to add the claim of an additional Model.

The Insurance Policies

[7] Insured Clubs claimed that they were entitled to coverage for Models' claims pursuant to business owners' insurance policies issued by ICC and other insurers. ICC issued business owners' insurance policies ("Policies") as follows: (1) annual policies to Showgirl with effective dates of November 5, 2014, through November 5, 2016, and August 29, 2017, through August 29, 2018; (2) annual policies to B&S with effective dates of November 16, 2014, through November 16, 2019; and (3) annual policies to Reba Enterprises with effective dates of August 29, 2018, through August 29, 2020. The Policies are largely similar and contain the following provision:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend against any "suit" seeking damages for "bodily injury", "property damage", or "personal and advertising injury" to which this insurance does not apply.

See, e.g., Appellant's App. Vol. IX p. 106.[2] The insurance applied to "'personal and advertising injury' caused by an offense arising out of your business, but

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[2] *See also* Policies at Appellant's App. Vol. III p. 218; Appellant's App. Vol. IV pp. 80, 215; Appellant's App. Vol. V pp. 108, 216; Appellant's App. Vol. VI pp. 72, 175; Appellant's App. Vol. VII pp. 49, 179; Appellant's App. Vol. VIII pp. 59, 210. For simplicity, we will only reference the Policy at Appellant's App. Vol. IX pp. 35-177, which also contains the Cyber Protection Endorsement.

only if the offense was committed in the 'coverage territory' during the policy period." *Id.* at 107.

Cyber Protection Endorsement

[8] Beginning in 2016, ICC added a Cyber Protection Endorsement and limited the personal and advertising injury coverage as follows:

> **w. Personal And Advertising Injury**
>
> * * * * *
>
> **(2) Cyber Protection**
>
> This insurance does not apply [to] any of the following, as defined under the Cyber Protection Form BL EC 06, except to the extent that coverage may be provided under the Cyber Protection Form BL EC 06.
>
> (a) Multimedia Liability[3]

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[3] The Cyber Protection Endorsement defined "Multimedia peril" as:

> the release or display of any "electronic media" on your "internet" site or "print media" for which you are solely responsible, which directly results in any of the following:
>
> a. Any form of defamation or other tort related to the disparagement or harm to the reputation or character of any person or organization, including libel, slander, product disparagement, or trade libel;
>
> b. Invasion, infringement or interference with an individual's right of privacy including false light, intrusion upon seclusion, commercial misappropriation of name, person, or likeness, and public disclosure of private facts;
>
> c. Plagiarism, piracy, or misappropriation of ideas under an implied contract;
>
> d. Infringement of copyright, trademark, trade name, trade dress, title, slogan, service mark or service name; or

(b) Security and Privacy Liability

(c) Privacy Regulatory Defense and Penalties

(d) Privacy Breach Response Costs, Notification Expenses and Customer Support and Credit Monitoring Expenses

(e) PCI DSS Assessment

Id. at 116-17.

[9] The Cyber Protection Endorsement contained significant limits on liability, as opposed to the personal and advertising injury coverage, which had much higher limits on liability. The Cyber Protection Endorsement is a "claims made" policy, *id.* at 144, which is a policy that "protects the holder only against claims made during the life of the policy." *Paint Shuttle, Inc. v. Cont'l Cas. Co.*, 733 N.E.2d 513, 522 (Ind. Ct. App. 2000), *trans. denied*. Appellees do not dispute ICC's contention that Models' claims were not made during the lives of any of the Policies at issue here.

[10] The Cyber Protection Endorsement provides: "The **terms**, conditions, exclusions, and limits of insurance **set forth in this form apply only to the**

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e. Domain name infringement or improper deep-linking or framing.

Appellant's App. Vol. IX p. 159.

coverage provided by this form." *Id.* (emphasis added). The Cyber Protection Endorsement also contains the following:

> **J. Arbitration**
>
> Notwithstanding any other provision of this form or the Policy, any irreconcilable dispute between us and an "insured" is to be resolved by arbitration in accordance with the then current rules of the American Arbitration Association, except that the arbitration panel shall consist of one arbitrator selected by the "insured", one arbitrator selected by us, and a third independent arbitrator selected by the first two arbitrators. Judgment upon the award may be entered in any court having jurisdiction. The arbitrator has the power to decide any dispute between us and the "insured" concerning the application or interpretation of this form. However, the arbitrator shall have no power to change or add to the provisions of this form. The "insured" and us will share equally in the cost of arbitration.

Id. at 165.

Settlement and Consent Judgment in Underlying Litigation

[11] In November 2020, ICC sent a letter denying coverage and refusing to defend the Insured Clubs. In April 2021, ICC requested that the Insured Clubs withdraw their request for coverage within thirty days to avoid ICC filing a declaratory judgment action.

[12] On May 25, 2021, the Insured Clubs and the Models signed a Settlement Agreement. ICC claims that it was not informed of the Settlement Agreement. Under the Settlement Agreement, the Insured Clubs agreed to a consent

judgment against Insured Clubs for $1,917,825.00, in which the Insured Clubs agreed to pay $177,825.00 of the consent judgment. As for the remainder of the consent judgment, the Insured Clubs assigned their rights against ICC and other insurance companies to the Models, and the Models agreed to not execute the unsatisfied judgment against Insured Clubs. Specifically, the Settlement Agreement provided, in part:

> **Assignment of Claims Against ICC, Golden Bear, and SPRISKA[4] by Defendants.** In consideration for the releases set forth in paragraph 2 hereof, [Insured Clubs] agree to, and hereby do, assign to [Models] all of their rights, claims, and causes of action against ICC, Golden Bear and/or SPRISKA and their agents, brokers, employees, officers and all other persons or entities arising out of the Action, any applicable insurance policy or policies, and the Stipulated Judgments (as defined in paragraph 3 hereof), including but not limited to all statutory rights, contractual rights, and rights arising in tort or otherwise, relating to ICC's, Golden Bear's and/or SPRISKA's duties to defend [Insured Clubs] against the Action, to indemnify [Insured Clubs] for any judgment against [Insured Clubs] in the Action, to deal with [Insured Clubs] in good faith, and/or to participate in and/or pay any settlement of the Action on behalf of [Insured Clubs] (the "Assigned Claims"). The assignment in this paragraph 5 will be effective immediately following the entry of the Stipulated Judgments and before the covenant not to execute set forth in paragraph 6 herein is effective.

Appellant's App. Vol. IX p. 188.

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[4] Golden Bear and SPRISKA are other insurers, but they are not parties to this litigation.

[13] On June 1, 2021, the Insured Clubs and the Models filed a joint motion to approve the consent judgment, which the district court denied on June 17, 2021. On July 27, 2021, the parties filed a renewed joint motion to approve the consent judgment, and the district court granted the motion on July 29, 2021.

Declaratory Judgment Action

[14] On July 1, 2021, before the consent judgment was approved by the district court, ICC filed a declaratory judgment action against the Insured Clubs and the Models in state court in Allen County. On September 30, 2021, ICC filed its first amended complaint for declaratory judgment. The amended complaint alleges that the Policies do not provide coverage under the "bodily injury," "property damage," or "personal and advertising injury" coverages; the Policies do not provide coverage under the Cyber Protection Endorsement, which is a "claims made" policy; the Policies do not provide coverage due to breaches of the policy conditions; and the Policies do not provide indemnity coverage for the consent judgment.

[15] The Insured Clubs and Models responded by filing a motion to compel arbitration. The Insured Clubs and the Models relied upon the arbitration provision in the Cyber Protection Endorsement and argued that "[a]t least six of the Policies directly contain the broad written arbitration clause[.]" Appellant's App. Vol. II p. 53. They also argued that the Insured Clubs "assigned their rights against [ICC] under the Policies related to the Underlying Suit to the Models." *Id.* at 54. The Insured Clubs and Models contended that the arbitration provision was broad and that "the scope of claims within the ambit

of arbitration are for the arbitrators, and not the Court, to decide in the first instance." *Id.* at 59.

[16] ICC responded to the motion to compel arbitration and argued: (1) some of the Policies that some of the Models rely upon did not contain an arbitration provision at all; (2) the arbitration provision applies only to the Cyber Protection Endorsement, and the Cyber Protection Endorsement coverage clearly does not apply here; (3) the disputed issues are outside the scope of the Cyber Protection Endorsement; (4) ICC did not have an arbitration agreement with Models because the Policies contain an anti-assignment provision and the Insured Clubs did not obtain ICC's permission before assigning their rights to the Models; and (5) the consent judgment was unreasonable, collusive and in bad faith. Accordingly, ICC contended the Models had no right to compel arbitration. The trial court held a hearing on the motion to compel arbitration on January 13, 2022.

[17] On January 31, 2022, ICC filed a voluntary motion to dismiss the Insured Clubs from the proceedings without prejudice. The trial court granted ICC's motion to dismiss the Insured Clubs.

[18] The trial court then granted the motion to compel arbitration, and Models filed a motion to correct error to correct a clerical mistake. The trial court then entered an amended order granting the motion to compel arbitration. The trial court found: (1) "[i]n light of the ambiguous language employed by [ICC] in the policies, the Court construes the arbitration provision against [ICC], and the

Court concludes that the arbitration provision is valid and enforceable"; (2) "[a]lthough the Models are not the 'insured' who maintained the Businessowners Liability and Cyber Protection policies with [ICC], the Settlement Agreement and consent judgment entered in the underlying suit assign all of [Insured Clubs'] rights under the policies to the Models"; and (3) all of the Models are entitled to present their dispute to the arbitrator even though the arbitration provision applied to only some of the Policies. *Id.* at 32-33. The trial court stayed the proceedings pending arbitration and directed entry of final judgment pursuant to Indiana Trial Rule 54(B).

[19] ICC filed motions to certify the order for interlocutory appeal and to stay arbitration pending appeal. The trial court granted both motions. This Court granted ICC's motion for interlocutory appeal.

Discussion and Decision

[20] ICC challenges the trial court's grant of the Models' motion to compel arbitration. "A trial court's decision on a motion to compel arbitration is reviewed de novo." *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021). Moreover, to the extent we are required to interpret the insurance Policies, the "[i]nterpretation of an insurance contract is a question of law, which we address de novo." *G&G Oil Co. of Ind. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021).

[21] ICC raises several issues on appeal, including that the Policies contain anti-assignment provisions and that ICC did not consent to the assignment of rights

to Models. ICC also claims that the consent judgment was made in bad faith and through collusion and that the consent judgment violates the Policies' provisions barring an insured from making a voluntary payment or assuming an obligation without ICC's written consent. We need not address these arguments, however, because, even assuming the assignment to Models was permissible, we conclude that: (1) the Models with pre-2016 claims are not entitled to arbitration; and (2) as for the Models with 2016 and later claims, the parties' dispute is not covered by the language of the Cyber Protection Endorsement's arbitration provision.

[22] "Whether parties have agreed to arbitrate a dispute is a matter of contract interpretation and the parties' intent." *Progressive Se. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 88 N.E.3d 188, 194 (Ind. Ct. App. 2017). "In determining whether parties agreed to arbitrate a particular dispute, the court decides whether the dispute, on its face, is within the language of the arbitration provision." *Id.* "A reviewing court must attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties." *Id.* "Additionally, '[w]hen construing arbitration agreements, every doubt is to be resolved in favor of arbitration,' and the 'parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used.'" *Id.* (quoting *Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001)). "We do not, however, extend arbitration agreements beyond the clear language of the agreement and we will not extend arbitration agreements by construction or

implication." *Id.* "To determine whether a dispute falls within the provisions of an arbitration agreement we turn to the contract's plain language." *Id.* at 195.

A. Are the Models with Pre-2016 Claims Entitled to Arbitration?

[23] Even if the assignment to Models was proper, ICC points out that almost a third of the Models do not allege a publication of their images after the 2016 addition of the Cyber Protection Endorsement, which contained the arbitration provision; and many of the Models allege publication of their images both before and after the Cyber Protection Endorsement was added to the Policies. The trial court found:

> [A]lthough [ICC] argues that if arbitration is warranted, then only some of the Models are entitled to arbitrate, nothing in the Settlement Agreement and consent judgment distinguishes between any of the Models. Thus, all of the Models are entitled to present their dispute regarding the consent judgment and the validity of the assignment to an arbitrator. Inconsistent results would surely flow from arbitration of only some, but not all of the claims being forwarded by the Models. Those inconsistencies would be contrary to the principle of equal justice.

Appellant's App. Vol. II p. 46.

[24] Our Courts have held that, "because arbitration is a matter of contract, a party cannot be required to submit to arbitration unless he or she has agreed to do so." *Progressive Se. Ins. Co.*, 88 N.E.3d at 194. The trial court found that the Settlement Agreement and consent judgment did not differentiate between the Models, but the issue here is whether a valid arbitration agreement exists with

each Model, not the Models as a whole. We cannot conclude that the Models making claims based upon Policies issued prior to the addition of the Cyber Protection Endorsement's arbitration provision in 2016 are entitled to arbitration. Although Courts have recognized that "piecemeal litigation" may result from this approach, separate consideration of the Models with pre-2016 claims is required. *See, e.g., Welty Bldg. Co. v. Indy Fedreau Co., LLC*, 985 N.E.2d 792, 803 (Ind. Ct. App. 2013) (noting that the Federal Arbitration Act "requires enforcement of arbitration agreements, even if the result is piecemeal litigation and 'notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S. Ct. 927, 939 (1983)).

B. Are the Models with 2016 and Later Claims Entitled to Arbitration?

[25] As for the remaining Models with claims falling after the addition of the Cyber Protection Endorsement, ICC argues that the Models' claims do not fall within the scope of the Cyber Protection Endorsement's arbitration provision. ICC contends that the arbitration provision "clearly and unambiguously" applies only for disputes under the Cyber Protection Endorsement form. Appellant's Br. p. 30. Models, however, argue that: (1) the arbitration provision is broad and does not limit itself to disputes falling under the Cyber Protection Endorsement form; and (2) they are entitled to arbitration because the Policies'

personal and advertising injury coverage exclusions reference the Cyber Protection Endorsement.[5]

[26] The Cyber Protection Endorsement contains the following provision:

> **J. Arbitration**
>
> **Notwithstanding any other provision of this form or the Policy, any irreconcilable dispute between us and an "insured" is to be resolved by arbitration** in accordance with the then current rules of the American Arbitration Association, except that the arbitration panel shall consist of one arbitrator selected by the "insured", one arbitrator selected by us, and a third independent arbitrator selected by the first two arbitrators. Judgment upon the award may be entered in any court having jurisdiction. **The arbitrator has the power to decide any dispute between us and the "insured" concerning the application or interpretation of this form**. However, the arbitrator shall have no power to change or add to the provisions of this form. The "insured" and us will share equally in the cost of arbitration.

Appellant's App. Vol. IX p. 165 (emphasis added).

[27] The term "form" in the arbitration provision refers to the Cyber Protection Endorsement. This is evident by a review of the Endorsement as a whole. The first page of the Endorsement provides: "This **Form** Changes The Policy.

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[5] The concurring opinion contends that we should not address one of the Models' main arguments—that the arbitration provision applies to any claim under the Policies, not just claims brought under the Cyber Protection Endorsement. Addressing this issue is necessary to resolve the appeal and properly address the parties' arguments. If the arbitration provision applies to any claim brought under the Policies, then it would be possible for the Models' non-Cyber Protection Endorsement claims to be subject to arbitration. Accordingly, we respectfully disagree with the concurring opinion.

Please Read It Carefully." *Id*. at 144 (emphasis added). The same page also provides: "This **form** amends your policy to provide Cyber Protection insurance on a Claims-Made and Reported basis. Various provisions in this **form** restrict coverage." *Id.* (emphasis added). The Endorsement also provides: "The **terms**, conditions, exclusions, and limits of insurance **set forth in this form apply only to the coverage provided by this form**." *Id*. (emphasis added).

[28] The trial court found the arbitration provision to be ambiguous and construed the Policies against ICC. Specifically, the trial court found the first and third sentences of the arbitration provision to be "at odds" because the first sentence is "very broad" and the third sentence "limit[s] arbitration" to "only disputes concerning the Cyber Protection Endorsement." Appellant's App. Vol. II p. 44. We disagree.

[29] Although the first sentence of the arbitration provision is broad, it is clarified and limited by the third sentence of the provision, which only gives the arbitrator the power to decide disputes "concerning the application or interpretation of this form," which is the Cyber Protection Endorsement. Appellant's App. Vol. IX p. 165. We are required to read the agreement "as a whole and construe the language so as not to render any words, phrases, or terms ineffective or meaningless." *Anonymous, M.D. v. Hendricks*, 994 N.E.2d 324, 329 (Ind. Ct. App. 2013). Under the trial court's interpretation, we would be required to ignore the limitations on arbitration set forth in the third sentence. Reading the Cyber Protection Endorsement as a whole, we conclude

that the arbitration provision clearly and unambiguously applies only to claims brought under the Cyber Protection Endorsement. *See State, ex rel. Carter v. Philip Morris Tobacco Co.*, 879 N.E.2d 1212, 1215 (Ind. Ct. App. 2008) ("[A]rbitration agreements are not to be extended by construction or implication; therefore, parties are bound to arbitrate only those issues that by clear language they have agreed to arbitrate."), *trans. denied*.

[30] The Cyber Protection Endorsement is a "claims made" coverage. This Court explained the difference between occurrence based policies and claims made based policies in *Paint Shuttle*, Inc., 733 N.E.2d at 522:

> Conventional liability insurance policies are "occurrence" policies. "Occurrence" policies link coverage to the date of the tort rather than of the suit. Thus, "occurrence" policies protect the policyholder from liability for any act done while the policy is in effect. A "claims made" policy links coverage to the claim and notice rather than the injury. Thus, a "claims made" policy protects the holder only against claims made during the life of the policy.
>
> Both [ ] "occurrence" and "claims made" insurance policies require the insured to promptly notify the insurer of the possible covered losses. The notice provision of a "claims made" policy is not simply the part of the insured's duty to cooperate, it defines the limits of the insurer's obligation. If the insured does not give notice within the contractually required time period, there is simply no coverage under the policy.

(internal citations omitted). Thus, the Cyber Protection Endorsement required that a claim be made against an insured *during* the coverage period.

[31] ICC contends that Models' claims were not timely under the Cyber Protection Endorsement. ICC argues:

> [T]he Cyber Protection coverage is a claims-made based coverage, and no claim was made until well after the last effective date of all three ICC Policies. The last SHOWGIRL Policy with ICC expired on 8/29/18, while the last B&S Policy with ICC expired on 10/16/19, and the last REBA Policy with ICC expired on 8/29/20, all of which expired well before the original Underlying Complaint was filed. As such, those 13 models cannot be construed to have been assigned any rights under the ICC Policies issued in 2016 or later, which are the only Policies that contain the Cyber Protection Coverage that contains the limited arbitration provision.

Appellant's Br. p. 27.

[32] Models acknowledge that the Cyber Protection Endorsement is a claims made coverage, *see* Nov. 18, 2022 Oral Argument at 21:04, and Models do not address or dispute ICC's argument that, to the extent Models are making Cyber Protection Endorsement claims, the Models' claims, which were not brought until at least October 2020, were untimely. *See* Appellees' Br. pp. 31-32. Because the claims were not timely made under the Cyber Protection Endorsement, the arbitration provision does not apply, and the Models are not entitled to arbitration on their claims against ICC.

[33] Although we conclude that the arbitration provision applies only to claims made under the Cyber Protection Endorsement, we must also address Models' argument that the arbitration provision applies because the personal and

advertising injury provisions in the Policies refer to the Cyber Protection Endorsement form. Specifically, Models contend "the applicability of B.1.w.(2) Cyber Protection exclusion[ ] to the personal and advertising injury coverage part of the Businessowners Liability coverage form is directly in dispute . . . ." Appellees' Br. p. 32; *see* Appellant's App. Vol. IX pp. 116-17. This exclusionary provision in the Policies, B.1.w.(2), merely states that the "insurance does not apply [to] any of the following, as defined under the Cyber Protection Form BL EC 06, except to the extent that coverage may be provided under the Cyber Protection Form BL ED 06 . . . ." Appellant's App. Vol. IX p. 117. The mere fact that the Cyber Protection Endorsement is mentioned in the Policies does not indicate that the Cyber Protection Endorsement's arbitration provision is somehow incorporated into the Policies. We, thus, find Models' argument unpersuasive.

Conclusion

[34] We conclude that the Models with claims prior to the addition of the Cyber Protection Endorsement are not entitled to arbitration because an arbitration provision did not exist in the Policies at that time. As for Models with claims after the addition of the Cyber Protection Endorsements, the Cyber Protection Endorsement's arbitration provision applies only to claims made under the Cyber Protection Endorsement. None of the Models' claims fell within the time frame of coverage. Accordingly, we conclude that the trial court erred by granting Models' motion to compel arbitration, and we reverse and remand for further proceedings consistent with this opinion.

[35] Reversed and remanded.

May, J., concurs.

Crone, J., concurs in result with separate opinion.

Illinois Casualty Company,
Appellant-Plaintiff,

v.

B&S of Fort Wayne Inc., *et al.*,
Appellees-Defendants.

Court of Appeals Case No.
22A-PL-432

Crone, Judge, concurring in result.

[36] Paragraph 4 of the majority's opinion succinctly summarizes the basis for its holding that the trial court erred in granting the Models' motion to compel arbitration. Unfortunately, the majority's analysis regarding the Models with 2016 and later claims is not nearly as concise, and I fear that it may unnecessarily confuse the trial court and the parties on remand and muddy the water for practitioners in this area. All anyone needs to know about the Cyber Protection Endorsement is that it is a "claims made" coverage and that the Models made no claims during the coverage period, and thus the arbitration provision does not apply. Full stop. Paragraphs 26 through 29 and 33 of the majority's opinion are pure dicta. The issues addressed therein are not

necessary to resolve this appeal or any of the issues that remain upon remand, and the majority acknowledges that fact in footnote 5. Therefore, I respectfully concur in result.