The Sixth Circuit Highlights A Key Insurance Issue for the #MeToo Era in Negligent Hiring, Supervision and Retention Cases Involving Sexual Misconduct

Insured-employers take note: In the age of #MeToo and the seemingly endless flood of sexual misconduct and sexual harassment claims, insureds should be aware that a court's evaluation of the number of "occurrences" under a general liability policy could significantly impact available insurance coverage when defending claims of negligent hiring or supervision, or training of an individual accused of sexual harassment or sexual misconduct.

The U.S. Sixth Circuit Court of Appeals recently addressed this issue and that which insured-employers should consider when confronted with a claim of negligent hiring, supervision, or retention of an employee accused of sexual misconduct. *Scott Fetzer Co. v. Zurich American Insurance Co.,* 2019 WL 1925550 (6th Cir. April 30, 2019), involved coverage for an underlying lawsuit alleging negligent hiring, retaining and supervision of an independent contractor who allegedly committed verbal abuse and sexual harassment. The insured settled the claims with the accusers and sought indemnification under its general liability policies.

Zurich agreed to indemnify the insured but contended that the alleged sexual misconduct against each of the three individuals was a separate "occurrence." *Id.* Zurich agreed to pay $2 million per "occurrence" of bodily injury coverage, but Fetzer was responsible for a deductible of the first $1 million for each "occurrence." *Id*. Of the three settlements, only one met or exceeded the per-occurrence deductible amount. *Id*. Applying its interpretation that each claim was a separate "occurrence," Zurich stated it would only pay the amount that exceeded the deductible on the one claim and refused to indemnify any portion of the other two settlements. *Id*. In contrast, Fetzer contended that there was only one "occurrence." *Id*.

The Sixth Circuit held that Fetzer's negligent hiring, retention and supervision of the tortfeasor, who allegedly committed separate acts of sexual misconduct against multiple victims, constituted a single "occurrence" for purposes of insurance coverage. *Id*. at *5. In its analysis and applying Ohio law, the court held that the policy was ambiguous because "occurrence" had two reasonable interpretations and reaffirmed that any ambiguity required a finding of coverage. *Id*. at *4. The court also considered a split in authority as to whether "occurrence" is ambiguous, with some courts finding that it refers to the insured's negligent hiring and supervision, even when multiple people have been allegedly harmed. *Id*.

The Zurich policy contained two definitions of occurrence, but the Sixth Circuit focused on the policy's standard definition of "occurrence." This definition states that an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at *2. Focusing on the term "exposure," the Sixth Circuit held that case law supported Fetzer's position as a reasonable one—that the "exposure" was when the women were exposed to Fetzer's negligent supervision of Mr. Fields. *Id*. at 4. Further, because "accident" was not defined in the Zurich policy, it had to be accorded its common definition as "something that happens by chance" or "without apparent or deliberate cause." *Id*. Because the intentional, sexual misconduct of Mr. Fields could never be considered an "accident" under this definition, the only alternative was for Fetzer's negligent conduct to constitute the "accident." *Id*.

Scott Fetzer is one of many cases concerning the analysis of the number of "occurrences" in negligent hiring cases in which sexual harassment or sexual misconduct is involved. Some courts have held that a claim against an employer for the negligent supervision, retention or hiring is a distinct and single "occurrence" consisting of the employer's negligent acts. *See, e.g*., *Pacific Ins. Co. v. Catholic Bishop of Spokane*, 450 F. Supp. 2d 1186, 1203 (E.D. Wash. 2006) (Diocese's alleged negligence in connection with hiring, retention and supervision of priests who committed sexual abuse, not conduct of priests, was occurrence); *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co*., 842 F. Supp. 1151, 1164 (W.D. Ark. 1994) (negligent hiring and supervision of employee who sexually molested a child was a single occurrence), *aff'd*, 33 F.3d 1476 (8th Cir. 1994); *Home Indem. Co. v. City of Mobile*, 749 F.2d 659 (11th Cir. 1984) (intervening negligence of insured constituted the occurrence that created the liability; "occurrence" did not refer to damages sustained by each individual plaintiff).

However, other courts have held that the "occurrence" is the sexual misconduct itself and that each act of sexual misconduct or harassment against different victims is separate and distinct "occurrences" *See, e.g*., *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co*., 150 F.3d 526 (5th Cir. 1998) (when one perpetrator assaulted two victims once each on separate occasions, there was one occurrence for each victim); *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652 (Tex. App. 2005) (when a camp counselor molested six children, resulting in three separate lawsuits, each instance of sexual abuse of a different child constituted a different occurrence); *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 87 A.D.3d 1057 (N.Y. App. Div. 2011) (multiple occurrences when claimant alleged molestation at different locations over seven-year period).

Given this split in authority, insureds should consider early on what law will apply to their coverage dispute. In doing so, insureds should review their policies for any choice of law provisions, conduct a choice-of-law analysis, and research the applicable jurisdictions' positions on this issue. In this initial analysis, insureds should also review all policies that are even potentially applicable and pay close attention to the definition or definitions of "occurrence."

Furthermore, insureds should keep in mind that a court's interpretation of "occurrence" that will maximize coverage in one situation will not necessarily maximize coverage in another

situation. For example, in *S.F. v. West American Insurance Co*., 250 Va. 461 (1995), the employer argued that the molestation of each child was a separate "occurrence," while the insurer argued that the employer's negligence in hiring, supervising and retaining its pedophilic employee constituted the only one "occurrence." *Id.* at 452. The court ultimately construed "occurrence" in favor of the employer and concluded that the molestation of each child was a separate occurrence—giving the insured full coverage for each molestation up to the policy's per-occurrence maximum (instead of coverage for only one "occurrence"). *Id*. The employer's and the insurer's arguments here are diametrically opposed to the arguments made by employer and insurer in *Scott Fetzer*. As the Seventh Circuit has noted regarding this issue

> "Winners and losers will change with the circumstances . . . .[I]f tomorrow the victim's loss exceeds the maximum coverage for a single occurrence, the roles will be reversed.

Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 104 (7th Cir. 1996).

Finally, in a coverage dispute, insureds should never forget the basic tenets of policy interpretation. Often, these principles provide the strongest arguments for coverage. As the Sixth Circuit stated in *Scott Fetzer*, "two principles decide[d] the case . . . 'where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured' and if an insurer wants to defeat coverage, 'it must show that the clause in the policy is capable of the construction it seeks to give it, and that such construction *is the only one* that can be fairly placed upon the language.'" 2019 WL 1925550, at *3.

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