

# Bad Faith, Number of Occurrences, Contractual Liability Exclusion Coverage Update

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*The e-POST*

## Bad Faith – Iowa

### *De Dios v. Indem. Ins. Co. of N. Am.*

--- N.W.2d ---, 2019 WL 2063289 (Iowa May 10, 2019)

The Supreme Court of Iowa held that state law does not recognize a cause of action for bad faith against a third-party claims administrator responsible for adjusting claims on behalf of a workers' compensation insurer. The plaintiff, an injured employee who suffered a work-place injury, brought suit against his employer's workers' compensation carrier as well as the third-party claims administrator who adjusted the claim. The Supreme Court of Iowa initially recognized that "the predominant justification for recognizing a bad-faith tort against workers' compensation carriers was the existence of certain 'affirmative obligations' placed upon them by our statutory and regulatory scheme." According to the Supreme Court, however, such statutes did not impose "'affirmative obligations' on third-party administrators as they do on insurers." The Supreme Court observed that the Legislature did not define "insurer" to include "third-party administrators," which "shows that our [L]egislature recognized a distinction between insurers and third-party administrators, and opted to impose 'affirmative obligations' only on the former." The Supreme Court ultimately ruled that "the nondelegable duties imposed by Iowa statutes and administrative regulations remain on the carrier regardless of any attempt to pass them to a third party."

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## Number of Occurrences – Sixth Circuit (Ohio Law)

### *Scott Fetzer Co. v. Zurich Am. Ins. Co.*

--- F.3d ---, 2019 WL 1925550 (6th Cir. Apr. 30, 2019)

The U.S. Court of Appeals for the Sixth Circuit held that an insurer must cover multiple sexual harassment settlements stemming from its insured's negligent hiring of an employee. In the underlying lawsuit, three female employees of The Scott Fetzer Co. (Fetzer) alleged that Fetzer negligently hired and retained salesman John Fields, who allegedly sexually harassed each of them. Fetzer entered into confidential settlements with each of the women and sought coverage from its insurer, Zurich American Insurance Company (Zurich). One of the three settlements exceeded the Zurich policy deductible, and

Zurich paid the remainder of that settlement. Zurich denied coverage for the remaining two settlements on the grounds that they stemmed from separate occurrences and were, therefore, individually subject to the policy deductible.

Fetzer sued Zurich in federal court, arguing that because all three women claimed that that Fetzer's negligent hiring caused their damages, the suit involved only one occurrence and that a single deductible should apply to all three settlements. The U.S. District Court for the Northern District of Ohio ruled in favor of Zurich, holding that the suit involved multiple occurrences. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the trial court's decision and held that the suit involved only one occurrence. Specifically, the appellate court stated that "[b]ecause we have decided that the occurrence in this case could be negligent supervision, and because under Ohio law where there is one proximate cause all injuries are included within the scope of that cause, it is reasonable to read the policy as Fetzer asks us to and determine that there is just one occurrence." Therefore, only a single deductible applied and Zurich was liable for the remaining two settlements.

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### **Contractual Liability Exclusion – West Virginia (Tennessee Law)**

*J.A. St. & Assocs., Inc. v. BITCO Gen. Ins. Corp.*

No. 17-0079, 2019 WL 1949710 (W. Va. May 1, 2019)

The West Virginia Supreme Court of Appeals affirmed a lower court's grant of summary judgment to several insurers that issued primary, umbrella and excess policies to J.A. Street & Associates (J.A. Street), finding that an exclusion in each of the policies precluded coverage for J.A. Street's contractual liability.

J.A. Street contracted with Thundering Herd LLC (Thundering Herd) to be the general contractor for a 78-acre shopping center being developed by Thundering Herd in West Virginia. After construction was completed, Thundering Herd found multiple construction defects at the shopping center and brought suit against the engineering firm and eventually J.A. Street. Bitco General Insurance Corporation (Bitco) agreed to defend J.A. Street under a reservation of rights and brought a declaratory judgment action in which several other insurers were later joined. The lower court granted the insurers' motions for summary judgment. That court rejected the arguments of some of the insurers that the damages did not arise out of an occurrence. However, the lower court found that the contractual liability exclusions in the primary policies (to which the umbrella and excess policies followed form) precluded coverage for Thundering Herd's claims.

Applying Tennessee substantive law, the West Virginia Supreme Court of Appeals affirmed the lower court's grant of summary judgment, noting that Thundering Herd's claims were brought under a breach

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of contract theory and not a tort theory. Because the developer claimed that each construction defect constituted a breach of J.A. Street's general contract, and sought damages for the economic losses stemming from those breaches, coverage for those claims was precluded as a result of the contractual liability exclusions in the policies.

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