

Number of Occurrences, Liquor Liability Exclusion, Occurrence Coverage Update

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Wisconsin, Ohio, California, Oklahoma Coverage Update

The e-POST

Number of Occurrences – Wisconsin

SECURA Ins. v. Lyme St. Croix Forest Co., LLC

--- N.W.2d ---, 2018 WL 5534110 (Wisc. Oct. 30, 2018)

The Wisconsin Supreme Court found that a wildfire that burned continuously for three days was one occurrence even though it spread to multiple parcels of property, overturning the decisions of both an appellate panel and trial court. Secura Insurance (Secura) issued a policy to Ray Duerr Logging LLC (Duerr) with a \$500,000 per-occurrence limit of liability and a \$2 million aggregate limit of liability. In May 2013, Duerr's logging equipment allegedly started a wildfire on land owned by Lyme St. Croix Forest Co. (Lyme). The fire eventually spread across three towns, causing property damage for dozens of property owners. The property owners filed claims for those damages. Secura took the position that coverage for Duerr was subject to the \$500,000 per-occurrence limit, but the trial and appellate courts disagreed, finding there was a separate occurrence every time the fire moved to a new property.

The Wisconsin Supreme Court disagreed, holding that the lower courts had applied the incorrect theory in determining the number of occurrences. Wisconsin follows the “cause theory,” in which the number of occurrences depends on whether a “single, uninterrupted cause results in all of the injuries and damage....” Under this theory, the Supreme Court reasoned, the wildfire was one occurrence because it was one uninterrupted fire that spread, and not multiple fires. The Supreme Court rejected the lower courts' reliance on another case in which multiple wells were contaminated with fertilizer used by a neighboring farm. In that case, the damage could have been caused by multiple, separate occurrences of contamination, rather than the single fire causing the property damage to Lyme and other claimants.

Liquor Liability Exclusion – Sixth Circuit (Ohio Law)

Mesa Underwriters Specialty Ins. Co. v. Secret's Gentleman's Club

--- Fed. Appx. ---, 2018 WL 5004919 (6th Cir. Oct. 16, 2018)

The U.S. Court of Appeals for the Sixth Circuit ruled that a strip club's liability insurer must cover an \$8 million award to a deceased car crash victim's family because the strip club negligently failed to stop the man responsible for the crash from driving home drunk. In the underlying state court case, the victim's family (the Snyders) sued Secret's Gentleman's Club (Secrets) under a theory of common law negligence for its failure to prevent Julio Vargas from leaving Secrets in an extremely intoxicated condition, ultimately causing the death of Desiree Snyder. Secrets' general liability insurer, Mesa Underwriters Specialty Insurance Company (Mesa), refused to provide a defense on the grounds that the claims fell within the policy's liquor liability exclusion. The Cuyahoga County Court of Common Pleas, in awarding the victim's family approximately \$8 million, held that Secrets breached its duty of reasonable care to prevent noticeably intoxicated persons from driving, and that these negligence claims were "separate, distinct and independent from the sale or service of alcoholic beverages."

Mesa filed a declaratory judgment action in the United States District Court for the Northern District of Ohio, arguing that the state court's "separate, distinct and independent" determination was contrary to Ohio law. The district court held that Mesa was bound by the state court's judgment and liability determinations under the doctrine of collateral estoppel, and that Mesa had a duty to pay defense costs and indemnify Secrets for the underlying judgment. The appellate court affirmed the district court's opinion on the issues of collateral estoppel, defense and indemnity, noting that "the state court in the instant case adjudicated Secret's [sic] liability on the Snyders' common-law negligence claims, which it determined were unrelated to the sale or service of alcohol[.]" and, therefore, did not fall within the policy's liquor liability exclusion.

'Occurrence' – Ninth Circuit (California Law)

Liberty Surplus Ins. Corp. v. Ledesma and Meyer Constr. Co.

--- Fed. Appx. ---, 2018 WL 5116360 (9th Cir. Oct. 19, 2018)

A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit agreed with the California Supreme Court's interpretation of Liberty Surplus Insurance Corporation's (Liberty) commercial general liability policy issued to Ledesma & Meyer Construction Company, Inc. (Ledesma), holding that an "occurrence" under an employer's policy covers claims against the employer for the negligent hiring and supervising of an employee who intentionally injures a third party, because an occurrence is considered an "accident." A state trial court initially determined that the San Bernardino Unified School District and Ledesma negligently hired, retained, and supervised Darold Hecht (Hecht), who was convicted of molesting a student on school grounds while working on a construction project at a

middle school.

Liberty filed a declaratory judgment action disputing the availability of coverage for the claim arising from this criminal conduct, and a lower court granted summary judgment in its favor, finding that Liberty was not liable for covering Ledesma's defense costs. Ledesma appealed the ruling to the appellate court, which certified the question to the California Supreme Court after concluding that whether an "occurrence" under an employer's CGL policy is alleged when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of an employee who intentionally injured the third party is a question of California insurance law. The appellate court agreed with the California Supreme Court's reasoning that Ledesma could not have expected or foreseen that its employee was going to molest a student. "This was true despite the fact that Hecht's conduct in perpetrating the assault was willful." Accordingly, the appellate court opined that there was an occurrence and reversed the lower court's order granting summary judgment in favor of Liberty.

Indoor Air Quality Exclusion – Tenth Circuit (Oklahoma Law)

Siloam Springs Hotel LLC v. Century Surety Co.

--- F.3d ---, 2018 WL 4997489 (Oct. 16, 2018)

The U.S. Court of Appeals for the Tenth Circuit held that an exclusion for hazardous indoor air quality did not preclude coverage for a hotel at which some guests experienced carbon monoxide poisoning from faulty equipment.

Century Surety Company (Century) issued a general liability policy to Siloam Springs Hotel LLC (Siloam) for its hotel. The policy excluded injuries "arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause." In January 2013, a pool heater malfunctioned, causing bodily injury to several guests who experienced carbon monoxide poisoning. Century denied coverage for these injuries on the basis of the indoor air quality exclusion. The district court found that the exclusion was unambiguous. Following an appeal on jurisdictional matters, the appellate court remanded the case to the district court and recommended the district court certify to the Oklahoma Supreme Court the question of whether the exclusion was contrary to public policy. This was in part because during the pendency of the appeal, the Nevada Supreme Court considered the same exclusion and found it ambiguous.

While the Oklahoma Supreme Court ultimately did not reach a decision on the public policy implications, one of the justices opined that the policy language was ambiguous because it was unclear whether "qualities or characteristics" referred to something that was permanently in the air, or if it also referred to a condition that came about for a short amount of time. If the exclusion could also

refer to irritants in the air for only a short amount of time, this would exclude virtually all claims regarding the air. The appellate court agreed with this analysis as well as that of the Nevada Supreme Court, which also found this portion of the exclusion to be ambiguous. The appellate court opined that even though only one justice of the Oklahoma Supreme Court reached the question of ambiguity, it was likely that the remainder of the Supreme Court would agree with her analysis. The appellate court also found that the ambiguity existed whether the court considers extrinsic evidence right away (as Nevada law allows) or looks first to the policy to determine whether an ambiguity therein necessitates resorting to extrinsic evidence (as Oklahoma law requires).

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