

Zurich Owes On Sexual Harassment Payouts, 6th Circ. Says

By **Jeff Sistrunk**

Law360 (April 30, 2019, 10:09 PM EDT) -- The Sixth Circuit ruled Tuesday that Zurich American Insurance Co. must fully cover two of three settlements that a vacuum cleaner company reached with salespeople who alleged they were sexually abused by a colleague, saying the three women's claims were a single "occurrence" and the company only had to pay one policy deductible.

Reversing a **2017 decision by an Ohio district judge**, a unanimous appellate panel found that the claims of three female employees of The Scott Fetzer Co. are one accidental occurrence for insurance purposes, given the women's unifying assertion that Fetzer was liable for hiring salesman John Fields and failing to properly supervise him.

"Because 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," Senior Circuit Judge Alice M. Batchelder wrote for the panel.

The practical effect of the panel's decision is that Fetzer only has to satisfy a single \$1 million deductible under its liability policies with Zurich before the insurer's obligation to pay kicks in, rather than three separate deductibles totaling \$3 million, as the district court had found. Under the lower court's ruling, Zurich only had to pay part of one of Fetzer's three settlements, but with the Sixth Circuit panel's reversal, the insurer is now on the hook for the entirety of the other two settlements as well.

According to court papers, the three female employees of Cleveland-based Fetzer filed the underlying suit in 2013, claiming Fields had sexually harassed and assaulted them when they accompanied him on door-to-door sales calls. The women said that Fetzer negligently hired and retained Fields despite his criminal history and past instances of sexual misconduct, and that it failed to warn the women of his past issues.

Fetzer ultimately entered into separate settlements with the three women for confidential sums. One of the settlements exceeded the deductible on Fetzer's Zurich policies and the insurer paid a portion of that deal, but the other two did not and Zurich did not pay, court documents say.

Fetzer sued in Ohio federal court in June 2016, arguing that because all three women claimed it had negligently hired, retained and supervised Fields, the suit involved one occurrence and a single deductible should be applied to the total of all three settlements.

Zurich countered that, because the suit claimed Fields harassed and assaulted three women under different circumstances in different locations during different policy years, the settlements represented three separate occurrences.

The case was referred to Magistrate Judge Thomas Parker, who issued a report in November 2017 recommending a ruling in Zurich's favor. Senior U.S. District Judge Donald C. Nugent adopted Judge Parker's recommendation in December 2017, prompting Fetzer to appeal.

In Tuesday's opinion, the Sixth Circuit panel pointed out that, under Ohio insurance law, an insurer

attempting to limit coverage must prove that its interpretation of the policy terms is the only reasonable one.

Here, Fetzer presented ample case law supporting its position that a policyholder's negligent hiring and supervision of an employee can constitute an accidental occurrence under a liability policy like Zurich's, according to the opinion. Since Fetzer's interpretation of the policy language is reasonable, the appellate panel said it is required to accept it.

Furthermore, Ohio law bolsters Fetzer's stance that its negligent hiring and supervision of Fields was a single occurrence, the panel held. The Buckeye State's courts employ the so-called "cause test," under which "the number of occurrences is determined by reference to the cause or causes of the damage or injury, rather than by the number of individual claims," according to the opinion.

The panel returned the case to Judge Nugent's court and ordered him to enter a judgment in favor of Fetzer.

Counsel for Fetzer and Zurich did not immediately respond to requests for comment late Tuesday.

Judges Alice M. Batchelder, John M. Rogers and Julia Smith Gibbons sat on the panel for the Sixth Circuit.

Fetzer is represented by David W. Mellott and Mark A. Phillips of Benesch Friedlander Coplan & Aronoff LLP.

Zurich is represented by Laura M. Faust of Roetzel & Andress LPA.

The case is *The Scott Fetzer Co. v. Zurich American Insurance Co.*, case number 18-3057, in the U.S. Court of Appeals for the Sixth Circuit.

--Additional reporting by Rick Archer. Editing by Adam LoBelia.